Are Decisions And Recommendations Still Mutually Exclusive Concepts? Expanding The Professional Liability of Architects and Engineers to Contractors

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More than 45 years ago, the Florida Supreme Court established in A.R. Moyer v. Graham that an architect can be liable to a contractor who is impacted by the architect's negligence. A.R. Moyer established the potential for liability even without contractual privity between the architect and the contractor. Opinions that have directly applied A.R. Moyer to architects and engineers have closely examined the question of whether these professionals had final authority to terminate a contractor, shut down a project or withhold payment. Architects who merely made "recommendations" to owners did not have true supervisory authority and therefore often owed no duty to contractors. In the recent Singer opinion, the Fourth District Court of Appeal has arguably blurred the line between decisions and recommendations, thereby potentially expanding liability for architects and engineers. The reasoning of Singer suggests that architects and engineers who make recommendations to receptive owners that are relying on the professional's expertise may owe contractors a duty.

The Facts of *Singer*

The Plaintiff in *Singer* was a contractor terminated by the county in the final stages of an airport improvement project. The trial court entered summary judgment in favor of the architect on a professional negligence claim asserted by the contractor. The Fourth District Court of Appeal reversed the summary judgment ruling and remanded the case to the trial court.

The facts concerning the architect's contractual obligations to the county and its day-to-day work on the project are discussed at some length in the opinion. The architect in *Singer* had broad responsibility for oversight on the project. The architect agreed, among other things, to visit the site regularly, update the owner, manage paperwork, assist the owner in determining payment amounts, review shop drawings, assist in change order review and prepare the final punch list. Despite these broad duties and obligations, the architect in *Singer* lacked final control and complete authority over key aspects of the project. As the court observed, the architect could not terminate the contractor and could not stop work. Indeed, the ultimate decision to terminate the contractor from the project was made by the county based on a recommendation from the architect.

In analyzing and weighing these factors, the court may have been swayed by the candid testimony of the principal of the architectural firm, who described himself as the county's "eyes and ears" on the project and characterized his firm as part of the team that would "run the job." While we can only guess at the impact this blunt testimony had on the appellate court, we know that, on balance, the court concluded there was sufficient basis to reverse the summary judgment. What makes *Singer* fascinating is that the court did not weigh the architect's expansive role in the project against its lack of final authority and conclude that the architect might owe a duty despite its lack of final authority. Instead, the court appears to have redefined final authority as something akin to a mere recommendation, and in doing so, concluded that the architect in *Singer* had such authority.

Given that the Fourth DCA was merely reversing a summary judgment, it might be tempting to discount the opinion as somehow less significant. However, the language of the opinion, and in particular its analysis of what constitutes real "authority" on a construction project, is worth consideration. If *Singer's* definition of final authority gets traction in other districts, architects and engineers may see a real expansion of their potential exposure to claims by contractors.

Defining a Duty Is Always a Balancing Act

From the beginning, *A.R. Moyer* made clear that determining the scope of an architect's extra-contractual duties was a

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balancing act. The Florida Supreme Court recited numerous factors relied upon by courts in other states, including: the foreseeability of harm to the contractor as a result of architect's negligence, the certainty of the harm, the closeness of the connection between the architect's conduct and the injury to the contractor, and even the "moral blame" attached to the architect's conduct.[4] In addition to these factors, the Court noted the overarching theory that the "legal responsibility of the architect should be commensurate with his control of the construction project."[5] Where an architect has complete authority over the most critical decisions, such as stopping work on a project, that architect essentially holds the "power of economic life or death over the contractor."[6] An architect or engineer vested with such power should expect to be burdened with expansive duties.

In practical application, courts applying *A.R. Moyer* to architects and engineers have relied heavily on two factors as tools to evaluate foreseeability and the required nexus described by the Supreme Court. First, courts have examined the scope of the professional's work on the project. This inquiry has included whether they were involved in the project for a lengthy or limited period of time, whether they actually designed plans that contractors would rely upon or merely inspected work, and whether they had representatives on site on a regular basis.

