Defending the Design Professional: Can Contract Language Shield the Professional from Ever-Expanding Duties?[1]

In liability cases against design professionals, one strategy repeatedly used by claimants to achieve a recovery is to avoid, ignore, reinterpret or otherwise attempt to negate contract defenses raised by the defending design professional. More specifically, while the duties of the design professional are frequently spelled out in no uncertain terms by the contract documents, the claimant will use expert testimony to establish evidence of a deviation from the standard of care even though the criticism of the expert assumes duties and obligations on the part of the defending design professional which are specifically excluded by or otherwise conflict with the contract documents. In other cases, the expert will testify about an alleged error or departure from the standard of care when contract provisions are ambiguous or silent with respect to various assumed duties. In this constant theoretical and practical interface between contract and tort law, there are several issues which need to be addressed with respect to the imposition of ex-contractual duties upon design professionals and the source of such duties.

I. Introduction

Parties to construction litigation typically have a contract binding them to some other party involved in the construction project at issue. These "contract documents" often include several different component parts, including the plans, specifications, General Conditions and other agreements, which set out in detail the duties and responsibilities of each party to the construction project. Interpretation or application of these diverse documents can lead to litigation between the owner, contractor, design professional, subcontractors and others. However, their contents also bear on the liability of design professionals to unrelated third parties. Therefore, an analysis of their terms is essential.

The traditional model of the Owner-Design Professional-Contractor relationship is a triangular one, with the Owner contracting separately with the Design Professional and Contractor. A design professional often contracts solely with the owner, requiring third parties to seek alternatives in the event of a breach which allegedly causes injury. Since the design professional and contractor typically do not contract with each other, the duties, if any, owed between them arise from an interpretation of their contracts with the Owner.

Misconceptions of the design professional's role in modern construction projects has resulted in strained interpretations of their contractual obligations or imposition of common law liability which before did not exist. No longer the "master builder" of antiquity, modern design professionals relinquished day-to-day control to general contractors and subcontractors, the purported "experts." Increasingly complex and expansive projects, new technology, skills, and building materials, and the retention of numerous specialists and subcontractors has reduced the modern design professional's input into the overall project. Despite their waning control, design professionals face a proliferation of claims against them for failing to exercise *enough* control.

Some commentators point out that:

> Building in accordance with plans and specifications involves interpretation and judgment [by the contractor], no matter how much detail is spelled out in the design documents, and is therefore subject to divergent conclusions drawn from the same information.[2]

It is therefore in the interest of the contractor to find ambiguities, errors or omissions in the contract documents and impute liability to the design professional on that basis. Also, various

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2. Murray H. Wright & David E. Boelzner, *Quantifying Liability Under the Architect's Standard of Care*, 29 U. RICH. L. REV. 1471, 1486 (1995).

parties will resort to expert testimony to generate favorable interpretations of the contract's terms.

More and more, design professionals face expert testimony enlarging or modifying their contractual duties ultimately resulting in liability exposure and an expansion of the "standard of care." While liability should be based upon contract provisions which bind the design professional, courts have increasingly disregarded clear contract language and imposed extra-contractual duties not originally contemplated by the parties.

This article will address the situation faced by many architects and engineers when an expert witness testifies as to the duties owed by a design professional despite the contractual relationship and contract provisions in the particular circumstances. After initially discussing the concept of privity and the origins of a design professional's duties, the article will then focus on the phenomena of expanding duties through expert testimony and postulate that a potential solution comes in directing the attention of courts and litigants to the various parties' positions and responsibilities as limited by their contract.

II. Privity of Contract

Unlike other professional endeavors, such as attorneys and accountants, for many years design professionals enjoyed relative immunity from suit based upon the doctrine of "privity of contract." Since the design professional contracted exclusively with the Owner, non-contracting third parties were precluded from recovery. The basic policies behind this principle were to prevent exposure to excessive and unlimited liability to an unlimited class of potential claimants, and to maintain the parties' control over their contracts.

Starting with *United States v. Rogers & Rogers*,[3] many jurisdictions began to abolish the privity doctrine. The court in *Rogers* noted:

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3. 161 F. Supp. 132 (S.D. Cal. 1958).

> Considerations of reason and policy impel the conclusion that the position and authority of a supervising architect are such that he ought to labor under a duty to the prime contractor to supervise the project with due care under the circumstances, even though his sole contractual relationship is with the owner.[4]

The concept of privity which long shielded design professionals from liability was replaced with a common law duty of due care in many jurisdictions.

