

**IN THE SUPREME COURT OF MISSOURI**

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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

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APPEAL FROM THE CIRCUIT COURT OF JEFFERSON COUNTY

THE HONORABLE TIMOTHY J. PATTERSON, DIVISION NO. 1

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APPELLANTS' SUBSTITUTE BRIEF

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### **JURISDICTIONAL STATEMENT**

The Court of Appeals, Eastern District, had original jurisdiction to hear this Appeal pursuant to the general appellate jurisdiction conferred by Article V, Section 3 of the Missouri Constitution, in that Appellant/Defendant is appealing from a Judgment entered against it by the Circuit Court of Jefferson County, Missouri, and there are no issues within the jurisdiction of the Supreme Court raised by this Appeal. The Supreme Court now has jurisdiction pursuant to transfer from the Court of Appeals, Eastern District.

## STATEMENT OF FACTS

Throughout the Brief the following designations will be used for each party in this

Appeal:

Appellant	Essex Contracting, Inc.	“Essex”
/Plaintiff		
Appellant	Federal Insurance Co.	“Federal”
/Plaintiff		
Appellants	Essex & Federal, jointly	“Appellants”
Respondent	Jefferson County, MO (the County of Jefferson)	the “County”
Respondent	The Unincorporated Property Owners Assoc. Class	“Intervenors”
Respondent	J.H. Berra Paving, Co., Inc.	“Berra”
/Third Party Defendant		
Respondent	Boling Concrete Construction, Inc.	“Boling”
/Third Party Defendant		

The “Trial Court” will be referred to as the “Court.”

Winter Valley Subdivision is a residential subdivision development of over 500 lots, Tr. p. 77, located in Jefferson County, Missouri. Tr. p. 19. There are 519 homes built in the Subdivision. Tr. p. 498. There are over five miles of streets in the Subdivision. Tr. p. 31.

The Subdivision was developed by Winter Valley, L.C. Tr. p. 14. Essex and C.F. Vatterott Construction Company each own fifty percent (50%) of the development company. Essex acted as the general contractor. Tr. p. 15. C.F. Vatterott Construction

Company built homes in the Subdivision, along with other builders, but Essex did not build homes. Id.

The plans for development of the Subdivision, Pl. Tr. Ex. 28, were submitted to Jefferson County for approval, and approved in 1995. Tr. p. 19. These plans constitute the guidelines for developing the Subdivision. Grading, elevations, storm and sanitary sewers, and street profiles are included in the plans. Tr. p. 20.

Before construction can begin, Essex had to comply with the Jefferson County Subdivision Regulations in effect at the time. Pl. Tr. Ex. 4. These Subdivision Regulations require that a Bond, Letter of Credit or cash be posted, or that the improvements be constructed before final plat approval. Tr. p. 21. Essex posted three separate surety bonds, Pl. Tr. Exs. 1, 2 & 3, to cover three different phases of construction in Winter Valley Subdivision. Tr. pp. 21-2. The Subdivision Regulations provided that the surety bonds should be in the form of: “A completion bond guaranteeing performance of the subdivider/developer and construction and completion of the improvements in the amount and within the time frame approved by the planning department.” Pl. Tr. Ex. 4, p. 31, Subsection 1.

Each of the Subdivision Bonds provides by its operative terms that it is for the following purpose:

Now therefore, the condition of this obligation is such that if said principal shall complete the installation and construction of such improvements and utilities as the same are prescribed and required by the Jefferson County Planning and Zoning Commission pursuant to the Subdivision Regulation

adopted by Jefferson County and upon obtaining a letter to that effect from the Jefferson County Planning Director, then this obligation shall be void, otherwise to remain in full force and effect. Pl. Tr. Exs. 1, 2, & 3.

All three of the land subdivision bonds were provided by Federal. The Bonds have been partially released by the County, and the remaining balance is \$1,015, 838.00. Tr. p. 22.

The Bonds were submitted pursuant not only to the Subdivision Regulations but also to a “Guarantee Under Subdivision Regulations” (“Guarantee”) with the County. Def. J.C. Ex. C. The Guarantee provides that the Bonds were issued: “To be used to guarantee the construction, installation and completion of the required subdivision improvements...” in Winter Valley Subdivision “...all in accordance with the approved plans therefore and in accordance with the Subdivision Regulations of Jefferson County.” Guarantee p. 1. The Guarantee further provides that if the developer shall “...abandon the subdivision or fail to complete the improvements, the County may complete or have completed, the said improvements and the surety shall disperse on the land subdivision bonds therefore as ordered and directed by the County.” Guarantee, p. 4. This Guarantee was signed by Essex but not by Federal.

Construction began in 1995. Tr. pp. 22 and 58. Initial grading of the Subdivision was partially done by Cole Grading Company and partially by Essex. Tr. pp. 23-4. It was necessary during the grading to make some areas lower, “cuts,” and make some areas higher, “fills.” Tr. p. 24. Fills are areas where additional soil is added at the toe of a slope to make it meet the elevations required on the plans. Tr. p. 26. When that is done, it is necessary to have a soils engineer check the compaction to make sure it meets the

requirements of the Subdivision Regulations. Tr. p. 25. Compaction tests are not required where cuts are made to remove soil. Tr. p. 26.

At Winter Valley Subdivision, Brucker Earth Engineering and Testing, Inc., now known as GeoTest, Inc., performed the compaction testing. Tr. p. 25. Brucker Engineering had technicians in the field doing compaction testing as the fills were being made. Tr. p. 27. If any compaction problems were encountered, the Brucker Engineering employees would contact Essex employees, and areas needing additional compaction would be re-rolled or re-compacted. Tr. pp. 28-9. These areas would then be re-tested to make sure they met the necessary compaction. Tr. p. 29.

The County inspects the grading and compaction as it occurs. Tr. p. 30. Mr. Fred Dishner was the inspector for the County at Winter Valley Subdivision. Tr. p. 31.

Mr. Daniel Barnes is the vice president of GeoTest, formally Brucker Engineering. He has been a registered engineer in Missouri since 1987. Tr. p. 111. GeoTest's engineers are geo-technical consultants. They deal with engineering of soils, ground engineering and construction materials. Mr. Barnes has worked in this field since 1981. Tr. p. 112.

Brucker Engineering was hired to do the sub-surface investigation before grading, to monitor the grading, and to provide the compaction testing for both the fill and subgrade compactions. Tr. p. 113. They tested the fills at Winter Valley to make sure the fills would support the proposed construction. Tr. p. 114. Mr. Barnes is familiar with the soil density requirements of the Jefferson County Subdivision Regulations, Tr. p. 119,

and the technicians under his supervision that performed the actual testing were trained in what requirements had to be met. Tr. p. 116.

Soil compaction densities are measured as either a ninety five percent (95%) standard proctor or a ninety percent (90%) modified proctor. Tr. pp. 119-20. The 90% modified proctor is slightly denser and better compacted than the 95% standard proctor. Tr. p. 120. Jefferson County Subdivision Regulations require the 95% standard proctor. Tr. p. 341.

When fill is being placed, it is tested with each additional one foot of fill. Tr. p. 128. During much of the compaction, the County inspector was there. Tr. p. 129.

Brucker Engineering kept records of their compaction tests of the fill. Tr. p. 116. Some of the compaction records on this job were lost in a flood at their offices. Tr. p. 124. The fill compaction records that are available were marked as Pl. Tr. Ex. 31.

All of the fill that was compacted at Winter Valley Subdivision was compacted to either the 90% modified proctor or 95% standard proctor requirement. The fill that did not meet those requirements was re-compacted and re-tested until it did. Tr. p. 120. Mr. Brian Oliver, an employee of Essex, testified that to the best of his knowledge all areas of fill were properly compacted. Tr. p. 31.

There are three entrances to the Subdivision. Pl. Ex. Tr. 79. All the traffic in the Subdivision, both during construction and after construction was completed, must use one of these three entrances. The entrances are at the top of a high point, Tr. p. 17, and there are steep grades leading from the entrances on the roads to the lower areas of the

Subdivision. Tr. p. 260. The entrance off of Corisande by Lots 120 and 121 was built first. Tr. p. 33.

After the grading and compaction of the soil was completed, Essex contracted with Boling and Berra for construction of the streets. Boling Contracts, Pl. Ex. Tr. 9, and Berra Contracts, Pl. Ex. Tr. 6, 7, & 8. The Jefferson County Subdivision Regulations provide that the streets 26 feet in width are to be poured six inches in thickness, and the streets 30 feet in width are to be poured seven inches in thickness. Pl. Ex. Tr. 4, p. 59, Tr. pp. 42-3. Boling and Berra were responsible for the actual paving. Essex had nothing to do with the actual paving. Tr. p. 40.

Before Boling and Berra built the streets, Essex had the streets staked on both sides. Tr. p. 38. The paving contractors would then use a paving machine as trimmer, and trim the subgrade. This flattens the area. Tr. p. 38.

Prior to paving, Brucker Engineering tested the compaction of the subgrade where the streets are to be poured. Tr. p. 40. The compaction tests on the subgrade are completed the day before or the morning of the pour. Tr. p. 125. The compaction testing is completed after the trimming but before the pour. Tr. p. 41. In the areas where the compaction did not meet requirements, the area would be re-rolled, re-compacted and re-tested. Tr. p. 42, 121-22. The streets are poured on the ground, and no gravel or granular fill is used except possibly in some soft spots where compaction cannot otherwise be obtained. Tr. pp. 44, 123. Records of the subgrade compaction were kept by Brucker Engineering. Pl. Ex. Tr. 31. Essex has the subgrade compaction reports. Tr. p. 41; Pl. Ex. Tr. 31.

Mr. Barnes testified that they would not allow the concrete streets to be poured if the subgrade was not properly compacted. To the best of Mr. Barnes' knowledge, all of the subgrade compaction tests met the 90% modified proctor requirement. To the best of his knowledge, all areas of the subgrade met the compaction requirements of the Jefferson County Subdivision Regulations. Tr. pp. 127-28. Mr. Oliver does not know of any areas where the subgrade compaction did not meet the County requirements. Tr. pp. 45-46.

Mr. Daniel Barczykowski, a geotechnical engineer, Tr. p. 250, called by the County, Tr. p. 248, testified that he had no information that any of the compacted fill did not meet the compaction requirements of Jefferson County at the time the concrete was poured. Tr. p. 286. He also stated that he had no information that the subgrade for all of the streets in Winter Valley Subdivision was not compacted to the requirements of Jefferson County at the time the streets were constructed. Tr. p. 286.

Mr. Randy Boling, the owner of Boling Concrete Construction, Inc., Tr. p. 430, started construction at Winter Valley Subdivision in 1995. It took approximately four or five weeks for Boling to do its work. Tr. p. 431. Its work encompassed pouring Winter Park Drive to the last house, and part of Copper Mountain Court. Tr. p. 431.

During construction, Boling poured some of the streets in areas that Mr. Boling did not believe he should have poured at the time. Tr. p. 432-33. One such area was on Copper Mountain Court. Mr. Boling testified that he did not have access up the side of Copper Mountain Court for the concrete trucks, so the trucks had to back up the subgrade. Tr. p. 433. Mr. Dishner, was present at this time. Mr. Dishner told him it was

acceptable to back the trucks up the subgrade if he re-compacted the area before the street was constructed. Tr. pp. 433-34. Mr. Boling testified that the subgrade in this area was re-dressed, compacted, before the street was poured. Tr. p. 436. However, there was no re-testing of the compaction of the subgrade before the street was poured on Copper Mountain Court. Tr. pp. 438-39.

Mr. Boling also identified an area where he did not think he should pour on Winter Park Drive between Lots 120 and 121 and Lots 124 and 117, somewhere in that area. Tr. pp. 439-40. Mr. Boling admitted in his prior testimony that he may have included from Lots 111 or 112 up to Lots 120 in the area where he poured. Tr. pp. 446-48. He had to have the concrete trucks drive on the subgrade. Tr. p. 440. He said they had to enter the subgrade at approximately Lot 116 and back up for approximately four blocks. Tr. p. 441. He says there was an access road in that area, but the access road was wet and could not be used by the trucks. Tr. p. 441. After backing the trucks over that area, he would re-dress, re-compact the area but no additional compaction testing was taken before the street was poured. Tr. p. 442.

