

**Summary of SC89407, *Essex Contracting, Inc., and Federal Insurance Company v. Jefferson County, Missouri, Patrick J. Acheson, et al., J.H. Berra Paving Co., Inc., and Boling Concrete Construction, Inc.***

Appeal from the Jefferson County circuit court, Judge Timothy J. Patterson.

**Attorneys:** Essex and Federal were represented by Mr. Dana Hockensmith of Hockensmith Tatlow McKinnis Hammill PC in St. Louis, (314) 965-2255; Boling was represented by Ted F. Frapolli of The Law Firm of Ted F. Frapolli in St. Louis, (314) 993-4261; Berra was represented by Pamela M. Triplett of Law Offices of Donald B. Balfour in Chesterfield, (314) 317-3700; the homeowners' association (Acheson, et al.) was represented by Paul V. Rost, Emily Rushing Kelly and Ryan A. Moehlman of Cunningham, Vogel & Rost in St. Louis, (314) 446-0800; and the county was represented by Dennis Kehm Jr. of the Jefferson County counselor's office in Hillsboro, (636) 797-5072.

*This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.*

**Overview:** This case involves appeals and cross-appeals following protracted litigation over the responsibility for completing and repairing streets that failed in a new subdivision. The trial court determined the developer failed to make the necessary repairs within the specified timeline and that the amount remaining on the bond the developer had obtained should be paid over to the county so it can make the necessary repairs. The trial court assessed against the developer civil penalties and costs for core-testing of the streets and then assigned a portion of those penalties to two concrete companies that subcontracted with the developer to pour (and then repair) the streets. The trial court also ordered the developer and the two concrete companies to pay attorneys' fees.

In a unanimous per curiam opinion that cannot be attributed to any particular judge, the Supreme Court of Missouri affirmed certain portions of the trial court's judgment: that the developer breached its obligations to the county to complete the subdivision streets on time; releasing the remaining bond money to the county; assigning portions of the civil penalties and core-testing fees assessed against the developer to the two concrete companies; and awarding attorneys' fees and repair costs to the homeowners' association. The Supreme Court reversed other portions of the trial court's judgment: awarding the developer less than full indemnity against one of the concrete companies; and assessing liability for attorneys' fees to the two concrete companies. The Court remands (sends back) the case for the trial court to evaluate the developer's claim for indemnity against the one concrete company and to determine whether attorneys' fees appropriately may be given to the developer, pending a finding of liability on the part of the concrete companies.

**Facts:** In developing the Winter Valley subdivision in Jefferson County, Essex Contracting Inc. agreed to adhere to the county's subdivision regulations, which required Essex to post three separate bonds totaling nearly \$3.6 million so it could work on all three phases of construction before the final plat was approved. Construction began in 1995 and was to be completed in June 2000. Essex contracted with J.H. Berra Paving Co. Inc., and Boling Concrete Construction Inc.

to construct the streets. After the streets were completed in 1998, the concrete in some of them began to split and crack. Essex replaced some of the damaged street sections, with Berra and Boling also making some of the repairs. The repairs revealed that some of the concrete poured did not meet the thickness requirements of the subdivision regulations, which require that deficiencies of more than 0.3 inches necessitate replacement of the slabs. In 2000, because of concerns with the thickness of the pavement, the county ordered Essex to conduct core-sample testing, which revealed that in several places, the concrete was thin by more than 0.3 inches. Also in 2000, Essex obtained from the county a one-year extension – until July 26, 2001 – in exchange for a guarantee under which Essex agreed to complete the repairs on time or the bonds would go to the county so it could complete the improvements. Before a bond can be released, the county inspects the property and recommends whether to release the bond to the county commission, which determines whether the improvements have been made. If the county determines the improvements have not been made, then the county refuses to release the bonds to the developer but instead takes control of them so it can make the repairs itself.