However, some states still cling to the doctrine of privity in analyzing claims against design professionals. In *Bernard Johnson, Inc. v. Continental Contractors, Inc.,*[5] the contractor argued the contractual relationship between the owner-design professional and the owner-contractor created common law duties on the part of the design professional in favor of the contractor. The power to "supervise" carried with it power over the contractor, and thus a common law duty was created. The court disagreed, and held any duty or power assigned the architect in the owner/architect contract was for the sole benefit of the owner who employed the architect. After analyzing the architect's contractual duties, the court held there was no power over the contractor sufficient to impose a common law duty.

The *Bernard* court held a general rule that architects owe a duty of care to the contractor for exercising control over them stood on too indefinite and ambiguous a base to support itself. The court stated:

4.. *Id*. at 135-6. *See also* Council of Co-Owners Atlantis Condominium, Inc. v. Whiting-Turner Contracting Co., 517 A.2d 336, 344 (Md. 1986) (duty extended to those foreseeably subject to injury for latent or unreasonably dangerous condition or negligence); Aetna Ins. Co. v. Hellmuth, Obata & Kassabaum, Inc., 392 F.2d 472 (8th Cir. 1968) *citing* Westerhold v. Carroll, 419 S.W.2d 73 (Mo. 1967).

5. 630 S.W.2d 365 (Tex. Ct. App. 1982).

> Any such rule of general application, based upon an assumed general control of the architect over the contractor, must invariably result in an injustice in a particular case when the contract assigns no control to the architect with respect to a particular aspect of the contractor's work wherein the injury occurs, but the architect is, nevertheless, held to a general duty said to be founded upon and justified by the existence of his power over the contractor.[6]

Prompted by the abolition of privity as a defense, and faced with the possibility of ever expanding liability, design professionals amended their form contracts limiting their duties to the owner and thus the general contractor. The major revision came with removal of "supervisory authority" from the contract documents. The seventh edition of the AIA General Conditions (1958) had authorized architects to "supervise" construction.[7]

Due to many courts' inability to distinguish "supervision" and "superintendence," the AIA General Conditions were amended, and the eighth edition (1961) deleted the duty to supervise. The current AIA General Conditions now make clear that the general contractor has control over the means and methods of construction.[8] Nevertheless, many courts continue to impose liability on design professionals due to a strained interpretation of the contract documents and a misunderstanding that the design professional does in fact, or should "supervise" the project.

II. Duty to "Supervise"

The supervision issue is one frequently faced by design professionals. Most jurisdictions

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6.. *Id*. at 374.

7.. Keith L. Davidson, *The Liability of Architects*, 13 TRIAL 6:20, 21 (1977).

8.. AMERICAN INSTITUTE OF ARCHITECTS, GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION,, ə 3.3.1.

follow the general rule that requires express contractual terms are necessary to impose a duty to "supervise." Despite the rule, litigants urge courts to impose a duty to supervise, and thus liability, on the design professional in the absence of, or even contrary to, their contractual terms.

In *Brown v. Gamble Construction Co.*,[9] plaintiff's decedent fell through a ventilation duct, and was fatally injured. Plaintiff claimed the architect owed a duty by virtue of his position as a design professional to supervise the construction and insure that safety precautions were taken. The court stated the general rule that an architect is under no duty to supervise construction unless the duty was expressly agreed upon in the contract documents. Examination of the contract documents revealed the general contractor, not the architect, was charged with the duty of supervision, project safety and responsibility for the means, methods and procedures of the work.[10]

In *Mayor & City Council of Columbus, Mississippi v. Clark-Dietz & Associates-Engineers, Inc.,*[11] the contract between the engineer and the city required the engineer to exercise general control over the work, required them to determine whether the contractor's work complied with the plans and specifications, and gave the engineer the power to reject work which did not comply. The construction was delayed by severe flood damage. The city brought suit against the engineer and contractor for additional expense and delay damages.

In its claim against the engineer, the city alleged breach of contract and negligent design. The contractor cross-claimed against the engineer charging negligent design and negligent supervision. Several experts testified that the design constituted "imprudent engineering," failed

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9. 537 S.W.2d 685 (Mo. Ct. App. 1976).

10. *Id.* at 687 (*citing AIA*, ∋ 2.2.4, & Art. 10 (1970 ed.)).

11. 550 F. Supp. 610 (N.D. Miss. 1982).

to consider feasible alternatives, and was the proximate cause of the levee failure and subsequent damage. Based on this testimony, the contractor argued the engineer breached its duty to supervise the project and should be solely responsible.

While the court found the engineer liable to the owner for defective design, the court held the engineer's duty of supervision was met. The contractor still owed a contractual duty to the owner to construct the project in accordance with the plans and specifications. The contractor argued that despite the court's finding that poor workmanship was partially responsible for the failure, the engineer's supervision and approval of the project absolved them of any liability.

