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Construction Drawings That Work—Or Maybe Not?: Architects Get a Free Pass in Ohio

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NOTE

CONSTRUCTION DRAWINGS THAT WORK—OR MAYBE NOT?: ARCHITECTS GET A FREE PASS IN OHIO

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I. INTRODUCTION

The construction industry in the United States employs five percent of the total workforce, represents roughly thirteen percent of the annual gross domestic product, and is the largest sector of the U.S. economy.[1] A construction project involves a series of contractual relationships between owner/architect and owner/contractor. These interrelated relationships are often a "veritable minefield of conflict which is a fertile source of recurring, often unique issues."[2]

From this "veritable minefield of conflict," the Spearin Doctrine emerged in the early part of the Twentieth Century from a Supreme Court case involving defective construction documents. The Spearin Doctrine holds that a set of owner-furnished construction documents are impliedly warranted by the owner to be free from any defects.[3] This implied warranty could not be negated by any express contract provisions which serve to shift liability for design defects to the contractor.[4] This doctrine was applied by courts in Ohio prior to April 2007 to hold contractors liable only for conditions that a reasonable pre-site inspection would have revealed or when the contractor was not acting in good faith.[5] However, in April 2007, the Supreme Court of

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1. Thomas J. Stipanowich, *Reconstructing Construction Law: Reality and Reform in a Transactional System*, 1998 WIS. L. REV. 463 (1998) (citing Jimmie Hunze, CONSTRUCTION CONTRACTS 1-2 (1993)).

2. *Id.* (citing Lawrence P. Simpson & Essel R. Dillavou, LAW FOR ENGINEERS AND ARCHITECTS, xi (1958)).

3. United States v. Spearin, 248 U.S. 132, 137 (1928).

4. *Id.*

5. *See* Lehmkuhl Excavation v. City of Troy, No. 2004-CA-31, 2005 WL 994607, at ¶ 24 (Ohio 2005) ("Spearin stands for the proposition that the city cannot make affirmative statements regarding site conditions and then hold the contractor responsible for any conditions differing from those asserted by the City, notwithstanding contractual provisions purporting to do so."); Central Ohio Bd. of Educ. v. Peterson Construction Co., 716 N.E.2d

Ohio, refusing to follow ninety years of federal and state jurisprudence, held that a contractor was not entitled to damages as a result of defective plans prepared by the owner's architect.[6] The court reasoned that an express no-damages-for-delay clause, since outlawed by the Ohio Legislature, controlled.[7]

Part II.A. of this Note introduces the problems inherent in the construction process, including building owners who are poorly educated about construction issues, architects who increasingly refuse to be held accountable for their designs, and contractors who try to make sense of poorly designed drawings. Part II.B. details the origin of the Spearin Doctrine and how it has been handled by the Supreme Court. Part III.A. details Ohio cases prior to the *Dugan & Meyers* decision that have applied the Spearin Doctrine. Parts III.B and III.C. chronicle the *Dugan & Meyers* case and describe what the decision will mean to the construction industry. Finally, Part IV of this Note proposes solutions that would come from both the legislature and the construction industry itself. These are solutions to the difficulties incurred by Dugan & Meyers Construction Company in their dispute with Ohio State University.

II. BACKGROUND

A. Nuts and Bolts of the Construction Process

Construction of a building from start to finish involves a complex, intricate series of relationships, contracts, and transactions, each one giving rise to different legal responsibilities and potential liabilities. The most important parties to our discussion of the Spearin Doctrine are the building owner, architect, and general contractor. The building owner is responsible for determining three criteria related to the project: the scope of work, the timeline, and the budget.[8] The owner must also communicate these needs and constraints to the architect.[9] The architect then incorporates these constraints in developing a set of construction documents that "represent the final design in the form of drawings and specifications, which are sufficiently

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1210 (1998) (A contractor cannot rely upon the Spearin doctrine where the contractor had unique knowledge the plans were obviously flawed and did not inform the owner).

6. Dugan & Meyers Construction Co. v. Ohio Dep't. of Admin. Servs., 864 N.E.2d 68, 76 (Ohio 2007).

7. *Id.* at 74.

8. CONSTRUCTION LAW 2 (Carina Y. Ohara et al., eds., 2001) [hereinafter CONSTRUCTION LAW].

9. *Id.* at 9.

detailed and suitable for bidding and building the project."[10] The general contractor then takes the construction documents and develops pricing for the work, submits a bid to the owner, develops schedules and work plans, and performs the actual construction.[11]

In the U.S., the most common method of construction delivery is called the "design-bid-build" process.[12] This process begins with an owner establishing his design criteria and then entering into a contract with an architect or other design professional.[13] The architect will often be involved through the final completion of the project, from preparation of the design of the building and other contract documents to assisting with the construction management process.[14] The architect may provide additional services for the owner during the construction process including inspection of the work to determine quality and conformance with design, interpretation of design documents, resolution of owner-contractor disputes, approval of contractor payment applications, processing change orders, and review of the contractor submittals that propose execution of the design.[15]

The next step in the design-bid-build process depends on whether the project is privately or publicly funded.[16] Privately funded construction projects have more flexibility in the selection of a general contractor, and often an owner will negotiate directly with one or several builders.[17] However, projects that are funded with taxpayer dollars are governed by federal and state law and administrative regulations, which are designed to prevent favoritism and promote fair competition.[18] Regardless of whether the

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10. *Id.* at 56.

11. *Id.*

12. Carl J. Circo, *When Specialty Designs Cause Building Disasters: Responsibility for Shared Architectural and Engineering Services*, 84 NEB. L. REV. 162, 168 (2005) (citing John W. Hinchey, *Karl Marx and Design Build*, CONSTRUCTION LAW, Winter 2001, at 46). The primary alternative to the design-bid-build delivery system is the design-build system where the owner enters into one contract for both design and construction services. *Id.*

13. THE CONSTRUCTION PROJECT: PHASES, PEOPLE, TERMS, PAPERWORK, PROCESSES 6 (Marilyn Klinger & Marianne Susong eds., 2006) (stating typical design criteria include a project's budget, environmental restrictions, and other needs).

