

Attorney Fees Allowed for Failure  
To Make Scheduled Payments

by

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Owners and contractors now clearly risk paying for the other side's attorney fees and up to eighteen percent interest when they withhold scheduled payments in private construction contracts. They cannot rely on a good faith belief of reasonable cause, such as poor workmanship or untimely delivery, to justify withholding payments otherwise due pursuant to the contract.

The case is *Vance Brothers, Inc. v. Obermiller Construction Services, Inc.*, 181 S.W.3d 562 (Mo. 2006), handed down by the Supreme Court of Missouri on January 10. The Supreme Court took this case on a transfer from the Western District Court of Appeals. The Supreme Court seldom accepts such transfers, highlighting perhaps its interest in weighing in on this important issue.

The decision has sweeping ramifications for all construction projects in Missouri that involve private contracts and places an emphatic declaration from Missouri's highest court that disputes during construction will not justify withholding scheduled payments.

This result will prompt prudent owners and contractors who would otherwise like to withhold contractually scheduled payments to reconsider whether they can afford this risk. Owners and contractors sometimes withhold payment for leverage and sometimes because of a legitimate and serious dispute over the work. Neither may be a safe approach.

More owners and contractors now are likely to pay what the contract calls for and then resolve their dispute in court or arbitration.

The case involves Obermiller Construction, the general contractor for several Wal-Mart stores. Obermiller contracted with Vance Brothers to apply micro surfacing to the stores' parking lots in Fort Scott and Topeka, Kansas.

A dispute arose over the quality of the work, causing Obermiller to withhold a scheduled payment. Vance sued on account, alleging the

payment was owed. Obermiller countersued in several counts including breach of contract, alleging poor workmanship.

The jury returned a verdict for Vance on its claim and for Vance on Obermiller's counterclaim. Prior to the trial starting, they both agreed that the judge would decide the issue of attorney fees and interest after the jury's verdict.

There was no question that the trial court could award attorney fees and interest under certain circumstances pursuant to §431.180 R.S.Mo., known as Missouri's Private Prompt Payment Act.

This Act provides that all persons who enter into a contract for private design or construction work "shall make all scheduled payments pursuant to the terms of the contract." It also states that the court "may" in addition to other damages "award interest at the rate of up to one and one-half percent per month from the date payment was due pursuant to the terms of the contract, and reasonable attorney fees, to the prevailing party."

The Act offers no exceptions to when payment can be withheld. Nevertheless, many attorneys believed that a "good-faith" exception existed in the Act, since such an exception clearly is in Missouri's Public Works Prompt Payment Act, §34.057.

The Public Works Act covers construction projects on public jobs and allows for the recovery of up to eighteen percent interest and attorney fees. The Public Works Act also provides that such a recovery can exist if a payment "was not withheld in good faith for reasonable cause." There is no similar provision in the Private Prompt Payment Act.

Disputes over workmanship and timely performance often create good faith reasons to withhold a scheduled payment under the Public Works Act. Obermiller argued that this same exception should apply to the Private Act as well.

The Supreme Court summarily rejected this argument by simply stating that such an exception is not in the Act and therefore it does not apply.

In reaching this result, the high court reaffirmed the trial court's award of \$61,400.00 in attorney fees to Vance even though the trial court did not award any interest. Obermiller had argued that interest must be awarded first before attorney fees could be awarded.

The Supreme Court concluded that the Act does not require a finding of interest first. The trial judge has the discretion to award interest, or attorney fees, or both, or neither.

Eighteen percent interest and attorney fees are significant damages in many cases. Few statutes in Missouri give a trial judge such widespread power over damage issues.

The high court also concluded that Vance could recover even though its cause of action was for an account, not for breach of contract. The Act allows an aggrieved contractor or subcontractor to “bring an action in a court of competent jurisdiction against a person who has failed to pay.”

The Act does not require that the cause of action has to be for breach of contract. However, there must be a contractual basis for the scheduled payment before the Act will apply.

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