Survey of Construction Law Cases

Appellate Court Finds Error in Trial Court's Assessment of Sole Proximate Cause

In *Johnson v. Illinois State Toll Highway Authority*, the Illinois Appellate Court First District, in a Rule 23 Order, reversed the circuit court's allowance of summary judgment in favor of the Illinois State Toll Highway Authority and other entities on the issue of reasonable foreseeability, and that a driver's negligence was the sole proximate cause of an accident. The appeal stemmed from a single-vehicle accident involving a limousine. The accident occurred in an active construction zone on Interstate 90 after the limousine driver, Nash, missed a lane shift to the right, struck an orange construction barrel, and then an impact attenuator, causing the vehicle to overturn onto its roof, killing one passenger and causing injuries to the other passengers.

Despite the driver's clear negligence, plaintiffs filed amended complaints asserting two theories of negligence. The first was predicated on the alleged omission of warning signs; the second was based on the alleged omission of proper roadway barriers. Plaintiffs alleged that lack of lane shift warning signs caused Nash to miss the lane shift. Plaintiffs further alleged that the placement of the impact attenuator was one of the proximate causes of the accident.

The appellees argued that Nash's reckless driving was an intervening and superseding cause of the crash, which broke any causal connection between their alleged negligence and the accident. Not only was Nash recklessly speeding with the sun in his eyes at the time of the crash, but Nash did not possess a commercial driver's license to operate a limousine in Illinois. One of the passengers warned Nash he was going too fast and asked him to slow down.

While appellees also moved for summary judgment on other grounds, including lack of duty, the circuit court only heard argument on the issue of proximate cause. Following the hearing, the circuit court held that it was not reasonably foreseeable to the appellees that an underage, non-licensed driver, would be driving a limousine when he was not properly qualified to do so. Further, the court found it was not reasonably foreseeable that the driver would not be familiar with the basic principle that he had to slow down when the sun was in his eyes. The court further found that Nash was driving entirely too fast while he was tired, despite being warned by his passenger that he was going way too fast, and that he also ignored the visual cues to change lanes. Nash's intervening action was so beyond the ordinary expectation of drivers, that appellees could not have reasonably expected nor anticipated them.

On appeal, appellants claimed that evidence was presented concerning prior accidents at or near where the instant accident occurred. Appellants also presented testimony from their hired experts that had advanced warning signage been placed in advance of the lane shift, it would have provided Nash information to allow him to safely anticipate and negotiate the lane shift, even despite the sun in his eyes.

Appellees argued they could not have reasonably foreseen that Nash would miss the lane shift where he had successfully driven through it on three occasions prior to the accident and where the highway pavement was painted to indicate the lane shift. Appellees pointed out that Nash testified that on the day of the accident, he did not pay attention to the pavement markings and admitted that he would not have adjusted his driving speed if he had seen the sign indicating the speed limit. From this, appellees argued that it is speculative to assume that Nash would have observed and reacted to the lane shift sign if it had been posted on the roadway.

The appellate court held that the evidence raised by appellants created a reasonable inference that it was foreseeable that the absence of lane shift signs might cause a driver to miss a lane shift, creating a genuine issue of material fact that precluded summary judgment.

Johnson v. Ill. State Toll Highway Auth., 2024 IL App (1st) 210941-U.

With a Focus on Retained Control: Appellate Court Upholds Summary Judgment in Favor of General Contractor

In *Neisendorf v. Abbey Paving & Sealcoating, Company, Inc.*, the Illinois Appellate Court Second District affirmed summary judgment in favor of general contractor on the issue of sufficient retained control over a worksite, and absence of actual or constructive notice. The plaintiff, employee of subcontractor, was injured and filed suit against the defendant, general contractor, when a trench wall collapsed. He alleged defendant had a duty to exercise reasonable care in its control over the project and had a nondelegable duty to provide a safe workplace. Defendant moved for summary judgment arguing: (1) it owed no duty to plaintiff because it did not retain the requisite control of the details of the work, and (2) it had no actual or constructive notice of the alleged dangerous condition. The circuit court granted defendant's motion and found there was no evidence that defendant's contract with the county created an "automatic duty owed to plaintiff." The court found that it did not retain any control over the "incidental aspects" of plaintiff's work so as to give rise to a duty. In regard to the premises liability allegations, the court found that plaintiff's employer maintained responsibility for the trench work and that defendant did not have actual or constructive notice that the trench presented an unsafe condition.