14. *Id.* at 7.

15. Circo, *supra* note 12, at 169 (citing JUSTIN SWEET, SWEET ON CONSTRUCTION LAW, 114-115 (1997). A change order is a written change to the contract scope of work which results in a revision to the contract price and/or project timeline. THE CONSTRUCTION PROJECT: PHASES, PEOPLE, TERMS, PAPERWORK, PROCESSES 140 (Marilyn Klinger & Marianne Susong eds., 2006)

16. *Id.* at 14.

17. *Id.*

18. *Id.* Publicly funded construction projects are controlled by statutes and regulations such as competitive bidding laws, payment and performance bond statutes, federal and state

construction project is public or private, the goal of the bidding process is "to select the lowest qualified bidder to allow for project completion to the owner's satisfaction at the most competitive price."[19]

Once the lowest responsible bidder is selected, he will enter into a contract with the owner to build the building per the plans and specifications prepared by the architect.[20] During the construction process, it is critical to establish a communication and a decision-making process among the owner, architect, and the general contractor.[21] Because most owners do not have construction or architectural expertise in-house and because, for most owners, a construction project is far removed from their area of focus, they will rely on the architect as their representative to and protector from the general contractor.[22]

The owner and contractor, even in the best of circumstances, have conflicting interests.[23] The contractor's main concern is to protect and maximize his profit. The owner is primarily interested in having the contractor complete a building that meets the owner's expectations in terms of form and function, budget, and schedule.[24] Thus, a formalized system of communication between all parties involved becomes necessary in order to establish the processes that will provide the means and methods for conflicts and changes to be resolved as well as to ensure the quality of the project.[25]

Due to the complex nature of the construction process and interrelationships among owner, architect, and contractor, disputes can and often do arise.[26] Unfortunately, the causes of the problems are also complex. First, owners increasingly pressure architects to lower professional fees.[27] This "lowest cost first" mentality leads architects to pay less attention to project detailing, place design responsibility on contractors, and reduce the level of

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false claim acts, prompt pay legislation, minority preference programs, special procurement regulations, and special procedures for filing and prosecuting claims. CONSTRUCTION LAW, *supra* note 8, at 82.

19. *Id.* at 15.

20. *Id.* at 18-19.

21. *Id.* at 19.

22. CONSTRUCTION LAW, *supra* note 8, at 8.

23. Circo, *supra* note 12, at 169.

24. *Id.*

25. *Id.* at 176, 180.

26. Unfortunately on many projects, because these relationships are not functioning properly, the finished product does not meet the needs of "both the end-user and the people creating the product." CONSTRUCTION LAW, *supra* note 8, at 1.

27. Thomas J. Stipanowich, *Reconstructing Construction Law: Reality and Reform in a Transactional System*, 1998 WIS. L. REV. 463, 476, 478 (1998).

job site administration.[28] The problem with discounting fees is that while achieving cost savings to the owner, it enhances the potential for incomplete, inaccurate, and inadequate designs and job administration.[29]

An architect does not owe a duty to produce flawless construction documents. Rather, he only owes a duty to his employer to possess the necessary technical competency and ability that will enable him to produce plans and specifications commensurate with similarly situated professionals.[30] The primary rationale for this level of duty is that architects have not been found to guarantee results.[31] In contract disputes arising out of defective plans, courts traditionally have limited liability of design professionals solely to the party who hired the professional on the basis of privity.[32] Contractors have tried to assert claims based in third party beneficiary contract principles, but such claims have not found a great deal of favor with the courts.[33] Accordingly, the principal cause of action in design

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28. *Id.*

29. *Id.* at 19.

30. Circo, *supra* note 12, at 176, 180.

31. *Id.* at 175. *See* Surf Realty Corp. v. Standing, 78 S.E.2d 901, 907 (Va. 1953) ("An architect does not imply or guarantee a perfect plan or satisfactory result."); Aetna Ins. Co. v. Obata & Kassabaum, Inc., 392 F.2d 472, 476 (8th Cir. 1968) ("An architect is not a guarantor or an insurer but as a member of a learned and skilled profession he is under the duty to exercise the ordinary, reasonable technical skill, ability and competence that is required of an architect in a similar situation."); White v. Pallay, 119 Ore. 97, 99 (1926) (If an architect prepares plans and specifications with a level of skill comparable with others in the business, he is not liable for defects in the plans.).

32. *Id.* at 185. *See, e.g.*, R.H. Macy & Co. v. Williams Tile & Terrazo Co., 585 F. Supp. 175, 178 (N.D. Ga. 1984) (Professionals are not liable to those not in privity.); Floor Craft Floor Covering v. Parma Cmty. Gen. Hosp., 560 N.E.2d 206, 209 (Ohio 1990) (In the absence of privity of contract between two disputing parties the general rule is there is no duty to exercise reasonable care to avoid intangible economic loss or losses to others that do not arise from tangible physical harm to persons and tangible things."); Guardian Constr. Co. v. Tetra Tech Richardson, Inc., 583 A.2d 1378, 1386 (Del. Sup. Ct. 1990) ("In order for third-party beneficiary rights to be created, not only is it necessary that performance of the contract confer a benefit upon a third person that was intended, but the conferring of the beneficial effect on such third-party, whether it be creditor or donee, should be a material part of the contract's purpose.").

