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Illinois Supreme Court: Overturn *Thompson v. Gordon* and Protect Design Professionals from Unbargained-For, Extra-Contractual Obligations

I. INTRODUCTION

Imagine you are a professional engineer and you enter into a contract with a developer to design a replacement for a simple light bulb switch in the bathroom of a new house.[1] You agree to design the replacement with the degree of care and skill normally expected of a professional engineer. You complete your assignment, the developer is satisfied with your work, and you are adequately compensated. Twenty years later that house burns down because of a faulty light bulb switch in the kitchen. The homeowner subsequently sues you for negligence and claims that you did not analyze, review, and redesign all of the switches in the house, including the one in

1. The hypothetical is loosely-based on a recent policy argument. *See* Thompson v. Gordon, 923 N.E.2d 808, 825-829 (Ill. App. Ct. 2009).

the *kitchen*, and thus you breached your duty as a professional engineer and are liable for damages. Even though you only agreed to design the replacement switch in the *bathroom*, the Illinois Second District Court of Appeals may likely have found that you owed a contractual duty to redesign the *kitchen* switch based on the standard of care provision in the contract.[2]

This Note addresses the aforementioned hypothetical regarding how Illinois courts conduct contract interpretation and define the scope of contractual duties for design professionals.[3] It considers whether the *Thompson* Court properly interpreted the contract as well as whether it correctly followed applicable Illinois precedent when defining the scope of contractual duties for an engineer. It also advocates how the Illinois Supreme Court should rule on this issue when it comes before the court.[4] Finally, this Note addresses the short and long-term practical impacts of the *Thompson* decision, and also addresses a number of policy considerations associated with the majority's ruling.

In Part II, this Note first looks at some background information with respect to design professionals in general. It also details how Illinois courts conduct contract interpretation. Next, this Note looks at how the Illinois Supreme Court has defined the scope of design professionals' contractual duties as illustrated by *Ferentchak v. Village of Frankfort*.[5] Finally, it contrasts design professionals' contractual duties under negligent design claims with independent contractors' contractual duties under negligent construction claims as illustrated by both *Hunt v. Balsius*[6] and *Billman v. Frenzel Construction Co.*[7] Part III examines the facts of *Thompson* and its nearly twenty-year procedural history. [8] Part IV considers the arguments contemplated by both the majority and the dissent, and then analyzes how the Illinois Supreme Court should rule. Finally, Part V addresses the practical impacts of upholding or overturning the *Thompson* decision in addition to any policy problems the ruling could create.

This Note argues that the Illinois Supreme Court should overturn the *Thompson* decision. For reasons of honoring bargained-for contractual obligations, upholding established conventions of contract interpretation, reaf-

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2. *See id.*

3. A "design professional" is a term used to describe professional architects and engineers. *See* CONSTRUCTION ACCIDENT LITIGATION § 2.2 (2010).

4. After completion of this article, its central argument was in fact used by the Illinois Supreme Court in overturning the Second District's decision. *See* Thompson v. Gordon, 948 N.E.2d 39 (Ill. 2011).

5. Ferentchak v. Vill. of Frankfort, 475 N.E.2d 822, 825-26 (Ill. 1985).

6. Hunt v. Blasius, 384 N.E.2d 368, 371-72 (Ill. 1978).

7. Billman v. Frenzel Constr. Co., 635 N.E.2d 435, 437 (Ill. App. Ct. 1994).

8. *Thompson*, 923 N.E.2d at 810-12.

firming applicable Illinois precedent, fairness, and finally public policy; the Illinois Supreme Court should reverse the Second District Court's ruling.

II. BACKGROUND

A. DESIGN PROFESSIONALS & CONTRACT INTERPRETATION

Throughout history design professionals have been held liable for defective designs.[9] One way design professionals can be held liable for defective designs is through a professional negligence claim, but when duties are created by contract, liability for negligence necessarily depends on the contractual obligations.[10] Moreover, liability can result from a breach of a contractual duty occurring during or after construction, as well as with or without structural failure.[11] In some cases, design professionals decide to take on many contractual duties, such as overseeing or supervising the construction phase, and thus, they will be subjected to increased liability.[12] In other cases, design professionals may want less cost and exposure to risk, and therefore take on less contractual duties by only contracting to create the

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9. *See, e.g.*, W.E. Guillian, *Liability of Architects & Engineers*, 35 TENN. L. REV. 9 (Fall 1967) (discussing how the ancient society of Babylon dealt with defective construction and design of buildings: The Code of Hammurabi provided that if a house collapsed and the owner was killed, the architect would be put to death); *see also, e.g.*, Miller v. De Witt, 208 N.E.2d 249, 255 (Ill. 1965) (finding that the architects breached their duty of care when preparing the designs for a roof that collapsed and injured three people); Fox v. Stanley J. How & Assocs., 309 N.W.2d 520, 527 (Iowa Ct. App. 1981) (involving a woman who ran into a window at a hospital; the court found that the architectural firm breached a duty of care to make its designs without defects); Montijo v. Swift, 219 Cal. App. 2d 351, 353 (Cal. Ct. App. 1963) (involving a person who fell on the stairway of a bus depot; the court held that the architect owed a duty to exercise ordinary care when designing the stairway by not creating a dangerous condition).

10. *Ferentchak*, 475 N.E.2d at 825-26.

11. *See, e.g.*, Evans v. Howard R. Green Co., 231 N.W.2d 907, 916 (Iowa 1975) (involving construction of a pollution control plant where two construction workers were killed by hydrogen sulfide gas because of an architectural and an engineering firm's negligent design); Karna v. Byron Reed Syndicate No. 4, 374 F. Supp. 687, 690 (D. Neb. 1974) (involving a guest who was injured after walking into a glass door upon completion of construction at a hotel; court held architect was not liable because the design was modified by someone other than the architect); Sherman v. Miller Const. Co., 158 N.E. 255, 256 (Ind. 1927) (after construction of a school was completed, a child fell onto a concrete basement because of a lack of a guard or railing; the architect was found not liable for negligent design because the plans had been approved by the school trustee).

12. *See, e.g.*, Gross v. Kenton Structural & Ornamental Ironworks, Inc., 581 F. Supp. 390 (S.D. Ohio 1984) (holding that a design professional undertook supervisory role and had a duty to prevent a stairway collapse that killed one person during construction); Geer v. Bennett, 237 So. 2d 311, 314 (Fla. Ct. App. 1970) (finding a design professional liable while acting in a supervisory role when a worker fell from the second floor of a building that had no guardrail).

designs.[13] Finally, in the majority of instances where courts find design professionals liable for negligent design, the design professional generally undertook some type of supervisory responsibility as opposed to merely creating the designs.[14]

But why do design professionals enter into contracts in the first place? Legal authorities have stated that contracting "enables parties to project exchange into the future and to tailor their affairs according to their individual needs and interests . . . ."[15] When design professionals form contractual relationships, it also allows them to allocate the risks as well as the costs associated with bargaining.[16] Because contracting parties bargain in these terms, the main function of contract law is to protect the contracting parties' expectations by enforcing their bargained-for legal agreements.[17]

To protect contracting parties' reasonable expectations, the court's main goal is to effectuate the intent of the parties through contract interpretation.[18] The Illinois Supreme Court has found that the "plain and ordinary meaning" of the contract language gives the best indication of intent.[19] This means that judges will look at the explicit contractual terms to determine the intent of the parties.[20]

It is well settled that a court may not "interpret the agreement as meaning something different from what the parties intended as expressed by the language they saw fit to employ."[21] In addition:

> [T]he [judicial] interpretation or construction of a contract does not include its modification or the creation of a new or different agreement; a court is not at liberty to revise, modify, or distort an agreement while professing to construe it, and has no right to make a different contract from that actually made by the parties.[22]

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13. *See* CONSTRUCTION ACCIDENT LITIGATION § 2.7 (2010).

