

## **Spearin and the Standard of Care** ***How Good Does a Design Have to Be?***

by Kevin O'Beirne, PE

No one is infallible, but how close a design professional should be to “perfect” is often the subject of hot debate and lawsuits. Usually this question is posed when a project owner or construction contractor believes the project design professional's performance was sub-par. Two important concepts address this question: the “standard of care” in an agreement between the owner and its design professional consultant, and an important caselaw precedent commonly known as the Spearin Doctrine.

### **The Standard of Care**

The standard of care provision is a critical element of contracts for the performance of professional services, including architecture and engineering. It establishes a basic expectation between the parties regarding the quality of the services to be rendered.

Although no one is perfect, the reason for a standard of care provision is that a project owner retaining a design professional may potentially expect something pretty close to perfection. The typical standard of care, as presented below, does not require perfection, but rather only that the design professional perform with the level of skill and care of other, similar professionals engaged in similar work in the same geographic area as the project. Thus, under the typical standard of care, the design professional does not warrant its services. A warranty is a promise of a specific performance by one party to another party; for example, “the item will be free of all defects in materials and workmanship.”

Section 2.2 of AIA® B101™, *Standard Form of Agreement between Owner and Architect* (2007), is the American Institute of Architect's (AIA) standard of care:



**It's "Spearin", not "spearing"**  
(Nineteenth Century Zulu warrior)

§ 2.2 The Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.

Paragraph 6.01.A of EJCDC® E-500, *Agreement between Owner and Engineer for Professional Services* (2014), is the Engineers Joint Contract Documents Committee's (EJCDC) standard of care:

A. *Standard of Care*: The standard of care for all professional engineering and related services performed or furnished by Engineer under this Agreement will be the care and skill ordinarily used by members of the subject profession practicing under similar circumstances at the same time and in the same locality. Engineer makes no warranties, express or implied, under this Agreement or otherwise, in connection with any services performed or furnished by Engineer.



The AIA's standard of care applies only to architectural services, whereas EJCDC's standard of care applies to all professional services performed by or for the Engineer. EJCDC's provision also expressly states that the Engineer does not warrant its services.

Standard of care provisions are preferred and supported by professional liability insurers. A design professional that agrees to a higher-than-typical standard of care, or that warrants its services beyond the standard of care, may find that their professional liability insurance will not cover a claim against their policy. Thus, it is highly desirable for a design professional to incorporate the typical standard of care into its agreements with its clients, and it may be unwise for owners to require adherence to a higher standard (compared with the standard of care in AIA or EJCDC contracts) that may not be covered under the terms of the professional liability insurance policy carried by the associated architect or engineer..

Agreements for design professional services that promise “expert” services, evaluation of “all options”, completed construction that achieves a specific performance, or other promises regarding performance may bind the design professional to an elevated standard of care. Design professionals entering into an agreement with a project owner should carefully evaluate all clauses of the contract to guard against an elevated—and potentially uninsurable—standard of care.

A notable consideration is design-build contracts, in which an owner retains both design and construction services under a single contract. While Paragraph 7.01.B of EJCDC® D-700, *Standard General Conditions of the Contract between Owner and Design-Builder* (2016), and Section 2.3 of the Design-Build Institute of America's DBIA 535, *Standard General Conditions of the Contract between Owner and Design-Builder* (2010), both include the typical standard of care, interestingly AIA® A141™, *Standard Form of Agreement between Owner and Design-Builder* (2014), does not. Instead, AIA A141 (2014) requires the design-builder to warrant all its work—including design services—to the owner. However, Section 2.2 of AIA® B143™, *Standard Form of Agreement between Design-Builder and Architect*



(2014), includes the typical standard of care. Thus, AIA's design-build documents leave the design-builder holding the risk of the architect's imperfections beyond the standard of care, whereas both EJCDC and DBIA assign such risk to the owner.