After making some repairs to the streets, Essex twice sought release of its bonds, asserting it fully had completed the necessary improvements and developments. Both times, the commission refused to release the bonds, instead providing Essex with a list of deficiencies in the completion of the construction. In May 2001, Essex filed a petition for declaratory judgment, seeking full release of the bonds and alleging it fully had completed the improvements. In July 2001, the county conceded some of the repairs had been made and released part of the bond, leaving more than \$1 million of the bond unreleased. Essex maintained its suit for release of the rest of the bond, and the county counter-sued, adding Federal Insurance Co. – which had issued the bonds – as a third-party defendant for failing to disburse the bonds to the county. Federal cross-claimed against the county for a declaratory judgment stating either that the bonds were void or that the improvements were complete. Members of the Winter Valley Homeowners' Association intervened, seeking injunctive relief, declaratory relief and damages against Essex, alleging negligence, breach of contract and zoning enforcement. Essex filed third-party petitions against Berra and Boling, seeking indemnity and adding claims for breach of contract. In the meantime, the county contended the testing Essex had performed was unsatisfactory, and in 2005, court-ordered core testing revealed an additional 218 slabs of concrete that were more than 0.3 inches too thin according to the subdivision regulations.

At the trial – which was before a judge rather than a jury – a licensed geotechnical engineer testified that there were no failures in the design of the Winter Valley subdivision streets, that the volume of traffic was no more than the streets had been designed to withstand, and that the quality of concrete was sufficient to prevent premature failing. By elimination, he determined that poor subgrade condition and support was responsible for the streets' failures. Other evidence at trial showed that concrete trucks were allowed to drive on the subgrade during the pouring and that the subgrade was not recompacted or retested after the trucks disturbed it.

The trial court found that Essex failed to meet the subdivision regulations' standards and the guarantee's requirements, which mandated that Essex complete the subdivision improvements. It further found the county and the homeowners' association were entitled to hold the bonds. The trial court ordered that:

- Essex and Federal pay the remainder of the bonds to the county to fund the county's completion of the subdivision improvements; pay out of the bonds nearly \$102,200 in civil penalties for Essex's failure to conform to the subdivision requirements' thickness requirements; and pay nearly \$35,900 for the homeowners' association's costs for work performed to repair the prematurely failing streets;
  - Essex pay nearly \$219,300 in attorneys' fees;
  - Boling pay nearly \$74,000 to indemnify Essex for its share of the civil penalties; pay Essex more than \$6,000 for the cost of testing the cores; and pay more than \$17,000 in attorneys' fees; and
  - Berra pay nearly \$28,300 to indemnify Essex for its share of the civil penalties; pay Essex nearly \$6,500 for the cost of testing the cores; and pay nearly \$7,100 in attorneys' fees.
- Essex and Federal appeal, and Boling and Berra cross-appeal.

**AFFIRMED IN PART; REVERSED IN PART; REMANDED.**

**Court en banc holds:** (1) Substantial evidence supports the trial court's finding that Essex breached the guarantee by failing to complete the subdivision streets pursuant to the county's subdivision regulations. The subject matter in dispute here is highly technical and was addressed almost exclusively through expert testimony, and on review, the appellate court must exercise proper deference to the trial court's judgment and not attempt to second-guess the trial court's evaluation and weighing of evidence. Here, expert testimony was presented about tests conducted on the streets, observations made during the streets' construction, the decision not to retest the subgrade after the concrete trucks had driven on it and the deficiencies in the thickness of many tested slabs. Essex, and not its subcontractors, was obligated to complete improvements under the guarantee's terms. The testimony and other evidence showed that Essex did not meet the guarantee's requirements of completing the required improvements, seeking an inspection from the county, and obtaining an approval and release from the county before the deadline in the guarantee.

(2) The trial court properly released the remaining funds in the bonds to the county. The guarantee provides that if Essex either abandoned the subdivision or failed to complete the improvements by July 2001, then Federal "shall disburse" the bonds "as ordered and directed by the [county]." This Court need not reach a conclusion as to whether Essex's actions constitute abandonment because, as discussed above, Essex failed to complete the improvements within one year of the guarantee – the other triggering condition for releasing the bonds to the county. The county will not "hold" the bond; rather, Federal will pay the remainder of the bond so the county may complete the improvements. The trial court reviewed the estimated construction costs the county submitted and deemed them to be accurate and reasonable, and the county gave Essex a detailed list of "deficiencies" that needed to be remedied to meet the terms of the guarantee. Essex failed to remedy those deficiencies, and so the job now falls to the county.

