



## **The Alabama Supreme Court Affirms General Contractor’s Recovery from Testing Engineer**

The Alabama Supreme Court recently affirmed a finding that a testing engineer was liable to a general contractor with which it had no contract. The Court affirmed that the engineer had negligently failed to perform necessary compaction tests or to inform the contractor that it could not determine the adequacy of the compaction at the pertinent construction site, and that this negligence caused the slab built on the site to crack.

In late 2004, RKM Leeds, LLC (“RKM”) bought a former gas station lot with the intention of constructing a facility to house a Walgreens pharmacy. In May 2005, RKM hired Gallet & Associates, Inc. (“Gallet”) to investigate and report on subsurface conditions at the site. Gallet indicated that the fifteen-foot-deep pits caused by the removal of fuel tanks should be backfilled with engineered fill. The Gallet report also recommended that specific compaction procedures be performed on the site.

After receiving the Gallet report, RKM retained defendant, QORE, Inc. (“QORE”) to perform construction-materials-testing (“CMT”) services. The RKM-QORE contract required QORE to perform a variety of soil compaction and soil density tests. In addition, the contract incorporated the findings of the Gallet report by reference. QORE’s project manager testified at trial that it was QORE’s responsibility to ensure that Gallet’s recommendations were followed. QORE was not required to monitor fill operations, however.

Bradford Building Company, Inc. (“Bradford”), the plaintiff general contractor, undertook the responsibility to inform QORE of the progress of construction. During the removal of the storage tanks at the site by contractors hired by the previous owner, various entities, including Bradford, noted that the backfill was not being compacted correctly. The subcontractor that was removing the underground tanks and fuel lines from the site was dumping loose fill into the pits where the fuel tanks had been. It was also observed that there was no compaction equipment on the site.

Bradford notified the owner and QORE of this improper backfilling on October 11, 2005. Thereafter, Bradford relied on QORE to verify that the backfill was properly compacted so that the bearing capacity of the soil would be sufficient to support the store.

QORE visited the Project site in early November 2005 to perform a subgrade evaluation to determine whether the soil compaction met specifications. QORE performed a single test at the site: a proof roll, which consists of the observation of the surface of the soil as a fully loaded tandem-axle dump truck is driven over it. This process is meant to reveal soft or structurally unsound soils. QORE did not attempt to locate or perform additional testing on the specific areas where the fuel tanks had been removed. The proof roll revealed that certain areas at the site were too soft. These areas were corrected. Although the QORE employee asked the grading subcontractor where the fuel tanks had been located, the grading subcontractor did not know. QORE made no additional attempts to locate or evaluate the fill material in the tank pits.

Based on QORE's determination of the suitability of the backfill, Bradford built a concrete slab on the site to serve as the foundation for the Walgreens store. The concrete slab failed during the construction because it was built over an excavated fuel-tank pit that had been filled with material that had not been properly compacted. Bradford made necessary repairs to the site, which cost \$223,000. Bradford subsequently sued QORE for negligence.

In its suit, Bradford claimed that QORE had failed to adequately test the compaction of the fill. Bradford's expert testified that, if QORE had performed the tests required by its contract, it would have discovered that the fill material had been improperly compacted. This expert testified further that QORE breached the standard of care by neither locating the exact locations of the fuel tanks and other excavated portions of the project, nor notifying Bradford that it could not verify the fill's adequacy. The trial court found for Bradford.

QORE argued on appeal that the evidence did not support a finding of negligence. The Alabama Supreme Court affirmed the trial court's verdict. In addition, the Alabama Supreme Court determined that, even though Bradford had neither entered into a contract with QORE, nor was a third-party beneficiary to the RKM-QORE contract, Bradford could still recover from QORE in negligence for QORE's breach of a duty imposed by the RKM-QORE contract. In essence, Bradford was permitted to recover because QORE negligently performed the contract knowing that Bradford would rely on QORE's proper performance. As such, the resulting harm was reasonably foreseeable to QORE. The Court affirmed the lower court's determination that CMT services are performed for the benefit of the construction project as a whole and that, therefore, it was foreseeable that Bradford would rely on QORE's CMT services.

#### **Risk Management Prevention Tip**

This case provides an example of how, during the performance of its services, a design professional can have a duty to an entity with which it had no contract. While architects and engineers often perform services for project owners, as was the case here, the work they perform is generally used or relied upon by third parties. As the outcome of this case demonstrates, it is important to remain aware and, if possible, in control of who is using and relying on the professional services and to whom the architect or engineer may owe a professional duty.

by Samuel R. Pierce, Esq., Donovan Hatem LLP, Seaport East, Two Seaport Lane, Boston, MA 02210.  
© Donovan Hatem LLP 2009. All rights reserved.

*ASCE is dedicated to providing its members with high-quality professional liability coverage at affordable rates. Through their partnership with the ASCE Professional Liability Program Administrator, Pearl Insurance, they can provide insured members with valuable risk management tools and services to help effectively assess and reduce their potential risks and liabilities. For more information about the ASCE Professional Liability Program, call a Customer Service Representative today at 1.888.619.1908 or email [ascepro@pearlinsurance.com](mailto:ascepro@pearlinsurance.com).*

The information contained in this article should not be relied upon as legal advice for specific facts and circumstances and is not intended to be a substitute for consultation with counsel.