

2011

Jason Ross v. Epic Engineering : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

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IN THE UTAH COURT OF APPEALS

JASON ROSS,

Plaintiff/Appellant,

vs.

EPIC ENGINEERING, P.C.,

Defendant/Appellee.

**ANSWER BRIEF OF APPELLEE
EPIC ENGINEERING, P.C.**

Case No. 20110537

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PARTIES TO THE PROCEEDING

The following are parties in this appeal:

1. Jason Ross
2. Epic Engineering, P.C.

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Defendant-Appellee Epic Engineering, P.C. (Epic), respectfully submits this brief in response to the Opening Brief of Plaintiff-Appellant Jason Ross (Ross).

JURISDICTIONAL STATEMENT

Epic agrees with the Statement of Jurisdiction set forth in the Brief of Appellant.

ISSUES PRESENTED FOR REVIEW

1. Was the district court's decision to grant Epic's motion in limine precluding Ross's engineering expert from offering opinions on subject matters outside of his expertise, opinions that were contrary to Utah law, or opinions on issues that were undisputed, an abuse of discretion?

Standard of Review: "A decision to admit or exclude expert testimony is left to the discretion of the district court, and that decision will not be reversed unless it constitutes an abuse of discretion." *U.S.A. United Staffing Alliance, LLC v. Workers' Comp. Fund*, 2009 UT App 160, ¶ 17, 213 P.3d 20. An abuse of discretion occurs when the district court's decision "exceeds the limits of reasonability" or is based on a misinterpretation of the Utah Rules of Evidence. *Eskelson ex rel. Eskelson v. Davis Hosp. and Med. Ctr.*, 2010 UT 59, ¶ 5, 242 P.3d 762.

2. Did the district court err in dismissing Ross's breach of contract claim as a matter of law on the basis that Ross lacked expert evidence that would enable

him to prove that Epic breached the parties' contract by failing to properly engineer the construction plans as Ross alleged?

Standard of Review: A district court's ruling on a summary judgment motion is reviewed for correctness. *Warenski v. Advanced RV Supply*, 2011 UT App 197, ¶ 5, 257 P.3d 1096.

3. Does the district court's decision to grant Epic's motion in limine excluding Ross's engineering expert prior to the time allowed for Ross to respond, where the issue of the expert's lack of qualifications was fully briefed by the Parties in connection with Epic's summary judgment motion, constitute harmless error such that reversal is not warranted?

Standard of Review: In determining whether a procedural error is harmless, this Court asks whether the error is "sufficiently inconsequential so no reasonable likelihood exists that the error affected the outcome of the proceedings." *Jones v. Cyprus Plateau Mining Corp.*, 944 P.2d 357, 360 (Utah 1997). "In order to justify reversal the appellant must show error that was substantial and prejudicial in the sense there is at least a reasonable likelihood that in the absence of the error the result would have been different." *Ortega v. Thomas*, 383 P.2d 406, 408 (Utah 1963).

STATEMENT OF THE CASE

Ross entered into a contract with Epic for the design and engineering of a small commercial building that Ross planned to construct in Roosevelt, Utah. Epic delivered to Ross a stamped set of construction drawings and Ross hired his brother to construct the building. After the building was finished, it experienced settling that the parties agree is due to the presence of unconsolidated fill material underlying the site. Ross filed suit against Epic, asserting causes of action for breach of contract and negligence. In his complaint, Ross alleged vaguely that "Epic breached the contract by failing to properly engineer the [building] plans," but did not identify any specific shortcomings in Epic's performance.

Both Ross and Epic retained local engineers to provide expert testimony on their behalf. Ross retained geotechnical engineer James. E. Nordquist, P.E. and Epic designated Larry Gilson, P.E., a structural engineer and licensed general contractor with 36 years of experience, as its standard of care expert. At the close of expert discovery, Epic moved for summary judgment on both of Ross's claims.

Epic argued that Ross's negligence claim was barred by Utah's economic loss doctrine and that the breach of contract claim failed as a matter of law because Ross had not presented expert evidence demonstrating that Epic "failed to properly engineer the plans." Ross's engineering expert was not qualified to offer an opinion as to the standard of care governing Epic's performance and, in fact, had

not attempted to do so. Ross opposed summary judgment, responding to Epic's challenge to his expert and attempting to raise issues of fact regarding the content of parties' agreement to preserve his breach of contract claim. Ross also cited to the "independent duty exception" to the economic loss doctrine in an attempt to prevent dismissal of his negligence claim.

Judge Peterson granted Epic's motion in part, dismissing the negligence claim but denying summary judgment on the breach of contract claim. The parties were ordered to participate in mediation and when that effort was unsuccessful, the matter was scheduled for trial. Epic re-crafted its motion for summary judgment on the breach of contract claim into a motion in limine seeking to preclude Ross from presenting expert testimony from Mr. Nordquist to the jury.

As Epic had previously argued, as a geotechnical engineer Mr. Nordquist lacked the relevant knowledge, skill, or experience that would enable him to testify as to the standard practices of structural engineers, contractors, or excavators. Therefore, Mr. Nordquist could not satisfy the threshold requirement of competency set forth by Utah Rule of Evidence 702. Moreover, Mr. Nordquist frankly admitted in his deposition that he did not have an opinion as to the relevant standard of care. The other opinions offered by Mr. Nordquist were unnecessary because they went to undisputed issues, such as the cause and extent of the settling and the appropriate method of repair.