He also identified an area around Lots 153 and 156. He testified he had to have the trucks on the subgrade in that location because there was a high bank of rock that prevented his trucks from having access to pour the street. Tr. pp. 442-43. He also identified an area on Winter Park Drive coming down the hill from Corsandi Hill Road to the entrance of Winter Park Court. He testified in that area that there was rock encountered on the uphill side of the road which prevented them from getting their trucks

in to pour the street. They had to drive on the subgrade to get the trucks in. Tr. p. 444.

Again, the area was re-dressed and then was poured. Tr. p. 445.

He identified an additional area, the mark of C-11 on Def. J.C. Ex. E. They had to cross an intersection to get the trucks in and had to drive on the subgrade. Tr. p. 445.

Mr. Boling testified that he called Mr. Oliver of Essex and talked with him about pumping concrete so they would not have to drive the trucks on the subgrade. Tr. pp. 450-52. Mr. Boling stated that “perhaps” he may have had conversations with Mr. Oliver regarding the thickness issue as it related to driving over the subgrade. Tr. p. 453. Under cross-examination, however, Mr. Boling stated that he was not sure if he had talked with Mr. Oliver. Tr. p. 469. He said he had no specific recollection of talking with Mr. Oliver, even though Mr. Oliver would have been the only one he would have talked to at the Essex office. Tr. p. 470. Mr. Boling has no recollection of any specific instructions from Essex regarding driving on the subgrade or not driving on the subgrade. Tr. pp. 471-72.

Mr. Boling testified that when Boling re-dressed an area, but it is not tested, it may not be possible to return it to the condition that it was originally in when it was trimmed. Tr. pp. 458-59. He stated that the pavement may not be perfectly uniform after it was re-dressed, and it may not meet the thickness requirement. Tr. p. 459. He stated that if there is poor subgrade support, any soft spot or weak area in the subgrade underneath the pavement, the pavement can bridge and it may give way or break. Tr. p. 460.

After the streets are constructed, they must not be driven on for 28 days to allow them to cure. Tr. p. 411. After that cure period, unlimited traffic can be driven on the

streets. Tr. p. 411-12. There are no restrictions in the Jefferson County Subdivision Regulations that restrict traffic on the streets after the 28 day cure period. Tr. p. 412.

After the 28 days of cure, builders started building homes and using the streets. Tr. p. 412. All types of construction traffic used the streets in building the houses, including concrete trucks, dry wall trucks, roofing trucks, and carpet trucks. Tr. pp. 77-8. Trucks delivering appliances would be used. Moving vans would move people into the houses by using the roads. Tr. p. 78. All of the traffic would come over one of the three entrances. Tr. p. 79-80.

When the streets are constructed, control joints with groves or saw cuts are made. This is to allow the concrete to crack at the central joint. Tr. p. 56. It is not unusual, in fact it is to be expected in subdivision streets, that cracks will develop in the streets other than at the control joints. Tr. pp. 56-7.

After the streets were constructed, and as the streets were used for construction of the homes, some cracking of the streets occurred. Tr. p. 58. Both Boling and Berra, at Essex's request, made certain repairs and replacements to the streets. Tr. pp. 59. Pl. Exs. Tr. 10, 11, 12 & 13. Essex also hired S & D Concrete Construction Company to come in and replace some sections of the streets. Tr. pp. 59 & 64. Pl. Ex. Tr. 14. The repairs by Boling, Berra and S & D were completed in 1998 through 2000. Tr. p. 157. These repairs were done because Essex recognized that certain sections needed to be replace, and at the County's request. Tr. p. 61. The repairs included any areas damaged during construction. Tr. p. 83.

During these repairs, it became known that there were some deficiencies in street thickness. Tr. p. 60. Some of Boling's replacements involved thickness, and Boling paid the costs of those replacements. Tr. pp. 60-1; Pl. Ex. Tr. 10.

The County questioned whether or not the streets were constructed to the proper thickness. Tr. p. 67. The County and Essex met and discussed what approach would be taken. Tr. p. 69. Essex believed the only remaining issue for release of the Bonds was to address the thickness issue. Tr. pp. 69-70; Pl. Tr. Ex. 20. Essex cooperated with the County and agreed to do some additional coring of the streets to evaluate the thickness issues. Tr. p. 70. The County adopted St. Louis County's regulations regarding evaluation of street thickness, and Essex and the County agreed to apply those requirements. Tr. pp. 67-8, Pl. Ex. Tr. 21.

The coring was completed in 2000 by SCI Engineering Inc. Tr. p. 71. Reports of that coring were produced by SCI. Pl Exs. Tr. 15, 16 & 17. Boling and Berra agreed to replace thin sections as shown by this coring report, Tr. p. 72. The sections were, in fact, replaced by them, at Boling's and Berra's cost. Tr. p. 72.

Upon replacement by Boling and Berra of the sections of street found to be thin by the SCI report, Mr. Oliver believed that all of the work that needed to be done to get the Bonds released on the streets had been completed. Tr. pp. 72-3. Instead, he received an additional punch list, Pl. Ex. 25, from Ms. Kristi Bales, manager of the Planning Division for Jefferson County. That letter is dated January 25, 2001. Tr. p. 73. Many of the items on the list had already been completed, Tr. p. 73, and some items on the list were not even required. Tr. p. 74. For instances, sidewalks are not required in Winter Valley

Subdivision. Essex put sidewalks in some areas even though they were not required. Essex expected the builders to put in the remaining sidewalks. Tr. p. 74.

By letter dated March 5, 2001, Pl. Ex. Tr. 26, Mr. Oliver notified Ms. Bales that the deficiencies noted in her letter of January 25, 2001, except for the common ground areas needing grading, had been completed and an additional inspection was requested for release of the Bonds. Tr. p. 25. By letter dated March 30, 2001, Pl. Ex. Tr. 27, Ms. Bales set forth an additional punch list of items. Tr. pp. 75-6. In Mr. Oliver's letter of March 5, 2001, Pl. Tr. Ex. 26, he asked to be notified of the date of the next inspection at Winter Valley Subdivision so he could be present. Even though he made that request, he was not notified when the inspection was occurring, and he was not present. Tr. p. 76.

Following this inspection, and the refusal of the County to meet with Essex to review the list of items for which additional work was requested, Essex determined that it was not going to be able to obtain release of the remaining Bonds even though the Subdivision improvements were complete. Tr. pp. 76-7. Mr. Oliver testified that at that point in time he did not know who to satisfy at the County or what he needed to do. Tr. p. 201. Essex then filed this lawsuit seeking release of the Bonds. Tr. pp. 76-7. The Intervenors filed their Verified Petition. Legal File 3. Essex filed its Third Party Petition against Boling and Berra. Legal File 8, 19, 20 & 27.

The County and Intervenors presented the testimony of Mr. Daniel Barczykowski and Mr. William Koehrer. Mr. Barczykowski is a licensed engineer, Tr. p. 250, and Mr. Koehrer, is also an engineer, Tr. p. 372, and the County Director of Public Works. Tr. p. 371. Mr. Barczykowski testified that in his opinion there were 315 sections of concrete

that had failed and should be replaced. Mr. Koehrer testified that there were 537 sections of the streets that should be replaced.

Mr. Barczykowski identified four areas of cracking on a plat, Def. J.C. Ex. E. He stated that shrinkage was a cause, but it is a cosmetic problem that does not compromise the integrity of the roadway. Tr. p. 264. Mr. Barczykowski identified steep grades as a problem, but no slabs cracking because of steep grades are on his list for replacement.

Mr. Barczykowski attributes the vast majority of the failures to poor subgrade support. Tr. p. 270. He also identifies improperly compacted fill areas which are settling as reasons for cracking streets. Tr. p. 260.

Mr. Barczykowski was not involved construction of the Subdivision, and does not know how the streets were actually constructed. Tr. p. 276. Mr. Barczykowski is not familiar with the Jefferson County Subdivision Regulations. Tr. pp. 277-78. Mr. Barczykowski made visual observations of the streets at Winter Valley Subdivision. Tr. p. 254. He also made a few tests. Tr. p. 254. Mr. Barczykowski assumed that the cracking was the result of poor subgrade support because he has no other explanation. Tr. pp. 302-04. Mr. Barczykowski stated that you can have passing compaction results at the time of fill and subgrade compaction and not have adequate support. Tr. p. 303.

Mr. Barczykowski testified that he is not disputing the fill was properly compacted and the compaction tests completed. Tr. p. 279. Mr. Barczykowski does not dispute Mr. Barnes' testimony that the compaction tests of the fill were taken at different depths. Tr. p. 356.

According to Mr. Barczykowski, additional settlement of fill can occur after construction, even with proper compaction, from the dead load weight of the soils. Tr. p. 324. This would not be the result of a construction problem. Tr. pp. 324-25. Springs could be present at the Subdivision which could cause additional settlement, but he has no knowledge of any additional springs. Tr. p. 325.

Mr. Barczykowski testified that there are steep grades on the property. Tr. pp. 262-63. Heavy equipment on the streets will have a greater effect on the streets. Tr. p. 299. The most stress on the streets is during the construction phase. Tr. p. 335.

Mr. Barczykowski performed six compaction tests on subgrade and fill as shown in Pl. Ex. Tr. 33-34. Mr. Barczykowski said there are things that could happen between the time the streets were poured and the time he took his compaction tests that could make the compaction in his tests change from the time of construction. Tr. p. 330. The Brucker Engineering reports show that all of the compaction requirements were met at the time the fill was placed and the subgrade was prepared. Tr. p. 329.

Mr. Barczykowski's company did a previous study of the condition of the streets. The study was completed by Mr. James N. Pyatt. Tr. p. 294. Mr. Pyatt concluded in his report that cracking was a result of a joint problem. Tr. p. 298. Mr. Pyatt termed this joint problem the "most significant contributor" to the pavement cracking and failure. Tr. p. 296. Mr. Barczykowski testified that his criteria for determining whether or not a section of concrete was failing is whether it was cracked and there was displacement. Tr. p. 273.

Mr. Koehrer testified that his criteria for replacing a street slab was any slab with more than one crack. Tr. p. 422. He stated he made no attempt to determine the cause of any cracking. Tr. p. 406. Mr. Koehrer stated that it would be “nearly impossible to determine the causes of failure” of the slabs he believes should be replaced. Tr. p. 408.

Mr. Koehrer testified that there is nothing about the cracking that keeps the residents and others from using the streets as intended. This includes school buses and trash trucks. Tr. pp. 413-14.

During the trial, the Court ordered additional coring of the streets at Winter Valley Subdivision to determine the thickness of the streets. Tr. p. 83. That coring was performed by Midwest Testing Company. The result of that coring is shown on Def. J.C. Ex. B.

The Jefferson County Subdivision Regulations in effect at the time the streets were constructed, Pl. Tr. Ex. 4, did not provide for any monetary adjustment for streets not constructed to the proper thickness. The Subdivision Regulations were amended on April 30, 2002. Pl. Ex. Tr. 5. Appendix E to the Amended Subdivision Regulations provides for a monetary adjustment depending upon the amount by which any street is not built according to the proper thickness. Appendix E also provides a testing method, similar to the testing method used by St. Louis County for evaluating the thickness of the streets. See Appendix E.

Mr. Lauren Monge testified as a representative of the class of Intervenors. Tr. pp. 495-6. He was elected a Trustee of the Subdivision in 2003. Tr. p. 496. The Trustees for the Subdivision are established in the “Indenture of Trust and Restrictions for Winter

Valley.” Pl. Ex. Tr. 32; Tr. p. 84. Originally, there were three developer Trustees, and when the homeowner Trustees were elected, the number was increased to five. Tr. pp. 496-7.

The Winter Valley Homeowner’s Association is a unincorporated group of lot owners in the Subdivision. Tr. p. 497-98.