On appeal, plaintiff argued the contract between the county and defendant showed that defendant owed a duty to plaintiff, defendant had the power to stop plaintiff from performing unsafe work, and defendant had sufficient control to invoke a duty to exercise its supervisory control under Restatement (Second) of Torts §414. The appellate court noted the contract between the county and defendant provided that defendant "shall be solely responsible for and have control over construction means, methods, techniques, sequences, and procedures, and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters." The appellate court rejected plaintiff's argument and found the contract before it did not grant defendant control over the operative details of plaintiff's employer's work and had only the general right to stop work. These were insufficient to grant it the requisite contractual control.

The appellate court next rejected plaintiff's argument that the fact that defendant could stop work was evidence of control under section 414 of the Restatement. According to the appellate court, the evidence was undisputed that the power over safety issues that defendant had over plaintiff's employer was only a general power.

Plaintiff also argued that defendant had actual or constructive notice of a dangerous condition such that it owed him a duty of care under section 343. Plaintiff claimed defendant possessed the land where he was injured and the blueprints gave it actual notice that the trench was over five feet deep and unsafe without shelving, shoring, or a trench box. The trial court found that defendant did not have actual notice that the trench presented an unsafe condition. The court noted that plaintiff's employer maintained responsibility for the trench work. Defendant was not consulted about use of a trench box, shoring, nor the shelving. The court stated that, even if defendant knew from blueprints or otherwise that the depth would be over five feet, there was no evidence that defendant knew that the trench was unsupported or unsecured or that shoring was required by law or contract.

The court noted that the time between digging out the trench and its collapse was less than one hour. Defendant's superintendent, the only representative of the general contractor on site on the day of the accident, arrived four minutes before the trench collapsed. The appellate court found that his presence at the site for such a limited period was not sufficient to create a material factual question concerning defendant's constructive notice of the dangerous condition.

The appellate court further concluded defendant had no constructive notice of anything unsafe with the trench. The court noted that the time between digging out the trench and its collapse was less than one hour. Defendant's superintendent, the only representative of the general contractor on site on the day of the accident, arrived four minutes before the trench collapsed. The appellate court found that his presence at the site for such a limited period was not sufficient to create a material factual question concerning defendant's constructive notice of the dangerous condition.

Neisendorf v. Abbey Paving & Sealcoating, Co., Inc., 2024 IL App (2d) 230209.

At Some Point All Things Must Come to an End, Including the Fight for Attorney Fees in Construction Contracts

In *Pepper Construction Company v. Palmolive Tower Condominiums, LLC*, the Illinois Appellate Court First District affirmed the trial court's award of attorney fees and costs to Bourbon Marble, Inc. (Bourbon), concluding over 15 years of litigation. The court declined to remand the case for further proceedings, emphasizing that "at some point, all things must come to an end." *Pepper*

— Continued on next page

Constr. Co. v. Palmolive Tower Condos., LLC, 2024 IL App (1st) 221319, ¶ 27.

In 2004, plaintiff Pepper Construction Company and Bourbon collaborated on the interior build-out of approximately 96 condominium units. Disputes arose, leading to arbitration in March 2007. The arbitration award was confirmed by the circuit court, and a global settlement agreement was reached, leaving only the issues between plaintiff and Bourbon. *Pepper Construction,* 2024 IL App (1st) 221319, ¶ 5. During the bench trial, plaintiff was awarded $36,312 in back charges. *Id.* On appeal, the appellate court partially reversed, partially affirmed, and remanded the case for further proceedings. *Id.* On remand, Bourbon filed claims against plaintiff for breach of contract and unjust enrichment. Following another bench trial, Bourbon prevailed on both claims. The trial court also awarded Bourbon attorneys' fees and costs. *Id.* ¶ 7. Another appeal ensued, during which the appellate court affirmed the trial court's judgment in Bourbon's favor on the breach of contract claim but reversed the judgment on the unjust enrichment claim. *Id.* The appellate court remanded the case to determine whether Bourbon was still the prevailing party after the reversal of the unjust enrichment claim. *Id.* On remand, the matter was fully briefed, with both plaintiff and Bourbon claiming to be the prevailing party; the trial court ultimately entered an order awarding Bourbon $3,605,880.33 in attorney fees and costs. *Id.* ¶ 9. Both parties appealed.

