

IN THE SUPREME COURT OF MISSOURI

ESSEX CONTRACTING, INC., and)
)
FEDERAL INSURANCE COMPANY,)
)
Appellants,)
)
v.)
)
JEFFERSON COUNTY, MISSOURI)
)
Respondent)
)
PATRICK J. ACHESON, et al.,)
)
Intervenors/Respondents)
)
J.H. BERRA PAVING CO., INC.)
)
Respondent/Cross-Appellant)
)
BOLING CONCRETE CONSTR., INC.)
)
Respondent/Cross-Appellant)

No.: SC89407

APPEAL FROM THE CIRCUIT COURT OF JEFFERSON COUNTY

THE HONORABLE TIMOTHY J. PATTERSON, DIVISION NO. 1

APPELLANTS' SUBSTITUTE REPLY BRIEF TO SUBSTITUTE BRIEFS OF
RESPONDENTS JEFFERSON COUNTY, MISSOURI AND INTERVENORS

APPELLANTS' SUBSTITUTE RESPONSE TO CROSS APPEALS OF
RESPONDENTS J.H. BERRA PAVING CO., INC. AND BOLING CONCRETE
CONSTRUCTION, INC.

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INTRODUCTION TO REPLY

Intervenors made no response to Points Relied On II and IV. Therefore, no Reply relating to Appellant's Substitute Points II and IV is included herein. Respondent Jefferson County raised two points in response to Appellant's Substitute Brief. Appellant's Reply to County's Response is included under Reply Points I and IV which incorporate related issues raised by Intervenors.

I. REPLY TO INTERVENORS' RESPONSE TO APPELLANTS' POINT RELIED ON I AND THE COUNTY'S RESPONSE/ARGUMENT – POINT I.

Intervenors' and Jefferson County's arguments seek to recast the proof and issues in this case to place additional burdens on Appellants that are not found in the statutes, ordinances, Guarantee Agreement or Bonds. These Respondents seek to require Appellants to be responsible for "excessive premature failures," and to require Appellants to meet the subjective "satisfaction" of the County in accepting the streets.

There is no requirement that Essex construct the streets to prevent "excessive premature failure."

There is no requirement that Essex construct the streets to the subjective satisfaction of the County, only to the objective satisfaction of the County.

There is no requirement that Essex maintain or repair the streets after construction.

Most importantly, even if Essex did not complete construction of the streets, the Bonds can only be used to complete what is shown not to have been completed.

The Bonds can not be used to maintain, repair or rebuild streets that were properly constructed in the first place. Any failure to complete the streets to the required thickness does not make Appellant Essex a guarantor of the longevity of the streets otherwise completed.

CAUSATION

Realizing that they have not presented any evidence to support the Trial Court's judgment, the Intervenor's now argue that they are not required to prove any "...cause for the failures and defects prior to recovery on the Bonds and Guarantee...." Intervenor's Sub. Brief p.26. They argue that causation is not a requirement for liability under Section 64.895 and Section 89.491, RSMO. They further argue that there is no requirement of causation in the Bonds or the Guarantee. Intervenor's seek to set their own requirement by stating that "...they only must demonstrate that such failures are neither in compliance with the County's standards nor as guaranteed to the County and therefore render the subdivision incomplete." This is not the test to be applied.

Section 64.895.2. permits a lawsuit where subdivision of land is made in violation of the adopted County requirements. As provided in that Section, in the event a violation is proven, the Court may enter orders to correct the violation. Therefore, under this Section, the Intervenor's and the County must prove that there has been a violation of the County development requirements, and the Court Order must be to correct that violation.

Section 89.491.3. permits the Court to enter an order, again, to correct a proven violation or to impose a civil penalty provided for the violation.

The Bonds and Guarantee Agreement provide simply for the completion of the subdivision improvements in accordance with the County requirements. There is no "guarantee" of performance standards or length of life.

Intervenor's content that neither the Contracts (the Bonds and Guarantee) nor the subdivision regulations nor the statutes have a causation requirement. They concede,

however, that the suit on the Bonds and Guarantee are contract actions. One of the necessary elements of proof in a contract action is that the damages resulted from the claimed breach. Green v. Penn – American Ins. Co., 242 S.W.3d 374, 381 (Mo. App. W.D. 2007); Gilomen v. Southwest Mo. Truck Center, Inc. 737 S.W.2d 499, 501 (Mo. App. S.D. 1987); U.S. Suzuki Motor Corp. v. Johnson, 673 S.W.2d 105, 106 (Mo. App. E.D. 1984).

To make a submissible case, each and every element essential to liability must be predicated upon legal and substantial evidence.

(Citations omitted) The mere breach of a contract which causes no loss to the Plaintiff will not sustain a suit by him for damages.

(Citations omitted). Gilomen, p. 501.

To recover on the Bonds or Guarantee, the Intervenors and the County must prove that the damages they seek, money to work on the streets, are a result of some violation by the Appellants. They have not done so.

Under the statues, the Intervenors and the County must prove first a violation of the County requirements; second, that the violation means that construction was not complete; and, third, that damage resulted from the violations. The order then must be to correct the violation proven. Neither the County nor the Intervenors have provided such proof to support the Trial Court judgment. Instead, on Pages 27 and 28 of their Brief, Intervenors give a litany of facts they contend support the Trial Court decision. These “facts” do not, however, provide “ample evidence of specific failures for which

Appellants are responsible” as claimed. Instead, they are merely facts for which there is no proof of a relationship to a violation causing damage for which the Court can provide a remedy.

Intervenors argument is apparently that if they can show a technical violation of a County requirement, then Essex is required to replace the streets even though there is no showing that the violation resulted in or caused the cracking of the streets. This is absurd! There must be some showing that the violations alleged resulted in damage and requires the remedy sought.

The litany of facts provided by Intervenors are not connected by the evidence in any way to the remedies sought. Whether the Intervenors like it or not, they must prove that the alleged violations caused a failure of the street to be completed for which the Court can provide a remedy. Their litany of facts does not do that in any way. Nowhere do Intervenors cite any evidence that any of the listed facts in any way caused or resulted in a failure for which the Court can provide a remedy.

What Intervenors want is for this Court to order that there has been some technical violation of the County’s requirements, and forfeit the Bonds, to allow the County and the Intervenors to perform all of the work that they desire on the streets, all without any showing that the claimed violations resulted in the conditions for which the bond proceeds are now being used to fund the work. This result is in no way justified by any language in the statutes, the Guarantee, the Bonds or the ordinances. Intervenors must show a link between the alleged violations and failure to complete and the conditions for which they seek a remedy.

This requirement is not overcome by Intervenor's public policy arguments. The requirements under which the public policy is implemented are set forth in the Bonds, Guarantee, statutes and ordinances. These requirements protect not only the public but also the developer. These requirements implementing public policy can not be ignored simply to give Intervenors and the County what they want - Appellant's Bond funds.

To be blunt, Intervenors want this Court to ignore the facts and law, and the failure of Intervenors and the County to prove a causal link, and make Appellants pay to replace cracked sections of the streets which have been used for thirteen (13) years. This is not public policy.