After analyzing the terms of the contract regarding supervisory duties of the engineer, the court noted there was no duty to inspect and verify every step of the contractor's work. The sweeping duty of supervision argued for by the contractor was not a part of the contract. Since the engineer was not negligent in meeting these duties, the contractor was held partially responsible.

IV. Origins of Duty

A. Professional Status

There is no question the design professional owes a duty to the parties with whom they contract, for example, the owner. Many times, the design professional faces the issue of whether a duty is owed to a non-contracting party. This is often a question of law. The contract documents serve as important evidence of the scope of the duty owed by the design professional in this situation.

If a contract imposes a duty upon a design professional, the neglect or the breach thereof may give rise to an action in either contract or tort, or both. The type of action depends on the

status of the injured party and the contractual duty.[12] When not garnered from the design professional's contract, litigants must advance an alternative tort theory to establish a duty.

In a negligence case against a design professional, the claimant must establish there was a breach of the standard of care. Similar to doctors, lawyers and accountants, the law imposes upon design professionals the duty to exercise a reasonable degree of skill and care when performing their professional function. This standard of care is determined by the degree of skill and care ordinarily employed by like professionals under similar conditions and circumstances.[13]

Many jurisdictions have held the contract between the design professional and the Owner give rise to common law duties, including duties to non-contracting parties. One court noted:

> [T]he making of a contract may give rise to a relationship between the parties out of which arises the duty of the [design professional] to use due care so as not to injure the person or property of the other. In that event, the failure to use such care resulting in injury to the person or property of the other party gives him a right of action in tort for such negligent injury.[14]

Non-contracting parties may now sue the design professional in tort for breach of duty owed

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12.. Shepherd Components, Inc. v. Brice Petrides-Donohue & Associates, Inc., 473 N.W.2d 612, 615 (Iowa 1991).

13.. Fireman's Mutual Insurance Co. v. High Point Sprinkler Co., 146 S.E.2d 53, 60 (N.C. 1966).

14.. *Fireman's Mutual*, 146 S.E.2d at 60. *See also* Normoyle-Berg & Assoc. Inc. v. Village of Deer Creek, 350 N.E.2d 559, 561 (Ill. App. Ct. 1976) (duty flows between design professional and general contractor in absence of direct contractual relationship); I.O.I. Systems, Inc. v. Cleveland, Tex., 615 S.W.2d 786, 790 (Tex. Ct. App. 1980) (design professional's duty to non-contracting parties depends on the agreement entered into with the Owner).

under the contract documents, an affirmative assumption of additional responsibilities or an affirmative agreement to act.[15]

In *Board of Educ. of Community Consol. Sch. Dist. No. 54 v. Del Biano & Assoc., Inc.*,[16] in spite of the clearly defined contract duties of the design professional, the court noted that they were:

> not the only obligations which [the design professional] was required to perform. Not all of the duties growing out of a contract must have been expressly stipulated for: many duties arise *ex large* out of the relation created by the contract. Consequently, we find that [the design professional] had the implied obligation to specify the use of reasonably good materials, to perform its work in a reasonably workmanlike manner, and in such a way as reasonably to satisfy such requirements as it had notice the work was required to meet.[17]

However, the court, in *Maryland Cafeteria, Inc. v. Midwest Fire Protection, Inc.*,[18] noted a defendant who designed and installed a fire protection system "could not be guilty of negligence in not doing more than the contract [between it and the owner] obligated it to do."[19] Some courts are more willing to expand on contractual duties through the common law.

Since design professionals hold themselves out to the public in a professional capacity, courts have held several common law duties also arise. In their contract for services, the design

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15. *Westerhold*, 419 S.W.2d at 80.

16. 372 N.E.2d 953 (Ill. App. Ct. 1978).

17. *Id.* at 958.

18. 536 S.W.2d 182, 185 (Mo. Ct. App. 1976).

19. *Id.* at 185.

professional implies they possess the ordinary level of professional learning, skill and experience, that they will use reasonable and ordinary care and diligence in the exercise of their skill to accomplish the purpose for which they are employed, and that they will use their best judgment in exerting their skill.[20] These duties are imposed on all professionals. However, absent a special agreement, the design professional does not imply or guarantee a perfect result.[21]

In *Kaltenbrun v. City of Port Washington*,[22] plaintiff argued the architect was liable by virtue of the fact that they were a "professional firm responsible for the design and engineering aspects of the project." Plaintiff in essence contended the architect owed him a duty of care to make the construction site safe because it designed and engineered the project. The architect was granted summary judgment.

On appeal, the court noted the general contractor had ultimate responsibility for safety at the construction site under its contract with the city owner. The court was unwilling to extend a common law duty requiring the architect to insure site safety based on their "professional" status. Absent a contractual assumption of duty, the common law liability of the architect would only extend to negligent design of the structure itself.