14. *Id.* § 2.5.

15. 1 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 1:1 (4th ed. 1993 & Supp. 2010). *Accord* 17A AM. JUR. 2D *Contracts* § 1 (2010).

16. 17A AM. JUR. 2D *Contracts* § 1 (2010).

17. *Id.*

18. *See* Thompson v. Gordon, 923 N.E.2d 808, 813 (Ill. App. Ct. 2009); Gallagher v. Lenart, 874 N.E.2d 43, 58 (Ill. 2007).

19. *Gallagher*, 874 N.E.2d at 58.

20. *Id.*

21. 17A AM. JUR. 2D *Contracts* § 333 (2010).

22. 11 WILLISTON & LORD, *supra* note 15, § 31:5. *Accord* Imperial Fire Ins. Co. of London v. Coos Cnty., 151 U.S. 452, 456 (1894); City of New Orleans v. New Orleans Waterworks Co., 142 U.S. 79, 88 (1891); Memphis & L.R.R. Co. v. So. Exp. Co., 117 U.S. 1, 6 (1886); Morgan Cnty. v. Allen, 103 U.S. 498, 510 (1880). Note:

Moreover, "[j]udges have no roving writ to construe the contract language in the way that they think best."[23] Judges have a duty to protect bargained-for legal agreements and abide by the intent of the parties even if they disagree with the outcome.[24]

To illustrate how the Illinois courts have protected bargained-for legal agreements through contract interpretation, an examination of the Illinois Supreme Court case *Ferentchak v. The Village of Frankfort* is appropriate.[25] Specifically, *Ferentchak* is the precedent case in Illinois that defines how courts are to determine the scope of design professionals' contractual duties.[26]

B. THE *FERENTCHAK* DECISION AND HOW THE SCOPE OF A DESIGN PROFESSIONAL'S DUTY IS LIMITED BY THE CONTRACT

In *Ferentchak*, a licensed Illinois civil engineer contracted with a land developer to design a subdivision's surface water drainage system and to observe its construction.[27] After the engineer completed the designs and the developer accepted them, the Village of Frankfort gave its approval to begin construction.[28] The builder then constructed a custom home and sold it to the Ferentchaks.[29] A few months later, water began to accumulate in the backyard, and because the foundation grade elevation was set too low, the basement subsequently flooded.[30] As a result of the water damage, the homeowners brought a negligence action against the engineer.[31] The plaintiffs alleged that the defendant's failure to set foundation grade elevations

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> The notion, that free men and women may reach agreements regarding their affairs without government interference and that courts will enforce those agreements, is ancient and irrefutable. It draws strength from common-law roots and can be seen in our fundamental charter, the United States Constitution, where government is forbidden from impairing the contracts of citizens, art I, § 10, cl. 1.

Wilkie v. Auto-Owners Ins. Co., 664 N.W.2d 776 (Mich. 2003). Also note that, "[a]dditional obligations or undertakings may not be imposed on a party to a contract under the guise or authority of [judicial interpretation]." 11 WILLISTON & LORD, *supra* note 15, § 31:6.

23. 11 WILLISTON & LORD, *supra* note 15, § 31:5 (quoting Exxon Co. v. Esso Workers' Union, Inc., 118 F.3d 841, 844 (1st Cir. 1997)).

24. 11 WILLISTON & LORD, *supra* note 15, § 31:5.

25. *See* Ferentchak v. Vill. of Frankfurt, 475 N.E.2d 822 (Ill. 1985).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 824.

30. *Ferentchak*, 475 N.E.2d at 824.

31. *Id.* at 823-24.The plaintiffs also sued the Village of Frankfort, the developer, and the builder, but only the Illinois Supreme Court's ruling with respect to the engineer is pertinent to this Note. *Id.* at 824.

in the drainage system plans caused their damages.[32] The engineer maintained, however, that he was never asked by the developer to set the grade elevations.[33] Plaintiffs nevertheless claimed that a duty arose from the defendant's professional responsibility as a civil engineer to exercise the degree of care and skill required of ordinary engineers in the community.[34] Moreover, the plaintiffs' expert testified that the defendant should have included grade elevations in the plans, and because the specifications were missing, plaintiffs argued that the defendant failed to exercise the degree of care and skill required of an ordinary engineer.[35]

The supreme court disagreed with the plaintiffs and the lower courts[36] and ruled in favor of the defendant.[37] The court found that the scope of the engineer's duty was limited to what was specifically contained in the contractual agreement with the developer.[38] Because the contract did not explicitly mention setting foundation grade levels, the court held that the engineer did not owe a duty to the plaintiffs, and consequently he could not have deviated from the standard of care.[39] The court felt that it would be unreasonable to impose an extra-contractual duty of care on the engineer without a previously bargained-for agreement.[40] To support its holding, the court added that the developer accepted the engineer's work even though foundation grade elevations for the lots were not included, reasoning that had the engineer not met his contractual obligations, the developer would

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32. *Id.* at 823-24.

33. *Id.* at 825. The court agreed, "The record indicate[d] that this contract did not require [the engineer] to set the foundation grade levels for each lot." *Ferentchak*, 475 N.E.2d at 823.

34. *Id.* at 826. Design professionals can be sued for professional negligence, but the liability in tort originates in the obligations created through contract law. M. Wright & D. Boelzner, *Quantifying Liability Under the Architect's Standard of Care*, 29 U. RICH. L. REV. 1471, 1472 (1995). To bring a cause of action for negligence, the plaintiff must show that the defendant had a duty to meet a certain standard of care, the standard was not met, and as a result the defendant proximately caused the plaintiff's injury. *See, e.g.*, Town of Thornton v. Winterhoff, 92 N.E.2d 163, 166 (Ill. 1950). But before the plaintiff has the opportunity to prove the elements of breach, causation, or damages, it is first the job of the trial court to determine whether the defendant owed a legal duty to the plaintiff. *See, e.g.*, Barnes v. Washington, 305 N.E.2d 535, 538 (Ill. 1973). If the court finds that no legal duty is owed, there can be no liability whether the cause of action is for negligence or breach of contract. *Id.* This same approach applies when a court determines whether a design professional owes a contractual duty under a negligent design cause of action. *See, e.g.*, *Ferentchak*, 475 N.E.2d at 825.

35. *Ferentchak*, 475 N.E.2d at 825.

36. At trial, the jury found that the engineer was liable for negligence, and on appeal the Third District affirmed the judgment against the engineer. *Id.* at 824.

37. *Id.* at 825-26.

