



Illinois Supreme Court Limits Potential Liability of Construction Professionals in Negligence Cases

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The Illinois Supreme Court, in an apparent victory for the defense bar, has limited the liability of professionals who conduct their activities in accordance with the terms of their contracts. In *Thompson v. Gordon*, Docket No. 110066, the Court held that an engineering firm that performed its services in accordance with the terms of its contract could not be held liable for failing to do more than its contract required. The ruling protects engineering and construction professionals working under contract in Illinois from suits by third parties, although whether the decision will open the door to suits against owners and developers remains unclear.

Jack E. Leisch and Associates ("Leisch"), an engineering firm, which later merged with CH2M Hill, Inc. ("Hill"), contracted with Western Development Corporation ("WDC") to improve highway exit ramps and to replace an overpass bridge. The replacement bridge was built with a median of nearly the same height and width as the original.

In 1998, Plaintiff, her husband and her daughter were traveling westbound on the bridge when Defendant's eastbound traveling vehicle hit the median, vaulted in the air and landed on Plaintiff's vehicle. Plaintiff's husband and daughter were killed in the accident.

Plaintiff brought suit on a negligence theory claiming that Hill should have added a "Jersey Barrier" to the replacement bridge and that such a barrier would have prevented the accident. Hill sought summary judgment claiming that the contract it signed with WDC did not require it to make improvements. The trial court granted summary judgment, finding Hill's duty of care was limited by the terms of the contract. The appellate court reversed. It found that while the contract called for merely replacing the bridge, the engineers also owe a duty of care to perform their professional services with the degree of skill normally employed by members of the profession and that Hill should have included the barrier in its design. The court interpreted the duty of care to be above and beyond the terms of the contract. Both parties appealed to the Illinois Supreme Court.

The Illinois Supreme Court first addressed Plaintiff's contention that the contract itself required Hill to construct an improved bridge with a "Jersey Barrier." The court found that the contract required Hill to "improve" aspects of the thoroughfare, but only required it to "replace" the overpass bridge. Thus, the term "replace" could not be construed as synonymous with "improve" and could not be read to require design improvements to the bridge.

The Court then addressed whether Hill was required to go beyond the terms of the contract to satisfy its duty of care. The "standard of care" provision in the contract stated that Hill must exercise "the degree of skill and diligence normally employed by professional engineers or consultants



performing the same or similar services.” P. 12. The Court found that this provision merely required Hill to perform the services contracted for, *i.e.* the design for the replacement of the bridge. It did not require Hill to go above and beyond the terms of the contract.

The Court further held that this was consistent with *Ferentchak v. Village of Frankfort*, 105 Ill. 2d 474 (1985). There the Court held that a engineer who designed a drainage system consistent with the terms of his contract could not be liable for subsequent flooding. The appellate court had tried to distinguish *Ferentchak*, arguing that the existence of the design flaw was contingent on subsequent developments beyond the engineer’s knowledge or control. In this case, however, the design flaw was not contingent on future developments; Hill was aware of all aspects of the allegedly defective design of the replacement bridge.

The Illinois Supreme Court was not persuaded, finding that “[r]egardless of the appellate court’s view of the ‘essence’ of *Ferentchak*, the actual holding of *Ferentchak* was that the degree of skill and care required of the civil engineer depended on his contractual obligation, and the scope of the duty was defined by the contract.” Because the contract called for Hill to replace the bridge with the skill of a professional in the industry and Hill did just that, it could not be liable for failing to install or investigate the feasibility of a “Jersey Barrier.”

The *Thompson* decision is a significant victory for construction professionals. Those entities will now be able to defend against negligence suits from third parties by relying on the terms of their contracts. Third party claimants will not be able to allege that a construction professional should have done more, *i.e.* developed a more costly or elaborate solution, if the construction professional has performed its services in accordance with its contractual undertakings. In addition, those entities will also no longer have to consider how to meet a vague and sometimes unknowable duty of care that may be above and beyond the terms of their contracts.

The news may not be as positive for owners and developers — those entities that employ the construction professionals. While Hill was not liable because it simply followed the terms of its contract, it is possible that the party that ultimately decided to simply replace the bridge rather than improve it with a “Jersey Barrier” could be liable. However, claimants may face an equally difficult time proving their case. They will have to assert that owners and developers should have mandated that their construction professionals produce a design that exceed the industry norm without regard to cost. So long as the construction professional meets the degree of skill and diligence normally employed in the industry, both the construction professional and the owners and developers who retain them should be protected.

For both policyholders and insurers, it will be important to consider what impact *Thompson* may have on the viability of future negligence actions, what entities are most likely to be named as defendants in a post-*Thompson* context, and how subsequent Illinois courts may address standard of care issues in light of the *Thompson* decision.

For more information on the matters discussed in *Locke Lord's QuickStudy*, please contact the authors:

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