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DESIGN PROFESSIONAL LIABILITY FOR CONSTRUCTION WORKSITE ACCIDENTS—HOW ARKANSAS LED THE WAY TO A NATIONAL CONSENSUS

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Three major developments underlie the law of architect or engineer (a/e) liability to construction workers, beginning in the second half of the twentieth century: (1) a change from a no-duty regime to a duty of care under a foreseeability test, (2) reactions to that expanded liability by changes to standard form documents by industry associations (in particular the American Institute of Architects (AIA)), (3) currently culminating in a broad national consensus. The Arkansas Supreme Court was instrumental in framing the issues of this jurisprudence early in its development and later contributed to its continued evolution.

I. EARLY CASELAW AND AIA RESPONSE

Why should an a/e, who has no direct control over the actions of any construction worker, owe a duty of care to injured workers or their estates? This was never an issue until the fall of the privity doctrine in the first third of the twentieth century.[1] Yet even then, a nexus between the a/e's role in a construction project and liability to construction workers was, arguably, not straightforward. Nonetheless, the replacement of a no-duty rule

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1. *See e.g.*, MacPherson v. Buick Motor Co., 111 N.E. 1050, 1052-53 (N.Y. 1916) (adopting the privity doctrine). The privity defense was applied to shield an architect from liability in *Geare v. Sturgis*, 14 F.2d 256, 256-57 (D.C. Cir. 1926) (theater patron killed in theater collapse).

under the auspices of the privity doctrine, with a test for foreseeability to establish the existence of a duty, was more than sufficient to bridge that gap.

Appreciating the effect of the fall of the privity defense requires an understanding of the architect's role in supervising a contractor's performance at the mid-point of the twentieth century. This baseline understanding can be discerned through an examination of the AIA's 1951 standard form documents.[2] Under the "Standard Form of Agreement Between Owner and Architect," the architect provided "general supervision to guard the Owner against defects and deficiencies in the work of contractors."[3] Under the "General Conditions of the Contract for the Construction of Buildings," a section titled "Architect's Status," combined the duty of supervision with the architect's authority to stop the work:

> The Architect shall have *general supervision and direction of the work*. He is the agent of the Owner only to the extent provided in the Contract Documents and when in special instances he is authorized by the Owner so to act, and in such instances he shall, upon request, show the Contractor written authority. He has authority to *stop the work* whenever such stoppage may be necessary to insure the proper execution of the Contract.[4]

In short, in addition to being the project designer, which included review of shop drawings created by subcontractors, the architect's administrative duties involved supervision and direction of the contractor's performance, backed up by the

2. Of course, the AIA now competes with several other industry organizations which have produced their own, competing standard form documents, including: the Associated General Contractors of America (AGC) and associated entities, publishers of ConsensusDocs; the National Society of Professionals Engineers (NSPE) and affiliated organizations, which publish documents prepared by the Engineers Joint Contract Documents Committee (EJCDC); the Design-Build Institute of America (DBIA); and the Construction Management Association of America (CMAA). However, in the mid-twentieth century, the AIA reigned supreme. *See generally* Justin Sweet, *The American Institute of Architects: Dominant Actor in the Construction Documents Market*, 1991 WIS. L. REV. 317 (1991).

3. AM. INST. OF ARCHITECTS, AIA DOC. B102 art. 7 (1951).

4. AM. INST. OF ARCHITECTS, AIA DOC. A2 art. 38 (1951) (emphasis added).

authority to stop the work. How did the fall of privity affect this industry understanding of the architect's role?

Caselaw spanning a little more than a decade, from 1959 to 1970, in which Arkansas loomed large, upended this baseline understanding, at least regarding worksite accidents.[5] The first decision was not in Arkansas but in Louisiana. Renovation of a public hospital in Louisiana in the mid-1950s included installation of a new boiler.[6] The boiler exploded while being tested, killing a subcontractor's employee.[7] The explosion was caused by the boiler's lack of a pressure relief valve (although required by the specifications).[8] The estate sued the project's architects and a consulting engineer (hired by the architects) for negligence.[9] After a lengthy trial, all defendants except the architects and their insurer were exonerated.[10]

On appeal, the architects raised the privity defense.[11] In a 1959 decision, *Day v. Nat'l U.S. Radiator Corp.,* the Louisiana Court of Appeals rejected that defense and ruled that the architect owed a duty of care to foreseeable victims of the boiler

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5. For an in-depth review of this caselaw, see generally Justin Sweet, *Site Architects and Construction Workers: Brothers and Keepers or Strangers?*, 28 EMORY L.J. 291 (1979) [hereinafter *Site Architects*]. For further discussion, see generally 5 PHILIP L. BRUNER & PATRICK J. O'CONNOR, JR., BRUNER & O'CONNOR ON CONSTRUCTION LAW 663-688 §§ 17:52-17:58 (2002, 2021 Supp.); DWIGHT G. CONGER et al., CONSTRUCTION ACCIDENT LITIGATION ch. 2 (2d ed. 2021); MARC M. SCHNEIER, CONSTRUCTION ACCIDENT LAW: A COMPREHENSIVE GUIDE TO LEGAL LIABILITY AND INSURANCE CLAIMS 252 (1999); Karen S. Precella, *Architect Liability: Should an Architect's Status Create a Duty to Protect Construction Workers from Job-Site Hazards?*, 11 CONSTR. LAW. 11 (1991); Wyatt A. Hoch, *Architects' Liability for Construction Site Accidents*, 30 U. KAN. L. REV. 429 (1982); Northwestern University School of Law, *The Supervising Architect, His Liabilities and His Remedies When a Worker Is Injured*, 64 NW. U. L. REV. 535 (1969); Marc M. Schneier, *Architect's or Engineer's Liability for Injury or Death of Construction Worker on Construction Site Project*, 56 A.L.R.7th art. 7 (2020) [hereinafter *Architect's or Engineer's Liability*]. Design professional liability under the Occupational Safety and Health Act, not the topic of this article, is discussed in John E. Bulman et al., *The Horns of a Dilemma: Too Much Involvement in Worksite Safety Can Backfire on Design Professionals*, 21 CONSTR. LAW. 5 (2001).

6. *See* Day v. Nat'l U.S. Radiator Corp., 117 So. 2d 104, 107, 109 (La. Ct. App. 1959), *rev'd*, 128 So. 2d 660 (La. 1961).

7. *See id.* at 107.

8. *Id.* at 122.

9. *Id.* at 107.