38. *Id.*

39. *See id.*

40. *Ferentchak*, 475 N.E.2d at 825-26.

not have accepted the designs.[41] Furthermore, the court highlighted the fact that the engineer did not know what types of custom houses were going to be built on the lots and as a result, the engineer had inadequate information to set the foundation elevations accurately, and therefore his reliance on others to set the foundation levels was proper.[42]

The *Ferentchak* court also opined that its holding was limited to determining the scope of contractual duties for engineers creating designs under negligent design claims, and not independent contractors following designs under negligent construction claims.[43] To contrast the Illinois Supreme Court's stance on determining design professionals' contractual duties, *Hunt v. Balsius* demonstrates the court's stance when determining independent contractors' duties of care.[44]

C. *HUNT* AND *BILLMAN*: HOW ILLINOIS DISTINGUISHES BETWEEN DESIGN PROFESSIONALS AND INDEPENDENT CONTRACTORS

In *Hunt*, a car collided with a highway construction sign.[45] The impact killed two passengers and badly injured three others.[46] The plaintiffs sued the independent contractor for negligent construction and alleged that he failed to exercise reasonable care while designing and installing the exit sign.[47] The Illinois Supreme Court found that "[a]n independent contractor owes no duty to third persons to judge the plans, specifications or instructions which he has merely contracted to follow."[48] In addition, the court found that an independent contractor will only owe a duty to third persons if the specifications "are so obviously dangerous that no competent contractor would follow them."[49] Because the plaintiffs failed to demonstrate that the designs were "so obviously dangerous" that the independent contractor should not have followed them, the court held that the defendant owed no duty to the plaintiffs on the negligent construction claim, and affirmed the summary judgment for the defendants.[50]

Another Illinois case that examined an independent contractor's duty of care is *Billman v. Frenzel Construction Co.* from the Illinois First District Appellate Court.[51] In *Billman*, a car crossed over the median of a newly

41. *See id.* at 826.
42. *Id.*
43. *Id.*at 825.
44. Hunt v. Blasius, 384 N.E.2d 368, 371-72 (Ill. 1978).
45. *Id.* at 369.
46. *Id.*
47. *Id.* at 371.
48. *Hunt*, 384 N.E.2d at 371.
49. *Id.*
50. *Id.* at 371-72.
51. *See* Billman v. Frenzel Constr. Co., 635 N.E.2d 435 (Ill. App. Ct. 1994).

widened road and crashed into another car.[52] The impact rendered one of the passengers comatose.[53] The plaintiffs sued the independent contractor for negligent construction. They alleged that the median was too short to prevent the accident and that the defendant had a duty not to follow such obviously dangerous designs.[54] As evidentiary support, the plaintiffs submitted an affidavit from an expert engineer who contended that the defendant should have known that the designs he relied on were dangerous.[55] The First District Appellate Court held that because construction of the median was within the contractor's duty, the plaintiff's affidavit created "a material question of fact as to whether [the independent contractor] breached [the] duty it owed to [the plaintiff]."[56] The court also noted, like the Illinois Supreme Court in *Ferentchak*, that there is a distinction between an independent contractor who follows plans under a negligent construction claim such as in *Hunt*, and an engineer who creates designs under a negligent design claim as in *Ferentchak*.[57]

The Illinois Supreme Court's stance on limiting the scope of engineers' contractual duties under the *Ferentchak* precedent has been the benchmark case for the past twenty-five years.[58] Just recently the Illinois Second District Appellate Court's majority and dissenting opinions in *Thompson v. Gordon* fiercely and directly addressed the "essence"[59] of *Ferentchaks'* precedential scope regarding the extent of contractual duties for engineers.

III. FACTS OF *THOMPSON V. GORDON*

In January 1991, two engineering companies entered into a contract with a developer to design a replacement for a bridge deck on Chicago's I-94/Grand Avenue interchange.[60] The engineers agreed to perform their task

52. *Id.* at 436.
53. *Id.*
54. *Id.*
55. *Id.* at 437.
56. *Billman*, 635 N.E.2d at 439.
57. *See Billman*, 635 N.E.2d at 438. When referring to the engineers' duties for their designs in *Ferentchak*, the court stated, "It is not clear that the same rule should apply to a contractor governed by the *Hunt* decision." *Id.* The court however did not have to answer this question because constructing the median fell within the scope of the independent contractor's contractual duties. *Id.*
58. Thompson v. Gordon, 923 N.E.2d 808, 820-21 (Ill. App. Ct. 2009). (Hutchinson, J., dissenting).
59. *See Thompson*, 923 N.E.2d at 817-829.
60. *Thompson*, 923 N.E.2d at 810-11. The contract language for the bridge deck replacement stated, "[f]inal structural design plans will be provided for deck replacement of the existing Grand Avenue bridge over I-94." *Id.* at 811. The engineers also contracted to design a roadway interchange, which included redesigning a ramp from one to two lanes,

with the degree of care and skill normally expected of professional engineers.[61] Their proposed plans for the deck replacement included a median barrier that was approximately four feet wide and roughly seven inches tall.[62] The developer and the Illinois Department of Transportation (IDOT) accepted the plans and used them to construct the bridge deck.[63]

In November 1998, Trevor Thompson and his daughter, Amber, were traveling west on Grand Avenue.[64] Another driver, Christie Gordon, was simultaneously traveling eastbound when she lost control of her vehicle.[65] Her car crashed into the median barrier, vaulted into the air, and collided with the Thompsons' vehicle.[66] The impact killed both Amber and Trevor Thompson.[67] As a result, Corinne Thompson, both individually and on behalf of the estates of her husband and daughter, brought suit against the engineers.[68] The plaintiff alleged that the defendants negligently designed the bridge deck and that it caused the crash that killed her husband and daughter.[69]

The plaintiff supported her claim with an affidavit from an expert civil engineer[70] who opined that the defendants did not meet their standard of care when they designed the bridge deck replacement.[71] The expert believed that the defendants would have met their standard of care had they designed

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widening a lane, providing a roadway lighting design, and a number of other tasks. However, these contractual obligations were not the subject matter on appeal. *Id.*

61. *Id.* The contract language for the duty of care stated, "The standard of care applicable to [defendants'] services will be the degree of skill and diligence normally employed by professional engineers or consultants performing the same or similar services. [Defendants] will reperform any services not meeting this standard without additional compensation." *Id.* at 820.

62. *Thompson*, 923 N.E.2d at 811. The court noted that the median had previously been four feet wide and roughly six inches tall. *Id.*

63. *See Thompson*, 923 N.E.2d at 811.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Thompson*, 923 N.E.2d at 810. The plaintiff sued several other defendants that were not parties to this appeal: the driver and developer, among others. *See id.* at n.2. The plaintiff however could not sue the IDOT because "a suit against the Illinois Department of Transportation is considered to be a suit against the State itself," Magna Trust Co. v. Dep't of Transp., Div. of Water Resources, 600 N.E.2d 1317, 1319 (Ill. App. Ct. 1992), and "the State of Illinois shall not be made a defendant or party in any court," 745 ILL. COMP. STAT. 5/1 (2008).

69. *See Thompson*, 923 N.E.2d at 811.

70. The fact that the expert was not a licensed engineer in Illinois but was eligible to give expert engineering testimony was highly contested in this case. *See* Thompson v. Gordon, 813 N.E.2d 241 (Ill. App. Ct. 2004), *vacated & remanded by* Thompson v. Gordon, 817 N.E.2d 894 (Ill. 2004); Thompson v. Gordon 827 N.E.2d 983 (Ill. App. Ct. 2005), *aff'd*, Thompson v. Gordon, 851 N.E.2d 1231 (Ill. 2006).

71. *Thompson*, 923 N.E.2d at 811-12.

an improved median barrier that likely would have prevented the car from becoming airborne.[72] The trial court nevertheless granted summary judgment for the defendants because the contract did not specifically provide a duty to review or to design an improved median barrier.[73] Further, the trial court ruled that the contractual agreement only required the defendants to design a replacement median without changing the previously existing design.[74]

IV. ANALYSIS

A. REPORT

The plaintiff appealed the trial court's decision to the Illinois Second District.[75] On appeal, the appellate court reversed the summary judgment ruling by holding that the engineers had a duty to replace the median "exactly as it already existed," as well as had a duty to investigate and design an improved median barrier.[76] Further, the court relied upon an expert's affidavit to show that there was a factual question that still needed to be answered in order to determine whether the engineers breached their duty of care, and therefore the court remanded the case to the trial court.[77] In making its ruling, the court first had to determine the intent of the parties.[78] To do this, the court interpreted the contract by finding the "plain and ordinary meaning" of the standard of care provision as well as the term "replacement."[79] Based on the contract interpretation, the court was able to rule as a matter of law whether, and to what extent, the defendants owed a duty of care.[80] Finally, the court examined Illinois precedent by distinguishing the *Ferentchak* case and analogizing the *Billman* decision in support of its holding.[81]

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72. *Id.* The expert found that defendants also did not consider traffic capacities, weave lane failures, and other important information that would have been instrumental in creating an improved median barrier. *Id.* at 812.

