

Design Professional's Standard of Care: Keep it Based on Negligence

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Two distinct issues are presented when a design professional (DP) is sued for negligent performance. The first issue is whether the design professional owed any duty of care to the claimant at all. If so, then the second question is whether it's the design professional's obligation by performing its services consistent with the applicable professional standard of care.

What is the Professional Standard of Care?

The common law standard of care for performance of professional services is generally defined as the ordinary and reasonable care usually exercised by one in that profession, on the same type of project, at the same time and in the same place, under similar circumstances and conditions. Perfect performance is not required by the common law. A recent court decision in the case of *Cain v. Aquidneck Consulting Engineers, LLC*, (C.A. No. NC-2014-0228, Rhode Island Superior Court 2016) provides description of the standard of care. The court quoted from other decisions stating:

"[I]n the absence of a special agreement [a design professional] does not imply or guarantee a perfect plan or satisfactory result." Klein v. Catalano, 437 N.E.2d 514, 525 (Mass. 1982) (first alteration in original) (internal citations omitted) (quoting Mississippi Meadows, Inc. v. Hodson, 299 N.E.2d 359 (Ill. App. Ct. 1973)). Indeed, "[a]n engineer, or any other so-called professional, does not 'warrant' his service or the tangible evidence of his skill to be 'merchantable' or 'fit for an intended use.' . . . Rather, . . . the engineer or architect 'warrants' that he will or has exercised his skill according to a certain standard of care, that he acted reasonably and without neglect." Bd. of Managers of Park Point at Wheeling Condo. Ass'n v. Park Point at Wheeling, LLC, --- N.E.3d ---, 2015 IL App (1st) 123452, ¶ 18 (Ill. App. Ct. 2015) (quoting Kemper Architects, P.C. v. McFall, Konkell & Kimball Consulting Engineers, Inc., 843 P.2d 1178, 1186 (Wyo. 1992)).

Design professionals are not expected, or legally required, to be perfect. But failure to meet the generally accepted standard of care is deemed to be negligence. Professional liability insurance policies are intended to provide coverage to protect the design professional against claims arising out of its negligent performance. Thus, the negligent act, error or omission is covered by insurance.

Applying the Standard of Care to Judge the Services

In the *Cain v. Aquidneck* case, the engineer specified the use of a waterproof beam system, called Wolmanized Parallel Strand Lumber (PSL) for home deck project. The contract did not include responsibility for construction phase professional services. The

construction contractor chose to use beams that were not pressure treated or otherwise waterproofed. Those beams eventually rotted.

In a lawsuit against the designer for negligence, breach of contract and breach of warranty, the court granted summary judgment to the design professional, finding that the designer had no responsibility for the substitution of the product by the contractor and no duty and no actions or omissions by which he might be found to violated the professional standard of care. As stated by court, “That a [contractor] over whom [Engineer] had no control chose to undertake a course of action wholly different from which the [designer] suggested, does not create liability for [the engineer].”

The court concluded that it “is aware of no case that exposes a design professional to an implied warranty on his work.” And the court found no express warranty in the contract language.

Use of Expert Testimony

Expert testimony is necessary to prove what the Standard of Care is and that a design professional failed to meet that standard. In the case of *Jordan’s Furniture, Inc. v. Carter & Burgess, Inc.*, 87 N.E. 3d 1201 (Mass. App. 2017), and expert opined that damage to a concrete floor resulted from faults in design, specifically that the engineer had miscalculated what was needed for the structural integrity of the floor. The trial court awarded plaintiff compensatory damages based on negligence but declined to find breach of contract, breach of warranty, or an obligation to pay attorney’s fees pursuant to an indemnification clause.

On appeal, the appellate court held that the plaintiff could not recover for breach of contract or warranty because those counts were merely duplicative of the negligence count, and moreover, the alleged breach of contract was based on “heightened standard of care” that essentially required compliance with the generally accepted standard of care and nothing beyond that standard. With regard to the warranty claim, the appellate court stated that the plaintiff could not maintain an express warranty claim unless the engineer had “expressly promised a certain, specific result,” and the court found no such promise was made in this case.