Judge Peterson heard argument on Epic's revived challenge to Mr. Nordquist's expert testimony at the final pre-trial hearing, over Ross's objection. Ruling from the bench, the district court exercised its broad discretion to evaluate expert testimony and granted Epic's motion in limine. The district court then revisited its earlier ruling denying summary judgment on the breach of contract claim, reasoning that without expert testimony Ross would be unable to establish that Epic breached the parties' contract by failing to meet the relevant standard of care. As a result, the dispute regarding the exact terms of the contract, upon which basis the district court had previously denied Epic's motion for summary judgment, was immaterial and did not prevent judgment as a matter of law. This appeal followed.

STATEMENT OF RELEVANT FACTS

The following facts are undisputed, based on sworn testimony of the parties and their experts and facts that the parties agreed were undisputed.

A. The U.S. Design Building Project.

Ross contacted Epic in early 2006 to retain Epic's services for the design of a small commercial building that Ross intended to construct in Roosevelt, Utah (the U.S. Design Building). R.120 at ¶ 1 (EpicUF); R.140 at 30:10-19 (J.Ross Dep.).¹ Ross discussed his general needs and ideas for the U.S. Design Building

¹ "J.Ross" refers to Jason Ross. "D.Ross" refers to David Ross. "J.Nordquist"

with Adam Huff, P.E. (Huff), a structural engineer employed by Epic. R.120 at ¶ 2 (EpicUF). Ross subsequently entered into a “Short Form Consulting Services Contract” (the Contract) with Epic for its design services. R.141-42 at 36:4-7; 39:23-40:10 (J.Ross Dep.).

The Contract defined Epic’s scope of work as “structural engineering and drafting of 70’ X 100’ office and warehouse building” for a fee of \$8,250.00. R.147; R.149 (Contract). It was Epic’s position below that the Contract contained a second page of terms and conditions (Page 2), that included a limitation of liability clause and a standard of care provision that read, “Epic services shall be rendered without any warranty except that Epic will perform in accordance with a degree of care and skill generally exercised by professionals performing similar work under similar circumstance.” R.157. Ross denied ever receiving Page 2 of the Contract. R.142 at 39:2-10 (J.Ross Dep.).

The construction plans that Epic delivered to Ross, designed by Adam Huff and bearing his stamp, contained general directions for the builder and instructions pertaining specifically to the compaction of the building site: “all footings shall bear 12” minimum into original undisturbed earth or on engineered fill”

refers to James. E. Nordquist, P.E. “L.Gilson” refers to Larry Gilson, P.E. “RossUF” refers to Ross’s claimed undisputed facts as accepted by Epic. “EpicUF” refers to Epic’s claimed undisputed facts as accepted by Ross. “App.Brief” refers to the Opening Brief of Appellant Jason Ross.

R.122 at ¶ 9 (EpicUF); R.176 (Construction Plans). Ross's brother, David Ross, served as the general contractor on the project. David Ross is not himself a licensed contractor; rather, he was operating under a license issued to Desert Rim Construction of St. George, Utah. R. 122-23 at ¶ 10 (EpicUF); R.143-44 at 61:20-62:25; 65:1-8 (J.Ross Dep.). Ross's father also assisted with the excavation for the building's foundation. R.123 at ¶ 13 (EpicUF); R.172 at 21:7-15 (D.Ross Dep.).

Ross moved into the U.S. Design Building in the Fall of 2006.

Approximately ten months later, Ross notified Epic that the U.S. Design Building was experiencing settling and that cracks had appeared in the interior and exterior walls. R.123 at ¶¶ 14-15 (EpicUF); R. 139 at 18:17-19 (J.Ross Dep.).² Ross claimed that Epic should have performed a "soils report" in connection with the engineering of the U.S. Design Building. R.164 (J.Ross Dep. Ex. 16). Epic denied that the settling was due to any inadequacies in the engineering of the structural plans for the U.S. Design Building, which, again, specifically required that "all footings shall bear 12" minimum into original undisturbed earth or on engineered fill" or that a soils report was part of its scope of work under the Contract. *Id.*

² Ross's factual assertion that the building was built "according to the plans" designed by Epic is incorrect. App.Brief at 4. The plans specifically instructed that "all footings shall bear 12" minimum into original undisturbed earth or on engineered fill." R.122 at ¶ 9 (EpicUF); R.176. Yet, Ross conceded below that the cause of the settling was the unconsolidated fill material underlying the building site, R.722, and David Ross admitted that he made no efforts to determine whether the building site met the plans' specifications. R.123 at ¶ 11 (Epic UF).

Ross filed his complaint against Epic on January 23, 2008, raising causes of action for breach of contract and negligence. R.1-4. The only factual basis for Ross's breach of contract claim set forth in complaint is the allegation that "[Epic] breached the contract by failing to properly engineer the plans." R.3 at ¶ 17. Epic answered the complaint, denying all liability. R.16-19.