73. *Id.* at 812.

74. *Id.*

75. *Thompson*, 923 N.E.2d at 810.

76. *Id.* at 813-16.

77. *Id.* at 814-15.

78. *Id.* at 813.

79. *Id.* at 813-14.

80. *Thompson*, 923 N.E.2d at 814-15.

81. *Id.* at 816-18.

1. Contract Interpretation

To determine whether the defendants owed a duty of care to the plaintiff, the court must first, as a matter of law, interpret the language of the defendants' contract.[82] When interpreting the contract, the court's main objective is to effectuate the intent of the contracting parties, and the "plain and ordinary meaning" of the contract language gives the court the best indication of intent.[83]

The Second District found the plain language of the term "replacement"[84] in defendants' contract to mean that defendants "would submit plans to rebuild the bridge deck *(and accompanying median) exactly as it already existed*."[85] Given this interpretation, the court found that the defendants owed a duty of care to design the replacement median barrier exactly as it once was.[86] The court next interpreted the standard of care provision in the contract and found that it imposed an *additional* "professional duty of care on defendants' work" when designing the median.[87] The *Thompson* majority determined that the additional duty, borne out of the standard of care provision, entailed that the defendants investigate and design an improved median barrier. The dissenting justice agreed with the *Thompson* majority's interpretation of the term "replacement," but strongly disagreed with the court's interpretation of the standard of care provision.[88]

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82. *Id.* at 813; Gallagher v. Lenart, 874 N.E.2d 43, 58 (Ill. 2007).

83. *Thompson*, 923 N.E.2d at 813.

84. *See id.* at 813. The court found that "[t]he word 'replacement' has a well-understood meaning. Webster defines the word 'replace' as meaning to place again; to restore to a former condition." *Id.* (quoting Illinois Central R.R. Co. v. Franklin Cnty., 56 N.E.2d 775, 779 (Ill. 1944)). In addition, the court stated in *Gallagher* that "[b]ecause words derive part of their meaning from the context in which they are used, a court construing a contract must look at the contract as a whole, by viewing each part . . . in light of the others." *Gallagher*, 847 N.E.2d at 58. To find the "plain and ordinary meaning" the court contrasted the word "replacement" in one part of the contract with the word "improvements" in another. *Id.* "An improvement is '[a] valuable addition made to property . . . or an amelioration in its condition, amounting to more than mere repairs or replacement.'" *Thompson*, 923 N.E.2d at 813 (quoting Bank of Ravenswood v. City of Chicago, 717 N.E.2d 478, 483 (Ill. App. Ct. 1999).

85. *Thompson*, 923 N.E.2d at 814 (emphasis added).

86. *See id.* at 814, 820-21 (Hutchinson, J., dissenting).

87. *Id.* at 815 (majority opinion).

88. *See id.* at 820-21 (Hutchinson, J., dissenting). The interpretation of the standard of care provision was the most controversial issue on appeal. *Id.* at 820. In her dissent, Justice Hutchinson stated,

> [I]n what appears to be a strained effort to reach a predetermined result, the majority disregards its own interpretation of the contractual tasks to be performed by defendants and holds that defendants also had an obligation to perform the task of redesigning the bridge deck and median to include a Jersey barrier.

According to Justice Hutchinson's dissent, "[t]he plain language of [the standard of care][89] provision expressly limited the standard of care to '[defendants'] services.'"[90] Justice Hutchinson found the standard of care provision applied to the bargained-for contractual services of designing a "replacement," and did not create an entirely separate professional duty of care.[91] The dissent therefore determined that the defendants had a duty only to replace the median barrier "exactly as it already existed" *with* the degree of care expected of professional engineers.[92] Justice Hutchinson felt that the majority completely overlooked the intent of the contracting parties in its ruling.[93] She supported her conclusion by pointing to the importance of the conduct of the contracting parties: if the developer had wanted a "jersey barrier," he would have negotiated for an "improved" median and not requested a "replacement";[94] and if the engineers had not performed their task within the proper standard of care, the developer would have had them redo the plans.[95] The majority, however, did not address the dissent's reasoning with respect to the conduct of the parties as evidence of intent.[96] Finally, Justice Hutchinson believed that the effect of the court's ruling was to force the engineers to perform a task nearly twenty years after the parties signed

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Id. Justice Hutchinson also stated,

> [I]n an illogical perversion of contract interpretation, after acknowledging that the only bridge-deck-related task was to provide a design to replace it, the majority avails itself of the contract's standard-of-care provision to rewrite defendants' contract to require an unbargained-for task to redesign the bridge deck to include a Jersey barrier even though the existing bridge deck did not already have one.

Id.

89. *See supra* note 61 and accompanying text.

90. *Thompson*, 923 N.E.2d at 820 (Hutchinson, J., dissenting).

91. *Id.* at 821.

92. *Id.* at 814 (majority opinion); *Id.* at 825 (Hutchinson, J., dissenting).

93. *Id.* at 824 (Hutchinson, J., dissenting). The dissent stated that "from a practical perspective, the majority's decision is unworkable and renders the true intent of the contracting parties meaningless." *Id.*

94. *See Thompson*, 923 N.E.2d at 821 (Hutchinson, J., dissenting); *see also* Lee v. Allstate Life Ins. Co., 838 N.E.2d 15, 24 (Ill. App. Ct. 2005) (stating that there is a presumption "'against provisions that easily could have been included in the contract but were not.'" (quoting Klemp v. Hergott Group, Inc., 641 N.E.2d 957, 962 (Ill. 1994))).

95. *Thompson*, 923 N.E.2d at 821 (Hutchinson, J., dissenting). The dissent noted that the record did not indicate that the developer asked the engineers to redo any contracted obligations. *Id.* To bolster the dissent's position, the court referenced the following: "[A] court cannot alter, change or modify the existing terms of a contract or add new terms or conditions to which the parties do not appear to have assented, write into the contract something which the parties have omitted or take away something which the parties have included." Gallagher v. Lenart, 854 N.E.2d 800, 807 (Ill. App. Ct. 2006).

96. *Thompson*, 923 N.E.2d at 810-19 (majority opinion); *Id.* at 825-27 (Hutchinson, J., dissenting).

the agreement that was completely unbargained-for and outside the scope of the contract.[97]

The duty issue was further debated in a supplemental opinion, but still, the majority determined that the standard of care provision imposed a duty on the defendants to investigate and design an improved median barrier.[98] As a result, the court next moved to the issue of whether or not the engineers' duty of care was breached.[99] The court found that the expert engineer's affidavit provided enough evidentiary support for the plaintiff's argument that the engineers had breached their professional standard of care by not investigating or designing an improved median barrier.[100]

2. Precedential Evaluation

After the court interpreted the contract language and found that the defendants owed the plaintiff multiple duties of care, it next examined Illinois precedent.[101] The bulk of the court's precedential analysis looked at *Ferentchak v. Village of Frankfort*[102] and its application to *Thompson*.[103] First, the *Thompson* majority reasoned that the *Ferentchak* court did not create a duty of care to set foundation grade elevations in that case because that engineer's contract only involved designing the drainage system and not setting foundation levels.[104] Second, because another party was going to build custom homes on the individual lots, the *Thompson* court reasoned that the *Ferentchak* engineer did not have enough information to give any relevant input regarding the foundation levels, and thus, it was impossible for him to get involved.[105] Given this interpretation, the majority read the "essence" of *Ferentchak* to be "that the engineer . . . had no knowledge about the defective design and no involvement in creating it," and therefore no duty of care was imposed.[106] The *Thompson* defendants, on the other hand, contended that the *Ferentchak* precedent stood for prohibiting the imposition of a duty when a contract did not explicitly mention it; however, the court rejected the defendants' *Ferentchak* interpretation.[107]