Appellants agree with the Intervenors that the Bonds were simply "...Appellants promise that the improvements will actually be completed, installed and constructed per the County's standards...." Intervenor's Sub. Brief p. 31. Intervenors try to qualify this statement by stating that this promise continues "up until the day of inspection for release of the Guarantee." *Id.* There is no such requirement anywhere in the Bonds, the Statutes, the Subdivision Ordinances or the Guarantee. By adding this statement, the Intervenors seek to impose additional obligations on the Appellants not only to complete the improvements, but somehow to maintain the improvements until the Bonds are released by the County. There is no such requirement.

THICKNESS

Respondents rely on the deficiency in thickness to conclude that the streets were not timely or properly completed. Appellants agreed at trial that there were deficiencies

in thickness. The Trial Court has applied Appendix E to adjust for the thickness as permitted by the Jefferson County Subdivision Regulations, and as a permitted remedy under §89.491.3.

Intervenors complain that Appellants have not replaced any of the street slabs or paid the penalty ordered by the Trial Court. This Appeal prevents the Trial Court order from being final. Intervenors sought the transfer to this Court which delayed the finality of the Trial Court order. Appellants can not comply with an order that is not yet final.

The fact that there are deficiencies in thickness does not, however, make Appellants a guarantor of the conditions of the streets after their construction. It does not make Appellant liable for repair of cracked streets which were otherwise properly constructed in the first place. Intervenor's witness, Daniel Barczykowski, testified that the fact that some of the streets are not constructed to the proper thickness did not lead to the cracking of the streets. Tr. p. 261. Mr. Barczykowski does not believe the thin concrete caused the cracking, or that thin concrete should be removed. Tr. p. 336.

The fact that there may be deficiencies in thickness of some portions of the streets does not in anyway lead to the conclusion that there was some other deficiency in construction of the streets. The fact that there are deficiencies in thickness does not make Appellant responsible for Respondents claims of "excessive premature failures."

The deficiencies in thickness lead only to a remedy for correction of the deficiency in thickness. That has been accomplished by the Trial Court's judgment which these Appellants have not appealed. The deficiencies in thickness cannot impose upon

Appellants new obligations not found in the statutes, ordinances, Guarantee Agreement, and Bonds.

CLAIMED “EXCESSIVE PREMATURE FAILURES”

On Page No. 26 of their Response, Intervenors clearly explain the additional obligation they seek to impose upon Appellants by stating: “A mere showing that the streets are not in compliance with the Subdivision Regulations Approved Plans or Bonds and/or Guarantee Agreement is the requisite substantial evidence that the subdivision is incomplete.” By this statement, Respondents make their contention clear that “a mere showing” of failures means that the Subdivision streets were not constructed in accordance with the plan and specifications. Respondents wish to have this Court accept that premise because they have been completely unable to present any evidence that any cracking, “failures,” are a result of any deficiency of Appellants’ construction according to the plans and specifications. Respondent would have this Court accept that the mere showing of “failures” means that the Subdivision streets were not constructed according to the plans and specifications.

There is no requirement in any of the plans, specifications, ordinances, Guarantee Agreement or Bonds that Essex construct the streets to prevent “failures” of some portions of the streets. Essex’s obligation is to construct the street according to the plans and specifications, no more! If failures result, for whatever reason, after the streets are constructed according to the plans and specifications, that does not support an inference that the streets were not constructed according to the plans and specifications.

Respondents extend this argument by stating that they are not required to prove the cause of the failures. Here again Respondents misconstrue the requirement of this case. If Respondents wish to make Appellants responsible for cracking streets, they do not necessarily have to prove the cause of the “failure,” but they must prove that the failures result from Appellants’ failure to construct the streets in accordance with the plans and specifications. This they have not done!

Nowhere in any of the evidence presented in this case will you find a requirement that Appellants construct the streets to prevent “excessive premature failure.” Again in their arguments, Respondents seek to rely on a pseudo *res ipsa* argument that the mere fact of concrete failure implies a failure to construct the streets properly. The Intervenors and County argue that since the streets are not in a condition that is normal for a subdivision of this age, it must be as a result of construction defects. This does not logically follow as there is significant evidence in the record of other possible causes, such as construction traffic after construction of the streets; years of use by the residents; and whether the County’s design requirements are sufficient in a subdivision with streets of this length, on hills, to prevent cracking of the streets.

Respondents rely on the “uncontroverted core testing” by Mr. Barczykowski as evidence of a failure to construct the streets. But Mr. Barczykowski **admits** in his testimony that his tests were taken years after construction of the streets, and there are a number of reasons that his tests could show changes in the compaction results from the time of the original construction. Tr. p. 330.

Intervenors by giving their lengthy “Overview of Subdivision Improvement Guarantee Process” seek to place on Appellants some additional burden by asserting that Essex had other options to complete the Subdivision. Intervenors state that “the entire burden of completion (is) on the developer.” Intervenors are correct that it is the “burden of completion” that is on the developer, not the burden to maintain, repair or take care of cracking streets after completion, particularly where there is no showing that the cracking is a result of some deficiency in construction.

The Trial Court tried to place an extra duty on Essex to maintain the streets until the Bonds are released based on the “practices of the County.” J. p. 24. But the County by its unilateral “practices” can not enlarge Essex’s duties under the Bonds, Guarantee Agreement, statutes and ordinances. Essex’s duty was to complete construction of the streets, not have them “functioning at the time of the requested release.” J. p. 24. But the Trial Court based its decision on the fact that the County found that the streets were “not properly functioning” when inspected, so the Bonds could not be released. This is an improper requirement for release of the Bonds. In any event, the Trial Court is incorrect in determining that the streets are not “properly functioning.” The streets have been used for thirteen (13) years.

Intervenors argue that they do not need to show why the streets are too thin or why the streets have cracked, “only that such failures are neither in compliance nor as guaranteed to the County and therefore render the Subdivision incomplete.” But there is no evidence in the record to support a conclusion that the cracking is a result of a failure to comply with the construction requirements as guaranteed to the County. There is no

showing of any damage resulting from a failure by Appellants to construct the streets in accordance with the plans and specifications. In fact, contrary to Intervenor's statement that they must show "only that deficiencies exist," they have not in fact shown that any deficiencies exist resulting in cracking.

Intervenor's argue that there are a "multitude of reasons for the failures." They list their purported reasons. But there is absolutely no evidence that any of the things listed, with the possible exception of driving on the sub-grade by Boling, resulted in any failure by Appellants to construct the streets in accordance with the plans and specifications. And, if there were failures caused by Boling driving concrete trucks on the sub-grade, then Boling should be responsible for those damages. But even there, Respondents have failed to show that Boling driving on the sub-grade caused any later cracking of the streets.

Intervenor's argue that the "extent of deterioration was abnormal and excessive." While Plaintiffs disagree, as Brian Oliver testified, Tr. p. 582, that the cracking is in fact abnormal or excessive, even if it is abnormal or excessive, that is no proof of a failure to properly complete.

Intervenor's seek to limit the Trial Court's statement that "there is no evidence of negligence or failure of Essex to properly perform construction of the streets." While in other parts of its Response, Intervenor's repeatedly treat Essex and its subcontractors as one in responsibility, Intervenor's now seek to distinguish the Trial Court's statement by saying that the Court was merely referring to the fact that Essex did not actually construct the streets. Intervenor's cannot have it both ways. The fact is the Trial Court was

absolutely correct in stating there was no evidence of any negligence or failure on the part of Essex to properly complete the streets, because, in fact, there is no such evidence in the record.

