

## **Professional Engineers Play Key Roles in Missouri Construction Disputes**

**by**

**James R. Keller**

**This article appeared in *St. Louis Construction News and Real Estate*, p. 28-29 –March-April, 2010.**

**Missouri’s professional engineers play key roles in determining the outcome of a construction dispute, according to recent cases decided by Missouri’s appellate courts. Through their in-court testimony and out-of-court work, construction cases often depend on engineers.**

**In *Baetje v. Eisenbeis*, 296 S.W.3d 463 (Mo. App. E.D. 2009), the Eastern District recently used the testimony of one engineer to overturn the decision of the trial judge in a court-tried case. The case involved a landowner who filed a lawsuit against the seller for misrepresentation in the purchase of real property and ownership of a road.**

**The trial court had to decide if there was an easement by necessity that would allow the one landowner to use a bridge road owned by someone else for ingress and egress. There was another means of access but it sometimes flooded and made passage impossible about ten times each year.**

**The trial court awarded the landowner an implied easement by necessity over the bridge road. The Eastern District decided to review the evidence itself and decide what to do.**

**The appellate court noted that the landowner who wanted the easement did not call an engineer to testify or take any other steps to improve the road or build a bridge or maintain the other road in periods of high rain. The other landowner “had a civil engineer inspect the creek and the Creek Road. The engineer testified that the Creek Road had a solid foundation and could be modified to overcome the water issues.” *Id.* at 470.**

**The Eastern District concluded that the landowner who failed to use an engineer did not prove his case in a court of law. Appellate courts rarely overturn a trial court’s decision in a court-tried case but the Eastern District felt compelled to do so in this case, largely because one side had an engineer and the other side did not use one.**

In another case it took the involvement of an engineer in the middle of the project to get the project completed. Once completed there was a dispute over payment which led to an appellate decision on mechanic's liens on an important issue that had never been decided before by a Missouri appellate court.

The Eastern District decided that a contractor's mechanic's lien statement could include the work of its subcontractor, even though the subcontractor already had been paid in full. No Missouri appellate court had been asked before to decide this issue, even though it is a common practice in the construction industry for contractors to include in their lien all the work of their subcontractors. The case is *Midwest Floor Company v. Miceli Development Company*, 2009 WL 5124595 (Mo. App. E.D.).

The project involved construction of a retaining wall that was needed to build a rear-entry garage driveway. The driveway abutted a steep ravine. The contractor could not locate stable ground, so the parties agreed to stop the project and consult an engineer.

The engineer developed a new plan that called for installation of a 48 inch wide pipe through the ravine. Based on the engineer's work and approved plans, the contractor and subcontractor returned to the site and completed the work.

The contractor paid its subcontractor but the owner did not pay the contractor. The contractor then filed its mechanic's lien and included in its description of work the work performed by the subcontractor. The Eastern District rejected the argument that this was an improper lien because it included non-lienable items (namely the work of the already paid subcontractor).

The court concluded that to decide otherwise would deprive a contractor of security for the labor it offers through subcontractors.

The Missouri Supreme Court emphasized last year that appellate courts must defer to a trial court's evaluation of an engineer's expert testimony. The case is *Essex Contracting, Inc. v. Jefferson County*, 277 S.W.3d 647 (Mo. 2009).

The case involved a subdivision developer that sued Jefferson County, seeking a release of subdivision bonds posted to ensure completion of improvements in the subdivision. Part of the dispute was over failing concrete subdivision roads.

The county used a licensed geotechnical engineer to testify that the roads had failed due to a poor sub grade condition and lack of adequate support. The contractor offered contrary testimony but the trial court decided in favor of the county.

The Supreme Court of Missouri observed that the “subject matter in dispute here is highly technical and was addressed almost exclusively through expert testimony.” *Id.* at 652-53. “The role of the appellate court is not to reevaluate expert testimony through its own lens but rather to confine itself to determining whether substantial evidence existed to support the trial court’s 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.