33. *Id.* at 185-86. *See, e.g.*, Bernard Johnson, Inc. v. Cont'l Constructors, Inc. 630 S.W.2d 365, 731 (Tex. App. 1982) ("The fact that a contractor will benefit and profit from plans that are carefully and professionally drawn, and from specifications that are clear and precise, is an incidental benefit that accrues to the contractor.); Kaiser Aluminum & Chemical Corp. v. Ingersoll-Rand Co., 519 F. Supp. 60, 72 (S.D. Ga. 1981) ("The law of Georgia has not been anxious to find that parties not in privity can sue under the aegis of the third party beneficiary doctrine.").

liability cases has sounded in tort rather than in contract.[34] In tort cases, however, courts will (absent any public policy considerations) look to the express terms of the contract to "determine the nature and extent of the duty recognized for purposes of tort law."[35]

Architects—and by extension owners—therefore try to contractually limit their tort liability by contractual provisions.[36] A good example of a provision that architects include in their contract is a clause that negates third party beneficiary claims on the part of the contractor.[37] Another such contract term used is a "no damages for delay" clause.[38] Because a delay in a construction project inevitably results in an increased expense to one of the parties, the risk of delay is allocated contractually among the architect, owner, and contractor.[39] Owners will frequently try to eliminate any possible claims from the contractor requesting additional compensation for delays to the project.[40] Among other provisions, an architect will often insert a clause that places the burden on the contractor to visit the construction site prior to

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34. *Id.* at 177. *See, e.g.*, Eastern Steel Constructors, Inc. v. City of Salem, 549 S.E.2d 266, 277 (2001) ("A design professional (e.g. an architect or engineer) providing plans and specifications that will be followed by a contractor in carrying out some aspect of a design, impliedly warrants to the contractor, notwithstanding the absence of privity of contract between the contractor and the design professional, that such plans and specifications have been prepared with the ordinary skill, care and diligence commensurate with that rendered by members of his or her profession."); Owen v. Dodd, 431 F. Supp. 1239, 1242 (M.D. Miss. 1977) ("Mississippi does recognize the right of a third party to maintain a negligence claim against an architect with whom there is no privity of contract."); Davidson & Jones, Inc. v. County of New Hanover, 255 S.E.2d 580, 584 (N.C. Ct. App. 1979) ("An architect in the absence of privity of contract may be sued by a general contractor or the subcontractors working on a construction project for economic loss foreseeably resulting from breach of an architect's common law duty of due care in the performance of his contract with the owner.").

35. *Id.* at 178. *See, e.g.*, Moundsview Indep. Sch. Dist. v. Buetow & Assoc., 253 N.W.2d 836, 839 (Minn. 1977) ("It is the general rule that the employment of an architect is a matter of contract, and consequently, he is responsible for all the duties enumerated within the contract of employment.).

36. Form documents such as those produced by the American Institute of Architects contain "significant risk shifting and exculpatory language." CONSTRUCTION LAW, *supra* note 8, at 53. "It goes without saying that each separate form document . . . has been drafted to generally protect the interests of the drafter." *Id.*

37. CONSTRUCTION LAW, *supra* note 8, at 75.

38. *See* THE CONSTRUCTION CONTRACTS BOOK 113 (Daniel A. Brennan et al. eds., 2004) (A "no damages for delay" clause is an express contractual provision inserted which "attempts to eliminate any possible claim from the contractor for additional compensation due to delays.").

39. *Id.*

40. *Id.*

bidding.[41] The intent of this provision is to place the liability of additional costs regarding unforeseen site conditions squarely on the contractor.

B. Origin of the Spearin Doctrine

In the landmark construction law case *Spearin v. United States,* a site visitation clause was at issue. [42] Spearin was a general contractor hired by the U.S. Government to construct a dry dock at the Brooklyn Navy Yard.[43] The terms of the contract bound Spearin to build the dry dock in accordance with plans and specifications prepared by the Government.[44] In addition, the contract contained a general clause that stated, "Intending bidders are expected to examine the site of the proposed dry-dock and inform themselves thoroughly of the actual conditions and requirements before submitting proposals."[45]

Spearin did, in fact, visit the job site prior to submitting his bid and sought site-condition information from the civil engineer's office at the Navy.[46] However, no mention was made of the fact that the government was aware that the sewer line, that had to be relocated prior to constructing the dry dock, had overflowed in the past.[47] Spearin proceeded with the relocation of the sewer line in full compliance with the plans and specifications, and the Government approved the relocated line as satisfactory.[48] But approximately one year after the relocation, internal pressure caused by a heavy downpour of rain coupled with a high tide caused the relocated sewer pipe section to rupture in a number of places, which in turn flooded the excavation site for the new dry dock.[49]

Immediately after this incident, Spearin informed the government that under the existing plans, the sewers were a menace to the construction project.[50] He then refused to proceed any further with the dry dock until the government either assumed responsibility for the damage that had already occurred, or repaired the problem that caused the flooding in the first place.[51] The government insisted that the responsibility was on the contractor, and

41. United States v. Spearin, 248 U.S. 132, 137 (1928).
42. *Id.*
43. *Id.* at 133.
44. *Id.*
45. *Id.* at 137 n.1.
46. *Spearin*, 248 U.S. at 134-35.
47. *Id.* at 133-34.
48. *Id.*
49. *Id.*
50. *Id.* at 135.
51. *Id.*

after fifteen months spent in "investigation and fruitless correspondence," the Secretary of the Navy cancelled the contract with Spearin and hired other contractors to finish the project.[52]

Under these facts, the Supreme Court affirmed the Court of Claims decision in favor of Spearin.[53] The Supreme Court reasoned that the insertion of provisions in the plans and specifications that clearly defined the dimensions, location, and quality of the sewer implied "a warranty, that if the specifications were complied with, the sewer would be adequate."[54] Essentially, under the holding, the contractor was not required to second-guess the adequacy of the plans to achieve the completed project.[55] Further, the Court stated that the government could not overcome its breach of this implied warranty by inserting general contract provisions that required the contractor to make a site visit to determine existing conditions and assume responsibility for the work until completion and acceptance.[56] Since the government breached the implied warranty that the plans would be free from defects, refused to repair the sewer conditions that caused the site to be unsafe, and then annulled the contract unjustifiably, it was held liable to Spearin for all damages resulting from the breach.[57]

In the ninety years since *Spearin* was decided, the Supreme Court has only revisited the decision six times. The Court applied the Spearin Doctrine in *Atlantic Dredging Co. v. United States* to hold the U.S. Government liable to a contractor where the Government supplied soil conditions reports and maps in order for the contractor to dredge a section of the Delaware River.[58] However, in a later case, the Court refused to apply the Spearin Doctrine where the contractor was partially at fault in delays caused by defective material that was specified by the Government.[59] The Court even considered extending the Spearin Doctrine beyond a construction context, but then refused to do so in holding that the Government was not responsible for third

52. *Id.* at 135.