Lastly, Respondents seek to hold Essex liable because the construction is not to the “satisfaction” of the County. As stated in Appellants’ Substitute Brief, the County’s satisfaction is an objective standard of completion to the requirements of the plans and specifications, not a subjective standard of satisfaction to the whim of the County or the Intervenors.

PROOF OF COMPLETION

Respondents argue that Essex did not meet its burden of proof that the Subdivision streets were completed. Respondents, again, primarily rely on the fact there are some sections of street that were not constructed to the proper thickness. While as previously discussed, this entitles the County to the remedy for the thickness deficiencies which has been provided by the Trial Court, it does not, again as previously stated, support in any way a conclusion that the remainder of the construction requirements of the streets were not fully completed. Appellants submitted more than enough evidence to make a prima facie case that the other requirements of construction were met.

Appellants met their burden of proof when they presented enough evidence to establish a prima facie case. Hautly Cheese Co. v. Wine Brokers, Inc., 706 S.W.2d 920, 922 (Mo. App. W.D. 1986). “... [P]rima facie evidence means such evidence which, in law, is sufficient to satisfy the burden of proof to support a verdict in favor of the party

by whom it is introduced when not rebutted by other evidence. State ex rel. State Dept. of Public Health & Welfare v. Ruble, 461 S.W.2d 909, 913 (Mo. App. 1970). When Appellants met their burden of proof, the burden of going forward with the evidence to rebut Appellants' prima facie case shifted to Respondents. Id. Additionally, Respondents carry the burden of proof on their claims and affirmative defenses. Moses v. Carnahan, 186 S.W.3d 889, 905 (Mo. App. W.D. 2006).

It would require more words than are permitted to review individually all of the evidence presented supporting completion of the streets, other than thickness. Much of the evidence is cited in Appellants' Facts. But in summary, the following evidence was submitted.

Brian Oliver testified as to the manner of construction of the streets. Pl. Tr. Ex. 28. The Plans and Specifications were put in evidence. Pl. Tr. Ex. 28. Mr. Oliver testified that all of the sub-grade met compaction requirements. Tr. pp. 9 & 11. Mr. Oliver testified that the streets were properly constructed and completed. Tr. p. 15.

Both Todd Glant of Berra Paving and Randy Boling of Boling Concrete testified as to the methods of construction. Again, while Mr. Boling testified that his company drove concrete trucks on the sub-grade, there was no evidence that it caused any cracking of the streets. But if it did, Respondent Boling should be responsible for repair of those areas.

Mr. Daniel Barnes of Brucker Engineering testified as to the compaction tests. While some of the compaction tests were missing because of a flood in Brucker Engineering's business, that does not provide any evidence that the compaction was

improper. Mr. Barnes testified that to the best of his knowledge all of the compaction was properly completed. Tr. p. 127-28.

Respondent's expert Daniel Barczykowski testified he did not see all of the compaction tests he would expect to see. That is no evidence that the compaction was improper. Mr. Barczykowski provided no information that the fill did not meet the compaction requirements of Jefferson County at the time the concrete was poured, Tr. p. 286. He stated that he had no information that the sub-grade was not properly compacted. Tr. p. 286. While Mr. Barczykowski testified that he thought the cracking was the result of poor sub-grade support, he admitted that he assumed that was the cause because he had no other explanation. This "assumption" makes no sense because there is cracking in areas where the streets are constructed on rock. Tr. pp. 302-04. How can that be poor sub-grade support? Mr. Barczykowski admitted that these could be passing compaction results at the time of the fill and sub-grade compaction and still not have adequate support. Tr. p. 303. In other words, Mr. Barczykowski's testimony does not really challenge Mr. Barnes' testimony.

The Trial Court found that Appellants did not meet their burden of proof because of Mr. Barczykowski's and Mr. Kohrer's testimony, and because Appellants presented no expert rebuttal of their testimony. J. p. 25. The fact that Appellants did not present expert testimony to rebut the County's and Intervenors' case is not a failure by Appellants to meet their burden of proof. Appellants were under no requirement to present rebuttal testimony to Respondent's testimony because Respondent's testimony

failed to present any evidence that the cracking was caused by any deficiency in the construction of the streets.

Mr. Fred Dishner, the County Inspector, stated that he had no reason to believe that the sub-grade was not properly constructed. Tr. p. 222. In fact, Mr. Dishner recommended to his superiors that the bonds for construction of the streets be released be the streets were properly completed. Tr. p. 234-6.

While the Trial Court is entitled to believe or disbelieve evidence of any witness, where there is no evidence to show that any cracking was the result of a failure by Essex to properly construct the streets, the Trial Court cannot simply ignore all of the evidence presented by the Plaintiff showing that the streets, with the exception of this thickness issues, were properly constructed according to the plans and specifications. This is why this Court must reverse the Trial Court's decision. Appellants made a prima facie case that the streets were properly constructed, except for thickness, and there is no substantial evidence to show that Essex failed to complete the construction of the subdivision improvements. Certainly the Trial Court's decision is against the weight of the evidence.

The Respondent's Counter-claims against Appellants claim that the streets were not constructed according to the plans and specifications. Other than the thickness issue which has been adjusted, there is simply no substantial evidence presented by Respondents to demonstrate that any cracking of the streets is a result of the failure of Essex to construct the streets according to the plans and specifications. Respondents have failed to meet their burden of proof on their claims and affirmative defenses.

WAIVER

Appellants have no responsibility under the County ordinances, the Bonds or the Guarantee Agreement to repair or maintain the streets after their construction. Appellants only obligation is to construct the streets in the first place according to the plans and specifications. The Trial Court and Respondents seek to impose an additional obligation on Appellants to maintain the streets and repair streets that show cracking after construction based on the doctrine of waiver.

First, Respondents did not plead the doctrine of waiver. Waiver must be pled by the party relying on the doctrine. Wareham v. American Family Life Ins. Co., 922 S.W.2d 97, 99 (Mo. App. W.D. 1996).

Second, as the Trial Court and Intervenors cite, “Waiver is the intentional relinquishment of a known right ...” Link v. Kroenke, 909 S.W.2d 740, 746 (Mo. App. W.D. 1995). The “known right” the Trial Court says Essex waived is the “argument that it is under no obligation to repair the prematurely failing streets.” J. p. 20. This purported waiver is not a waiver of a “known right,” but purportedly of an “argument.” There is no waiver of anything.

Third, the purported “waiver” can not create an obligation to repair or maintain the streets where one does not already expect. A new obligation, contract, can not be created by waiver where an obligation does not already exist. Wareham, 922 S.W.2d at 99. Essex was under no obligation to maintain or repair the streets, and waiver can not create such an obligation.

Fourth, the doctrine of waiver being contractual in nature, there must be consideration, or a showing of detrimental reliance to support it. Doss v. Epic Healthcare Mgmt. Co., 901 S.W.2d 216, 221 (Mo. App. S.D. 1995). Here there is no showing of any consideration or detrimental reliance on the part of Respondents to support the purported waiver of the argument.