10. *Id.* at 130, 135.

11. *See Day*, 117 So. 2d at 118.

subcontractor's negligence in failing to include the pressure relief valve.[12] The court identified, as the source of that duty, a provision in the design agreement which required the architects to supervise the work.[13] Professor Justin Sweet wrote that the decision "shocked the AIA."[14] He continued:

> It seemed to require that the architect be present, if not continuously, at least at every crucial point in the construction process, judged from a worker safety standpoint. This, the AIA felt, went beyond the proper role of the architect and his contract commitment. . . . Finally, the AIA believed that by concluding the architects were negligent in approving shop drawings which did not show the pressure relief valve, the court revealed its misunderstanding of the architects' function in reviewing shop drawings. To the AIA, review is made for design purposes only and is not intended to be an approval of the means by which design compliance will be achieved.[15]

While the *Day* decision was on appeal, attention shifted to the Arkansas Supreme Court. A 1960 decision, *Erhart v. Hummonds*, involved an excavation cave-in which killed or injured several subcontractor employees.[16] Here, unlike in the Louisiana case, the architect knew of the danger and acted on that knowledge—he demanded that the contractor replace the job superintendent and threatened to order the work stopped, as he had the contractual power to do.[17] The trench collapsed before any remediation of the safety violations occurred, and the Arkansas Supreme Court deferred to the jury's finding of negligence by the architect.[18] So, as of 1960, two appellate court

12. *Id.* at 119-20.

13. *See id.* at 124. The appellate court did not quote the *contract* language, but the supreme court did, stating that the architect had agreed to *provide* "'adequate supervision of the execution of the work to reasonably insure strict conformity with the working drawings, specifications and other contract documents', and this supervision was to include 'frequent visits to the work site.'" Day v. Nat'l U.S. Radiator Corp., 128 So. 2d 660, 666 (La. 1961).

14. *Site Architects*, *supra* note 5, at 303.

15. *Id.*

16. 232 Ark. 133, 135, 334 S.W.2d 869, 871 (1960).

17. *See id.* at 135, 334 S.W.2d at 871.

18. *Id.* at 136, 138, 334 S.W.2d at 871-72.

decisions had rejected the privity defense and found an architect owed construction workers a duty of care.[19]

In 1961, the Louisiana Supreme Court reversed the court of appeals and held the architect's contractual duty of supervision did not impose upon the architect a duty of care owed to construction workers.[20] In contrast to the court of appeals,[21] the supreme court interpreted the design agreement's supervision requirement as creating a duty owed only to the project owner, that the work would comply with the design.[22] The supreme court continued:

> [W]e do not think that under the contract in the instant case the architects were charged with the duty or obligation to inspect the methods employed by the contractor or the subcontractor in fulfilling the contract or the subcontract. Consequently we do not agree with the Court of Appeal that the architects had a duty to the deceased Day, an employee of [the plumbing subcontractor], to inspect the hot water system during its installation, or that they were charged with the duty of knowing that the boiler was being installed.[23]

Apparently even the possibility of increased liability stirred the AIA into action. While the Louisiana Court of Appeals' *Day* decision was not released until 1959,[24] in its 1958 design agreement, the AIA deleted "supervision" from the standard agreement and replaced it with language emphasizing observation through periodic visits.[25] The AIA also made clear in the 1958 document that the duty to inspect was not a guarantee or warranty that the work was defect-free.[26] Just three years later, in 1961, the

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19. *See id.* at 136-37, 334 S.W.3d at 871-72; Day v. Nat'l U.S. Radiator Corp., 117 So. 2d 104, 119 (La. Ct. App. 1959), *rev'd*, 128 So. 2d 660 (La. 1961).

20. Day v. Nat'l U.S. Radiator Corp., 128 So. 2d 660, 666 (La. 1961).

21. *Day*, 117 So. 2d at 119-20.

22. *Day*, 128 So. 2d at 666.

23. *Id.*

24. *Day*, 117 So. 2d at 104.

25. AM. INST. OF ARCHITECTS, AIA DOC. B131 § C(I)(4)(b) (1958) (requiring the architect to provide "periodic inspections at the site"). Note that the AIA renumbered the owner/architect contract from Document B102 in 1951 to Document B131 in 1958. *Compare Id.*, *with* AM. INST. OF ARCHITECTS, AIA DOC. B102.

26. AM. INST. OF ARCHITECTS, AIA DOC. B131, *supra* note 25, § C(I)(4)(c) (obligating the architect only to "endeavor to guard the Owner against defects and deficiencies in the work of the contractors").

AIA again revised its owner/architect agreement.[27] It removed the architect's duty of inspection, instead providing that the architect was to make "periodic visits to the site to familiarize himself generally with the progress and quality of the work and to determine in general if the work is proceeding in accordance with the Contract Documents."[28]

While the AIA removed the duty of supervision from the owner/architect agreement in 1958, and from the General Conditions in 1961,[29] the General Conditions' "Architect's Status" article continued to grant the architect "authority to stop the work whenever such stoppage may be necessary in his reasonable opinion to insure the proper execution of the Contract."[30] Yet the AIA soon had cause to reexamine that language.

In a 1967 decision, *Miller v. De Witt*, the Illinois Supreme Court stated that the architect's power to stop the work was relevant in determining whether an architect had acted reasonably under the Illinois Structural Work Act,[31] after failing to prevent the contractor from removing supporting columns, causing the roof to collapse.[32] The AIA's response was the 1970 edition of the General Conditions, which might be called the first "modern" AIA document.[33]

First, this 1970 "General Conditions of the Contract for Construction" eliminated the architect's power to stop the work and gave that authority solely to the owner.[34] Second, it created

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27. *See generally* AM. INST. OF ARCHITECTS, AIA DOC. B131 (1961) (the new standard form of agreement between owner and architect as of 1961).

28. *Id.* § C(I)(4)(c).

29. *Compare* AM. INST. OF ARCHITECTS, AIA DOC. A201 art. 38 (1958) ("The Architect shall have general supervision and direction of the work."), *with* AM. INST. OF ARCHITECTS, AIA DOC. A201 art. 38 (1961) ("The Architect shall be the Owner's representative during the construction period and he shall observe the work in process on behalf of the Owner.").

30. AM. INST. OF ARCHITECTS, AIA DOC. A201 (1961), *supra* note 29, art. 38; AM. INST. OF ARCHITECTS, AIA DOC. A201 (1958), *supra* note 29, art. 38.