By 1999, an action committee was formed by some of the lot owners to address what they believed were issues at Winter Valley Subdivision. Tr. pp. 500-01. They asked the Trustees at that time to become involved, but the Trustees declined. Tr. pp. 502-03. The action committee group continued to investigate issues in the Subdivision, particularly the streets. Tr. pp. 504-05. They talked to the County Commissioners. Tr. p. 506. The Intervenor then filed this litigation. Tr. p. 506.

The Intervenor sought an award of \$35,875.00 for what they deemed to be repairs. Tr. p. 509. Intervenor’s Exhibit 57 sets out invoices for what the Intervenor claimed to be street repairs. Tr. p. 510. Some of these invoices were paid prior to the homeowners being elected Trustees in 2003. Inv. Ex. 57. Intervenor’s counsel, Mr. Paul Rost, admitted that the Trustees of the Subdivision paid these expenses. Tr. p. 509.

The original judgment in this cause was entered by the Court on March 14, 2006. No attempt will be made to summarize the original judgment entered in this cause on March 14, 2006 because of its length and complexity. The Judgment is No. 29 in the Legal File, and it is included in the Appendix.

A separate hearing was held on Intervenor's request for attorney's fees. Mr. Rost testified at this hearing. Tr. pp. 591-618. A separate judgment regarding attorney's fees was entered by this Court on December 26, 2006.

Additional facts are addressed in the Argument portions of this Brief.

**POINTS RELIED ON**

**I. The Trial Court erred in ordering that Essex and Federal, jointly and severally, should pay the entire remainder of the Bonds in the amount of \$1,015,838.00 to Jefferson County so that Jefferson County may hold the Bonds to complete the subdivision improvements consistent with the County’s and Intervenor’s evidence of deficiencies and in accordance with the Subdivision Regulations and approved plans, because there is no substantial evidence to support it, in that there is no evidence that Essex failed to complete construction of the subdivision improvements in accordance with the plans, specifications and Subdivision Regulations.**

**Cases**

<u>Abbott v. Haga</u> , 77 S.W.3d 728 (Mo. App. S.D. 2002) .....	36, 37
<u>Air Evac, EMS, Inc. v. Palen</u> , 113 S.W.3d 234, 237 (Mo. App. E.D. 2003) .....	31
<u>Biggerstaff v. Mance</u> , 769 S.W.2d 470 (Mo. App. S.D. 1989) .....	31
<u>Bond v. Cal. Comp. and Fire Co.</u> , 963 S.W.2d 692, 698 (Mo. App. W.D. 1998) .....	31
<u>Bryant v. Laiko Intern. Co., Inc.</u> , 2006 W.L. 2788520, slip op. at H.N 10, (E.D. Mo.) ....	31
<u>Hale v. Advance Abrasives Co.</u> , 520 S.W.2d 656, 658 (Mo. App. 1975).....	32
<u>Inv. Title Co. v. Chicago Title Ins. Co.</u> , 983 S.W.2d 533, 538 (Mo. App. E.D. 1998) .....	45
<u>Jerry Bennett Masonry, Inc. v. Crossland Const. Co., Inc.</u> , 171 S.W.3d 81, 96 (Mo. App. S.D. 2005) .....	27
<u>Murphy v. Carron</u> , 536 S.W.2d 30, 32 (Mo. 1976).....	26
<u>Murphy v. Carron</u> , 536 S.W.2d 30, 32 (Mo. en banc 1976) .....	47, 57, 60, 63
<u>Roebuck v. Valentine-Radford, Inc.</u> , 956 S.W.2d 329, 334 (Mo. App. W.D. 1997).....	29
<u>S.P. Personnel Assoc. of San Antonio, Inc. v. Hosp. Bldg. &amp; Equip. Co., Inc.</u> , 525 S.W.2d 345, 348 (Mo. App. St. L.D. 1975) .....	59
<u>Shapiro Bros., Inc. v. Jones – Festus Prop., L.L.C.</u> , 205 S.W.3d 270, 273 (Mo. App. E.D. 2006) .....	passim
<u>Smith v. Seven-Eleven, Inc.</u> , 430 S.W.2d 764, 769 (Mo. App. 1968) .....	31
<u>Wiedmaier v. Robert A. McNeil Corp.</u> , 718 S.W.2d 174, 176-77, (Mo. App. W.D. 1986) .....	32

**II. The Trial Court erred in failing to enter Judgment in favor of Essex and against Boling on Essex’s Third Party claim because it failed to find that Boling**

**was responsible for any failing concrete streets which were constructed by it, in that Boling’s vehicles drove on the subgrade prior to construction of the streets.**

**Cases**

Abbott v. Haga, 77 S.W.3d 728 (Mo. App. S.D. 2002) ..... 36, 37  
Air Evac, EMS, Inc. v. Palen, 113 S.W.3d 234, 237 (Mo. App. E.D. 2003) ..... 31  
Biggerstaff v. Mance, 769 S.W.2d 470 (Mo. App. S.D. 1989) ..... 31  
Bond v. Cal. Comp. and Fire Co., 963 S.W.2d 692, 698 (Mo. App. W.D. 1998) ..... 31  
Bryant v. Laiko Intern. Co., Inc., 2006 W.L. 2788520, slip op. at H.N 10, (E.D. Mo.) .... 31  
Hale v. Advance Abrasives Co., 520 S.W.2d 656, 658 (Mo. App. 1975)..... 32  
Inv. Title Co. v. Chicago Title Ins. Co., 983 S.W.2d 533, 538 (Mo. App. E.D. 1998) ..... 45  
Jerry Bennett Masonry, Inc. v. Crossland Const. Co., Inc., 171 S.W.3d 81, 96 (Mo. App. S.D. 2005) ..... 27  
Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. 1976)..... 26  
Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. en banc 1976) ..... 47, 57, 60, 63  
Roebuck v. Valentine-Radford, Inc., 956 S.W.2d 329, 334 (Mo. App. W.D. 1997)..... 29  
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) ..... 59  
Shapiro Bros., Inc. v. Jones – Festus Prop., L.L.C., 205 S.W.3d 270, 273 (Mo. App. E.D. 2006) ..... passim  
Smith v. Seven-Eleven, Inc., 430 S.W.2d 764, 769 (Mo. App. 1968) ..... 31  
Wiedmaier v. Robert A. McNeil Corp., 718 S.W.2d 174, 176-77, (Mo. App. W.D. 1986) ..... 32

**III. The Trial Court erred in awarding Intervenors \$219,277.00 in**

**attorney’s fees because the award is excessive, in that the award should be reduced because the amount of the underlying judgment should be reduced as provided in**

**Point Relied on I.**

**Cases**

Abbott v. Haga, 77 S.W.3d 728 (Mo. App. S.D. 2002) ..... 37, 38  
Air Evac, EMS, Inc. v. Palen, 113 S.W.3d 234, 237 (Mo. App. E.D. 2003) ..... 32  
Biggerstaff v. Mance, 769 S.W.2d 470 (Mo. App. S.D. 1989) ..... 32  
Bond v. Cal. Comp. and Fire Co., 963 S.W.2d 692, 698 (Mo. App. W.D. 1998) ..... 32  
Bryant v. Laiko Intern. Co., Inc., 2006 W.L. 2788520, slip op. at H.N 10, (E.D. Mo.) .... 32  
Hale v. Advance Abrasives Co., 520 S.W.2d 656, 658 (Mo. App. 1975)..... 33  
Inv. Title Co. v. Chicago Title Ins. Co., 983 S.W.2d 533, 538 (Mo. App. E.D. 1998) ..... 46  
Jerry Bennett Masonry, Inc. v. Crossland Const. Co., Inc., 171 S.W.3d 81, 96 (Mo. App. S.D. 2005) ..... 28

<u>Murphy v. Carron</u> , 536 S.W.2d 30, 32 (Mo. 1976).....	27
<u>Murphy v. Carron</u> , 536 S.W.2d 30, 32 (Mo. en banc 1976) .....	48, 58, 61, 64
<u>Roebuck v. Valentine-Radford, Inc.</u> , 956 S.W.2d 329, 334 (Mo. App. W.D. 1997).....	30
<u>S.P. Personnel Assoc. of San Antonio, Inc. v. Hosp. Bldg. &amp; Equip. Co., Inc.</u> , 525 S.W.2d 345, 348 (Mo. App. St. L.D. 1975) .....	60
<u>Shapiro Bros., Inc. v. Jones – Festus Prop., L.L.C.</u> , 205 S.W.3d 270, 273 (Mo. App. E.D. 2006) .....	passim
<u>Smith v. Seven-Eleven, Inc.</u> , 430 S.W.2d 764, 769 (Mo. App. 1968) .....	32
<u>Wiedmaier v. Robert A. McNeil Corp.</u> , 718 S.W.2d 174, 176-77, (Mo. App. W.D. 1986) .....	33
<u>Volk Constr. Co. v. Wilmescherr Drusch Roofing Co.</u> , 58 S.W.3d 897, 901 (Mo. App. E.D. 2001)	

State ex rel. Div. of Transp. vs. Sure-way Transp., Inc. 948 S.W.2d 651, 655  
(Mo.App.W.D. 1997)

**IV. The Trial Court erred in awarding Essex only \$7,088.00 in attorney’s fees against Berra and only \$17,013.00 in attorney’s fees against Boling because Boling and Berra are liable to Essex on Essex’s Third Party claims for all attorney’s fees of Intervenors, in that Boling and Berra failed to construct the streets to the proper thickness in violation of Section 64.895, RSMo.**

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)

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

McClain v. Papka, 108 S.W.3d 48, 53 (Mo. App. E.D. 2003)

**V. The Trial Court erred in awarding Intervenor’s costs in the amount of \$35,875.00 because the costs awarded were not costs paid by Intervenors, in that the costs awarded were paid by the Trustees of the Subdivision, not the Intervenors,**

**and the Trustees are not parties to this action, in that the costs awarded were for maintenance and repairs, not completion, of the streets.**

Farris v. Boyke, 936 S.W.2d 197, 200 (Mo. App. S.D. 1996)

Roth v. Lehmann, 741 S.W.2d 860, 862 (Mo. App. E.D. 1987)

**VI. The Trial Court erred in ordering that the County and Intervenor are entitled to hold the Bonds to guarantee completion of the improvements and to pay from the Bonds the cost to the County to complete the subdivision improvements, including the County's costs to supervise the work, and to also pay Intervenor's costs in the amount of \$35,875.00 to repair the prematurely failing streets and all court costs, and that the Court assess attorney's fees against the Bonds, because the Court's order requires that the terms of the Bonds, and the County's Guarantee, be altered beyond their plain language, in that the Bonds and the Guarantee provide only that they will remain in effect to allow the surety to complete all of the required improvements in accordance with the plans, specifications and Subdivision Regulations.**

Frank Powell Lumber Co. v. Federal Ins. Co., 817 S.W.2d 648, 651 (Mo. App. S.D. 1991)

State ex rel. S. Surety Co. v. Haid, 329 Mo. 1220, 49 S.W.2d 41, 42 (Mo. 1932)

Marcomb v. Hartford Fire Ins. Co., 934 S.W.2d 17, 20 (Mo. App. W.D. 1996)

Jerry Bennett Masonry, Inc. v. Crossland Const. Co., Inc., 171 S.W.3d 81, 96 (Mo. App.