Relying on the expert report, the trial judge found the floor was “inadequate for its intended use, and negligently designed, with the concentrated demand of the stockpicker exceeding the capacity of the floor as designed.” According to the trial judge, this failure to “adequately evaluate the [effects] of the use of the stockpicker on the floor... constituted a deviation from the exercise of reasonable care required of members of the engineering profession engaged in commercial facilities.” The court awarded (as was affirmed on appeal) compensatory damages in the amount of the cost of the repairs but declined to award damages for breach of contract or warranty, and declined to apply the indemnification clause to award attorney’s fees.

The allegation of “heightened standard of care” was apparently based on what the court called a “brief reference to ‘retail and movie theatre space.’” It is not uncommon to see the description of the standard of care state that it will be based on the standard of care generally applied by design professionals designing similar facilities – and then list things like, hospitals, stadiums, parking garages, or whatever is specifically be designed. The court is stating that the standard of care is not heightened merely by identifying the specific type of building to which the standard will be applied.

Elevating the Standard: Creating an Uninsurable Warranty

An architect may be liable for failure of design to comply with fire code requirements even if it met the generally accepted standard of care if it agreed to contract language stating it would comply with the Standard of Care AND would comply with code requirements. In *School Board of Broward County v. Pierce Goodwin Alexander & Linville*, 2014 WL 1031461 (Fla. App., 4th Dist, 2014), the school board sued its architect to recover its increased construction costs to construct a third-floor balcony to have an emergency exit in case of fire, which was mandated by the fire marshal, a school board alleged that the designer breached its contractual obligation to provide a design consistent with code. The architect’s defense that it met the standard of care in its interpretation of what was required by code was rejected by the court, which found that the contract held the architect to both a generally accepted standard of care, plus a separate duty to design to code.

The standard of care paragraph of the contract stated that the architect would comply with the “customary professional standards currently practiced by firms in Florida AND in compliance with any and all applicable codes, laws, ordinances, etc.” The appellate court held that compliance with code was separate and apart from the normal standard of care requirements.

The appellate court concluded that the generally accepted standard of care had been “heightened” by three provisions of the contract:

“2.1.3 As to all services provided to this Agreement, the Project Consultant [the architect] shall furnish services by experienced personnel and under the supervision of experienced professionals licensed in Florida and shall exercise a degree of care and diligence in the performance of these services in accordance with the customary professional standards currently practiced by firms in Florida **and in compliance with any and all applicable codes, laws, ordinances, etc....**”

2.1.4 As to any drawings, plans, specifications or other documents or materials provided or prepared by Project Consultant or its Sub-Consultants, the Project Consultant agrees same **shall: ... Comply with all applicable laws**, statutes, rules and regulations,

building codes and Owner's [the school board] guidelines and regulations, which apply to or govern the Project ...

2.1.5 All professional design services and associated products or instruments of those services provided by the Project Consultant shall:

.1 Be in accordance with all applicable codes, laws, and regulations of any governmental entity, including, but not limited to, [list of regulatory entities] with the Owner serving as the interpreter of the intent and meaning of ... any other applicable code[.]”
(emphasis added).

The appellate court concluded that although Article 2.1.3 described a generally accepted standard of care as being the applicable standard by which the designer would be judged, Article 2.1.4 added another requirement over and above that. Specifically, Article 2.1.4 mandated compliance with all applicable laws and codes and did not make such compliance subject to the standard of care provision. In other words, code compliance was a separate requirement that the designer agreed to without any limitation.

In addition, the court concluded that even within the Article 2.1.3 standard of care clause, there were two separate requirements, one being to meet the standard of care but the other being “AND in compliance with any and all applicable codes, laws, ordinances, etc...”

If the designer intended that compliance with code be subject to reasonable efforts pursuant to the generally accepted standard of care, it needed to more accurately write the clause to state that intent. By the placement of the word “and,” the court concluded compliance with code was a requirement additional to what was required by meeting the standard of care.

Conclusion

The decisions discussed in this article explain the generally accepted standard of care applicable to design professionals and demonstrate the importance of being careful in contract language to avoid agreeing to warrant specific results such as code compliance. In agreeing to meet specific requirements such as those required by codes, it is prudent to agree only to exercise the Standard of Care to comply with those requirements.