31. 740 ILL. COMP. STAT. 150/0.01-9 (repealed 1995).

32. 226 N.E.2d 630 (Ill. 1967), *superseded by statute*, ILL. COMP. STAT. 70/301 (1979), as recognized in Doyle v. Rhodes, 461 N.E.2d 382, 387-88 (Ill. 1984).

33. *See generally* AM. INST. OF ARCHITECTS, AIA DOC. A201 (1970); *see also* American Institute of Architects, *History*, AIA (2022), [https://perma.cc/9C5U-AKH8].

34. AM. INST. OF ARCHITECTS, AIA DOC. A201, *supra* note 33, ¶ 3.3.1.

a new article exclusively devoted to imposing site safety responsibility on the contractor.[35] This language has remained virtually unchanged in later editions of the General Conditions.[36] Third, it disclaimed the architect's responsibility for performance of the construction work and for safety measures:

> The Architect will not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, and he will not be responsible for the Contractor's failure to carry out the Work in accordance with the Contract Documents.[37]

These changes have remained nearly verbatim with each new edition of the AIA documents, and the risk-limiting strategies they adopt for architects have been embraced by other industry organizations' standard form documents.[38]

II. ARKANSAS LAW: LIABILITY FOR SUPERVISION AND DESIGN SERVICES

Two additional Arkansas Supreme Court decisions, issued in 1966 and 1970, cemented evolution of the judicial approach to worksite accident claims based upon the a/e's duty to be present at the construction site during performance by the contractor—an

35. *Id.* ¶ 10.

36. In the current General Conditions, contractor responsibility for site safety is found in AM. INST. OF ARCHITECTS, AIA DOC. A201 ¶ ¶ 3.3.1, 3.7.2, 10.2 (2017).

37. AM. INST. OF ARCHITECTS, AIA DOC. A201, *supra* note 33, § 2.2.4. In the current General Conditions, this disclaimer by the architect, although somewhat differently phrased, appears in AM. INST. OF ARCHITECTS, AIA DOC. A201, *supra* note 36, § 4.2.2.

38. *See, e.g.*, ENGINEERS JOINT CONTRACT DOCUMENTS COMMITTEE, EJCDC DOC. E-500 ¶ 6 § 6.01(I) (2020) ("Engineer shall not at any time supervise, direct, control, or have authority over any Constructor's work, nor will Engineer have authority over or be responsible for the means, methods, techniques, sequences, or procedures of construction selected or used by any Constructor, or the safety precautions and programs incident thereto . . . ."); ENGINEERS JOINT CONTRACT DOCUMENTS COMMITTEE, EJCDC DOC. C-700 ¶ 7 § 7.01(A) (2018) ("Contractor shall be solely responsible for the means, methods, techniques, sequences, and procedures of construction"); CONSENSUSDOCS, DOC. 240 § 3.2.8.3 (2017) ("Design Professional shall not be responsible for construction means, methods, techniques, sequences, and procedures, unless they are specified by Design Professional . . . ."). However, Doc. 240's "Standard Agreement Between Owner and Design Professional," uniquely among industry standard form documents, imposes upon a design professional, who "has actual knowledge of safety violations," an affirmative duty to notify the owner. *Id.* § 3.2.8.4. No court has interpreted this language.

evolution now reflecting the national consensus.[39] The first case, *Walker v. Wittenberg, Delony & Davidson, Inc.*,[40] is particularly instructive. On a commercial project, the architect was hired by an oral agreement, but the City of Little Rock Building Code Section 204 mandated the owner employ an architect and required that architect to perform specific inspections of the work.[41] The parties also used the AIA General Conditions, AIA A201 (1958), which in Article 38 stated that "[t]he Architect shall have general supervision and direction of the work."[42]

A contractor's employee was injured when the wall he was standing on collapsed under him when braces were removed.[43] Plaintiff sued the architect for negligent supervision, and the trial court entered a directed verdict in favor of the architect.[44] Citing its earlier decision in *Erhart*, the Arkansas Supreme Court reversed, finding that the contractual duty of supervision (under the General Conditions) created a jury question as to whether the architect breached a duty of care owed to the plaintiff.[45] The court rejected the architect's argument—that its duty of supervision was owed only to the owner and was for the limited purpose of ensuring a completed building was in compliance with the design—observing that the same argument had been rejected in *Erhart*.[46]

Yet, after granting a rehearing, the court reversed.[47] The court held that, under the General Conditions, the architect's duty

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39. *See* Walker v. Wittenberg, Delony & Davidson, Inc., 242 Ark. 97, 108, 412 S.W.2d 621, 631 (1967) (*Walker II*); Heslep v. Forrest & Cotton, Inc., 247 Ark. 1066, 1067, 449 S.W.2d 18, 182 (1970).

40. *Walker II*, 242 Ark. 97, 412 S.W.2d 621.

41. *Id.* at 100-01, 412 S.W.2d at 627. The architect was required to inspect the foundation, the framing, and to make a final inspection, per the full language of Section 204. *Id.* at 101-03, 412 S.W.2d at 628.

42. *See* AM. INST. OF ARCHITECTS, AIA DOC 201 (1958), *supra* note 29, art. 38. The court initially said that the parties used the 1952 edition of A201 (*See* Walker v. Wittenberg, Delony & Davidson, Inc., 241 Ark. 525, 527, 412 S.W.2d 621, 623 (*Walker I*)) but corrected itself in the opinion issued after a rehearing (*See Walker II*, 242 Ark. at 103-04, 412 S.W.2d at 629).

43. *Walker I*, 241 Ark. at 526-27, 412 S.W.2d at 622-23.

44. *Id.* at 526-27, 412 S.W.2d at 623.

45. *Id.* at 529-30, 412 S.W.2d at 624.

46. *Id.* at 528-30, 412 S.W.2d at 624.

47. *Walker II*, 242 Ark. at 97-98, 412 S.W.2d at 626.

of supervision did not require it to be "present continuously during construction," nor did the architect have the authority or a "duty to prescribe safety precautions for the contractor or to enforce performance of the safety provisions contained in the contract between the owner and the contractor, to which he was not a party."[48] Invoking the presumption that parties contract only for themselves, the court concluded:

> Before an architect can be said to have agreed with an owner to exercise direct control over a contractor with respect to day-to-day safety supervision of a building contract, such agreement must clearly appear from the terms of the agreement, the conduct of the parties, or the nature of the work being performed.[49]

The court then distinguished *Erhart* on three grounds.[50] First, the hazard in that case constituted a "special danger" within the meaning of the Restatement (Second) of Torts § 427.[51] Second, the architect in *Erhart* was expressly employed to supervise the work.[52] Third, the architect knew of the danger;[53] by contrast, in *Walker II*, "the architect had no reason to contemplate the contractor's negligence when the contract was made, i.e., the negligence here was collateral to the risk of doing the work."[54] Limiting *Erhart* to the underlying circumstances, the

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48. *Id.* at 98, 412 S.W.2d at 626.