EJCDC's rationale for including the standard of care in the owner/design-builder contract is twofold: (1) the engineer may be the lead in the design-build entity and thus might find its professional services to be uninsurable without a standard of care in the owner/design-builder contract, and (2) many design-builders seek to flow down all the provisions of their prime contract to all their subcontractors, including their design professional consultant(s) and, when the prime contract does not include a standard of care, some design-builders are reluctant to provide such a "carve out" to its design professional(s), thus, potentially leaving the design professional(s) without professional liability insurance coverage for their services on the project.

## The Spearin Doctrine

Under the Spearin Doctrine, an owner that retains a contractor to build a project based on construction drawings and specifications furnished by the owner, whether prepared by the owner directly or by a design professional separately retained by the owner, makes an implied warranty to the contractor that the drawings and specifications are sufficient for the project's construction. Thus, under the Spearin Doctrine, the owner is representing to the contractor that the drawings and specifications are reasonably complete, adequate, and constructible.

The doctrine arose from a landmark, 1918 United States Supreme Court decision—United States v. Spearin (248 U.S. 132)—in which the court found that a contractor cannot be liable to the owner for loss or damage resulting solely from insufficiencies or defects in the drawings, specifications, and other information furnished by the owner. In the decision, the prevailing opinion included the following notable language:



Again, that's "Spearin", not "spearing".  
(Image from *Braveheart*, Paramount Pictures, 1995)

*"Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered. Thus one who undertakes to erect a structure upon a particular site, assumes ordinarily the risk of subsidence of the soil. But if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. This responsibility of the owner plans, and to inform themselves of the requirements of the work...the contractor should be relieved [e.g., receive additional time and compensation from the owner], if he was misled by erroneous statements in the specifications."*

The Spearin Doctrine has been tested and applied in virtually every state, but it is not an express contractual provision. Rather, Spearin is an underlying basis for many of the risk allocations in standard contract documents such as AIA® A201™, *Standard General Conditions of the Contract for Construction*, and EJCDC® C-700, *Standard General Conditions of the Construction Contract*

Spearin applies primarily to project delivery methods in which the owner provides construction drawings and specifications to the contractor, such as design-bid/negotiate-build, construction

manager as advisor (CMa), and construction manager at risk (CMAR or CMc). In design-build delivery, the design-builder prepares the design and its associated construction drawings and specifications and therefore Spearin has little or no applicability in this delivery method.

## Who's the Judge?

While the standard of care establishes the minimum level of quality in the design professional's services (without being a warranty), and the Spearin Doctrine establishes between the owner and contractor a generally-similar expectation (which is an implied warranty) of the quality of the drawings and specifications, one certainly might think, "*These are pretty subjective things. Who decides when a design professional's drawings and specifications were not good enough?*"



First, the owner's expectations of quality in the design professional's instruments of service are probably the most-important factor in whether or not the owner is satisfied and will retain the design professional for a future assignment. While many owners have a basic understanding of the design process, owners may *expect* adherence to a higher standard, regardless of what the contract's standard of care indicates or allows. Any design professional who relies on the standard of care provision in its contract with the owner might win the argument in court but is likely to lose the client.

Thus, the standard of care is arguably the design professional's last ditch of defense, often used only when the owner and design professional have consulted their respective legal counsel in a disagreement between themselves.

The best defense for engineers and architects is to prepare "good" reports, drawings, specifications, and other instruments of service, and to recognize and advise the owner of associated risks early, and in writing, and to properly perform their other services. However, when optimal practices fail, who ultimately decides when the design professional's instruments of service or performance was insufficient and thus violated either the standard of care or the Spearin Doctrine?

The **standard of care** may arise in circumstances where an owner alleges that its design professional consultant's instruments of service had errors or omissions or when its performance was otherwise substandard. Often, it is the design professional who first brings the standard of care into play, typically asserting that its performance was within the standard of care. While such arguments may not always impress a project owner in initial discussions between the parties, the issue can become much more important as a legal and contractual principle when a disagreement between the owner and design professional escalates to a dispute, which may ultimately be decided via a formal proceeding such as binding arbitration or litigation in court.



