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The Necessity of Expert Testimony in Establishing the Standard of Care for Design Professionals

Eugene J. Farrug*

Architects and engineers who work in the construction industry have become increasingly popular targets for lawsuits. This increased exposure is due in part to the expansion of tort liability among all professions. However, developments specifically expanding the duties of design professionals and

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1. In 1976, almost 30% of insured architectural or engineering firms were sued for malpractice. N.Y. Times, Feb. 12, 1978, § 1, at 1, col. 1. "In 1985, there were 44 claims filed for every 100 insured architecture firms: 'This justifies the architect's fear that, regardless of the quality of his practice, there is a 50-50 chance he will be sued.'" From Bauhaus to Courthouse, 13 BARRISTER 24 (1986) (quoting A. Abramowitz, Associate General Counsel, American Institute of Architects). This increase in potential malpractice liability has resulted in a corresponding increase in insurance premiums. See M. LUNCH, Forward to Architect and Engineer Liability: Claims Against Design Professionals (T. Bottum & R. Cushman eds. 1987) (insurance premiums increased 80% between 1980 and 1985 while architecture and engineering firms paid a larger part of their gross income for insurance in 1987 than just a few years earlier—from 2-3% to 5.6%). See also Abramowitz, Professional Liability from the Architect's Perspective, 17 GUIDELINES FOR IMPROVING PRACTICE, No. 3, at 1, 2 (1987) ("Between 1984 and 1985, the number of insurance companies offering design professional liability coverage nationwide shrank from 13 to 2."); Coleman, Insurance Requirements in Construction Contract—General Conditions as an Element of Professional Negligence, 23 St. Louis U.L.J. 264, 268 (1979) (general contractors' insurance carriers generally refuse to issue riders naming design professionals as additional insured parties due to their increasing liability).

2. See, e.g., Pelham v. Griesheimer, 92 Ill. 2d 13, 21, 440 N.E.2d 96, 100 (1982) (third-party non-client may assert malpractice claim against attorney when client intends attorney's efforts to directly benefit third party); Davis v. Weiskopf, 108 Ill. App. 3d 505, 510-12, 439 N.E.2d 60, 64-65 (2d Dist. 1982) (plaintiff may recover against physician who failed to warn of serious knee injury even though defendant never treated nor medically advised plaintiff).


3. For the purposes of this article "design professional" means an architect or an engineer who designs or supervises construction projects. While there are other types of design professionals who may be sued for professional negligence, the overwhelming majority of cases involve
the range of people to whom those duties are owed are the primary reasons for the surge in the number of these suits. As design professionals' liability has increased, it has triggered questions regarding the appropriate scope of liability and, correspondingly, the methods of establishing such liability.

Most actions against design professionals are brought pursuant to a standard negligence theory. In a negligence action, defining the duty of care owed by the design professional is critical to the plaintiff's ability to recover. What is considered relevant evidence of this duty, however, differs from jurisdiction to jurisdiction. Some courts, applying rules which govern medical and legal malpractice actions, require the plaintiff to present expert testimony to establish the standard of care owed by the defendant. Illinois courts, those operating in the construction industry. However, the observations and conclusions drawn regarding these design professionals apply equally to all design professionals providing similar services.

Illinois statutes define three types of design professionals: architects, professional engineers, and structural engineers. "An architect is a person who is qualified by education, training, experience, and examination, and who is registered under the laws of this State to practice architecture." Ill. Rev. Stat. ch. 111, para. 1204 (1983). "Professional engineering is . . . a profession in which a knowledge of the mathematical and natural sciences gained by study, experience and practice, is applied with judgment to the materials and forces of nature in the economical planning and design of engineering works, systems or devices for the benefit of mankind." Ill. Rev. Stat. ch. 111, para. 5104 (1983). A structural engineer is one "who is engaged in the designing or supervising of the construction, enlargement or alteration of structures, or any part thereof, for others, to be constructed by persons other than himself." Ill. Rev. Stat. ch. 111, para. 6502 (1983).

See also Crisham, Liability of Architects and Engineers to Third Parties, 26 Fed'n. Ins. Couns. Q. 177, 177 (Spring 1976) ("While philosophical distinctions can be drawn between the meanings of the terms professional engineer and professional architect it is difficult to find recognition of distinctions in court decisions . . . [Nevertheless], the legislatures of most states continue to distinguish between the two."); Lurie & Stein, Injured Workmen: Loss Allocation Among the Direct Participants in the Construction Process, 23 St. Louis U.L.J. 292, 295 (1979) (design professionals' duties "fall within any one of the following three categories or a combination thereof: design, design and inspection, and construction supervision and management"); Mills, The Design Professional—An Unlikely Defendant Under the Illinois Structural Work Act, 23 St. Louis U.L.J. 317, 317 (1979) (design professionals are architects and engineers).

6. See, e.g., Civit v. Robert & Co. Assocs., 112 Ga. App. 163, 144 S.E.2d 450 (1965). "By analogy with other cases in which recovery has been sought against persons for their negligence in performing skilled services, it was necessary here that plaintiffs establish the standard of care applicable to defendant by the introduction of expert opinion evidence. If this standard was not established by the necessary proof, the trial court was justified in the grant of nonsuit." Id. at 167, 144 S.E.2d at 454 (citations omitted). Most courts adopting the rule have also incorporated the "common knowledge exception," which requires no expert testimony as to the defendant's standard of care where the fact finder's own knowledge is sufficient to recognize a deviation from the accepted standard of care. See, e.g., Seaman Unified School
however, have resisted this trend, and have declined to require such testimony as part of a plaintiff's prima facie case.\footnote{Dist. v. Casson Constr. Co., 3 Kan. App. 2d 289, 594 P.2d 241 (1979).}

The rule may assume the form of a jury instruction requiring the jury to use expert testimony to determine the defendant's standard of care. See, e.g., Paxton v. Alameda County, 119 Cal. App. 2d 393, 259 P.2d 934 (1953).


The Eighth Circuit of the United States Court of Appeals has also required expert testimony where questions relating to the alleged negligence of an architect were beyond the comprehension of laymen. See, e.g., Aetna Ins. Co. v. Hellmuth, Obata & Kakssbaum, Inc., 392 F.2d 472 (8th Cir. 1968) (applying Missouri law requiring expert testimony in medical malpractice actions to negligence claim against architect). The Eighth Circuit later applied the rule to architectural malpractice actions based on South Dakota law. See Jaeger v. Henningson, Durham & Richardson, Inc., 714 F.2d 773 (8th Cir. 1983) (citing Aetna Ins. Co. v. Helmhut, Obata & Kakssbaum, Inc., 392 F.2d 472 (8th Cir. 1968)); Bartak v. Bell-Galyardt & Wells, Inc., 629 F.2d 523 (8th Cir. 1980) (same). The Seventh Circuit, applying Illinois law, similarly applied the general rule to a negligence action against an architect. See Chicago College of Osteopathic Medicine v. George A. Fuller Co., 719 F.2d 1335 (7th Cir. 1983).

The Supreme Court of Arkansas explicitly refused to require expert testimony as to a design professional's standard of care. Hill Construction Co. v. Bragg, 291 Ark. 382, 725 S.W.2d 538 (1987). The court gave no rationale for its holding, stating only that the rule "applies only to physicians, surgeons, and dentists." Id. at 390, 725 S.W.2d at 543. A Florida appellate court refused to require the plaintiff to establish an engineer's standard of care through expert
This article will examine how the Illinois courts have defined the standard of care for design professionals. By exploring the rationale underlying the use of expert testimony in other professional negligence contexts, this article will demonstrate the need for expert testimony in establishing the standard of care in an action involving a design professional. The purpose of the article is to highlight the unfairness to the design professional where expert testimony is not required. In such cases, the architect or engineer is subject to an ever-changing standard of care, devised by fact finders who lack the professional training and skill necessary to discern appropriate professional standards. Indeed, under current Illinois law, an architect or engineer may meet the standards set by the design profession, but may nonetheless be found liable by a jury unaware that the professional standard has been satisfied. Requiring plaintiffs to present expert testimony as to the relevant standard of care will prevent such inequity, and allow architects and engineers to attain their true professional status before the court.

I. THE DESIGN PROFESSIONAL'S EXPOSURE TO LIABILITY

The design professional is exposed to three basic types of liability: breach of contract, negligence in design, and negligence in supervision. An action based in contract, however, differs little from an action for negligence because a contract for architectural services contains a duty based in tort law, an implied promise to exercise the ordinary and reasonable skill of the profession where the plaintiff had proven defendant's violation of a state regulation. Henry v. Britt, 220 So. 2d 917 (Fla. Dist. Ct. App. 1969). Because the regulation established the minimum standard design for safety, violation of the regulation was prima facie evidence of negligence. Thus, requiring expert testimony might have improperly exonerated the defendant. Id. at 920.