49. *Id.* at 106, 412 S.W.2d at 630.

50. *Id.*

51. *See id.* at 106, 412 S.W.2d at 630 (citing RESTATEMENT (SECOND) OF TORTS § 427 (AM. L. INST. 1965)). Section 427, titled "Negligence as to Danger Inherent in the Work," is one of the numerous exceptions to the so-called independent contractor rule. S*ee also* RESTATEMENT (SECOND) OF TORTS § 409 (AM. L. INST. 1965). Section 427 applies to "[o]ne who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work . . . is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger." RESTATEMENT (SECOND) OF TORTS § 427.

52. *Walker II*, 242 Ark. at 106, 412 S.W.2d at 630.

53. *Id.* at 106, 412 S.W.2d at 630.

54. *Id.* at 98, 412 S.W.2d at 626 (citing RESTATEMENT (SECOND) OF TORTS § 426(a) (AM. L. INST. 1965)). The section cited provides that "an employer of an independent contractor . . . is not liable for physical harm caused by any negligence of the contractor if . . . the contractor's negligence consists solely in the improper manner in which he does the work . . . ." Of course, it should be noted that these Restatement provisions apply to

court stated that the "correct rule" was stated in the Louisiana Supreme Court's *Day* decision.[55]

A final "supervision" case by the Arkansas Supreme Court was issued three years later.[56] In *Heslep v. Forrest & Cotton, Inc.*, a contractor's employee used a front-end loader with a mobile crane to move a piece of pipe near a high-voltage power line (in violation of a safety statute), rather than wait for a truck to move the pipe.[57] The crane created an arc with a power line. The injured worker sued the resident engineer, hired to inspect the work for compliance with the architect's design, for permitting use of the crane without requiring the general contractor to insulate the boom or order the overhead line de-energized.[58]

In affirming a judgment notwithstanding the verdict in favor of the engineer, the Arkansas Supreme Court reasoned that the "engineers' rights and powers are not to be confused with their obligations and duties under their contracts."[59] Specifically, "they do not have the right, power, obligation or the duty to supervise [the contractor's employees] in the performance of their duties."[60] The contractor, not the engineer, had the obligation to guarantee site safety under the contract and performance in compliance with the safety statute.[61]

To recap, under *Erhart*, *Walker II*, and *Heslep*, a design professional's contractual duty of supervision, even under the 1950s-era AIA standard form documents, cannot establish a safety duty of care owed to construction workers, at least where the a/e did not know of the hazardous condition beforehand.[62] A designer's rights or powers under its contract with the owner are

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employers of independent contractors, not to a project architect, who did not hire the general contractor or any subcontractor.

55. *Walker II*, 242 Ark. at 107, 412 S.W.2d at 630-31 (citing Day v. Nat'l U.S. Radiator Corp., 128 So. 2d 660 (La. 1961)).

56. Heslep v. Forrest & Cotton, Inc., 247 Ark. 1066, 449 S.W.2d 181 (1970).

57. *Id.* at 1067-68, 1071, 449 S.W.2d at 181-83.

58. *Id.* at 1067, 449 S.W.2d at 182.

59. *Id.* at 1072, 449 S.W.2d at 184.

60. *Id.* at 1072, 449 S.W.2d at 184 (emphasis omitted).

61. *Heslep*, 247 Ark. at 1070-71, 1073, 449 S.W.2d at 183-84.

62. *See* Erhart v. Hummonds, 232 Ark. 133, 135, 334 S.W.2d 869, 870-71 (1960); *Walker II*, 242 Ark. 97, 98, 412 S.W.2d 621, 626 (1967); *Heslep*, 247 Ark. at 1072, 449 S.W.2d at 184.

presumptively only for the benefit of the owner.[63] Absent clear contract indications, these obligations do not accrue to the benefit of construction workers injured by an unsafe manner of performance, as responsibility for safe performance lies squarely on the contractor.[64] These conclusions were exactly the goals sought by the AIA when it created the "modern" AIA standard form documents starting in 1970.

Of course, before an architect's or engineer's on-site activities (whether described as supervision or inspection) may arise, the a/e must first create the project's design, and injured construction workers have alleged negligent design as a stand-alone basis for liability.[65] Again, the Arkansas high court helped establish a national jurisprudence.

In *Hill Constr. Co. v. Bragg*, a steel erection subcontractor's employee was injured by the fall of a column that was being erected in a high wind.[66] No guy wires or other bracing were used to temporarily hold the column, and the plaintiff blamed both the general contractor and the architect's design for the accident.[67] A jury agreed, attributing 90% fault to the general contractor and 10% fault to the architect.[68]

The supreme court reversed and remanded, ruling that the defendants' proffered instruction on intervening cause (by the subcontractor) should have been provided.[69] The court noted that, while the architect and engineer had specified the use of guy wires and other bracings during the steel erection process, the subcontractor had used only wooden wedges to temporarily brace steel columns.[70] Nonetheless, the court also rejected the architect's assertion that a directed verdict should have been entered at the close of plaintiff's evidence, stating:

> While it is true there was sufficient evidence of the subcontractor's negligence to warrant an instruction on

63. *Walker II*, 242 Ark. at 98, 412 S.W.2d at 626.
64. *Heslep*, 247 Ark. at 1072-73, 449 S.W.2d at 184.
65. *See infra* Part III.
66. 291 Ark. 382, 384, 725 S.W.2d 538, 539 (1987).
67. *Id.* at 384, 725 S.W.2d at 540.
68. *Id.* at 384, 725 S.W.2d at 539.
69. *Id.* at 390, 725 S.W.2d at 543.
70. *Id.* at 384, 725 S.W.2d at 540.

