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OWNER-CAUSED CONSTRUCTION DAMAGES AND DELAYS: A FOOTBALL ANALOGY BY: LARRY G. CANADA, ESQ.

The Design Professional ("DP") is generally thought of as the eyes and ears of the Owner on the construction Project. In fact, most construction documents memorialize that relationship, and in practice it usually works pretty well. When the Project is on time and under budget, life on the Project is good. We all have seen issues occur in a Project when errors of construction or design delay the Project and cause significant damages. But what happens when the cause of the delay and the resulting damages is the Owner? The answer to this question depends less on the Owner and more on the actions of the DP during the Project.

Let me put it in terms of the latest Super Bowl. With a little over three minutes left in the game (Project), Manning makes a thirty-eight yard pass to Manningham (General Contractor). The official on the sideline (DP) calls the catch good (Change Order for damages and delay). The Patriots coach (Owner) throws the flag challenging the call (thinks it isn't Owner-caused delay). The replay (project documentation) clearly shows that Manningham had control of the ball and was in bounds. This play starts the drive that wins the Giants the game. The sideline official (DP) called the game according to the rules and was backed up on his call by the replay camera (project documentation). Establishing the rules at the beginning of the game, impartially enforcing them during the game, and being backed up by the instant replay means the game is fair. The winner is everyone who watches and plays the game. Likewise, establishing the requirements of the contract documents at the beginning of the Project, enforcing them fairly during the Project and maintaining good documentation will help to manage everyone's expectations and thus reduce risk for the DP.

Larry G. Canada, Esq.

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PHYSICIAN DUTY EXTENDED TO BABY IN PRECONCEPTION TORT PENNSYLVANIA CASE

BY: STUART T. O'NEAL, ESQ. AND MARC L. PENCHANSKY, ESQ.

Milan Matharu passed away two days after his birth in 2005. His parents believed that a negligent omission by the mother's doctor seven years earlier caused Milan's death. This factual scenario required the Pennsylvania courts to determine whether a child or his estate has a viable cause of action against his mother's physician for a tort which allegedly occurred before his conception but led to his death? The Superior Court sitting *en banc* and without dissent permitted Milan's estate to pursue such a claim against his mother's previous physician. *See Matharu v. Muir*, 2011 PA Super. 134, 29 A.3d 375 (2011).

Routine blood work during Milan's mother's first pregnancy showed that she lacked a specific protein on the surface of her red blood cells, thereby designating her as Rh-negative. *See id.* at 378. The father possessed the protein and was therefore designated as Rh-positive. *See id.* Neither parent's status caused them any health concerns, but if the unborn baby inherits the father's Rh-positive

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OWNER-CAUSED DAMAGES AND DELAYS, CONT'D

Pre-game Warm Ups – Getting the Program Right in the Beginning

There are those Owners that you just can't deal with; they are the ones that make constant documentation and long contracts necessary. It is important to advise such Owners at the time of an addition or deletion from the design of the impact of such a change to the schedule. It is not enough to verify that the Owner wants to add an access ladder and safety railing to a piece of equipment on the Project; the additional costs, and impact on schedule need to be related as well (this information is often obtained directly from the GC in the form of a bid for a change to the contract, either through use of an addendum or Change Order). The Owner must fully understand that any such changes to cost or delay in completion will be the Owner's responsibility. Some Owners may respond that the option should have been offered before letting the contract and that such an omission is a design error. Therefore, it is important to document exactly what the Owner wants (the Program) in the beginning and the options offered to, and rejected by, the Owner.

We litigated a case in Mississippi a few years ago that details this situation well. The Owner had a franchise to build and operate a hotel for a national chain. My client was the Architect who took the prototype hotel and adapted it to the locale. The Architect retained the services of a Mechanical Engineer to design the HVAC. During the design phase, it was recommended that air handling units be installed to provide a certain amount of makeup air into the hallways to maintain a positive air flow into the rooms, thus helping to prevent untreated air from coming into the rooms. Most people who live in the south know that humidity is a problem, and if not controlled, it can cause mold and mildew growth. The Owner, being from another part of the world, decided against the extra cost of the make-up air units and built the hotel with air flowing into the halls from the rooms only.

Less than a year after opening for business, most of the rooms had mold issues. The Owner, as expected, sued everyone including the GC and the Architect. In this instance, the Mechanical Engineer had written a nicely detailed letter to the Architect advising that the failure to include the designed make-up air units would cause a negative air pressure in the hotel thus causing untreated air to flow into the rooms and a number of issues, including mold growth, would likely ensue. The Architect promptly conveyed that warning, along with his own, to the Owner. The Owner wrote back and advised that this was simply a maintenance issue and to proceed. The result of litigation was that the Owner was solely at fault.

First Half - Delay Before Bid

A change in the Owner's status can spell delay before the project is awarded to a GC. Financing is usually, but not always, at the heart of that change. Regardless of the actual cause, at the start of the delay, the event must be documented and the Owner's expectations must be managed.