After the pleadings were filed, the parties jointly commissioned a geotechnical investigation by Intermountain GeoEnvironmental Services, Inc. (IGES) to definitively determine the cause of the settling. R.178-86 (IGES Report). IGES evaluated the subsurface conditions around the U.S. Design Building by digging several test pits and reported that "[n]umerous pieces of asphalt, concrete, and other debris were observed in each of the test pits." R.180 (IGES Report at 3). IGES concluded that the cause of the settling was insufficient compaction at the building site: "the footings for the [U.S. Design Building] were placed on undocumented, loosely placed fill material. Moisture later infiltrated the subsurface soils next to the structure, causing the fill soil to settle under foundation loads" R.181 (IGES Report at 4).

B. Mr. Nordquist's Expert Report.

Ross retained geotechnical engineer James E. Nordquist, P.E. to provide expert testimony on his behalf. R.53-58 (Plaintiff's Expert Designations). Mr. Nordquist is president of Applied Geotechnical Engineering Consultants, Inc. and

has specialized in geotechnical engineering since 1979. R.55-58 (J.Nordquist Report). Mr. Nordquist's expert opinions were as follows:

- The building in question, more likely than not, is settling due to the densification of the underlying fill soil that is present under the building.
- Extending support of the building through the fill, down in to the natural soil using piers, such as helical piers, under the subject building is an appropriate remedy to the settling and would provide suitable support of the building.
- A licensed engineer looking at the lot in question, would (or should have been) immediately concerned about the obvious fill and the slope of the lot.
- The building in question is settling far more than normal, and not just in one area, but through the footprint of the building.
- It is not unreasonable for Jason Ross to believe that the term "structural engineering" on the Epic [contract] included being able to rely on the engineer for recommendations to be done to assure a stable building that would not settle. While Epic was not hired specifically to perform geotechnical engineering, it was hired to prepare the "stamped set of construction drawings" in order to obtain the building permit, and to design the structural aspects of the building. It is not unreasonable for Jason Ross to expect that this would include pointing out the possibility of problematic fill soil, based on the obvious fill present on the lot as set forth above.
- When digging the footings a machine operator or contractor wouldn't necessarily be able to determine if the soil they were digging into was native or fill.

R.55-56 (J.Nordquist Report at 1-2).

Mr. Nordquist testified that geotechnical engineers "are typically involved in evaluating the subsurface soil conditions," including making "determinations of

compressibility, how strong it is, what impact water would have on it,” in order to evaluate “what impact there would be of new construction,” but that geotechnical engineers do not actually design buildings. R.189-90 at 20:18-21:10 (J.Nordquist Dep.). With regard to his experience with excavation, Mr. Nordquist testified that his experience was limited to personally operating a backhoe on two occasions; once to grade a road on recreational property that he owns and once to install window wells at his home. R.501 (citing J.Nordquist Dep. at 14:20-16:4)

Mr. Nordquist did not offer an opinion on the standard of care observed by structural engineers and, consequently, could not offer an opinion as to whether Epic met the relevant standard of care or otherwise “failed to properly engineer the plans” as Ross alleged. Mr. Nordquist testified that he “was asked to provide a cost estimate to evaluate whether or not [Epic] met the standard of care or at least to develop [his] opinion as to whether or not they met the standard of care.” R.191 at 50:19-51:9 (J.Nordquist Dep.). Mr. Nordquist submitted a proposal to Ross that estimated that such an opinion could be developed at a cost of \$5,000.00. *Id.* The proposal stated that:

In order to provide our professional opinion on the engineer’s standard of care, we recommend that the standard of care prevailing at the time in question be established through investigation. Investigation would include the review of reports, records or opinions of other professionals performing the same or similar service at the time in question. With this in mind, we would propose to visit Roosevelt City and Vernal City building departments to review project files.

R.192-93 at 56:24-57:6 (J.Nordquist Dep.). Mr. Nordquist explained why this type of research was necessary in order for him to derive the applicable standard of care:

Q. And did you think those project files would actually show you what the standard of care was?

A. It would help significantly in what the standard of practice is in that area.

Q. And how would it have helped significantly?

A. If there were geotechnical reports on every project that was submitted, that would say a geotechnical report would be standard practice.

R.566 at 68:7-14 (J.Nordquist Dep.). However, Mr. Nordquist never performed the project file review or the other work outlined in the proposal that he submitted to Ross:

Q. Your testimony is that none of that was done?

A. That's correct.

R.193 at 57:20-21 (J.Nordquist Dep.).

Mr. Nordquist testified that he never received notice to proceed with the standard of care analysis that he proposed and that the work he performed in developing his "opinion letter" was limited to a visit to the U.S. Design Building and a level survey:

Q. In terms of the work that you actually did on this project, did it end up being limited to the issue of the standard of care?

A. It did not.

Q. What else did it include?

A. It did not include the standard of care.

Q. Oh. What did it include, then?

A. A site visit and a level survey.

Q. So none of what is referenced here in the [proposal], none of that work was actually done?

A. That's correct.

Q. Why did the work on the standard of care – why was that not done?

A. I don't know.

Q. Who told you that you should not do that?

A. I never received a notice to proceed.

R.192-93 at 56:7-18; 58:1-5 (J.Nordquist Dep.).

When the subject of the standard of care arose again during Mr. Nordquist's deposition, he testified as follows:

Q. Why aren't you opining as to the standard of care as an engineer?

A. The standard of care for this project is very important to recognize what happened in that locale with the local engineers at that time. That is not something that we have investigated. Our entire business is based on other engineers calling and asking for guidance and help in the geotechnical area.

