An Update on the Law on Construction

by

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Contractor Recovers Big Against
Both Owner and Subcontractor

In a must-read decision because of the number of issues covered and their importance to frequently recurring construction disputes, the Eighth Circuit Court of Appeals recently affirmed judgments exceeding $1,500,000 from jury verdicts and federal district court orders in favor of a contractor and against an owner and a subcontractor for breach of contract. The case is *The Weitz Co. v. MH Washington v. Summit Steel Fabricators*, 631 F.3d 510 (8th Cir. 2011).

The end result of this high-stakes litigation, after applying set-offs, was a finding for the contractor and against the owner of $696,575.93 for breach of contract for nonpayment, $318,924.53 in attorney fees, $46,454.54 in court costs, and prejudgment interest in an amount not disclosed in the opinion. There also was a finding for the contractor and against its subcontractor (a subcontractor picked by the owner on a rebid to find a lower bid) of $326,839 for breach of contract for poor workmanship and delays, $198,812.45 in attorney fees and $41,265.43 in court costs.

The case involved, among other issues: A201 General Conditions, incorporating from the prime contract another contract, alter ego of owner companies, progress payment applications, mechanic's liens, counterclaims, liquidated damages, Missouri's Prompt Payment Act, change orders, final completion date, delays, expert testimony, critical path analysis, poor workmanship, prevailing party concepts, architect certificates and mitigation of damages.

The project was the construction from 2004 to 2006 of the 46th and Washington Townhomes located near the Country Club Plaza in Kansas City, Mo. Mackenzie House, LLC, a Colorado real estate company, was the developer; MH Washington LLC was the managing member; The Weitz Company, an Iowa company, was the general contractor and Summit Steel, a Texas corporation, was the steel subcontractor to Weitz.

The prime contract consisted of A111, a standard form AIA agreement between owner and contractor on large projects with a guaranteed maximum price (GMP), where payment was based on cost-of-the work plus a fee. The A111 contract adopted by reference (and thus incorporated) AIA Document A201, General Conditions of the Contract for Construction.

The dispute arose after project delays whereby the owner decided to withhold payment of $701,876 from the general contractor. Without this money several unpaid subcontractors filed mechanic's liens.

The Eighth Circuit faced a myriad of legal challenges on appeal, all of which it rejected. Among them, MacKenzie House argued that it was not co-liable with MH Washington as the owner for the adverse judgment because the prime contract listed only MH Washington (not MacKenzie) as the owner. However, the A201 contract stated that the owner was MacKenzie House and evidence showed that MacKenzie directed all the work. The evidence also supported the trial court's decision that there was either a principal-agent relationship or an alter-ego between the two companies, further supporting liability for each.

The court further concluded that it was for the jury to decide when Weitz' work was complete such that liquidated damages could be assessed by the owner at $500 per building per day, given the contract's ambiguity on this point. The project had three buildings and a total of eighteen units.

The owner argued that contractor delays and quality problems supported its request for a new trial. The jury had "ample evidence" for its verdict, the Eighth Circuit concluded, especially since it was the owner that had selected a new group of low-bid subcontractors for Weitz to use after the subcontractors that Weitz had selected had provided bids considered by the owner to be too high. This prompted an unusual rewrite of the contract, at Weitz' behest, such that the owner agreed to accept the "risk for the performance and payment defaults of the Contractor's subcontractors in the performance of the work."

The Eighth Circuit supported the decision to allow the testimony of Weitz' expert, a professional engineer, who analyzed project delays by using a "windows analysis." This analysis distinguished activities on the critical path from those where there was float time. The court did not find his testimony to be inherently unreliable. "Expert opinion necessarily involves some speculation."

The Eighth Circuit also found the award of attorney fees to be proper even though the owner had recovered a partial off-set on its claim against Weitz. After comparing the results, the court found Weitz to be the "net prevailing party" as it ultimately was the one that would be compensated for its claim. Citing from an earlier court opinion, the Eighth Circuit noted that each "side may score, but the one with the most points at the end of the contest is the winner."

