

IN THE SUPREME COURT OF ILLINOIS

CORRINE THOMPSON, individually and as Independent Administrator
of the Estate of TREVOR THOMPSON, deceased, and the Independent
Administrator of the Estate of AMBER THOMPSON, Deceased,

Plaintiff-Appellee,

vs.

CHRISTIE GORDON, GRAND AVENUE PROPERTIES, INC., GURNEE
MILLS (MLP) LIMITED PARTNERSHIP, f/k/a GURNEE MILLS LIMITED
PARTNERSHIP, GURNEE PROPERTIES ASSOCIATED LIMITED
PARTNERSHIP, an Illinois limited partnership, WESTERN DEVELOPMENT
CORPORATION, a foreign corporation, THE MILLS CORPORATION,
a foreign corporation, THE MILLS LIMITED PARTNERSHIP,
an Illinois limited partnership, GURNEE MILLS II, LLC, an Illinois limited
partnership, and GURNEE MILLS, LLC, an Illinois limited partnership,

Defendants,

and

JACK E. LEISCH AND ASSOCIATES,
INC., a corporation, CH2M HILL, INC., a foreign corporation,

Defendants-Appellants.

On Appeal from the Appellate Court of Illinois, Second District

No. 2-07-0667

There Heard on Appeal from the Circuit Court for the
Nineteenth Judicial Circuit, Lake County
Hon. David M. Hall, Judge Presiding

**BRIEF AMICUS CURIAE OF
THE ILLINOIS SECTION OF THE AMERICAN SOCIETY OF CIVIL
ENGINEERS AND THE ASSOCIATION OF
LICENSED ARCHITECTS IN SUPPORT OF
JACK E. LEISCH AND ASSOCIATES, INC. AND CH2M HILL, INC.**

Jeffrey T. Kubes
Jean M. Prendergast
Michael J. Faley
SCHUYLER, ROCHE & CRISHAM, P.C.
130 E. Randolph Street, Suite 3800
Chicago, Illinois 60601

POINTS AND AUTHORITIES

	<u>Page</u>
INTRODUCTION.....	1
INTERESTS OF AMICI.....	2
FACTS AND PROCEDURAL HISTORY.....	4
ARGUMENT.....	7
I. CONSTRUCTION CONTRACTS, INCLUDING THOSE DEFINING THE DUTIES OF DESIGN PROFESSIONALS, ALLOCATE SAFETY AND OTHER PROJECT RESPONSIBILITIES IN ACCORD WITH ACTUAL PRACTICE AND FUNDAMENTAL PRINCIPLES OF CERTAINTY, TRANSPARENCY AND ACCOUNTABILITY.....	7
<i>The Architect’s Handbook of Professional Practice</i> , AIA (2008).....	7
<i>Managing Project Risk, Best Practices for Architects and Related Professionals</i> (Wiley 2008).....	8
City of Chicago Department of Buildings History < http://egov.cityofchicago.org >.....	8
American Institute of Architects, <i>AIA Guide to Chicago</i> , (2d. ed., 2004).....	8
Seth Stein, <i>When Safety Costs Too Much</i> , New York Times, January 10, 2004.....	8
Illinois Department of Transportation, Standard Specifications for Road and Bridge Construction, Art. 1004.02(f) < http://www.dot.state.il.us/desenv/stdspecs1.html >.....	8
<i>Best Practices for Architects and Related Professionals</i> , <i>supra</i> at 30-37.....	9
<i>The Architects Handbook of Professional Practice</i> , <i>supra</i> at 877.....	9, 10