Essex has not waived its right to argue that it has no obligation to repair or maintain the streets. And the doctrine of waiver can not create an obligation to do so.

COURT OF APPEALS DECISION AND APPLICATION FOR TRANSFER

Intervenors complain that Appellants refer to Intervenors Application for Transfer and the Court of Appeals decision. Appellants do so to address in its Substitute Brief issues raised by Intervenors in their Application for Transfer and to comment on the Court of Appeals decision. Such comment is completely proper.

The Missouri Practice Series, Appellant Practice, recognizes that the Substitute Brief "...gives an opportunity to comment on the Court of Appeals Opinion...." 24 Missouri Practice 469 (2001) The Practice Series supports this proposition in Head Note 11 by stating:

Technically, on Transfer, the Court of Appeals Opinion is without presidential effect. See Carroll vs. Loy-Lang Box Co., 829 S.W.2d 86, 90 (Mo App E.D. 1992). Even so, as former Chief Justice Blackmar noted in his presentation at the 1985 annual meeting of the Missouri

Bar... “the Court of Appeals Opinion is very much before us, and there should usually be some comment on it....”

It is proper to discuss the Court of Appeals analysis. While the Opinion itself may have no precedential effect, reference to the Court of Appeals analysis is instructive and beneficial in arriving at an ultimate decision.

Similarly, the Application for Transfer and the issues raised therein are before this Court. It is proper for Appellants to address issues raised in the Application for Transfer. Appellants may anticipate the arguments which will be made in Intervenors Substitute Brief by reference to the Application for Transfer. Appellants have not violated Missouri Supreme Court Rule 83.04 because that Rule references making a response to the Application for Transfer for consideration by this Court before transfer is granted or denied. That Rule makes no comment on addressing issues raised in the Application for Transfer in Appellants’ Substitute Brief.

STANDARD OF REVIEW

Lastly, Intervenors begin their argument on Point I with a laundry list of citations of general rules applying to Appeals. Intervenors do not, however, demonstrate in their Argument how any of these general rules support affirmation of the Trial Court judgment. Apparently these citations are given to set a “tone” that would deflect this Court’s consideration from the real issue: that, except for thickness (which has been remedied by the Trial Court judgment), there is no evidence that Essex failed to properly construct the streets. Intervenors do not tie any of these principles of law to specific

evidence supporting their position. For that reason, these rules have no real bearing on the outcome of this Appeal.

Appellant's Point Relied on I should be granted and the judgment reversed.

**II. REPLY TO INTERVENORS' RESPONSE TO APPELLANTS' POINT
RELIED ON III**

Appellants Substitute Brief does not violate Rule 83.08 and Rule 84.04, because Appellants do not, in Point Relied on III, alter the basis of their claim in their Substitute Brief.

Point Relied on III submits that award of attorney's fees is excessive and should be reduced. The Point Relied on does not state the amount of the reduction. Therefore, the basis of the claim has remained the same. It is only the amount of the reduction that is in issue.

All along Appellants have argued that the award of attorney's fees was not reasonable, was arbitrary, and that a reduction was not only proper, but required. The only question is what is the proper amount of attorney's fees, if any. Appellant's Reply to Point Relied on IV in the Court of Appeals and this Court make it clear that Appellants are challenging the award of any attorney fees. There Appellants stated: "As presented in this Appeal, Appellants do not believe that the County or Intervenors are entitled...to an award of \$219,277.00 in attorney fees." Appellants go on to say that the attorney fees should not be awarded and the judgment should be reversed.

That Appellants Point III on Appeal was sufficient to include a reduction in the award of attorney's fees to zero (0) was recognized by the Court of Appeals. If the Court of Appeals did not believe that the Point Relied on included a challenge to any award of attorney's fees, it could not have ruled as it did. Of course, Intervenors will complain

that Appellants cannot refer to the Court of Appeals decision, but as cited above in the Missouri Practice Series, Chief Judge Blackmar believed it was appropriate to make comment upon the Court of Appeals opinion.

Intervenors cite Lane vs. Lensmeyer, 158 S.W.3d 218 (Mo. Banc 2005) as analogous to this case. It is not.

In Lane, the issue involved the calculation of a tax rate. In the Court of Appeals the Taxpayers used a 94% tax collection rate in calculating the proper tax rate, and before this Court, it sought to use a 100% collection rate. The change by the Taxpayers in Lane related to the actual calculations of the appropriate tax rate. This changed the basis of the Taxpayers claim because they sought to change the actual formula for calculation.

Here, such is not the case. The basis of the claim, that the award is excessive and should be reduced, remains the same. The only question is under the facts and law of the case, what is the proper amount of reduction. Appellants here do not change the basis of their claim, that the award is excessive and should be reduced, but simply argue the amount of the appropriate reduction under the facts and the law.

In point of fact, the Trial Court ruled that the Intervenors were not prevailing parties under the statute. And, in fact, Intervenors could not be prevailing parties because the bonds were payable to the County and not the Intervenors. The Intervenors not being prevailing parties, attorney's fees could not be awarded to them under the Statute. There is no other provision in the statutes, the Bonds, the Guarantee, or otherwise, for an award of attorneys' fees.

The award of attorney's fees to Intervenors should be reversed.

III. REPLY TO INTERVENORS' RESPONSE TO APPELLANTS' POINT RELIED ON V.

The Intervenor's two arguments in response to Appellants' Point V are creative, if nothing else.

Intervenor's first argument is that since the Developer Trustees refer to themselves as the Winter Valley Homeowners' Association, the Trustees are parties to the suit. Of course, the Winter Valley Homeowners' Association is an unincorporated association and is not an entity. While the three named Respondents are representatives of this unincorporated association, the Association itself is not a party to this lawsuit. The parties are the class members which are the record owners of lots in the Subdivision. Intervenor's are correct that the Trustees, not the unincorporated Association, serve as the governing body for the Subdivision. The mere fact that the Trustees may at some time have been referred to as the Winter Valley Homeowners' Association does not make those individuals, as trustees, parties to this suit. One can easily understand that if this suit was one against the Trustees to recover money, the Trustees would certainly not agree that simply suing the Winter Valley Homeowners' Association somehow granted jurisdiction over the Trustees for purposes of a judgment. The converse is also true.

Second, the Intervenor's argue that the Association (governed by the Trustees) can accept money on behalf of the class. Again, the Association is nothing. It is an unincorporated Association. It is not a party to this litigation. It cannot have a judgment entered in its favor, and it can not accept money on behalf of the class or the Trustees.

The Intervenor miss the most basic point. The expenses Intervenor seek to recover were not paid by the Intervenor, the class, but by the Trustees. They could have simply joined the Trustees as parties to seek recovery of these expenses. They did not. Neither the unincorporated Association nor the class members paid these expenses, and they have no cause of action to recover these expenses. They have not been damaged because they did not pay these expenses.

This judgment should be reversed because there is no substantial evidence to support it, and it erroneously applies the law.