The second factor examined by courts has been whether the architect had final authority on the project. Essentially, courts have asked whether the architect had the power to shut down a job, stop payments and otherwise "control" the contractor. This is the power of financial "life or death" the Supreme Court spoke of in *A.R. Moyer*. The Fourth DCA's treatment of this second consideration and its arguable break from past precedent are what make *Singer* potentially troubling for architects and engineers.

Casa Clara's Strict Limitation of *Moyer*

A.R. Moyer has been cited over 100 times by state and federal courts applying Florida law. However, the Florida Supreme Court's 1993 opinion in *Casa Clara* strictly limited the holding in *A.R. Moyer* to the facts of that case.[7] As a result of the limitations imposed by *Casa Clara*, and the fact that *A.R. Moyer* has been pulled into the vortex of the general economic loss rule discussion, few of the 100 citations involve a meaningful application of *A.R. Moyer* to architects and engineers.

Many of the cases that do analyze *A.R. Moyer* in the context of architects and engineers provide limited guidance because they analyze fairly one-sided fact sets. In many cases, the engineers and architects had limited roles in the projects, and they lacked final authority.[8] In other cases, the professionals had critical supervisory roles in the project and final authority.[9] *Singer* tackles the much more interesting situation where an architect had an expansive role in a project but still lacked final authority.

Decisions and Recommendations Are Mutually Exclusive Concepts

The one-sided fact patterns analyzed prior to *Singer* seemed to lend themselves to sweeping language and definitive statements by the courts. Where courts found no duty, the opinions often justified the result by observing that the architect or engineer lacked final decision-making authority. As one opinion bluntly stated, "*decisions* and *recommendations* are mutually exclusive concepts."[10] The significance of the Fourth DCA equating the mere power to recommend with the power to control can only be appreciated in the context of this strong language that permeated prior opinions.

In 1989, in *E.C. Goldman*, the Fifth District Court of Appeal analyzed a roof inspector's potential liability to a roof contractor. The appellate court affirmed judgment on the pleadings in favor of the inspector. The court based its ruling, in part,

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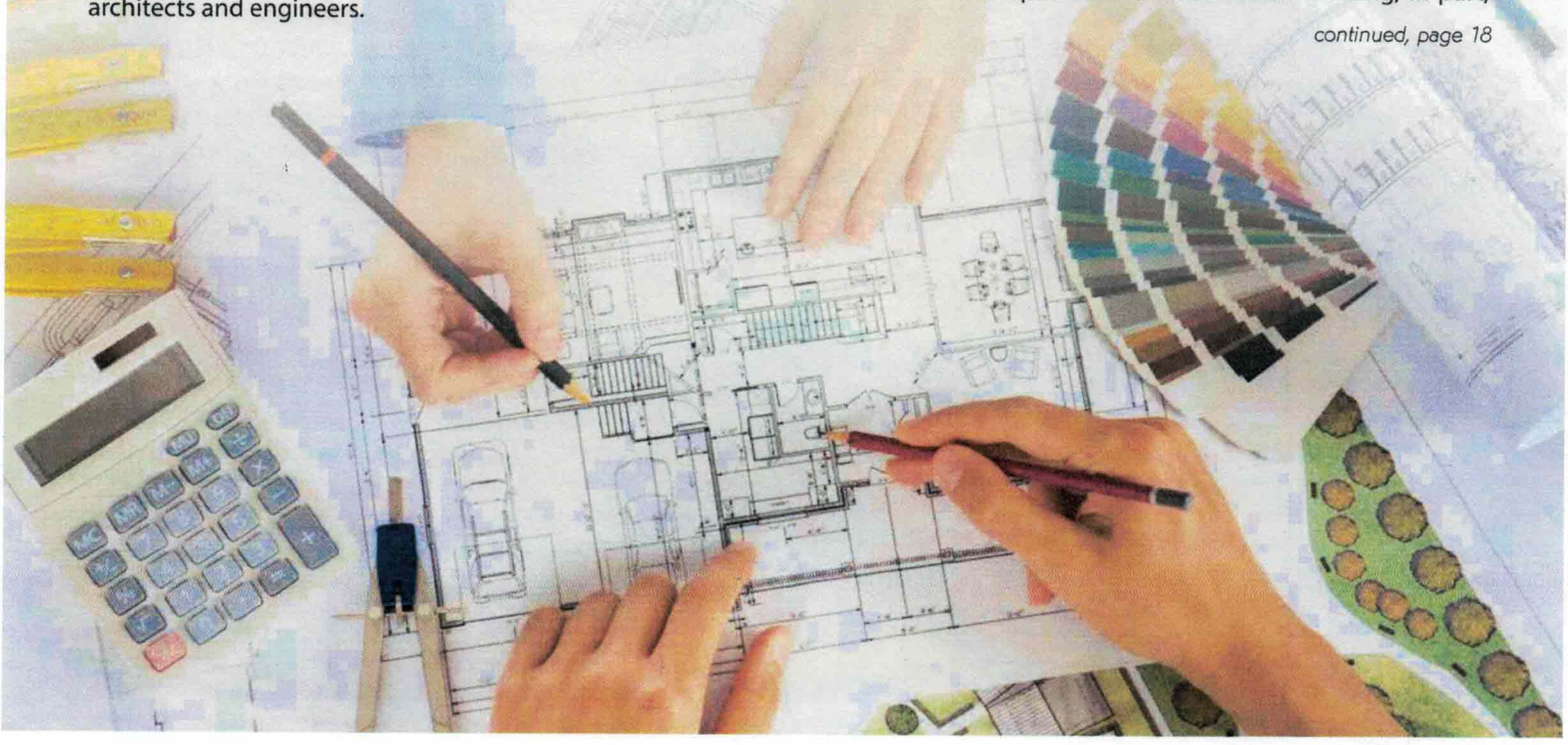