The issue on appeal was the trial court's award of attorney fees to Bourbon. Generally, each party is responsible for their own attorneys' fees. An exception exists when a contract stipulates that the prevailing party is entitled to reasonable attorneys' fees and costs, as was the case here.

The issue on appeal was the trial court's award of attorney fees to Bourbon. Generally, each party is responsible for their own attorneys' fees. An exception exists when a contract stipulates that the prevailing party is entitled to reasonable attorneys' fees and costs, as was the case here. *Id*. ¶ 20. The subcontract between plaintiff and Bourbon stated "in the event of any legal proceeding, arbitration or other form of dispute resolution procedure . . . between the parties . . . whether in contract or tort, the prevailing party shall be entitled . . . to attorneys' fees and costs." To determine whether a party is considered the prevailing party for the purposes of a fee award, the court determines if: (1) it succeeds on any significant issue in the action and achieves some benefit in bringing suit, or (2) it receives a judgment in its favor, or (3) it obtains affirmative recovery. *Id.* ¶ 22. Even if the party does not succeed on all matters of claims, a party may nevertheless be deemed the prevailing party. *Id.*

The trial court found that plaintiff did not win any significant issue in the case; plaintiff was awarded a fraction of what it had sought. *Id.* ¶ 10. The trial court noted that Bourbon's trial court and two appellate court victories were significant, specifically because Bourbon successfully limited plaintiff's trial court verdict. *Id.* ¶ 11. The trial court concluded that plaintiff breached the contract and failed to pay Bourbon what it was entitled to. *Id.* ¶ 13. The appellate court affirmed and declined to remand for further proceedings. Indicating that the trial court correctly exercised its discretion, specifically when it reviewed each specific time entry for reasonableness. *Id.* ¶ 26. The appellate court emphasized that both parties were fully aware of the additional costs and risks involved in pursuing the litigation for as long as they did.

Pepper Constr. Co. v. Palmolive Tower Condos., LLC, 2024 IL App (1st) 221319.

Keep Your Stories Straight—a Look into Oral Versus Written Contracts

In *Vanderplow v. Miller,* the Illinois Appellate Court Third District affirmed the trial court's dismissal of plaintiff's breach of oral contract claim based on judicial estoppel because plaintiff previously took the position in arbitration that a written contract with different terms controlled. The plaintiff, Cindy Vanderplow, brought an action in small claims court. The claim provided: "defendant built a non-compliant deck; for 9 months defendant has refused to make necessary repairs to bring deck in compliance with Village; and $4,800 due from defendant to bring deck compliant."

The small claims court ordered the parties to participate in non-binding arbitration. Pursuant to Illinois Supreme Court Rule 90(c), plaintiff submitted a packet of documentary evidence to the arbitration panel. Plaintiff's 90(c) packet contained July 6, 2019 *written* contract to build a deck. Further, the plaintiff testified to and regarding the written contract at the hearing. On March 23, 2021, the arbitration panel found in favor of plaintiff, awarding her $9,074 in damages. On April 21, 2021, defendant, who was represented by the same counsel throughout the proceedings below and on appeal, rejected the non-binding arbitration award.

The complaint stated that the parties entered into an *oral* contract to build a deck at plaintiff's primary residence in Roselle "in exchange for money." Plaintiff would "pay for all deck materials and labor" and defendant would "build a deck to the building code specifications as required by the Village of Roselle."

Plaintiff contended defendant's work was defective and did not comply with the local building code, citing several issues such as improperly sized piers, unsafe stairs, and warped decking. Although defendant verbally agreed to correct the issues, he did not follow through, prompting plaintiff to pursue legal action. Plaintiff argued she had a valid oral agreement with defendant, demonstrated by actions like purchasing materials and obtaining permits.

Defendant moved to dismiss the claims by claiming that the written contract signed by the parties on July 6th superseded any oral contract between the parties. Defendant argued that pursuant to the legal principle of judicial estoppel, plaintiff's claim was estopped.