.....	<b>S.D. 2005)Cases</b>	
<u>Abbott v. Haga</u> , 77 S.W.3d 728 (Mo. App. S.D. 2002) .....		37, 38
<u>Air Evac, EMS, Inc. v. Palen</u> , 113 S.W.3d 234, 237 (Mo. App. E.D. 2003) .....		32
<u>Biggerstaff v. Mance</u> , 769 S.W.2d 470 (Mo. App. S.D. 1989) .....		32
<u>Bond v. Cal. Comp. and Fire Co.</u> , 963 S.W.2d 692, 698 (Mo. App. W.D. 1998) .....		32
<u>Bryant v. Laiko Intern. Co., Inc.</u> , 2006 W.L. 2788520, slip op. at H.N 10, (E.D. Mo.) ....		32
<u>Hale v. Advance Abrasives Co.</u> , 520 S.W.2d 656, 658 (Mo. App. 1975).....		33
<u>Inv. Title Co. v. Chicago Title Ins. Co.</u> , 983 S.W.2d 533, 538 (Mo. App. E.D. 1998) .....		46
<u>Jerry Bennett Masonry, Inc. v. Crossland Const. Co., Inc.</u> , 171 S.W.3d 81, 96 (Mo. App. S.D. 2005) .....		28
<u>Murphy v. Carron</u> , 536 S.W.2d 30, 32 (Mo. 1976).....		27
<u>Murphy v. Carron</u> , 536 S.W.2d 30, 32 (Mo. en banc 1976) .....		48, 58, 61, 64
<u>Roebuck v. Valentine-Radford, Inc.</u> , 956 S.W.2d 329, 334 (Mo. App. W.D. 1997).....		30
<u>S.P. Personnel Assoc. of San Antonio, Inc. v. Hosp. Bldg. &amp; Equip. Co., Inc.</u> , 525 S.W.2d 345, 348 (Mo. App. St. L.D. 1975) .....		60
<u>Shapiro Bros., Inc. v. Jones – Festus Prop., L.L.C.</u> , 205 S.W.3d 270, 273 (Mo. App. E.D. 2006) .....		passim
<u>Smith v. Seven-Eleven, Inc.</u> , 430 S.W.2d 764, 769 (Mo. App. 1968) .....		32
<u>Wiedmaier v. Robert A. McNeil Corp.</u> , 718 S.W.2d 174, 176-77, (Mo. App. W.D. 1986) .....		33

### **Point Relied on I**

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### **The Big Picture**

The Winter Valley Subdivision streets were constructed between 1995 and 1998. Tr. p. 58. They should last for not less than 20 years. Tr. p. 295. There are 519 homes constructed in the subdivision. Tr. p. 498. During that construction, the streets were used by all manner of construction traffic for completion of the homes. Tr. pp. 77-80. The residents, Intervenor, have used the streets for anywhere from nine to 12 years. But, the Intervenor now want 315 sections of the streets replaced, Tr. p. 344, and the County wants 537 sections of the streets replaced. Tr. p. 376.

The County and the Intervenors want these sections replaced even though the Court found that “. . . **there is no evidence of any negligence or failure of Essex to properly perform construction of the streets.**” J. p. 12. (Emphasis added).

### **Standard of Review**

This case was tried to the Court without a jury. The judgment of the Trial Court will be sustained by the Appellate Court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. 1976); Shapiro Bros., Inc. v. Jones – Festus Prop., L.L.C., 205 S.W.3d 270, 273 (Mo. App. E.D. 2006).

### **A. The Bonds And Guarantee**

Essex and Federal provided Jefferson County with three Land Subdivision Bonds. Pl. Tr. Ex. 1, 2 and 3. The operative provisions of the Bonds required Essex to "...complete the installation and construction of such improvements as the same are prescribed and required by the Jefferson County Planning and Zoning Commission pursuant to the Subdivision Regulations ..."

Essex also provided to the County a Guarantee Under Subdivision Regulations. Def. J.C. Ex. C. This guarantees to the County "...that all required utilities and improvements will be installed, constructed and completed within one year from the date of the approval of this Guarantee Agreement." Federal did not sign the Guarantee.

Essex is bound on the Guarantee to the County to complete the subdivision improvements according to the plans, specifications and Subdivision Regulations. Similarly, Federal is bound to the County in the same manner as the principal for such completion. The obligations of Essex and Federal, though co-extensive, are limited to the terms of the Bonds, as a contract, and nothing more. Jerry Bennett Masonry, Inc. v. Crossland Const. Co., Inc., 171 S.W.3d 81, 96 (Mo. App. S.D. 2005). The Court cannot expand the obligations of either Essex or Federal on the Guarantee or the Bonds. Their liability is limited by the terms and conditions of the Guarantee and the Bonds. Marcomb v. Hartford Fire Ins. Co., 934 S.W.2d 17, 20 (Mo. App. W.D. 1996).

The primary issue before this Court is whether Essex “completed” the subdivision improvements, according to the plans and specifications and the Subdivision Regulations, as required by the Bonds.

### **B. No Evidence Of Construction Defects Or Fault**

**“As is discussed below, there is no evidence of any negligence or failure of Essex to properly perform construction of the streets.”** (Emphasis added). J. p. 12.

This finding by the Court makes it abundantly clear that the Court’s order is not based upon the negligence of Essex, or any failure of Essex to construct the streets in accordance with the plans, specifications and Subdivision Regulations of Jefferson County. Rather, the Court’s decision is based upon “two defects which have affected or will affect their (the subdivision’s streets) design life - deficient thickness and excessive

premature failure.” J. p. 8. Since the Court does not specify on which counts of the party’s pleadings it is ruling, the exact legal ruling of the Court is difficult to determine.

### **1. Excessive Premature Failure**

Under the Guarantee and the Bonds, Plaintiff and its subcontractors are not guarantors of a specific performance or life of the streets. Nowhere does Plaintiff or its subcontractors guarantee performance of the streets for any specific period of time. **This is not a warranty case.** Rather, as stated above, Essex’s obligation is to build the streets in accordance with the plans, specifications and Subdivision Regulations. The reliance by the Court on “premature failures” is contrary to the terms and conditions of the Bonds and the Guarantee. The Court cannot rewrite the Bonds or Guarantee for the parties to benefit the County and the homeowners in Winter Valley Subdivision by implying a warranty period. The requirements placed upon Essex and Federal must only be those requirements of the subdivision Bonds and Guarantee.

The Trial Court goes to great lengths to justify its expansion of liability under the terms of the Bonds and the Guarantee.

To find “premature failures,” the Court infers some sort of negligence on the part of Essex in constructing the streets. The Court states: “...[I]t can be inferred that but for some act or failure to act by Essex or those under Essex’s control, the types and extent of deficiencies and failures with regard to the subdivision improvements would not have occurred.” J. p. 25. The Court goes on to state that it is not possible to determine the cause of the premature street failures without ripping out the streets and doing a

comprehensive investigation. J. pp. 25-6. This is an admission by the Court that there is no evidence to support the cause of any such failures.

This “inference” of cause of failures is similar to the doctrine of *res ipsa loquitur*, implying negligence. That cause of action was not pled in this case, and cannot be the basis for the Court’s decision. Roebuck v. Valentine-Radford, Inc., 956 S.W.2d 329, 334 (Mo. App. W.D. 1997). Further, it is irrelevant. Unless the cause of the premature street failures, if there are such, which Essex denies, relates to a proven failure of Essex to build the streets in accordance with the plans, specifications and Subdivision Regulations as required by the Bonds and the Guarantee, there is no liability on the Bonds.

There are other possible causes of failures. Most importantly, the level of use after construction. After construction, the streets were used by all of the construction traffic to build over 519 homes. Tr. p. 498. Construction of these homes started right after the streets were completed. Tr. p. 412. These homes were not built by Essex but by other builders. Tr. p. 15. They have been used by the residents for over 12 years. Mr. Barczykowski testified that natural settlement could occur causing the cracking. Tr. p. 324. Any or all of these factors “could” have caused the cracking.

The Court says that Boling’s driving on the subgrade “could lead” to failure of the streets. J. p. 9. Similarly, the Court references back-filling of the curbs and sealing of the streets as possible causes of street failure. Id. Certainly there was discussion of these items in the evidence. The streets were sealed after they were poured. Tr. pp. 57-58. The Court stated that Mr. Koehrer “voiced concerns” about backfilling of the streets. J. p. 9. But, Mr. Koehrer stated he had no opinion whether backfilling or sealing had anything

to do with cracking. Tr. pp. 406-08. There is no evidence that these items led to any failure of the streets.

The Court also concluded that Boling driving on the subgrade “**can** result in pumping and rutting of the subgrade” leading to “concrete streets breaking or giving way.” J. p. 9. (Emphasis added). There is no question Boling’s trucks and equipment drove on the subgrade. Tr. pp. 432-448. But there is no evidence that this caused cracking to the streets.

The streets are not, in fact, failing. It must be remembered that there are over five miles of streets, and the oldest of the streets have been used for over 12 years. While there may be a minimum life expectancy of 20 years for the streets as a whole, it can be anticipated that some failures will occur in some sections prior to reaching the minimum life expectancy.

While the Trial Court goes to great lengths trying to show Essex must have done something wrong causing, what the Court believed to be, premature failure of the streets, it then goes on to conclude that any such finding is unnecessary. The Court finds that no proof of negligence or fault causing premature failure of the streets is required in order to hold Appellants responsible for those failures. J. p. 26. The Court does not specify in its Judgment what cause of action or count of the County’s or Intervenor’s pleadings it is ruling upon. Rather it seems to say there is per se liability against Essex regardless of cause or fault. The Court says that all the County must establish to draw on the Bonds is “that deficiencies exist.” J. p. 26. But deficiencies in what? It can only be deficiencies in constructing the improvements as required by the Bonds. J. p. 9. While the Court

discusses many issues that **could** have led to cracking streets, **nowhere does the Court ever say what it finds Essex did, or failed to do, in constructing the improvements, that was not in accordance with the plans, specifications and Subdivision Regulations, thereby constituting “deficiencies.”**

In Biggerstaff v. Mance, 769 S.W.2d 470 (Mo. App. S.D. 1989), a retaining wall was built, and after several days of heavy rainfall, it collapsed. The Biggerstaffs failed to present evidence of the cause of the collapse. The Court held: “(T)he mere showing that the wall fell did not, in and by itself, furnish proof that it was not constructed in a workman-like matter.” Id. at 473. Similarly here, the fact that some streets have cracks does not prove, and it may not be inferred, that Essex failed to complete the improvements. In Bryant v. Laiko Intern. Co., Inc., 2006 W.L. 2788520, slip op. at H.N. 10, (E.D. Mo.) the Court held that the fact that Plaintiff was hit by a helicopter did not establish that the helicopter had a manufacture or design defect.

The County and Intervenors evidence must be more than mere speculation and conjecture. Air Evac, EMS, Inc. v. Palen, 113 S.W.3d 234, 237 (Mo. App. E.D. 2003). Inferences may be drawn from the evidence. “An inference is a logical *a priori* conclusion drawn from proven or admitted facts. It is more than, and cannot be predicated on, mere surmise or conjecture. It is not a possibility that a thing could have happened or an idea founded on the probability that a thing may have occurred. Smith v. Seven-Eleven, Inc., 430 S.W.2d 764, 769 (Mo. App. 1968) (citations omitted).” Bond v. Cal. Comp. and Fire Co., 963 S.W.2d 692, 698 (Mo. App. W.D. 1998).

The Court's reasoning aside, the County and Intervenors tried to prove that Essex did not complete the improvements by offering the testimony of Mr. Barczykowski, an engineer, Tr. p. 250, and Mr. Koehrer, the County Director of Public Works, also an engineer, Tr. p. 371, as experts. Expert testimony may be used as proof, but the party using the experts has "...the burden of establishing circumstances from which the facts necessary to prove his claim may be inferred, without resort to conjecture and speculation, and the circumstances proved must point reasonably to the desired conclusion and tend to exclude any other reasonable conclusion." Weatherford v. H.K. Porter, Inc., 560 S.W.2d 31, 34 (Mo. App. 1977) citing Hale v. Advance Abrasives Co., 520 S.W.2d 656, 658 (Mo. App. 1975). That something "might or could" have been the cause, or raising the "mere possibility" that something could be the cause, is insufficient. Wiedmaier v. Robert A. McNeil Corp., 718 S.W.2d 174, 176-77, (Mo. App. W.D. 1986).

Mr. Barczykowski identified four areas of cracking on Def. J.C. Ex. E. Mr. Barczykowski identified shrinkage as a cause. Mr. Barczykowski stated that the shrinkage was a cosmetic problem that did not compromise the integrity of the roadway. Tr. p. 264. He says that no remediation of these areas is necessary. Steep grades are also listed as a cause. But while Mr. Barczykowski identified steep grades as a problem, he never testified it caused a problem with cracking of the streets. Tr. pp. 262-63. In short, he testified that none of the slabs on steep grades are on his list for replacement. Tr. p. 305. These grades are as designed on the plans approved by the County. Tr. pp. 19-21; Pl. Ex. Tr. 28.