**IV. REPLY TO INTERVENORS' RESPONSE TO
APPELLANTS' POINT RELIED ON VI AND
RESPONDENT JEFFERSON COUNTY'S POINT II.**

As presented in this appeal, Appellants do not believe that the County or Intervenor are entitled to an award for repair or replacement of cracked sections of concrete streets, or that Intervenor are entitled to an award of \$35,875.00 for reimbursement of costs or for an award of \$219,277.00 in attorney's fees. While Appellants continue to maintain that these amounts should not be awarded and that the judgment for these amounts should be reversed, Appellants hereby withdraw their argument in Point Relied on VI that if these amounts are affirmed, or reduced amounts awarded, that they cannot be paid from the Bonds. Appellants stipulate that whatever amounts, if any, are awarded to Intervenor's or the County, these amounts may be paid from the Bonds.

How can the parties, or, as argued by Respondents, the County alone, use the Bond funds to complete construction of the streets when there is no evidence, and there has been no finding of, what is left "to be completed?" The County argues it can use the money to complete the roads in a manner satisfactory to the County. But as previously stated, satisfaction is not subjective, it is only objective. The money can only be used objectively to complete any work which is uncompleted.

The County argues that the money can be used to repair and/or replace slabs as found to be failing by Mr. Barczykowski under his definition of failure. But failure of a

slab, more appropriately cracking, which is not shown to be a failure to properly construct the streets according to the plans and specifications, cannot be repaired or replaced by money from the Bonds. The Bonds are not there to simply maintain the Subdivision streets. They are only there to complete construction that is incomplete, not replace slabs that may be cracking for whatever reason.

As a practical matter, Essex should not have to bear the cost of repair or replacement of portions of the street which have been used by the property owners for over thirteen (13) years without at least a showing that the cracking was caused by some failure to construct the streets originally as required. Even then, because of the thirteen (13) years of use, Appellants should be entitled to a credit for such use and depreciation. Respondents are, if anything only entitled to the remainder of the useful life, not a completely new useful life.

Further, Mr. Barczykowski testified that some of his 315 slabs do not need to be completely replaced; some can have half slabs replaced, and others quarter slabs replaced. The County's objective satisfaction does not require replacement of entire slabs, as testified by Mr. Kohrer, but only to do work to complete construction which is incomplete.

Without evidence that the cracking is a result of a failure to properly construct the streets, the County is not entitled to use the Bond proceeds to repair or replace sections of the street. Further, the County is not entitled to use money to repair or replace cracking streets "to their satisfaction," but rather they are only entitled to use Bond funds to repair or replace sections of street which have failed or cracked because of a failure to properly

construct them in the first place. There being no showing of any such failure on the part of Essex, except for thickness which has already been adjusted. The County is not entitled to receive and use the proceeds of the Bonds to replace cracking streets.

Without a judgment specifying what streets have cracked because of a failure to complete, and specifying what work is to be done to complete these areas, the County will be allowed to apply its “subjective” desires to use of the Bond funds rather than apply an “objective” criteria to application of the funds.

The judgment of the Trial Court should be reversed because it erroneously applies the law and is against the weight of the evidence.

CONCLUSION

Appellants respectfully submit that the judgment of the Trial Court should be reversed in accordance with the Points Relied On set forth in Appellants’ Substitute Brief.

PART B

TABLE OF AUTHORITIES

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STATEMENT OF FACTS

Appellants incorporate in this Response the Statement of Facts in Appellants' Substitute Brief. Appellants may reference additional facts in the response to individual Points Relied On.

INTRODUCTION TO RESPONSE

Because of the interrelationships of the issues in this Appeal, many of the facts, and much of the Argument, responsive to the Cross Appeals of Respondents were previously set forth in Appellants' Substitute Brief. To avoid redundancy, Appellants will not restate facts and arguments from Appellants' Substitute Brief which are applicable to these Responses. Appellants incorporate in these Responses their Appellants' Substitute Brief.

**I. RESPONSE TO RESPONDENT BERRA'S POINT RELIED ON I AND
RESPONDENT BOLING'S POINT RELIED ON II.**

The Trial Court did not err in awarding damages against Berra and Boling for thin pavement even though a small amount of the pavement was replaced by another contractor.

Respondents raise a false issue by arguing that the replacement of some sections of the street by S&D Construction Company ("S&D") should prohibit Essex from recovery of its penalties for thin pavement against Respondents. The issue is false for two reasons.

First, there is absolutely no evidence that any of the sections replaced by S&D are in any of the areas found by the coring ordered by the Trial Court to be thin. Second, there is no evidence that any of the slabs actually poured by S&D are thin.

As the Respondents cite in the case of Williams v. Williams, 99 S.W.3d 552, 557 (Mo. App. W.D. 2003), Essex had the burden of proving the existence and the amount of damages with reasonable certainty. That burden of proof is met when the Plaintiff introduces sufficient evidence to make a prima facie case. Hautly Cheese Co. v. Wine Brokers, Inc., 706 S.W.2d 920, 922 (Mo. App. W.D. 1986). A prima facie case is made when the Plaintiff produces sufficient evidence to support a verdict in its favor unless it is rebutted by other evidence. State ex rel. State Dept. of Public Health & Welfare v. Ruble, 461 S.W.2d 909, 913 (Mo. App. 1970). Once the Plaintiff makes a prima facie case, the burden of going forward with the evidence shifts to the party opposing the issue.

Hautly, 706 S.W.2d at 922; State ex rel. State Dept. of Public Health, 461 S.W.2d at 913.

Further, if the matter is one of affirmative defense, the party claiming the affirmative defense has the burden of proof on that issue. Moses v. Carnahan, 186 S.W.3d 889, 905 (Mo. App. W.D. 2006).

Plaintiff has proved its damage with reasonable certainty. The amount of the damage awarded by the Court is based on Appendix E. It is based upon the coring and the various levels of deficiency resulting in various levels of monetary adjustment. If Respondents believe and contend that some of the slabs replaced by S&D were in fact slabs for which they are now being penalized, it is their burden to come forward with the evidence to claim a credit or offset. They offered no evidence to do so, but instead speculate that some of the slabs replaced by S&D might have been thin slabs.

In fact, rather than assuming that slabs replaced by S&D were thin, it is more logical to assume they are not. S&D was replacing slabs because they had been discovered by SCI Engineering's coring to be thin. It is reasonable to assume that S&D, in replacing those slabs, would make sure they were constructed to the right thickness so that S&D would not be charged with any deficiency.

That Essex has proved its damages to a reasonable certainty is also shown by the minor amount of replacement undertaken by S&D.

S&D replaced 566 square yards, not square feet as cited by Respondent Boling, of concrete. Tr. p. 64. This is 5,094 square feet. Mr. Kohrer testified that slabs are 13 feet by 15 feet, on a 26 foot wide street, for 195 square feet each. Tr. p. 404. On a 30 foot wide street, the slabs are 10 feet by 15 feet, for 150 square feet each. Id. Dividing 195

square feet into a total of 5,094 square feet would give a total of 26 slabs. Dividing 150 square feet into 5,094 square feet would give 34 slabs. Therefore, at most, S&D replaced between 26 and 34 slabs of concrete street. Comparing this to the 315 slabs which Mr. Barczykowski testified he believed needed to be replaced, Tr. p. 344, or the 537 slabs which Mr. Kohrer testified he believed needed to be replaced, Tr. p. 410, shows that the amount replaced by S&D is very minor. And, this would assume that all of the 26 to 34 slabs replaced by S&D were thin. Of course, there has been no such showing.