R.503 (citing J.Nordquist Dep. at 122:22-123:5).

Mr. Nordquist also testified that, in his opinion, conducting a geotechnical study of the site prior to construction of the U.S. Design Building would have cost

between \$4,000 and \$5,000, increasing Ross's engineering costs by fifty percent.

R.191-93 at 52:22-53:13 (J.Nordquist Dep.).

C. Mr. Gilson's Expert Report.

The expert designated by Epic was Larry Gilson, P.E., president of Gilson Engineering. R.73-74 (Defendant's Expert Disclosures). Mr. Gilson has over 36 years of experience in both designing and supervising the construction of hundreds of commercial and residential projects. Mr. Gilson is also a licensed general contractor who has served as the city engineer for numerous Utah municipalities. R.81 (L.Gilson CV).

In his expert report, Mr. Gilson states that he was retained to provide his professional opinion as to the standard of care that would be expected of structural engineers on a project similar to the U.S. Design Building; whether Epic met the standard of care in performing under the Contract with Ross; and whether the presence of concrete and other debris at the building site, as described by the IGES analysis, should have alerted the general contractor and principal excavator David Ross to the possibility of non-native soil or fill material. R.77 (L.Gilson Report at 1).

On the standard of care issue, Mr. Gilson opined that in his experience geotechnical studies are typically never ordered for light commercial structures, such as the U.S. Design Building, because of the expense involved. R.78 (L.Gilson

Report at 2). Mr. Gilson also concluded that it was proper for Epic to use the minimum soil bearing capacity set forth in the International Building Code in lieu of data obtained from a geotechnical report in engineering Ross's building plans. R.78-79 (L.Gilson Report at 2-3).

Mr. Gilson stated that the contours of the building site shown on the topographic survey do not necessarily indicate the presence of fill material and that, in any event, pursuant to the International Building Code it is the responsibility of the local building official to require a soils investigation if the official questions the suitability of the building site. R.79 (L.Gilson Report at 3). Further, Mr. Gilson concluded that any experienced excavator that encountered asphalt, concrete, and other debris while excavating for a foundation, as found in each of the test pits excavated by IGES, would have notified the structural engineer or contacted a geotechnical firm to investigate the site before continuing with the placement of the footings. *Id.*

D. Epic's Motions for Summary Judgment and Motion in Limine to Exclude Mr. Nordquist's Testimony.

At the close of discovery, Epic moved for summary judgment on both of Ross's claims. Epic argued that Ross's negligence claim was barred by the economic loss doctrine as articulated in *Sunridge Dev. Corp. v. RB & G Eng'g, Inc.*, 2010 UT 6, ¶¶ 28-30, 230 P.3d 100, where Ross was seeking damages from Epic to repair the U.S. Design Building but conceded that a Contract existed

between the parties. R.209-12; R.254-56. The district court agreed, granting Epic's motion and dismissing the negligence claim. R.394 (Order).

Epic's motion for summary judgment on Ross's breach of contract claim was premised on a failure of evidence. Specifically, Ross had not presented expert evidence in support of his allegation that "[Epic] breached the contract by failing to properly engineer the plans" or rebutted the expert evidence put forward by Epic. R.131. Epic pointed to Mr. Nordquist's unequivocal testimony that he did not have an opinion as to the appropriate standard of care. R.133.

Epic further argued that although Mr. Nordquist opined that the contours of the building site should have "concerned" an engineer, without first establishing the appropriate standard of care, Mr. Nordquist could offer no assistance to the trier of fact as to what a structural engineer would have done in response to the alleged "concerns" or any other expert opinions that would tend to show that Epic failed to properly engineer Ross's plans. *Id.* Epic also questioned Mr. Nordquist's qualifications, arguing that Mr. Nordquist, who has specialized in geotechnical engineering for over thirty years, was unqualified to offer an expert opinion on the standard practices of structural engineers, contractors, or excavators. *Id.*

Ross opposed Epic's summary judgment motion and responded to the challenge to his expert. It was Ross's position that the dispute over whether he received Page 2 of the Contract prevented the trial court from granting summary

judgment on the breach of contract claim. R.273-75. Ross argued that the standard of care was ambiguous and, therefore, “summary judgment regarding whether or not Epic breached or fulfilled that obligation [was] not appropriate.” R.275. Ross also defended his expert’s credentials, arguing that because Mr. Nordquist was a licensed engineer his opinion that it was not unreasonable for Ross to expect recommendations as to what should “be done to assure a stable building that would not settle” was admissible. R.276-77.

The district court denied Epic’s motion for summary judgment on the breach of contract claim, citing to disputed facts regarding the terms of the Contract and the “professional duty of care,” and ordered the parties to participate in mediation. R.700-702; R.394-95 (Order). When the mediation was unsuccessful, the matter was scheduled for trial and Epic renewed its challenge to Mr. Nordquist’s expert opinions. Epic filed a motion in limine to preclude Ross from presenting expert testimony from Mr. Nordquist on subject matters for which Mr. Nordquist was unqualified to act as an expert and redundant testimony on factual issues that were undisputed. R.491-92. Epic once again analyzed Mr. Nordquist’s expert report and deposition testimony, which had been previously discussed by the parties in the briefing submitted in connection with Epic’s summary judgment motion, in the context of Rule 702 of the Utah Rules of Evidence. R.276-77.

