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NEW YORK

PREMISES LIABILITY

Dismissal of Claim Against Engineering Company Client



Robert A. Fitch

Robert A. Fitch and **Diana Kane** of Rawle & Henderson LLP represented the defendant engineering company and its owner in a partial building collapse case in New York County that went to trial and resulted in a dismissal of the claim against our client after plaintiff rested in September 2017.



Diana Kane

Plaintiff insurance company brought a suit on behalf of its insured property owner for alleged damages sustained

in October 2008 to a three-story residential Brooklyn property, resulting from negligent underpinning and excavation work performed by defendants on the construction of a hotel at the adjacent lot. The trial proceeded against the owner of the adjoining property, the general contractor, construction superintendent, project architect and our client, who was hired to inspect the underpinning work to make sure it complied with the plans.

Plaintiff alleged that defendant engineering company and its owner owed duties to plaintiff to ensure that their designs relating to support of excavation would not cause harm to plaintiff's premises. Plaintiff further alleged that defendant engineering company's designs were deficient, that the inspection was done improperly and that there was statutory absolute liability. Total demand was \$750,000, which included 9% statutory interest accruing since October 2008 on plaintiff's \$450,000 payment to their subrogor. Co-defendants alleged cross-claims rooted in contract, seeking indemnification and contribution.

Our client was retained by the co-defendants architect, to replace the original engineer (non-party) as the engineer of record, as well as design the structure of the new hotel and also the foundation and excavation portion of the design. Accordingly, our client prepared plans and filed them with the New York City Department of Buildings. Our client also filed the TR1 form, required by the New York City Department of Buildings, listing himself and his company as responsible for inspections of the excavations being performed. The plans

required the engineer to be notified 24 hours in advance of any underpinning work so he could be present to inspect it.

Sometime in October 2008, underpinning work to support plaintiff's foundation was performed. Our client was not present, however, since he had not been notified that such work had commenced. It was not until two days into the underpinning work that someone from co-defendant general contractor's office called our client and informed him that plaintiff's building had been damaged. When our client went to the site to inspect the damage, he was informed that the excavation had been performed with a back hoe instead of manually with shovels, as was required by his designs, and the rubble foundation of the plaintiff's building settled, causing extensive damage.

The New York City Department of Buildings subsequently issued a Stop Work Order and directed our client to design shoring and bracing to prevent further settlement. Our client's remedial plans were ultimately approved by the Department of Building, and the Stop Work Order was lifted in the spring of 2009. Importantly, following the Stop Work Order, it was co-defendant general contractor that pled guilty to the Department of Buildings violation order.

Upon motions by defendants at the start of the trial, plaintiff's liability expert was precluded from testifying at the time of trial.

During the over three-week-long trial, plaintiff's counsel called our client and co-defendant's representative as his witnesses. Our client successfully relayed to the jury the chaotic working conditions under which the property in question was being constructed. His testimony was further supported by the damaging testimony by the witness for the co-defendant general contractor, who was in theory responsible for the construction, yet he possessed no knowledge as to what exactly went on at the construction site, subcontracted out the work and never visited the job site.

Once plaintiff's counsel rested his case, **Robert Fitch** moved to dismiss, arguing that there was no evidence produced establishing that our client had violated his contract or was negligent.

We argued that it was obvious that the role of our client, as the inspectors of the excavation work pursuant to the Department of Building's TR1 form, did not displace co-defendants' duty of performing their work in a non-negligent

manner and following the architectural and engineering designs.

We also used the case relied upon by plaintiff in his opposition to our motion to support our argument that there was no absolute statutory liability. Plaintiff's statutory absolute liability claim was based on the First Department case of *87 Chambers, LLC v. 77 Reade, LLC*, 122 A.D.3d 540 (1st Dep't 2014), referring to the applicable provision (effective July 2008) of Administrative Code §3309.4. The provision provides as follows:

"Regardless of the excavation or fill depth, the person who causes an excavation or fill to be made shall, at all times and at his or her own expense, preserve and protect from damage any adjoining structures, provided such person is afforded a license in accordance with the requirement of Section 3309.2 to enter and inspect the adjoining buildings and property, and to perform such work thereon as may be necessary for such purpose."