As for the sizable amount of attorney fees awarded, the court found the award to be a proper yet costly result of a "concede nothing, litigate everything attitude." The Eighth Circuit also stated that the payment by

a party of its legal fees before knowing if it would prevail was the "best evidence" as to the reasonableness of the amount of the fees.

Architect Recovers $250,000.00 from Owner for Fees on Building Never Built

The Eighth Circuit Court of Appeals recently upheld a jury verdict from the federal district court in Kansas City in favor of an architectural firm and against the owner for unpaid fees of $250,000.00. The case is *Shaw Hofstra & Associates v. The Ladco Development, Inc.,* 673 F.3d 819 (8th Cir. 2012).

The lawsuit highlights the problems that frequently occur when parties to a project continue negotiating a contract as work progresses. As occurred in this case, each side typically leverages for an advantage but creates a trail of uncertainty as to how, when and if the architect will be paid.

Shaw Hofstra & Associates (SHA), an architectural firm, submitted a written "fee proposal" to Ladco Development, Inc. (Ladco) to provide architectural services for a 75,000 square foot multi-tenant office building in Kansas City, Kansas. The proposal was divided into three separate scopes of service, with three corresponding fee structures.

The first part pertained to obtaining the requisite government approvals to build the project. It covered the design from project inception to the point the project could be submitted to the City for approval of tax and other incentives. The architect proposed a flat fee of $35,000.00 for this scope of work.

The second part concerned architectural and engineering services for the design and construction of the building. This scope proposed "a percentage base fee of 6.0% of the Construction Cost assuming a projected cost of $92.00/sq. ft. for the building shell." Instead of providing hourly rates, the second part divided the services into five phases with a corresponding percentage payout toward the overall fee.

The third part stated upon "acceptance of this proposal SHA/SDC will prepare a standard AIA contract for the project." It included a statement of intent that provided SHA would work at "standard hourly rates and under the terms and conditions contained in this proposal until such time as a final agreement is put in place or until SHA is notified that its services are no longer needed." The parties signed the proposal and the owner signed the statement of intent.

Shortly thereafter, SHA began work on the site development plan, design of the three-story building and an initial space plan for a law firm to occupy 50,000 square feet of the building. The scope of the project continued to increase due to tremendous interest from perspective tenants who wanted to relocate to the project site. Thus, the project grew to an 80,000 square foot building, an additional 170,000 square foot building and an 800 stall parking garage. This increased SHA's fee for the entitlement process from $35,000.00 to $55,000.00.

SHA and Ladco then entered into a letter agreement which stated that it superseded all prior agreements. At trial, SHA testified its intention was that the letter agreement would only replace the first part of the original fee proposal, but not the second part.

Ladco then brought in another architectural firm, Bell Knott & Associates (BKA), to add resources. At this point, the project had become an eight-story building containing 240,372 square feet, including 103,890 square feet of parking for 343 vehicles, a five-story, 165,675 square foot building including a preschool and a separate 137,624 square foot parking garage for 348 vehicles.

Shortly thereafter, Ladco informed SHA that BKA was taking over as the lead architect on the project. SHA would be responsible for interiors, tenant space and street scape.

Thereafter, SHA sent Ladco a letter asserting SHA had completed 80% of the schematic design services for the project and calculated a fee was due of $320,000.00. This was not based on an hourly rate but on the percentage in phase two of the fee proposal. The owner responded that its counsel determined that only 40% of the work had been completed. They also disputed whether an e-mail on fee arrangements changed what was owed.

Ultimately, Ladco and BKA never signed an architectural services contract, financing was never put in place and the project was never built.

SHA was not paid and brought a breach of contract lawsuit against Ladco as well as a claim for unjust enrichment for the value of services performed. The heart of the dispute at trial related to whether the parties had a contract and if so what the contract was.

