Construction Law in 1969: A Look Back

By James R. Keller

This article appeared in *St. Louis Construction News and Real Estate* p. 22-23, 40th Anniversary Special Edition.

Given the 40-year celebration of *CNR*, let us look back at some of the appellate decisions from 1969. Our President was Richard M. Nixon and our nation was in the Vietnam War.

Some of the cases seem shocking – legal events such as segregation occurred only 40 years ago. Other cases involve significant construction projects that still shape Missouri's landscape today.

Forty years ago, the Supreme Court of the United States considered a desegregation case wherein a federal district court had provided in a court order "for safeguards to assure that construction of new schools or additions to existing schools would not follow a pattern tending to perpetuate segregation." The case is *Supreme Court of the United States v. Montgomery County Board of Education*, 89 S. Ct. 1670, 1673 (1969).

Up until then, the Montgomery County Board of Education in Alabama had operated a "dual school system based on race and color . . . one set of schools to be exclusively attended by Negro students and one set of schools to be attended exclusively by white students." *Id.* at 1672.

The high court affirmed the trial court's order and that stated it looked forward to a day when a "completely unified, unitary, nondiscriminatory school system becomes a reality instead of a hope." *Id.* at 1676.

The Supreme Court also considered in 1969 whether to compensate owners of buildings who suffered damage by rioters. The case is *National Board of Young Men's Christian Assoc. v. United States*, 89 S. Ct. 1511 (1969).

United States' troops occupied the buildings during riots in Panama. The court ruled that building owners were not entitled to compensation for their damages since the troops were acting primarily in defense of these buildings.

Another 1969 case involved a lawsuit by the U.S. Attorney General charging local sheet metal and electrical workers' unions in St. Louis with engaging in a pattern of discrimination against "Negroes on account of their race." *United States v. Sheet Metal Workers International Assoc., Local Union No. 36, AFL-CIO*, 416 F.2d 123 (8th Cir. 1969). The Eighth Circuit concluded that both locals committed unlawful employment practices "by excluding Negroes from membership and from participating in apprenticeship training programs." *Id.*

Other cases are noteworthy because of the construction projects more than any fundamentally different legal point of view. For example, there is *Peter Kiewit Sons' Co. v. Summit Construction Co.*, 422 F.2d 242 (8th Cir. 1969). The Eighth Circuit decided that a contractor could recover on a breach of subcontract claim against its prime contractor. The disputed work involved backfilling for an additional $1,097,856. The project was the construction of 150 underground launch facilities (missile sites) and 15 launch control areas in South Dakota. The Cold War was red hot in 1969.

The Eighth Circuit wrote an unusually long 40-page opinion considering whether there was sufficient evidence to support that general contractor Peter Kiewit Sons' had breached its subcontract, whether there were changes in the scope of the work, whether Kiewit interfered with Summit's work, and whether Summit waived its right to claim a breach of the subcontract. While the Cold War is over, the court's analysis still would be relevant today.

A supplier's price quotes often provide the backbone for a bid or a cost estimate. Their accuracy and reliability are critical. The Eighth Circuit decided in another case that a supplier's price quote for materials did not bind the supplier to that price for future orders. The case is *Thos. J. Sheehan Co. v. Crane Co.*, 418 F.2d 642 (8th Cir 1969).

The project was an apartment development called the Mansion House Project, which became one of downtown St. Louis' more prominent developments, even today. The court decided that an oral quotation manifested only a "future intention to sell" and not a solid offer that, if accepted, would constitute a binding contract to sell at that lower price into the indefinite future.

Cash flow problems caused Carter Electric Company, a subcontractor, in 1969 to ask for and receive weekly advances against estimates from its general contractor for labor and materials instead of the contractually agreed monthly payments. The case is *S.S. Silberblatt, Inc. v. Seaboard Surety Co.*, 417 F.2d 1043 (8th Cir. 1969).

The project was an 800-unit military housing project for the Department of the Army at Fort Leonard Wood, MO, for a total cost of $12,194,200. Carter agreed to do the electrical work and the underground telephone lines for $600,000.

The Eighth Circuit rejected Carter's argument that by agreeing to weekly payouts on estimates, Silberblatt and Carter had abandoned their subcontract. Abandonment requires mutual consent, according to the court, which cannot be supported simply by altering the payment terms. It is a common practice today for parties to a contract to agree to alter the payment terms at some point during construction.

Also in 1969, the Eighth Circuit decided that subcontractor Planet Corporation could not recover additional compensation on its claim for extra work. The case is *United States v. MacDonald Construction Company*, 417 F.2d 687 (8th Cir. 1969). Planet was the subcontractor for construction of the Gateway Arch.

Planet's $725,700 subcontract with MacDonald Construction Company specified that it do all electrical work required to complete the installation of the passenger train system to take passengers to and from the top of the Arch.

Planet alleged that another subcontractor—Sachs Electric—was responsible for the disputed work. Planet sought additional compensation of $88,000, alleging that any wiring from a panel to another source was not within its scope. The court had no trouble, however, deciding that this was part of Planet's work under its contract and that Sachs was only responsible for running the power from a control panel to the base of each leg of the Arch.

James R. Keller is a partner at Herzog Crebs LLP where he concentrates his practice on construction law, complex business disputes, real estate and ADR. He also is an arbitrator and a mediator.