E. The District Court's Decision.

At the final pre-trial hearing, Judge Peterson heard argument on Epic's motion in limine. R.712-737. Ross objected to the district court hearing argument prior to the time his written opposition to the motion in limine was due, but nonetheless offered his rebuttal to Epic's motion. R.720-30. Ross argued, citing back to his opposition to the motion for summary judgment on the breach of contract claim, that as a licensed engineer Mr. Nordquist was qualified to offer expert opinion on the standard of care observed by structural engineers. *Id.* Ross also argued that because the contents of the Contract were in dispute, his own testimony that he expected Epic to perform a soils study was sufficient to present that issue to the jury. R.726-728.

Ruling from the bench, Judge Peterson granted Epic's motion in limine. R.734-36. The district court concluded that "[Mr. Nordquist] isn't going to be able to testify to the standard of care He would be testifying to something that is not relevant to the case." R.734. The district court also concluded that Mr. Nordquist's opinion that "a machine operator or contractor wouldn't necessarily be able to determine if the soil they were digging into was native or fill" was contrary to Utah law. R.736 (citing *Smith v. Frandsen*, 2004 UT 55, ¶¶ 18-19, 94 P.3d 919).

Judge Peterson then stated that he had gone "back over the motions on summary judgment" and was revisiting his earlier decision. *Id.* The district court

explained that because Epic's expert testimony stood unrebutted, summary judgment would be granted: "The reason the Court did not grant summary judgment initially on the first issue was . . . the proffer that the expert[s] would disagree on critical issues. They don't." R.734. The district court rejected Ross's argument that a breach could be established via his own testimony or that Ross could "reform the contract unilaterally based upon his expectations." R.735. This appeal followed.

SUMMARY OF APPELLEE'S ARGUMENT

The district court acted well within its broad discretion in excluding the testimony of Ross's engineering expert. Mr. Nordquist is not qualified to offer an opinion and, in fact, expressed no opinion as to what standard of care governed Epic's performance under the parties' contract. Ross's argument on appeal that the trier of fact would first need to determine the terms of the parties' contract before expert testimony became relevant glosses over the central issue – that Ross lacked any admissible expert evidence that would enable him to establish a breach of the relevant standard of care. Consequently, Ross failed to meet his burden of presenting specific evidence demonstrating that there was a genuine issue for trial and summary judgment was appropriate.

Further, Ross's protest regarding the district court's decision to rule on Epic's motion in limine prior to receiving a written response from Ross does not

justify reversal. The district court had already heard Ross's response to the challenge to his expert in connection with Epic's prior summary judgment motion. While Ross may have been able to fine tune his legal arguments in responding to the motion in limine, Mr. Nordquist's expert report and his unequivocal deposition testimony that he had no opinion on the standard of care were fixed. There is not a reasonable likelihood that the district court's ruling would have been different had Ross been permitted to submit a written opposition to the motion in limine. For these reasons, the decision below should be affirmed.

ARGUMENT

I. The District Court Did Not Abuse Its Discretion or Misinterpret Rule 702 in Excluding Ross's Expert.

"It is within the discretion of the district court to determine the suitability of expert testimony in a case and the qualifications of the proposed expert." *Ostler v. Albina Transfer Co., Inc.*, 781 P.2d 445, 446 (Utah Ct. App. 1989) (concluding that the trial court properly excluded expert evidence based on pure conjecture).

"Consequently, absent a clear abuse of this discretion, an appellate court will not reverse the trial court's determination." *Grindstaff v. Grindstaff*, 2010 UT App 261, ¶ 8, 241 P.3d 365 (affirming exclusion of an expert witness that lacked relevant experience).³

³ Ross's brief first addresses the summary judgment decision and second, the district court's exclusion of his expert. But this Court's practice when reviewing

Rule 702 of the Utah Rules of Evidence requires a determination as to whether expert testimony is necessary to assist the trier of fact, and if so, whether the proposed expert has the requisite “knowledge, skill, experience, training, or education” to provide such assistance to the trier of fact. Utah R. Evid. 702. The advisory committee notes make clear that Rule 702 “assigns to trial judges a ‘gatekeeper’ responsibility to screen out unreliable expert testimony.” Utah R. Evid. 702 advisory committee’s note, ¶ 3. When applying Rule 702, Utah courts should approach expert testimony with “rational skepticism.” *Id.*

A. Mr. Nordquist Was Not Qualified To Offer Expert Opinion On the Standard Practices of Structural Engineers, Contractors, or Excavators.

In challenging the district court’s decision, Ross argues that Mr. Nordquist is qualified to offer testimony on the standard practices of structural engineers, such as Epic, because he too is a licensed engineer. App.Brief at 19-20. Putting aside, for the moment, the fact that Mr. Nordquist testified that he did not have an opinion as to the appropriate standard of care, Utah law is clear that an expert from one professional specialty is not normally qualified to testify as to the standards of

summary judgment decisions predicated on the exclusion of a party’s expert is to review the admissibility of the expert testimony and then, after determining whether or not the exclusion was an abuse of discretion, the summary judgment decision. *See, e.g. Brussow v. Webster*, 2011 UT App 193, 258 P.3d 615 (reviewing exclusion of plaintiff’s expert prior to considering summary judgment ruling); *Pete v. Youngblood*, 2006 UT App 303, 141 P.3d 629 (same); *Dikeo v. Osburn*, 881 P.2d 943 (Utah Ct. App. 1994) (same).

care required of a distinct, although related specialty. *Burton v. Youngblood*, 711 P.2d 245, 247-249 (Utah 1985) (affirming exclusion of plaintiff's expert, an ocular plastic surgeon, in malpractice case against general plastic surgeon when the expert failed to establish that the practices observed a common standard of care).