7. The most recent Illinois court to address the issue stopped short of explicitly rejecting application of the rule requiring expert testimony, and instead relied on an exception to the general rule where negligence is apparent to a layman. See Fence Rail Develop. v. Nelson & Assoc., 174 Ill. App. 3d 94, 528 N.E.2d 344 (2d Dist. 1988). See also infra text accompanying notes 56-72.

A Seventh Circuit panel has interpreted Illinois' general rule requiring expert testimony as to a physician's standard of care to apply to a negligence claim against an architect. Chicago College of Osteopathic Medicine v. George A. Fuller Co., 719 F.2d 1335 (7th Cir. 1983).

8. See generally Note, Architectural Malpractice: A Contract-Based Approach, 92 Harv. L. Rev. 1075, 1089, 1094 (1979) [hereinafter Note, Architectural Malpractice] (architects may be liable in contract to the contractor or client, and to job site workers or the general public for injuries due to "negligent design or breach of a duty of supervision"). See also Crisham, Liability of Architects and Engineers to Third Parties, Fed'n Ins. Couns. Q. 178, 184 (Spring 1976) (architect may be liable to those in contractual privity and those injured by negligent design or supervision); Peck & Hock, Engineer's Liability, 23 Trial 42, 46 (Feb. 1987) (engineer may be liable for a contractual breach or for negligence to workers and bystanders); Note, The Architect's Tort Liability For Personal Injury, 17 Drake L. Rev. 242, 254 (1968) (architect may be liable for negligent design or for breach of a contractual or common-law duty to supervise).
If the contract documents do not define a standard of care applicable to this duty, then the court usually applies the tort standard of reasonable care. Thus, defining the standard of care is essential even when suing a design professional for a contractual breach.

The standard of reasonable care also applies to the design professional in actions for negligent design or supervision. Until recently, however, the doctrine of privity prevented such actions by anyone not a party to the contract. Since the fall of the privity defense, the design professional has

9. See, e.g., Mississippi Meadows, Inc. v. Hodson, 13 Ill. App. 3d 24, 26, 299 N.E.2d 359, 361 (3d Dist. 1973) ("The duty of an architect depends upon the particular agreement he has entered with the person who employs him and in the absence of a special agreement . . . he is only liable if he fails to exercise reasonable care and skill"), appeal denied, 54 Ill. 2d 597 (1973); Miller v. DeWitt, 59 Ill. App. 2d 38, 208 N.E.2d 249, 284 (4th Dist. 1965), aff'd in part, rev'd in part on other grounds, 37 Ill. 2d 273, 226 N.E.2d 630 (1967) ("The architects in contracting for their services implied . . . that they would exercise and apply in the case their skill, ability and judgment reasonably and without neglect."). See also J. SWEET, LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING AND THE CONSTRUCTION PROCESS 838-39 (2d ed. 1977) (because the professional standard is one of reasonableness, client may treat contract breach as a tort); Note, Architectural Malpractice, supra note 8, at 1089 (suit brought in contract similar to one brought in tort because "contract interpretation is infected with tort standard of reasonable care") (citations omitted).

10. The design professional's tort standard of reasonable care was enunciated in Coombs v. Beede, 89 Me. 187, 36 A. 104 (1896). In a widely followed decision the Supreme Court of Maine said:

The responsibility resting on an architect is essentially the same as that which rests upon the lawyer to his client, or upon the physician to his patient, or which rests upon anyone to another where such person pretends to possess some special skill and ability in some special employment, and offers his services to the public on account of his fitness to act in the line of business for which he may be employed. The undertaking of an architect implies that he possesses skill and ability, including taste, sufficient enough to enable him to perform the required services at least ordinarily and reasonably well; and that he will exercise and apply, in the given case, his skill and ability, his judgement and taste reasonably and without neglect.

Id. at 188, 36 A. at 104-05.


Illinois applied the doctrine of privity not only to independent contractors, but also to suppliers of chattels. E.g., Watts v. Bacon & VanBuskirk, 18 Ill. 2d 226, 231-32, 163 N.E.2d 425, 428 (1959) (glass supplier not liable to third parties injured by its product unless the product was inherently dangerous or defectively made). The severity of the privity doctrine, however, brought exceptions. For example, in Davidson v. Montgomery Ward & Co., 171 Ill. App. 355 (1st Dist. 1912), the court carved out three exceptions to the privity requirement: 1) where manufacturer or vendor acts negligently with respect to an inherently dangerous article; 2) where a land owner's negligence causes injury to an invitee on the premises; and 3) where
become liable to potentially anyone lawfully on the property who is injured due to the design professional's failure to exercise the ordinary skills of his profession. Although courts have expanded the design professional's lia-

one sells or delivers an inherently dangerous product without giving notice of its danger. Id. at 364. In 1916, the privity defense was held inapplicable to a manufacturer's liability for the negligent design of chattels. See MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916). In MacPherson, Judge Cardozo stated that a manufacturer who marketed an inherently dangerous product, which was defectively made, was liable to anyone who foreseeably might use that product. Id. at 389, 111 N.E. at 1054. The Illinois Supreme Court expressly rejected the general rule of non-liability in Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965). There, the court declared the general Illinois rule that a manufacturer may be liable for injuries to third persons not in privity with him and that such liability is governed by the rules governing any action in negligence. 32 Ill. 2d at 616-17, 210 N.E.2d at 185.

The doctrine remained effective in construction law after it was rejected in other contexts. See Comment, The Supervising Architect: His Liabilities and His Remedies When a Worker is Injured, 64 N.W. U.L. Rev. 535, 538-48 (1969) [hereinafter Comment, Supervising Architect's Liabilities]. The landmark case rejecting the privity defense within the construction industry is Inman v. Binghamton Housing Auth., 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957). The architect in Inman designed a porch without a railing. A child fell from the porch and was injured. The court held that the foreseeability test applied to architects and that injured persons no longer needed to show contractual privity in order to recover. Id. at 146, 143 N.E.2d at 899, 164 N.Y.S.2d at 705. Illinois more recently rejected the privity defense for design professionals, and adopted the foreseeability test. See infra text accompanying notes 29-35. The privity defense, however, is generally no obstacle in actions against design professionals brought by sureties, contractors, subcontractors or third parties. See Block, As the Walls Came Tumbling Down: Architects' Expanded Liability Under Design-Build/Construction Contracting, 17 J. MARSHALL L. REV. 1, 5-6 (1984) (listing cases).

13. The design professional owes a duty to those members of the general public who can be reasonably anticipated to be present in the structure. See Laukkanen v. Jewel Tea Co., 78 Ill. App. 2d 153, 161, 222 N.E.2d 584, 588 (4th Dist. 1966). See also infra text accompanying notes 29-35. The Illinois legislature attempted to protect design professionals by limiting the time period during which one can sue those designing real estate improvements for damage to persons or property arising out of defective and unsafe conditions. ILL. REV. STAT. ch. 83, para. 24(f) (1965). This statute placed a four-year limitation on any such action against architects and contractors while excluding all other possible defendants. The Illinois Supreme Court struck down the statute of limitations in Skinner v. Anderson, 38 Ill. 2d 455, 231 N.E.2d 588 (1967). The court found that the statute granted special and exclusive immunities to architects and contractors and therefore violated article 4 of the Illinois Constitution. Id. at 459, 231 N.E.2d at 590.

The legislature rewrote the statute in 1983. The amended statute stated that any action based on negligence "in the design, planning, supervision, observation or management of construction . . . shall be commenced within two years from the time the person bringing an action . . . knew or should reasonably have known" of such negligence. ILL. REV. STAT. ch. 110, para. 13-214(a) (1983). The statute barred all actions not brought within twelve years of the date of the alleged negligent act. ILL. REV. STAT. ch. 110, para 13-214(b). The Illinois Supreme Court upheld the statute as a reasonable classification by the General Assembly, and thus it did not constitute "special legislation" prohibited by the state constitution. People ex rel. Skinner v. Hellmuth, Obata & Kassabaum, Inc., 114 Ill. 2d 252, 500 N.E.2d 34 (1986). The court noted with approval that the statute classifies not on the basis of status but on the activities performed. Id. at 261-62, 500 N.E.2d at 37-38. The court also noted that the legislature traditionally enacted statutes of limitations which vary as to the activity and the cause of action involved and that such classification was neither unreasonable nor arbitrary. Id. at 263, 500 N.E.2d at 38.
bility to extend to all persons who foreseeably may be on the premises, they have almost universally refused to apply concepts of strict liability and warranty. Therefore, design professionals, like attorneys and physicians, are liable to anyone injured when their conduct falls below the professional standard of reasonable conduct. However, unlike attorneys and physicians, the nature of the design professional's work creates potential liability to a far greater number of people.

A. Expert Testimony and the Professional Standard of Care

Generally, in order to establish a prima facie case of ordinary negligence, a plaintiff must initially show that the defendant owed a duty of care to the plaintiff, and that the defendant breached that duty. The plaintiff establishes a breach by showing that the defendant's conduct fell below that of a reasonably careful person. To this end the plaintiff elicits proof as to the standard of care that a "reasonable man" would have exhibited had he been in the defendant's shoes at the time of the alleged negligence.