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97. *See id.* at 824-25 (Hutchinson, J., dissenting).
98. *Id.* at 825-27.
99. *Id.* at 814-15 (majority opinion).
100. *Id.* at 815.
101. *Thompson*, 923 N.E.2d at 816-17 (majority opinion).
102. *See supra* Part II.A (explaining the facts of the case and the court's holding); *see also* Ferentchak v. Vill. of Frankfurt, 475 N.E.2d 822 (Ill. 1985).
103. *See Thompson*, 923 N.E.2d at 816-17 (majority opinion).
104. *Id.* at 817.
105. *Id.*
106. *Id.*
107. *Id.* The majority stated, "We do not read *Ferentchak* so broadly." *Id.*

The *Thompson* court next attempted to support its finding by distinguishing *Ferentchak*.[108] The majority stated that the *Thompson* engineers, unlike the *Ferentchak* engineer, "were charged with designing precisely the object (the median barrier) that plaintiff claim[ed] was defective."[109] Also, the majority noted that the *Thompson* engineers, unlike the *Ferentchak* engineer, had complete information regarding the purportedly defective median design.[110] The court reasoned that because the *Thompson* engineers were involved in creating the median design and had knowledge of its allegedly defective nature, they "had a duty to go beyond the specifically mentioned task of replacing the bridge deck" by considering or designing an improved median "even though the improved median barrier was not explicitly mentioned in the contract."[111] The majority emphasized that its holding did not violate *Ferentchak*; however, the dissenting justice emphatically disagreed.[112]

Justice Hutchinson found that the majority's reading of the *Ferentchak* holding was too restrictive.[113] In her view, the Illinois Supreme Court in *Ferentchak* did not create a duty to set foundation levels not because that engineer had inadequate information or involvement to complete an extra-contractual task, but because the "engineer's duty [was] dependent only on his contractual obligations" and setting foundation levels was not specifically mentioned in the contract.[114] Justice Hutchinson believed that the *Ferentchak* court merely mentioned the engineer's lack of information as evidence in support of its conclusion, not as the "essence" of its holding.[115] The dissenting justice then gave her reading of the "essence" of *Ferentchak* by stating the following:

> When addressing the question of whether, pursuant to his responsibility as a professional engineer, the engineer had a duty to set foundation levels despite the absence of a contractual obligation to do so, our supreme court unequivo-

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108. *See Thompson*, 923 N.E.2d at 817 (majority opinion).

109. *Id.*

110. *See id.*

111. *Id.*

112. *See id.* at 822 (Hutchinson, J., dissenting). The dissent stated, "the majority's opinion intentionally disregards relevant and binding authority . . . while employing its own perverted version of the law." *Id.* at 822-23. Justice Hutchinson also stated that "[n]ot surprisingly, by focusing on the 'essence' of the *Ferentchak* decision, the majority overlooks the actual holding in the case," and further stated that "the majority's selective disregard for relevant and binding authority in order to reach what appears to be a predetermined result is disturbing." *Id.* at 824.

113. *See id.* at 822 (Hutchinson, J., dissenting).

114. *Thompson*, 923 N.E.2d at 822 (Hutchinson, J., dissenting).

115. *Id.*

> cally held that "[t]he degree of skill and care required [of the engineer] is dependent on his contractual obligation."[116]

Given Justice Hutchinson's interpretation of *Ferentchak*, she believed that the majority's ruling did not follow applicable precedent.[117] The justice felt that to impose a duty on the defendants to design an improved median was "to impose an obligation not provided in the contract," which directly violated the *Ferentchak* precedent.[118]

The majority also found support for its holding from the *Billman* decision.[119] In *Billman*, like *Thompson*, a car drove over the median and crashed into another badly injuring the passenger.[120] The *Thompson* court reasoned that, like the *Thompson* engineer, the *Billman* contractor completed all of his expressly described contractual obligations, and the court still relied on an expert's opinion "to conclude that there was at least a material question of fact as to whether the defendant contractor had breached a duty."[121] Therefore, the majority believed the *Billman* holding was on point and it could apply the *Billman* reasoning to *Thompson*.[122] The defendants, however, claimed that the comparison was flawed because one involved a contractor following plans under a negligent construction cause of action and the other an engineer creating designs under a negligent design claim; the majority dismissed these differences as inconsequential.[123]

The dissent, on the other hand, found the majority's reasoning confusing with respect to *Billman*.[124] According to Justice Hutchinson, "our supreme court has repeatedly . . . found this distinction to be significant."[125] The dissent referenced the *Ferentchak* decision where the court held that the "so obviously dangerous" *Hunt* rule only applied to independent contractors following plans and not engineers creating designs, as well as *Marshall v. Burger King*[126] where the court again touched on the difference between *Hunt* and *Ferentchak*.[127] Finally, Justice Hutchinson concluded by reiterating her determination that *Billman* was irrelevant because of the

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116. *Id.* (quoting Ferentchak v. Vill. of Frankfort, 475 N.E.2d 822, 826 (Ill. 1985).
117. *Id.*
118. *Id.* at 823.
119. *Thompson*, 923 N.E.2d at 816 (majority opinion).
120. *See supra* Part II.C; *see also* Billman v. Frenzel Constr. Co., 635 N.E.2d 435, 438 (Ill. App. Ct. 1994).
121. *Thompson*, 923 N.E.2d at 816.
122. *See id.*
123. *Id.*
124. *Id.* at 823 (Hutchinson, J., dissenting) (stating that "the irrelevancy of *Billman* to the current matter is manifest.").
125. *Id.*
126. Marshall v. Burger King, 856 N.E.2d 1048, 1064 (Ill. 2006).
127. *Thompson*, 923 N.E.2d at 823 (Hutchinson, J., dissenting).

engineer-independent contractor distinction and that *Ferentchak* was the only controlling authority to this case.[128]

After the court concluded its precedential analysis, the majority held that there was a factual question that needed to be answered and it reversed the trial court's ruling and remanded the case.[129]

B. ANALYSIS

The Illinois Second District Appellate Court overruled the trial court's decision and in the process made three critical errors.[130] First, the majority ignored established practices of contract interpretation by disregarding the intent of the contracting parties.[131] Second, the majority broke with the *Ferentchak* precedent by not limiting the scope of the engineers' contractual duties to those explicitly mentioned in the contractual agreement.[132] Third, the *Thompson* court incorrectly relied on the *Billman* decision by analogizing an independent contractor's contractual duties under a negligent construction claim with an engineer's contractual duties under a negligent design claim.[133] As a result, the Illinois Supreme Court should overturn the Second District's decision in *Thompson*.

1. Contract Interpretation Gone Bad

To protect contracting parties' reasonable expectations, courts have a legal duty to effectuate the intent of the parties through contract interpretation.[134] The majority in *Thompson* attempted to discern the intent of the parties by analyzing two specific contractual provisions.[135] First, the court determined that the word "replacement" in the contract meant that the engineers "would submit plans to rebuild the bridge deck *(and accompanying median) exactly as it already existed*."[136] Second, it determined that the

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128. *Id.* Justice Hutchinson stated,

> The majority attempts to distinguish this matter from the *Ferentchak* decision by focusing on the 'essence' of that case while ignoring its actual holding, and then relies on *Billman* without bothering to address the distinction between a contractor who follows plans and an engineer who creates plans, which our supreme court has repeatedly emphasized. I cannot subscribe to such a legally and logically unsound approach.

