

Illinois Supreme Court Limits Design Professional Liability to Terms of the Contract

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According to a recent ruling by the Illinois Supreme Court, duties and responsibilities of a design professional in Illinois are limited to the scope of its contract and cannot be expanded by outside testimony. The Supreme Court of Illinois in *Thompson v. Gordon* recently reversed the Appellate Court's decision and affirmed the circuit court's decision in holding that the scope of a design professional's duty was "circumscribed by the terms of the contract" and that expert testimony could not be used to expand that duty. In so holding, the Illinois Supreme Court affirmed a victory for design professionals in the state.

Background

In January 1991, various Defendants, including CH2M Hill, Inc. ("CH2M"), entered into a contract with a development company to provide engineering services in connection with the development of a shopping mall in Gurnee, Illinois. As a means of accommodating the expected increase in traffic, the contract required CH2M to design two ramps west of the adjacent expressway as well as a replacement bridge deck surface over the expressway. The original bridge deck had an existing concrete median measuring six inches high and four feet wide that divided the eastbound and westbound lanes of traffic. The replacement bridge deck designed by CH2M had a median that measured seven inches high and the same width as the original. The work was eventually completed in 1992.

On November 27, 1998, the Thompsons, including husband Trevor, wife Corinne, and daughter Amber, were traveling westbound in the area when Christine Gordon, who was traveling eastbound, lost control of her vehicle and hit the median separating the traffic. Upon hitting the median, Gordon's vehicle catapulted into the air and landed on top of the Thompsons' car, killing Trevor and Amber and seriously injuring Corinne.

Plaintiff, Corinne Thompson, individually and as administrator of the estates of her husband and daughter, sued Defendants, including CH2M, for negligence. Among other allegations, Plaintiff's complaint alleged that CH2M was negligent in failing to design and construct a "Jersey barrier," claiming that had such a barrier been constructed, Gordon's vehicle would not have vaulted into the air and onto Plaintiff's car when it struck the median.

Defendants, including CH2M, filed a motion for summary judgment, arguing that they owed no duty to Plaintiff because the work that they contracted to undertake did not require median barrier analysis or design. In response, Plaintiff filed the affidavit of her expert engineer witness, who testified that Defendants failed to meet the ordinary standard of care in failing, among other things, to submit the necessity of crossover protection in the form of a Jersey barrier and failing to design a Jersey barrier.

The trial court granted Defendants' motion for summary judgment, stating that Defendants' duty to Plaintiff was "circumscribed by the terms of the contract" and the scope of their work was determined by the contractual undertaking. Specifically, the trial court found that the contract did not call for an assessment of the sufficiency of the median barrier but rather required Defendants to reconstruct the raised median and road surface. The trial court ultimately concluded that to impose an obligation on Defendants to perform a median analysis would impose an obligation on Defendants that was not specified in their contract.

Plaintiff appealed the trial court's decision, and the appellate court reversed the lower court's finding. 398 Ill.App.3d 538. In reversing the lower court, the appellate court held that the standard of care clause in the contract qualified Defendants' work in obligating Defendants to act within the prescribed standard of care. *Id.* at 544. More specifically, the appellate court, in relying upon Plaintiff's expert engineer's affidavit, stated that CH2M owed a duty to perform its contractual task using the degree of skill and diligence normally employed by professional engineers. *Id.* In essence, the expert's affidavit established CH2M's breach of duty.

Supreme Court Opinion: The Supreme Court of Illinois granted Defendants' petition for leave to appeal. CH2M and the other Defendants disputed the appellate court's decision, contending that the contract did not impose a duty to recommend or design a Jersey barrier. In its analysis, the Supreme Court initially noted that the trial and appellate courts agreed that the contract only required Defendants to replace the bridge deck; it did not require them to improve the deck and add a Jersey barrier.

The Supreme Court undertook the issue of whether Defendants' contract imposed a professional duty of care on Defendants' work, and whether the extent of that duty and whether it was breached created a factual question subject to expert testimony. In its analysis, the Supreme Court looked to the language of the contract in finding that the standard of care set forth therein provided for "the degree of skill and diligence normally employed by professional engineers or consultants *performing the same or similar services*" (emphasis added).

The Court then concluded that, pursuant to the language of the contract, the standard of care was limited to the degree of skill and diligence normally employed by professional engineers performing the same or similar services, specifically, replacing the bridge deck. Because replacing the bridge deck did not entail improving the bridge deck or considering or adding a Jersey barrier, the appellate court improperly considered expert testimony to expand the duty expressly set forth in the contract.

In providing the exclamation point to its ruling, the Supreme Court cited to the appellate court dissent, which stated that the majority's finding that Defendants' standard of care included a duty to investigate the need for an improved median barrier "imposes an obligation on Defendants that is not provided for in the contract." 398 Ill.App.3d at 556-67 (Hutchinson, J., dissenting). The Supreme Court noted that the imposition of such a duty is contrary to well-settled law in that a court cannot alter, change, or modify existing terms of a contract or add new terms or conditions to which the parties do not appear to have assented.

Conclusion

The *Thompson* decision provides a victory for design professionals by ensuring that their duties cannot be expanded outside the terms of the contract. If nothing else, the Supreme Court's opinion should serve as a precaution to all parties involved in drafting and executing construction contracts with respect to the terms used in defining a party's scope of work.

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