II.	THE IMPOSITION OF EXPERT CREATED EXTRA-CONTRACTUAL DUTIES EXTENDING BEYOND THE SCOPE OF THE DESIGN PROFESSIONAL’S BARGAINED-FOR CONTRACT WILL UNDERMINE SAFETY AND HAVE A CHILLING EFFECT ON FUTURE CONSTRUCTION ACTIVITIES IN ILLINOIS.....	11
	Illinois Highway Code, 605 ILCS 5/4-101, <i>et. seq.</i>	12
	List of IDOT Construction Guides, Contractor Services, Manuals, Memoranda, Rules, etc. < http://www.idot.state.il.us.dobuisns.html >.....	12
	Table of Contents to IDOT’s Standard Specifications for Road and Bridge Construction.....	13
	ISTHA 2009 Annual Report.....	13
	Illinois Toll Highway Act, 605 ILCS 10/1, <i>et. seq.</i>	13
	ISTHA Traffic Barrier Guidelines.....	13
	Illinois Tollway Press Release, dated September 18, 2009.....	14
	<i>Miller v. Chicago Transit Authority</i> , 78 Ill.App.3d 375 (1st Dist. 1996).....	14
	<i>Amstar Corp. v. Aurora Fast Freight</i> , 141 Ill.App.3d 705 (3rd Dist. 1986)..	14
	Summary of OSHA’s role in workplace safety from < http://www.osha.gov/workers.html >.....	15
	29 U.S.C.A. 655.....	15
	<i>The Architects Handbook of Professional Practice</i> , <i>supra</i> at 372.....	17
III.	THE APPELLATE COURT’S DECISION IN THOMPSON HAS PROFOUND CONSTITUTIONAL IMPLICATIONS FOR ILLINOIS DESIGN PROFESSIONALS.....	18
	U.S. Const., Art. I, §10.....	18
	Ill. Const. 1970, Art. I, §16.....	18
	<i>First of America Bank, Rockford, N.A. v. Netsch</i> , 166 Ill.2d 165 (1995).....	18
	U.S. Const., Art. I, §2.....	18

U.S.C.A. Const. Amend 14.....	18
Ill. Const. 1970, Art. I, §2.....	18
<i>Lazenby v. Murk's Construction, Inc.</i> , 236 Ill.2d 83 (2010).....	18
CONCLUSION	19

INTRODUCTION

In *Thompson v. Gordon*, 398 Ill.App.3d 538, 923 N.E.2d 808 (2nd Dist. 2009), the Illinois Appellate Court held that the scope of an engineer's contractual, bargained-for duties potentially can be changed to include extra-contractual duties created by the opinions of an unlicensed, out-of-state expert witness in litigation. Here, the majority of the appellate court held that the plaintiff could blame an engineer before a jury for failing to redesign the median barrier of a bridge deck when the engineer did not agree to redesign the median barrier of the deck in the first place.

The appellate court's holding in *Thompson* contravenes the longstanding bedrock principle of construction law in Illinois, which provides that the scope of an engineer's and an architect's duty is defined by the terms of their contract. The appellate court failed to properly consider (i) that design and construction contracts, including those entered by architects and engineers ("design professionals"), allocate safety and other significant responsibilities in accordance with actual practice, the standard of care and fundamental principles of certainty, transparency and accountability and (ii) that judicial involvement with that process by allowing extra-contractual expert created duties to override the contractual scope of design professionals' duties has the potential of creating confusion in the design and construction permit process. Additionally, the decision potentially disrupts the insurability of projects because the definition of the project scope can become a moving target. The net effect is that the majority opinion of the appellate court undermines safety and has a chilling effect on construction activities.

The appellate decision conflicts with this Court's precedent, including *Ferentchak v. Village of Frankfort*, 105 Ill.2d 474 (1985), which holds that the scope of a design

professional's duty is defined by contract. Judicial or jury-created expansion of contractual duties for design professionals will have a profound impact on the ability of Illinois state agencies and municipalities to set, implement and enforce a uniform safety regimen of building codes and standards. Safety currently is addressed through comprehensive contract letting and approval processes, which includes such steps as verification of compliance with codes and standards on design plans related to public works projects, issuance of building permits and inspections by government officials before a structure can be opened to the public. Any alteration of the doctrine that contract scope defines duty will affect the use of contracts as the fundamental means by which the construction industry allocates responsibility for all significant project duties, including code compliance, construction permit compliance and other matters affecting public safety.

The circuit court's correct decision should be upheld by the Court. On balance, the public policy considerations in this case overwhelmingly favor reaffirming the established principle of Illinois law that a design professional's contractual scope controls its duty in tort. For these reasons, and for those set forth fully below, the Illinois Section of the American Society of Civil Engineers and the Association of Licensed Architects respectfully request that the Court reverse the decision of the appellate court and affirm the correct decision of the circuit court.