The appellate court affirmed the trial court's ruling under judicial estoppel. Judicial estoppel is an affirmative matter avoiding the legal effect of or defeating a claim, and it is properly raised in a section 2-619(a)(9) motion to dismiss. Judicial estoppel is an equitable doctrine, aimed at protecting the judicial process by "prohibiting parties from deliberately changing positions according to the exigencies of the moment." *See Seymour v. Collins*, 2015 IL 118432, ¶ 36. The five "generally required" elements of judicial estoppel are: (1) the party to be estopped has taken two positions, (2) that are factually inconsistent, (3) in separate judicial or quasi-judicial administrative proceedings, (4) intending for the trier of fact to accept the truth of the facts alleged, and (5) succeeded in the first proceeding and received some benefit. If the five prerequisites are present, the court then exercises its discretion in deciding whether to apply judicial estoppel. In exercising this discretion, a "critical factor" is whether the party to be estopped intended to deceive the court or whether inadvertence or mistake may account for previous positions taken and facts asserted. *Vanderplow*, 2023 IL App (3d) 230004-U, ¶ 37.

The court reviewed the sufficiency of plaintiff's pleadings and the applicability of judicial estoppel. Ultimately, the appellate court upheld the trial court's dismissal finding that the plaintiff failed to establish the necessary elements of an enforceable oral contract and that her prior reliance on the written agreement in arbitration precluded her claims. The court also believed that plaintiff's oral explanation at the hearing was contradictory. Plaintiff appeared to argue that the terms set forth in the written contract were not followed, not that they were invalid.

Vanderplow v. Miller, 2023 IL App (3d) 230004-U.

Property Damage from Nine Years' Worth of Gradual Water Infiltration Not Caused by Sudden or Dangerous Event Under Economic Loss Doctrine

In *Delacourte Condominium Association v. Focus Development, Inc*., the Illinois Appellate Court First District affirmed the circuit court's dismissal of a third-party complaint based upon a tort claim in that the action was barred by the economic loss doctrine. The plaintiffs' claims for damage to "carpeting, floors, and draperies within [their] homes" were dismissed under the economic loss doctrine. The plaintiffs argued that their damages fell within the economic loss doctrine exception that requires sustained damage to other property caused by a sudden, dangerous, or calamitous occurrence.

The court held that the allegations of the complaint did not support the exception as the alleged damages were not caused by any sudden, dangerous, or calamitous event. Such an event is defined as a "sudden event, consistent with a tortious act" or an event that is "highly dangerous and presents a likelihood of personal injury or injury to other property." The plaintiffs' damages were caused, in part, by gradual water infiltration from normal precipitation over time that was not discovered for over nine years after the allegedly defective repairs were made.

The court ultimately concluded, "the infiltration of water over an extended period of time will generally not constitute a sudden or dangerous occurrence within the meaning of the economic loss doctrine."

Delacourte Condo. Ass'n v. Focus Dev., Inc., 2024 IL App (1st) 230162-U.

No Statutory Fraud when Contractor Acted in Good Faith in Abiding by Condo Board's Insurance and Licensing Requirements

In *Halabi v. Monarch Contract Builders, LLC*, the Illinois Appellate Court First District upheld the trial court's decision that defendant did not violate the Illinois Consumer Fraud and Deceptive Business Practices Act.

— Continued on next page

In this case, the plaintiff contracted with defendant to perform demolition and construction work on her bathroom and hallway. She paid defendant a down payment of $4,200. In fall 2019, the plaintiff's condo association did not approve the start of construction due to issues regarding defendant's insurance status and licensing. Plaintiff then cancelled the contract, and defendant returned $1,350 of the down payment. Defendant retained $2,850 of the down payment as compensation for time and expenses.

Plaintiff filed a five-count complaint. She alleged two counts of violations of the Home Repair and Remodeling Act, a violation of the Consumer Fraud and Deceptive Business Practices Act, common law fraudulent inducement, and common law breach of contract. After a bench trial, the plaintiff prevailed only on her breach of contract claim in that defendant's assessment of costs was excessive. The trial court awarded plaintiff $2,400 in damages and ordered that both parties should bear their own costs. Plaintiff appealed.

On appeal, plaintiff only contended that the court erred in finding that defendant did not violate a subsection of the Consumer Fraud and Deceptive Business Practices Act. The relevant court quoted the relevant section as follows:

> 'A person engaged in the business of home repair, as defined in Section 2(a)(1) of the Home Repair Fraud Act who fails or refuses to commence or complete work under a contract or an agreement for home repair, should return the down payment and any additional payments made by the consumer within 10 days after a written demand sent to him by certified mail by the consumer or the consumer's legal representative or any a law enforcement or consumer agency acting on behalf of the consumer.'