> intervening proximate cause, there was also evidence that there were problems with the design of the column's anchor bolts and that they were offset, and that the layout of the portion of the building which had been constructed when the column was erected was an "ironworker's nightmare." There was sufficient evidence to send the question of [the contractor's] and [the architect's] negligence to the jury.[71]

In the Arkansas Supreme Court's only decision in the twenty-first century on the issue of design professional liability for a construction site accident, *Clark v. Transcon. Ins. Co.*, a worker was electrocuted while carrying a metal pole eight feet from an overhead power line.[72] He sued the architect for negligent design arguing that, because the construction site was located near the high-voltage overhead line, the architect had a duty to delineate the proximity of the power line in a way that would be readily determinable by looking at the plans, but had not done so.[73] The architect countered that it had no duty to supervise the construction, advise the utility to de-energize the power line, or specify any safety measures.[74] The trial court granted the architect's motion for summary judgment.[75]

Declaring that "[a]n architect has the duty of exercising reasonable care in the preparation of plans,"[76] and pointing to expert testimony submitted by plaintiff that the defendant had violated that duty, the supreme court reversed.[77] In the face of that expert testimony, the defendant:

> [F]ailed to provide evidence or authority to show that architects are not responsible for accurately depicting the location of power lines on plans. He also failed to provide evidence or authority to show that architects are not

71. *Hill Constr. Co.*, 291 Ark. at 387-88, *725 S.W.2d at 541.* As revealed by a subsequent appeal from the second trial (on an unrelated issue), the jury found the architect was not liable. *See* Bragg v. Mayes, Sudderth & Etheredge, Inc., 297 Ark. 537-38, 764 S.W.2d 44, 45 (1989).

72. 359 Ark. 340, 344, 197 S.W.3d 449, 451 (2004).

73. *Id.* at 345, 197 S.W.3d at 452.

74. *Id.* at 352, 197 S.W.3d at 456.

75. *Id.* at 350, 197 S.W.3d at 455.

76. *Id.* at 352, 197 S.W.3d at 457.

77. *Clark*, 359 Ark. at 352-53, 197 S.W.3d at 457.

> responsible for providing warnings on the plans of the need to avoid the hazard produced by the power line.[78]

The fundamental difference in the Arkansas Supreme Court's treatment of claims arising out of an a/e's supervision or inspection duties versus those involving allegations of negligent design is clear. A design professional's duty of supervision or inspection is presumptively owed to the owner alone.[79] Absent an a/e's knowledge of the hazardous condition, its contractual power during inspections to *possibly* perceive dangerous performance methods is insufficient to trigger a safety duty of care owed to construction workers.[80] By contrast, creation of a design may well include responsibility to take into consideration safety features of the project site and even the method of performance.[81]

III. NATIONAL LAW—LIABILITY ARISING FROM DESIGN

The Arkansas caselaw discussed above is both a historical introduction to, and a mirror of contemporary national law.[82] The clear majority rule is that an architect may be liable for a worksite accident caused at least in part by a defective design.[83] Indeed, even those states which have enacted statutes partially shielding architects and engineers from liability claims by injured workers or their estates consistently except negligent design claims.[84]

In light of that majority rule, an understanding of what constitutes a design defect, for purposes of an injured worker's construction accident claim, is essential. Clearly, as each construction site is unique, no definitive list of defects is possible, and the following recounting is simply a sampling of claims that have been made:

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78. *Id.* at 353, 197 S.W.3d at 457.
79. *Walker II*, 242 Ark. 97, 99-100, 106, 412 S.W.2d 621, 627, 630 (1967).
80. *See supra* note 61 and accompanying text.
81. *See infra* Part III.
82. *See supra* Part II.
83. Geer v. Bennett, 237 So. 2d 311, 316 (Fla. 1970).
84. See *infra* note 116.

- Failure to specify bracing for unsupported wall during partial demolition;[85]
- On a project to renovate a sewage treatment plant where toxic gases escaped from an adjoining room killing construction workers, the design's inclusion of a window between the area of the building containing the wet sludge and the rest of the building violated a design standard from an engineering association, adopted by Iowa, which prohibited "'interconnection between the wet well and dry well ventilating systems'";[86]
- Where the engineer on site indicated to the contractor to cut a pipe along its length, and when the contractor did so the pipe rolled outward, causing its employee who was standing on the pipe to fall and be crushed when the pipe rolled on top of him, the court found the estate stated a claim for negligent design, reasoning, "[w]e perceive no appreciable distinction between providing the specifications for pipe cutting through a professional drawing or by physically marking on the pipe";[87]
- Collapse of steel frame during erection traced to engineer's incorrect calculation of the correct sizes of steel members;[88]
- Specification of a "double connection" method to connect two horizontal steel beams, caused the beams to bend and workers sitting on it to fall;[89]

85. Wagner v. Grannis, 287 F. Supp. 18, 25 (W.D. Pa. 1968).

86. Evans v. Howard R. Green Co., 231 N.W.2d 907, 913 (Iowa 1975) (jury finding of liability upheld).

87. Edwards v. Anderson Eng'g, Inc., 166 P.3d 1047, 1055 (Kan. 2007) (rejecting a statutory defense found in then KAN. STAT. ANN. § 44-501(f), now KAN. STAT. ANN. § 44-501(d) (2006)).

88. *See* Mudgett v. Marshall, 574 A.2d 867, 871-72 (Me. 1990) (The engineer calculated a rafter beam of 36' by 150', instead of 36' by 230'; the longer rafter beam would have had greater lateral stiffness and an increased resistance to buckling, while the shorter beams would have required the addition of 16 permanent knee braces—the design specified only two—for safe erection.).

89. Tiffany v. Christman Co., 287 N.W.2d 199, 202-03, 209 (Mich. Ct. App. 1979) (jury verdict upheld; the engineer knew of a prior accident of the same nature six weeks earlier but did not alter the design).

- Authorizing substitution of anchor bolts with expansion bolts, which were insufficient to stop the steel beam from falling over;[90]
- The engineer directed city employees to undertake a course of conduct without first conducting an engineering analysis;[91]
- Design of trench bracing system, which failed, causing the trench to collapse onto a worker present in the trench;[92] and
- Design omitting safety-related information as to the project site.[93]

Defenses to a defective design claim include that:

- The architect or engineer is not responsible for the inclusion of temporary safety measures during the erection of the structural steel;[94]
- The architect is not responsible for inclusion of bracing methods for a trench excavation;[95]
- Lack of or insufficient expert testimony to establish the defendant's professional negligence;[96]
- No causal connection between the alleged design defect and the accident;[97]

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90. *See* Campbell v. Daimler Grp., Inc., 686 N.E.2d 337, 339-40, 344-45 (Ohio Ct. App. 1996), *appeal denied*, 677 N.E.2d 816 (Ohio 1997).