However, in a negligence or malpractice action against a professional, a standard of care different from that of a layman is applied. The professional is held to a standard which comports with the learning, skill and care ordinarily associated with and practiced by those professionals who practice in the same region as the defendant professional at the time of the alleged negligence. Courts often require a plaintiff to present expert testimony in order to establish this professional standard of care, and the resulting breach. The exception to this rule arises where the negligence of a professional is so obvious that it is easily recognized by the average juror.


15. See, e.g., Bates & Rogers Construction Corp. v. North Shore Sanitary Dist., 92 Ill. App. 3d 90, 414 N.E.2d 1274 (2d Dist. 1980) (engineers did not warrant the accuracy of plans and specifications but owed only a duty of reasonable care to contractor); Mississippi Meadows, Inc. v. Hodson, 13 Ill. App. 3d 24, 299 N.E.2d 359 (3d Dist.) (absent special contractual provision, architect "does not imply or guarantee a perfect plan or satisfactory result"), appeal denied, 54 Ill. 2d 597 (1973).

16. Suits against physicians and attorneys are generally limited to their clients and patients. A design professional, however, may be sued by any member of the public who is injured in or around the building. See infra text accompanying notes 29-35.


19. Id.

20. See PROSSER AND KEETON ON TORTS ch. 5, § 32 (5th ed. 1984)(discussing higher standard of care required of those with special skills including professionals).


22. See, e.g., House v. Maddox, 46 Ill. App. 3d 68, 72-73, 360 N.E.2d 580, 584 (1st Dist. 1977) (attorney's failure to file lawsuit prior to running of statute of limitations indicated such
Where courts have required expert testimony, it has been deemed essential for two reasons. First, professional procedures, such as those involved in law and medicine, may be too complex for jurors to understand. Thus, a jury would have difficulty even discerning the standard with which the professional must comply. Second, the law distinguishes between errors in professional judgment and negligence. While a plaintiff may suffer an injury due to an error in the professional’s judgment, this exercise of judgment may be within an acceptable range of decisions and within the standard of care for that profession. For example, the expert testimony of a physician that he would have pursued a course of action different from that chosen by the defendant physician neither establishes nor supports an inference of negligence.

Thus, the use of an expert not only facilitates a greater understanding of the case in the minds of jurors, it also protects the professional from the imposition of liability merely because his efforts culminated in what his client and the jury perceive as a bad result. Although the requirement of expert testimony rule is well established in the areas of medical and legal malpractice, design professionals in Illinois do not enjoy the same protection.

B. Illinois Law Regarding Design Professionals

Liability for design professionals in Illinois has undergone dramatic changes in the last quarter century. Specifically, two decisions in the mid-1960's expanded the legal duties of design professionals and, correspondingly, the range of people to whom those duties are owed. The first of these two decisions, Laukkanen v. Jewel Tea Co., abolished the privity requirement

obvious malpractice that expert testimony not necessary); City of Urbandale v. Frevert-Ramsey-Kobes, Architects-Engineers, Inc., 454 N.W.2d 400 (Iowa Ct. App. 1988) (evidence of blisters in roof and streaks down walls constituted such obvious negligence of engineer that expert testimony was unnecessary).

23. Cf. Schmidt v. Hinshaw, Culbertson, Moelmann, Hoban & Fuller, 75 Ill. App. 3d 516, 523, 394 N.E.2d 559, 564 (1st Dist. 1979) (expert testimony necessary in order to explain complexities in drafting complex, multi-document purchase and sale agreement regarding sale of a business); Scardina v. Colletti, 63 Ill. App. 2d 481, 488, 211 N.E.2d 762, 764 (1st Dist. 1965) (evidence indicating that plaintiff suffered post-operative internal bleeding does not by itself establish lack of skill or proper care on the part of the operating physician).

24. Brainerd v. Kates, 68 Ill. App. 3d 781, 786, 386 N.E.2d 586, 590 (1st Dist. 1979) (failure of defendant attorney to accurately ascertain date which triggered the running of time period for filing notice of appeal did not amount to professional malpractice).

25. Walski v. Tiesenga, 72 Ill. 2d 249, 261, 381 N.E.2d 279, 285 (1978). The rationale behind this rule is that a professional is expected to exercise a certain level of judgement, and because medicine is an inexact science, a physician may exercise due care by merely opting for a particular procedure within an established framework. Id.

26. Scardina v. Colletti, 63 Ill. App. 2d 481, 488, 211 N.E.2d 762, 766 (1st Dist. 1965) (evidence indicating that plaintiff suffered post-operative internal bleeding does not by itself establish lack of skill or proper care on the part of the operating physician).

DESIGN PROFESSIONALS’ LIABILITY

for plaintiffs suing negligent design professionals. Shortly thereafter, the Illinois Supreme Court, in *Miller v. DeWitt*, expanded the supervisory duties of design professionals. These two decisions both diminished the contract’s importance in defining the design professional’s scope of liability, and elevated tort liability to its new prominence in this area.

The Illinois appellate court, in *Laukkanen*, rejected the defendants’ privity defense to a negligence action, thereby enlarging the class of persons to whom design professionals owe a duty. The plaintiff in *Laukkanen* was struck and injured by a concrete block pylon as she entered a building designed by the defendant engineers. The court rejected the defendants’ contention that their duty of care extended only to the contractual parties. Instead, the court determined that the engineers owed a duty to those “who can be reasonably anticipated to be present in the structure they designed.” Following the lead of New York’s highest court, the Illinois appellate court increased the scope of liability for design professionals.

The *Laukkanen* court also explored the standard of care to which a design professional is held. The court stated: “[I]iability rests only on unskillfulness or negligence, and not upon mere errors of judgment . . .” The question of the defendant’s design negligence was described as one of fact and, consequently, an issue for the jury. Although the court relied on expert

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29. 78 Ill. App. 2d at 161, 222 N.E.2d at 588. “Negligence which proximately causes injury will require the negligent actor to respond in damages for the harm suffered, where the injury is foreseeable, regardless of the prior relationship of the parties.” Id. at 162, 222 N.E.2d at 589.

30. Id. at 157, 222 N.E.2d at 586. The plaintiff attempted to enter the building, a retail grocery store, during a severe thunderstorm. She was rendered a paraplegic from the falling pylon. Id.

31. Id. at 161, 222 N.E.2d at 588.


33. 78 Ill. App. 2d at 161, 222 N.E.2d at 588. (quoting 5 AM Ju R 2d Architects § 23, at 686-87). The professional negligence standard of care for architects and engineers has been compared to the duty owed by physicians and other professionals. See, e.g., Rosos Litho Supply Corp. v. Hansen, 123 Ill. App. 3d 290, 462 N.E.2d 566 (1984).

Those who employ [architects] perceive their skills and abilities to rise above the levels possessed by ordinary laymen. Such persons have the right to expect that architects, as other professionals, possess a standard minimum of special knowledge and ability, will exercise that degree of care and skill as may be reasonable under the circumstances and, when they fail to do so, that they will be subject to damage actions for professional negligence, as are other professionals.

*Id.* at 295, 462 N.E.2d at 571. See also Chicago College of Osteopathic Medicine v. George A. Fuller Co., 719 F.2d 1335, 1345 (7th Cir. 1983) (approving jury instruction defining architects' standard of care which was patterned after Illinois Pattern Jury Instruction for medical profession).

34. 78 Ill. App. 3d at 163, 222 N.E.2d at 588 (quoting 5 AM Jur 2d Architects § 23, at 686-87).
testimony in deciding that the evidence addressed at trial was sufficient to support a jury verdict against the defendants, it did not rule that such testimony was necessary for a prima facie case in negligence.

In Miller v. DeWitt, the Illinois Supreme Court defined and expanded the supervisory duties of the design professional. There, employees of a contractor sued the defendant architects, who were responsible for supervising the construction, for damages due to injuries suffered as a result of a roof collapse. The plaintiffs claimed that the defendants had breached their duty to supervise the construction of the building to insure compliance with the contractual specifications.

The Miller court relied on the contract between the architect and the contractor to impose liability. The court noted that the terms of the contract between the owner-architect and the owner-contractor gave the supervisory architects the right to stop any unsafe work practices which violated the contracts. Although the supervisory architects had no duty to specify work methods, they had a contractual right to insist upon safe methods. From this right the court found an implicit "corresponding duty" to stop the work until the construction conditions had been made safer.

35. Id. at 158-59, 222 N.E.2d at 587-88. An expert witness for the plaintiff, for example, testified that the winds which caused the concrete block pylon to fall were within the range of winds to be expected in the area of the building. Id.