INTERESTS OF AMICI

The Illinois Section of the American Society of Civil Engineers (ASCE-IL), is the Illinois section of the American Society of Civil Engineers, a national professional society representing more than 144,000 members of the engineering profession, and the

United States' oldest national engineering society. App. Tab 1, at A1-A7. ASCE-IL's stated mission is to develop leadership, advance technology, advocate lifelong learning, and promote the civil engineering profession. *Id.*

Association of Licensed Architects (ALA), is an organization of architects and related professionals united to advance the profession of architects. App. Tab 2, at A8-A14. ALA has chapters in Illinois, Minnesota, Missouri, Ohio and Wisconsin. ALA's mission is to positively impact the architectural profession through education and by supporting and improving the profession's role in society. *Id.* ALA further develops and issues standard form contracts widely used throughout the construction industry. *Id.* ALA and its members strive to implement the best professional practices to all work within the construction industry and further promote safe design and construction through the construction contracting process. *Id.*

Interests. ASCE-IL and ALA offer unique and valuable insight regarding the obligations of design professional engineers and architects in the context of large and complex construction projects which are highly regulated at the federal, state and local levels. App. Tabs 1 and 2, at A1-A14. Indeed, construction projects operate under the microscope of the many governmental agencies that regulate their work. ASCE-IL and ALA are able to provide this Court with valuable insights concerning the significant implications of the design and construction contracting process underlying every construction project within the State of Illinois and how that contracting process is essential to accomplishing safe design and construction within the regulatory framework. Both ASCE-IL and ALA have unique knowledge because they have close and continuous contact with engineers and architects who practice in the field every day. *Id.* The issues

at stake in this case affect and concern the professional practice of engineering and architecture. *Id.* Both ASCE-IL and ALA seek to protect and foster the integrity of the professional practice of engineering and architecture in Illinois. *Id.* Thus, they seek to advance the underlying public policy of guarding and promoting the public health, safety and welfare. *Id.*

FACTS AND PROCEDURAL HISTORY

Defendants-Appellants, Jack E. Leisch & Associates and CH2M, Inc. (herein “the engineers or defendant-engineers”), performed roadway design work at the intersection of I-94 and State Route 132 (Grand Avenue) in Gurnee, Illinois. *Thompson*, 923 N.E.2d at 811. The engineers designed two ramps west of I-94 and a replacement bridge deck surface over I-94. *Id.* The bridge deck portion of the contract between the engineers and Western Development Corporation (“WDC”) stated that the engineers would provide WDC the following services:

A. Structural Design

Final structural design plans will be provided for deck replacement for the existing Grand Avenue bridge over I-94. Final structural design plans will also be prepared for a proposed overhead cantilever sign truss on eastbound Grand Avenue, west of Ramp B. *Id.*

The contract also contained a provision stating that “[t]he standard of care for [the engineers’] services will be the degree of skill and diligence normally employed by professional engineers or consultants performing the same or similar services.” *Id.*

The engineers proposed structural designs for the bridge deck replacement were accepted by WDC. The engineers completed their designs in April 1991. *Id.* The Illinois

Department of Transportation (“IDOT”) approved of the engineers’ proposed designs before IDOT issued a permit to allow construction work to begin. *Id.*

Seven years later, in November 1998, a vehicle traveling eastbound on State Route 132 (Grand Avenue) lost control, crossed the raised median, and collided with the westbound vehicle of the decedents, Trevor Thompson and Amber Thompson. *Thompson*, 923 N.E.2d at 811. Plaintiff filed suit alleging that the engineers caused the accident by negligently designing the bridge deck without the type of median barrier that would have prevented the eastbound vehicle from becoming airborne. *Id.*

The engineers filed a motion for summary judgment. *Id.* at 812. In response, plaintiff submitted the affidavit of plaintiff’s expert, Andrew Ramisch, a civil engineer unlicensed to practice in Illinois. *Id.* In his affidavit, plaintiff’s unlicensed expert stated that the standard of care required the engineers to consider, submit, and design a different median barrier. *Id.*

Following a hearing, the trial court granted defendant’s motion for summary judgment on the grounds that the contract “[did] not call for an assessment of the sufficiency of the median barrier” and “[did] not require the engineers to modify or redesign the road surface or the raised median,” but instead indicated that “[t]he road surface was to be removed and replaced by others without modification of the existing design.” *Id.* at 812. The trial court discounted the plaintiff’s expert’s opinion that the standard of care required consideration of a completely redesigned median barrier because the duties actually laid out in the contract - performed with the requisite care - did not include the study or redesign of a median barrier. *Id.* Plaintiff appealed pursuant to Illinois Supreme Court Rule 304(a). *Id.*