Utah courts have allowed an expert to offer standard of care testimony outside of his or her professional specialty only when a foundation is laid establishing that (1) the standards of care observed by the two specialties are the same; or (2) the expert is independently knowledgeable about the standard of care of the other specialty. *See Boice v. Marble*, 1999 UT 71, ¶ 14, 982 P.2d 565 (overturning the exclusion of physiatrist's testimony on the standard of care required of neurosurgeons where the expert laid a foundation establishing that the standard of care for both medical specialties was the same); *Dikeo*, 881 P.2d at 946-48 (affirming exclusion of the testimony from an emergency room doctor who failed to show that the defendant cardiologist, that treated plaintiff's emergency heart condition, would observe the same standard of care).

In this case, while both Mr. Nordquist and Adam Huff are licensed engineers, it is undisputed that Mr. Nordquist specializes in geotechnical engineering and not design or structural engineering. *See supra* at 8-9. According to Mr. Nordquist, geotechnical engineers "are typically involved in evaluating the subsurface soil conditions," including making "determinations of compressibility,

how strong it is, what impact water would have on it,” in order to evaluate “what impact there would be of new construction,” but that geotechnical engineers do not actually design buildings. R.189-90 at 20:18-21:10 (J.Nordquist Dep.).

Mr. Nordquist acknowledged that in order for him to have developed an opinion on the standard of care observed by structural engineers, such as Epic, he would have needed to conduct an investigation including the “review of reports, records or opinions of other professionals performing the same or similar service at the time in question.” *See supra* at 10-12. It is clear, then, that Mr. Nordquist recognized that his experience as a geotechnical engineer did not qualify him to offer an opinion on the standard of care observed by structural engineers. As a geotechnical engineer, Mr. Nordquist does not possess the “knowledge, skill, experience, training, or education” that would enable him to offer expert testimony on the standard of care applicable to structural engineers nor did he establish that the standard of care for geotechnical engineers is the same.

Similarly, Mr. Nordquist was unqualified to offer an expert opinion as to whether a contractor or machine operator would be able to determine if a building site contained fill material. Mr. Nordquist explained that his “opinion that a machine operator or contractor wouldn’t necessarily be able to determine if the soil they were digging into was native or fill [was] based on [his] personal experience in determining if a soil mass is fill or naturally deposited.” R. 199 (J.Nordquist

Supp. Report at 3). Mr. Nordquist's experience in determining the composition of soil as a geotechnical engineer, however, has no corollary whatsoever to the experience of a general contractor or excavator. Mr. Nordquist testified that the sum total of his personal experience with excavation is comprised of two small projects that he undertook on his own property. *See supra* at 10. Mr. Nordquist's expert opinion on this topic was pure speculation and contrary to Utah law, as recognized by the district court, which "imputes to builders and contractors a high degree of specialized knowledge and expertise with regard to residential construction . . . In particular, builder-contractors are expected to be familiar with conditions in the subsurface of the ground." *See Smith v. Frandsen*, 2004 UT 55, ¶¶ 18-19, 94 P.3d 919.⁴

In sum, Ross failed to make the threshold showing of competency required by Utah Rule of Evidence 702 in order to present Mr. Nordquist to the jury as an expert witness on the specialized practices of structural engineers, contractors, or excavators.

⁴ Ross misconstrues the decision below in arguing that the district court relied upon *Smith v. Frandsen*, 2004 UT 55, to "absolve" Epic of liability. App.Brief at 18. Epic's position, that was adopted by the district court, is that Mr. Nordquist's opinion that "when digging the footings [for a building] a machine operator or contractor wouldn't necessarily be able to determine if the soil they were digging into was native or fill" is contrary to Utah law and, therefore, inadmissible. R.132; R.660 (Final Order).

B. Mr. Nordquist Never Articulated the Relevant Standard of Care Governing Epic's Performance.

Mr. Nordquist testified unequivocally that he did not have an opinion as to the appropriate standard of care in this case. *See supra* at 10-12. As a result, Mr. Nordquist's opinion that the contours of the building site evidence the presence of fill that should have "concerned" an engineer (a proposition that Epic's expert disputes) is meaningless. First, as established above, Mr. Nordquist lacks the training or skill necessary for him to offer an opinion as to what conclusions a structural engineer might draw from the slope of a building site. Second, without articulating the applicable standard of care, Mr. Nordquist could not (and did not) opine as to what a structural engineer of ordinary care and skill would have done in response to the alleged "concerns."