53. *Id.* at 139.

54. *Id.* at 137.

55. Thomas C. Clark, *Application of the Spearin Doctrine to Plans and Specs*, Mar. 28, 2005, http://acppubs.com/article/CA512254.html.

56. *Spearin*, 248 U.S. at 137.

57. *Id.* at 138.

58. Atl. Dredging Co. v. United States, 253 U.S. 1, 11 (1920); *accord* United States v. Smith, 256 U.S. 11, 17 (1921); *compare* Sanford & Brooks Co. v. United States, 267 U.S. 455, 456, 458 (1925) (holding that the Spearin Doctrine did not apply where the contractor did not act in a expeditious manner in regard to a claim for additional compensation as per a provision in its dredging contract).

59. Robinson v. United States, 261 U.S. 490 (1923).

party tort claims resulting from a contractor producing Agent Orange according to U.S. military specifications.[60]

Spearin Doctrine issues have been addressed by state courts as well. A majority of jurisdictions recognize the Spearin Doctrine as controlling law.[61] However, a small minority of states—such as Missouri—do not recognize that an owner impliedly warrants construction documents to be free from defects.[62]

III. SPEARIN GETS DERAILED IN OHIO

A. Application of the Spearin Doctrine by Ohio Courts—Prelude to Dugan & Meyers

The Spearin Doctrine was first recognized by Ohio in *S & M Constructors v. City of Columbus* ("*S & M*").[63] The Ohio Supreme Court refused to apply the Spearin Doctrine where a contractor on a sewer line project incurred additional expenses resulting from an encounter with concretions[64] and water inflows.[65] The contractor claimed that the Spearin Doctrine applied in order to hold the city responsible where he relied on subsurface boring reports and test excavations prepared by the design engineer.[66] However, an express contract provision specifically excluded these reports from being part of the

60. Hercules Inc. v. United States, 516 U.S. 417, 424-25 (1995).

61. *See* Burgess Mining & Constr. Corp. v. Bessemer, 312 So. 2d 24, 27 (Ala. 1975) (citing Simpsen v. United States, 172 U.S. 372 (1899), "If the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications."); Chaney Bldg. Co. v. Tucson, 716 P.2d 28, 31 (Ariz. 1986) ("A contractor is also not liable for damages which are the direct result of defective plans and specifications furnished by the owner."); Graham Constr. Co. v. Earl, 208 S.W.3d 106, 109 (Ark. 2005) ("When an owner supplies plans and specifications to a contractor, an implied warranty arises that the owner's plans and specifications are adequate and suitable for the particular project."); E. H. Morrill Co. v. State, 423 P.2d 551, 554 (Cal. 1967) (holding the government's responsibility to provide plans and specifications free from defects is not overcome by general clauses); BRW, Inc. v. Dufficy & Sons, Inc., 99 P.3d 66, 73 (Colo. 2004) ("The City impliedly warranted the adequacy of the plans and specifications.").

62. *See* Sandy Hites Co. v. State Highway Comm., 149 S.W.2d 828, 833-34 (Mo. 1941) (holding that there is no implied warranty by the owner of the sufficiency of plans and specifications.).

63. S & M Constructors v. City of Columbus, 434 N.E.2d. 1349 (Ohio 1982).

64. A concretion is a mass of hard mineral found in sedimentary rock. THE AMERICAN HERITAGE COLLEGE DICTIONARY 297 (4th ed. 2002).

65. *S & M Constructors*, 434 N.E.2d at 1350.

66. *Id.* at 1352.

contract documents.[67] Thus, the court found the case distinguishable from *Spearin,* and the city was not at fault.[68]

Spearin has been applied four times by Ohio courts in cases subsequent to *S & M* and prior to *Dugan & Meyers.*[69] The decisions in *Smoot Co. v. Ohio* and *Trucco Construction Co. v. City of Columbus*[70] are most important to the discussion at hand. The *Smoot* court cited a federal case from Georgia which held that recovery would be denied under *Spearin* if: (1) actual job site conditions would have been revealed by a reasonable inspection by the contractor; or (2) the government provided accurate information, "but the conclusions drawn therefrom by the contractor differed from the actual site conditions."[71] Additionally, the court held that if the information provided by the government is intended to be used by contractors to compute their bids, implied warranties as to the accuracy of the information will prevail over any contract clause which disclaims responsibility for accuracy of the information.[72] In applying these rules, the court held that because pre-bid investigation would not have revealed the conditions at issue, the contractor could recover on his differing site condition claim.[73]

In 2006, the Ohio Court of Appeals for the Tenth Appellate District applied the Spearin-related rules articulated in *Smoot* to hold a contractor responsible for his claim for differing site conditions.[74] Specifically the court held that in order to succeed on his claim, the contractor must show:

> (1) that its contract contains an affirmative indication regarding the subsurface or latent physical condition that forms the basis of

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67. *Id.*

68. *Id.*

69. Dugan & Meyers Constr. Co. v. Ohio Dep't of Admin. Servs., 864 N.E.2d 68 (Ohio 2007).

70. Smoot Co. v. Ohio, 736 N.E.2d 69 (2000); Trucco Constr. Co. v. City of Columbus, 2006-Ohio-6984; *See also* Lehmkuhl Excavation v. Troy, No. 2004-CA-31, 2005 WL 994607, at ¶ 24 (Ohio 2005) ("Spearin stands for the proposition that the city cannot make affirmative statements regarding site conditions and then hold the contractor responsible for any conditions differing from those asserted by the City, notwithstanding contractual provisions purporting to do so."); Central Ohio Bd. of Educ. v. Peterson Constr. Co., 716 N.E.2d 1210, 1216 (1998) (holding a contractor cannot rely upon the Spearin doctrine where the contractor had unique knowledge the plans were obviously flawed and did not inform the owner).