91. *See* Michaels v. CH2M Hill, Inc., 257 P.3d 532, 536-37 (Wash. 2011).

92. *See* Bauer v. Howard S. Wright Constr., No. 44817-0-1, 2000 WL 987165 at *1 (Wash. Ct. App. July 17, 2000).

93. Mallow v. Tucker, Sadler & Bennett, Architects & Eng'rs, Inc., 54 Cal. Rptr. 174, 176 (Cal. Ct. App. 1966) (design did not indicate underground high-voltage transmission line).

94. Cady v. E.I. DuPont de Nemours & Co., 437 F. Supp. 1030, 1033 (S.D. Tex. 1977); Nicholson v. Turner/Cargile, 669 N.E.2d 529, 533 (Ohio Ct. App. 1995).

95. Jones v. James Reeves Contractors, Inc., 701 So. 2d 774, 784-86 (Miss. 1997); McAninch v. Robinson, 942 S.W.2d 452, 456-58 (Mo. Ct. App. 1997).

96. Paxton v. Alameda Cnty., 259 P.2d 934, 942-43 (Cal. Ct. App. 1953); Hobson v. Waggoner Eng'g, Inc., 878 So. 2d 68, 77, 80 (Miss. Ct. App. 2003); Simon v. Drake Constr. Co., 621 N.E.2d 837, 839 (Ohio Ct. App. 1993); Nauman v. Harold K. Beecher & Assocs., 467 P.2d 610, 616-17 (Utah 1970).

97. Hutcheson v. E. Eng'g Co., 209 S.E.2d 680, 681 (Ga. Ct. App. 1974) (contractor removed guardrails required by the specifications); Walters v. Kellam & Foley, 360 N.E.2d 199, 206-11 (Ind. Ct. App. 1977); Demetro v. Dormitory Auth., 96 N.Y.S.3d 30, 33 (N.Y. App. Div. 2019).

- Performance methods or safety measures are the domain of the contractor and not the architect's responsibility to include in the design;[98] and
- Information not included in the design was not the architect's responsibility to include.[99]

Closely related to design liability is an architect's liability arising out of its review of shop drawings, and failure to detect a defect in the drawings.[100] Courts rejecting liability often do so to enforce the disclaimer in the modern AIA documents, which provide that the architect's approval of shop drawings is "only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents."[101]

IV. NATIONAL LAW—LIABILITY ARISING FROM SITE SERVICES

Unlike claims for negligent design, courts faced with the modern AIA standard form documents have, to a large degree, enforced the disclaimers limiting the architect's authority over the contractor's manner or method of performance, while imposing

98. Nat'l Found. Co. v. Post, Buckley, Schuh & Jernigan, Inc., 465 S.E.2d 726, 730 (Ga. Ct. App. 1995) (lack of temporary handrails on walkway); Burns v. Black & Veatch Architects, Inc., 854 S.W.2d 450, 454-55 (Mo. Ct. App. 1993), (unshored trench); Wells v. Stanley J. Thill & Assocs., Inc., 452 P.2d 1015, 1018 (Mont. 1969) (unshored trench).

99. *See, e.g.*, Jones v. City of Logansport, 436 N.E.2d 1138, 1144-45, 1150-51 (Ind. Ct. App. 1982), *reh'g denied*, 439 N.E.2d 666 (Ind. Ct. App. 1982) (design specification did not include overhead, uninsulated power line); Patin v. Indust. Enters. Inc., 421 So. 2d 362, 366 (La. Ct. App. 1982) (electric wires); Frampton v. Dauphin Distrib. Servs. Co., 648 A.2d 326, 327 (Pa. Super. Ct. 1994) (power lines); Alexander v. State, 347 So. 2d 1249, 1250, 1252 (La. Ct. App. 1977) (underground butane tank). *See also* Transp. Ins. Co., Inc. v. Hunzinger Constr. Co., 507 N.W.2d 136, 140-41 (Wis. Ct. App. 1993) (design not required to show method of performance); Kaltenbrun v. City of Port Washington, 457 N.W.2d 527, 531 (Wis. Ct. App. 1990) (no duty to test soil at the site's ingress and egress routes to ensure they were adequate to bear the weight of a dump truck coming to the site).

100. *See* Jaeger v. Henningson, Durham & Richardson, Inc., 714 F.2d 773, 775 (8th Cir. 1983); Juno Indus., Inc. v. Heery Int'l, 646 So. 2d 818, 823-24 (Fla. Dist. Ct. App. 1994).

101. AM. INST. OF ARCHITECTS, AIA DOC. B101 § 3.6.4.2. (2017). Earlier versions of the AIA documents contain slightly different wording. *See, e.g.*, AM. INST. OF ARCHITECTS, AIA DOC. B101 § 3.6.4.2 (2007). Courts finding an architect not liable based on a theory of negligent review of shop drawings include *Case v. Midwest Mech. Contractors, Inc.*, 876 S.W.2d 51, 51 (Mo. Ct. App. 1994) and *Waggoner v. W & W Steel Co.*, 657 P.2d 147, 148 (Okla. 1982).

on the contractor responsibility for site safety.[102] As noted, these allocations of responsibility for site safety have been largely adopted by other industry organizations which have also published standard form documents.[103]

Of course, many (often commercial) projects use custom design agreements, and the architect's duties must be understood in light of that contract's specific wording. For example, where an architect was hired only to create the design and not to provide site services, there can be no liability arising out of a theory of negligent supervision.[104] At the other extreme, large project owners may impose detailed supervision obligations upon the architect.[105] Contracts authorizing the architect to stop the work may well convince a court that an architect has a duty to exercise that power when necessary to protect construction workers.[106]

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102. *See, e.g.*, Black & Vernooy Architects v. Smith, 346 S.W.3d 877, 886-87 (Tex. App. 2011) (holding that architect did not have power to control performance of construction at site because several contract provisions explicitly restricted architect's authority); Yow v. Hussey, Gay, Bell & Deyoung Int'l, Inc., 412 S.E.2d 565, 567-68 (Ga. Ct. App 1991).

103. *See supra* note 38 and accompanying text.

104. Rian v. Imperial Mun. Servs. Grp., Inc., 768 P.2d 1260, 1263-64 (Colo. App. 1988); Swartz v. Ford, Bacon & Davis Constr. Corp., 469 So. 2d 232, 233 (Fla. Dist. Ct. App. 1985); *Patin*, 421 So. 2d at 366; Jones v. James Reeves Contractors, Inc., 701 So. 2d 774, 784-86 (Miss. 1997); McAninch v. Robinson, 942 S.W.2d 452, 458 (Mo. Ct. App. 1997); *Frampton*, 648 A.2d at 327.