Mr. Barczykowski attributes the vast majority of the failures to poor subgrade support. Tr. p. 270. Mr. Barczykowski also identifies fill areas not compacted and settling as a reason for cracking streets. Tr. p. 260.

Mr. Barczykowski admits that he was not involved in the construction, and does not know how the streets were actually constructed. Tr. p. 276. He also admits he is not familiar with the Jefferson County Subdivision Regulations. Tr. pp. 277-78. While Mr. Barczykowski made visual observations of the streets of Winter Valley Subdivision, and made a few tests (which will be addressed hereinafter), the bottom line is that Mr. Barczykowski assumed that the cracking was a result of poor subgrade support because he had no other explanation. Tr. pp. 302-04. In fact, he admitted on cross-examination from his deposition that: “You can still have a passing compaction result and not have adequate support.” Tr. p. 303.

This is in spite of, or possibly in disregard of, the compaction test from Brucker Engineering. Mr. Barnes of Brucker Engineering testified that Brucker Engineering had technicians on site doing compaction tests during the entire project. Tr. p. 131. They tested the areas where fill was placed, Tr. p. 114, and they tested the subgrade before the streets were poured. Tr. pp. 121-22. Mr. Barnes testified that in areas that did not meet the necessary compaction requirements of Jefferson County, re-compaction was required and completed. Tr. pp. 121-22. Mr. Barnes testified that from his records and knowledge of the project, all areas of fill met the necessary required compaction, Tr. pp. 120-21, and all the subgrade for the streets also met all necessary compaction. Tr. p. 127.

Mr. Barczykowski testified that all of the results of compaction tests that he saw indicated that the necessary compaction requirements were met. Tr. pp. 33, 278-79. He said that he was not disputing that the fill was properly compacted and the compaction tests were completed. Tr. p. 279. Mr. Barczykowski does not dispute Mr. Barnes' testimony that the compaction test of the fill was taken at different depths. Tr. p. 356. All of the Brucker Engineering tests that he saw showed passing results. Tr. pp. 284-285. Mr. Barczykowski has no information that any fill was not properly compacted for all of the streets. Tr. p. 287. Specifically, he looked at the compaction tests for every area where he says concrete needs to be replaced, and they all show that in these areas the necessary and required compaction was met. Tr. p. 286.

Mr. Barczykowski admits that additional settlement could occur after construction, even with proper compaction, from the dead load weight of the soils themselves. Tr. p. 324. This would not be a result of a construction problem. Tr. pp. 324-25. He also admits that springs which might be present at the Subdivision could cause additional settlement. Tr. p. 325.

Mr. Barczykowski admits that traffic puts stress on the streets because of steep grades. Tr. p. 263. There are steep grades throughout the Subdivision in addition to the areas marked "steep grade" on Mr. Barczykowski's map. Intervenors' Ex. E. Mr. Oliver testified that the high point is at the entrance on Corsandi Hill Road and Old Highway 141. Tr. p. 17. These steep grades are subject to heavy traffic, both from the residents and construction traffic. Mr. Barczykowski admits that there was a street creep problem in the Subdivision, as Mr. Oliver testified. He testified that street creep was not a result

of a construction defect, but rather a result of expansion and contraction of the pavement and the amount of traffic over a number of years. Tr. p. 298. This problem is particularly exacerbated by heavy equipment traversing the streets, which will have a greater effect on street creep. Tr. p. 299. Mr. Barczykowski admits that street creep has contributed to displacement and damaged slabs, including some of the failed slabs. Tr. p. 337. The construction phase of the Subdivision put the most stress on the pavement. Tr. p. 335. Of course, the construction phase came mainly in the late 1990's as the street construction was completed and construction of the homes was undertaken.

In 2002, Tr. pp. 253-54, Mr. Barczykowski performed six compaction tests on the subgrade and fill as shown in Pls. Ex. Tr. 33 & 34. He first testified that these compaction tests met the necessary compaction requirements. Tr. pp. 287-94. And, he admits that there are things that could happen between the time the concrete was poured until he took his compaction test some six years later that could make the compaction change. Tr. p. 330. He admits that the Brucker Engineering report shows that all of the compaction requirements were met at the time the fill was placed and the subgrade was prepared. Tr. p. 329.

Mr. Barczykowski's own company did a previous study of the streets. Tr. p. 294. This study was completed by Mr. James N. Pyatt. Id. Mr. Pyatt's conclusion, contrary to the conclusion of Mr. Barczykowski, was that the cracking problem was a result of a joint problem. Tr. p. 298. In fact, Mr. Pyatt, in his report, stated: "This could be the most significant contributor to pavement cracking and failure observed." Tr. p. 296. Mr. Pyatt attributed the street creep to ineffective expansion joints and lack of dowels at

longitudinal joints. Tr. p. 297. Mr. Barczykowski testified that dowels and longitudinal joints were not required in this project. Tr. p. 297.

In other words, we have two experts from the same company disagreeing over the reasons for the concrete cracking. While Mr. Barczykowski tries to explain this away by stating that Mr. Pyatt's report was a "preliminary report," Tr. p. 353, this disagreement points up the subjective nature of Mr. Barczykowski's testimony.

At no time did Mr. Barczykowski testify that there was any failure on the part of Essex or its contractors to properly construct the streets, causing any cracking or displacement. This is particularly evident in the direct examination by Mr. Fried, counsel for the County, and in the examination by Mr. Rost, counsel for the Intervenors. They didn't even ask Mr. Barczykowski to testify to any failure by Essex or its subcontractors to properly construct the streets. In other words, the County and the Intervenors want their streets replaced, from the proceeds of the Bonds, without any evidence that Essex caused the cracking and displacement by failing to build the streets in accordance with the Bonds, the Subdivision Regulations or the plans and specifications, or even any proof beyond speculation of the cause of the cracking. In Abbott v. Haga, 77 S.W.3d 728 (Mo. App. S.D. 2002), Plaintiff's experts testified that a levee had leaks and would eventually fail. He testified that use of unsuitable material with improper compaction "could" cause the leak. Other than these causes, "... there were not many more possible causes." Id. at 733. The Court held that where there are two or more possible causes, the expert testimony must be to a reasonable degree of certainty. "Evidence by the expert that the act or omission of the party charged was a positive factor or extremely likely to have a

causal effect is not sufficient to make a submissible case.” Id. Mr. Barczykowski has testified that poor subgrade support caused the cracking, but he admits that natural settlement of the soils or water conditions of which he is unaware, could have caused the cracking. His testimony is not to a reasonable degree of certainty.

Mr. Koehrer testified that his criteria for replacement was any slab with more than one crack. Tr. p. 422. While he says there are 537 panels that need to be replaced, he did not identify the location of the panels. Tr. p. 376. But Mr. Koehrer readily admits that he made no attempt to determine the cause of any cracking. Tr. p. 406. He goes even further, admitting that it is “nearly impossible to determine the cause of the failure” of the panels on his list. Tr. p. 408. Of course, cracking in concrete streets is to be expected. Tr. p. 56-7.

The Court ruled that Essex failed to carry its burden of proof because it did not present expert evidence to rebut Mr. Barczykowski’s and Mr. Koehrer’s testimony. J. p. 25. But, Essex is not required to rebut speculation and conjecture. The expert’s testimony having no probative value, there is no reason to offer testimony in opposition.

Essex has met its burden to make a prima facie case. The testimony of Mr. Oliver, Mr. Barnes and Mr. Dishner show that the improvements were completed according to the plans, specifications and Subdivision Regulations. On March 5, 2001, Essex notified the County that the improvements were complete. Pl. Ex. Tr. 26. This was within one (1) year as required by the Guarantee which is dated July 26, 2000. Def. J.C. Ex. C.

Neither the Court’s speculation and conjecture, nor the expert’s assumptions and conditional opinions, support a conclusion that any cracking of the streets, or “premature

failure” as the Court defines it, is caused by Essex not completing construction of the streets according to the plans, specifications and Subdivision Regulations.

That there is no substantial evidence to support the Trial Courts judgment was recognized by the Court of Appeals. The Court of Appeals correctly found that:

After reviewing all the evidence, we find there was not substantial evidence presented at trial to show there was any specific failure on the part of Essex to properly construct the streets in the subdivision, which resulted in the premature failures. The evidence showed Essex fulfilled its responsibility by compacting and testing the sub grade prior to the pouring of the concrete. **In addition, the evidence illustrated that the causes of the street failures could not be specifically determined.** (Emphasis added)

Moreover, while there was evidence of premature failing of some streets, under the bonds and the guarantee, Appellants are not guarantors of a specific performance of the streets or the life of the streets. At issue here is a performance or a completion bond, not a warranty bond. A performance bonds protects obligee by obligating the surety to cover any extra cost obligee may incur to complete project if principle defaults. Miller–Stauch Construction Company vs. Williams-Bungart Electric, Inc., 959 S.W.2d 490,494 (Mo.App.W.D. 1998). Court of Appeals Opinion page 12.

In their “Grounds For Transfer” the Intervenors challenge this ruling arguing that the Court of Appeals decision raises question of general interest and importance because the Court of Appeals “failed to give due regard to the opportunity of the Trial Court to adjudge the credibility of all witnesses.” This argument is surprising since the credibility of witnesses is really not an issue in the evidence of this case. With the exception of the testimony of Randy Boling, which was challenged on credibility grounds by Appellants, no one has challenged the credibility of other witnesses. In fact, taking the testimony referenced in the Trial Court decision at face value, there is no evidence to support the Trial Courts decision.

Intervenors in their Application for Transfer failed to set forth any specific testimony supporting the Trial Court decision. Intervenors generally refer to the testimony of Mr. Koehrer, Randy Boling and Dan Barczykowski, but they cite no specific testimony affected by credibility issues that would support a finding by the Trial Court that Essex failed to complete construction of the subdivision streets. Regardless of credibility, the evidence is devoid of any support for the Trial Court decision, and the Court of Appeals was correct in finding that there was no substantial evidence to support that decision.

Intervenors further attempt to avoid reversal of the Trial Court by a semantic argument that “completion” must mean something more than “construction.” And, in fact, it does. Webster’s Dictionary defines construction as “the act of constructing or building something.” Installation is defined as “to install or to put in to position for service.” Completion is defined as “the process or act of completing.” To complete is

defined as “having all the necessary parts; whole; completed.” All of these words modify “subdivision improvements” in the Guarantee. Taking this into account, the meaning of this requirement is very simple. Essex was to construct and install the subdivision improvements and bring them to a state of completion. Completion means simply to finalize construction and installation of the subdivision improvements; not to leave them only partially constructed and installed.

What is certainly clear is that the word “completion” does not mean to guarantee the streets against failure for an unlimited time into the future. As pointed out by the Court of Appeals, that would require a warranty bond.

What Intervenors seek is, in fact, a warranty bond, to protect them “against failing streets at the time of release from the obligation.” Application for Transfer page 11. Such is not the case. In fact, the Bonds themselves do not use the phrase “construction, installation and completion.” Rather the Bonds provide more clearly and succinctly that what is required is for the principle to “complete the installation and construction of such improvements as the same are prescribed and required by the Jefferson County Planning and Zoning Commission pursuant to the subdivision regulations.” Appellants’ Substitute Appendix, pages 49-61.

Intervenors cite Homebuilders Association of Greater St. Louis vs. City of Wildwood, 107 S.W.3d 235 (Mo. En Banc 2003). They try to imply from this case that Essex should be responsible for the streets years into the future. Such is not the holding of the case. As this Court well knows, having decided the case, the case stands for the proposition that the amount of the bond that can be required by the City may reasonably

exceed the estimated cost of construction made at the time the bond or deposit is posted. This is true because the actual cost of completing the improvements, which may occur years from the date the cost of completion of improvements was estimated, may exceed the original cost estimate. Homebuilders does not stand for the proposition that the developer guarantees maintenance and repair of the streets for years into the future. The developer guarantees only the streets will be “completed.”