on the fact that the inspector had no final decision-making authority. The inspector could only make recommendations to the school board. As the court observed, "Plaintiffs were not harmed by the consultant's opinion, but rather by the school board's refusal to pay based upon that opinion."[11] The power to advise and recommend was not the true power over economic life and death.

The Second District Court of Appeal analyzed the scope of an architect's duty to an electrical contractor in the 1991 *McElvy* opinion. In that case, the contractor had obtained a jury verdict establishing that it was entitled to a recovery from the architect as a result of the architect's negligence in interpreting plans and specifications. The Second DCA overturned that judgment and mandated that the trial court enter judgment in favor of the architect, in part because the architect lacked final authority on the project. The court acknowledged that the architect was charged with making recommendations. The court further observed that all parties understood that the plaintiff might be harmed if the owner followed the architect's recommendations. There was no question as to the foreseeability of the harm. Still, the court focused on the fact that ultimate authority rested with the owner.[12]

Finally, in 2011, in *Recreational Design*, the Southern District of Florida analyzed an engineer's potential liability to a contractor building a water slide. The court dismissed the action with prejudice on the motion of the engineer. The contractor's claim had previously been dismissed based on an argument that the engineer owed no duty to the contractor. In order to avoid a second dismissal, the contractor was careful to allege that the engineer had total control and decision-making authority. However, as the court observed, this was not reality. The contracts established that the engineer merely made recommendations to the City and the final authority rested with the City. As the court observed, *"decisions and recommendations* are mutually exclusive concepts."[13] The court noted that the engineer was hired to evaluate and report, and the ultimate decision to red tag the slide and reject plaintiff's work rested with the City.

Circling Back to *Singer*

When read on its own, the language of *Singer* seems not only reasonable, but compelling. Consider these quotes from *Singer* analyzing the authority of the architect.

"The principal admitted he recommended the contractors' termination to the county and knew termination could happen upon his recommendation."[14]

"...the county paid the contractor based on the principal's recommendation."[15]

"Although the county had final authority to terminate the contractor or otherwise stop work, it relied on the architect's duty as consultant to makes its ultimate determination to terminate the contractor. The architect was given near absolute authority regarding payments to the contractor, demonstrating the architect's influence over the contractor's economic vitality."[16]

Each of these excerpts paints the picture of an architect who was in charge and essentially running a construction project. Further, these quotes seem to describe an owner who was relying on, if not completely dependent on, the architect for guidance. Under these circumstances, it is easy to understand how an architect could be held liable for potential damages resulting from its negligent recommendations. However, when the language of *Singer* is juxtaposed with the reasoning and language of earlier opinions, the analysis becomes less straightforward. Consider these quotes from the cases discussed above.