On appeal, two justices held that the plaintiff's expert's opinion was sufficient to create a question of fact as to the engineers' duty under the contract. *Thompson*, 923 N.E.2d at 815-818. The majority acknowledged that when an engineer is accused of negligence due to his or her failure to perform an act allegedly required by a contractual obligation, the existence of a duty will be determined by the terms of the contract, and the scope of the engineer's duty will not be extended beyond those terms. *Id.* The majority concluded, however, that plaintiff's unlicensed expert's opinion that the contractual standard of care provision required the engineers to completely redesign a new median barrier created a question of fact as to whether the engineers breached their duty under the contract. *Id.*

The dissent strongly disagreed with the majority, finding that the contractual standard-of-care provision applied only to the contractually described duties - providing structural designs for replacing the bridge deck. *Id.* at 820-821. The dissent stated that "if the parties wanted to place on the engineers a project-specific standard of care requiring them to redesign the bridge deck to include a jersey barrier...then the parties could have added that language to the contractual provision to reflect that." *Id.* at 824. The dissent maintained that examining the contract as a whole demonstrated that, absent a specific contractual commitment to do so, the contracting parties never contemplated requiring the engineers to redesign the bridge deck to include a jersey barrier. *Id.*

In a supplemental opinion denying the engineers' petition for rehearing, the majority repeated its conclusion that "we hold that there is at least a factual question as to whether [the engineers] owed a duty to investigate an improved median barrier." *Thompson*, 923 N.E.2d at 825. In a supplemental dissent, Justice Hutchinson noted that

the majority, “without stating that a duty exists, skips ahead to the element of breach and wonders whether [the engineers] might have breached their duty to replace the bridge deck by not contemplating and designing a jersey barrier even though, as the majority clearly stated, the only contractual task [the engineers] were obligated to perform was to provide designs to restore the bridge deck to its former condition.” *Id.* at 827. The supplemental dissent found the plaintiff’s unlicensed expert’s affidavit irrelevant because it did “not offer any indication as to whether [the engineers] failed to complete their contractual task of providing designs to replace the bridge deck with the degree of skill and diligence normally employed by a professional engineer.” *Id.* Rather, the “affidavit indicates only that a professional engineer would have gone beyond the terms of its contract” *Id.*

ARGUMENT

I. CONSTRUCTION CONTRACTS, INCLUDING THOSE DEFINING THE DUTIES OF DESIGN PROFESSIONALS, ALLOCATE SAFETY AND OTHER PROJECT RESPONSIBILITIES IN ACCORD WITH ACTUAL PRACTICE AND FUNDAMENTAL PRINCIPLES OF CERTAINTY, TRANSPARENCY AND ACCOUNTABILITY.

Frequently, numerous contractual relationships govern a construction project. *See The Architect’s Handbook of Professional Practice*, AIA at 825 (2008). The contracts commonly include (1) a professional services agreement between the project owner and an architect or engineer; (2) subconsultant agreements between design professionals and subconsultants for specialized design services; (3) a construction contract between the owner and a general contractor; (4) various construction subcontracts between the general contractor and subcontractors; (5) supply agreements and purchase orders for building materials and equipment to be installed; (6) labor agreements; (7) tool and equipment

leases; (8) bonds; and (9) numerous insurance policies. *See Id.* at 826-879. The terms of these contracts are all invariably essential to anticipate and address issues, problems and safety concerns that arise during project design and construction. *Id.* at 826