In a case involving the standard of care, the owner and design professional always disagree and, because arbitrators or judges experienced in such cases are not themselves experienced design professionals (and juries certainly do not possess relevant experience), such cases almost always turn on the testimony of expert witnesses retained by the opposing parties. *Black's Law Dictionary*<sup>1</sup> defines an "expert witness" as:



"One who by reason of education or specialized experience possesses superior knowledge respecting a subject about which persons having no particular training are incapable of forming an accurate opinion or deducing correct conclusions. . . . A witness who has been qualified as an expert and who thereby will be allowed (through his/her answers to questions posed) to assist the jury in understanding complicated and technical subjects not within the understanding of the average lay person."

An expert witness testifying in a standard of care case involving a design professional would, therefore, be a design professional with significant experience in the same discipline(s) and type of work involved in the case. An expert witness testifying in such a case would likely be required by the state's professional licensing laws and regulations to possess a valid professional license in the same jurisdiction as the project site. The opposing party's legal counsel will carefully examine the expert witness's qualifications. In a standard of care case, both the owner's and the design professional's attorneys are likely to retain (and pay for) one or more expert witnesses to support their client's case. The testimony of such expert witnesses will typically carry significant weight in the outcome of the case. Inevitably each party will also present other evidence, such as the record of construction change orders and the number of requests for interpretations (RFI) processed, among other documents, evidence, and testimony. The case's outcome will be determined by the arbitrator(s), judge, or jury, as applicable.



When it arises on a project, the **Spearin Doctrine** will be cited by the contractor in claims or disputes against a project owner. Similar to the discussion above on the standard of care, the opposing parties—the contractor and the owner—will each present to the arbitrator(s), judge, and/or jury testimony and documentary evidence of the alleged defects in the construction drawings and specifications and the alleged effects via change orders and RFIs. In arbitration and litigation, the opposing parties are likely to employ expert witnesses, similar to the process described above for standard of care cases. In the end, the expert witness(es) that present the most-compelling combination of qualifications, experience, testimony, and knowledge of the subject are likely to sway the arbitrator(s), judge, or jury.

When the contractor initially asserts its construction claim and alleges defective or insufficient drawings and specifications, and when the construction contract requires that the project's design professional serve as the initial decision-maker in the claim between the parties, the design professional should give careful consideration as to whether the design professional should recuse itself from determining entitlement in the claim, due to the perception of a conflict of interest.

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<sup>1</sup> Sixth Edition, 1991.

## Recent Cases of Interest

### ***William H. Gordon Assocs. v. Heritage Fellowship, United Church of Christ***

(February 2016, Supreme Court of Virginia, 016-6-008, Record No. 150279) was a case much-watched by industry organizations such as the National Society of Professional Engineers (NSPE), American Society of Civil Engineers (ASCE), the American Council of Engineering Companies (ACEC), and the AIA, and involved an engineer's liability for the failure of a storm water tank that it designed. The case addressed the standard of care, the engineer's reliance on a product manufacturer's published information, and the contractor's responsibility.<sup>2</sup>



Heritage Fellowship Church dedication, 2012

In 2006, Heritage Fellowship Church retained Gordon Associates for the civil/site work design for a large, new church in Fairfax County, Virginia. Gordon designed a prefabricated storm water detention tank to be located ten feet under a new parking lot. The construction contract incorporated as its General Conditions AIA A201. Gordon's professional services agreement with the church allowed Gordon to rely on third-party information (such as product manufacturers' literature) and included a standard of care provision generally similar to that of AIA B101 and EJCDC E-500.

In October 2010, the construction contractor raised concerns about the suitability of the storm water tank, noting that the local groundwater table was high, and submitting a RFI about the installation requirements. Gordon did not re-evaluate the tank's design or provide any additional information about the required installation, but assured the contractor that the groundwater level would not affect the tank. The tank was installed in April and May 2011 and, in August 2011, the tank and the parking lot above it collapsed, requiring a full year of rework and delaying occupancy of the new facility.