Respondents have not shown that any of the slabs replaced by S&D were thin or in an area later found to be thin. Essex has proved its damage under Appendix E for thin pavement to a reasonable certainty. Respondent's Appeals and Points Relied On Berra II and Boling III should be denied.

**II. RESPONSE TO RESPONDENT BERRA'S POINT RELIED ON II AND
RESPONDENT BOLING'S POINT RELIED ON III.**

The Trial Court did not err in awarding attorney's fees against Respondents Berra and Boling.

In their Points Relied On and in their Argument, the Respondents give three reasons they contend that the Court erred in awarding attorney's fees against them because they failed to construct the streets to the proper thickness. None of these reasons is the basis upon which attorney's fees were properly awarded against them. Essex does not rely on Section 89.41 to provide for a pass through of attorney's fees; it does not rely upon the Contract between it and the Respondents as a basis for the attorney's fees; and, assumption of risk is a tort concept, this is a contract action, and assumption of risk simply does not apply.

This last point of assumption of the risk is a curious point to be raised by Respondents. Essex hired Respondents to build the streets according to the plans and specifications, including the proper thickness. It is Respondents who failed to build the streets to the proper thickness. It is Respondents who owe a duty to Essex to construct the streets to the proper thickness. This was recognized by the Trial Court in awarding Essex judgment against the Respondents for the penalties for Respondent's failure to build the streets to the proper thickness.

While the Trial Court's judgment is not clear on which cause of action alleged by Jefferson County and Intervenors it bases its award of penalties for thin concrete, it must

follow that the award is based upon the counter-claims of either Jefferson County or the Intervenor. Essex was required to defend against these counter-claims which constitute collateral litigation. Essex would not have been involved in these counter-claims, or penalties resulting from the failure of Respondents to construct the streets to the proper thickness, but for Respondents' failure to construct the streets to the proper thickness.

It should be noted that the thickness of the streets was always an issue long before Essex filed the initial suit. The County required Essex to hire SCI Engineering to do additional coring. Tr. pp. 70-71. Once that coring was done, Boling and Berra replaced some sections of street which were found to be too thin. Tr. p. 72. While Essex believed that those replacements resolved the thickness issue, the County never approved release of the Bonds. As it turned out, from the additional coring that was completed, there were other areas where Respondents Boling and Berra failed to construct the streets to the proper thickness. Construction of the streets to the proper thickness was totally under their control.

As the Intervenor and County brought the counter-claims against Essex for the thin concrete, Essex was involved in collateral litigation.

“Collateral litigation occurs when a person breaches a contract [or a duty] causing one of the other contracting parties to sue or be sued by an outside third party.” Memco, Inc. v. Chronister, 27 S.W.3d 871, 877 (Mo. App. S.D. 2000) *citing* Ohlendorf v. Feinstein, 697 S.W.2d 553, 556 (Mo. App. 1985). “The collateral litigation must be with a party different than the party from whom the damages are sought.” Singer v. Siedband, 138 S.W.3d 750, 754 (Mo. App. E.D. 2004).

Here the attorney's fees incurred by Essex and awarded by the Court were with an independent Third Party, the County or Intervenors. Essex did not seek, and the Court did not award, attorney's fees based on Essex defending the claims of Respondents Boling and Berra. The fees are therefore properly awarded as fees incurred in collateral litigation.

This case is similar in nature to St. Louis County v. Taylor-Morley, Inc., 923 S.W.2d 507 (Mo. App. E.D. 1996). In that case, St. Louis County sued Taylor-Morley and Green claiming that Taylor-Morley had failed to construct a residence in accordance with either the original or amended plans approved by the County. Green filed a cross-claim against Taylor-Morley. The Court awarded judgment in favor of the County against Taylor-Morley and Green, and awarded Green judgment against Taylor-Morley on its cross-claim for attorney's fees. On appeal, the Court found that Green was involved in collateral litigation with the County because of Taylor-Morley's failure to build the residence in accordance with the applicable building codes. The Court found that Green incurred attorney's fees as a direct and proximate result of Taylor-Morley's breach of its contract with Green, requiring Green to defend the action brought by the County against it.

Similarly in this case, Essex had to defend against the counter-claims of the County and Intervenors as a direct and proximate result of Respondents Boling and Berra's failure to construct the streets to the proper thickness according to the plans and specifications. Essex is entitled to its award for attorney's fees because of Respondents Boling and Berra's failure in that respect.

Not only is Essex entitled to its attorney's fees as actually awarded by the Court, but as stated in Point Relied on IV in Appellant's Substitute Brief, Appellant are entitled to an award of all attorney's fees of Intervenors against Respondents Boling and Berra. Appellants incorporate their Point Relied on IV in their Substitute Brief in this Response.

Appellants request the Court not only to affirm the Trial Court's judgment in its award of attorney's fees against Respondents Boling and Berra and in favor of Essex, but to also award to Appellants judgment against Respondents Boling and Berra for all attorney's fees found to be due to Intervenors in this cause as requested in Point Relied IV in Appellant's Substitute Brief.

**III. RESPONSE TO RESPONDENT BERRA’S POINT RELIED ON III AND
RESPONDENT BOLING’S POINT RELIED ON IV.**

Essex is entitled to an award for reimbursement of testing fees as ordered by the Court.

Respondents Boling and Berra barely make a pass at this argument.

The testing costs awarded by the Trial Court were not incurred pursuant to the Contract between the parties. The testing fees were ordered by the Court, without objection by any party. See Court Order of December 10, 2004 – Appellants’ Sub. Supp. Appendix Ex. A. This coring was ordered by the Court, without objection, in order to comply with the requirement of Jefferson County Appendix E, which the Trial Court found applied in this case. Respondent Boling, however, tried to stop the coring. Appellants’ Sub. Supp. Appendix Ex. B. It was necessary for this coring to be completed for all parties and the Court to determine what, if any, issue remained regarding the thickness of the concrete streets. By order of July 22, 2005, Appellants’ Sub. Supp. Appendix Ex. C, the Court initially apportioned the costs between the parties. Appellants asked the Court to order Boling and Berra to reimburse Appellants for the coring costs. Appellant’s Sub. Supp. Appendix Ex. D. In its judgment, the Court ordered Respondents Boling and Berra to reimburse Essex for its portion of the cost of coring.

This is as it should be. It was Boling and Berra who did not construct the streets to the correct thickness. Their failure to construct the streets to the correct thickness constitutes a breach of contract. The cost of performing the coring would not have been

incurred by Essex but for Respondents' breach of the contract. Damages caused by a breach of contract which could have been reasonably contemplated by the parties at the time of the Agreement are recoverable in a breach of contract action. Gill Const., Inc. v. 18th & Vine Authority, 157 S.W.3d 699, 715 (Mo. App. W.D. 2004); Crank v. Firestone Tire and Rubber Co., 692 S.W.2d 397, 402 (Mo. App. W.D. 1985).

While Respondents claim the contract provision shifts this liability to Essex, Essex is not responsible for these costs because the Respondents first breached the contract and the Respondents cannot now claim the benefits of the contract to relieve themselves of the damages which they have caused. Forms Mfg., Inc. v. Edwards, 705 S.W.2d 67, 69 (Mo. App. E.D. 1985) *citing* S.G. Adams Printing v. Central Hardware Co., 572 S.W.2d 625, 629 (Mo. App. 1978).