Ross argues on appeal that Mr. Nordquist's opinion that "[i]t is not unreasonable for Jason Ross to believe that the term 'structural engineering' on the [Contract] included being able to rely on the engineer for recommendations to be done to assure a stable building that would not settle" bears on the standard of care issue. App.Brief at 16. As Epic pointed out at the pre-trial hearing, testimony from Mr. Nordquist as to what was reasonable for Ross to believe lacks any foundation and simply is not expert opinion. R.719. The district court did not abuse its discretion in excluding Mr. Nordquist's unsupported opinions.

C. The Trial Court Properly Concluded that Mr. Nordquist's Remaining Expert Opinions Were Superfluous.

Lastly, Mr. Nordquist's remaining opinions went to matters that were not in dispute: That the settling is due to the presence of unconsolidated fill material under the building, that the extent of the settling is beyond what would normally be expected, and that using helical piers to stabilize the building is an appropriate remedy. *See supra* at 9, 17. The district court properly exercised its broad discretion in excluding Mr. Nordquist's testimony on these uncontroverted issues as needlessly cumulative.

II. The District Court's Dismissal of Ross's Breach of Contract Claim Was Correct and Should be Affirmed.

Epic, as the party moving for summary judgment on an issue that Ross had the burden to prove at trial, *i.e.* that Epic breached the parties' contract by failing to properly engineer the plans, satisfied its burden on summary judgment by showing, by reference to the pleadings, depositions, answers to interrogatories, and admissions on file, that there is no genuine issue of material fact. *Warenski v. Advanced RV Supply*, 2011 UT App 197, ¶ 5, 257 P.3d 1096 (citing Utah R. Civ. P. 56(c)). Upon such a showing, the burden shifted to Ross, the nonmoving party, who "may not rest upon the mere allegations or denials of the pleadings," but "must set forth specific facts showing that there is a genuine issue for trial." *Id.* (quoting Utah R. Civ. P. 56(e)).

A. Ross Could Not Prevail On His Breach of Contract Claim Without Expert Testimony Establishing the Relevant Standard of Care.

On appeal Ross asserts that it was not necessary for him to establish a standard of care to prevail on his breach of contract claim and that the dispute over the exact terms of the Contract precluded summary judgment. App.Brief at 16-17. While Ross's position is somewhat difficult to discern, he appears to argue that the jury must first determine whether Page 2, containing the limitation of liability and standard of care provisions, is a part of the Contract. Only then, Ross argues, would expert testimony become potentially relevant. *Id.*

The flaw in Ross's reasoning is that the fundamental basis for his breach of contract claim was the allegation that Epic "failed to properly engineer the plans." Because the average juror has little understanding of what is required to properly engineer building plans, expert testimony is required to establish the relevant standard of care and then evaluate Epic's performance against that standard. *See Wycalis v. Guardian Title of Utah*, 780 P.2d 821, n.8 (Utah Ct. App. 1989) ("where the average person has little understanding of the duties owed by particular trades or professions, expert testimony must ordinarily be presented to establish the standard of care"). As noted by this Court in *Wycalis*, "expert testimony has been required to establish the standard of care for medical doctors, *Chadwick v. Nielsen*, 763 P.2d 817, 821 (Utah Ct. App. 1988); architects, *Nauman v. Harold K. Beecher*

& Assocs., 467 P.2d 610, 615 (Utah 1970); and engineers, *National Housing Indus., Inc. v. E.L. Jones Dev. Co.*, 576 P.2d 1374, 1377 (Ariz. Ct. App. 1978).” *Id.*

The fact that Ross’s claim is premised on contract law and not tort does not change the analysis. Once Mr. Nordquist’s testimony was excluded, the testimony of Epic’s expert, Mr. Gilson, that Epic met the standard of care observed by structural engineers on similar projects in using the minimum soil bearing capacity set forth in the International Building Code in lieu of data obtained from a geotechnical report in engineering Ross’s plans stood un rebutted. R.79. As the district court properly concluded, Ross lacked any admissible evidence to support his allegation that Epic “breached the contract by failing to properly engineer the plans” to present at trial and summary judgment was appropriate.

The Arizona case of *National Housing Indus., Inc. v. E.L. Jones Dev. Co.*, cited favorably by this Court in *Wycalis v. Guardian Title of Utah*, is particularly instructive here. In *National Housing*, an engineering firm was retained to prepare a subdivision plat and associated paving, sewer, water, drainage and grading plans for the development of real property later acquired by the plaintiff. 576 P.2d at 1376. The plaintiff brought suit against the engineering firm, alleging that it had failed to meet the appropriate standard of care by not including a “cut and fill” estimate as part of the subdivision design that would have disclosed that 20,000

cubic yards of fill material would have to be imported before homes could be built on the property in question. *Id.* at 1377.

The defendant engineering firm introduced expert testimony establishing that the standard of care in that locale did not include cut and fill estimates as part of the standard engineering fee for designing a subdivision. *Id.* The plaintiff failed to offer any contradictory expert evidence, and the Arizona Court of Appeals affirmed the grant of summary judgment to the engineering firm, holding that the plaintiff failed, as a matter of law, to raise an issue of fact as to the standard engineering practices with respect to preparing “cut and fill” estimates. *Id.* at 1378.

The same result is required here. Ross failed to rebut the expert testimony offered by Mr. Gilson that in his extensive experience geotechnical studies are typically never ordered for light commercial structures, such as the U.S. Design Building and, in addition, that the gradation of the building site was not necessarily indicative of fill. R.78 (L. Gilson Report at 1). Without admissible expert testimony Ross could not, as a matter of law, raise an issue of fact as to Epic’s performance under the Contract and the district court’s conclusion that the dispute over Page 2 was immaterial is correct.