37. Id.

38. Id. The owner-architect contract included among the architects' duties "the general administration of the construction contracts and supervision of the work" id. at 75, 208 N.E.2d at 267, and "general supervision and direction of the work," and gave the architects the authority to "stop the work whenever such stoppage may be necessary to insure the proper execution of the contract." Id. at 80, 208 N.E.2d at 269. The owner-contractor agreement provided that the contractor "shall take all necessary precautions for the safety of employees on the work." Id.

39. Id. at 281, 226 N.E.2d at 638. The supreme court stated that the architect's failure to stop the work and make the contractor add extra shoring, even though he had no authority to specify such work methods, could have led the jury to find the architect negligent. Id. at 284, 226 N.E.2d at 639.

40. Id. "If the architects knew or in the exercise of reasonable care should have known that the shoring was inadequate and unsafe, they had the right and the corresponding duty to stop the work until the unsafe condition had been remedied." Id. The Miller court's transformation of a right into a duty has been roundly criticized. See, e.g., Comment, Supervising Architect's Liabilities, supra note 12, at 546-48 (Miller decision is oversimplified and failed to consider policy implications); Note, The Crumbling Tower of Architectural Immunity: Evolution and Expansion of the Liability to Third Parties, 45 OHIO ST. L.J. 217, 242 (1984) (imposing duty upon architect to protect workers from unsafe work conditions results in liability greater than that contemplated by contractual parties). The Illinois Supreme Court later returned to the issue of an architect's duty to supervise when deciding whether an architect was a person "having charge of" a construction site under Illinois statute. In McGovern v. Standish, 65 Ill. 2d 54, 357 N.E.2d 1134 (1976), the court held that an architect sued by an injured construction worker under the Illinois Structural Work Act was not liable because the architect did not have a duty to supervise construction methods. The contract terms were similar to those in Miller,
that breach of this duty constituted both negligence under common law principles and negligence per se by its violation of the Structural Work Act.\textsuperscript{41} Furthermore, the court accepted the parties' stipulation that the architects could be held liable to those who foreseeably may be injured by their negligence, regardless of privity.\textsuperscript{42}

In his dissent, Justice House opposed the majority's interpretation of the contract as embodying a duty which, in his view, the parties had not contemplated.\textsuperscript{43} The duty to inspect is generally interpreted as a means to facilitate the architect's duty to the owner, and the architect only undertakes this duty to insure that the work is completed according to the plans and specifications.\textsuperscript{44} Therefore, according to the dissent, this duty should not except that the architect did not have the right to direct or control construction methods. \textit{Id.} at 63, 357 N.E.2d at 1138-39. "Indeed . . . the defendant's function was limited to generally overseeing the work in an effort to ensure that the completed project conformed with the plans and specifications." \textit{Id.} at 69, 357 N.E.2d at 1142. \textit{See generally} Mills, \textit{supra} note 3, at 324-30 (tracking Illinois Supreme Court decisions on architects' liability under the Structural Work Act).

\textsuperscript{41} 37 II. 2d at 286, 226 N.E.2d at 639. The supreme court adopted the lower court's reasoning in affirming the statutory violation. \textit{Id. See also} Miller, 59 Ill. App. 2d 38, 123-28, 208 N.E.2d 249, 289-91 (4th Dist. 1965) (construing \textit{ILL. REV. STAT.} ch. 48, paras. 60-69 (1981)). The lower court stated that it was not necessary that there be a reckless disregard of the Structural Work Act provisions. Rather, a party may become liable if the dangerous condition is known to him or, by the exercise of reasonable care, he could have discovered the dangerous condition. \textit{Id.} at 125, 208 N.E.2d at 290. The Structural Work Act, \textit{ILL. REV. STAT.} ch. 48, paras. 60-69 (1981), also called the Scaffolding Act, provides for the protection and safety of persons in and about the construction of buildings, bridges, viaducts and other structures. The statute provides workers in extrahazardous occupations with a safe place to work and should be liberally construed to achieve that end. Halberstadt v. Harris Trust & Savings Bank, 55 Ill. 2d 121, 127, 302 N.E.2d 64, 67 (1973); Claffy v. Chicago Dock & Canal Co., 249 Ill. 210, 218-19, 94 N.E. 551, 553-54 (1911).

Section 1 of the Act provides:

\begin{quote}
That all scaffolds, hoists, cranes, stays, ladders, supports, or other mechanical contrivances, erected or constructed by any person, firm or corporation in this State for the use in the erection, repairing, alteration, removal or painting of any house, building, bridge, viaduct, or other structure, shall be erected and constructed in a safe, suitable and proper manner . . . .
\end{quote}

\textit{ILL. REV. STAT.} ch. 48, para. 60 (1981).

Section 9, the enforcement section of the Act, provides that:

\begin{quote}
Any owner, contractor, sub-contractor, foreman or other person having charge of the erection, construction, repairing, alteration, removal or painting of any building, bridge, viaduct or other structure within the provisions of this act, shall comply with all terms thereof . . . .
\end{quote}


\textsuperscript{42} 37 Ill. 2d at 283, 226 N.E.2d at 637.

\textsuperscript{43} 37 Ill. 2d at 292-94, 226 N.E. 2d at 642-43 (House, J., dissenting). The contract specifically disclaimed any guarantee of the contractor's performance. \textit{Id.} at 293, 226 N.E.2d at 642.

\textsuperscript{44} \textit{Id.} at 284, 226 N.E.2d at 638. The \textit{Miller} majority, however, found that the architect had contracted for an increased duty to inspect when the contract between the owner and the contractor was read in conjunction with the contract between the owner and the architect. \textit{Id.}
extend to the general public. Furthermore, Justice House contended that the duty created by the *Miller* majority was not contemplated by the contracting parties and was inconsistent with general usage in the architectural profession. Finally, the dissent concluded that imposing a greater supervisory duty on architects would interfere with the traditional roles of the architect.

45. *Id.* at 293-94, 226 N.E.2d at 642-43 (House, J., dissenting). The duty to supervise the work is generally taken as a duty to see that the building, when constructed, meets the plans and specifications contracted for by the owner. *Day v. National United States Radiator Corp.*, 241 La. 288, 304-05, 128 So. 2d 660, 666 (1961). Standard legal forms between owner and architect appear to limit the architect’s duty to inspecting for compliance with contract specifications. See 27 *West’s Legal Forms* § 10.201(4) (2d ed. 1986) (“The Architect shall thereafter supervise the construction through to completion with thoroughness and fidelity and it shall be his responsibility to see to it that all contract requirements shall be fully complied with.”). See also *Block*, *supra* note 2, at 9-10 (discussing American Institute of Architects owner-architect form contract that seeks to limit architect’s liability).


It has been suggested that the underlying motive for the *Miller* decision was the court’s desire to circumvent the limited recovery available to injured workmen from their employer under workmen’s compensation statutes. See, e.g., *Note, Miller v. DeWitt: Architect’s Liability for Failure to Supervise Contractor’s Methods*, 72 DICK. L. REV. 506, 518-19 (1968). Worker’s compensation statutes set a fixed ceiling on compensation for injuries. The worker recovers regardless of negligence or fault; and the worker’s contributory negligence does not affect the amount of compensation. In return for the guaranteed recovery, the worker relinquishes any right to sue his employer. See, e.g., *ILL. REV. STAT. ch. 48, para. 138, 138.30* (1981). For a general discussion of worker’s compensation laws, see A. LARSON, *THE LAW OF WORKMEN’S COMPENSATION* (1964). Often the recovery ceiling inadequately compensates for the severity of the injury, thus the worker looks to sue someone other than his employer. *See Comment, Up Against the Wall, Master Builder: The Architect’s Legal Status*, 23 Srv. Louis U.L.J. 384, 407-08 (1979).

However, legislative revision of worker’s compensation statutes represents an easier and more specific remedy than allowing suits against design professionals. *Id.* For example, the Oklahoma legislature recently enacted a statute requiring the general contractor to carry worker’s compensation insurance on every public work’s project and to name the architect and engineer as additional insured parties. *See OKLA. STAT. tit. 61, § 113.B.4* (1986). *See also KAN. STAT. ANN. § 44-501(f)* (1986) (no construction design professional shall be liable for any injury compensable under the worker’s compensation statute which results from the employer’s failure to comply with safety standards, unless the contract specifically assigns safety responsibility to the design professional).
DESIGN PROFESSIONALS' LIABILITY

Since Laukkanen and Miller, Illinois courts have grappled with clarifying the standard of care for design professionals under these expanded duties. Because a design professional's duty is measured by the ordinary and reasonable skill of those in the profession, the role of expert testimony in defining that standard has often been at issue. For example, the plaintiff's failure to define the defendant's standard of care was one basis for reversal of a jury verdict in Mississippi Meadows, Inc. v. Hodson. There, a contractor sued the architect for the alleged failure of the architect's building design to conform to existing topography and local building regulations. The court, however, noted the plaintiff's lack of evidence that the architect violated the local building code and also noted the lack of expert testimony regarding the appropriate standards concerning the architect's plans. Because the evidence was insufficient to support a finding of negligence, the appellate court reversed the jury verdict.