Let me use an example that came up with a client recently. The Owner was an industrial client who contracted with the DP to design a new gas processing unit for a portion of Owner's existing complex that was vacant. The area was previously used for rainwater runoff. The design was finished and the DP submitted a final set of contract documents to the Owner. The Owner, in the meantime, had a change in management and decided to table the Project for the time being, which was not a problem. Ten years later, after the market turned around, the Owner decided it wanted to build the Project as originally designed. In ten years, however, the cost to build the Project has likely changed, so any cost estimates are no longer valid. Even more troublesome are the likely changes in Code requirements, site conditions and general state-of-the-art for the equipment and/or processes used in designing the Project. Finally, I asked my client if his rates had changed in the intervening years (which they had) and asked if he really wanted to redesign the Project for free or at the old rates; he did not.

In this instance, when the Owner decided to resurrect the Project, a letter outlining these concerns was sent to the Owner. There were some tense moments and some posturing by both sides, but the lines of communication were maintained and the documentation as to the cause for the delay was sufficient such that the Owner, although not happy about the increased cost, ultimately understood and agreed to negotiate a new contract. The Project was redesigned and is being built today.

What we learn from this example is that the wise DP should immediately send the Owner a letter once the delay is evident: 1) memorializing the Owner's choice to delay the Project for Owner's own reasons (state if those reasons are known), 2) stating that the services of the DP are no longer needed and the responsibilities of the DP under the agreement are at an end until such time as the Owner wishes to revive the Project, 3) warning the Owner that a delay in bid and construction could result in a change in site conditions, code requirements, state-of-the-art, and/or other unknown issues which would necessitate the redesign of the Project, 4) warning the Owner that delays in starting the Project can cause the cost of the Project to change, including but not limited to

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material and labor costs, and 5) depending on the length of the delay, stating that new terms for the DP's fees may be necessary. If the Owner still wishes to proceed with the delay of the Project that is the Owner's choice.

Another safeguard to minimize risk for the DP is to include a provision in the contract advising that the design is only good, and the services are only offered, for a specific period of time. That period of time will vary depending on the complexity and size of the Project. However, I suggest that one year is the outside time frame to issue the notice to proceed, and any stoppage in the construction over three months will require additional tests, services and fees. Taking care of the situation in the beginning is preferable to litigating it years later.

Second Half - Owners Change Their Minds and Add or Delete Something

Although this scenario can happen with any Owner, it more often occurs with the less sophisticated ones. A new homeowner, for instance, might not want to decide the color scheme or the wall covering until they have their friend/sister-in-law/mother visit the site. Such a decision is certainly within the purview of the Owner, but waiting can have an impact on the GC and its suppliers, resulting in a Project delay. Documentation of the timeline and any departure from same by the Owner is crucial. It is also advisable to remind the Owner, in writing, of the deadlines necessary to maintain the current schedule and advise the Owner when her/his actions or inactions impact that schedule. You know the GC will document all delays and seek to be compensated for them. Documentation of the actual cause of the delay, even if the Owner is your friend, is imperative.

Another example occurred when a local couple hired an Architect to design their dream home. This home had everything, including solar power on the roof, oxygen stations in the house for the wife's medical issues, and other health related improvements. When the bids came in, the Owner decided that the cost was too expensive and decided to delete the solar power and certain medical improvements. During construction, the Owner continually visited the Project site and directed the Contractor to make certain changes and additions to the Project. The Architect was not aware of the Owner's changes until he received a change order from the GC. What should the DP do?

Here, the Architect advised the Owner that his actions in directing additions to the work directly to the GC were in violation of his contract with the GC and the Architect. The Architect also notified the Owner that certain changes made by the Owner required redesign by the Architect and some of the Architect's sub-consultants, which would increase the cost of their professional services contract. Finally, the changes were so serious that the Architect advised the Owner that the Owner's changes may necessitate the withdrawal of the Architect's approval of the drawings and the notification of the local authority that the construction was not based on the permitted drawings. The Architect's recommendations were immediately reduced to writing to memorialize the conversations he had with the Owner. The reason for the initial conversation was an attempt to preserve the business relationship that the Architect had with this Owner; both belong to the same church. The follow-up in writing was necessary to document the situation and avoid the likely blame from the Owner that the inevitable cost overruns and delays were someone else's fault. Ultimately, the Owner continued on in his ways, the Architect continued to memorialize all the conversations and warnings issued to the Owner, and the Architect was finally forced to terminate the Contract because of the Owner's actions. An unfortunate result, but the actions were necessary to protect the Architect in a situation that the Owner caused.