The obligation of Essex under both the Guarantee Agreement and the Bonds was to complete the installation and construction of the subdivision improvements and nothing more. This Essex has done! Nowhere is Essex required to maintain and repair the subdivision streets to “the time of release from the obligation.”

Points 3 and 4 of Intervenors Application for Transfer do not raise issues conflicting with other opinions of the Appellate Courts of this State, nor do they raise questions of general interest and importance that should be considered by this Court. These grounds for transfer should be denied, and the decision of the Court of Appeals, Eastern District, should be reinstated.

## **2. Thickness of Streets**

Does the fact that some of the streets were not constructed to the proper thickness prevent the streets from being completed? The answer is no! This is true for four reasons:

- a. All of the streets that were to be constructed, were constructed.

b. The thickness of the streets has in no way hindered anyone who, for the last nine to 12 years, was entitled to use the streets, from using the streets in the manner and for the purposes intended.

c. The thickness of the streets is not related to the issue of cracking or displacement of the streets. The thickness of the street has not contributed to any of the alleged failures of the street. Tr. pp. 334-36. Just because the streets were thin does not make Essex liable to maintain or repair streets where the maintenance or repair is not related to the thickness of the streets.

d. Variations in street thickness is a common problem for which the County provides a remedy, which was enforced by the Court. The Trial Court has applied the provisions of Appendix E of the County's Subdivision Regulation, Pl. Ex. Tr. 5, to provide for payment of compensation for the sections of street which the coring, Def. JC Ex. B, shows were not of the proper thickness. Appendix E was not in the Subdivision Regulations in effect at the time the streets were originally constructed. Pl. Ex. Tr. 4. The County has adopted, and the Court has correctly applied, the provisions of Appendix E to adjust for the anticipated variations in the thickness of the streets during construction. St. Louis County has a similar provision for adjustment because of variation in thickness which was applied by the County before Appendix E was adopted. P. Ex. Tr. 21. Variations in thickness are not a failure to properly construct the street, but are rather an anticipated occurrence for which the County has provided a remedy. A remedy having been provided, and that remedy having been ordered by the Court, the variations in thickness have nothing to do with completion. It would constitute a double

penalty to require not only the payment of compensation under Appendix E, but to also hold that the concrete thickness, even though adjusted, constitutes a failure to complete the streets. Payment of the compensation constitutes compliance with the Subdivision Regulations in completing the streets.

It should also be noted that with imposition of these penalties, Jefferson County and the Intervenor have gotten exactly what they were entitled to receive in terms of thickness, under the plans, specifications and Subdivision Regulations. The streets were constructed to the proper thickness or they have received the compensation provided in Appendix E for any thin section.

It is appropriate to charge these costs to Boling and Berra since they were the ones that actually poured the streets, and they are responsible for pouring the streets to the required thickness.

### **C. Wavier**

The Court also found that Essex was required to replace failed slabs because by prior replacements it has “acknowledged” the County’s authority to require replacement of “failed slabs” as part of the standards for release. The Court went on to hold that Essex had waived any argument that it does not have to replace slabs that are thin or have premature failure. J. p. 20.

As set forth above, the standards for release are set forth in the Bonds, the Guarantee and the Subdivision Regulations. The County cannot add by its conduct or unstated requirements additional “standards for release.” If these standards for release are not in the Subdivision Regulations, Guarantee or Bonds, how is Essex, or any other contractor, to know what it needs to do to get the Bonds released?

This is exactly the problem Essex faced in this case. Essex had constructed the improvements, but every time it sought a release from the County, new items were raised by the County that have nothing to do with completion, but with maintenance. Tr. pp. 196-201. Essex was in essence held “hostage” to the demands of the County’s officials. While the required thickness was still an issue, it has been resolved by the Court’s Judgment through adjustment under Appendix E.

The depth of the problem Essex encountered is demonstrated by Mr. Koehrer’s statement that if an improvement was originally completed, but before the Bonds were released, the improvement showed deterioration, it would have to be replaced. Tr. pp. 397-98. This is true even if the street was built according to the plans and specifications but later developed faults and cracks. Tr. p. 416.

And, according to Mr. Koehrer, damage to the streets not caused by Essex or its subcontractors, must be repaired prior to release of the bonds. For instance, if an airplane crashed into the street, damaging the street, the street would have to be repaired before the Bonds were released. Tr. p. 416. Or, if a homeowner building a pool had a concrete truck drive over a curb and break the curb, the curb would have to be repaired before the Bonds were released. Tr. pp. 416-17.

Clearly, these are not completion issues, but maintenance and repair issues. The County is exceeding not only the provisions of the Bonds and the Guarantee, but it is exceeding the authority of its own Subdivision Regulations which nowhere require maintenance and repair after completion. Pl. Ex. Tr. 4 & 5. To confirm this, one only need to refer to the County's letter of March 30, 2001, to Essex, Pl. Ex. Tr. 27, in which Kristi Bales references the inspector's letter of August 28, 2000 and reminds Essex: "It is important for you to realize that if something becomes deficient prior to the release of the bonds, then those issues too will need to be addressed." She goes on to say that this list includes "an item that has not been listed in previous inspections, but was sighted during the most recent inspection."

Nor did Essex recognize an obligation to repair or waive any objections to working on repairs or performing maintenance as ordered by the County. While waiver is the relinquishment of a known right, it "...must be so manifestly consistent with and indicative of an intention to renounce a particular right or benefit that no other reasonable explanation of the conduct is possible." Inv. Title Co. v. Chicago Title Ins. Co., 983 S.W.2d 533, 538 (Mo. App. E.D. 1998). Here the actions by Essex were not a waiver of

any right, but simply action Essex was taking to get its Bonds released. Essex in good faith replaced a number of sections of streets which it saw had failed. Tr. pp. 58-63. But its good faith efforts in this respect should not now be used against it under a theory of waiver to alter the standard of completion under the Bonds.

The Court is really trying to use “waiver” not to have Essex release or forfeit a right, but to impose on Essex additional requirements to get the Bonds released. This is not “waiver.”

Essex completed the improvements. It had no obligation to replace or repair the streets. The requirements for release of the Bonds can not be increased by Essex’s voluntary actions separate and apart from completion of the improvements.

## **Point Relied on II**

**The Trial Court erred in failing to enter Judgment in favor of Essex and against Boling on Essex's Third Party claim because it failed to find that Boling was responsible for any failing concrete streets which were constructed by it, in that Boling's vehicles drove on the subgrade prior to construction of the streets.**

## **Standard of Review**

This case was tried to the Court without a jury. The judgment of the Trial Court will be sustained by the Appellate Court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. en banc 1976); Shapiro Bros., Inc. v. Jones – Festus Prop., L.L.C., 205 S.W.3d 270, 273 (Mo. App. E.D. 2006).

## **Argument**

As stated in Point Relied on I, there is no evidence that any cracked streets are a result of the failure by Essex to properly construct the streets according to the plans, specifications and Subdivision Regulations. It is, however, undisputed that Boling's construction vehicles and concrete trucks drove on the subgrade after it was compacted and tested. There is cracking of the streets in these areas.

Mr. Barczykowski testified that driving construction vehicles on the subgrade could disturb the subgrade after the compaction test. His testimony is also addressed in Point Relied on I and will not be restated here.

Essex has brought third-party claims against Boling and Berra under Mo. Sup. Ct. R. 52.11. Third-party defendants are “. . . 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. 1975). See also State ex rel. Perkins Coie L.L.P. v. Messina, 138 S.W.3d 815, 817 (Mo. App. W.D. 2004).

As stated in Point Relied on I, Subsection B, Essex does not believe that Mr. Barczykowski gives sufficient expert testimony to support a finding that either Essex or Boling are responsible for any cracking sections of the streets. But, if the Court determines that Mr. Barczykowski’s testimony, or other evidence, is sufficient to hold Essex responsible for any cracking sections of the streets, this testimony would also be sufficient to hold Boling responsible for the cracking streets in those areas on which Boling drove on the subgrade. This is true whether the cause of action is for negligence, for driving on the subgrade causing subgrade failure, or for breach of contract for driving on the subgrade in breach of Paragraph 16 of Boling’s contract, Pl. Ex. Tr. 9.

Simply, and candidly, put, Essex does not believe that it or Boling should be responsible for replacement of any concrete sections of streets. But if Essex is held to be liable for replacement of sections of the street, then Boling should be held liable as well for those street sections that are cracking where Boling drove on the subgrade. Since, as

ordered by the Court, the replacement would be by the County “consistent with the County’s and Intervenor’s evidence of deficiencies,” it is impossible to determine at this time which sections of street would have to be replaced.

Specifically, Boling was responsible for pouring Copper Mountain Court. Boling knew there were no access roads along Copper Mountain Court. Tr. p. 433. The contract provision of Paragraph no. 16 in Pl. Ex. Tr. 9 does not absolve Boling of responsibility to construct the streets on Copper Mountain Court according to the plans and specifications.

Mr. Boling, Mr. Oliver and the County’s inspector, Mr. Dishner, all met at Copper Mountain Court. Tr. p. 219. Mr. Dishner approved the method of pouring which required that the concrete trucks be driven on the subgrade. Tr. pp. 219-221. Mr. Dishner approved pouring in that manner with the understanding that Boling would re-compact the subgrade to requirements. Tr. pp. 219-221, 434. It was up to Boling to make sure the streets were properly re-compacted prior to pouring the streets. The streets on Copper Mountain Court have now cracked.

While Essex does not believe there is sufficient evidence to hold either Essex or Boling responsible for replacement of any streets on Copper Mountain Court, if Essex is required to replace those streets, Boling is liable to Essex on Essex’s third party claim to replace those streets.

### **Point Relied on III**

**The Trial Court erred in awarding Intervenor's \$219,277.00 in attorney's fees because the award is excessive, in that the award should be reduced because the amount of the underlying judgment should be reduced as provided in Point Relied on I.**

### **Standard of Review**

In most cases, the review of an award of attorney's fees is whether the Trial Court abused its discretion. Volk Constr. Co. v. Wilmescherr Drusch Roofing Co., 58 S.W.3d 897, 901 (Mo. App. E.D. 2001). However, under this Point Relied On, Appellant Essex submits the standard of review is whether the amount of attorney's fees awarded by the Trial Court is reasonable considering the reduction that should be made in the underlying award. Knopke v. Knopke, 837 S.W.2d 907, 922 (Mo. App. W.D. 1992).

### **Argument**

The Court awarded Intervenor's a judgment of \$219,277.00 against Essex for attorney's fees. The Court's judgment of December 26, 2006 does not specifically provide under what provision these attorney's fees are awarded. The Intervenor's requested the attorney's fees under the provisions of Mo. Rev. Stat. § 64.895 (2007), and Mo. Rev. Stat. § 89.491 (2007). However, Intervenor's attorney's fee bills were not placed in evidence.

As set forth in Point Relied on I, the Intervenor and County are not entitled to an award for cracked sections of the streets. They are entitled to the award in the amount of \$102,174.65 to adjust for the thin sections of the concrete streets.

While a set formula has not been established, the amount of an award of attorney's fees must bear some reasonable relationship to the amount otherwise awarded to the recovering party. O'Brien v. B.L.C. Ins. Co., 768 S.W.2d 64, 71 (Mo. 1989); Knopke at 922. To effectuate this rule, when an underlying award is reduced by the Appellate Court, the award of attorney's fees based on the award prior to reduction must also be reduced. Knopke at 922.

In Knopke, the damage judgment was reduced by approximately \$300,000.00 leaving a damage judgment approaching \$500,000.00. The Court ruled that “. . . the attorney's fee award must be reduced as the amount of the judgment is reduced, although not necessarily ratably.” Knopke at 922. The Court reduced the attorney's fee award by twenty five percent (25%).

