

Missouri Appellate Court
Adopts Spearin Doctrine

by

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In one of the most comprehensive and important construction decisions in years, the Missouri Court of Appeals for the Eastern District has found the Spearin doctrine applies in Missouri. This is the first Missouri appellate court to definitively reach this conclusion.

The Spearin doctrine stands for the proposition that when a governmental entity includes detailed specifications in a contract, it impliedly warrants that if the contractor follows those specifications, the finished product will not be defective or unsafe and if the finished product turns out to be defective or unsafe, the contractor will not be liable for the consequences. The Spearin doctrine is widely accepted around the country, but no previous Missouri appellate court has specifically adopted or rejected this doctrine in a published opinion.

The case is *Penzel Construction Company, Inc. v. Jackson R-2 School District*, 2017 WL 582663, decided February 14, 2017.

This sweeping appellate opinion also discusses expert qualifications and the measure of damages through a total cost approach or modified total cost approach. Missouri construction lawyers will be citing this case for years to come.

Penzel Construction Company, Inc. on behalf of Total Electric, Inc. brought a breach of contract action against Jackson R-2 School District based on breach of implied warranty for allegedly furnishing deficient and inadequate plans and specifications.

The District had entered into a contract with WNB as architect to build an addition to the Jackson High School. During the bidding process, the District furnished the plans and specifications for the project to Penzel, who gave a copy of the plans to Total Electric.

Neither Penzel nor Total Electric noticed any errors in the plans at the bidding stage. Based on the plans, Total Electric submitted a bid of \$1,040,444.00 to Penzel to furnish and install electrical work for the project.

The District then entered into a contract with Penzel to be the general contractor. Penzel entered into a subcontract with Total Electric to provide electrical work.

Penzel's claim at the trial court level pursuant to the Spearin doctrine was that the District impliedly warranted that the plans it furnished were adequate for completing the project and that the District breached the contract by providing inadequate and defective plans and specifications.

Alleged defects in the plans included inadequate low voltage switching and wire design affecting the gymnasium and some student areas, incorrect kitchen drawings, failure to specify emergency ballasts, failure to depict all the water heaters and circulating pumps requiring wiring, outdated products, non-compliance with building codes and an incorrect depiction of some site electrical work that actually was to be performed by others.

Total Electric's claim was for labor loss of productivity and a 16-month delay in reaching substantial completion. Total Electric alleged that its damages were compounded by slow responses from the District and WNB as problems arose. Total Electric argued that it frequently had to wait weeks to months for a response.

This caused inefficiencies requiring Total Electric to pay workers for being on the project site with little or no work available to be performed. Total Electric also claimed higher hourly costs for manual labor due to trade labor wage escalation.

At the trial court level, the District brought a third-party claim against WNB. The trial court granted motions for summary judgment on behalf of the District and WNB.

In reversing, the Eastern District concluded pursuant to the Spearin doctrine that if a contractor makes a bid in reliance on a governmental entity's representations of what a project would entail, that contractor should not be punished—and the entity should not receive a windfall—because the entity's renderings were defective.

The Eastern District also decided that Penzel was not required to use expert testimony to prove the plans were substantially deficient. Rather, testimony that the plans omitted critical components, called for outdated or non-existent products, and failed to comply with building codes were issues that a lay person (or a juror) without any technical training could understand.

Also, Penzel could use two witnesses with 40 and 60 years of construction experience to testify that the electrical plans and specifications were deficient,

even though neither one was a registered architect, licensed electrician or licensed engineer.

To prove Total Electric's loss of productivity claim, Penzel used the total cost method or modified total cost method.

The total cost method requires proof of four elements: (1) the nature of the particular loss makes it impossible or highly impractical to determine any loss with a reasonable degree of accuracy; (2) the contractor's bid or estimate was realistic; (3) the actual costs are reasonable; and (4) the contractor is not responsible for any added costs.

The modified total cost method is more flexible by allowing for adjustments to the total calculation of damages. The four-prong test is still used; however, it is merely a starting point and subject to adjustments to aid in proving the actual losses.

The appellate court concluded that the total cost method or modified total cost method may be an avenue to establish damages in this case.

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