



LEGAL NOTES

ABA—ARIZONA BUILDERS' ALLIANCE

An Association of ABC Arizona and AGC Arizona Building Chapter
1825 W Adams, Phoenix, AZ 8500 (602) 274-8222 FAX: (602) 274-8999
1661 N. Swan, Suite 144; Tucson, AZ; 85712 (520) 881-7930; FAX: (520) 327-1686

Vol 16, #8

March 2006

CRIME AND CONSTRUCTION

By Robert Feinberg and Joseph Anthony¹

Edited by Jim Sienicki
Snell & Wilmer

Being charged with a criminal offense is vastly different from being named a civil defendant in a construction negligence suit. A contractor or builder in a civil action is concerned with paying damages (that may or may not be covered by insurance), receiving bad publicity, and suffering increased insurance premiums. A contractor or builder facing criminal charges is concerned with going to jail or prison.

Criminal actions against contractors and builders were once unheard of, but unfortunately the tide is changing. The trend toward criminal accountability is gaining momentum.

OSHA

Initially, any discussion about crime and construction must acknowledge Occupational Safety and Health Administration ("OSHA") regulations dealing with construction accidents.² The penalty for OSHA violations can oftentimes be severe, including fines and even jail time in the rare circumstance.³ However, in addition to OSHA investigations, state and local law enforcement officials may bring criminal charges against construction professionals for work site accidents.

Negligent Homicide and Manslaughter

Two of the criminal charges that prosecutors have brought with increasing frequency are negligent homicide and manslaughter. A construction professional may be charged with negligent homicide if he acts with criminal negligence and causes the death of one of his

¹ Robert Feinberg is an attorney with Snell & Wilmer L.L.P., where his broad-based litigation practice includes representation of construction professionals in both civil and criminal matters. Mr. Feinberg was a criminal prosecutor with the Maricopa County Attorney's Office prior to becoming a civil litigator.

Joseph Anthony is an attorney with Snell & Wilmer L.L.P., where his litigation practice includes construction matters.

Jim Sienicki is an attorney with Snell & Wilmer L.L.P., where his practice has been concentrated on a wide variety of construction matters since 1983. Jim is a member of the Arizona Builders' Alliance's Legislative Committee.

² OSHA has authority to seek criminal prosecution for workplace violations in three situations: (1) the willful violation of a specific OSHA standard, resulting in death to an employee, (2) the giving of advance notice of an OSHA inspection, and (3) the knowing falsification of statements or documents supplied to OSHA. 29 U.S.C. §§ 666(e)-(g) (2006). Workplace violations that result only in injury to employees are not subject to criminal prosecution by OSHA.

³ Conviction of a willful violation of an OSHA standard, resulting in death to an employee, results in either a fine of not more than \$10,000 or imprisonment for not more than six months, or both. If the conviction is for a violation committed by a person previously convicted, the punishment is a fine of not more than \$20,000 or imprisonment for not more than one year, or both. 29 U.S.C. § 666(e) (2006).

employees. Criminal negligence is typically defined as the failure to perceive a substantial and unjustifiable risk, which constitutes a gross deviation from the standard of care that would be observed by a reasonable contractor or builder. Manslaughter is defined as recklessly causing the death of another person.

In Apache Junction, Arizona, Joshua Castro, a seventeen year old high school football player, worked weekends for a small construction company owned by his friend's father, Patrick Galloway. In February 1999, Joshua was on a job site one weekend at a condominium complex where the company was digging a ditch for a sewer line. When a backhoe being used at the site broke down, Galloway left to get another machine, leaving Joshua behind. Joshua decided to use a shovel to clean out some of the loosened soil from the six-foot deep, 30-foot-long hole.

While Joshua was in the trench, one of the walls suddenly gave way, burying him under tons of soil and rocks. It took nearly 11 hours to recover his body. As it turned out, Galloway's construction company, in violation of safety laws, hadn't shored up the trench walls with the necessary system of boards and jacks. Galloway's alleged safety lapses eventually resulted in a \$192,000 State OSHA fine. A local grand jury indicted him on charges of negligent homicide. Galloway pleaded guilty to the count and, in exchange, avoided prison time. Galloway was placed on probation and was required to complete 640 hours of community service.

Assault and Battery

Assault and battery charges are similar to manslaughter charges. The defendant is charged with reckless or intentional conduct resulting in harmful or potentially harmful contact with the victim. A contractor may be charged with assault if the prosecutor believes that the contractor recklessly caused physical injury to his employee or if the contractor knowingly touched his employee with the intent to insult or provoke the employee.

In October 2001, two Far West Water and Sewer, Inc. employees were killed, and another injured, while working on an underground sewage tank at a golf course near Yuma, Arizona. Far West employee James Gamble entered the tank to remove a plug blocking sewage while Connie Charles, a Far West foreperson, turned on a pump running sewage into the tank through another line. Gamble inhaled sewage gas and immediately collapsed in the tank. Gary Lenser went down the ladder to try to save Gamble, but also was overcome. A third worker, Nathan Garrett, started down to help his co-workers, but didn't make it all the way. He inhaled gas and was incapacitated. Gamble and Lenser were killed. Garrett suffered lung damage.

After investigating the matter, Arizona Attorney General Terry Goddard brought several criminal charges against Far West, including assault. Witnesses for the State testified the air in the sewer tank had not been tested during the day, the workers were not properly trained, safety equipment was not available or used, and required safety and rescue procedures were not followed.

