

## Engineer's Standard Of Care Cannot Be Expanded by Opposing Expert's Testimony

**S**IX YEARS AGO we wrote about the case *Corinne Thompson v. Christie Gordon et al.* (*Thompson v. Gordon*), which addressed whether providing expert testimony on a design issue constitutes the practice of engineering and as such requires licensure in the state in which the testimony is given. In that decision, the court held that the expert retained by the plaintiff did not have to possess an engineering license in order to provide testimony in the state; it was only necessary that he or she have the requisite experience and qualifications to assist the trier of fact. Incredibly, the parties in *Thompson v. Gordon* continue their legal battles to this day, and those battles still involve the plaintiff's expert. In a case that is considered to be a major legal victory for design professional firms, the newest *Thompson v. Gordon* decision addresses whether the scope of a design professional's duty is defined by the terms of the contract or is subject to interpretation based on an opposing party's expert testimony.

The underlying issues in *Thompson v. Gordon* arose out of a fatal motor vehicle accident that was caused when a car hit a low median separating traffic on a highway overpass bridge and vaulted over it into oncoming traffic. Thompson, who had been injured in the accident and was the administrator of the estates of the motorists killed in the accident, brought an action in an Illinois state court against the entities involved in constructing the roadway.

Thompson alleged that two of the defendants, Jack E. Leisch & Associates, Inc., and CH2M HILL, Inc.,

failed to properly design the road and that the improper design proximately caused the accident. The crux of Thompson's case was that a Jersey barrier should have been designed and constructed for the road, including the bridge deck and the areas encompassing the interchange and weave lanes. Thompson asserted that, had a Jersey barrier been constructed, Gordon's vehicle would not have vaulted into the air and onto Thompson's vehicle when she lost control and struck the median.

Although CH2M HILL had complied with the contract by designing a deck equivalent to the one that was replaced, Thompson contended that the engineer owed a duty to consider the necessity of crossover protection on the bridge deck and that the engineer failed in his or her duty by not including a Jersey barrier in the design to separate the traffic. In particular, Thompson's expert asserted that the defendants should have considered and analyzed all available data provided by their consultants, should have considered crossover protection, should have explained to the state department of transportation the necessity of crossover protection in the form of a Jersey barrier, and should have designed such a barrier. Thompson's expert also testified that crossover accidents were likely to occur and that if the defendants had included a Jersey barrier, such a measure would have prevented the car from flipping over the median into the oncoming traffic.

CH2M HILL's contract, however, did not require a median barrier analysis or design. The firm argued that it met the requirements of its contract with the owner and that no independent duty was owed to Thompson to perform analysis or design services beyond what was called for in the contract. The trial court granted judgment in favor of CH2M HILL, but the decision was reversed on appeal.

The appellate court, having found a duty of care imposed by the contract, decided that Thompson had presented sufficient evidence through its expert witness to allow the issue to go for-

ward to a jury to decide, as a question of fact, whether CH2M HILL had met its duty of care.

After receiving supportive legal briefs from, among other parties, ASCE and the American Council of Engineering Companies, the trial court ruling was reinstated by the state supreme court. The high court decided that the contract set forth the standard of care as "the degree of skill and care and diligence normally employed by professional engineers or consultants performing the same or similar services, namely, replacing the bridge deck... [and] replacing the bridge deck did not include improving the bridge deck or considering or adding a Jersey barrier." For these reasons, the high court found that the appellate court had incorrectly permitted Thompson's expert witness affidavit, which sought to raise a question of fact whether the engineer's standard of care required it to improve the bridge to include a Jersey barrier.

The case is a victory for design professionals in that it serves as a precedent for similar disputes that an engineering firm's standard of care should not be a factual determination for a jury. Likewise, the decision underscores the importance of including "standard of care" language in design professional agreements, such as the American Institute of Architects' document B101 (section 2.2), which provides that the "architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the project." **CE**

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