Here, the Court found that the cost of completion of the improvements was \$1,015,838.00. J. p. 28. This should be reduced to \$102,174.65, the amount to adjust for thin concrete, a ninety percent (90%) reduction. The Court set the award of \$219,277.00 for attorney's fees based on the \$1,015,838.00 cost of completion and the adjustment for thin concrete. When these costs are reduced, the attorney's fees award should also be reduced.

Further, the attorney's fee award is more than twice the amount of the award to adjust for the thin streets. This amount is not reasonable in relation to the amount which

should be awarded to Intervenors and the County. The attorney's fees include substantial amounts related to the cracking issue rather than the thinness issue. As the award in favor of Intervenors and the County for street replacement should be reversed, the award of attorney's fees is not reasonably related to the amount which should be affirmed for the thin streets.

Appellants request the Court to reduce the award of attorney's fees to an amount which is reasonable under the circumstances. Appellant believes a reduction to \$100,000.00 is reasonable and appropriate. This Appellate Court may set the amount of attorney's fees to be awarded to resolve this issue. Knopke at 922-23.

This was the argument submitted to the Court of Appeals, Eastern District. And, the Court of Appeals, in determining a reasonable amount under the circumstances, carefully evaluated all of the circumstances, including the law applying to the award. Following that evaluation it came to the proper legal conclusion: the reasonable amount to be awarded to Intervenors is zero (0) dollars.

The Court of Appeals, as is this Court, is an expert in determining the reasonable amount of attorney's fees to be awarded under any appropriate set of facts. As Appellants stated in their brief to the Court of Appeals, the Appellate Court, including this Supreme Court, may set the amount of attorney's fees to be awarded to resolve a request for attorney's fees. Mo. Sup. Ct. R. 84.14; Knopke at 922-23.

In its opinion, the Court of Appeals properly found that "the Trial Court specifically stated it was entering 'judgment in favor of the County on Count I of its counterclaim against Essex, and on its claim against Federal, in the amount of

\$102,174.65.’ The County was the prevailing party on the award of civil penalties.” Missouri Court of Appeals – Eastern District Opinion page 17. As also found on page 17 of its Opinion, the Court of Appeals quoted Section 89.491 which provides that attorney’s fees may only be awarded “to the prevailing party.” The Intervenors were not a prevailing party; as ruled by the Trial Court, Jefferson County was the prevailing party on the civil penalties. This is particularly true since the Bonds from which the Trial Court ordered the civil penalties to be paid are payable only to Jefferson County and not to Intervenors. Appellant Federal could not pay the money from the Bonds to any party other than Jefferson County.

Intervenors argue that the Trial Court found that they were “aggrieved parties” entitled to relief under Section 89.491 and 64.895, RSMo. Application for Transfer p.5. The finding of the Trial Court is that Intervenors were “aggrieved parties,” and not that they were “prevailing parties.” The judgment of the Trial Court is specifically in favor of the County and not the Intervenors. The same may be said of the Trial Court’s finding, as quoted by Intervenors, that Intervenors are third party beneficiaries to the terms of the Bonds and the Guarantee Agreement. While Intervenors may be third party Beneficiaries, that does not make them prevailing parties in the litigation.

The Intervenors further argue that because the penalties are to be paid into a special escrow account established by the County Commission, and eventually paid by the County Commission to the Subdivision Property Owners Association, these are “paid to the Homeowners Association for the homeowners benefit.” From this Intervenors conclude that “when the County prevailed on the civil penalties, Intervenors prevailed as

well.” Application for Transfer page 6. But this extension from being a beneficiary to being a prevailing party does not hold. The County was deemed by the Trial Court to be the prevailing party. The civil penalties are paid to the County. The fact that the County may ultimately pay the penalties to the Intervenor is an action determined by the County’s ordinances and not by the Trial Court decision. The fact that the Intervenor may ultimately benefit from the penalties does not make them a “prevailing party” under the statute.

Intervenor argues in their Application for Transfer, Point 2, that the Court of Appeals can not enter its ruling over turning the award of attorney’s fees, and by extension this Court can not enter a similar ruling, because there is no finding of plain error, and because the point was conceded and not argued or briefed by any party on appeal. Intervenor is incorrect in both respects.

To take the last point first, Appellant did not concede that Intervenor is entitled to attorney’s fees. Rather, they asked the Court of Appeals for a reduction in amount, to be determined by the Court of Appeals. The same is true in this Court. Appellant asks this Court to set an amount appropriate under the circumstances and the law. This Court, as does the Court of Appeals, shall review the award of attorney’s fees to determine “whether the Trial Court’s determination was arbitrary and capricious, unreasonable, unsupported by competent and substantial evidence, made contrary to law or in excess of the Court’s jurisdiction. State ex rel. Div. of Transp. vs. Sure-way Transp., Inc. 948 S.W.2d 651, 655 (Mo.App.W.D. 1997). The Trial Court is afforded no deference in its determinations of law. This Court will review those de novo. Id.” Hinton vs. Director of

Revenue, 21 S.W.3d 109, 111-112 (Mo.App.W.D. 2000). This Court, as did the Court of Appeals, should review the award of attorney's fees under all of the circumstances, specifically including the applicable determinations of law, and determine what amount, if any, should be awarded. Contrary to Intervenor's assertions, Point Relied on III specifically challenges the award of attorney's fees, asks for a reduction in those fees, and requests that the Appellate Courts, including this Court, review the appropriate amount under all of the circumstances and the applicable law. When that is done, as pointed out by the Court of Appeals, the appropriate amount determined is nothing.

As to Intervenor's second point, that the Court of Appeals ruling was not based on a finding of plain error, as stated above, such a finding was not necessary. But, certainly under the circumstances and the law, plain error would be applicable in this case to this issue.

Plain error may be invoked where there are substantial grounds for believing that a manifest injustice or a miscarriage of justice would result if left uncorrected. Mo. Sup. Ct. Rule 84.13 (c); Hensley v. Jackson Co., 227 S.W.3d 491, 497 (Mo 2007). Plain error review is appropriate where the substantial rights of a party have been affected.

Hunsucker v. Fischer, 221 S.W.3d 433, 435 (Mo. App. W.D. 2006). Here it is clear that there would be manifest injustice and a miscarriage of justice if the award of attorney's fees is not reversed.

Intervenor's were not the prevailing party. They are not entitled to an award of attorney's fees under the statute. Appellants have specifically raised in this Point III that the attorney's fees awarded were excessive, and that they should be appropriately

reduced. While they made a “suggestion” that a \$100,000 reward would be fair and reasonable, Appellants deferred to the Courts of Appeals to set the appropriate amount. That appropriate amount is zero (0). To allow Intervenors to collect substantial attorney’s fees where they are not entitled to those attorney’s fees, rather than to have the Court reduce the award to a reasonable amount under the circumstances, nothing, would constitute a manifest injustice and a miscarriage of justice.

The use of plain error in this case differs from the more common cases seeking to invoke plain error and involving a failure to object to evidence or to jury instructions. Here the error is of law in granting attorney fees where none are appropriate under the statute. Since this Court reviews determinations of law de novo, Hinton at 111-112, the use of plain error here does not deprive the Trial Court of an opportunity to rule on the issue. Instead, it corrects an error made by the Trial Court.

Nonetheless, should this Court determine that Intervenors are entitled to some award of attorney’s fees, Appellants are entitled to judgment against Boling and Berra for reimbursement of the amount of such attorney’s fees as set forth in Point Relied on IV of this Brief. It was Boling and Berra who constructed the concrete streets. It was they who poured the concrete streets to an insufficient thickness, resulting in civil penalties. It should be they who pay any amount of attorney’s fees awarded to Intervenors.

### **Point Relied on IV**

**The Trial Court erred in awarding Essex only \$7,088.00 in attorney's fees against Berra and only \$17,013.00 in attorney's fees against Boling because Boling and Berra are liable to Essex on Essex's Third Party claims for all attorney's fees of Intervenor, in that Boling and Berra failed to construct the streets to the proper thickness in violation of Section 64.895, RSMo.**

### **Standard of Review**

This case was tried to the Court without a jury. The judgment of the Trial Court will be sustained by the Appellate Court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. En Banc 1976); Shapiro Bros., Inc. v. Jones – Festus Prop., L.L.C., 205 S.W.3d 270, 273 (Mo. App. E.D. 2006).

### **Argument**

As discussed in Point Relied on I, construction of the streets was completed by Essex. The only proven deficiency in constructing the streets to the plans, specifications and Subdivision Regulations was the deficiency in thickness. Essex contracted with Boling and Berra, and relied upon Boling and Berra to construct the streets to either six inches thick or to seven inches thick as required by the plans, specifications and

Subdivision Regulations. Pl. Exs. Tr. 6, 7, 8 & 9. The responsibility for constructing the streets to the required thickness was solely that of Boling and Berra.

Intervenor's Pleadings allege that the streets were not to the proper thickness. Legal File Ex. 3, Paragraph no. 32. To resolve this issue, the Court ordered coring be performed by Midwest Testing. The coring was completed by Midwest Testing, and the results of the coring is shown in Def. J.C. Ex. B. The corings demonstrated that there were 31 sections in the areas of Berra's construction, and 81 sections in the areas of Boling's construction, to be replaced because of insufficient thickness. Def. J.C. Ex. B.

Intervenors seek an award of attorney's fees under the provisions of Section 64.895.2, RSMo., and Section 89.491 RSMo. Section 64.895.2 RSMo. permits the owner of any private property affected by the violation of any zoning order or other order in the subdivision of any land to bring an action to abate or correct the violation. Section 89.491 RSMo. permits the Court to award attorney's fees to the prevailing party in such an action.

Here, since, as discussed in Point Relied on I, there is no showing that Essex failed to construct the streets according to the plans, specifications and Subdivision Regulations, except for the failure of the streets to be constructed to the proper thickness, the only grounds for the award of attorney's fees to the Intervenors against Essex is the failure to construct the streets to the proper thickness. As stated above, the responsibility was Boling's and Berra's to construct the street to the proper thickness. But for Boling's and Berra's failure to construct the streets to the proper thickness, the Intervenors would not be entitle to the award of attorney's fees against Essex.

Since Boling and Berra are the direct cause for the failure to construct the streets to the correct thickness, they have breached their contracts with Essex. McClain v. Papka, 108 S.W.3d 48, 53 (Mo. App. E.D. 2003). They are liable to Essex on Essex's third party claims to reimburse Essex for all attorney's fees charged against Essex by the Trial Court and payable to the Intervenor. 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).

Certainly the award by the Court of only \$7,088.00 against Berra and \$17,013.00 against Boling for reimbursement of attorney's fees is inadequate. The Trial Court ruling should be reversed, and judgment should be entered against Boling and Berra, jointly and severally, and in favor of Essex, for all attorneys' fees awarded to Intervenor and against Essex for prosecution of this action.

### **Point Relied on V**

**The Trial Court erred in awarding Intervenor’s costs in the amount of \$35,875.00 because the costs awarded were not costs paid by Intervenor, in that the costs awarded were paid by the Trustees of the Subdivision, not the Intervenor, and the Trustees are not parties to this action, in that the costs awarded were for maintenance and repairs, not completion, of the streets.**

### **Standard of Review**

This case was tried to the Court without a jury. The judgment of the Trial Court will be sustained by the Appellate Court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. en banc 1976); Shapiro Bros., Inc. v. Jones – Festus Prop., L.L.C., 205 S.W.3d 270, 273 (Mo. App. E.D. 2006).

### **Argument**

The Trial Court ordered Appellants to pay \$35,825.00 to Intervenor for “costs of work performed . . . to repair the prematurely failing streets.” J., p. 33. The Trial Court found that these were “...expenditures by the Association . . . for repairs to the streets that the Association paid for with lot owner funds.” J., p. 16.

The original Intervenor in this action were three individuals. Legal File, Ex. 3. Verified Petition for Injunctive and Declaratory Relief and For Damages. They alleged

they were “members of the Winter Valley Subdivision Home Owners Association, a Missouri unincorporated association (the “Association”). Legal File, Ex 3, p. 2. Upon a motion by Essex, the Court ordered that the members of the unincorporated Association be formed into a class under Mo. Sup. Ct. R. 52.10. Order Certifying Class and Approving Class Notice, Legal File, Ex. 17. The class members are “... made up of the current record owners, of the fee simple title to any lot which is a part of the Winter Valley Subdivision, but excluding . . . the subdivision’s developer . . .” Id.