815 ILCS 505/2Q(c).

Plaintiff argued that defendant's failure to commence work in and of itself should be interpreted as a failure to complete work under the provision. The court noted that there is a nuanced interpretation of this section in that the party engaging in home repair must (1) breach the contract, (2) refuse to commence or complete work, and (3) fail to return the down payment. In this case, the appellate court ruled that the trial court appropriately determined that defendant's inability to procure the necessary credentials did not constitute a breach of contract. The work did not commence because defendant had not met the condo board's licensing and insurance requirements. Defendant made a good faith effort to provide all information to the association, and defendant's effort was only stymied because plaintiff cancelled the contract. Moreover, the trial court's determination was not against the manifest weight of the evidence.

The appellate court also noted that the record contained no transcript of the bench trial, nor was there a bystander's report. Plaintiff, as appellant, has a burden to present a sufficiently complete record of proceedings at trial to support a claim of error, citing *Foutch v. O'Bryant*, 99 Ill.2d 389, 381 (1984). Because the appellate court was unable to determine whether the trial court's findings were against the manifest weight of the evidence, there is a presumption that the trial court had a sufficient factual basis for its holdings, citing *Corral v. Mervis Industries, Inc.*, 217 Ill.2d 144, 157 (2005). Therefore, the appellate court affirmed the trial court's determination that defendant's failure to perform was not a breach of contract. Without a breach of contract, defendant did not violate that particular subsection of the Consumer Fraud and Deceptive Business Practices Act.

Halabi v. Monarch Contract Builders, LLC, 2024 IL App (1st) 231080-U.

Jury's Assessment of Comparative Fault Does Not Run Afoul of *Carney* and its Application on Retained Control

In *Harris v. Germantown Seamless Guttering, Inc.*, the Illinois Appellate Court Fifth District affirmed the pre-trial and trial rulings of the circuit court and judgment entered on the jury verdict finding plaintiff contributorily negligent. The plaintiff, Stephen Harris, owned API, Inc., the general contractor for a construction project on plaintiff's home. Plaintiff was injured when a tube of gutter sealant fell from the roof and hit him in the eye. The defendant, Germantown Seamless Guttering, was the subcontractor responsible for the gutter installation. Plaintiff's lawsuit alleged that defendant was negligent in failing to keep proper control to secure the tube, failing to warn, and failing to barricade the area.

Defendant filed an answer and asserted affirmative defenses of comparative fault. Defendant asserted three bases to support its affirmative defense: plaintiff's failure to take reasonable precautions to protect himself from injury; walking under an area where he knew or should have known the defendant was working; and his failure to barricade or cordon off the area where defendant worked.

At trial, plaintiff's motion for directed verdict was denied and the jury returned a verdict in plaintiff's favor but assessed 45% comparative fault against plaintiff. Plaintiff moved to set aside the verdict and sought a new trial. Plaintiff argued he was entitled to a new trial because he was "only" an employee of the general contractor and therefore was not contributorily negligent. He also argued that, even if he was the general contractor, per *Carney v. Union Pacific Rail-*

Regardless of duties imposed on a general contractor, the court noted "when plaintiff walked out of the house and moved from beneath the safety of any support above his head, he had a duty to protect himself." Under these facts, the court could not find that the jury's assessment of comparative fault was against the manifest weight of the evidence.

road Company, 2016 IL 118984, he was not contributorily negligent because "one who employs an independent contractor is not liable for the harm caused by the latter's acts or omissions." Per plaintiff, the fact that API maintained the contractual right to oversee safety is insufficient to rise to the level of "retained control" over defendant.

In affirming the verdict, the Fifth District acknowledged the holding in *Carney* on the issue of retained control and the RESTATEMENT (SECOND) OF TORTS §414, but noted that the theory of "vicarious liability" discussed in *Carney* only addressed one of the three theories posited for plaintiff's negligence. *Carney* only speaks to the theory directed to plaintiff's failure to barricade or cordon off the area under which the defendant worked. The other affirmative defenses of plaintiff's failure to take reasonable precautions to protect himself from injury and his act of walking in an area where he knew, or should have known, defendant was working are not dependent on his status as a general contractor.