105. *See e.g.*, Associated Eng'rs, Inc. v. Job, 370 F.2d 633, 638, 643-45 (8th Cir. 1966) (applying South Dakota law; the architect contractually agreed to see that construction was "expeditious and economical"; could subject the "manner of construction" to "inspection, tests and approval"; was required to perform "constant supervision" and take "all reasonable safety precautions"; and could stop the work if the contractor failed to use reasonable safety precautions) (internal quotations omitted), *cert. denied*, Troy Cannon Constr. Co. v. Job, 389 U.S. 823 (1967); Geer v. Bennett, 237 So. 2d 311, 317 (Fla. Ct. App. 1970); Phillips v. Mazda Motor Mfg. (USA) Corp., 516 N.W.2d 502, 507-508 (Mich. Ct. App. 1994), *abrogated on other grounds by* Ormsby v. Capital Welding, Inc., 684 N.W.2d 320, 327 (Mich. 2004); *Jones*, 701 So. 2d at 785 ("It would seem natural that the supervision of safety is encompassed in the duty to supervise, and no separate agreement to supervise safety is necessary where the architect is supervising the details of every other aspect of the project."); Simon v. Omaha Pub. Power Dist., 202 N.W.2d 157, 161, 168 (Neb. 1972); Amant v. Pac. Power & Light Co., 520 P.2d 181, 185 (Wash. Ct. App. 1974), *aff'd per curiam*, 529 P.2d 829 (Wash. 1975). *But see Walker II*, 242 Ark. 97, 105-06, 412 S.W.2d 621, 630 (1967). The court in *Jones* disagreed with *Walker II* in dicta. *Jones*, 701 So. 2d at 785.

106. *Associated Eng'rs, Inc.*, 370 F.2d at 644-45; Moore v. PRC Eng'g, Inc., 565 So. 2d 817, 820 (Fla. Ct. App. 1990). *But see* Parks v. Atkinson, 505 P.2d 279, 283 (Ariz. Ct. App. 1973) (holding summary judgment for architect was appropriate even though he had stopped the work twice because the "interruptions were solely to insure that the work was being done in accordance with the plan and specifications"); Wheeler & Lewis v. Slifer, 577

Moreover, regardless of the contract language, an architect, by its conduct, may assume a duty of care regarding project safety.[107]

However, those projects which use the "modern" (post 1970) AIA standard form documents, or documents of other industry organizations reflecting the AIA's allocation of responsibility for site safety, have overwhelmingly concluded that an architect with site services roles owes no duty of care toward construction workers, at least absent the architect's actual knowledge of the hazardous condition.[108] However, where the architect or engineer

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P.2d 1092, 1094-95 (Colo. 1978) (finding the architect had the right to stop the work, but no contractual control over the contractor with respect to day-to-day safety); Graham v. Freese & Nichols, Inc., 927 S.W.2d 294, 296 (Tex. Ct. App. 1996) (finding the engineer stopped the work twice due to quality concerns, not safety concerns).

107. Hanna v. Huer, Johns, Neel, Rivers & Webb, 662 P.2d 243, 252-53 (Kan. 1983), *superseded by statute on other grounds*, KAN. STAT. ANN. § 44-501 (1985), *as recognized in* Edwards v. Anderson Eng'g, Inc., 166 P.3d 1047, 1053 (Kan. 2007) (stating in dicta that a design professional may by his conduct assume a duty of safety and listing several factors by which to determine whether an expanded duty had been assumed); *Simon*, 202 N.W.2d at 168.

108. Baker v. Pidgeon Thomas Co., 422 F.2d 744, 746 (6th Cir. 1970) (applying Arkansas law); Peck v. Horrocks Eng'rs, Inc., 106 F.3d 949, 955 (10th Cir. 1997) (applying Utah law; AIA contract); Padgett v. CH2M Hill Se., Inc., 866 F. Supp. 563, 564-65 (M.D. Ga. 1994); Poehmel v. Aqua Am. Penn., Inc., No. 3:10-cv-2372, 2013 WL 27493, at *7 (M.D. Pa. Jan. 2, 2013); Easter v. Percy, 810 P.2d 1053, 1056 (Ariz. Ct. App. 1991); Reber v. Chandler High Sch. Dist. No. 202, 474 P.2d 852, 854 (Ariz. Ct. App. 1970); Seeney v. Dover Cnty. Club Apartments, Inc., 318 A.2d 619, 624 (Del. Super. Ct. 1974); Vorndran v. Wright, 367 So. 2d 1070, 1071 (Fla. Dist. Ct. App. 1979); Yow v. Hussey, Gay, Bell & DeYoung Int'l, Inc., 412 S.E.2d 565, 567 (Ga. Ct. App. 1991) (AIA General Conditions); Jones v. City of Logansport, 436 N.E.2d 1138, 1150-51 (Ind. Ct. App. 1982), *reh'g denied*, 439 N.E.2d 666, 669 (Ind. Ct. App. 1982); *Hanna*, 662 P.2d at 250, 254 (AIA General Conditions); Young v. Hard Rock Constr., L.L.C., 292 So. 3d 178, 183 (La. Ct. App. 2020) (modified AIA contract); Black v. Gorman-Rupp, 791 So. 2d 793, 795-96 (La. Ct. App. 2001); Krieger v. J. E. Greiner Co., Inc., 382 A.2d 1069, 1074, 1079 (Md. 1978); MacInnis v. Walsh Bros., Inc., No. 044250, 2006 WL 1047134, at *4-*5 (Mass. Super. Ct. March 23, 2006); Eleria v. City of St. Paul, No. A10-1045, 2010 WL 5293742, at *5 (Minn. Ct. App. Dec. 28, 2010); Dillard v. Shaughnessy, Fickel & Scott Architects, 864 S.W.2d 368, 370 (Mo. Ct. App. 1993) (Kansas law); Brown v. Gamble Constr. Co., Inc., 537 S.W.2d 685, 687 (Mo. Ct. App. 1976); Hobson v. Waggoner Eng'g, Inc., 878 So. 2d 68, 77, 80 (Miss. Ct. App. 2003); Kemp v. Bechtel Constr. Co., 720 P.2d 270, 274 (Mont. 1986), *overruled on other grounds by* Beckman v. Butte-Silver Bow Cnty., 1 P.3d 348, 350 (Mont. 2000); Pfenninger v. Hunterdon Cent. Reg'l High Sch., 770 A.2d 1126, 1129, 1141-43 (N.J. 2001) (a somewhat confusing opinion in which the majority adopted the position of Justice Coleman's dissent on the question of the architect's liability); Torres v. CTE Eng'rs, Inc., 786 N.Y.S.2d 101, 101 (N.Y. App. Div. 2004); Welch v. Grant Dev. Co., Inc., 466 N.Y.S.2d 112, 114-15 (N.Y. Sup. Ct. 1983) (thorough analysis of modern AIA contracts); Nicholson v. Turner/Cargile, 669 N.E.2d 529, 534 (Ohio Ct. App. 1995); Marshall v. Port Auth. of Allegheny Cnty., 568 A.2d 931, 935 (Pa. 1990); Johnson v. EMPE, Inc., 837 S.W.2d 62, 65