This unincorporated association grew out of a group of homeowners who had banded together to form an “action committee.” Tr. p. 502. The “action committee” contacted the Subdivision’s Trustees about their complaints, but the Subdivision Trustees did not believe it was “wise” to get involved. Tr. p. 503. The “action committee” also contacted the County Commissioner’s about holding the Bonds. Tr. p. 506.

The Intervenor class, and its representatives, are separate and apart from the Subdivision’s Trustees. The Trustees are established in Indentures of Trust and Restrictions of Winter Valley Subdivision. Pl. Tr. Ex. 32. Under Article II of the Restrictions, the Trustees collect assessments from the lot owners, and spend the assessments as provided in the Restrictions. Article X, Pl. Tr. Ex. 32. Nowhere do the Restrictions form an association. The expenses awarded by the Court to the Intervenors were paid by the Trustees, not the Intervenors as an unincorporated association. Tr. p. 509. Mr. Rost, as attorney for the Intervenors, admits this by stating: “No, the Trustees have paid those.” Tr. p. 510.

The original Trustees were appointed by the developer. Pl. Tr. Ex. 32. Mr. Monge and the other lot owner Trustees were not elected until 2003. Tr. p. 496. Mr. Monge claims that he is a Trustee for the Homeowner's Association, and this is where they came up with their invoices. Tr. p. 509. But neither Mr. Monge, as a Trustee, nor any other Trustees, are parties to this case.

“A trust is not a legal entity. The trustee is the legal owner of the trust property, in which the beneficiaries have equitable ownership. (Citations omitted). As a general rule, in suits involving trust property, both the trustees and the beneficiaries are necessary parties. Roth v. Lehmann, 741 S.W.2d 860, 862 (Mo. App. E.D. 1987).” Farris v. Boyke, 936 S.W.2d 197, 200 (Mo. App. S.D. 1996). Mr. Mongee and the other lot owner Trustees are not parties to this suit as Trustees but as the owners of “the fee simple title to any lot” in Winter Valley Subdivision. The Trustees, as trustees, must be named as parties in that capacity.

Most of the expenses for which the Intervenors seek reimbursement were paid by the prior Trustees. The Byrne and Jones Contractor's invoice for \$28,000.00 is dated January 2, 2002, and the Byrne and Jones invoice for \$3,200.00 is dated December 13, 2002. Int. Ex. 57. Obviously, the Trustees at that time believed both of these invoices were properly paid by the Trustees. Sealing the streets several years after they were constructed is certainly a maintenance item, not a construction item.

The Trustees are not parties and are not represented by the Intervenors. The Trustees paid the bills. The Trial Court award of \$35,875.00 to the Intervenors should be reversed.

### **Point Relied on VI**

**The Trial Court erred in ordering that the County and Intervenor are entitled to hold the Bonds to guarantee completion of the improvements and to pay from the Bonds the cost to the County to complete the subdivision improvements, including the County's costs to supervise the work, and to also pay Intervenor's costs in the amount of \$35,875.00 to repair the prematurely failing streets and all court costs, and that the Court assess attorney's fees against the Bonds, because the Court's order requires that the terms of the Bonds, and the County's Guarantee, be altered beyond their plain language, in that the Bonds and the Guarantee provide only that they will remain in effect to allow the surety to complete all of the required improvements in accordance with the plans, specifications and Subdivision Regulations.**

### **Standard of Review**

This case was tried to the Court without a jury. The judgment of the Trial Court will be sustained by the Appellate Court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. En Banc 1976); Shapiro Bros., Inc. v. Jones – Festus Prop., L.L.C., 205 S.W.3d 270, 273 (Mo. App. E.D. 2006).

## Argument

In its judgment, the Court ordered that the “. . . County and Intervenor are entitled to hold the Bonds to guarantee and to complete such improvements.” J. p. 32. The Court further ordered that the “. . . County is authorized to pay such costs (the following costs) out of the proceeds of the Bonds . . .” J. p. 33. The Court went on to list the costs which were to be paid by the County out of the Bonds as:

- (1) All of the costs of the County to complete the subdivision improvements, including County’s costs to supervise the work;
- (2) Intervenor’s costs for work performed in the amount of \$35,875.00 to repair the prematurely failing streets;
- (3) All court costs;
- (4) The Court will assess attorney’s fees upon application and notice.

J. p. 33.

As previously discussed in Point Relied on I, each of the Bonds simply provides that they will be for the installation and construction of the improvements as required by the Jefferson County Planning and Zoning Commission and the Subdivision Regulations. Pl. Tr. Ex. 1, 2, & 3. The Subdivision Regulations in effect when the Bonds were originally given provide for: “A completion bond guaranteeing performance of the subdivider/developer and construction and completion of the improvements in the

amount and within the time frame approved by the planning department.” Pl. Tr. Ex. 4, p. 31. The Subdivision Regulations amended as of April 30, 2002 provide: “If the developer does not complete all improvements, the Bank or Surety will cause such uncompleted improvements to be performed in accordance with the approved plans.” Pl. Tr. Ex. 5, p. 31.

Even the Guarantee does not provide that the County is entitled to “hold” the Bonds to guarantee completion. Instead, the Guarantee provides, in Paragraph 4, that “. . . the County may complete, or have completed, the said improvements and the Surety shall dispense on the land subdivision Bonds therefore as ordered and directed by the County.” Def. J.C. Ex. C.

“The surety is not to be held beyond the terms of its contract; it is bound by its agreement and nothing more.” Jerry Bennett Masonry, Inc. v. Crossland Constr. Co. Inc., 171 S.W.3d 81, 96 (Mo. App. S.D. 2005), State ex rel. S. Surety Co. v. Haid, 329 Mo. 1220, 49 S.W.2d 41, 42 (Mo. 1932). “[T]he obligation of the bond may not in the guise of construction be enlarged beyond the plain terms and stipulations, . . .” Frank Powell Lumber Co. v. Federal Ins. Co., 817 S.W.2d 648, 651 (Mo. App. S.D. 1991) citing Bolivar Reorganized School Dist. #1, Polk County v. Amer. Sur. Co. of NY, 307 S.W.2d 405, 409 (Mo. 1957). “In other words, a bond’s terms and conditions limit a surety’s liability.” Marcomb v. Hartford Fire Ins. Co. 931 S.W.2d 17, 19 (Mo. App. W.D. 1996).

As stated in Point Relied on I, the Court’s judgment goes beyond the terms of the Bonds, Guarantee Agreement and the Subdivision Regulations. The Court’s Judgment attempts to make a new agreement between Appellants, the County and the Intervenors.

Whether the old Subdivision Regulations, Pl. Tr. Ex. 4, or the new Subdivision Regulations, Pl. Tr. Ex. 5, are used, the County has adopted a procedure relating to the Bonds. In both, the Guarantee is to provide that the Surety will complete the subdivision improvements in accordance with the approved plans. But, the Guarantee goes beyond the authority of the Subdivision Regulations by purporting to allow the County to complete or have completed the improvements. Because the Guarantee goes beyond the Subdivision Regulations, the County is without authority to enforce this provision of the Guarantee. In any event, the County has not attempted to enforce the provision of the Guarantee because it has not completed or had completed the subdivision improvements. Even under the Guarantee, the Surety's only obligation is to disperse on the land subdivision Bonds in the event the County may complete or have completed the improvements. The County has not made a request to Federal for disbursement on the land subdivision Bonds to pay for its completion of any improvements.

All that being said, the Bonds themselves simply provide that they will remain in effect. The Bonds run to the County, and there is no provision for the County to "hold" the amounts of the Bonds. Certainly, there is no provision in the Bonds, the Guarantee, or in the Subdivision Regulations for the Intervenors to "hold" the Bonds.

Further, the Court's order is ambiguous, and cannot be implemented by the parties. The Bonds are to be "held" by the County and Intervenors to pay the costs to complete the subdivision improvements "...consistent with the County's and Intervenor's evidence of deficiencies and in accordance with the Subdivision Regulations and approved plans." J. p. 32. The Court does not specify what "deficiencies" it is

referencing. The Intervenors' evidence from Mr. Barczykowski is that there are 315 sections of concrete that need to be replaced. Tr. p. 344. Mr. Barczykowski admitted that in many cases only half sections or quarter sections need be replaced. Tr. pp. 322-23. Mr. Barczykowski further admitted that whether a section needs to be replaced is a subjective determination. Tr. pp. 310-11. Mr. Koehrer testified that there were 537 sections that needed to be replaced. Tr. p. 376. He admitted that half sections could be replaced. Tr. p. 424. He also admits that whether a panel, slab, or section needs to be replaced is subjective. Tr. p. 411. It is impossible to determine from the "evidence of deficiencies," what deficiencies must be remedied and what those remedies must be.

The County has made no attempt to comply with the provisions of the Bonds. On October 30, 2001, Mr. Koehrer sent a letter to Federal stating a claim on the Bonds. In. Ex. 48. This was more than five months after this lawsuit was filed on May 15, 2001. Legal File Ex. 1, Docket Sheet.

Certainly, neither the language of the Bonds, nor the Guarantee, nor the Subdivision Regulations, permits payment from the Bonds of attorney's fees, costs or reimbursement to the Intervenors. There is absolutely no language in any of these documents that would permit payment of these items. In Marcomb, the bond included an indemnity for "any loss." The Court determined that the term "loss" did not include attorney's fees. Here, there is not even the word "loss."

The judgment of the Trial Court permitting the County and Intervenors to "hold" the Bonds should be reversed because neither the County nor the Intervenors have complied with the terms of the Bonds, the Guarantee, nor the Subdivision Regulations.

Similarly, the award of \$35,875.00 of Intervenor's costs and court costs from the proceeds of the Bonds should be reversed.

The Court does not specifically order that attorney's fees will be paid from the Bonds. Its Judgment simply says that the Court will assess attorney's fees at a later time. The Judgment of December 26, 2006 makes no mention of paying attorney's fees from the Bonds. Since payment of any attorney's fees from the Bonds is inappropriate, any implication that attorney's fees should be paid from the Bonds should be reversed.

## CONCLUSION

Based upon the points relied on and the argument thereunder, Appellants, Essex Contracting, Inc. and Federal Insurance Company, request the following relief:

1. That the Trial Court's order that Essex and Federal pay the entire remainder of the Bonds in the amount of \$1,015,838.00 to the County be reversed.
2. That this Court order that the improvements in Winter Valley Subdivision are complete and that Essex and Federal be released from any further obligation to Jefferson County or the Intervenors, and that the Bonds be released and cancelled.
3. That the Judgment against Essex in the amount of \$102,174.65 for civil penalties for thin slabs be affirmed and that the Judgment in favor of Essex and against Third Party Defendant Berra in the amount of \$28,261.37 for civil penalties for thin slabs be affirmed, and, that the judgment in favor of Essex and against Third Party Defendant Boling in the amount of \$73,913.28 for civil penalties for thin slabs be affirmed.
4. That the order that Berra reimburse Essex \$6,468.92 for testing of the streets be affirmed and that the order that Boling pay to Essex \$6,040.72 for testing of the streets be affirmed.
5. That the amount of attorney's fees awarded to Intervenors be reduced to \$0.00.
6. That this Court enter judgment in favor of Essex and against Defendants Berra and Boling, jointly and severally, for all attorney's fees awarded in favor of Intervenors and against Essex.

7. That the judgment in favor of Intervenor in the amount of \$35,875.00 be reversed.

8 That the award of any Court costs or attorney's fees to be paid from the Bonds be reversed.

Intervenor's Application for Transfer to this Court is without merit. The transfer to this Court was improvidently granted, and the case should be retransferred to the Court of Appeals, Eastern District, for reinstatement of its decision, all in accordance with Mo. Sup. Ct. R. 83.09.

Respectfully submitted,

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