Respondents Boling and Berra having failed to construct the streets to the proper thickness, and having caused the Court to enter its order to require the coring, without any objection by Berra and Boling, should be responsible to bear the costs of that coring and reimburse Essex for its portion of the costs.

IV. RESPONSE TO RESPONDENT BOLING’S POINT RELIED ON I.

The Court did not err in awarding judgment in favor of Essex and against Boling Concrete Construction, Inc. for \$73,913.28 for adjustment of thin pavement.

Boling raises two issues in this Point Relied On. First, whether Appendix E to the Jefferson County Subdivision Regulations should be applied in this case. Second, whether Intervenors have suffered any damage by reason of thin pavement entitling Essex to judgment on its third party claim against Boling for thin pavement.

The Trial Court applied Appendix E as a remedy for Boling’s failure to construct the concrete streets to the proper thickness. Boling argues that Appendix E is being applied in this case retroactively. While not specifically saying so, Boling apparently believes that retroactive application is improper.

Article I, Section 13 of the Missouri Constitution prohibits the retrospective application of a law. A law is retrospective in its operation under Article I, Section 13 if it “take[s] away or impair[s] vested rights acquired under existing laws, or create[s] a new obligation, impose[s] a new duty or attach[es] a new disability in respect to transactions or considerations already passed.” Kinder v. Peters, 880 S.W.2d 353, 355 (Mo. App. E.D. 1994); see also Doe v. Roman Catholic Diocese of Jefferson City, 862 S.W.2d 338, 340 (Mo. banc 1993). The Missouri Supreme Court has repeatedly held that “a law ... is not retrospective in the constitutional sense, although it may change the remedy or provide new remedies for enforcing or defining such a right.” McManus v. Park, 229 S.W. 211, 213 (Mo. 1921); Manwarring v. Mo. Lumber & Mining Co., 98

S.W. 762, 766 (Mo. 1906). A law is not retrospective if it affects only procedural or remedial matters and not substantive rights. Kinder, 880 S.W.2d at 355. A law is considered “procedural” if it prescribes a method of enforcing rights or obtaining redress for their invasion. Jones by Williams v. Mo. Dept. of Social Serv., 96 S.W.2d 324 (Mo. App. E.D. 1998).

Appendix E is a subdivision regulation adopting Jefferson County’s policies and procedures for construction of streets. It changes the method of enforcement from replacement of slabs to monetary adjustment. Such a change does not constitute a retrospective law and violation of the constitutional requirements. Miller v. Mitchell, 25 S.W.3d 658 (Mo. App. W.D. 2000).

The application of Appendix E merely constitutes the provision of a new remedy of enforcement of the Jefferson County Subdivision Regulations requiring construction of the streets to the proper thickness. It is not a change in any substantive law subject to the Missouri constitutional prohibition. As such, the application of Appendix E in this case is proper.

If the application of Appendix E is appropriate as stated above, then the application of Appendix E in awarding an adjustment for thin pavement against Essex by the Trial Court is appropriate. If the award by the Trial Court against Essex is appropriate, then Essex, under its third party claims against Boling and Berra, is entitled to recover those amounts from Boling and Berra. S.P. Personnel Assoc. of San Antonio, Inc. v. Hosp. Bldg. & Equip. Co., Inc., 525 S.W.2d 345, 348 (Mo. App. St. L.D. 1975).

See also State ex rel. Perkins Coie L.L.P. v. Messina, 138 S.W.3d 815, 817 (Mo. App. W.D. 2004).

Boling poured the concrete streets. It was their responsibility to make sure they were poured to the right thickness. Boling is the cause of the thin pavement, and Boling is responsible to reimburse Essex for payment of the adjustments under Appendix E for the thin pavement.

Boling argues that there is no showing of any damage by reason of the thin pavement. Boling argues that there is no need to remove and replace the thin pavement. In essence, Boling argues that there is no need to “repair” the thin pavement.

While Essex does not believe there is any need for such a showing under Appendix E, if there is no need for repair, then the question becomes whether or not there is a diminution in value which supports the Court’s award.

In a construction case, the measure of damages is the lesser of cost of repair or diminution in value. Steffens v. Paramount Prop., Inc., 667 S.W.2d 725, 728 (Mo. App. E.D. 1984). Once the claimant of damages has presented evidence for cost of repair, if the other party believes that “the cost of repair was disproportionate to the diminution in value of the property,” that party has the obligation to present evidence to show unreasonable economic waste and diminution in value. County Asphalt Paving Co., Inc., v. 1861 Group, Ltd., 908 S.W.2d 184, 186 (Mo. App. E.D.1995).

Boling argues that there is no need for repair, and that the cost of repair as set forth in Appendix E, is unnecessary. Boling has not come forward with evidence, however, that the costs applied in Appendix E represent unreasonable economic waste, nor has it

presented any evidence as to the diminution in value to demonstrate that the diminution in value is less than the cost of repair. It has therefore failed to meet its burden to show the diminution in value is less than the cost of repair.

In its Appeal, Essex has not challenged the Court's award of damages under the provision of Appendix E because Essex believes that the evidence is clear that the streets were not constructed by Boling and Berra to the required thickness and as agreed in Essex's contracts with them. Essex believes that the Intervenors and the County should get the benefit of their bargain in this respect, and that the application of Appendix E is appropriate. As provided by the Trial Court, Essex should recover under its third party claims against Boling and Berra their respective shares of their adjustments for thin pavement.

Should the Court, however, determine that the application of Appendix E awarding damages for thin pavement is inappropriate, and the damages should not be awarded under the provisions of Appendix E against Boling, then this Court should also set aside the Trial Court's award against Essex and Berra under the application of Appendix E. Not to do so would result in an inconsistent application of Appendix E between Essex as a general contractor, and Boling and Berra as the subcontractors who actually constructed the streets.

V. RESPONSE TO RESPONDENT BOLING'S POINT RELIED ON V.

The Trial Court did not err in assessing penalties against Boling for thin slabs.

Boling relies on Paragraph 7 of the Contract, Def. Boling Ex. A, between Boling and Essex to relieve it from the imposition of penalties. There are two reasons that this Paragraph does not protect Boling from the Trial Court's order of penalties for thin concrete.

First, that Paragraph only applies after "completion of work." As is undisputed in this case, the streets constructed by Boling were thin, so Boling never "completed" its work. The Court has now applied a penalty under Appendix E to adjust for that deficiency. As it relates to thin slabs, Boling certainly did not complete its work because it did not construct the streets to the proper thickness according to the plans and specifications.

Second, "a party to a contract cannot claim its benefits where he is the first to violate it." Forms Mfg. Co. Inc. v. Edwards, 705 S.W.2d 67, 69 (Mo. App. E.D. 1985), *citing* S.G. Adams Printing v. Central Hardware Co., 572 S.W.2d 625, 629 (Mo. App. 1978). Certainly Boling first breached the Contract by failing to construct the streets to the proper thickness. This breach is material. It is the basis for the Court applying the penalty. It cannot violate the Contract and then claim the benefits of the Contract to release it from such liability.