The Eighth Circuit concluded that their contractual arrangements were unclear and therefore it was up to a jury to decide what the parties had agreed to do. The court noted that a different jury may have decided the

case differently but this is what happens when the parties have an ambiguous contract.

Owner Recovers Almost $5,000,000 in Liquidated Damages and Costs to Complete

The Eighth Circuit Court of Appeals (located in St. Louis) recently upheld a multi-million dollar jury verdict against a terminated contractor for liquidated damages and the denial of the contractor's claim for breach of contract. In doing so, the court reaffirmed its substantial deference to what a jury decides.

The case is *The Weitz Company LLC v. MacKenzie House, LLC*, 665 F.3d 970 (8th Cir. 2012), decided January 5, 2012.

The Weitz Company had sued MacKenzie House, LLC and MH Metropolitan, LLC for breach of a construction contract involving a multi-building apartment project known as the Metropolitan Apartments in the Kansas City, Missouri area. MacKenzie House was the developer of the project and the managing member of MH Metropolitan, the owner of the apartments. MH Metropolitan had hired Weitz as the general contractor and they agreed to a maximum price for the work of $13,498,006 with completion to occur within 458 days.

Work on the apartments was delayed. Weitz had attributed the delays to its subcontractors. MH Metropolitan blamed Weitz, asserting several material breaches of contract including failing to provide lien waivers, allowing liens to be filed against the project, providing poor quality construction and allegedly falsifying a pay application.

MH Metropolitan had withheld payment on two of Weitz's pay applications. Weitz then stopped work but at that point the first building on the project was four months late and the entire project was two months late. A couple weeks later, MH Metropolitan terminated Weitz for cause and finished the project with another contractor.

Weitz sued MacKenzie House and MH Metropolitan for the unpaid contract balances. MH Metropolitan counterclaimed for breach of contract, seeking liquidated damages and the cost to complete. MH Metropolitan alleged that Weitz's mismanagement provided just cause to stop payment and cancel the contract.

Weitz also filed third-party claims against two of its subcontractors, Arrowhead and Concorde for allegedly defective work as well as the cost to complete their work and delays. Arrowhead counterclaimed for

amounts due under its subcontract, arguing Weitz terminated it improperly.

After a 12-day trial, the jury awarded MH Metropolitan liquidated damages of $3,022,520 due to project delay and $1,969,450.87 for the cost of completion. The jury awarded Arrowhead $556,110 and found in favor of Concorde.

Weitz argued on appeal that the district court incorrectly excluded evidence of two other construction projects involving the same parties. One of the projects resulted in litigation and was the subject of a previous column entitled "Contractor Recovers Big Against Both Owner and Subcontractor" that appeared in the March-April, 2011 edition of *St. Louis Construction News & Review*. In that case, the Eighth Circuit affirmed judgments following jury verdicts and court orders in favor of Weitz that exceeded $1,500,000.

In this case, the Eighth Circuit held that the trial court properly excluded evidence of prior litigation between the parties. Such evidence would only be properly admissible to prove a motive, intent, plan or knowledge that might be at issue. The Eighth Circuit noted that the claims were for breach of contract and therefore such evidence was not appropriate.

The Eighth Circuit also found that the liquidated damage clause in the contract was a reasonable forecast of delay damages that the parties had agreed to at the time they entered into the contract. Thus, it was enforceable.

The Eighth Circuit rejected an argument by Weitz that a Missouri Supreme Court decision from 1908 limited liquidated damages for construction delay to the period of time before the owner removed the contractor from the project. The Eighth Circuit decided that this 1908 case was different because in that case the project was not late when the owner terminated the contract. By contrast, in this case, Weitz's performance was late by several months at the time of termination.

The Eighth Circuit concluded that it was up to the jury to decide whether MH Metropolitan's damages were in fact cost to complete or were delay damages excluded by the language in the contract. The Eighth Circuit emphasized that its review of a jury verdict is "extremely deferential."