B. Statutes or Code Sections

Some litigants have argued a design professional owes a common law duty of care based on statutes and code sections which govern certain aspects of their work and profession.

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20. Chapel v. Clark, 76 N.W. 62 (Mich. 1898).

21.. Sams v. Kendall Constr. Co., 499 So. 2d 370, 373 (La. Ct. App. 1986); Lukowski v. Vecta Educ. Corp., 401 N.E.2d 781, 786 (Ind. Ct. App. 1980); Stanley Consultants Inc. v. H. Kalicak Constr. Co., 383 F. Supp. 315, 319 (E.D. Mo. 1974).

22. 457 N.W.2d 527, 530 (Wis. Ct. App. 1990).

In *Vonasek v. Hirsch & Stevens, Inc.*,[23] plaintiff/general contractor sought to impose liability on the defendant/architect for an alleged violation of the Wisconsin Administrative Code requiring specific design parameters with regard to structural steel construction. The plaintiff argued the code section, which was not violated in letter, established a common law duty of care. Plaintiff cited *Swaney v. Peden Steel Co.*,[24] wherein the court held an architect liable for the design of a truss which was so unusual, that none of the testifying experts had ever seen anything like it. In such a case, the design created a latent defect which imposed a duty to instruct the contractor about the proper method of construction. Rejecting application of *Swaney*, the court held no duty existed since the contractor was an experienced steel installer with sufficient experience to know the project's danger.

Plaintiff's further attempt to impose liability on the architect for a breach of a "duty to inspect" was denied. The contractor was responsible for on-site safety. The court noted that plaintiff's claim the architect was responsible for worksite safety imposed duties contrary to the express language of the contract.[25]

C. Duty by Virtue of Licensing Statutes

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23. 221 N.W.2d 815 (Wis. 1974).

24. 131 S.E.2d 601 (N.C. 1963).

25.. *Id*. at 820. *See also*, Wheeler & Lewis v. Slifer, 577 P.2d 1092 (Co. banc 1978) (contracts between owner and architect and owner and contractor unambiguous as a matter of law, and that there was no duty to supervise); Waggoner v. W & W Steel Co., 657 P.2d 147; and Lutz Engineering Co., Inc. v. Industrial Louvers, Inc., 585 A.2d 631 (R.I. 1991) (contract between owner and contractor made contractor, not architect responsible for approval and accuracy of shop drawings, and architect not liable as a matter of law for negligence in their approval).

Some litigants and their experts seek to impose a duty, and therefore liability, on a design professional by virtue of state licensure acts. These statutes, while setting out professional standards of conduct and capacity, also set out procedures for discipline. Litigants often argue these statutes create a duty of care in their favor.

Business Men's Assurance Co. of America v. Graham,[26] involved a civil negligence case where the plaintiff alleged, and the trial court instructed the jury, that violation of the Missouri Architect, Professional Engineer and Land Surveyor Licensing Act, Mo. Rev. Stat. § 327, regarding an engineer's personal seal, constituted negligence *per se*. Plaintiffs argued an engineer's statutory duty to the "public at large" also extended to specific contracting parties.

Plaintiff alleged it was negligence *per se* for the engineer to approve negligently prepared plans and shop drawings by affixing his professional seal to these documents. The statute, which requires the engineer to affix his personal seal to any document prepared, reads:

> He shall affix the seal to all plans, specifications, estimates, plats, reports, surveys, and other documents or instruments prepared by him, or under his direction, and he shall be held personally responsible for the contents of all such documents.[27]

The court noted the purpose of the licensing statute and professional seal was to protect members of the public. Furthermore, the statute has its own enforcement provisions which include censure and revocation of the professional's license. Since the nature of the licensing statute was to insure that professionals display and maintain a certain standard of competence, it was held not to provide a cause of action for negligence *per se.* Plaintiff's claim the statute created a common law duty in their favor was denied.

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26. 891 S.W.2d 438 (Mo. Ct. App. 1994).

27. Mo. Rev. Stat. ∋327.411 (1969).

V. Expert Testimony - Expanding Duties

Contract interpretation is of utmost importance to determine the scope of the duty owed by a design professional in each particular case. Contract interpretation is either a question of law, if the language is unambiguous, or a question of fact, given a dispute with regard to the terms or their definition. If a contract for construction is ambiguous as to its terms, a question of fact is created for the jury.