Postgame Analysis

Most Owners just want a useable completed Project. It is the few that cause trouble because of the positions they find themselves in or the choices they make. It is for these individuals that the DP must always take certain precautions. In case I haven't been clear, it is important that the DP do the following on each Project: 1) establish the contractual relationship early on by having a written and signed contract, 2) understand and follow the contract documents, 2) be fair and impartial in enforcing the contractual provisions as to all parties, even the Owner, 3) prior to the design, clearly establish in writing the program for the Project and confirm all design recommendations and changes, along with the Owner's choices and decisions, and 4) document everything no matter how inconsequential it may appear at the time, because the one time you don't will be the one time you needed to!

It's not just about winning or losing, it truly is in how you play the game. And because we don't always have instant replay on the Project, documentation of the DP's communications with the Owner is crucial. If you can't point to a document that reflects the decisions on the job and the choices made by the Owner, you have to rely on a jury. We use the following to describe a jury to our clients on the Gulf

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"Documentation of the timeline and any departure from same by Owner is crucial."

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Coast: go to your local football game, position yourself so you can see the exit after it's over, close your eyes and when you open them the next twelve people coming out will be your jury. If you don't want to have the fate of your firm and your practice in those people's hands, put everything down in writing! Officiate a good game, or leave it to the fans. It is your choice.

Larry G. Canada is a director of **Galloway, Johnson, Tompkins, Burr and Smith, PLC,** at its **New Orleans, Louisiana** and **Gulfport, Mississippi** offices. After receiving his B.A. and J.D. degrees from the University of Alabama, Larry became licensed to practice in Louisiana, Texas, Mississippi, and Alabama. His practice focuses on the defense of construction design and other professional liability cases, products, toxic tort and environmental claims, and trucking and transportation law cases. Larry is accredited by the American Institute of Architects, and the Louisiana Board of Engineers and Land Surveyors to provide continuing education coursework to those professions. In addition to his state bar association memberships, Larry is a member of the Professional Liability Defense Federation where he chairs its Construction Design Committee.

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PHYSICIAN DUTY EXTENDED TO BABY, CONT'D

status it could have severe implications for subsequent pregnancies. *See id.* If the red blood cells from an Rh-positive fetus enter the mother's system, the mother's body may produce Rh antibodies that would treat the fetus like an unwanted intruder. This condition is known as becoming sensitized or iso-immunized. To prevent this serious condition, the mother is usually provided an injection of Rh immunoglobulin (RhoGAM) at the 28th week of gestation and within 72 hours after birth if the baby is Rh-positive. *See id.*

The mother was properly administered RhoGAM during her first pregnancy. *See id.* But she was not properly administered RhoGAM during her second pregnancy in 1998. *See id.* This omission may have had tragic consequences during the mother's sixth pregnancy. During that pregnancy, the mother was iso-immunized and the parents alleged that Milan passed away due to the doctor's failure to administer RhoGam during the second pregnancy. *See id.* at 379. Milan's parents sued the physician who cared for her during the second pregnancy despite the fact that he did not provide any care during her sixth pregnancy. *See id.* at 378-79. When presented with a motion for summary judgment, the trial court determined that the executors of Milan's estate sufficiently established that the mother's physician owed a duty to the mother's children conceived after the omission. *See id.* at 384. The trial court certified the decision for immediate interlocutory appeal. *See id.* at 380.

The Superior Court accepted the interlocutory appeal and the full court affirmed with some trepidation. The court noted that it was chary to subject a physician to third-party liability and therefore required compelling circumstances to do so. *See id.* at 385. Further, it acknowledged that permitting this cause of action would potentially subject physicians to lawsuits many years after the alleged negligence. But the court believed that any unfairness involved in this expansion of liability was an issue for the legislature to address. *See id.* at 384.

Previously, the Pennsylvania Supreme Court had only extended physician liability to third parties when the physician failed to protect someone from the transmission of a communicable disease. The court reasoned that physicians must inform their patient on what measures to take, including quarantine or abstinence. *See DiMarco v. Lynch Homes–Chester County, Inc.,* 525 Pa. 558, 583 A.2d 422 (1990). These measures do not protect the patient's health but rather protect the spread of disease to others. Consequently, *DiMarco* held that the physician's duty extends to third-parties who are brought within the "foreseeable orbit of risk of harm." *Id.* at 562.

The *Matharu* court found this situation essentially similar to the *DiMarco* rationale. The administration of RhoGAM was meant to "protect future unborn children . . ." and not provide any physical health benefit to the mother. *Id.* at 387. Milan was therefore in the class of persons who was likely to suffer harm from the physician's omission. Consequently, Milan was within the "foreseeable orbit of the risk of harm" and therefore the suit was allowed to go forward.

The states that have considered the viability of preconception torts have not ruled uniformly. Many courts have been uncomfortable stretching the bounds of duty to accommodate preconception torts. For example, in *Albala v. City of New York,* 54 N.Y.2d 269, 429 N.E.2d 786 (1981), parents alleged that during an abortion for a previous pregnancy, the

> "[The court] acknowledged that permitting this cause of action would potentially subject physicians to lawsuits many years [later]."