Example of a prefabricated, buried storm water detention tank

In the subsequent litigation, the contractor and the owner (e.g., the church) offered expert testimony that Gordon Associates had breached its standard of care. In reply, Gordon's expert witnesses contended that the tank's failure was caused by construction errors by the contractor and that Gordon had met its standard of care by relying on the tank manufacturer's product information. The trial court concluded that the contractor had complied with Gordon's design and that the sole cause of the collapse was Gordon's failure to meet the standard of care. Gordon appealed and the case was ultimately decided in the Supreme Court of Virginia.

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<sup>2</sup> The summary of this case as presented herein was adapted from "EJCDC Recent Cass of Interest", February 2016, by Hugh Anderson, Esq. and is used here with permission. This article's author also reviewed the court decision and the NSPE "friend of the court" brief on this case.

Upon appeal, the Supreme Court of Virginia affirmed the lower court's ruling against Gordon Associates, although the court decided in Gordon's favor on other matters. The court found ample basis for affirming that Gordon had not met the professional standard of care.

The court's decision noted testimony that Gordon's construction specifications for the storm water tank were prescriptive, and the contractor's duty was to comply with them, rejecting the notion that the construction contract had shifted design liability or duties from the engineer to the contractor. Expert testimony in the trial court had also been critical of Gordon's reliance on the manufacturer's generic product literature, and failure to conduct due diligence on the tank's location and the impact of the high groundwater table. The court described the design as, "*not clear, constructible, or very likely to serve its purpose,*" apparently with respect to the construction contract documents' lack of direction regarding the need for a very level base for the tank and the need for "nearly perfectly perpendicular" vertical panels. The court also criticized the engineer's (Gordon Associates) failure to answer the contractor's question regarding installation requirements.



The court's decision favorably cited testimony from the contractor's and owner's expert witnesses, but the point seems to be that there were factual grounds for affirming the lower court's decision—the intent behind the decision does not appear to be to establish broad precedents of what is and is not within the design professional's standard of care. For example, in general support of the lower court's finding that the engineer did not meet the standard of care, the Virginia Supreme Court cited testimony by an expert witness that the standard of care requires an engineer "*to reexamine its original plan when the contractor submits an RFI about the suitability and performance of a structure.*" That may have been a valid point in the context of the church project, but perhaps was not intended by the Virginia Supreme Court as a new rule of law for all design professionals.

Also in the Gordon case, the Virginia Supreme Court reported that an expert witness had opined that "*an engineer that adopts the general plans and specifications prepared by the non-engineer manufacturer falls below the standard of care.*" It would seem reasonable to take this as a project-specific statement regarding Gordon Associates' liability rather than a holding that has absolute application to all claims against design professionals. In some situations, a design professional's reliance on third-party information, such as a product manufacturer's published literature, may be routine and entirely justified.

In *Gordon v. Heritage Fellowship Church*, the Virginia Supreme Court correctly employed a professional standard of care analysis in determining Gordon Associates' liability. The allocation of such liability was strongly supported by expert testimony offered by the project owner's and contractor's witnesses at trial.

***Penzel Construction Co. v. Jackson R-2 School District*** (February 2017, Missouri Court of Appeals, No. ED103878) was the first published case to test the Spearin Doctrine in Missouri and also addressed whether expert witness testimony is necessary in such cases.



In September 2006, Penzel Construction Company was hired by the Jackson R-2 School District as the general contractor for a significant project at the district's high school. Penzel retained Total Electric, Inc. as its electrical subcontractor for an amount slightly over \$1 million. Neither Penzel nor Total Electric noted errors or omissions in the drawings and specifications at the time of bidding.



Jackson, MO high school

In what was apparently a troubled project, Total Electric alleged it was delayed for 16 months because of “defects and inadequacies” in the drawings and specifications. In accordance with a “liquidating agreement” between Penzel and Total Electric, in October 2009, Penzel sued the project owner, the owner’s insurer, and the architect to pursue a claim alleging defects in the construction documents and a violation of the owner’s implied warranty under the Spearin Doctrine. Penzel’s claim sought compensation for damages for additional project management and supervision costs, wage escalation, unpaid change order work, and administrative consultant’s fees. After a complicated series of multi-party legal actions lasting more than eight years—including the school district filing third-party claims against the architect and its electrical engineering consultant—after appeals, the case was decided in February 2017.