"Plaintiffs were not harmed by the consultant's opinion, but rather by the school board's refusal to pay based on the opinion."[17]

"Plaintiff could not possibly dispute that decisions and recommendations are mutually exclusive concepts."[18]

"Under their contract with the City, the architects undertook to render good faith advice and interpretation; they did not undertake to render the ultimate decision even though the City's ultimate decision might be similar."[19]

It is hard to mistake the bright-line approach of these earlier opinions. Architects and engineers either had complete and final authority, or they did not. The power to recommend, even to a receptive owner likely to rubber stamp that recommendation, was not the power to decide. Having teased out the language and reasoning of these prior opinions, it seems apparent *Singer* is a shift in approach and a lowering of the bar for potential professional liability. *Singer* does not hold that decisions and recommendations are the same thing, but it plainly rejects the view that they are mutually exclusive concepts.

The Bottom Line

The *A.R. Moyer* analysis has always been a complex balancing act. Post *Singer*, courts will continue to examine a variety of factors. As such, *Singer* certainly does not turn the *A.R. Moyer* analysis on its head. However, in cases like *Singer*, where the scales are relatively balanced, the new standard for defining control will make a difference. Where *A.R. Moyer* once singled out architects with final authority over the "economic life and death" of a contractor, *Singer* now states that "influence over the contractor's economic vitality" may be enough.

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Endnotes

1 *A.R. Moyer, Inc. v. Graham*, 285 So. 2d 397 (Fla. 1973).

2 *McElvy, Jennewein, Stefany, Howard, Inc. v. Arlington Electric, Inc.*, 582 So. 2d 47, 50 (Fla. 2d DCA 1991); E.C. *Goldman, Inc. v. A/R/C Associates, Inc.*, 543 So. 2d 1268, 1270 (Fla. 5th DCA 1989), *Recreational Design & Construction, Inc. v. Wiss, Janney, Elstner & Associates, Inc.*, 867 F. Supp. 2d 1234, 1238 (S.D. Fla. 2011). *See also Posen Construction, Inc. v. Lee County, T.Y.*, 921 F. Supp 2d 1350, 1362 (M.D. Fla. 2013) (noting the significance of final authority and comparing those areas where the architect had such authority versus those where they merely made recommendations).

3 *Grace and Naeem Uddin, Inc. v. Singer Architects, Inc.*, 278 So. 3d 89, 91 (Fla. 4th DCA 2019).

4 *A.R. Moyer*, 285 So. 2d at 401.

5 *Id.*

6 *Id.*

7 *Casa Clara Condo v. Chales Toppino & Sons, Inc.*, 620 So. 2d 1244, 1248 (Fla. 1993). Receded From by *Tiara Condominium Ass'n, Inc. v. Marsh & McLennan Companies, Inc.*, Fla., March 7, 2013.

8 *McElvy*, 582 So. 2d at 50; E.C. *Goldman*, 543 So. 2d at 1270; *Recreational Design*, 867 F. Supp.2d at 1238.

9 *Suffolk Constr. Co. v. Rodriguez and Quiroga Architects Chartered*, 2018 WL 1335185 (S.D. Fla.) (denying motion to dismiss and finding duty arising out of broad supervisory authority, power to reject the contractors work and contractor's reliance on plans created by the architect).

10 *Recreational Design*, 867 F. Supp.2d at 1238 (emphasis in original).

11 *E.C. Goldman*, 543 So. 2d at 1271.

12 *McElvy*, 582 So. 2d at 50.

13 *Recreational Design*, 867 F. Supp.2d at 1238.

14 *Singer*, 278 So. 3d at 91.

15 *Id.* at 92.

16 *Id.* at 93.

17 *E.C. Goldman*, 543 So. 2d at 1271.

18 *Recreational Design*, 867 F. Supp.2d at 1238 (emphasis in original).

19 *McElvy*, 582 So. 2d at 50.