Id. at 824.

129. *Id.* at 816, 819 (majority opinion).

130. *See supra* Part IV.A.1-2.

131. *See, e.g.*, Gallagher v. Lenart, 874 N.E.2d 43, 58 (Ill. 2007).

132. *See* Ferentchak v. Vill. of Frankfort, 475 N.E.2d 822, 825 (Ill. 1985).

133. *See Thompson*, 923 N.E.2d at 816.

134. *See id.* at 813; *Gallagher*, 874 N.E.2d at 58.

135. *Thompson*, 923 N.E.2d at 813-14.

136. *Id.* at 815 (emphasis added).

standard of care provision meant that the defendants would employ a "professional duty of care on defendants' work" when designing the median.[137] Under this second provision, the court interpreted the standard of care to create a completely separate duty of care on defendants' work, which included an obligation to investigate and design an improved median barrier.[138] As a result, the majority, in effect, determined that the engineers had a duty to design an exact replacement as well as a simultaneous duty to design an improved median barrier.[139]

Unfortunately for the contracting parties, the majority did not take into consideration that its interpretation is actually inconceivable, as these two competing duties are in direct conflict with one another.[140] Under the majority's reasoning, if the engineers were to perform either one of these required duties, they would physically be unable to perform the other, and thus, would violate a contractual duty.[141] For example, had the defendants created an improved median instead of the replacement as described in the contract, the developer could have sued the engineers for breach of contract.[142] Furthermore, the Illinois Supreme Court has found that the court's main goal when interpreting a contract is to effectuate the intent of the parties.[143] However, this overriding principle is at odds with the majority's finding as it is unlikely that the parties intended to create conflicting and unworkable duties of care in their contract.[144]

In addition to looking at the plain meaning of the terms of the contract, a court has the ability to look to the conduct of the parties as evidence of the parties' intent.[145] When looking at the conduct of the parties in this case, both the engineers and the developer acted in accordance with only one interpretation: replacing the median "exactly as it already existed."[146] As the dissent aptly pointed out, if the developer had wanted a "Jersey barrier," he would have negotiated for an "improved" median, and not requested a "replacement;"[147] and if the engineers had not performed their task within the proper standard of care, the developer would have had them redo the plans in accordance with the terms of the contract.[148] There was no indication in the record that the engineers had to redo any of the contracted ser-

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137. *Id.*
138. *Id.*
139. *See id.*
140. *See Thompson*, 923 N.E.2d at 813-14.
141. *See id.*
142. *See id.*
143. Gallagher v. Lenart, 874 N.E.2d 43, 58 (Ill. 2007).
144. *See Thompson*, 923 N.E.2d at 811.
145. *See supra* note 16; *see also* Gillett v. Teel, 111 N.E.722 (Ill. 1916).
146. *Thompson*, 923 N.E.2d at 814, 825 (Hutchinson, J., dissenting).
147. *See supra* note 95 and accompanying text.
148. *See supra* note 95 and accompanying text.

vices with respect to the median,[149] and the majority made no reference to either of the parties disputing the engineers' work.[150] Therefore, when looking at the conduct of the parties as evidence of intent, both parties intended to design an exact replacement, and not an improved median.[151]

Had the court simply determined that the word "replacement" meant "improvement," and not, "exactly as it already existed," then an improved median barrier would have been an acceptable interpretation.[152] Instead, as the dissent stated, "the majority disregards its own interpretation of the contractual tasks to be performed by defendants and holds that defendants also had an obligation to perform the task of redesigning the bridge deck and median to include a Jersey barrier."[153] Because the court interpreted the contract as having two completely opposite and conflicting duties, the majority's interpretation failed its purpose of determining the intent of the parties.[154]

Since the evidence of the intent of the parties strongly points to the dissent's interpretation, Justice Hutchinson on many occasions suggested that the majority was reaching a "predetermined result."[155] It is well settled that judges may not "interpret the agreement as meaning something different from what the parties intended as expressed by the language they saw fit to employ."[156] Moreover, "'[j]udges have no roving writ to construe the contract language in the way that they think best.'"[157] When looking at the *Thompson* opinion, it is not clear whether the majority deliberately disregarded the intent of the parties as the dissent suggests, however, it certainly is arguable that the majority's contract interpretation did not come to the proper ruling.[158]

2. *The* Ferentchak *Precedent and the Scope of Design Professionals' Contractual Duties*

The second critical error that the Second District made was that it misinterpreted the "essence" of the *Ferentchak* decision and subsequently ap-

149. *See Thompson*, 923 N.E.2d at 821 (Hutchinson, J., dissenting).
150. *See id.* at 810-19 (majority opinion); *see id.* at 825-27 (Hutchinson, J., dissenting).
151. *See Thompson*, 923 N.E.2d at 821 (Hutchinson, J., dissenting).
152. *See Thompson*, 923 N.E.2d at 814 (majority opinion).
153. *Id.* at 820 (Hutchinson, J., dissenting).
154. *See id.* at 814 (majority opinion); *see also* Gallagher v. Lenart, 874 N.E.2d 43, 58 (Ill. 2007).
155. *See Thompson*, 923 N.E.2d at 820-21 (Hutchinson, J., dissenting).
156. 17A Am. Jur. 2D *Contracts* § 333 (2010).
157. 11 WILLISTON & LORD, *supra* note 15, § 31:5 (quoting Exxon Co. v. Esso Workers' Union, Inc., 118 F.3d 841, 845 (1st Cir. 1997)).
158. *See Thompson*, 923 N.E.2d at 820-21 (Hutchinson, J., dissenting).

plied a flawed reasoning to the *Thompson* holding.[159] The majority stated that the "essence" of the *Ferentchak* decision was "that the engineer . . . had no knowledge about the defective design and no involvement in creating it," and therefore, no duty was imposed.[160] However, as the dissenting justice appropriately noted, "the *Ferentchak* court did not restrict its holding to provide that an engineer's duty is dependent on his contractual obligations only when he lacks adequate information to perform an extra-contractual task."[161] Rather the "essence" of the *Ferentchak* holding was that the scope of an engineer's duty is limited to what is specifically contained in the contract.[162] The majority simply disregarded the fact that the *Ferentchak* court merely mentioned that the *Ferentchak* engineer lacked information about the defective design and lacked involvement in creating it as support for its conclusion.[163]

After improperly interpreting the *Ferentchak* precedent, the majority attempted to distinguish the Illinois Supreme Court's ruling from *Thompson*.[164] Applying its interpretation of *Ferentchak*, the *Thompson* majority determined that because the engineers in *Thompson* had knowledge of the allegedly defective median design and were involved in creating it, the defendants owed a duty of care to the plaintiff.[165] However, the scope of an engineer's legal obligation in a given task has to be defined by the bargained-for contractual agreement.[166] The court's reasoning fails to take notice of the fact that neither of the engineers in the *Ferentchak* case nor in *Thompson* actually bargained for or contracted to perform the plaintiffs' alleged responsibilities.[167] If the parties in *Thompson* did bargain for an improved median, they would have included this obligation in their agreement, and would not have built a replacement median barrier.[168]

Furthermore, the *Ferentchak* contract did not explicitly mention a duty of care to set the foundation levels, and the lack of an explicit contractual obligation was the reason why the court determined that no duty existed.[169] Like *Ferentchak*, the *Thompson* contract did not explicitly mention a duty to investigate and design an improved median, and similarly no such duty