71. *Smoot,* 736 N.E.2d 69 at 77 (citing Robert E. McKee, Inc. v. City of Atlanta, 414 F. Supp. 957, 959-960 (N.D. Ga. 1976)).

72. *Id.* at 76.

73. *Id.* at 77.

74. Trucco Constr. Co. v. Columbus, No. 05AP-1134, 2006 WL 3825262, ¶ 39 (Ohio Ct. App. 2006).

> the claim; (2) that the contractor interpreted the contract as would a reasonably prudent contractor; (3) that the contractor reasonably relied upon the contract indications regarding the subsurface or latent physical condition; (4) that the contractor encountered conditions at the job site which differed materially from the contract indications regarding the subsurface or latent physical condition; (5) that the actual conditions encountered by the contractor were reasonably unforeseeable; and (6) that the contractor incurred increased costs which are solely attributable to the materially different subsurface or latent physical condition.[75]

The Ohio Court of Appeals only discussed the first of the listed factors because it was dispositive of the Spearin Claim.[76] The court overruled the contractor's Spearin-related assignment of error because the contract did not contain an affirmative indication regarding subsurface conditions.[77]

The principal that emerges from the Spearin cases in Ohio is that when there is a conflict between drawings and specifications that are part of the contract and actual job site conditions, the contractor is not responsible for additional expenses, notwithstanding an express contract provision limiting the government's liability.[78] In addition, to avoid liability for his increased expenses, a contractor must show that he was acting in good faith—i.e., he had visited the job site prior to bidding the project, the differing site conditions must not have been readily apparent from a reasonable inspection, and he must not have known that the plans were defective and not have informed the owner.[79]

B. Taking a Wrong Turn in Columbus

Dugan & Meyers Constr. Co. v. Ohio Dep't of Admin. Servs. involved a twenty million dollar contract to build three buildings for Ohio State University's business school.[80] Dugan & Meyers agreed to complete construction on the buildings in accordance with drawings and specifications provided by the project architect hired by the state.[81] Three other key

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75. *Id.* at ¶ 36 (quoting Smoot, 736 N.E.2d 69 at 174).

76. *Id.* at ¶ 39.

77. *Id.*

78. Dugan & Meyers Constr. Co. v. Ohio Dep't of Admin. Servs., 864 N.E.2d 68 (Ohio 2007).

79. *Smoot*, 736 N.E.2d 69 at 77; *see also Trucco*, 2006 WL 3825262, at ¶ 39.

80. Dugan & Meyers Constr. Co. v. Ohio Dep't of Admin. Servs., 864 N.E.2d 68, 70 (Ohio 2007).

81. *Id.*

contract provisions involved the project timeline. The first provision stated that the entire project would be completed in six hundred and sixty days – enforceable by a $,3000 per day liquidated damages provision.[82] The second held that the contractor would not be entitled to any additional compensation or mitigation of liquidated damages for delays regardless of whether the state was at fault.[83] The final contract provision at issue stated that failure to ask for an extension of time constituted a waiver on the contractor's part for any claim for mitigation of liquidated damages or a claim of extension of time.[84]

Approximately one year after construction began, when the interior work was progressing, Dugan & Meyers discovered "numerous omissions, inaccuracies, and conflicts in the design documents."[85] To clarify these omissions, inaccuracies, and conflicts, Dugan & Meyers sent over seven hundred requests for information to the architect, the majority of which the architect did not respond to in a timely manner.[86] In an effort to correct and clarify defects in the original plans, the state's architect issued over two hundred fifty field work-orders and eighty-five architectural supplemental instructions to Dugan & Meyers.[87] All of these defects and resulting corrections by the architect materially impacted the project schedule.[88] After Dugan & Meyers failed in its attempt to bring the project back on schedule, the state fired them and hired another contractor to complete the project.[89]

Dugan & Meyers filed suit in the Ohio Court of Claims after the state rejected a request for recovery of the contract balance, delay damages, and reversal of the liquidated damages and then subsequently back-charged Dugan & Meyers $589,340.00.[90] In the suit, Dugan & Meyers alleged that

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82. *Id.*

83. *Id.* at 70.

84. *Id.*

85. *Id.* at 71.

86. *Id.* at 72.

87. *Id.* "A field order is a written order issued by the owner or the owner's representative to the contractor as a directive to clarify a specification, resolve a site access difficulty, deal with technical execution problems, or change the contract documents." THE CONSTRUCTION PROJECT: PHASES, PEOPLE, TERMS, PAPERWORK, PROCESSES 141 (Marilyn Klinger & Marianne Susong eds., 2006). An architect's supplemental instruction is a written form issued by the architect to issue additional instructions or interpretations or to order minor changes in the work which do not involve a change to the contract price or schedule. *See* AMERICAN INSTITUTE OF ARCHITECTS, FORM G710 – ARCHITECT'S SUPPLEMENTAL INSTRUCTIONS (1992). *See also,* The American Institute of Architects, *Documents Synopses by Series*, FORM G710-1992 2008, Nov. 26, 2008, http://www.aia.org/docs_series_g.

88. *Dugan*, 864 N.E.2d at 71.

