There are many circumstances where the applicable standard of care in construction activities is not prescribed in clear terms.

What is the 'Standard of Care' in Litigation?

> In many states and at the federal level, the magnitude, volume and rapidity of recent substantive changes make it hard for counsel to remain abreast of construction law.

A party in construction litigation is, in general, subject to civil liability only if its conduct deviates from some established standard of care. Construction disputes typically deal with multiple legal theories, including allegations regarding warranties, negligence and breach of contract.

The specific "standard of care" alleged to have been violated may be quite specific, such as governmental regulations, industry wide requirements by entities such as the American National Standards Institute (ANSI) or the American Society for Testing and Materials (ASTM), or in detailed written specifics contained in project plans and specifications. Where the underlying standard of conduct has been specified precisely in the contract documents, warranty representations, or through appropriate regulations, there may be no dispute as to the standard of care; i.e., what a party "should" or "should not" have been done.

What should be done in circumstances where the applicable standard of care is not prescribed in black-or-white terms and must be established by competent expert testimony? Recent Texas legislation and court decisions have changed litigation requirements regarding proof of this more general standard of care.

In any litigation filed against specified

licensed design professionals (architects, engineers, landscape architects, or land surveyors), Texas statutory law requires that the Plaintiff must file a report or affidavit in a precise format setting out the acts or omissions that constitute negligence or fault by the professional. (See Texas Civil Practice and Remedies Code §150.002.) The report, called a "Certificate of Merit," must detail how the architects, engineers or surveyors deviated from the standard of care. If a certificate in proper detail along with supporting expert affidavits is not timely filed, the suit will be summarily dismissed.

Recent judicial decisions in Texas have made explicit certain requirements that a party seeking to establish the standard of care must come forward with empirical evidence of what the parties in a specific practice or a given industry actually do, as opposed to merely hypothecating on what a "reasonable person" in that industry would or would not do.

The opinion of the Texas Supreme Court in *FFE Transportation Services v. Fulgham*, 154 S.W.3d 84 (Tex. 2004) ("Fulgham") illustrates these changes in "standard of care" proof requirements. In Fulgham, the plaintiff was injured when the trailer in the tractor-trailer rig he was driving separated from the tractor. The cause of the separation was the failure of certain components in the coupler/kingpin assembly of the trailer. Plaintiff claimed that the defendant trucking company deviated from the "standard of care" in failing to comply with its own self-imposed policy which called for torque testing and inspection of the coupler assembly every 60 days.

Plaintiff's expert on the standard of care stated that he was not aware of an industry-wide standard interval for torque testing coupler components, but that the defendant's self-imposed 60-day interval was "reasonable" and was thus the applicable standard of care in this instance. The trial judge refused to admit the expert's testimony on the grounds that the expert did not identify any industry inspection interval that was "universally shared" or even "prevalent throughout the industry."

The Texas Supreme Court held that the proof offered by the plaintiff's expert on the standard of care was insufficient and not admissible. The court stated that the trucking company's self-imposed inspection policy, taken alone, did not establish any "standard of care that a reasonably prudent operator would follow." The self-imposed policies might have actually exceeded what a true universally shared interval may have been. Therefore, the trucking company's alleged failure to conform to its own internal, self-imposed 60-day inspection interval would not subject the company to liability. A party should not, the court reasoned, be penalized and subjected to liability based solely on setting its own internal standard higher than what a reasonably prudent operator would follow.

Reliable Experts Required

Any expert opinions as to the standard of care must be "reliable." In *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1973) ("Daubert"), the U.S. Supreme Court held that federal judges had a duty to scrutinize the substance of expert testimony and act as gatekeepers in determining when expert testimony could be considered by juries. Expert testimony would not be permitted unless the opinions expressed were "reliable." Every state now has some form of reliability minimums that expert testimony must exceed for the opinion to be admissible. Texas adopted Daubert-like requirements in *DuPont v. Robinson*, 923 S.W.2d 549 (Tex. 1995). Before any expert can testify, the opinions offered must be reliable – reliable foundational data, reliable methodology and reliable reasoning. Speculation and assertions resting on the expert's imminence alone – ipse dixit – will be excluded.

The practical consequences of Fulgham/Robinson changes are illustrated by litigation in central Texas in the mid-1990s involving a high-end condominium complex that had sustained significant water penetration and mold.

The major pathway for the water was around the perimeters of the windows. The prevalent custom at that time for almost all residential framing contractors in the local community was to not install extensive flashing or taping around the perimeter of the windows. The plans and specifications were silent as to how the flashing was to be performed. There were no ASTM or similar industry-wide standards that applied.

Plaintiff's experts were not from Texas and had little or no familiarity with local flashing practices. The experts made no effort to establish what framers in Texas actually did in their day-to-day practice. The standard of care relied upon by these experts to support their opinions was vague and based largely on their "experience." In light of the fact that there was little proof of what central Texas framers actually did with respect to window flashing and the suspect reliability of the underlying data on which the standard of care was based, the admissibility of these same opinions today would be questionable in light of the 2004 Texas Supreme Court in Fulgram.

The trend in Texas as to the standard of care is to insist on a greater showing of actual empirical proof of what parties actually do; of going beyond mere evidence of self-imposed polices; and on the exclusion of experts who whose actual knowledge of the prevalence of the alleged standard is either not present or is based on unreliable data or speculation. In Texas, as in other states and on the federal level, the magnitude, volume and rapidity of recent substantive changes place a difficult burden on counsel to keep abreast of current law. Therefore, it is not surprising that even experienced counsel may overlook the inadequacies and fatal defects in proof, relating to a standard of care. The failure to appreciate, understand and respond to these changes by counsel, managers and clients may lead to unnecessary and unacceptable outcomes.

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