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159. *See id.* at 816-18 (majority opinion).
160. *Id.* at 817.
161. *Id.* at 822 (Hutchinson, J., dissenting).
162. *See* Ferentchak v. Vill. of Frankfort, 475 N.E.2d 822, 817 (Ill. 1985).
163. *See Thompson*, 923 N.E.2d at 816-18 (majority opinion).
164. *Id.*
165. *Id.*
166. *See Ferentchak*, 475 N.E.2d at 826; *Thompson*, 923 N.E.2d at 822 (Hutchinson, J., dissenting).
167. *Ferentchak*, 475 N.E.2d at 826; *Thompson*, 923 N.E.2d at 822 (Hutchinson, J., dissenting).
168. *See Thompson*, 923 N.E.2d at 816-18 (majority opinion).
169. *See id.* at 823-26 (Hutchinson, J., dissenting).

should have been imposed on the engineers.[170] Indeed, there was an explicit duty of care in the *Thompson* contract, but that entailed replacing the median "exactly as it once was," per the majority's interpretation.[171] Finally, because the majority imposed a duty on the defendants that was outside the explicit contractual obligations, the court therefore broke with the Illinois Supreme Court's *Ferentchak* precedent.[172]

Besides breaking with the *Ferentchak* precedent, when looking at cases from around the country, the majority's "no knowledge about the defective design and no involvement in creating it" reasoning is unsupported.[173] Courts have followed the same reasoning as the *Ferentchak* court and the *Thompson* dissent by looking to the contractual terms to determine the existence and scope of a given duty of care.[174] In one Missouri case, a designer was sued for not supplying a hospital with certain window features that would have made it less likely for a psychiatric patient to commit suicide.[175] However, because these improved features were not asked for, and not included in the contract, the court found that there was no duty to include these improved features.[176]

In another case from New York, a design professional was sued for improperly designing an apartment complex walkway where the plaintiff slipped on ice and was injured.[177] The court found that, because this certain design was not specified, no duty and no liability were found.[178] In another case from Texas, a design professional was sued for failing to properly design a platform in a factory where a worker fell from a ladder and was injured.[179] The court found that because the design professional did not contract to anticipate the negligence of others in the factory, no duty of care was owed to the plaintiff.[180] In all of the previous cases the design professionals were somehow involved in the injury causing object, however, no duty was found because the possible injury preventing features or improvements were not asked for or included in the contract.[181] Like Justice

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170. *See id.* at 811 (majority opinion).
171. *Id.* at 813-14.
172. *See id.* at 822 (Hutchinson, J., dissenting); *Ferentchak*, 475 N.E.2d at 826.
173. *See, e.g.*, DWIGHT G. CONGER ET AL., CONSTRUCTION ACCIDENT LITIGATION § 2.7 (2nd ed. 2010).
174. *See id.*
175. Honey v. Barnes Hosp., 708 S.W.2d 686, 704 (Mo. App. Ct. 1986).
176. *Id.*
177. Lewis v. I.K.E. Realty Assoc., 439 N.Y.S.2d 447 (N.Y. App. Div. 1981).
178. *Id.*
179. *See* Hanselka v. Lummus Crest, Inc., 800 S.W.2d 665, 667 (Tex. App. Ct. 1990).
180. *See id.*
181. *See* Honey v. Barnes Hosp., 708 S.W.2d 686, 704 (Mo. App. Ct. 1986); *see also Lewis*, 439 N.Y.S.2d at 447; Hanselka, 800 S.W.2d at 667.

Hutchinson reasoned in her dissent, and like the *Ferentchak* court held, the key in determining the existence of a contractual duty is whether a given duty was contractually bargained for, not whether a party has knowledge of a possible defective design or some limited involvement in a certain project.[182]

3. Design Professional vs. Independent Contractor

In addition to distinguishing *Ferentchak*, the majority attempted to find support for its holding by analogizing a case from the First District, *Billman v. Frenzel Construction Co*.[183] In *Billman*, there was an accident similar to that in *Thompson* where a car drove over the median barrier killing a passenger in another car, and consequently, the independent contractor who constructed the median barrier was sued for negligent construction.[184] The *Thompson* majority reasoned that the *Billman* contractor, like the *Thompson* engineer, completed all of his expressly described contractual obligations, and the *Billman* court still relied upon an expert's opinion "to conclude that there was at least a material question of fact as to whether the defendant contractor had breached a duty."[185] Therefore, the *Thompson* majority determined that, like *Billman*, it could also rely on an expert's opinion to determine whether the engineers breached some duty of care, even though the engineers had completed all of their expressly described contractual duties.[186]

The problem with this comparison is that *Billman* involves a contractor following plans, whereas *Thompson* involves an engineer creating designs.[187] The majority in *Thompson* disregarded this distinction and found that "these differences do nothing to undermine the applicability of *Billman's* basic holding to this case."[188] Although the majority has found similarities between the *Billman* independent contractor and the *Thompson* engineers, the Illinois Supreme Court approaches the two very differently.[189]

On two occasions, the Illinois Supreme Court has noted that there is a difference between a contractor following plans under a negligent construc-

182. *See* Thompson v. Gordon, 923 N.E.2d 808, 822 (Ill. App. Ct. 2009) (Hutchinson, J., dissenting).

183. *Id.* at 816.

184. *See supra* Part II.C.

185. *Thompson*, 923 N.E.2d at 816.

186. *See id.*

187. *See* Billman v. Frenzel Constr. Co., 635 N.E.2d 435, 438 (Ill. App. Ct. 1994); *see also* Ferentchak v. Vill. of Frankfort, 475 N.E.2d 822, 825 (Ill. 1985).

188. *Thompson*, 923 N.E.2d at 816.

189. *See* Hunt v. Blasius, 384 N.E.2d 368, 371 (Ill. 1978); *see also Ferentchak*, 475 N.E.2d at 825; Marshall v. Burger King, 856 N.E.2d 1048, 1055 (Ill. 2006).

tion claim and an engineer creating designs under a negligent design claim.[190] First, in *Ferentchak*, the court addressed the same argument that the *Thompson* majority made when it attempted to use the "so obviously dangerous" rule from *Hunt* and apply it to the engineers.[191] The *Ferentchak* court opined that the rules for an independent contractor following designs and an engineer creating them do not coincide.[192] Second, in *Marshall v. Burger King*, the court more recently reaffirmed its distinction between an engineer and an independent contractor by referencing its prior opinion in *Ferentchak*.[193] Because the Illinois Supreme Court has on multiple occasions expressed its opinion that there are separate precedential tracks that exist for engineers and independent contractors, *Thompson* is unsupported by *Billman*.[194]

V. PRACTICAL IMPACTS AND POLICY CONCERNS

The *Thompson* court determined that the engineers owed a duty of care to the plaintiff to investigate and design an improved median barrier even though this duty was not explicitly mentioned in the contract.[195] As a result, the court disregarded the intent of the parties through its contract interpretation, and it disregarded the *Ferentchak* precedent by imposing an unbargained-for extra-contractual obligation on the engineers.[196] The *Thompson* ruling will have immediate as well as possible long term negative effects on design professionals and contracting parties in general.[197]

The immediate effect of the court's decision is that the engineers who built the replacement median barrier, which both contracting parties originally agreed upon, now, nearly twenty years later, owe a duty of care to a third party for an additional unbargained-for task.[198] The engineers were not compensated for the extra cost or liability risk generally associated with performing the additional task.[199] Yet, they could very likely be liable for breaching a duty of care for not completing the additional task of investigating and designing an improved median barrier when on remand.[200]

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190. *Marshall*, 856 N.E.2d at 1055; *Ferentchak*, 475 N.E.2d at 825.
191. *Marshall*, 856 N.E.2d at 1055; *Ferentchak*, 475 N.E.2d at 825.
192. *Ferentchak*, 475 N.E.2d at 825.
193. *See Marshall*, 856 N.E.2d at 1055.
194. *See id.*; *Ferentchak*, 475 N.E.2d at 825.
195. Thompson v. Gordon, 923 N.E.2d 808, 815 (Ill. App. Ct. 2009).
196. *See id.* at 813-17.
197. *See id.* at 824-25 (Hutchinson, J., dissenting).
198. *See id.* at 813-15 (majority opinion).
199. *Id.* at 813-15.
200. *Thompson*, 923 N.E.2d at 813-15 (majority opinion).