Where the design professional's negligence results in foreseeable injury, whether economic or otherwise,[28] liability arises in tort from the common law duty of care between the design professional, owner and general contractor.[29] This duty arises and is reinforced by the

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28.. Design professionals will often raise as a defense to an action the notion that purely economic injuries cannot be recovered in tort. Many courts have held purely economic losses are recoverable based upon the "professional" status of the design professional. *See eg*. Davidson & Jones v. County of New Hanover, 255 S.E.2d 580 (N.C. Ct. App. 1979); Business Men's Assurance Co. of America v. Graham, 891 S.W.2d 438 (Mo. Ct. App. 1994) (economic injuries are recoverable from a design professional based solely upon their "common law duty of care." *Id*. at 454.) *Yet cf*. 2314 Lincoln Park West Condo. Assoc. v. Mann, Gin, Ebel & Frazier, Ltd., 555 N.E.2d 346 (Ill. 1990) (Pure economic loss not recoverable).

Although a thorough examination of this issue is beyond the scope of this article, arguably delays and complications with construction are foreseeable events, and are in commonplace in the industry, and so should be accounted for in initial allocation of risk and contract formation decisions.

29.. Davidson & Jones, Inc. v. County of New Hanover, 255 S.E.2d 580, 584 (N.C. Ct. App. 1979); A.R. Moyer, Inc. v. Graham, 285 So. 2d 397, 402 (Fla. 1973).

contractor's reliance on the contractual performance of the design professional.[30] A design professional's duty of care, then, is determined by the contract between it and the owner, and also on the basis of the contract between the owner and the general contractor.[31] Construing contracts between an owner and architect and owner and contractor, the court in *Sears, Roebuck & Co. v. ENCO Assoc., Inc.*,[32] held all obligations of the architect, whether in tort or contract, must arise out of the contractual obligation of the parties. Absent a contract, there would be no services and therefore no basis for a claim.

Once a duty is established, testimony as to its breach is required. Since professional expertise is involved, in general, expert testimony is required to establish the standard of care owed by a design professional and to demonstrate how the standard was violated.[33] Many courts have allowed experts to testify as to duties which are either non-existent or which are a drastic expansion of the plain terms of contractual duties in the contract documents. Other courts have held expert testimony unnecessary to establish liability of a design professional, as certain duties are within the "common knowledge" exception to the requirement of expert testimony. Failure to "supervise" and "failure to correct improper workmanship" have in some instances been held to be understood by laymen without the need for expert testimony.[34]

30.. Forte Brothers, Inc. v. National Amusements, Inc., 525 A.2d 1301, 1303 (R.I. 1987).

31.. *See eg*. Luterbach v. Mochon, Schutte, Hackworthy, Juerisson, Inc., 267 N.W.2d 13, 14 (Wis. 1978).

32. 372 N.E.2d 555 (N.Y. 1977).

33.. *Sams*, 499 So. 2d at 374; Nauman v. Harold K. Beecher & Assoc., 467 P.2d 610, 615 (Utah 1970).

34.. *Aetna Insurance Company*, 392 F.2d at 478. The court found a jury able to pass upon issues it

A. Phases of construction - Differing Duties

A design professional's involvement with a construction project is unique in that it often occurs in four distinct phases: design, design development, construction document preparation and general administration. Liability may arise from any four of these phases.[35] These distinct phases are significant as the standard of care expected of the design professional may differ depending on the phase of the project at issue.

For example, in *Nelson v. Commonwealth*,[36] the court held that the design phase is separate and distinct from the construction administration phase of the contract, and no expert testimony was offered to define the standard of care on this claim. After the design phase was completed, a new phase began requiring different duties and different applicable standards of care. The court refused to allow the owner's experts on design to testify as to the standard of care in administration, as they were not sufficiently qualified or even asked to do so.

B. Duty Where There Was None

Perhaps the most widely cited case for expanding duties under a contract is *Miller v. DeWitt*.[37] In *Miller*, several workmen brought suit against the project architect when the roof

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felt were commonplace factual situations and not beyond the comprehension of lay persons; that of supervising construction. (Assuming the court meant when a contractual duty for these responsibilities existed). *See also* Jaeger v. Henningson, Durham & Richardson, Inc., 714 F.2d 773 (8th Cir. 1983) (the "common knowledge" exception applied to review of shop drawings, which was held to be a "supervisory" not "design" function.)

35. Wright & Boelzner, at 1473.

36. 368 S.E.2d 239 (Va. 1988).

37. 226 N.E.2d 630 (Ill. 1967).

they were constructing collapsed, causing injuries. After setting out in detail the contractual obligations of the design professional, the principal question before the court was the extent of these duties. Recognizing the general rule at that time that a duty to "supervise" the work merely created a duty to see that the building meets the plans and specifications upon completion, the court nevertheless held the architect responsible for plaintiffs' injuries. Under the contract terms, the court held the architects had the right to stop the work if the contractor violated its contract with the owner and operated in an unsafe and hazardous manner, and therefore owed a duty to plaintiffs.