Similarly, expert testimony was crucial to the appellate court's affirmance of a negligence finding in Society of Mt. Carmel v. Fox. There, architects and engineers for both plaintiff and defendant testified as to the relevant standard of care for architects at the time of design and construction. The appellate court described the negligence issue as "a classic battle of the experts" and upheld the trial court's judgment for the plaintiffs.

While Illinois courts have frequently relied on expert testimony in measuring the sufficiency of evidence establishing the negligence of design professionals, they have declined to require plaintiffs to present such evidence to establish the relevant standard of care. The question of whether expert testimony is required is still a matter of debate. In Mississippi Meadows, Inc. v. Hodson, the court noted that the plaintiff's lack of evidence concerning the appropriate standards concerning the architect's plans was a basis for reversal of the jury verdict. In Society of Mt. Carmel v. Fox, the appellate court upheld the trial court's judgment for the plaintiffs based on expert testimony.

46. 37 Ill. 2d at 294, 226 N.E.2d at 643 (House, J., dissenting). Justice House also predicted that the greater supervisory duty imposed upon architects would create an "unnecessary and unwarranted financial burden upon the public without a commensurate benefit." Id.
49. Id. at 28, 299 N.E.2d at 363.
50. Id. at 27-28, 299 N.E.2d at 362-63. The court seemed to be saying that the lack of expert testimony doomed the plaintiff's case, but they did not explicitly instruct the jury that such testimony was required. Id.
51. Id. at 30, 299 N.E.2d at 364.
52. 90 Ill. App. 3d 537, 413 N.E.2d 480 (2d Dist 1980).
53. Id. at 540-41, 413 N.E.2d at 483-84.
54. Id. at 542, 413 N.E.2d at 484.
55. Id. at 542-43, 413 N.E.2d at 485. The court stated that other evidence introduced at trial did not conclusively establish a standard nor did it conclusively support the experts' testimony. However, the trial court's decision was not against the manifest weight of evidence. 90 Ill. App. 3d at 542, 413 N.E.2d at 485.
56. See, e.g., Miller v. DeWitt, 59 Ill. App. 2d 38, 108 N.E.2d 249 (4th Dist. 1965), rev'd on other grounds, 37 Ill. 2d 273, 226 N.E.2d 630 (1967). Although the expert witnesses were
testimony was essential to a prima facie case arose in Rosos Litho Supply Corp. v. Hansen. In Rosos Litho, the defendant-architect contended that the plaintiff's failure to present expert testimony constituted a failure to establish the standard of care. The defendant analogized to the need for expert testimony in cases involving attorney and physician negligence, and referred to other jurisdictions which require expert testimony for design professionals. The appellate court, however, stated that the standard of care was sufficiently established by the evidence, and noted that prior Illinois decisions have defined an architect's duty by reference to the particular employment contract. The Rothos Litho court relied on expert testimony to uphold the trial verdict, but refused to require such testimony as an element of a plaintiff's case.

The issue of the necessity of experts to the prima facie case arose once again in Fence Rail Development Corp. v. Nelson & Assoc. Once again, the court refused to require the use of expert testimony to establish the design professional's standard of care. Once again, the court refused to require the use of expert testimony to establish the design professional's standard of care, but, identified a broad exception to the need for experts all architects, the trial court refused the defendants' proposed instruction requiring the jurors to base the standard of care only on expert testimony. The appellate court found the trial court's refusal to give the proposed instruction proper because Illinois law did not require expert testimony to establish a malpractice action against a design professional. 59 Ill. App. 2d at 134, 208 N.E.2d at 294. The supreme court summarily dismissed the defendants' argument for the jury instruction and found the appellate court's decision on that subject to be "adequate and correct." 37 I1. 2d at 287, 226 N.E.2d at 639.

57. 123 Ill. App. 3d 290, 462 N.E.2d 566 (1st Dist. 1984). The plaintiff in Rosos Litho sued the defendant-architect for the faulty construction of a storage building addition to the plaintiff's existing structure. The jury found the architect and two other defendants guilty of negligence but found no breach of contract. Id.

58. 123 Ill. App. 3d at 298-99, 462 N.E.2d at 573.

59. Id. See, e.g., Walski v. Tiesenga, 72 Ill. 2d 249, 381 N.E.2d 279 (1978) (plaintiff alleging medical malpractice may not recover in absence of expert testimony); Brown v. Gitlin, 19 Ill. App. 3d 1018, 313 N.E.2d 180 (1974) ("the standard of care against which an [attorney's] actions are measured must be based on expert testimony").


61. 123 Ill. App. 3d at 299, 462 N.E.2d at 573 (citing Bates & Rogers Construction Corp. v. North Shore Sanitary Dist., 92 Ill. App. 3d 90, 414 N.E.2d 1274 (1981)). See also Mississippi Meadows, Inc. v. Hodson, 13 Ill. App. 3d 24, 299 N.E.2d 359 (3d Dist 1973). The Rosas Litho court ruled that the standard of care was established by provisions in the contract and by the trial testimony of architects and engineers. Hansen's own testimony, the court noted, proved that he knew of the problem and his failure to correct it could lead the jury to infer that he was negligent. Id. at 299-300, 462 N.E.2d at 574.

62. 123 Ill. App. 3d at 299-300, 462 N.E. 2d at 574.

in professional negligence cases. There, a builder sued an architect for the defendant's alleged negligence in supplying incorrect house foundation plans. The contract called for plans based on a "Georgian" style house, however, the architect delivered plans for a "Brookside" home.

The court declined to require expert testimony stating that "[i]t does not take a degree in architecture to determine the error." In doing so, the court implicitly relied on the "common knowledge" exception of the expert testimony requirement in professional negligence cases, to justify its holding. The court noted that under this exception, if the error was such an apparent breach of duty that a layman would have no difficulty in appraising it, then expert testimony was not required.

In both Fence Rail and Rosos Litho, the Illinois courts declined to require that the standard of care be established by expert testimony, and instead relied on the contract to establish this element of the case. However, reliance on the contract for this purpose is inappropriate. The contract merely defines the general tasks that the design professional agrees to perform for the owner and is inappropriate as an embodiment of the duties owed to third parties. While the contract may define what the design professional has agreed to design or what construction he has agreed to supervise, it does not define the level of skill with which the design professional must complete these tasks. It is only after these contractual duties are defined, that the design

64. Id. at 99, 528 N.E.2d at 347. See also Chicago College of Osteopathic Medicine v. George A. Fuller Co., 719 F.2d 1335 (7th Cir. 1983) (in action based on diversity jurisdiction, federal court interpreted Illinois law as requiring expert testimony to prove architect's negligence except where case requires only common sense or involves gross negligence). The Seventh Circuit panel, however, could cite no Illinois case applying the rule to design professionals. It merely cited generally to Walski v. Tiesenga, 72 Ill. 2d 249, 256, 381 N.E.2d 279, 285 (1978), which required expert testimony to establish a physician's standard of care, and to other jurisdictions applying the rule to design professionals. 719 F.2d at 1346.

65. Id. at 96, 528 N.E.2d at 345.

66. Id. at 98-99, 528 N.E.2d at 347. The court relied on Rosos Litho Supply Corp. v. Hansen, 123 Ill. App. 3d 290, 462 N.E.2d 566 (1st Dist. 1984), and defined the architect's duty by referring to the particular employment contract. Id. at 99, 528 N.E.2d at 347.

67. Id. at 99, 528 N.E.2d at 347. "Defendant cites Schmidt but ignores the comment in Schmidt where the court explains that where professional negligence is so grossly apparent that a layman would have no difficulty in appraising it as where the record discloses such an obvious, explicit, and undisputed breach of duty, expert testimony would not be required." Id. (citing Schmidt v. Hinshaw, Culbertson, Moelmann, Hoban & Fuller, 75 Ill. App. 3d 516, 394 N.E.2d 559 (1979)). See also Chicago College of Osteopathic Medicine v. George A. Fuller Co., 719 F.2d 1335, 1346 (7th Cir. 1983) (upholding in contractor's diversity jurisdiction suit against architect; a jury instruction based on Illinois pattern instruction for medical malpractice actions, requiring expert testimony as to architect's standard of care). See infra note 86 and accompanying text (discussion of the common knowledge exception to the rule requiring expert testimony).


69. See Fence Rail, 174 Ill. App. 3d at 98-99, 528 N.E.2d at 347; Rosos Litho, 123 Ill. App. 3d at 299, 462 N.E.2d at 573.
professional owes a general duty to use reasonable care in performing the contract.\textsuperscript{70}

The standard of reasonableness is analogous to the professional standard of care for physicians and attorneys.\textsuperscript{71} Not surprisingly, courts which have required expert testimony to establish a design professional's standard of care have referred to the similar rule for professional negligence actions against physicians and attorneys.\textsuperscript{72} The reasons for requiring expert testimony in such malpractice actions, as well as the history and evolution of expert testimony in general, support the need in Illinois for a similar rule in actions against design professionals.