If left unchecked, there is the possibility for additional fallout from the *Thompson* decision that could impact more than just the named parties.[201] The court has set a dangerous precedent by allowing judicial contract interpretation to be a much more fluid and subjective process than originally intended.[202] The majority created an unworkable interpretation by not properly analyzing the "plain and ordinary meaning" of the contractual terms and by not attempting to discern the actual intent of the parties.[203] Future Illinois courts could cite *Thompson* as authority to create conflicting contractual duties as a means of disregarding the contractual provisions and intent of the parties under the guise of contract interpretation.[204] Moreover, by not limiting the scope of engineers' contractual duties, the *Thompson* court has also contradicted and confused the *Ferentchak* Rule which limited the scope of contractual duties to those explicitly contained in the contract.[205] Future Illinois courts could use *Thompson* as a springboard to further broaden the scope of contractual duties and increase the liability of design professionals and possibly contracting parties in general.[206]

Beyond *Thompson's* improper contract interpretation and breaking with precedent, the court's ruling could have a chilling effect on contracting parties in the future.[207] If design professionals believe that their bargained-for explicit contractual terms can easily be re-written by a court at some point in the future, it is very possible that parties would be reluctant to enter into contractual relationships altogether.[208] The ripple effect of possibly fewer design professionals entering into contractual relationships could result in fewer construction projects and higher prices for these types of services.

With respect to the engineers' court expanded median barrier duties, the *Thompson* majority essentially rewrote the defendants' contractual agreement nearly twenty years after its inception.[209] When a court decides to fundamentally change the parties' contractual agreement, it is not only wrong from a legal standpoint, it is also unfair to the contracting parties.[210] The main reason why parties enter into contractual relationships in the first place is "to project exchange into the future and to tailor their affairs ac-

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201. *Id.* at 824-25 (Hutchinson, J., dissenting).
202. *See* Gallagher v. Lenart, 874 N.E.2d 43, 58 (Ill. 2007).
203. *See id.*; *Thompson*, 923 N.E.2d at 813-15 (majority opinion).
204. 17A AM. JUR. 2D *Contracts* § 1 (2010).
205. *See Thompson*, 923 N.E.2d at 816-18; *see also* Ferentchak v. Vill. of Frankfort, 475 N.E.2d 822, 825-26 (Ill. 1985).
206. *See Thompson*, 923 N.E.2d at 824-25 (Hutchinson, J., dissenting).
207. *Id.*
208. *See* 11 WILLISTON & LORD, *supra* note 15 and accompanying text.
209. *See Thompson*, 923 N.E.2d at 824-25 (Hutchinson, J., dissenting).
210. *See* 11 WILLISTON & LORD, *supra* note 15 and accompanying text.

cording to their individual needs and interests."[211] Because parties contract to prepare for future risk and costs associated with contractual obligations, when a court takes away parties' valid expectations, it is both unfair and against public policy.[212]

VI. CONCLUSION

The *Thompson* court erred in its ruling because it ignored established practices of contract interpretation by disregarding the true intent of the contracting parties.[213] The majority found that the defendants owed a duty of care to replace the median "exactly as it once was."[214] It then found a conflicting duty in the standard of care provision to investigate and design an improved median barrier.[215] These two duties are unworkable as it is impossible for them both to be performed.[216] The parties did not intend to create unworkable duties, instead, their intent was to design an exact replacement, and the parties' conduct has confirmed their intent.[217] Therefore, the majority has ignored the true intent of the parties and thus improperly interpreted the terms of their contractual agreement.[218]

The *Thompson* majority also erred because the court imposed a duty of care on the defendants that was outside the explicit contractual obligations.[219] The contract was devoid of an explicit duty of care to investigate and design an improved median barrier.[220] In fact, the only explicitly mentioned duty of care was to design a replacement median barrier "exactly as it once was," per the majority's interpretation.[221] To support its finding the majority attempted to distinguish the *Ferentchak* decision, except it misinterpreted the actual holding of the case.[222] The *Ferentchak* court held that the scope of an engineer's contractual duty of care is limited by the explicit contractual obligations.[223] As a result of imposing an extra-contractual duty of care, the *Thompson* majority broke with the Illinois Supreme Court's

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211. 1 RICHARD A. LORD, WILLISTON ON CONTRACTS § 1:1 (4th ed. 2010) (citing MCA Television Ltd. V. Pub. Interest Corp., 171 F.3d 1265 (11th Cir. 1999)).
212. 17A AM. JUR. 2D *Contracts* § 1 (2010).
213. *See, e.g.*, Gallagher v. Lenart, 874 N.E.2d 43, 58 (Ill. 2007).
214. *See supra* Part IV.B.
215. Thompson v. Gordon, 923 N.E.2d 808, 813-15 (Ill. App. Ct. 2009).
216. *See supra* Part IV.B.
217. *Thompson*, 923 N.E.2d at 821 (Hutchinson, J., dissenting).
218. *See supra* Part IV.B.
219. *See supra* Part IV.B.
220. *Thompson*, 923 N.E.2d at 811.
221. *Id.* at 813-15.
222. *See supra* Part IV.B.
223. *See* Ferentchak v. Vill. of Frankfort, 475 N.E.2d 822, 825-26 (Ill. 1985).

Ferentchak precedent by not limiting the scope of the engineers' duties to the explicit contractual obligations.[224]

The *Thompson* court also incorrectly relied on the *Billman* holding to bolster its finding.[225] The majority attempted to analogize an independent contractor's duties under a negligent construction claim with an engineer's contractual duties under a negligent design claim.[226] The Illinois Supreme Court has on multiple occasions expressed its opinion that there are separate and distinct precedential tracks that exist for engineers and independent contractors, and therefore, *Thompson* is unsupported by *Billman*.[227]

Beyond the court's improper contract interpretation and failure to follow applicable precedent, the decision has immediate and long term negative consequences.[228] The court has imposed unbargained-for duties on the engineers, twenty years after the parties signed the contract.[229] The practical effect is that there could be a chilling effect regarding future contractual relationships.[230] If parties fear their contracts will be re-written by courts years later, it is very possible that parties will be reluctant to enter into contractual relationships altogether.[231]

Because the *Thompson* decision improperly interpreted the parties' contract, failed to follow applicable precedent, and because negative practical implications are inevitable, the Illinois Supreme Court should, therefore, overrule the Second District's grant of summary judgment for the plaintiff and reaffirm its *Ferentchak* precedent.

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224. *Thompson*, 923 N.E.2d at 822-23 (Hutchinson, J., dissenting).

225. *See supra* Part IV.B.

226. *See Thompson*, 923 N.E.2d at 816.

227. *See Ferentchak*, 475 N.E.2d at 825; *see also* Marshall v. Burger King, 856 N.E.2d 1048, 1055 (Ill. 2006).

228. *See supra* Part V.

229. *Thompson*, 923 N.E.2d at 811-12.

230. *Id.* at 824-25 (Hutchinson, J., dissenting).

231. *Id.*

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