B. The District Court Did Not Abuse Its Discretion in Revising Its Earlier Ruling Denying Epic’s Summary Judgment Motion.

Ross argues that there was no basis for the trial court to reconsider its prior ruling that the dispute over the Contract terms prevented summary judgment. This

Court reviews the issue of the trial court's reconsideration of a prior ruling for an abuse of discretion. *See IHC Health Servs., Inc. v. D & K Mgmt., Inc.*, 2008 UT 73, ¶ 27, 196 P.3d 588 ("reconsideration of an issue before a final judgment is within the sound discretion of the district court").

At the final pre-trial hearing, the district court explained that "You [Ross] relied heavily on your expert to substantiate that there was dispute in fact. Now I've got the expert who is in question here." R.725. The district court asked Ross for clarification as to what duty Epic had under the contract. R.722. When Ross was unable to point to any specific duty (or specific failure), the district court explained that because Epic's expert testimony stood unrebutted summary judgment would be granted. "The reason the Court did not grant summary judgment initially on the first issue was . . . the proffer that the expert[s] would disagree on critical issues. They don't." R.734.

The district court rejected Ross's argument that a breach could be established via his own testimony or that Ross could "reform the contract unilaterally based upon his expectations." R.735. There was no abuse of discretion in the trial court's decision to reconsider his earlier ruling on the standard of care issue.

III. The District Court's Grant Of Epic's Motion in Limine Prior To Receiving a Response from Ross Does Not Warrant Reversal.

The district court issued its ruling on the motion in limine prior to the deadline set forth in Utah Rule of Civil Procedure 7(c) for Ross to submit a written response had expired. The error, however, was harmless and there is no reasonable likelihood that a written opposition to the motion in limine would have affected the final outcome.

In determining whether a procedural error is harmless, this Court asks whether the error is "sufficiently inconsequential so no reasonable likelihood exists that the error affected the outcome of the proceedings." *Jones v. Cyprus Plateau Mining Corp.*, 944 P.2d 357, 360 (Utah 1997). "In order to justify reversal the appellant must show error that was substantial and prejudicial in the sense there is at least a reasonable likelihood that in the absence of the error the result would have been different." *Ortega v. Thomas*, 383 P.2d 406, 408 (Utah 1963).

Ross argues on appeal that had he been allowed to submit a formal response to the motion in limine, he would have presented details regarding the "expert's 32 years of experience dealing with settlement issues (including numerous interactions with structural engineers) . . . as well as the expert's specific knowledge and expertise regarding the specific facts of this case." App.Brief at 10. But Ross's argument would have this Court ignore Mr. Nordquist's own testimony that he did not have an opinion on the relevant standard of care and that developing

an opinion would have required substantial investigation on his part that he was never authorized to perform and did not perform. *See supra* at 10-12.

Moreover, Ross cannot claim prejudice when he had a full opportunity to respond to the challenge to his expert in opposing Epic's summary judgment motion. The basis for both Epic's summary judgment motion on the breach of contract claim and the motion in limine was the inadequacy of Ross's expert evidence, as Ross emphasized at the final pre-trial hearing: "They [Epic] made that same argument in their summary judgment motion. The exact same argument was there." R.730. The contents of Mr. Nordquist's expert report and his deposition testimony did not change in the interim. Perhaps Ross could have attempted to present his expert in a better light in responding to the motion in limine, but the substance of Mr. Nordquist's opinions and his deposition testimony could not be altered. There is not a reasonable likelihood that receiving further briefing on the motion in limine would have affected the district court's decision.

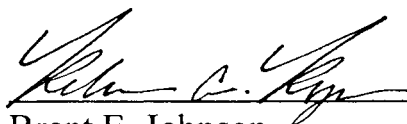
CONCLUSION

This case is about misplaced blame. The construction plans that Epic delivered to Ross were not faulty. The U.S. Design Building failed because it was not constructed according to the building plans that specified that the footings should be placed into undisturbed earth or on engineered fill. Ross failed to put forward any admissible evidence that Epic bore responsibility for the contractor's

failure to ascertain the subsurface conditions. Accordingly, and for all the reasons stated above, this Court should affirm the district court's entry of summary judgment in favor of Epic.

Respectfully submitted this 30th day of November, 2011.

HOLLAND & HART LLP

A handwritten signature in black ink, appearing to read "Brent E. Johnson", is written over a horizontal line.

Brent E. Johnson

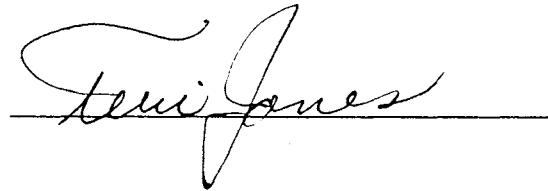
Rebecca A. Ryon

Attorneys for Epic Engineering, P.C.

CERTIFICATE OF SERVICE

I certify that on November 30, 2011, I served a true and correct copy of the foregoing document to the following by U.S. Mail, postage prepaid:

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A handwritten signature in cursive script, reading "Terri Jones", is written over a horizontal line.

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