Citing *Miller*, in *Associated Engineers, Inc. v. Job*,[38] a workman was seriously injured when electrical lines on which he was working became energized. The case was submitted on plaintiff's theories that the engineer permitted the allegedly incompetent contractor to remain on the job, failed to recognize unsafe procedures utilized by the contractor, and by energizing the lines when they should have known it was unsafe. The engineer argued it was not required to supervise the project to this extent.

Since the contract gave the engineer the right to control the "means and methods of construction," the court found the engineer contracted to supervise the manner of construction, to engage a competent superintendent, and take all reasonable safety precautions. In addition, the engineer was authorized to suspend the work if the contractor did not comply with the specifications, and require the contractor to correct the problem. The engineer failed to discharge these duties due to actual or constructive knowledge the general contractor was negligent.

The court noted it was doing no more than "construing a contract" to determine the engineer's duty. While the engineer argued there was no contractual obligation to interpret, the

38. 370 F.2d 633 (8th Cir 1966).

court, citing *Miller*, disagreed, finding substantial justification for the establishment of a duty under the contract. The court even went so far as to dismiss case authority to the contrary as mere "narrow readings of language which imposes supervisory duties in broad terms."

Recognizing the closeness of the issue, the court set the tone for the cases that followed when it stated:

> Perhaps it would have been helpful had the record contained evidence of the manner in which these . . . contracts in the past have been construed by these and other parties. In the absence of evidence of that kind, we are reduced to linguistic analysis with some assistance from cases construing similar agreements.[39]

i. Expert created duties

In *Ferentchak v. Village of Frankfort*,[40] the issue before the Illinois Supreme Court was whether an engineer could be held liable for a breach of duty when their contract for employment did not require the duties allegedly breached. Plaintiffs called an engineer as an expert to testify as to the defendant engineer's conduct. It was their expert's opinion damage to their home resulted from the foundation grade being set too low and an improperly designed drainage system. He also testified defendant engineer's plans lacked specifics as to foundation levels for homes in the subdivision, lacked specifics as to design criteria for the drainage swale, and contained inadequate specifics as to the grading in the subdivision. None of these alleged deficiencies were required by the defendant engineer's contract, however.[41]

39.. *Id*. at 645.

40. 475 N.E.2d 822 (Ill. 1985).

41.. Ferentchak v. Village of Frankfort, 459 N.E.2d 1085, 1089 (Ill. App. Ct. 1984).

Defendant engineer argued his duty to plaintiffs was limited to his duty under his contract with the subdivision. The defendant engineer testified these omissions were intentional as his contract with the subdivision did not require him to set these levels or provide any more specific detail with respect to the drainage system. Since his contract did not require these services, he could not be held liable for a failure to perform these duties.

The Illinois Supreme Court addressed the duty issue. After reviewing the terms of the contract between the engineer and subdivision, and considering the expert testimony as to its terms, the court noted the engineer was not asked to set the foundation levels. In fact, the subdivision's architectural control committee retained control over this area of construction. No duty was assumed by the engineer.

Plaintiffs then argued the duty to set foundation levels, in the absence of a contractual agreement to do, arose out of defendant's "professional responsibility" as a registered civil engineer. They relied on the opinion of their expert witness who testified defendant's conduct did not meet the standard of care commonly exercised by engineers in the community as a result of this omission.

The court disagreed, and held the scope of the duty owed by the engineer was defined by the contract between the engineer and subdivision, not some amorphous concept of "professional responsibility."[42] Absent a specific contractual commitment to provide the details plaintiffs' expert found lacking, it would be unreasonable to impose such an obligation on defendant engineer. The court held there was no duty on the part of the engineer to plaintiffs.

42.. *Id*. The court stated, "The scope of that duty, although based upon tort rather than contract, is nevertheless defined by the contract."

In *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assoc., Inc.*,[43] plaintiff, a non-contracting third party, brought suit against the contractor and project engineer when excavation on an adjacent property caused damage to its building. Under the agreement between the contractor and the owner, the contractor was responsible for all shoring and safety provisions on site, and for preventing damage to adjacent property. The contracts did not give the engineer control over the worksite or the activities that caused the damage. Though responsible for "quality control," the engineer was not given control over the "means and methods" of construction.