The Eighth Circuit also found that the jury was entitled to reject Weitz's evidence that its subcontractor Arrowhead had breached the subcontract. Apparently, the jury concluded that Weitz was the first to breach the contract and thus Arrowhead was relieved from its obligation to further perform.

Finally, Concorde did not have counsel at trial. Weitz attempted to obtain a default judgment on the basis that Concorde was not defending itself. The trial court rejected this argument and allowed the matter to go to the jury. The jury rejected Weitz's claims against Concorde. The Eighth Circuit affirmed the jury's decision.

Surety and Contractor Must Pay Subcontractor's Attorneys' Fees and Interest

A subcontractor will recover more in attorneys' fees and interest than in a contract balance under a recent ruling from a state appeals court. The Missouri Court of Appeals for the Western District upheld a trial court's award in favor of a subcontractor and against a contractor and a bond surety for $200,000 in attorneys' fees and $138,400.68 in interest.

This is in addition to an agreed settlement between the parties to pay the subcontractor $300,000 for work performed. The case is *Brooke Drywall of Columbia, Inc. v. Building Construction Enterprises, Inc.*, 361 S.W.3d 22 (Mo. App. W.D. 2011).

The case involves two construction projects at the Missouri University of Science and Technology in Rolla, MO. The curators of the University of Missouri are the owners of the projects. Building Construction Enterprises, Inc. (BCE) was the general contractor. Brooke Drywall was a subcontractor to BCE. Hartford Fire Insurance Company issued payment bonds with BCE as the principal.

The Western District took the unusual step of "assuming" that the prime contract between the University and BCE provided that the contractor was required to make all payments due to its subcontractors. The prime contract was not part of the record for the appellate court to review.

Brooke Drywall filed a lawsuit against BCE and Hartford alleging that it was owed the contract balance under its subcontract plus interest and attorneys' fees. BCE in turn filed a third-party lawsuit against the University seeking the remaining amounts due from the University including amounts due to Brooke Drywall.

Most of the disputes ultimately were settled prior to the introduction of evidence at trial, including an agreement by BCE and Hartford to pay Brooke Drywall $300,000 as the principal due under the subcontract. This left open for resolution at trial Brooke Drywall's claims for attorneys' fees and interest.

The subcontract provided that unpaid payments shall bear interest from the date payment was due. Final payment was due to the subcontractor upon demand even if the contractor had not received payment from the owner. The subcontract required that the losing party to the dispute pay to the prevailing party all attorneys' fees, costs and expenses. This is a common provision in many construction contracts. The circuit court found that the contractor and surety were both liable for interest and attorneys' fees and entered judgment against them.

The surety and contractor conceded at trial that the subcontractor had fully performed its work, that any delay in completion caused by a steel shortage was not the subcontractor's fault and that the subcontractor made demand for payment. Accordingly, the appellate court held that money was due the subcontractor and that interest ran from that date.

The surety and contractor contended that the trial court erred in awarding attorneys' fees because the subcontractor was not the "prevailing" party. They argued that in order for a party to "prevail," the issue had to be litigated and resolved in court, not settled as occurred in this case.

The Western District noted that a prevailing party is someone who obtains a judgment regardless of the amount of damages. A prevailing party need only obtain "some relief" from the court.

In this case, the parties agreed in settlement on the principal due to the subcontractor, but they litigated the issue of interest. The subcontractor ultimately prevailed on that issue and obtained relief from the court in the form of a judgment of $136,400.68.

The appellate court concluded that this was sufficient to render the subcontractor the "prevailing party" and thus triggered the subcontractor's contractual right to attorneys' fees.

The surety had argued that the payment bond only covered contractor payments for materials and labor performed by the subcontractor. It did not expressly include attorneys' fees and thus the surety contended that it was not liable for payment of attorneys' fees.

In rejecting this argument, the Western District concluded that the bond also provided that if the contractor was in default and failed to comply with any provision in the prime contract with the University, then the obligation becomes binding upon the surety.