89. *Id.*

90. Dugan & Meyers Constr. Co. v. Ohio Dep't. of Admin. Servs., 834 N.E.2d 1, 6, 7, 14 (Ohio Ct. App. 2005) (observing that the amount back-charged to Dugan & Meyers

the state had breached its implied warranty under the Spearin Doctrine and that this breach resulted in delays to the project that were beyond their control.[91] The Court of Claims found for Dugan & Meyers and awarded them over $3.5 million dollars.[92] The Court of Claims held that the primary reason for the construction delay was the defective drawings supplied by the state's architect and that the state breached its contract with Dugan & Meyers by dismissing them.[93] The court reasoned that the state offered no evidence in rebuttal to the fact that the drawings were in fact inaccurate and incomplete.[94] The state appealed and the judgment was overturned.[95] Dugan & Meyers then appealed to the Ohio Supreme Court.[96]

The Ohio Supreme Court, in upholding the Court of Appeals decision, first refused to extend the Spearin Doctrine beyond the context of site conditions to encompass delays due to changes in defective plans.[97] The court relied heavily on the no-damages-for-delay provision in the construction contract in its analysis and cited the *S & M* case to support its contention that the state was not liable for damages.[98] However, as discussed above,[99] the court failed to mention the fact that in *S & M*, the defective plans were expressly excluded from the contract by a contract provision in contrast to Dugan & Meyer's contract.[100] An additional problem with the court's reasoning is because, in order to reach its decision, it cited the rationale that Dugan & Meyers had not followed the express contractual procedure to formally request an extension in writing.[101] As the Court of Claims determined, Dugan & Meyers did not ask for an extension because they knew none would be granted; the state had repeatedly contended that no time extension would

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consisted of $264,340.00—the additional expense of hiring another contractor after Dugan & Meyers was dismissed—and liquidated damages totaling $325,000.)

91. Dugan & Meyers Constr. Co. v. Ohio Dep't of Admin. Servs., 864 N.E.2d 68, 70, 71-72 (Ohio 2007).

92. *Dugan & Meyers*, 834 N.E.2d at 3.

93. *Dugan & Meyers*, 864 N.E.2d at 71-72.

94. *Id.*

95. *Id.* at 72.

96. *Id.*

97. *Id.* at 68, 73.

98. *Id.* at 73.

99. *See supra* note 65.

100. S & M Constructors, Inc. v. City of Columbus, 434 N.E.2d. 1349, 1352 (Ohio 1982).

101. *Dugan & Meyers*, 864 N.E.2d at 76.

be allowed.[102] Additionally the trial court record was full of evidence that the project was going to be delayed and that Dugan & Meyers would be pursuing claims.[103]

The Court then contended that two things must be present in order to find for Dugan & Meyers: (1) the state impliedly warranted that its plans were free from defects; and (2) that this implied warranty would prevail over express contractual provisions.[104] In finding that neither one of these two conditions was present, the court maintained that to find otherwise "would contravene established precedent, which we will not do."[105] However, Ohio precedent clearly shows that the government *does* impliedly warrant construction drawings, which are incorporated into the contract, to be free from defects if those drawings are being utilized in the preparation of bids *and* that this warranty is not preempted by contract provisions absolving owners of all liability resulting from defective plans.[106] To further bolster support for their argument, the majority approvingly quoted the findings of the Court of Appeals stating that proof of the plans were adequately shown by the completion of the project by another contractor.[107] What the majority failed to acknowledge was the degree of correction necessary to make the drawings buildable and the fact that the project was completed six months behind schedule.[108] Thus, Dugan & Meyers had to pay the State of Ohio $325,000.00 in liquidated damages and they were not entitled to any breach of contract damages.[109]

In his dissent, Justice Pfeifer stated that the fault rested with the owner's plans, as in all Spearin Doctrine Cases, and contended that the owner's plans and specifications had to be free from defects in order for the construction (and contractual) process to work properly.[110] To illustrate the level of discord with the majority, Justice Pfeifer declared:

> The majority seems to suggest that an owner need not be concerned with preparing accurate plans, since any deficiencies

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102. Thompson Hine LLP, *Construction Update: A New Paradigm for Ohio's Construction Industry?*, Jun. 5, 2007, http://www.thompsononhine.com/publications/publication1089.html.

103. *Id.*

104. *Dugan & Meyers*, 864 N.E.2d 68 at 75.

105. *Id.*

106. *See, e.g.*, Smoot Co. v. Ohio Dep't of Admin. Serv., 736 N.E.2d 69, 76 (Ohio Ct. App. 2000).

107. *Dugan & Meyers*, 864 N.E.2d at 76.

108. *Id.* at 71.

109. *Dugan & Meyers*, 834 N.E.2d at 6.

110. *Id.* at 76-77.

> must be corrected by the contractor. As it turns out, the state could have saved a lot of money on blueprints and just submitted some sketches on the backs of a few cocktail napkins.[111]

The dissent went on to argue that the majority relied upon two cases incorrectly. As discussed above,[112] the *S & M* case stood for the proposition that a contractor could not claim that delays and damages were a result of the city's plans when the documents at issue were not part of the contract documents.[113] In the second case relied upon by the majority, *Carribine Construction*, the contractor caused the delay when he failed to have the construction site rezoned as per his contractual obligation.[114] In contrast, the majority merely characterized *Carribine* as standing for the proposition that no-damages-delays clauses were enforceable and did not delve into the details of the case, which would have distinguished it from Dugan & Meyers' situation.[115]

According to Justice Pfeifer, the case boiled down to one question: Were the delays caused by the design mistakes on the owner's drawings?[116] The answer to this essential Spearin Doctrine question was a clear yes – the answer correctly provided by the trial court.[117]

C. The Aftermath—Interesting Times for Ohio Construction

In 1998, after Dugan & Meyers had entered into their contract with the state, the Ohio Legislature passed the Fairness in Contracting Act, which, among other things, made no-damages-for-delay clauses void and unenforceable as a matter of public policy.[118] Unfortunately, as the Supreme Court of

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111. *Id.* at 77.

112. *See S & M Constructors*, *supra* note 65 and accompanying text.

113. *Dugan & Meyers*, 864 N.E.2d at 78.

114. *Id.* at 78-79 (citing Carrabine Constr. Co. v. Chrysler Realty Corp., 495 N.E.2d 952 (Ohio 1986)).

115. *Id.* at 74-75 (citing *Carrabine*, 495 N.E.2d 952).

116. *Id.* at 79.