Plaintiff offered testimony of an expert witness who opined that, under the general standards of the engineering profession, the defendant engineer had the duty to stop work which did not comply with the contract. In essence, plaintiff attempted to use expert testimony to create a duty where none existed. The court held that while expert testimony and "general standards" were helpful in interpreting ambiguous contract terms, the duties of the parties were set out unambiguously by the contracts. Furthermore, it is the providence of the court to determine the existence of a duty, not expert testimony. The expert testimony in the case was of no assistance in interpreting the contract's terms. The court held the defendant engineer had no responsibility or control over the construction procedures employed on the job site, and therefore, no duty to plaintiff.

ii. Actual knowledge of deficiencies giving rise to a duty

While many cases decide the duty question based on the contract terms or common law, both questions for the court, many cases come down to a factual question of whether, under the

43. 473 N.W.2d 612 (Iowa 1991).

circumstances, a duty existed and whether the duty was met. In *Balagna v. Shawnee County*,[44] plaintiffs' decedent was killed when the trench he was working in collapsed. Plaintiffs brought suit against the owner, architect and general contractor, who was also decedent's employer. The trial court granted all three defendants' motions for summary judgment, and plaintiffs appealed.

The plans and specifications required the contractor to be responsible for on-site safety. The architect was required to assure the construction complied with the plans and specifications, however. The issue on appeal was whether the architect could be held liable for the contractor's failure to carry out its duty to assure safety measures were taken at the job site.

The specific terms of the contract between the owner and architect did not impose responsibility for on-site safety on the architect, but rather on the contractor. The court cited *Hanna v. Huer, Johns, Neel, Rivers & Webb*,[45] a case decided some four months prior. In *Hanna*, plaintiffs' expert testified the architect had a duty to the public and workers at the job to assure the building was safely constructed, to see that the construction was properly performed, and to insure a safety program was in place. According to their expert, if the architect observed a problem, it was his duty to call it to the attention of the contractor. The court agreed that the architect would have an affirmative duty to act if they had actual knowledge of unsafe practices.

The *Balagna* court agreed that actual knowledge of a dangerous condition acquired while carrying out on-site inspections may result in a finding of liability. Under the facts, there was no question the architect had knowledge of non-conforming conditions. The architect's on-site representative testified that he noticed the unsafe condition, yet said nothing about lack of shoring in the trench because the contractor's representative was continuously on-site, and it was

44. 668 P.2d 157 (Kan. 1983).

45. 662 P.2d 243 (Kan. 1983).

his duty to enforce these safety standards.

The court considered the testimony of an engineer expert witness testifying on behalf of plaintiffs. The engineer testified when shoring was called for in the specifications but was not provided on-site, the engineer had a duty to specifically address that issue with the general contractor. It was furthermore the opinion of the expert that the on-site engineer had the power and duty to halt the work in such a situation. In effect, the expert testified that his interpretation of the contract included duties which were clearly delegated to the general contractor. Since the testimony revealed there was a breach of duty on the part of the defendant architect, and since the defendant had actual knowledge of a non-conforming condition, the court reversed the trial court's grant of summary judgment in favor of the architect.

Noting the paradox created by the majority's opinion, the dissent stated:

> By the court's opinion the architect is absolved of any contractual responsibility for safety on the jobsite, but under the court's negligence theory the architect's supervisory capacity to see that the plans and specifications are properly fulfilled is enlarged to include responsibility for [jobsite safety].[46]

As the dissent notes, the contractor had the same knowledge of the condition, and was actually charged with this duty under the terms of their contract.

In contrast to the *Balagna* opinion is *Burns v. Black & Veatch Architects, Inc.*[47] In *Burns*, an employee of the general contractor was injured during the course of trenching operations,

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46.. *Balagna,* 668 P.2d at 166. The dissent notes what underlies the majority's decision, plaintiff's inability to recover from the general contractor-employer by virtue of workers' compensation statutes.

47. 854 S.W.2d 450 (Mo. Ct. App. 1993).

similar to his Kansas counterpart. Plaintiff alleged the architect, by preparing the specifications which provided for trenching procedures, specified the "means and methods" of construction. This in turn created a common law duty to plaintiff. The court noted the plain contractual language made the contractor solely responsible for project safety and the means and methods of construction, not the architect.

Plaintiff sought to impose a duty upon the architect over the means and methods of construction through the presentation of expert testimony. Plaintiff's expert witness offered the opinion that the architect should have prepared drawings of a trench protection system, and should have provided for the means and methods of construction even though the terms of the contract did not require the architect to perform this function. The court noted architects generally do not perform these duties as it would infringe on the contractor's obligation to establish the means and methods of construction.