II. THE CASE FOR EXPERT TESTIMONY

A. History and Evolution of Expert Testimony

Prior to the emergence of trial by independent jury, courts utilized the experience of experts in deciding issues beyond their understanding.\textsuperscript{73} One method common law courts employed, involved the use of a special jury which collectively possessed expertise relating to the particular case before the court.\textsuperscript{74} Another method evolved after courts had begun using live witness testimony as a means of factfinding.\textsuperscript{75} Here, a court lacking expertise with respect to a particular issue incident to the case before it, utilized an expert to augment their understanding of the matter.\textsuperscript{76} However, this second practice

\textsuperscript{70} See, e.g., Mississippi Meadows, Inc. v. Hodson, 13 Ill. App. 3d 24, 26, 299 N.E.2d 359, 361 (3d Dist.) ("The duty of an architect depends upon the particular agreement he has entered with the person who employs him and in the absence of a special agreement . . . he is only liable if he fails to exercise reasonable care and skill"); \textit{appeal denied}, 54 Ill. 2d 597 (1973); Miller v. DeWitt, 59 Ill. App. 2d 38, 111, 208 N.E.2d 249, 284 (4th Dist. 1965) ("The architects in contracting for their services implied . . . that they would exercise and apply in the case their skill, ability and judgment reasonably and without neglect."); \textit{aff'd in part, rev'd in part on other grounds}, 37 Ill. 2d 273, 226 N.E.2d 630 (1967).

\textsuperscript{71} See supra note 2 (comparing duties of design professional to lawyers and physicians).

\textsuperscript{72} See, e.g., Crockett v. Crothers, 264 Md. 222, 285 A.2d 612 (1972) (applying general rule in professional malpractice actions requiring expert testimony to establish standard of care in action against contractor).

\textsuperscript{73} See Hand, \textit{Historical and Practical Considerations Regarding Expert Testimony}, 15 \textit{Harv. L. Rev.} 40 (1901). The use of some forms of expert testimony has been discovered in cases dating back to the thirteenth century. \textit{Id.} at 41 n.2. It was not until the early seventeenth century that courts began using juries which were independent in the sense that the jurors had no prior personal knowledge of the circumstances concerning the case before the court. Ladd, \textit{Expert Testimony}, 5 \textit{Vand. L. Rev.} 414, 414-15 (1952).

\textsuperscript{74} See Hand, supra note 73, at 40-42.

\textsuperscript{75} See C. \textsc{McCOMICK} on \textit{EVIDENCE} 725 (3d ed. 1984). "Though something like the jury existed at least as early as the 1100's th[e] practice of hearing witnesses in court [d[id] not become frequent until the later 1400's." \textit{Id.} (footnote omitted). Prior to the middle of the fifteenth century, when juries began summoning witnesses, jurors shouldered the responsibility of informing themselves of the facts in the given case before them. \textit{See Hand, supra note 71, at 44}.

\textsuperscript{76} See Hand, supra note 73, at 42-43 (court summoned "masters of grammar" to help it interpret documents drafted in Latin).
is distinguishable from the modern use of expert testimony. In the former, prevalent when the trial system was inquisitorial, the court itself summoned the expert and generally deferred to his or her conclusions. In the modern adversarial trial system, each party presents an expert whose opinions and conclusions support his position on the issue. The parties themselves control the information which is presented at trial.

As the adversarial system developed, the practice of presenting evidence through live witness testimony became more prevalent. Consequently, courts designed evidentiary rules to protect jurors from misleading testimony. The two most important rules which developed were the opinion and hearsay rules. Both opinion and hearsay testimony are considered inherently untrustworthy. The opinion rule generally precludes a witness from testifying as to her own subjective conclusions. The witness' role is that of informing the jury of what they knew rather than what they thought. The system vests the authority to draw conclusions solely in the trier of fact. Similarly, the hearsay rule precludes a witness from repeating, through testimony, an out of court statement made by another.

Expert testimony necessarily involves a certain amount of opinion, and has long been regarded as an exception to the rule prohibiting opinion testimony. This exception is justified because the expert's opinion is thought to be grounded in a foundation of expertise regarding the matter at issue. Moreover, although experts often rely upon out-of-court statements which, if submitted would violate the hearsay rule, courts often regard such statements as more trustworthy than the typical hearsay statement, and have allowed their use.

B. The Need For Expert Testimony in Cases Against Design Professionals

Scientific and technological advances have led to increased complexity in the methods of proof presented at trial; this has in turn resulted in a

77. See Ladd, supra note 73, at 414-15 (discussing issues incident to the transformation from the inquisitorial to the adversarial trial system).
78. Id. at 415.
79. Id. (citations omitted).
80. Id.
81. Id.
82. See Ladd, supra note 73, at 415.
83. See, e.g., Mima Queen v. Hepburn, 11 U.S. (7 Cranch) 290 (1813) (witness testimony about out-of-court statement by another regarding plaintiff's emancipation from slavery was inadmissible hearsay).
84. Hand, supra note 73, at 50. See also Ladd, supra note 73, at 417. Expert testimony is sometimes regarded as an exception to the opinion rule. Id. This exception is based upon the inability of the trier of fact to resolve certain issues without hearing from persons with special skills, experience or scientific knowledge. Id.
85. See generally McCormick supra note 75, at § 244. The federal rules of evidence currently contain so many exceptions to the hearsay rule that the exceptions may have effectively swallowed the rule. See Cleary & Graham's Handbook on Illinois Evidence Art. VIII (4th ed. 1984).
correspondingly greater need for expert testimony. As the use of experts has increased, courts have adopted rules concerning their qualifications, and the basis and scope of their testimony to ensure that the information

86. See, e.g., Carlson, Policing the Bases of Modern Expert Testimony, 39 Vand. L. Rev. 577, 578 (1986) (expanding many scientific . . . specialties allows for more sources of testimony); Special Project, Legal Rights and Issues Surrounding Conception, Pregnancy, and Birth, 39 Vand. L. Rev. 597, 604 (1986) ("The courts also have a duty to confront the impact of medical technology on the law. Judges have applied old common law rules to modern prenatal tort cases even though the modern fact situation could not have been contemplated when the rules were developed decades or centuries earlier.").

87. Illinois Supreme Court Rule 220(a)(1) serves as an example of an expert qualification rule:

An expert is a person who, because of education, training or experience possesses knowledge of a specialized nature beyond that of the average person on a factual matter material to a claim or defense in pending litigation and who may be expected to render an opinion within his expertise at trial. He may be an employee of a party, a party or an independent contractor.

88. In Wilson v. Clark, 84 Ill. 2d 186, 195, 417 N.E.2d 1322, 1327 (1981), cert. denied, the Illinois Supreme Court adopted Federal Rule of Evidence 703 to determine the basis for expert testimony. The Rule provides, "The facts or data . . . upon which an expert bases his opinion . . . may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions . . . upon the subject, the facts or data need not be admissible in evidence." Fed. R. Evid. 703. In allowing physician expert testimony which was based upon hospital records not admitted into evidence, the Wilson Court looked to the Advisory Committee's Note, which indicates: "The courts also have a duty to confront the impact of medical technology on the law. Judges have applied old common law rules to modern prenatal tort cases even though the modern fact situation could not have been contemplated when the rules were developed decades or centuries earlier.").

89. The court also adopted Rule 705, which provides that the "expert may testify in terms of opinion or inference and give his reason therefore without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination." Fed. R. Evid. 705. "The advisory committee's note to Rule 705 allows an expert opinion without disclosure of underlying facts whether the opinion is based on firsthand or secondhand information." Wilson, 84 Ill. 2d at 194, 417 N.E.2d at 1327. See also Melecosky v. McCarthy Bros. Co., 115 Ill. 2d 209, 503 N.E.2d 355 (1987)(relying on Advisory Committee Notes to Federal Rules of Evidence 703 and 705, and upholding wide trial court discretion regarding admissibility); Carlson, supra note 86, at 577 (discussing Federal Rule 703, its requisites of admissibility, and calling for restrictions on wholesale admissibility of underlying data based on hearsay rule and sixth amendment confrontation right); Stalmack & Switzer, Wilson v. Clark and its Progeny: The Application of Federal Rules 703 and 705 in Illinois, 67 Chi. B. Rev. 4 (1985)(surveying Illinois decisions
presented to the jury satisfies a modicum of authenticity. The expert's utility in this type of case is to bridge the gap between the common experience of the average juror and the complexities of science and technology. In some cases the testimony presented by an expert is not merely useful but critical if the jury is to truly understand the issues in the case before it.

The two rationales which underlie the requirement of expert testimony in legal and medical malpractice actions equally support the use of expert testimony in actions against design professionals. First, just as the complexity of medical and legal procedures often necessitate expert testimony to facilitate the jurors' understanding of the case, the technical aspects of design work

that apply the rules).