The court agreed with the contractor’s argument that the owner impliedly warranted the constructability of its project based on the drawings and specifications issued by the owner and that the theory of liability set forth under the Spearin Doctrine was actionable in Missouri.

Also of significant interest was the court’s decision against the owner’s argument that the contractor’s failure to produce expert witnesses to support its claim made the claim invalid. Rather, the court differentiated between an alleged defective design under Spearin and an allegation of a design professional’s breach of contract under the standard of care—the latter normally requiring testimony by expert witnesses. The court decided that a contractor did not have to prove that an allegedly defective design fell below the typical standard of care to successfully prosecute the claim under the Spearin Doctrine.



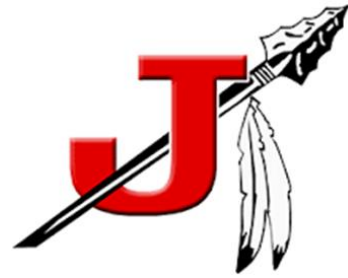
In *Penzel v. Jackson R-2 School District*, the court opined that, although electrical engineering is “*highly technical and complicated*,” most problems referenced in Penzel’s complaint were “*simple enough for a layman to understand*.” The plaintiff alleged

that critical elements were omitted from the design, the design called for outdated or non-existent materials and equipment, the design presented in the drawings and specifications violated the applicable building code, and several other alleged defects and omissions.

Penzel also argued that the owner’s and architect’s long response times for numerous issues during construction compounded the deficiencies in the drawings and specifications and resulted in additional damages. Penzel alleged that typically “weeks” and “sometimes months” were required to receive responses to its written inquires. Often, the responses received did not resolve the issue.



A project owner considering *Penzel v. Jackson R-2 School District* may be concerned that the decision exposes the owner to liability under Spearin's implied warranty, while the design professional's typical standard of care is not a warranty. The true gap in liability is, in all likelihood, relatively small and should not be of significant concern to owners or design professionals. Circumstances under which an architect or engineer could successfully defend itself against an alleged breach of its standard of care while, at the same time, a court finds that the architect's or engineer's drawings and specifications were not constructible and therefore violated the Spearin Doctrine, are likely to be very rare.



Of greater concern in the *Penzel* case is the court's decision that expert testimony was *not* required to determine that the drawings and specifications violated the Spearin Doctrine. While the *Penzel* case may be unique and perhaps presents a particularly egregious failure by the electrical engineer in the preparation of its drawings and specifications, the case may have created an opening for arguments in other, less clearly-cut cases, for non-experts to successfully convince a court or arbitrator that a "mediocre" design did, in fact, violate the Spearin Doctrine. Time will tell whether this comes to pass in Missouri or other jurisdictions.

## Conclusions

It is essential that architects and engineers be familiar with the critical concepts of the standard of care and the Spearin Doctrine. Design professionals should resist being bound to a standard of care higher than the typical as presented in EJCDC and AIA standard professional services agreements, and should be aware that agreeing to a higher standard of care may jeopardize coverage under their professional liability insurance policy. Contractors are keenly aware of the Spearin Doctrine and may make associated claims against the owner which can, in turn, lead to claims against the design professional for breach of contract under the standard of care provision. Recent court decisions have upheld these concepts, which are alive and well in the design and construction marketplace.

**Acknowledgements:** The author gratefully acknowledges the advice and comments on drafts of this article from Gerard Cavaluzzi, Esq., Vice President and General Counsel at Kennedy/Jenks Consultants, Inc. (Croton-on-Hudson NY). The author also gratefully acknowledges insights from Bruce Firkins, PE, LS, Vice President and Senior Principal Engineer at Bolton & Menck (Minneapolis MN) and Hugh Anderson, Esq., attorney-at-law and general counsel to EJCDC (Madison WI). Mr. Anderson also kindly allowed use of his summary of the *Gordon Associates v. Heritage Fellowship Church* case.

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