The court's discussion of the duty allegedly owed by the architect under plaintiff's negligence theory is directly on point with the theme of this article. The court stated:

> Duty is a matter of law to be determined by the court. Duty cannot be established by expert opinion of proper procedure. Expert opinion testimony deals only with whether there was a breach of a legally existing duty.[48]

An expert should not be allowed to testify as to additional, non-contractual procedures he would have performed. His testimony should be limited to establishing the standard of care and whether it was met.

iii. Absence of Contract Provisions

In the absence of contractual provisions, some courts, relying on expert testimony, will

48. *Id.* at 453 (citations omitted).

impose a duty on the architect based on expansions of common law duties. In *Rowe v. Moss*,[49] the plaintiff, a licensed architect, brought suit against defendants to recover a fee for preparing plans and specifications under a contract. The defendants counterclaimed, alleging the architect was negligent in the preparation of the plans.

The defendants approached plaintiff architect to design a basement for their home. Their plan for the construction included locating a wood burning furnace in the basement. After the design phase was completed and construction began, it was determined the wood burning furnace could not be located in the basement because its placement there was unsafe under the current design. Defendants alleged the architect was negligent in failing to make proper provisions to allow for the placement of the stove. The architect argued his agreement with defendants did not contemplate the design of a "heating system."

An architect testified as an expert witness on behalf of the defendant homeowners. It was his opinion that architects have the duty as a professional to inform the client should the end result desired by the design be unattainable. The court agreed, noting an owner tells the architect what they want, and relies on the technical skill of the architect to design the end result. A duty arises by virtue of the status of the parties, and the expectations of the owner. In this situation, the court held no contractual terms were necessary. The architect should have advised the defendants they would have to alter their design or do without the stove.

However, *Getzschman v. Miller Chemical Co., Inc.*,[50] involved an architect who contracted to design a home for defendants. When the cost of construction far exceeded the owner's anticipated cost, the owner refused to pay under the contract, and the architect brought

49. 656 S.W.2d 318 (Mo. Ct. App. 1983).

50. 443 N.W.2d 260 (Neb. 1989).

suit to recover. Defendant/owners alleged the architect was barred from recovering as he breached his duty of care and was negligent in preparing the plans. Since there was no contractual obligation to design within a specified budget, construction at a cost that exceeded the anticipated budget was not required and was no defense. The court held there was no breach of duty on the part of the architect.

VI. Conclusion

Duties of design professionals arise from various sources, including contractual terms, the common law of torts, statutes, their status as a professional or, in some cases, expert testimony. Cases assigning liability to the design professional in claims by third-party/workmen, for example, typically do so based upon the design professional's "supervisory authority." This duty to supervise has been eliminated from current form agreements and therefore some courts have a tendency to create a common law duty that the design professional must "supervise" the project. This common law approach makes design professionals responsible for matters outside their contracts, and "assign[s] responsibility to [design professionals] for tasks they are not paid to perform."[51] This is just an example of the morass that is created by these ever expanding duties.

Commentators argue for a three step analysis in assessing claims against a design professional by a contractor or owner. First, the allocation of liability in the parties' contracts should not be disregarded by the courts when making its own liability determinations. Second, the contract should be sufficient to explain the relationships of the various parties to the work. Third, the contract should be used to ascertain whether the proper standard of care was met in the situation. The contracts should provide sufficient guidance to assess which party had primary

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51. Note, *Architectural Malpractice: A Contract-Based Approach*, 92 HARV. L. REV. 1075, 1097 (1979).

responsibility for the error claimed.[52]

Opinions by the courts vary greatly with respect to the source of duties owed by the design professional and perhaps other parties involved in the construction process. Some courts appear to allow experts to testify about duties owed by design professionals and others as if the question of duty is a question of fact. Contractual agreements and contract documents often set forth the precise duties owed by the parties to the contract and yet the courts permit experts or even juries to expand the duties owed based upon "implied duties" and "implied powers." Courts also turn to general common law tort duties not expressly set forth in contract documents or even expressly excluded by contract resulting in the imposition of obligations the party to the contract never undertook. As a result, the allocation of risk defined by the contract documents is re-allocated by the court or a jury.

Although there is certainly an overlap between tort and contract law and confusion between the two areas as exemplified by concepts such as "negligent breach of contract," the line between tort and contract is often blurred. Experts are allowed to testify about "duty" which should be a question of law for the court alone. Ignoring contract requirements which are unambiguous is an agenda that needs careful scrutiny.

One thing is clear from this overview of the law on design professional liability, there is little uniformity despite the constant themes which underlie this area of the law. Many states have addressed identical issues and yet reached opposite results. As design professionals rely more and more on uniform contracts such as the American Institute of Architects' series of Form Agreements, perhaps courts should take a more unified approach to evaluating liability under these same documents. Since professionals often practice in many states, some semblance of

52. *Id.* at 1101-1102.

uniformity in the interpretation of their contracts would serve to assist design professionals, litigants and the courts in reaching predictable results when identical disputes arise.

Endnotes