The Western District then expressly "assumed" that the prime contract between the University and BCE required the contractor to make all

payments due under its subcontracts. The Western District stated this assumption was necessary because the prime contract was not part of the record and thus not available for review by the appellate court.

The court concluded that the contractor failed to make payment for labor performed, interest and attorneys' fees. Thus, the contractor failed to comply with the prime contract. This meant that the bond was still in effect and subject to the lawsuit brought by Brook Drywall.

Insurance Company Waived Claim to Recover $7,990,000 from Owner's Contractor

The Western District of Missouri recently denied the subrogation claim of an owner's insurance company for $7,990,000 against one of the owner's contractors. The court decided that the owner waived its claim by virtue of contracts it had with other contractors. The case is *RLI Insurance Company v. Southern Union Co. d/b/a Missouri Gas Energy*, 341 S.W.3d 821 (W.D. Mo. 2011).

The contracts that contained the waiver were industry standard form contracts prepared by the American Institute of Architects (AIA). The contract between the parties to this dispute, however, did not have any such waiver provision and it did not incorporate any of the contracts that contained the waiver provision.

The lawsuit was between the owner (Triumph Foods LLC) and Triumph's contractor, MGE. Triumph assigned its claim on appeal to RLI, Triumph's builder's risk insurer.

The Western District found that MGE was a third-party beneficiary to the contracts that contained the waiver. Thus, MGE was covered even though it was not a direct party to the contract.

A third-party beneficiary is one for whose benefit a promise is made in a contract but who is not directly a party to that contract. A third-party beneficiary can in fact enjoy the rights and privileges provided in a contract that it did not sign. This holds true even though the third-party beneficiary is not specifically identified by name in the contract.

The construction involved a hog processing plant in St. Joseph, Missouri that Triumph owned. A natural gas explosion destroyed part of the plant during construction.

Triumph separately contracted with MGE to transport natural gas to the plant during initial construction. Triumph alleged that MGE caused the explosion.

RLI paid to Triumph $7,990,000 to reconstruct the plant as a result of the gas explosion. RLI sought to recover this payment from MGE on a claim of subrogation.

Subrogation occurs when the insurance company (after paying a claim) files its own claim in the name of its insured (in this case Triumph) to recover for payments it made under the insurance policy.

Triumph used AIA's A101/CMa form of contract to enter into several separate contracts with contractors for various portions of construction work at the plant. Each AIA contract incorporated a separate set of general conditions. The general conditions contained a waiver of subrogation provision in Paragraph 11.3.7, which provided that the owner and contractor waived all rights against each other as well as the owner's other contractors for damages caused by fire or other perils to the extent covered by property insurance.

Paragraph 6.1.1 of the general conditions addressed the owner's right to perform construction with its own forces or to award contracts to others without using a construction manager. In this case, Triumph separately contracted with MGE.

The MGE contract did not use the AIA contract or the general conditions and did not provide for a construction manager. The MGE contract did not contain a waiver of subrogation provision or even mention subrogation. The MGE contract, however, did include an integration clause which is commonly found in construction contracts. This clause is designed to prevent one party to the contract from claiming an agreement with the other party that is at variance with the written contract.

The trial court entered summary judgment in favor of MGE, finding that Triumph could not maintain through its insurance company a subrogation claim against MGE.

On appeal RLI argued that the MGE contract exclusively defined the relationship between MGE and Triumph. This contract did not include a waiver of subrogation and thus, according to RLI, there was no prohibition from pursuing a subrogation claim.

The Western District noted that generally speaking, a written contract, especially one containing an integration clause, is the "final memorial of

the parties' agreement." It further reasoned, however, that by virtue of the AIA contracts, MGE was a third party beneficiary to those contracts.

While MGE had a separate contract with Triumph, Triumph's contracts with the other contractors precluded a subrogation action against any contractor. Since MGE was a contractor, this waiver included MGE.

