Can They Be Reconciled? One New Jersey Appellate Panel Held That An Engineer Cannot Provide An Affidavit Of Merit Against An Architect, While Another Appellate Panel Held That An Engineer Can Provide Expert Testimony Against An Architect
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On February 26, 2015, in a decision approved for publication, the New Jersey Appellate Division held that an engineer, who was not a licensed architect, could provide an expert opinion on whether an architect committed professional malpractice. Garden Howe Urban Renewal Associates, LLC v. HACBM Architects Engineers Planners, LLC, __ N.J. Super. __ (App. Div. Feb. 26, 2015). Less than two months ago, a different Appellate Division panel held in another published decision that a licensed engineer was not permitted to provide an affidavit of merit against an architect in an architectural malpractice action. Hill Int'l, Inc. v. Atlantic City Bd. Of Educ., __ N.J. Super. __ (App. Div. Dec. 30, 2014).

In Garden Howe, the plaintiff filed an affidavit of merit from an architect, but later obtained an expert report from two engineers. On motion of defendant that the engineers were not qualified to provide an expert opinion in an architectural malpractice action, the trial court ruled for defendant. The trial court noted that although an architect participated in the preparation of the report, the report did not specify the issues on which the architect provided support. Plaintiff appealed and the Appellate Division ruled that the motion judge mistakenly barred substantially all of the report because it was not signed by an architect. The Appellate Division ruled that the trial court "failed to consider whether [the engineers] had sufficient knowledge and experience as professional engineers to opine" as to the professional negligence of an architect. Additionally, the Appellate Division ruled that the motion judge erred by barring the engineers' testimony as experts in an architectural malpractice case. It stated "that there is no clear demarcation of the line between services that can be provided by licensed architects and by licensed engineers." The appellate Court noted that architects and engineers are governed under two separate licensing statutes. That said, the appellate Court stated that the Building Design Services Act ("BDSA") recognizes that there is an "area of concurrent practice between the practice of architecture and the practice of engineering, specifically in the area of building design." The Appellate Division remanded the case back to the trial court to consider, among other things, whether the engineers are qualified to testify at trial as to some or all of the opinions in the report.

In Hill, the Appellate Division held a licensed engineer's affidavit of merit against an architect in an architectural malpractice action did not qualify as an acceptable affidavit of merit because an engineer was not licensed in the same profession as an architect. In rendering its decision, the Appellate Division recognized there is a difference between architects and engineers that could not be overcome for purposes of the affidavit of merit statute. The Hill decision recognized that the professions are licensed under different statutes and have different boards regulating the professions. It further recognized that the engineering licensure statute expressly acknowledges the separate and distinct laws regulating the two professions. Although acknowledging the overlap between the two professions as is found in the BDSA, the appellate Court noted that the Legislature recognized in the BDSA that any overlap should not "comprom[ise] the integrity of either profession." According to the appellate Court, to permit an engineer

to provide an affidavit of merit as to an architect would be similar to permitting a licensed nurse to serve as a qualified affiant against a licensed physician who negligently took and recorded a patient's blood pressure. While both are trained and authorized to take blood pressure readings, they are each still held professionally accountable under the standards of care of their own individual profession. Ultimately, the appellate Court found that the affidavit of merit of the engineer was improper in the architectural malpractice action.

The Garden Howe Court acknowledged the Hill decision but determined that Hill did not apply "because the issue raised in this appeal does not concern the requirement of the [Affidavit of Merit] statute." Rather, the Garden Howe Court stated "the issue presented concerns the qualification of witnesses to testify as experts at the trial of a case in which claims of architectural malpractice are asserted," which according to the Court should be governed by the standards of N.J.R.E. 702.

The Affidavit of Merit statute requires an affidavit stating that there is a reasonable probability that the architect's services violated acceptable professional standards. If an engineer cannot submit an affidavit of merit as to the probability of a violation, we expect an argument will be made that an engineer should not be able to opine that an architect actually violated a professional standard. These issues will likely be reviewed again in future decisions.

Should you have any questions, please feel free to contact Vincent E. Reilly, Esq. or Michael S. Chuven, Esq.