117. *Id.*

118. *See* OHIO REV. CODE ANN. § 4113.62(C)(1) (2007), which states in part:

> Any provision of a construction contract, agreement, or understanding, or specification or other documentation that is made a part of a construction contract, agreement, or understanding, that waives or precludes liability for delay during the course of a construction contract when the cause of the delay is a proximate result of the owner's act or failure to act, or that waives any other remedy for a construction contract when the cause of the delay is a proximate result of the owner's act or failure to act, is void and unenforceable as against public policy.

Ohio pointed out, no-damages-for-delays clauses were valid under Ohio law when the parties entered into their contract.[119]

Time will show that the court's decision will raise more questions than it attempted to settle.[120] According to the reasoning of the Court of Appeals in this case, *Spearin* does not stand for the proposition that a contractor will be entitled to damages and extensions of time because plans and specifications furnished by an owner require "agreed changes in the work necessitated by some force not within the complete control of the contractor."[121] By this reasoning, the Spearin Doctrine has been relegated to apply only where the plans furnished by the owner are completely impossible to build from.[122] Now in Ohio, and in jurisdictions that look to this decision, contractors may only use the Spearin Doctrine as a defensive weapon against a building owner's claims of non-conforming and defective construction.[123] When a contractor is faced with plans and specifications that contain conflicts and defects, he may not have a choice but to go ahead and build according to the defective information.[124] Otherwise, he must be prepared to hold up the project to wait on an owner's decision on the defect in the drawings.[125] Either choice will do nothing, but result in a longer project, a more adversarial atmosphere, and increased taxpayer expense.[126]

Most importantly, the *Dugan & Meyers* decision almost completely removes the responsibility from architects to produce construction documents free from defects. A contractor is not professionally licensed, and he does not carry the proper liability insurance to design around flawed drawings or fill in holes left by architects. Yet, the American Institute of Architects

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119. *Dugan & Meyers*, 864 N.E.2d at 74.

120. Thompson Hine LLP, *Construction Update: A New Paradigm for Ohio's Construction Industry?*, Jun. 5, 2007, http://www.thompsonhine.com/publications/publication1089.html.

121. Dugan & Meyers Construction Co. v. Ohio Dept. of Admin. Servs., 834 N.E.2d 1, 9 (Ohio Ct. App. 2005).

122. Thomas L. Rosenberg, *Is the Spearin Doctrine Dead in Ohio or Just Wounded?* (2006), http://library.findlaw.com/2006/Jul/11/246726.html.

123. Patrick A. Devine, *Conflict Between Implied Contractual Obligations and the Written Word: Is the Spearin Doctrine All That It Was Cracked up to Be?*, UNDER CONSTRUCTION (Newsletter of the ABA Forum on the Construction Industry, Chicago, IL.), August 2007, 5, 7; *see also* Brickler & Eckler LLP, *The Spearin Doctrine and Owner Disclaimers*, June 2005, http://bricker.com/legalservices.industry/construction/resources/articles/155.asp. (defining defensive use of Spearin Doctrine).

124. *Id.*

125. Thompson Hine LLP, *Construction Update: A New Paradigm for Ohio's Construction Industry?*, Jun. 5, 2007, http://www.thompsononhine.com/publications/publication1089.html.

126. *Id.*

("AIA"), the nation's leading architectural professional organization, discourages express warranties in contracts with building owners.[127] The reasoning behind this policy is that like most professionals, architects should not be required to guarantee results. However, unlike the practice of law or medicine, whose uncertainties stem from the human element, architecture involves designing a physical structure that manipulates tangible objects in order to produce a building. The absurdity of this refusal to guarantee results is analogous to a BMW engineer giving his manufacturing team a stack of drawings and saying, "I'm pretty sure you can build a new 325i if you go by these, but I won't guarantee it. You figure it out and take responsibility for producing the finished product."

In addition to worrying about construction means and methods, contractors are now obligated to second guess the adequacy of plans and specifications. During the bidding process, prudent contractors will include additional money in their bid as an allowance just in case a flaw in the plans and specifications presents itself later, resulting in increased cost. Incompetent or unscrupulous contractors, in order to obtain the lowest bid, will not include such allowances and will instead try to tie up the project, pressuring the owner for more money with the threat of lengthy and costly litigation. Either way, the taxpayer is the one who suffers on a publicly-funded project. In addition to the waste of taxpayer dollars, neither one of the situations described above is an efficient use of scarce economic resources.[128]

IV. WHAT CAN BE DONE?

If a building owner wanted to completely shift the risk of defective design to the contractor, he could do so by writing a performance specification.[129] In contrast to design specifications, which set forth plans that the contractor must follow, a performance specification sets forth an objective and leaves the contractor to his own devices to determine how to achieve that objective.[130] So-called "design-build" contracts place the architect and contractor into one entity for the purposes of the project.[131] The architect and contractor work in concert to produce a buildable design that meets the

127. *See Watch Your Language: Express Warranties*, AIA BEST PRACTICES, January 2007, http://www.aia.org.

128. Economic efficiency is defined as a situation where a unit of good is produced at the least possible cost. Mike McFall, *What Does Economic Efficiency Mean?*, http://economics.about.com/od/productivity/f/economic_eff.htm.

129. Brickler & Eckler LLP, *The Spearin Doctrine and Owner Disclaimers*, June 2005, http://bricker.com/legalservices.industry/construction/resources/articles/155.asp.

