

# The Pen Is Indeed Mighty: Contract Language Limits Design Professionals' Duties

*I shall fulfill my contract, no more nor less.*

—Lily Langtry

When a design professional or engineer decides to sign a contract and undertake a design job, he obviously makes himself liable to the party with whom he agrees to work. What that same design professional may not anticipate is being liable to completely unrelated third parties for injuries they may suffer. These third parties will frequently use expert testimony in an effort to establish that the design professional owed a duty of care to the general public and that his actions deviated from that duty of care, even when the expert's opinion assumes duties and obligations that are absent from or conflict with the terms of the design professional's contract. In some cases, these claimants have been successful in circumventing contracts, and design professionals were found negligent and liable for the claimants' injuries. However, the Illinois Supreme Court recently reinforced its position that a design professional's duties and obligations are limited to those outlined in the contract in *Thompson v. Gordon*, 241 Ill. 2d 428 (2011). This article will discuss the court's decision and the lessons it provides to design professionals.

## NEGLIGENCE CLAIMS AGAINST DESIGN PROFESSIONALS

As in any negligence suit, a third-party claimant bringing a negligence claim against a design professional must show the necessary elements of negligence. First and foremost, the claimant must show that

the design professional owed a duty of care to the claimant. Unlike the other elements of negligence, the purported duty of care is a question of law and is determined by the judge or court, not by a jury. This is the point where the claimant will bring an expert witness who will attempt to enlarge or modify the contractual duties of the design professional to include a duty of care not contemplated by the parties to the contract. It was at this point that the Illinois Supreme Court decided that contracts govern the duties owed and in doing so limited the power of expert witnesses and the ability of third parties to circumvent contracts to bring negligence claims against design professionals.

## THE DECISION: THOMPSON V. GORDON

### Factual Background and Case History

In *Thompson v. Gordon*, the design-professionals-turned-defendants had contracted to design the following: improvements to roads leading to a shopping mall and a replacement of a pre-existing bridge deck over the nearby interstate. Crucial to the court's decision in the case, the contract specifically outlined that the roads were to be "improved," while the bridge deck was to be "replaced." The original bridge deck had a concrete median that was 6 inches high and 4 feet wide, and the replacement deck designed by the defendants had a median 7 inches high and 4 feet wide.

More than six years after the work was completed, a horrific accident occurred on the bridge. A driver lost control of her

car, jumped the median, and struck an oncoming car, killing two of its passengers and seriously injuring a third. The wife of the man killed in the accident became the plaintiff in the case, suing, among others, the engineers for negligence. To prove that the engineers owed her a duty and breached it, the plaintiff enlisted an expert witness to testify that they failed to meet the ordinary standard of care. In the expert's opinion, the standard of care would have required the defendants to consider and analyze crossover protection for the bridge, and that if they had worked within the standard of care, a larger barrier providing crossover protection would have been recommended and built on the bridge. Essentially, the expert witness argued that if the defendants had followed his definition of their duty of care, the accident never would have happened.

The trial court followed the holding in *Ferentchak v. Village of Frankfort*, 105 Ill. 2d 474 (1986) and found that the defendants' duty to the plaintiff was circumscribed by the contract it had signed for the job and that the scope of their work was determined by their contractual undertaking. Since the contract did not specifically call for the assessment of the median barrier, the defendants owed no duty to perform such assessments, and the trial court granted summary judgment in favor of the defendants.

The appellate court, however, reversed the trial court and remanded for further proceedings. While the appellate court agreed with the defendants that the contract required them only to submit plans to

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rebuild the bridge deck and median exactly as they already existed, it also found that the defendants were obligated to act within the prescribed standard of care. This standard of care would require them to perform the contractual task with the degree of skill and diligence normally employed by professional engineers. The appellate court then found that there was at least a question of fact as to whether the defendants had a duty to consider and design an improved median barrier. Therefore, it overruled the trial court's summary judgment and re-opened the possibility that the defendants would be liable to the plaintiff. It was at this point that the defendants appealed to the Illinois Supreme Court.