No area of business has more complex contractual arrangements than the design and construction industry. *See* James B. Atkins and Grant A. Simpson, *Managing Project Risk, Best Practices for Architects and Related Professionals* at 30 (Wiley 2008). The construction of roads, buildings and other structures in Illinois results from lengthy and difficult negotiations on responsibilities, fees and other arrangements between the parties. *See Id.* Illinois is a particularly unique jurisdiction for the work of design professionals because it is highly regulated. Illinois building codes and standards reflect a confluence of conditions that make Illinois different than just about any other state. For instance, the Chicago Building Code governs the construction, rehabilitation, and maintenance of approximately 450,000 structures located in the City of Chicago, including some of largest and most sophisticated buildings in the world. *See* City of Chicago Department of Buildings History <<http://egov.cityofchicago.org>>; *see generally* American Institute of Architects, *AIA Guide to Chicago*, (2d. ed., 2004). In addition, design plans for structures in southern Illinois incorporate design components to withstand the force of earthquakes that occur along the New Madrid seismic zone. *See* Seth Stein, *When Safety Costs Too Much*, New York Times, January 10, 2004, at A13. In fact, specific to this case, Illinois has adopted its own standards for road and bridge design that reflect the issues particular to Illinois such as expansion issues due to wide climate variations and seismic activities. *See* Illinois Department of Transportation, Standard Specifications for Road and Bridge

Construction, Art. 1004.02(f) <<http://www.dot.state.il.us/desenv/stdspecs1.html>>; *see also* Stein, *supra*.

Architects and engineers enter into contractual agreements with their clients to design and administer the construction phase of these building projects. *See Best Practices for Architects and Related Professionals, supra* at 30-37. Regardless of the project, the contract between the parties defines their respective duties and the parties rely on these contractual terms to determine the scope of their responsibilities. *Id.* On some projects, an owner may have the architect or engineer provide only preliminary conceptual designs and leaves to the contractor the more detailed drawings and responsibility for construction. *Id.* In such situations, the architect or engineer earns less, reflecting reduced responsibility. *Id.* Inferentially, therefore, the insurance for such an undertaking would be less. Other times, however, the owner retains the architect or engineer to perform more detailed design services, review shop drawings produced by the likes of structural engineers and inspect the contractor's work in an effort to detect deviations from the design. *Id.* The architect or engineer takes on more duties and, thus, commands a higher fee. *Id.* Such tasks also would call for more insurance and correspondingly, a higher premium. Indeed, it is always the terms of the contract between the parties that determine their respective duties.

Standard construction contract documents strive for balance and fairness by allocating risks and responsibilities:

- To the party best able to control them;
- To the party best able to protect against unexpected risk; or
- To the owner when no other party can control the risk or prevent the loss.

The Architects Handbook of Professional Practice, *supra* at 877. Form contract documents produced by organizations such as the ALA allocate design and construction responsibilities in a manner that is consistent with commonly accepted construction industry practices. *Id.* at 870-877. In particular, the construction contract:

- Sets forth the rights and obligations of the owner, contractor and design professional with respect to each other and to the work;
- Details the contractor's scope of work by incorporating the construction documents prepared by the architect;
- Determines the total amount that the owner will pay the design professional, contractor and others and when payments are to be made;
- Describes procedures that are to be followed in carrying out the work, including information the owner, design professional and contractor are to provide; and
- Identifies responsibility for construction means, methods, techniques, sequences or procedures and for safety precautions and programs in connection with a given project.

Id. at 869.

In short, a comprehensive set of coordinated project contracts is vital for any construction project because without such a system even basic issues such as who provides a given design cannot be answered. It is essential to the successful and safe execution of a construction project to establish *by contract* which party – be it owner, architect, engineer, other sub-specialist, general contractor, construction manager, or subcontractor - must (1) provide designs, (2) obtain building permits; (3) procure insurance and what kind of insurance; (4) obtain easements for access and staging of materials; (5) bear the risk of unforeseen subsurface conditions; (6) provide security; (7) dispose of hazardous substances that are discovered; (8) take responsibility for site safety; (9) review manufacturers' or subcontractors' shop drawings; (10) process or evaluate

change orders; (11) authorize payments; (12) respond to third-party lien claims; and (13) provide indemnification for claims and losses. The contracting process makes possible the allocation of the voluminous duties on a construction project. It provides the best available means to create certainty, transparency and accountability to accomplish a safe and successful construction project. The contracting process frequently can take many months to sort and balance the best practices for achieving a successful project.

II. THE IMPOSITION OF EXPERT CREATED EXTRA-CONTRACTUAL DUTIES EXTENDING BEYOND THE SCOPE OF THE DESIGN PROFESSIONAL'S BARGAINED-FOR CONTRACT WILL UNDERMINE SAFETY AND HAVE A CHILLING EFFECT ON FUTURE CONSTRUCTION ACTIVITIES IN ILLINOIS.