We successfully distinguished the responsibilities of the engineer in *87 Chambers, LLC v. 77 Reade, LLC* case from our client. The engineer in *87 Chambers, LLC* was found to be at fault for design changes, which were adopted over the excavation contractor's objections, and were allegedly the cause of the damage to plaintiffs' building. We were able to show that neither the plaintiff nor any of the co-defendants had evidence to support the conclusion that our client's plans were deficient (failed to meet the applicable standard of care), nor were they able to show that they informed our client 24 hours in advance of the start of any excavation work, as was called for in the plans. Finally, we argued that the strict liability component applied to violations of the Administrative Code's provisions, yet it was only co-defendant general contractor who pled guilty to the violation issued by the Department of Buildings, and was arguably the only party to be found strictly liable for plaintiffs' damages.

As a third alternative argument, we argued that plaintiff's claims against our client should be dismissed, as no expert was identified to opine on any deviation by our client from the standard of practice for engineers, and therefore plaintiff was unable to demonstrate any negligence on behalf of our client. We argued that it has been established by case law that a claim of negligence against a professional is a claim of malpractice, and must be supported by expert testimony and neither plaintiff's nor co-defendants had experts to support the allegations that our client's designs or work did not meet the accepted standards of engineering practice.

Our motion to dismiss was granted, and all claims and cross-claims against our client were dismissed. A dismissal at the end of plaintiff's case is highly unusual in New York since most judges reserve on such a motion and let the issue go to the jury. We were fortunate to have a strong, knowledgeable judge who was not afraid to make a decision.

The trial then went for another week on damages, resulting in a plaintiff's verdict for the full amount of the claim. The liability was divided 75% to 25% between the general contractor and a related company responsible for supervising the project.

Robert A. Fitch is the resident partner in our New York City office. He concentrates his practice on the defense of architects and engineers, construction, medical and oral surgery malpractice claims, and commercial motor vehicle litigation. He received his undergraduate degree from Syracuse University and his J.D. from Syracuse University College of Law. He is admitted to practice in New York since 1974, as well as in Federal Courts in Southern, Eastern and Northern Districts of New York and the Second Circuit Court of Appeals. Bob has tried over 100 cases to verdict and is a member of the Defense Research Institute, Federal Bar Council, PIAA and Trucking Industry Defense Association. Bob was named a New York Metro Super Lawyer in 2013, 2014, 2015, 2016 and 2017 by the publishers of *Law & Politics*. He has a peer review rating by Martindale-Hubbell of AV (the highest).

Bob can be reached directly at (212) 323-7070 • rfitch@rawle.com

Diana Kane is an associate in our New York City office. She focuses her law practice in the areas of construction litigation and the defense of commercial motor vehicle companies and their insurers. Diana earned her J.D. from Brooklyn Law School in 2015. While attending law school, she was a Full Time Fellow for the New York City Law Department, Tort Division, Brooklyn Borough Office as part of the Public Interest Public Service Fellowship. She served as a law clerk for the Law Firm of Candace C. Carponter, P.C., in Brooklyn, and an extern for the Honorable John M. Leventhal of the Appellate Division of the Supreme Court of the State of New York, Second Department, in Brooklyn. Diana earned a B.S. in Legal Studies, *magna cum laude*, from the John Jay College of Criminal Justice, City University of New York, in 2011. She was on the Dean's List every semester. Before joining Rawle & Henderson LLP, Diana was an attorney for the New York City Law Department, Tort Division, Manhattan Borough Unit. She is admitted to practice in New York.

Diana can be reached directly at (212) 323-7088 • dkane@rawle.com

GENERAL COUNSEL

Rawle and Henderson LLP has appointed **David Ira Rosenbaum**, a partner in our Philadelphia office, to serve as the Firm's General Counsel. As the chief, in-house legal adviser, David has and will continue to represent the Firm in business disputes, litigation and transactional matters. David was selected to be the Firm's first General Counsel because of his expertise and success in representing business clients and other law firms in litigation and transactional matters as its long-standing and continuing Chair of the Commercial Litigation and Transactions Practice Groups.