Presently, twenty-five states have adopted Federal Rule of Evidence 703 without change, six states have adopted it with some changes, and one—Ohio—has adopted an inconsistent rule. See 3 WEINSTEIN supra note 87, para 703[05], 703[40-50]. Twenty-two states have adopted rules identical to Federal Rule of Evidence 705 (or adopted with change of "court" to "judge"), seven states have adopted rules with varying degrees of similarity, and three states have adopted inconsistent rules. Id. at para. 705[03].

89. For example, Illinois Supreme Court Rule 220(d) concerns the scope of expert testimony and provides in part:

To the extent that the facts known or opinions held by an expert have been developed in discovery proceedings through interrogatories, deposition or requests to produce, his direct testimony at trial may not be inconsistent with nor go beyond the fair scope of the facts known or opinions disclosed in such discovery proceedings. However, he shall not be prevented from testifying as to facts or opinions on matters regarding which inquiry was not made in the discovery proceedings. Ill. Rev. Stat. ch. 110A, para. 220(d) (1987).

90. Courts generally allow expert testimony when the expert will appreciably help the jury understand the particular subject at hand. Merchant's Nat'l Bank of Aurora v. Elgin, J.& E.Ry., 49 Ill. 2d 118, 121, 273 N.E.2d 809, 811 (1971) (unlike accident "reconstruction" cases, where expert testimony is necessary because of lack of eyewitnesses, expert's opinion as to hazard posed by railroad grade crossing was admissible because it was helpful to the jury); Leonard v. Pitstick Dairy Lake & Park, Inc., 124 Ill. App. 3d 580, 464 N.E.2d 644 (3d Dist. 1984) (relying on helpfulness standard of Fed. Rule Evid. 702 in ruling expert's testimony regarding diving accident admissible).

"[T]he trend is to permit expert testimony in matters which are complicated and outside the knowledge or understanding of the average person, and even as to matters of common knowledge and understanding where difficult of comprehension and explanation. The jury may still accept or reject such testimony." Miller v. Pillsbury, 33 Ill. 2d 514, 516, 211 N.E. 2d 733, 734 (1965), quoted with approval in, People v. Albanese, 104 Ill. 2d 504, 518, 473 N.E.2d 1246, 1251 (1984) (accountant testified as expert as to murder defendant's financial condition), cert. denied, 471 U.S. 1044 (1985).

"[M]ore recently the trend is to permit [expert testimony] if the expert has some special knowledge and his testimony is of aid to the jury even though the average juror would also have some knowledge of the subject matter." Binge v. J.J. Borders Constr. Co., 95 Ill. App. 3d 238, 242, 419 N.E.2d 1237, 1240 (4th Dist. 1981). However, in some cases courts prohibit expert testimony when the subject matter of the case is clearly within the comprehension of laymen. Generally referred to as the common knowledge bar, expert testimony is inadmissible in such cases because it is unnecessary. Hernandez v. Power Constr. Co., 73 Ill. 2d 90, 382 N.E.2d 1201 (1978) (whether guardrails on scaffold would have prevented plaintiff's fall was matter within common knowledge and not difficult to comprehend and explain, thus expert testimony inadmissible).
may also require expert testimony. Second, the danger that jurors will find professional liability despite the defendant having met the standard of care, is as present in actions against design professionals as it is in medical and legal malpractice actions. Indeed, courts which have required expert testimony in architect and engineering malpractice actions have referred to these two rationales to justify their holdings.91

The technical nature of the design profession and designing procedures provided the rationale for a Kansas appellate court's requiring expert testimony in a negligence action against an architect for faulty design.92 In Seaman Unified School District v. Casson Const. Co., the defendant claimed the architect was negligent in grading the area surrounding a gymnasium. Although the expert testimony presented by defendants suggested that their design and specifications complied with local architectural standards, the trial court found professional negligence as a matter of law.93 Borrowing from medical malpractice actions, the defendant’s appeal urged application of a "professional community standard," and the accompanying rule requiring expert testimony to establish a standard of care.94 The Kansas appellate court noted that the purpose of requiring expert testimony was "to educate the fact finder as to the otherwise alien terminology and technology and thus preclude his rendering judgment on something he knows nothing about."95 Because the architectural profession and its procedures are similarly "outside the realm of ordinary knowledge," the court approved the application of an "architectural community standard."96 Thus the Seaman court recognized that architectural practices and techniques are so complex and technical that jurors cannot ordinarily understand them without the aid of expert testimony.

The second rationale for requiring expert testimony in design professional malpractice actions also presents itself in medical and legal malpractice

91. See Aetna Ins. Co. v. Hellmuth, Obata & Kakssabaum, Inc., 392 F.2d 472 (8th Cir. 1968) (applying Missouri law requiring expert testimony in medical malpractice actions to negligence claim against architect); Covel v. Robert & Co. Assoc., 112 Ga. App. 163, 144 S.E.2d 450 (1965) (analogizing to medical malpractice law's requirement of expert testimony in design negligence case).


93. Id. at 293, 594 P.2d at 245.

94. Id. at 292, 594 P.2d at 244.

95. Id. at 293, 594 P.2d at 245.

96. Id. See also Paxton v. Alameda County, 119 Cal. App. 393, 259 P.2d 934 (1953) (approving jury instruction that the jury could consider only expert testimony in determining whether the defendant architects were guilty of negligence); 530 East 89 Corp. v. Unger, 43 N.Y.2d 776, 373 N.E.2d 276, 402 N.Y.S.2d 382 (1977) (except where issue is within competence of laymen, allegation of negligence must be supported by expert testimony).

The Seaman court noted that the "common knowledge exception" to the rule requiring expert testimony would also apply to the architectural context. 3 Kan. App. 2d at 293, 594 P.2d at 245. Accord Daniel, Mann, Johnson & Mendenhall v. Hilton Hotels Corp., 98 N.M. 113, 642 P.2d 1086 (1982) (per curiam) (expert testimony required to establish surveyor's standard of care unless conduct is within the layperson's common knowledge).
actions. Because an injury may result despite the physician's or attorney's exercise of reasonable care, there exists the danger that liability will be imposed where no professional negligence occurred.⁹⁷ Without requiring expert testimony to establish the standard of care in a design case, fact finders may find liability even where the architect met the professional standard of care.⁹⁸ In design cases where expert testimony has been required, courts have cited this danger as a factor in their decision.⁹⁹ Design professionals do not guarantee a perfect result;⁹⁰⁰ therefore, mere injury to the plaintiff should not mandate an architect's liability. Because design professionals, like physicians and attorneys, must exercise judgment and discretion, jurors may be unable to distinguish between a bad result and true negligence absent the use of expert testimony.

The danger of juries unfairly imposing liability on design professionals who exercise reasonable care is best demonstrated by illustration. A design professional's work falls into two basic categories: design work and contract management. A degree of professional judgment and discretion is required for each task. For example, suppose a civil engineer is retained to design a storm sewer system. As is typical, the client gives the design professional certain parameters of location and cost. In developing the design for the system the engineer must make judgments regarding its capacity to accom-

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⁹⁷ Cf. Scardina v. Colletti, 63 Ill. App. 2d 481, 488, 211 N.E.2d 762, 765 (3d Dist. 1965) ("It is not enough to prove that [defendant] made a mistake or that this treatment harmed the plaintiff; proof of a bad result or mishap is no evidence of lack of skill or negligence.").


⁹⁹ See, e.g., Chicago College of Osteopathic Medicine v. George A. Fuller Co., 719 F.2d 1335, 1346 (7th Cir. 1983) ("To properly assess [architect's] actions, the jury needed a witness with an expertise in the field of architecture to explain the nature of the judgment calls [the architect] made and the accuracy to be expected."). Accord H. Elton Thompson & Assoc. v. Williams, 164 Ga. App. 571, 572, 298 S.E.2d 539, 540 (1982) ("Expert testimony is required because the court and jury are not permitted to speculate as to the standard against which to measure the acts of the professional in determining whether he exercised a reasonable degree of care.").

⁹⁰⁰ See, e.g., Bates & Rogers Const. Corp. v. North Shore Sanitary Dist., 92 Ill. App. 3d 90, 414 N.E.2d 1274 (2d Dist. 1980) (engineers did not warrant the accuracy of plans and specifications but owed only a duty of reasonable care to contractor); Mississippi Meadows, Inc. v. Hodson, 13 Ill. App. 3d 24, 299 N.E.2d 359 (3d Dist. 1973) (absent special contractual provison, architect "does not imply or guarantee a perfect plan or satisfactory result"), appeal denied, 54 Ill. 2d 597 (1973). Cf. City of Mounds View v. Walijarvi, 263 N.W.2d 420 (Minn. 1978) (architects not liable in strict liability or implied warranty). Architects, doctors, engineers, attorneys and others deal in somewhat inexact sciences and are continually called upon to exercise their skilled judgment in order to anticipate and provide for random factors which are incapable of precise measurement. The indeterminate nature of these factors makes it impossible for professional service people to gauge them with complete accuracy in every instance. Thus, doctors cannot promise that every operation will be successful; a lawyer can never be certain that a contract he drafts is without latent ambiguity; and an architect cannot be certain that a structural design will interact with natural forces as anticipated. Id. at 424.
moderate flooding. After research, the engineer designs a system able to handle a storm the size of the largest that occurred in the previous fifty years. Based on his best judgment and the cost and location limitations he is working with, such a system should be adequate. However, once the hypothetical storm system is built, a storm equalling the size of the largest storm in one hundred years causes flooding.