Based on their cumulative experience and knowledge of design and construction practices in the United States, the *amici curiae* present for the Court's consideration the foregoing fundamental principles of construction contracting that control and promote safety in design and construction. Architects and engineers as a profession are profoundly concerned about ensuring the safety of the general public and construction industry workers through a system in which responsibilities on construction projects are clearly defined. The construction contracting process whereby each party's scope of duty is set and known to all others involved, including those of the design professionals, is the best available method of meeting safety goals. The appellate majority opinion usurps this established, highly regulated process by allowing a jury to assign contract duties never before contemplated.

The *amici curiae* are concerned about the chilling effects that the appellate court's ruling could have on future public contracts and generally on the advancement of safe construction activities in Illinois. The State of Illinois and Illinois municipalities must

retain architects and engineers to design public works projects such as roads, dams, bridges and buildings and on such projects have the ability to define the scope of the project to accomplish its task, control costs, and obtain bids. At the same time, the design professional needs to be able to readily understand the defined scope of the work to provide an appropriate bid and fulfill the design services requested under the contract. Thus, pinpointing with particularity the scope of the project is a central task in negotiating every contract.

By way of example, in the current matter before the Court, the Illinois Department of Transportation (“IDOT”) reviewed and approved the engineers’ design plans as complying with all IDOT standards and specifications. *Thompson*, 923 N.E.2d at 811. Pursuant to the Illinois Highway Code (605 ILCS 5/4-101, *et. seq.*), IDOT has the responsibility to maintain public roadways in Illinois (other than toll roads) and this legal authority specifically includes the duties “to investigate and determine the various methods of highway construction adapted to different sections of the State and as to the best methods of maintenance of highways,” the letting of highway construction contracts and “to approve and determine the final plans, specifications and estimates” for all highway construction projects. *See* Illinois Highway Code Section 4-101, *et. seq.* at App. Tab 4, at A18-A22. To fulfill that purpose, IDOT has developed and issued comprehensive design and construction guidelines. *See* List of IDOT Construction Guides, Contractor Services, Manuals, Memoranda, Rules, etc. <<http://www.idot.state.il.us.dobuisns.html>> at App. Tab 3, at A15-A17. In particular, IDOT has issued comprehensive Standard Specifications for Road and Bridge Construction in Illinois. *See* Table of Contents to IDOT’s Standard Specifications for

Road and Bridge Construction pp. 1—1165 at App. Tab 5, at A23-A38.

Similar to IDOT, the Illinois State Toll Highway Authority (ISTHA) is responsible for the construction, operation and maintenance of Illinois toll roads. See ISTHA 2009 Annual Report at App. Tab 6, at A39-A54. Pursuant to the Toll Highway Act, ISTHA's purpose is "to promote the public welfare, and to facilitate vehicular traffic by providing convenient, safe, modern and limited access highways designed for the accommodation of the needs of the traveling public through and within the State of Illinois." See Illinois Toll Highway Act, 605 ILCS 10/1, *et. seq.* at App. Tab 7, at A55-A84. The Act directs ISTHA to ensure that their roads contain "the benefits of advanced engineering skill, design, experience and safety factors, to eliminate existing traffic hazards, and to prevent automotive injuries and fatalities." *Id.* As an example of this, ISTHA has developed a 103-page comprehensive set of Traffic Barrier Guidelines to control how median barriers are designed and constructed in Illinois. See ISTHA Traffic Barrier Guidelines at App. Tab 8, at A85-A188.

The implementation of IDOT's and ISTHA's system of comprehensive design and construction standards is accomplished through the contract letting and approval process. The process essentially mechanizes the incorporation of safety principles into construction, in this case being road construction. However, the *amici curiae* are deeply concerned that undermining the legal doctrine that contract defines the scope of duty of design professionals in the construction industry will impact adversely the ability of IDOT, ISTHA and other Illinois state agencies and municipalities to set, implement and enforce their uniform safety regimen of building codes and standards currently achieved through the contract letting and approval process. Opening the door to extra-contractual

expert created duties will subject design professionals to inconsistent standards and unknown obligations. In turn, this uncertainty in the contract letting and approval process meant to safeguard the citizens of Illinois will compromise the ability of design professionals to work effectively. The appellate majority decision results in bad public policy. The freedom to contract and to allocate risk and safety responsibility while complying with federal, state and local regulations is paramount. The majority decision upsets these carefully balanced considerations.