130. *Id.*

131. CONSTRUCTION LAW, *supra* note 8, at 84.

owner's objectives. The central premise of a design-build project is that when the architect and contractor are on the same team, "they are better able to address constructability issues during design, thereby lowering the overall cost of the project and shortening the duration between project design and final completion."[132]

Design-build projects, with their one-team approach involving architects and contractors, lend themselves well to privately financed projects and are in fact becoming quite popular.[133] The problem that makes them impracticable for publicly financed projects is that a contractor cannot produce a hard bid with a performance objective. In order to accurately produce a bid, a contractor needs completely designed drawings and a well-defined scope of work. And many states have laws that require publicly financed construction projects to be competitively bid rather than negotiated.[134]

Like Ohio's Fairness in Contracting statute passed by the Ohio legislature, statutes allowing public sector design-build projects greatly streamline construction and reduce job site finger pointing.[135] Procedural safeguards could be put in place that would still ensure the most prudent expenditure of tax dollars, such as having the contractors compete on a profit percentage and design fee basis rather than total project costs. Trade organizations such as the Associated General Contractors of America have lobbying arms in all fifty states and at the federal level, which are in an excellent position to get laws passed that will uniformly ban no-damages-for-delay clauses and allow public design-build construction projects.[136]

In lieu of seeking a legislative solution, the solution is dependent upon whether the contractor is sophisticated or a small player. As Professor Carl J. Circo points out:

> Major, sophisticated parties can negotiate contracts that serve their objectives and that facilitate commercially reasonable allocation of risk and responsibility. The same is not true for those who are less

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132. *Id.* at 84-85.

133. *Id.* at 85. (citing Mark C. Friedlander, *A Primer on Industrial Design/Build Construction Contracts*, CONSTR. LAWYER 3 (April 1994); Neil S. Haldrop & Mason A., *Design-Build in the Public Sector*, CONSTR. LAWYER 38 (Oct. 1998).

134. Phil Bruner & Patrick J. O'Connor Jr., BRUNER & O'CONNOR ON CONSTRUCTION LAW 92 (2002).

135. *See* OHIO REV. CODE ANN § 4113.62(C)(1) (2007).

136. Currently, only a handful of states statutorily ban no damages for delay clauses. *See* CAL. PUB. CONT. CODE § 7102 (2004); WASH. REV. CODE ANN. § 4.24.360-4.24.370 (1988). CAL. PUB. CONT. CODE § 7102 (1985 & Supp. 1990); COLO. REV. STAT. § 24-91-103.5, 24-91-102, 24-91-110 (1988 & Supp.1990); MO. REV. STAT. § 34.058 (Supp.1991); WASH. REV. CODE ANN. § 4.24.380 (1988).

> sophisticated or for those who have relatively little bargaining leverage. In practice, these participants often rely heavily on industry form contracts and on the good faith of their contractual counterparties. Given the highly competitive nature of the construction industry and the conflicting risk management interests of the parties, it is not surprising that contracting practices tend to preserve and strengthen the commercially fittest.[137]

For sophisticated parties who usually employ the assistance of counsel in drafting and negotiating contracts, the solution begins with attorneys taking a more central role in the construction industry. Attorneys, when brought into a construction project, are almost always there after a dispute arises, rather than playing a proactive role in contract planning or risk assessment.[138] A problem then arises in that many attorneys are not experienced enough in construction law to do an adequate job of reviewing construction contract documents.[139] The responsibility then falls to legal education, which is almost devoid of construction law subjects.[140] Increased emphasis in law schools on construction law principles produces attorneys who are more capable and willing to educate clients to seek legal advice at the transactional phase—which serves to alleviate disputes and litigation during the course of construction.

As Professor Circo points out above, most small contractors often rely on industry form contracts.[141] Most often, the form contract relied on is a standardized contract produced by the American Institute of Architects (AIA). These contracts generally contain, among the standard terms and conditions, a clause relating to Spearin-type conflicts.[142] This clause will entitle a contractor to receive additional time and expense when site conditions differ from what is described in the contract documents.[143] However, AIA contracts do not contain provisions that will entitle a

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137. Carl J. Circo, *When Specialty Designs Cause Building Disasters: Responsibility for Shared Architectural and Engineering Services*, 84 NEB. L. REV. 162, 232 (2005).

138. Thomas J. Stipanowich, *Reconstructing Construction Law: Reality and Reform in a Transactional System*, 1998 WIS. L. REV. 463, 492 (1998).

139. *Id.*

140. *Id.* at 495-96. As of 1998, only twenty member institutions of the American Association of Law Schools provided current offerings focusing on construction law. *Id.* However, upon review of a typical contracts textbook, it was found that nearly one in five cases involved construction contracts. *Id.* at 494.

141. *See supra* note 136 and accompanying text.

142. Brickler & Eckler LLP, *The Spearin Doctrine and Owner Disclaimers*, June 2005, http://bricker.com/legalservices.industry/construction/resources/articles/155.asp.

143. *Id.*

contractor to damages when he discovers errors which do not relate to site conditions.[144] Inclusion by the AIA of such a clause will serve to take the burden off contractors of second-guessing the architect's design.

V. CONCLUSION

Architects, like all professionals, must display a level of competency commensurate with other professionals in their respective industry. However, unlike other professionals, architects should guarantee results because they are dealing with physical, finite, and known objects. The Spearin Doctrine was developed to prevent contractors from being responsible for defective drawings in spite of any contractual provision that holds otherwise.[145] The decision of the Ohio Supreme Court overturns almost a century of legal protection for contractors and will serve to make publicly-funded construction projects more adversarial and ultimately more costly to the taxpayer.

Unfortunately, there is no simple solution to this complex problem. The Ohio legislature took a step in the right direction when it passed a statute holding no-damages-for-delays clauses unenforceable as a matter of law. Contractors' trade associations need to take steps to ensure that comparable legislation, as well as legislation allowing design-build construction for publicly-funded projects, is passed in all fifty states. In addition, law schools should improve treatment of construction law curriculum in concert with the AIA inserting protective provisions into its standard form contracts; these changes will serve to alleviate future *Dugan & Meyers* type conflicts.

144. *See* AMERICAN INSTITUTE OF ARCHITECTS, FORM A201—GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION (1997).

145. Patrick A. Devine, *Conflict Between Implied Contractual Obligations and the Written Word: Is the Spearin Doctrine All That It Was Cracked up to Be?*, UNDER CONSTRUCTION (Newsletter of the ABA Forum on the Construction Industry, Chicago, IL.), August 2007, at 5.