The contract between Triumph and MGE did not expressly negate MGE's rights as a third party beneficiary. Thus, the subrogation claims against MGE had been waived by virtue of the AIA contracts.

The Western District concluded that MGE fell into the identifiable class of "Owner's Other Contractors and own forces" and thus MGE was an intended third-party beneficiary of the waiver of subrogation provision. Accordingly, MGE could enforce these terms against Triumph pursuant to a contract in which MGE was not specifically one of the parties.

Electric Utility in Arkansas Ordered to Stop Construction of New Plant After Spending $800 Million

The Eighth Circuit Court of Appeals (which oversees federal cases in Missouri) recently affirmed a decision from a federal district court in Arkansas to enjoin Southwestern Electric Power Company (SWEPCO) from continuing to build a 600 megawatt pulverized coal fired facility. The court determined that the rights of a hunting club, the Sierra Club, and the National Audubon Society may be substantially damaged if construction were allowed to continue on a power plant where SWEPCO already had spent $800,000,000.

The case is *Sierra Club; National Audubon Society; Audubon Arkansas; Charles Mills v. United States Army Corps of Engineers and Southwestern Electric Power Company*, 645 F.3d 978 (8th Cir. 2011).

In reaching this result, the Eighth Circuit sided with the rights of environmentalists over the argument by SWEPCO that the injunction would cost the utility $8,000 per day for idled equipment, $400,000 in equipment demobilization, and $250,000 for demobilizing the contractor. The utility estimated that the injunction in a worst case scenario could cost it $11,000,000 per month and the loss of 100 permanent jobs.

At the heart of the court's decision was the fact that SWEPCO commenced plant construction a year before it had received the necessary Clean Water Act permit (the §404 permit) from the U.S. Army Corps of Engineers. Also, the utility had ignored a warning from the Corps that construction would proceed at the utility's own risk since it

had not received a permit. The court thus concluded that harm suffered by the utility from this costly result was "self inflicted."

In 2005, SWEPCO had conducted a planning session on the need for additional energy in Arkansas, Louisiana and Texas. It received approvals from the regulatory commissions in each of those states to construct the John W. Turk, Jr. Power Plant. SWEPCO secured a 3,000 acre site in Hempstead County, Arkansas. The site is near commercial pine plantations, agricultural row crop areas, cattle raising operations, railways, and is less than one mile from property owned by the Hunting Club, one of the plaintiffs in this case.

As part of the construction process, SWEPCO asked the court to issue a permit under §404 including permission to discharge "dredged" or "fill" material into wetlands and stream channels so it can construct ancillary components of the power plant, including roads, rail line, a coal yard, a cooling water intake structure, water lines and transmission lines.

Approximately a year after construction had begun, the Corps issued the §404 permit. Three days later, SWEPCO notified the Corps that it already filled 2.47 acres of wetlands as a result of errors in mapping and flagging of wetland boundaries. The Corps immediately withdrew its permit and required SWEPCO to conduct a new survey of the wetlands. SWEPCO then submitted a new permit application seeking "after-the-fact" authorization for its prior unauthorized discharge, as well as for proposed future discharges.

Thereafter, the Arkansas Court of Appeals invalidated SWEPCO's state Certificate of Environmental Compatibility and Public Need Certificate for the plant. Since SWEPCO's §404 permit application was based on this Certificate, the Court of Appeals concluded that the Arkansas Public Service Commission had not determined that there was a need for the construction of such a power plant.

The state court also found "particularly disturbing" SWEPCO's failure to address the comparative merits and determinants of alternative locations for its plant.

After SWEPCO submitted a revised analysis, the Corps issued a final §404 permit in December, 2009. This permit allowed SWEPCO to discharge dredged and fill material into eight plus acres of wetlands, including the 2.47 acres already filled without authorization as well as discharging into various streams.

The plaintiffs in this case did not immediately resort to federal litigation because they relied on a statement from SWEPCO's President that

SWEPCO would not construct the plant without first obtaining a valid State Certificate. When construction of the plant continued after the Arkansas courts had invalidated the Certificate, the plaintiffs filed the federal action.