The ability of the design professional to design a system that could have accommodated the once-in-a-hundred-year storm is not at issue; such a system could indeed have been created. The issue is not that the sewer system failed to withstand the storm; rather, the issue is what basis for calculation should the engineer, exercising reasonable care, should have used in his design. In other words, is the engineer making an unactionable error in judgment by using the fifty-year data or is he unreasonably committing a breach of the design profession's standard of care? No one argues that the system could not have been designed to withstand a once-in-a-hundred-years storm. However, the engineer must make a judgment call based on the available facts. Without expert testimony as to what a reasonable engineer would have done with the available information and the cost and physical limitations of the job, the fact finder cannot properly evaluate the engineer's judgment.

Evaluation of the supervisory duties of a design professional similarly requires expert testimony. In the typical situation, the architect agrees to supervise construction to ensure proper execution of the contract by the contractor. The architect typically does not contract to be responsible for the means, manner or techniques that the contractor uses, but rather agrees only to make periodic visits to the job site. The typical general contract requires a general contractor to provide necessary precautions for the safety of their employees and to comply with safety ordinances, statutes, and regulations.

Despite the limited character of the architect's supervisory duties, when an employee is injured on the job site, the liability of the architect for

101. The fact that an injury occurred is not evidence that the design professional did not meet the requisite standard of care. The plaintiff must instead show that the design professional did not perform according to the standards set by reasonableness. See supra notes 70-72 and accompanying text. Cf. Scardina v. Colletti, 63 Ill. App. 2d 481, 488, 211 N.E.2d 762, 765 (3d Dist. 1965) ("It is not enough to prove that [defendant] made a mistake or that this treatment harmed the plaintiff; proof of a bad result or mishap is no evidence of lack of skill or negligence.").

102. Cf. Chicago College of Osteopathic Medicine v. George A. Fuller Co., 719 F.2d 1335, 1346 (7th Cir. 1983) ("To properly assess the [architect's] actions, the jury needed a witness with expertise in the field of architecture to explain the nature of the judgment calls the [architect] made and the accuracy to be expected.").

103. The contracts at issue in Miller are a good example. The owner-architect contract defined the architect's duty to supervise and inspect the work. The owner-contractor contract specified that the architect could reject any work that did not conform to the specifications and could stop the work whenever necessary to ensure compliance with the contract. See supra text accompanying notes 36-42.
alleged improper supervision may be at issue. Because an architect is not a safety engineer, he should not be held to the standard of care of a safety engineer but, rather, to the standard owed by architects under similar circumstances. The jury should consider the nature of the work performed which led to the injury, whether or not the work performed was the type in which an architect would be expected to be involved and whether the architect had the duty to act to prevent the accident in question. If a plaintiff is not required to present expert testimony as to the architect’s scope of supervisory responsibility, there is the danger that the architect will be held to a standard reserved for the contractor.

C. Personal Observations on the Need for Expert Testimony

This writer has been involved in several design cases and has proposed jury instructions as to the duty of a design professional and the evidence a jury must have before it may properly find a breach of duty. These proposed jury instructions were variations of the typical instructions used in malpractice actions against physicians and attorneys. In each case, the court refused to enter the proposed instructions and instead used the standard negligence jury instruction. The effect was that the court did not require the plaintiff to present expert testimony that the defendant design professional had breached the standards of his profession.

One case in particular stands out. A van was travelling northbound on Interstate 294. On Bridge 441, just before the Wisconsin state line, the driver of a van, for no apparent reason, lost control and the van crashed. While investigating the accident, the Illinois Toll Highway Authority retained a consulting engineering firm to evaluate the bridge and its approaches to determine if there were any design flaws that could have caused the accident. The engineering firm published a report which listed a number of negative findings that could have contributed to the accident.

The plaintiff called a member of the engineering firm that compiled the study as its expert witness. The consulting engineer testified on direct examination about the adverse findings contained in the report he had prepared. On cross-examination, the engineer was asked if the design engineer had failed to comply with the standards of the engineering profession when he

105. See ILLINOIS PATTERN JURY INSTRUCTIONS, Civil § 105.01 (2d ed. 1971). See also Chicago College of Osteopathic Medicine v. George A. Fuller Co., 719 F.2d 1335, 1345-46 (7th Cir. 1983) (approving jury instruction for architect’s standard of care which is based on § 105.01 of Illinois Pattern Jury Instructions).
106. See ILLINOIS PATTERN JURY INSTRUCTION, Civil § 106.10.01 (2d ed. 1971).
designed the bridge and its approaches. The expert testified that the design complied with all of the standards of the engineering profession.

The defendant moved for a directed verdict after presentation of the plaintiff's evidence and again after the evidence was presented, relying for support on the plaintiff's expert's testimony that the design engineer did not fail to comply with engineering standards. The judge denied both motions. The defendant then proposed a jury instruction setting forth a professional standard similar to that of an attorney or physician. This too was denied. As a result, the jury applied its own concept of a design professional's standard of care and found the civil engineer liable.

One other example illustrates the need for expert testimony in establishing the standard of care of a design professional. The lawsuit again stemmed from an automobile accident on an Illinois highway. This accident occurred at a time when median dividers were installed on only a few of the highways in the nation and none were used in Illinois. A driver lost control of her car, crossed the center line and struck a car containing six family members. One occupant was killed and the rest were injured. At trial, an engineering professor from the University of Illinois testified that median dividers probably would have prevented the accident. He did not say, however, that a reasonable engineer in Illinois exercising the requisite standard of care would have installed the median dividers. Based on this testimony, the jury returned a verdict and a substantial damage award against both the Illinois Toll Highway Authority and the designers of the highway. Without any evidence of the care a reasonable engineer would have exercised, the jury inferred that the engineers were negligent by not installing the median dividers. Such a result is inconsistent with legal standards of proof and fairness and could be avoided through use of an expert testimony.

CONCLUSION

In *Miller v. DeWitt*, the Illinois Supreme Court expanded the scope of a design professional's potential liability by imposing a duty of reasonable care. Architects had previously been bound only by the parameters of their contract with the client. While the *Miller* court expanded the architect's duty, it failed to define or explain how a plaintiff was to establish a breach of this new duty.

Lacking any guidance on this issue, Illinois courts have defined a design professional's standard of care by referring to the contract between the professional and the client. However, use of the employment contract has proved inadequate in establishing a standard of care for design profession-

The typical contract merely sets forth the particular tasks that the design professional contracts to perform, and neither intends nor acts to define the standard of care in performing those tasks. Additionally, because the fact finder typically is unfamiliar with the complexities of professional design, he needs assistance in determining the standard of reasonable care. The fact finder needs information regarding the practices of the typical design professional in satisfying professional duties. The contract will not provide this assistance. Thus, expert testimony is necessary to determine whether the design professional acted negligently and unskillfully, or whether he simply made a reasoned decision based on professional judgment.

Design professionals are just that—professionals. They possess and use knowledge and skill that extends beyond the understanding of the average juror. Architects and engineers who fail to exercise the profession’s standard of reasonable care and skill should be liable for malpractice, as are attorneys and physicians. However, while legal and medical malpractice must be established by expert testimony, under current Illinois law, design profession negligence need not be. There seems to be no basis for the different requirement. Establishing the standard of reasonable care in professional design cases is no less difficult than in legal or medical malpractice cases and, in fact, may be more difficult.

Furthermore, due to the fall of the privity defense, design professionals have been exposed to potential suits from a virtually limitless class of claimants. In addition to the client, this class includes anyone who works on the design professional’s project or any member of the public who walks into a building designed by the design professional. In contrast, attorneys and physicians generally are liable only to their clients and to those third parties whose cause of action relates to the professional-client relationship. Thus, the need for expert testimony to ensure a fair result may be even more compelling in the case of a design professional. In summary, expert testimony is necessary to provide fact finders with an adequate understanding of architectural and engineering design procedures and establish a fair standard of care for professional design liability.


112. In fact, the employment contract contains an implied promise that the design professional will exercise the standard of care exercised by a reasonable member of the profession. See Miller v. DeWitt, 59 Ill. App. 2d 38, 208 N.E.2d 249, 284 (4th Dist. 1965) (“The architects in contracting for their services implied . . . that they would exercise and apply in the case their skill, ability and judgment reasonably and without neglect.”), aff’d in part, rev’d in part on other grounds, 37 Ill. 2d 273, 226 N.E.2d 630 (1967).