

Failing Concrete Streets Provide Nightmare for Developer, Surety and Subcontractors

by

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Improperly poured concrete streets triggered a series of claims and counterclaims between Jefferson County, Essex Contracting, Inc. (the developer of three subdivisions), Essex' subcontractors J.H. Berra Paving Co., Inc. and Boling Concrete Construction, Inc., and the developer's surety Federal Insurance Company. The case is *Essex Contracting, Inc. v. Jefferson County*, 2009 WL 454280 (Mo.), decided February 24.

The dispute provides a great lesson in the complexity of construction legal issues and on how wrong things can go on a project that started in 1995. Even worse, the dispute is not completely over, for the Supreme Court of Missouri has sent the matter back to the trial court for further consideration on one issue.

The saga began when Jefferson County required developer Essex to post three separate bonds totaling \$3,598,249 for development of the Winter Valley subdivision. The bonds covered three phases of construction.

When Essex could not complete the streets on time, Jefferson County and Essex agreed to a one-year extension in exchange for a guarantee from Essex and a pledge that the guarantee would be backed by the bonds already in place. The guarantee provided that if Essex did not complete the project within one year, including any necessary repairs to the work, the county would do so and use the bonds to reimburse for the costs to complete. In essence, this made the previous bonds, if they were not already, into performance bonds, whereby the county was assured the money necessary to complete the job if Essex failed to perform.

Construction of the concrete streets required three phases: (1) clearing and grading, (2) leveling dirt and compacting the subgrade, and (3) Essex' subcontractors were to pour the streets in a slip-form paving technique where the concrete is poured in a continuous fashion and control joints are added later.

Some of the streets began to split and crack. Both the developer and the subcontractors repaired and replaced broken slabs, but this created a bigger problem by revealing that at least some of the slabs were not poured to the proper thickness. The county required Essex to do core sample testing. The county was not satisfied with the results and in 2005 the court ordered additional core testing. This testing revealed that there were an additional 218 slabs of concrete that were deficient in thickness by more than 0.3 of an inch, in violation of the subdivision regulations.

Essex made additional repairs and sought release of the bonds. The county responded by refusing to release the bonds and presented Essex with a further list of deficiencies. Essex eventually filed a declaratory judgment lawsuit seeking the release of the bonds.

The county conceded that part of the bonds could be released, but kept in place \$1,015,837 for work it claimed was not properly completed. The county responded to the lawsuit by counter suing Essex for faulty work and added Federal as a defendant for its failure to disburse the bonds to the county. Federal then cross sued the county stating that the bonds were void or that the improvements were complete.

Members of the Winter Valley Homeowners' Association intervened in the lawsuit. They filed claims against Essex for injunctive relief and damages, alleging negligence, breach of contract and zoning enforcement. Essex filed third-party petitions against its subcontractors Boling and Berra for indemnity and breach of contract.

At trial, an expert for the county who was a licensed geotechnical engineer testified that poor subgrade conditions and support were responsible for the failures in the streets. There was evidence at trial that concrete trucks drove on the subgrade during the pouring, which if true could have disturbed the subgrade condition.

Boling attempted to recompact the subgrade after the trucks had disturbed it. They were unable to do so in at least one place because the trucks had brought in so much moisture that the dirt could not be recompact.

The trial court concluded that Essex failed to meet the standards of the subdivision regulations and the requirements of the guarantee. The court ordered Essex and Federal to pay the remainder of the bonds (\$1,015,838) to the county to fund completion and to pay an additional \$102,174 in civil penalties, also to be funded from the bonds.

The trial court also entered judgment in favor of Essex on its claims of indemnity against its subcontractors in the amounts of \$73,913 for Boling and \$28,261 for Berra for their shares of the \$102,174 civil penalty. Boling and Berra also had to pay Essex \$6,040 and Berra \$6,468 for the costs of the core testing.

The trial court awarded \$35,875 in costs against Essex and Federal for the intervenors' costs to repair the improperly poured streets. Intervenors also recovered their attorney fees in the amounts of \$219,277 from Essex, \$7,088 from Berra and \$17,013 from Boling. The Supreme Court rejected claims they were excessive by deferring to the judgment of the trial court, especially in a case of this length and complexity.

The Supreme Court affirmed the trial court's decision with the exception of Essex' claim for indemnity against Boling and the assessment of attorney fees against the subcontractors. The Supreme Court decided that if Boling was responsible for part of the thin concrete, then the trial court should have sustained Essex' claim for indemnity. The trial court will have to consider this further, per the order from the Supreme Court. The

attorney fee awards were not supportable because there was no contract between the intervenors and the subcontractors that would entitle the intervenors to recover attorney fees.

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