knew of the hazardous conditions, there is a split of authority.[109] Some courts continue to exonerate the a/e, pointing to the general contractor as the party responsible for safety at the construction site.[110] Other courts, emphasizing the safety-promotion principle underlying tort law, have held or at least expressed the possibility of finding a duty of care, especially if the a/e had the power to stop the work.[111] One standard form document imposes upon an architect or engineer with knowledge of a safety violation a duty to warn the owner; however, that provision has not been interpreted by the courts.[112]

V. NATIONAL LAW—DEFENSES TO A/E LIABILITY

As should be clear from the discussion above, an architect's or engineer's primary defense to a construction worker's personal injury claim, particularly where the claim asserts negligence regarding site services, is that the design contract disclaimed the a/e's duty of care regarding site safety.[113] In addition, as with any professional liability claim, the plaintiff must present expert testimony as to the standard of care and its violation, unless the

(Tenn. Ct. App. 1992); *Graham*, 927 S.W.2d at 295-96; Romero v. Parkhill, Smith & Cooper, Inc., 881 S.W.2d 522, 526-27 (Tex. App. 1994) (AIA contract); Peterson v. Fowler, 493 P.2d 997, 999 (Utah 1972), *overruled on other grounds by* Stamper v. Johnson, 232 P.3d 514, 516-17 (Utah 2010); Porter v. Stevens, Thompson & Runyan, Inc., 602 P.2d 1192, 1193 (Wash. Ct. App. 1979); Baumeister v. Automated Prods., Inc., 690 N.W.2d 1, 2-3 (Wis. 2004); Makinen v. PM P.C., 893 P.2d 1149, 1154-55 (Wyo. 1995), *overruled on other grounds by* Terex Corp. v. Hough, 50 P.3d 317, 321 (Wyo. 2002).

109. *See Yow*, 412 S.E.2d at 566-67.

110. *Id.* (stating in dicta that the architect's knowledge of the hazardous condition would not have given rise to a duty of care); Jones v. James Reeves Contractors, Inc., 701 So. 2d 774, 782-83 (Miss. 1997).

111. Balagna v. Shawnee Cnty., 668 P.2d 157, 163 (Kan. 1983), overruled by statute on other grounds as stated in Edwards v. Anderson Eng'g, Inc., 166 P.3d 1047, 1053, 1056 (Kan. 2007) (summary judgment reversed; a factual question whether the engineer knew of the hazardous condition); Carvalho v. Toll Bros. & Devs., 675 A.2d 209, 214 (N.J. 1996) (engineer knew of hazard and had power to stop the work); Duncan v. Pennington Cnty. Hous. Auth., 283 N.W.2d 546, 548 (S.D. 1979) (architect's duty of supervision included visits to the site by its employee several times a day, and the employee knew the work site had received an OSHA citation which indicated that 20% of the temporary railings were inadequate); Nauman v. Harold K. Beecher & Assocs., 426 P.2d 621, 622 (Utah 1967) (knowledge of hazard coupled with authority to stop the work).

112. CONSENSUSDOCS, *supra* note 38, § 3.2.8.4.

113. *See supra* note 102.

negligence is so clear as to not require such testimony.[114] Furthermore, an a/e may assert any defense any defendant in a personal injury lawsuit could raise, such as lack of causation.[115] Finally, although this Article is devoted to common law developments, it should be noted that a few states have amended their workers' compensation laws to extend immunity from tort liability to design professionals, so long as the accident did not arise out of the defendant's design responsibilities.[116]

VI. CONCLUSION

The changes in construction accident law jurisprudence from the mid-twentieth century to the present, and in particular a/e liability for worksite accidents, may be viewed as a microcosm of American tort law developments during the same period. The most fundamental progression was from a no-duty regime to the use of the foreseeability doctrine to determine the existence and scope of a duty. However, the particular nature of construction projects—they involve numerous unrelated parties who are on the site only by virtue of a contract—has created something of a "special case" in tort law, in which contractual risk allocations and disclaimers become of paramount importance in the liability landscape. In this regard, a focus on construction accident law, and a/e liability in particular, may be a lens through which to achieve insights into tort law more generally.[117]

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114. *See, e.g.*, Michael v. Huffman Oil Co., 661 S.E.2d 1, 11 (N.C. Ct. App. 2008).

115. McKean v. Yates Eng'g Corp., 200 So. 3d 431, 433 (Miss. 2016) (criticizing the quality of the design, however, the court pointed out that the contractor had "ignored essential features of [the engineer's] scaffolding design," thereby implying that any defect in the design was not a causal factor in the scaffold's collapse); Baumeister v. Automated Prods., Inc., 690 N.W.2d 1, 9-10 (Wis. 2004) (holding plaintiffs did not establish causation, as they did not follow the truss manufacturer's instructions).

116. A compilation of these statutes is found at 1 JON L. GELMAN, MODERN WORKERS COMPENSATION § 103:34 (2021). *See also Architect's or Engineer's Liability*, *supra* note 5, §§ 34-39.

117. Similarly, construction industry disputes may be a lens through which to examine the development of American contract law. *See generally* CARL J. CIRCO, CONTRACT LAW IN THE CONSTRUCTION INDUSTRY CONTEXT (2020); Carl J. Circo, *The Construction Industry in the U.S. Supreme Court: Part 1*, *Contract Law*, 41 CONSTR. LAW. 6 (2021); Carl J. Circo, *The Construction Industry in the U.S. Supreme Court: Part 2, Beyond Contract Law*, 41 CONSTR. LAW. 5 (2021).