Indeed, the *amici curiae* invites this Court to take judicial notice of the fact that in 2009, the Grand Avenue (IL Route 132) Bridge over the Tri-State Tollway (I-94) was reconstructed and lengthened without incorporation of a four foot high Jersey median barrier included in the opinions of the plaintiff's unlicensed, out-of-state expert as being the required design. *See* Illinois Tollway Press Release dated, September 18, 2009, App. Tab 9, at A189 – A190; App. Tab 10, at A191 (photographs taken on June 29, 2010 by Counsel for *amici curiae* ASCE-IL and ALA of the median barrier installed as part of the recently reconstructed Grand Avenue Bridge at I-94); App. Tab 11, at A192 (yellow highlighted section of Design Plan Cover Sheet for the recently reconstructed “Grand Avenue Over I-94” dated May 2, 2008, subject to the Illinois Freedom of Information Act and showing that all of the IDOT and ISTHA codes and standards are included as part of the design and construction contract); *see also Miller v. Chicago Transit Authority*, 78 Ill.App.3d 375, 382 (1st Dist. 1996) (the court took judicial notice of the fact that there is more than a mile of subway platforms in Chicago); *See Amstar Corp. v. Aurora Fast Freight*, 141 Ill.App.3d 705, 711 (3rd Dist. 1986) (the court took judicial notice that the posted speed limit on the interstate at a given location was 55 mph).

Therefore, even today the plaintiff's unlicensed, out-of-state expert continues to opine about design standards inconsistent with those set by Illinois regulatory bodies. This certainly begs the question: which design standard should the design professional follow -- the one set pursuant to code and defined by contract or the inconsistent standard opined by plaintiff's unlicensed, out-of-state expert. The *amici curiae* submit that the only workable framework is one that provides for the legal codes and standards to be implemented through a defined process of contract letting and approval wherein the design professional's scope of duty is defined by contract.

This same scenario is observable in nearly every area of construction. The construction contracting documents are used, for example, to define the party responsible for worker safety at construction work sites under the Occupational Safety and Health Act ("OSHA"). See Summary of OSHA's role in workplace safety from <[http://www/osha.gov/workers.html](http://www.osha.gov/workers.html)> at App. Tab 12, at A193-A197 and the Congressional statement of findings and declaration of purpose and policy of OSHA under 29 U.S.C.A. 655 at App. Tab 13 at A198-A204. Further, the City of Chicago Department of Buildings uses a complex and comprehensive permitting and approval process to ensure safety through compliance with the City of Chicago Building Code. See Background documents on the role of the City of Chicago Department of Buildings and the permitting and approval process for building within the City of Chicago at App. Tab 14, at A205-A218 and Index to the City of Chicago Building Code at App. Tab 15, at A219-A221.

In all of the foregoing contexts, it is vital that Illinois courts continue to allow the contract to define the scope of duty of the design professional and others on a

construction project in order to ensure uniform compliance with safety codes and standards administered by federal, state and local public bodies. As shown above, the United States, the State of Illinois and local municipalities have passed laws to provide standardized guidelines for workplace safety and safe design and construction. The construction contracting process promotes the goals of these laws because defined contractual scope of work fosters certainty, transparency and accountability on complex construction projects. Strict adherence by this Court to the bedrock principle that contract controls the scope of duty of design professionals promotes sound public policy in Illinois.

Further, if the majority opinion stands, the potential liability flowing from designing or engineering a project will no longer be limited by the terms of the contract negotiated by the parties. Instead, the liability exposure may be unlimited, and certainly unpredictable. Years after the architect or engineer has satisfied his or her contractual obligations, an unrelated third party will be able to claim that the design professional could have broadened the design and that if he or she had done so an accident might not have occurred. Such speculation and alteration of responsibilities is harmful to the entire construction process.

The *amici curiae* believe that should the appellate court's majority opinion in *Thompson* be allowed to stand, the decision will shake the confidence of all participants involved in complex construction projects. As explained *supra* in Section I, there is a strong need for certainty, transparency and accountability in design and construction that is achieved through the construction contracting process. One of the principal purposes of the publication and use of standard construction contract documents such as those

issued by *amici curiae* ALA is to provide that predictability. If parties can no longer count on their bargained-for contractual expectations, it will result in an adverse and chilling effect on construction industry commerce in Illinois. The citizens of Illinois can ill afford such an outcome during these challenging economic times in housing and commercial construction.