(3) The trial court properly assigned, of the civil penalties assessed against Essex, nearly \$74,000 to Boling and nearly \$28,300 to Berra. The effect of the thin cores on the failures of the streets has no bearing on the assignment of civil penalties. The subdivision regulations mandate a certain thickness, and several slabs failed to meet that thickness, necessitating their replacement under the subdivision regulations. As such, a measure of damages is not required to assign the

penalty. In addition, the penalty scheme described in Appendix E to the subdivision regulations is a constitutionally permissible measure of damages. The appendix, which requires that streets more than 0.3 inches thinner than what is required by the subdivision regulations, was adopted in 2002, after the streets here had been poured. At the time the streets were poured, the county used an “informal system” requiring the removal of pavement that so deviated from the required thickness. The appendix, therefore, is a new remedy, not a change in the county’s substantive law. Because there is no constitutional prohibition on the retrospective application of a new remedy, the damages provisions in Appendix E may be applied in assessing penalties against Boling. Further, Essex met its burden of proving the existence and amount of damages in its third-party claims against Boling and Berra for liability for the thin streets. Essex presented evidence as to what portion of the streets these companies poured, and the trial court’s judgment reflected the replacement costs accordingly. Boling and Berra, however, failed to provide any evidence that they had not poured the damaged streets.

(4) The trial court properly assigned testing fees to Boling and Berra. Language in Essex’s contracts with the companies provides that Essex shall pay for any testing it seeks, assuming that Essex is requesting the testing. The testing for which Boling and Berra were assigned the cost, however, did not arise from their contracts with Essex. Rather, it was ordered by the trial court after Boling and Berra failed to meet their contractual obligation to pour streets to a certain thickness, exposing Essex to liability.

(5) The trial court properly awarded nearly \$219,300 in attorneys’ fees, given the deference afforded to its assessment of attorneys’ fees, the length and complexity of the present suit, and the absence of evidence that the fees were unreasonable. To the extent Essex argued that the homeowners’ association is not a “prevailing party” and, therefore, is not entitled to attorneys’ fees, this Court will not consider such arguments. Essex violated Rule 83.08 by raising these arguments in its substitute brief filed in this Court when it failed to do so in the court of appeals.

(6) The trial court properly awarded repair costs to the homeowners’ association. This Court defers to the trial court’s determination that only \$35,875 of the total costs the homeowners’ association presented to the court constituted improvement costs caused by Essex’s failures to meet the guarantee’s requirements. Further, the trial court correctly found that the development trustees and the intervenors both represent the same class of people – the homeowners in the subdivision. The money for the cost of repairs to the streets came from the same place – a fund to which lot owners contributed. This fund was in the control of the trustees until their resignation in 2003, when it was turned over to the homeowners’ association. The distinction between the development trustees and the homeowners’ association is semantic only and does not affect the award of repair costs.

(7) The trial court erred in awarding Essex less than full indemnity against Boling. In its judgment, the trial court did not specify why Essex is not entitled to indemnity on the full amount of the judgment, and some of its findings undermine Boling’s defense against immunity. In fact, the trial court specifically found that “there is no evidence of any negligence or failure to properly perform construction of the streets.” and that it “disagree[d]” with Boling’s contention that access roads were not available. The trial court’s finding that “the testimony of all witnesses, except Randy Boling, was that there were access roads to all lots for constructing the subdivision

streets” is inconsistent with the trial court’s refusal to assign greater liability to Boling for the full judgment. If Boling was responsible for some of the thin cement and uneven subgrade, which the trial court found caused the streets to fail, then the trial court should have sustained Essex’s indemnity claim. On remand, the court can evaluate Essex’s claim for indemnity against Boling.

(8) As the findings and conclusions now stand, the trial court erred in assessing liability for the attorneys’ fees to Boling and Berra. The provision in Essex’s contracts with Boling and Berra providing that Essex is responsible for all attorneys’ fees incurred to enforce the contract applies only to litigation costs and fees incurred as a result of a suit between Essex and Boling and Berra. This provision does not apply here, however, where the attorneys’ fees resulted from an action brought on behalf of the homeowners’ association against Essex. Even though Essex itself was not found negligent, there is no statutory provision that authorizes attorneys’ fees to be passed through to Boling and Berra as the underlying negligent parties. Essex may have a claim that it should be reimbursed for the attorneys’ fees assessed against it in the litigation with Boling and Berra, but such an assessment would require preliminary findings that Boling and Berra breached an agreement and that their breach resulted in Essex’s liability. The trial court has not yet made such findings. On remand, the trial court should determine whether attorneys’ fees appropriately may be given to Essex, pending a finding of liability on the part of Boling and Berra.