### Illinois Supreme Court Limits Design Professionals' Duties to Contract

In its decision, the Illinois Supreme Court first addressed whether the Scope of Services clause in the defendants' contract gave rise to a duty to design or recommend a median providing better crossover protection. The Court reiterated that its primary objective in construing a contract is to interpret it to mean what the parties intended it to mean by looking at the contract and its language as a whole, construing any unambiguous words to have their ordinary and plain meanings. In reading the contract according to those rules, the Court determined that the term "replacement" in the contract meant strictly that and did not require any investigation into improvements or crossover protection for the bridge deck. The Court found this to be true because the Scope of Services section of the contract specifically used the word "improvements" in the section about the roads to the shopping mall and "replacement" in the section about the bridge deck. If the defendants were supposed to analyze improvements to the bridge deck, the contract clearly would have kept using the word "improvements." However, because it

did not, the defendants only had a duty to design a replacement bridge deck.

Next, the Court examined whether the contract imposed a professional duty of care on the defendants' work. In doing so, the Court looked to the language of the contract's Standard of Care provision, which stated: "The standard of care applicable to ENGINEER's services will be the degree of skill and diligence normally employed by professional engineers or consultants performing the same or similar services." The Court held that the appellate court wrongly relied on a case that held that a professional's standard of care is "the use of the same degree of knowledge, skill, and ability as an ordinarily careful professional would exercise under similar circumstances." Crucial to the Court's decision that the two standards were different was that the defendants' contract included the words "performing the same or similar services." In this case, the "same or similar" service to which the standard applied was replacing the bridge deck—not improving or considering adding a barrier to it—because that was the service the defendants unambiguously agreed to perform.

Finally, the Court discusses why the appellate court was wrong to distinguish this case from *Ferentchak v. Village of Frankfort*. In doing so, the Court reaffirmed the court's holding in *Ferentchak* that the degree of skill and care required of a design professional depends on his contractual obligation. Because in this case both the work and standard of care obligations were outlined in the contract, the defendants' duties were limited to those contained therein. As the Court went on to explain, it cannot and will not impose a duty or obligation that was not provided for in the contract or add any terms or meanings to terms or conditions to which the parties have not assented. If a provision could easily be put in a contract but is not, the court will not construe it to be present. As such, design professionals' duties are limited to those that are included in the contract.

### Lessons to Learn from *Thompson v. Gordon*

While *Thompson v. Gordon* did not involve plumbing engineers, all design professionals can learn a number of lessons from the case and the Illinois Supreme Court's decision.

First, it is of course important to always have a written contract for any and all work you are to perform. Without a contract that sets forth both the scope of services and the standard of care, you may find yourself liable to parties who use expert witnesses to expand and extend your duties beyond those to which you thought you agreed.

Second, make sure that the terms of the contract are clear and unambiguous. Be certain that the terms in the contract specifically describe the services you are to perform and only those services. Including ambiguous language as to the services you are to perform can open up questions about both those services and your duty of care owed while performing those services. Such questions can expose you to liability that could have been avoided with a carefully and clearly worded contract.

Third, have your attorney review each and every contract before agreeing to its terms. Attorneys are trained and experienced in making sure that contract language is as specific, narrowly tailored, and clear as possible. By having your attorney review every contract, you will be maximizing the protection that a contract can offer you. As *Thompson v. Gordon* illustrates, a design professional may be shielded from liability solely by reason of the language used in a contract.

Finally, it is important to keep in mind that this decision was made by the Illinois Supreme Court and as such is binding only in that state. However, most courts will find that the language of the design professional's contract is the primary determinant of his legal duties and will only look elsewhere (i.e., to expert witnesses) when the contract language is ambiguous. Your attorney can give you a clearer picture of what standards of care exist in your jurisdiction and allow you to better protect yourself. Regardless of where you live, though, these suggestions for contract drafting and review are universally important. **PSD**

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