Indeed, for architects and engineers the most devastating professional and business risks are almost always from litigation alleging negligence in the performance of professional services. *The Architects Handbook of Professional Practice, supra* at 372-380. A professional liability insurance policy absorbs a portion of such claims in exchange for the premiums paid to the insurance company. *Id.* The premium is calculated by an insurer's underwriter and based on such factors as the firm's practice, project mix, claims experience, coverage needs, and the resulting risks to the insurer. *Id.* Insurers increase the cost of insurance if risks cannot be clearly delineated. *Id.* Thus, if an architect's or engineer's scope of duty can no longer be defined by the terms of his or her contract, the architect's or engineer's liability for potential claims may be unlimited and unpredictable and thereby cause insurance costs to become unaffordable. Accordingly, in order to keep insurance costs under control, design professionals must be able to provide specific and unambiguous information regarding their scope of duty as defined by contract. Design professionals will be unable to do that if the majority opinion of the appellate court stands.

III. THE APPELLATE COURT'S DECISION IN *THOMPSON* HAS PROFOUND CONSTITUTIONAL IMPLICATIONS FOR ILLINOIS DESIGN PROFESSIONALS.

The *amici curiae* are further deeply concerned about the significant infringement upon the constitutional rights of Illinois design professionals that will occur should this Court permit the majority decision of the appellate court in *Thompson* to stand. Both the United States Constitution (U.S. Const., Art. I, §10) and the Illinois Constitution (Ill. Const. 1970, Art. I, §16) prohibit any law that retroactively impairs contract rights. See *First of America Bank, Rockford, N.A. v. Netsch*, 166 Ill.2d 165, 185 (1995). In this case, the majority of the appellate court is effectively renegotiating the contract of the engineers by permitting a jury to imply into their professional services contract extra-contractual, expert created duties that do not otherwise exist. In the view of the *amici curiae*, a change in the law that permits such a fundamental rewriting of a design professional's bargained-for contractual scope of duty violates the design professional's constitutionally protected right to freedom of contract.

Further, a retroactive change in the law that imposes a new duty is prohibited as a violation of the due process clause of the United States Constitution (U.S. Const., Art. I, §2; U.S.C.A. Const. Amend 14) and the Illinois Constitution (Ill. Const. 1970, Art. I, §2). See *Lazenby v. Murk's Construction, Inc.*, 236 Ill.2d 83, 98 (2010). Imposing a new duty upon design professionals - in this case now nearly 20 years after the engineers entered into their professional service contract - is inherently unfair. In the view of the *amici curiae*, it violates all consideration of proper due process. Overall, the imposition of new duties many years after the fact is against public policy because it will unlock a flood of tort litigation against design professionals and others in the construction industry that


currently hold a vested and constitutionally protected right against being sued upon duties which they did not accept under contract.

CONCLUSION

For these reasons, ASCE-IL and ALA as *amici curiae* respectfully request that the Court consider their position in support of appellants Jack E. Leisch and Associates, Inc. and CH2M Hill, Inc., reverse the appellate court's decision and affirm the correct decision of the circuit court.

Respectfully submitted,

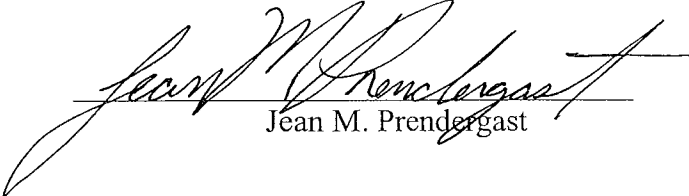
THE ILLINOIS SECTION OF THE
AMERICAN SOCIETY OF CIVIL
ENGINEERS AND
THE ASSOCIATION OF
LICENSED ARCHITECTS

By: 

Jeffrey T. Kubes
Jean M. Prendergast
Michael J. Faley
SCHUYLER, ROCHE & CRISHAM, P.C.
130 E. Randolph Street, Suite 3800
Chicago, Illinois 60601
(312) 565-2400
Doc: 735242.1

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Illinois Supreme Court Rules 341(a) and (b). The length of this brief, excluding appendix is 19 pages.


Jean M. Prendergast