In fact, Paragraph 7 does not release it from penalties and liability for constructing thin streets. It is not clear what being "responsible" for the pavement means, but

certainly there is no clear and unambiguous language that shows that Boling is to be, by this Paragraph, released from any liability from failing to properly execute the Contract. If Boling wished to have a provision that released it from liability for penalties, or other failures to build the streets according to the plans and specifications, clearly such language must be included.

Paragraph 7 of the Contract does not release Boling from its liability to Essex for failing to construct the streets to the proper thickness. The Judgment of the Trial Court in favor of Essex and against Boling for its Third Party claim for penalties for thin slabs should be affirmed.

VI. RESPONSE TO RESPONDENT BOLING'S POINT RELIED ON VI.

Respondent Boling is responsible for replacement of failing concrete slabs where Boling vehicles drove on the sub-grade prior to construction of the streets.

As stated in Appellants' Point Relied On I in its Substitute Brief, Appellants do not believe there is sufficient evidence presented to show that any cracking of the streets or failure of the streets is caused by a failure on the part of Appellant Essex to construct the streets according to the plans and specifications. However, the Trial Court has so found, and if this Court affirms that decision, Respondent Boling should be held responsible on Appellants' Cross Claim for repair or replacement of those portions of the streets constructed by Boling and for which during that construction Boling drove on the sub-grade.

Respondent Intervenor and Jefferson County expert, Daniel Barczykowski testified that driving on the sub-grade could cause a problem with the sub-grade support. Tr. p. 346. Mr. Barczykowski testified that a lack of sub-grade support was, in his opinion, a cause of the failure of the concrete streets. Tr. p. 270.

Mr. Randy Boling of Boling Concrete constructed the streets on a portion of Winter Park Drive, Winter Park Court and Copper Mountain Court. Tr. p. 431; Jefferson County Ex. E. Mr. Boling admitted that his company drove on the sub-grade in numerous areas when constructing the streets. Tr. pp. 443-54 and 463-69. Driving on the sub-grade caused the ruts to be created in the sub-grade. Tr. pp. 448. These areas would then have to be re-graded and re-compacted. Tr. pp. 448. However, no additional testing was done after they re-graded and re-compacted the sub-grade. Tr. pp. 458-59.

Mr. Boling testified that if there is poor sub-grade support, any spot or weak area in the sub-grade underneath the pavement, the pavement can bridge, and it may give way or break. Tr. p. 460.

There is no question that Respondent Boling's driving on the sub-grade caused damage to the sub-grade. If, in fact, a lack of sub-grade support is the cause of the cracking and failures, then Boling should be responsible for the cost of repairing and replacing the concrete streets in these areas.

Respondent Boling tries to justify its driving on the sub-grade by stating there were no access roads in the Subdivision. Mr. Brian Oliver testified that there were access roads in the Subdivision, with the exception of Copper Mountain Court. Tr. pp. 48-49. Mr. Fred Dishner, the County's inspector, testified that there were access roads to all of the streets in the Subdivision, again with the exception of Copper Mountain. Tr. pp. 215-16. The Court in its judgment found that there were access roads to all areas of the Subdivision for pouring of the streets, again with the exception of Copper Mountain. J. p. 7.

Respondent Boling seeks to absolve itself of any responsibility on Copper Mountain by stating there were no access roads in that area. But, Respondent Boling accepted the responsibility to pour the concrete streets while backing the trucks on the sub-grade.

Mr. Boling admits that he discussed with the County's inspector, Fred Dishner, that he would have to drive on the sub-grade on Copper Mountain in order to pour the streets. Tr. p. 434. Mr. Dishner and Mr. Boling discussed that they would dump each

truck and move forward and re-dress and re-compact the sub-grade behind each truck. In fact, Mr. Dishner watched the operation throughout the day. Id.

No one from Essex was present during this discussion of the pouring. Tr. p. 434. Mr. Boling knew that the sub-grade would have to be repaired after he backed the trucks on it. Tr. p. 434.

Respondent Boling went forward with pouring Copper Mountain Court on its own initiative. It made its own arrangements with the County inspector. It assumed the responsibility to re-dress and re-compact the sub-grade to the necessary requirements. Essex Contracting, Inc. was not involved in the pouring. Respondent Boling assumed the responsibility to make sure that the sub-grade was properly re-compacted before pouring, and Respondent Boling should be responsible for the cost of replacing any streets on Copper Mountain where it poured the original streets.

Respondent Boling seeks to also relieve itself of liability by citing the provisions of Paragraph 16 of its contract with Appellant Essex. Def. Boling Ex. A. That Paragraph is no assistance. Contrary to Respondent Boling's contention in this point that this Paragraph relieves it from "all liability", it does not. The Paragraph specifically references three areas of liability covered by Paragraph 16. Cracking and failure of the concrete are not included in the liabilities covered by Paragraph 16.

As set forth in Appellants Point Relied On VI in its Substitute Brief, one of the problems with the Trial Court order is its failure to specify what sections of concrete must actually be replaced at Winter Valley Subdivision. But, if the Court allows that order to stand, Respondent Boling should be required to reimburse Appellant Essex for

those sections of concrete streets in the areas constructed by Boling where, as shown by the Trial Transcript, Boling admits it drove on the sub-grade prior to pouring. Absent a more definitive order by the Court, this would have to be determined at the time of replacement in those areas. Appellants are unable to specify exactly which areas are the responsibility of Boling, and for which they should be reimbursed, since the Trial Court's Judgment does not specify what areas are to be replaced or repaired. Nonetheless, Appellant Essex should be reimbursed for the cost of such repairs if the Trial Court's Judgment requiring repairs and replacement is affirmed.

As stated in Appellants' Point Relied On II in its Substitute Brief, Boling, as a Third Party Defendant, is "...liable to the Third Party Plaintiff if such Third Party Plaintiff is found to be liable to the original Plaintiff." S.P. Personnel Assoc. of San Antonio, Inc. v. Hosp. Bldg. & Equip. Co., Inc., 525 S.W.2d 345, 348 (Mo. App. St. L.D. 1975); *see also* State ex rel. Perkins Coie L.L.P. v. Messina, 138 S.W.3d 815, 817 (Mo. App. W.D. 2004).

CONCLUSION

Appellants request the Court to deny Respondents Boling and Berra's points on their Cross Appeals and enter Judgment in favor Appellants as requested in Appellants' Substitute Brief filed herein.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the ____ day of October, 2008 one printed copy and one copy of a disk as required by Rule 84.06(g) of the foregoing was served on:

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CERTIFICATE REQUIRED BY RULE 84.06(c)

The undersigned hereby certifies that the foregoing Reply includes the information required by Rule 55.03 and complies with the length limitations in Rule 84.06(b), in that there are 10,911 words in this Reply and Response (excluding the cover, table of contents, table of authorities, signature block, certificate of service certificate required by Rule 84.06(c), and appendix) according to the word count of the word processing system used to prepare this Reply and Response. The undersigned further certifies that the disks containing the Reply and Response have been scanned for viruses and are virus-free.

APPENDIX

Exhibit A - Order of December 10, 2004	56
Exhibit B - Motion to Compel, July 14, 2005	57
Exhibit C - Order of July 22, 2005	67
Exhibit D - Plaintiff Essex Contracting, Inc.'s Motion for Allocation of Testing Costs, November 7, 2005	68