In October 2005, Far West was convicted of assault, negligent homicide and endangerment for the deaths and injury of the three workers overcome by toxic gases in the underground sewer tank. The company was fined \$1.7 million for the accident and was ordered to pay more than \$150,000 in restitution to the victims' survivors. The company was also sentenced to nine years

of probation and ordered to implement a safety program that complies with all OSHA regulations, including the regulations specifically regarding confined spaces.

What to Do If You Are Facing a Criminal Investigation

The phone in your office rings. An investigator wants to talk to you about your conduct. A construction site death or injury has occurred. What do you say? How do you protect yourself?

What if you are served with a Grand Jury subpoena? Or a search warrant has been executed? Or you are being read your rights and arrested?

Initially, you should NOT say anything to anyone except a lawyer well versed in criminal and construction law. (This includes friends, colleagues, spouses, coworkers, confidants, the state registering and licensing board investigators, police officers, media, fire department personnel, insurance representatives and anyone else.) Furthermore, you should NOT make any notes or records; and likewise, you should NOT destroy any notes or records.

A lawyer with both criminal and construction law experience should be consulted as soon as possible. In most states, lawyers can move to quash Grand Jury subpoenas; however, search warrants are court orders and must generally be complied with immediately. You have the right to the presence of counsel during investigative interviews, and this right should generally be exercised.

You will also have the right to refuse interviews and invoke your Fifth Amendment right to remain silent, but opting to do so may have severe ramifications. While remaining silent may be best for the criminal case, the Registrar of Contractors or OSHA may show no mercy to a construction professional who refuses to cooperate. A civil jury may consider a construction professional's refusal to testify as evidence of liability. Sometimes presenting your side of the story is the best course, albeit with careful preparation and legal assistance. Ultimately, whether to remain silent is your decision. However, you should consult with competent legal counsel who have criminal and construction law experience BEFORE making your decision.

Conclusion

A nationwide trend towards criminal accountability for construction professionals appears to be emerging. While prosecutions arising out of construction still are relatively rare, charges have been brought with increasing frequency over the past decade. State and local law enforcement officials have started using their police powers to prosecute company officials for knowing and reckless conduct resulting in death or injury at construction work sites. As a result, look for crime and construction to be the subject of much debate and litigation in the near future.

Case Notes Update

**Arbitration Provisions Are Enforceable in Arizona Barring Extreme Circumstances
By Joshua Grabel and Jennifer Axel⁴**

⁴ Joshua Grabel is an attorney with Snell & Wilmer L.L.P., with over seven years experience in construction litigation and contract review, including numerous arbitration/mediation provisions.

The Arizona Court of Appeals recently confirmed that arbitration provisions in contracts are enforceable, even if one of the parties did not know, or could not object, to the provision, barring extreme circumstances. In *Harrington v. Pulte Homes*, the Court held that Arizona's "strong public policy both federal and state, favoring arbitration" means that these provisions are almost always enforceable. *Harrington* involved the enforceability of an arbitration provision that a home builder put into its sales contract. The trial court found the provision unenforceable because the purchase contracts were pre-drafted and non-negotiable and the purchasers did not get the chance to negotiate whether they wanted to arbitrate. The Appeals Court reversed, holding that the arbitration provision was enforceable because the builder had no "reason to believe the other party would not have accepted the agreement if he had known that the agreement contained the particular term." In other words, the Court found that if an arbitration clause is in a contract, it does not matter if one party is unaware the clause exists or if that party was forced to accept it, if the party trying to enforce the provision did not know that the party challenging the provision would not have entered the contract if they had known about it.

Practically speaking, this will be very difficult, if not impossible, to prove. Thus, in all but rare cases, a neutral and fair arbitration provision will likely be enforceable in Arizona.

How This Affects Arizona Contractors

This ruling is important for all Arizona contractors for at least two reasons. First, in most cases it means that anyone who puts a valid arbitration clause into a contract will be able to enforce it. Second, and perhaps more importantly, this warns all parties involved in construction, whether they are owners, contractors, subcontractors, or suppliers that they must be fully aware of all terms in their contractual agreements before entering into them or they may be forced into legal forums they were not aware of and may not have agreed to for resolving their disputes.

For example, if a general contractor has an arbitration provision in its contract with an owner but does not have one in its subcontracts and a dispute arises about the quality of a subcontractor's work, the general contractor may find itself arbitrating with the owner while litigating with the subcontractor, all at a substantial cost and more importantly, may get different results. In the owner arbitration, the arbitrator finds for the owner because the general contractor is responsible for its subcontractor's work. However, in the litigation, the jury finds for the subcontractor. The general contractor NEVER wants to find itself in this position. Similarly, a subcontractor who agrees to do work under a contract that incorporates through a flow down clause "terms from the general contract," may be subject to arbitration without knowing it. Thus, it is important that a contractor know, and understand, the ramifications of arbitration provisions before entering into its contract.

ABA LEGAL COUNCIL

Bowman & Brooke, LLP
Dyer & Butler, LLP
Fennemore Craig, PC
Folk & Associates, PC
Gammage & Burnham PLC
Greenberg Traurig
Holden Brodman PLC
Jennings Haug & Cunningham

Jennings, Stross & Salmon, PLC
Jones Skelton Hochuli
Lewis and Roca LLP
Mariscal, Weeks, McIntyre & Friedlander
Mesch, Clark & Rothschild, PC
Sacks Tierney P.A.
Snell & Wilmer, L.L.P.
Steptoe & Johnson LLP
Wamer Angle Hallam Jackson & Formanek PLC