

**Environmental Contractor Awarded
Attorney Fees for Defending an Appeal**

by

James R. Keller

This article appeared in *St. Louis Construction News and Real Estate*, p. 22-23, March-April, 2008.

Missouri's Eastern District Court of Appeals started 2008 with a bang. On January 2 it awarded to The Kiesel Company, an environmental clean-up contractor, the attorney fees Kiesel spent defending an appeal.

The court based its decision on Missouri's Prompt Payment Act. In so ruling, the appellate court expanded the Act's application to include the potential award of appellate court attorney fees.

Previously, the risk of paying the other side's attorney fees was widely viewed as being a trial court risk. This result throws up a legal cautionary flag about when to pursue an appeal. The stakes for losing on appeal have just gotten higher.

The case is *The Kiesel Company v. J&B Properties, Inc.*, 241 S.W.3d 868 (Mo. App. E.D. 2008).

The dispute involved the purchase by Glasgow Enterprises, Inc. of a defunct gas station at a St. Louis County tax sale. After purchase, Enterprises conveyed the property to Glasgow Realty, LLC. William Glasgow owned these two companies and a third one named J&B Enterprises, Inc.

Larry Gooden, the executive vice president for Kiesel (the environmental contractor) received a telephone call from another contractor (Patrick McQuay). McQuay frequently performed work for Glasgow's companies. McQuay said that he was with "Glasgow" and that J&B Enterprises had purchased the property. The property needed an environmental assessment.

Kiesel did the environmental assessment, invoiced J&B Enterprises and received payment from Glasgow Realty, the actual owner of the property.

McQuay then requested a bid to do the remediation work set out in the assessment. Kiesel submitted its bid to J&B Enterprises, care of William Glasgow. The work involved the excavation and removal of five tanks and their contents and related environmental clean-up efforts.

Kiesel did the work and invoiced J&B Enterprises \$80,476.24.

Missouri had a program in place—the Missouri Petroleum Storage Tank Insurance Fund (PSTIF)—that would cover part of the costs for this work. Kiesel assisted William Glasgow in submitting to the PSTIF a claim form for reimbursement of the remediation costs naming J&B Enterprises as the owner of the property.

The Missouri Secretary of State issued a check for \$45,595.24 payable jointly to J&B Enterprises and Kiesel. Using Glasgow's signature stamp, McQuay deposited the check into J&B Enterprises' back account. Kiesel had not endorsed the check.

Upon inquiry from Kiesel, Glasgow admitted that he had received and deposited the check into the bank account of J&B Enterprises. According to the appellate court, he “essentially refused to pay Respondent's [Kiesel's] invoice because it was more than he expected.” 241 S.W.3d at 871. Apparently, Kiesel did not get paid at all for its work.

Kiesel sued William Glasgow and his three companies for breach of contract. The jury found against all of them in the amount of \$105,476.24.

Glasgow and his companies moved the trial court for remittitur, which is a request that the judge lower the amount of the jury verdict. Kiesel agreed that the verdict could be reduced by \$25,000. Accordingly, the trial court entered judgment for \$80,496 plus interest, costs and attorney fees.

Missouri created the Prompt Payment Act, §431.180 R.S.Mo., in 1995. It allows a judge, jury or arbitrator in deciding a dispute involving a private construction project to award up to 18 percent interest per year and/or attorney fees against anyone who did not make a scheduled payment pursuant to the terms of the construction contract.

Since its enactment, this statute has been used frequently by courts and arbitrators. The statute is designed to encourage payments to be made on time and to penalize those who fail to do so.

The trial court's award of attorney fees in this case was pursuant to Section 431.180. Kiesel asked the appellate court to apply this same statute to award the attorney fees it incurred to “defend this appeal.” *Id.* at 873. Courts and arbitrators usually have applied the Act to persons and companies pursuing recovery of money, not those defending a judgment they have received.

Kiesel pointed to Glasgow's "deliberate misconduct in keeping the PSTIF reimbursement check" and to the \$180,000 profit Glasgow and his company or companies received in selling the property after Kiesel's clean-up efforts. The appellate court found these facts to be persuasive.

The appellate court decided that the trial evidence did not support a jury finding against Realty Enterprises or Glasgow Realty. The remediation contract was between William Glasgow and J&B Enterprises on the one hand and The Kiesel Company on the other. The other companies were not parties to the contract.

Thus, the Eastern District Court of Appeals reversed the judgment against Realty Enterprises and Glasgow Realty.

The appellate court noted merit in Glasgow's challenge as to who was responsible for the debt to Kiesel. It found no merit, however, in Glasgow's challenge to the existence of that debt.

Exercising the discretion the court has in applying the Prompt Payment Act, the appellate court agreed with Kiesel's request to add another \$22,100 in attorney fees for the appeal to the amount Glasgow and J&B Enterprises already owed pursuant to the trial court judgment.

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.