The district court had concluded that the individual plaintiffs in the federal action had suffered an adequate injury to support an injunction because they resided in close proximity to the plant and engaged in bird watching and many other outdoor activities around the area.

The plaintiffs alleged a number of technical defects in the process of approval for the plant, including that the Corps (another defendant in the case) failed to comply with the requirements of the National Environmental Policy Act (NEPA) that federal agencies include a detailed statement on alternatives to the proposed action.

Finally, the Eighth Circuit, while noting the potential economic loss to the utility, said this was more than offset by the potential economic gains in the public's confidence that its government agencies act independently, thoroughly and transparently when reviewing permit applications.

City May Proceed with Lawsuit Against Contractor over Sewer Project

Missouri Southern District Court of Appeals has allowed the City of Kimberling City to proceed with its breach of contract and warranty lawsuit against its general contractor Leo Journagan Construction Company, Inc. for construction of a sanitary sewer system. The case is *City of Kimberling City v. Leo Journagan Construction Co.*, Inc., 337 S.W.3d 48 (Mo. App. S.D. 2011).

In reaching this result, the appellate court overturned the trial court's decision that no trial was necessary because the City's claims were without merit and thus the contractor was entitled to summary argument in its favor. The trial court had largely based its decision on the findings of the City's architect, E.T. Archer Corporation, that the contractor had performed its duties and obligations under the contract and was entitled to final payment by the City. The architect's decision–the trial court concluded–precluded the City from proceeding with its claim that Leo Journagan's work was unsatisfactory and defective.

This dispute–and the Southern District's holding–touch on two issues that frequently arise in construction disputes; namely, (1) does an architect's decision bind the owner and (2) must a contractor or owner

first present its claims to the architect for consideration before being allowed to proceed with those claims.

The court's decision did not specifically identify the source of the contract between the owner and contractor. However, the contract language cited in the opinion clearly shows it was based on AIA A201, an industry standard for drafting construction contracts. Thus, this decision has broad applications in the construction industry.

At the end of the project architect Archer sent a letter to the Missouri Department of Natural Resources wherein Archer affirmed that to the best of its knowledge and belief the contractor substantially completed the wastewater facilities in accordance with the contract's plans and specifications. Contracts typically require architects to provide statements to governing bodies such as state or local agencies about whether the contractor has complied with the contract and the project's level of completeness. The appellate court concluded that this letter was not a binding admission by the City that the work complied with the contract documents, thereby precluding the City from bringing any further claim against the contractor.

The contractor also argued that by virtue of the City's final payment, it released any claim it had that the work was not satisfactory. The appellate court relied on the contract to conclude that final payment did not waive any owner claims arising from defective work for failure to comply with the contract documents.

The Southern District further emphasized that there was a legitimate factual dispute over whether Journagan properly performed its work. For example, the City contended that the contract documents required 95% compaction. Testing showed that streets continued to sink throughout the City and that actual compaction at four locations ranged from 87.1% to 93.3%. The City also claimed that the contractor did not properly trench, using clay and chert instead of the contractually mandated granular fill.

The contractor also argued that the City waived any further warranty claims by not objecting that Journagan's warranty work was incomplete at the time. Journagan also asserted that the owner waived an additional warranty claims by not first presenting them to the architect for consideration and recommendation.

Journagan relied on the fact that the contract stated that the architect was to be "the initial interpreter of the requirements of the contract documents and judge of the acceptability of the work thereunder."

According to Journagan, this made the architect the gatekeeper of all claims, including warranty claims.

The appellate court decided that the contract did not clearly state whether warranty claims had to be presented first to the architect. It allowed for two different interpretations on this. Also, the court noted that the parties in practice did not act as if all warranty claims had to be presented first to the architect for consideration.

Thus, the trail court erred by deciding this issue as a matter of law. Instead, the dispute will be decided at trial after hearing all the evidence.

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