

Article

Illinois Supreme Court Rejects an Expert Witness's Expanded Duty of Care



Kenneth A. Slavens
314.345.6419
ken.slavens@huschblackwell.com

This article was first published in May 2011 on IRMI.com and is reproduced with permission. Copyright 2011, International Risk Management Institute, Inc.

When design professionals need to respond to claims that their "professional duty" imposes obligations to third parties that go beyond the terms of the contract with the clients, an Illinois Supreme Court holding provides some guidance and support to the design professionals.

The Illinois Supreme Court has held that, although the engineers named in a lawsuit may be required to perform the contract with the client in accord with the acceptable standard of care, this does not mean that the professional's duties to third parties can be expanded beyond the services the professional contracted to provide. The opinion was handed down in *Thompson v. Gordon*, No. 1100662011, 2011 Ill. LEXIS 458 (Sup. Ct. March 28, 2011).

The holding of *Thompson v. Gordon* buoys a recent trend of courts that has constricted retained expert witness efforts to impose duties beyond the professional services contracts by rendering opinion testimony that a duty, though not in the contract, arises from an amorphous standard of care obligation. The court distinguished the professional liability claims against design professionals where the duties arise from contracts apart from other professionals, such as health care professionals, where no contractual specifics exist. The court recognized that, in a suit such as this, the duty of care involves a contractual duty and is controlled thereby.

Factual Background

In the *Thompson* lawsuit, the engineers contracted to provide engineering services to the developer of a shopping mall. To accommodate increased traffic anticipated by the development, certain highways near the development required improvement and some modification. The work included roadway and ramp improvements as well as the replacement of an existing bridge deck. The bridge deck, as originally constructed, had a concrete median that was 6 inches high and 4 feet wide. The replacement bridge deck, as designed by the defendant engineers, had a median that was 7 inches high and 4 feet wide.

Following completion of the project, the plaintiff and some family members were traveling

westbound across the bridge. Gordon was traveling eastbound and lost control of her vehicle while trying to avoid a third vehicle. The Gordon vehicle hit the median, became airborne, and landed on the top of plaintiff's family vehicle. The accident killed two members of the plaintiff's family and seriously injured the plaintiff.

In the plaintiff's lawsuit against the engineers who designed the bridge deck, among others, the plaintiff claimed that the defendant engineers should have designed a "Jersey barrier" for the roadway. The barrier, the plaintiff claimed, would have prevented the Gordon vehicle from becoming airborne.

To support the claims against the defendant engineers, the plaintiff retained an expert witness engineer who rendered the opinion that the defendant engineers failed to meet the standard of care required of their profession because the defendant engineers failed to consider crossover protection and failed to perform an analysis of crossover protection for the bridge deck. The expert engineer explained that crossover accidents are likely to occur and that the purpose of the Jersey barrier is to prevent vehicles from crossing over into oncoming traffic. The expert witness engineer concluded that, had the defendant engineers performed within the standard of care, they would have more than likely designed and installed a Jersey barrier, and the barrier would have prevented the accident.

The defendant engineers argued that the contract with the developer did not require a median barrier design or analysis of the need for such a barrier.

Holding of the Court

The Illinois Supreme Court recited the principal that, in suits alleging professional negligence, the burden of establishing the standard of

care through expert testimony is on the party asserting the claim. In this lawsuit, that would be the plaintiff. The court noted that, to be successful on a claim of professional negligence, the plaintiff must establish both the required standard of care and a deviation from that standard of care. This is what the plaintiff attempted to do with the opinions rendered by the expert engineer.

However, the Illinois Supreme Court pointed out that the expert engineer failed to take into account the defendant engineers' contract with the developer that set forth the defendant engineers' standard of care. The contract required that the defendant engineers exercise "the degree of skill and diligence normally employed by professional engineers or consultants *performing the same or similar services*" (emphasis added by the court).

Based on the contract, the court concluded that the defendant engineers' standard of care was limited to the degree of skill and diligence normally employed by professional engineers "replacing" the bridge deck. The court went on to say that "replacing" the bridge deck did not include "improving" the bridge deck or considering adding a Jersey barrier. In other analysis within the opinion, the Illinois Supreme Court concluded that the parties to the defendant engineers' contract used the words "replacing" and "improving" to mean different things and that if the developer had wanted to retain the defendant engineers to "improve" the bridge deck, the language of the contract would have said so.

The court concluded that the expert engineer's opinion, if the court accepted it, would impose an obligation on the defendant engineers that was not found in the contract. Such an imposition would be contrary to well-settled law that a court cannot alter, change or modify the terms of a contract or add new terms or conditions.

The court concluded that the correct holding was that the terms of the defendant engineers' contract with the developer circumscribed the defendant engineers' duty to the plaintiff and the scope of that duty. The contract with the developer did not require the defendant engineers to consider or design an "improved" median barrier. Therefore, the court found in favor of the defendant engineers on the claims of the plaintiff for professional negligence.