David will continue to maintain his active law practice in commercial litigation, commercial transactions, product liability, premises liability and employment relations. As a litigator, David represents corporate clients in a wide variety of complex commercial matters. As a transactional attorney, he has handled complex, multi-million-dollar asset purchase agreements, employment contracts, physician contracts, real property leases and purchase agreements, joint ventures and vendor agreements.



David Rosenbaum

David graduated *cum laude* from Temple University School of Law and earned an A.B. in Political Economy from Vassar College. He is admitted to practice in Pennsylvania and New Jersey, as well as the U.S. District Courts for the Eastern and Middle Districts of Pennsylvania, the District of New Jersey, the Third Circuit Court of Appeals and the U.S. Supreme Court. David has been rated AV Preeminent from 2001 to 2017. David is a member of the prestigious Product Liability Advisory Council. He has served as an Adjunct Professor at Temple University's School of Law and as a Judge Pro Tem in the Court of Common Pleas of Philadelphia County. He is currently a Board Member and President of the Neighborhood Club of Bala Cynwyd, a Regional Alumni Admissions Coordinator for Vassar College and a member of the Board of Directors of the Philadelphia Boys Choir and Chorale.

David can be reached directly at (215) 575-4378 • drosenbaum@rawle.com

OF COUNSEL

Rawle & Henderson LLP is pleased to announce that **Franklin C. Love** and **Michael R. Lobick** have been named Of Counsel to the Firm, effective January 1, 2018.

Franklin C. Love, Of Counsel to the Firm in our **Philadelphia** office, concentrates his practice on general casualty defense litigation, including construction site accidents, premises liability, catastrophic injury, motor vehicle accidents, subrogation defense, and general negligence. Frank graduated from Pennsylvania State University with a Bachelor of Arts in 1998 and a Juris Doctorate from Temple University James E. Beasley School of Law in 2002. He is admitted to practice in the state and federal courts of Pennsylvania and New Jersey as well as the U.S. District Court for the Eastern District of Pennsylvania.

Frank can be reached directly at (215) 575-4356 • flove@rawle.com

Michael R. Lobick, Of Counsel to the Firm in our **Pittsburgh** office, focuses his practice on the defense of corporations in the areas of product liability, toxic torts and environmental law. Michael received his J.D. from the University of Pittsburgh School of Law in 2007 and his B.S. in History & Policy from Carnegie Mellon University in 2000. While at Carnegie Mellon, Michael received a full NROTC Scholarship. He is admitted to practice in Pennsylvania and West Virginia, as well as the U.S. District Court for the Southern District of West Virginia.



Franklin C. Love



Michael R. Lobick

BREAST CANCER RESEARCH

As an advocate for breast cancer survivors and those living with breast cancer, **Patrice S. O'Brien** recently participated in the evaluation of research applications submitted to the **Breast Cancer Research Program sponsored by the Department of Defense**. Patrice was nominated for participation in the program by Susan G. Komen Philadelphia. As a consumer reviewer, she was a full voting member, along with prominent scientists, at meetings to help determine how the \$120 million appropriated for the program by Congress for Fiscal Year 2017 will be spent on research to address breast cancer and treatments.

Consumer reviewers are asked to represent the collective view of patients and family members by preparing comments on the impact of the research on issues such as diagnosis, treatment, and quality of life. Scientists applying propose to conduct innovative research to improve the quality of life by decreasing the impact of cancer on Service members, their families and the American public.

Patrice O'Brien has a strong commitment to breast cancer research. For the past 10 years, she has been the captain of Rawle & Henderson LLP's race team for the annual Komen Philadelphia Race for the Cure, helping to raise over \$78,500 to find a cure for breast cancer. Patrice is Of Counsel in our Philadelphia office. She has practiced as a civil trial lawyer for over 30 years in the areas of medical malpractice, products liability, catastrophic loss and premises liability in the Mid-Atlantic region. She received her undergraduate degree from Delaware Valley College, *magna cum laude*, in 1983, and law degree from Columbus School of Law at Catholic University in 1986. Patrice is also currently co-chair of the Medical-Legal Committee of the State Civil Litigation Section of the Philadelphia Bar Association.

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Patrice S. O'Brien