The *Harris* court reaffirmed the notion that "the determination of what conduct is negligent or contributorily negligent is the composite of the experience of average people, and is left to the jury for evaluation." Here, plaintiff admitted he was onsite on the date of the occurrence as a contractor and had "years" of construction experience. He admitted he hired the defendant and, per the contract, plaintiff had authority to inspect defendant's work and instruct defendant to do its work in a "safer" manner. Plaintiff admitted he saw defendant's trucks when he pulled into the site, saw people working on the roof when he walked toward the house, and the presence of a ladder extending to the ground.

Regardless of duties imposed on a general contractor, the court noted "when plaintiff walked out of the house and moved from beneath the safety of any support above his head, he had a duty to protect himself." Under these facts, the court could not find that the jury's assessment of comparative fault was against the manifest weight of the evidence.

Harris maintains the precedent of *Carney* and identified other bases for contributory negligence independent of the duties imposed on a general contractor and, as such, is consistent with longstanding Illinois precedent.

Harris v. Germantown Seamless Guttering, Inc., 2023 IL App (5th) 220463-U.

Subcontractor Only Entitled to Interest on Payment Bond Claim for Period between Arbitrator's Interim Award and Final Award, and Not Entitled to Additional Attorney's Fee Award due to General Contractor Not Violating Bond Terms

In *Concrete Structures/Sachi, J.V. v. Clark/Bulley/OVC/Power*, the Illinois Appellate Court First District affirmed the award of an arbitration panel on damages, and affirmed the circuit court's award of prejudgment interest based upon certain bond conditions, but also affirmed the circuit court's denial of prejudgment interest and attorneys' fees under section 23 of the Mechanics Lien Act, under section 2 of the Interest Act, and under section 2 of the Public Construction Bond Act.

The plaintiff, Concrete Structures/Sachi, J.V. (Concrete Structures) performed concrete work on a 41-story hotel project for general contractor, Clark/Bulley/OVC/Power (CBOP). When CBOP did not pay Concrete Structures for its work, Concrete Structures filed a bond claim and a mechanics lien in the amount of $9,247,203 against the hotel project, MPEA (owner), PD3 (designer), and CBOP, pursuant to section 23 of the Mechanics Lien Act. In October 2017, Concrete Structures also filed a complaint with the following counts: count I requested an accounting; count II alleged a breach of contract claim against CBOP; count III asserted a bond claim against Concrete Structures' insurers; and, count IV alleged an unjust enrichment claim against MPEA, PD3, CBOP, and those parties' joint venture partners.

The circuit court granted CBOP's motion to compel arbitration on counts II and IV and stayed counts I and III pending arbitration. On June 19, 2019, the arbitration panel issued Concrete Structures an interim award of $10,629,741, which included the outstanding balance, $6,448,344 in labor productivity damages and compensa-

— Continued on next page

tory damages for extended project hours and other delays. In its final arbitration decision on September 20, 2019, the panel reiterated its prior interim award and further awarded Concrete Structures $27,026.75 in attorney fees (reasoning that CBOP's insurance carrier had already paid most of Concrete Structures' attorney fees) and 5% prejudgment interest for the period of time between the issuance of the interim award and the final award. The final award amounted to $10,656,767.75 plus five percent interest.

On December 20, 2019, the circuit court granted Concrete Structures' motion to confirm the arbitration award, and CBOP paid Concrete Structures the arbitration award in full. Concrete Structures, CBOP, and MPEA then filed cross-motions for summary judgment on counts I (accounting pursuant to section 23 of the Mechanics Lien Act) and III (payment bond claim against Concrete Structures' sureties). The court denied Concrete Structures' motion for summary judgment, granted CBOP's and MPEA's cross-motions for summary judgment, and denied any further prejudgment interest and attorney fees owed to Concrete Structures. Concrete Structures appealed the circuit court's grant of summary judgment as to count III only.

On appeal, Concrete Structures argued that section 2 of the Interest Act allowed it to recover prejudgment interest from the date it filed the lawsuit (October 13, 2017) to when the circuit court confirmed the arbitration panel's final award (December 20, 2019), rather than just the period between the panel's interim and final awards. Defendants argued that prejudgment interest began to accrue when money became due under the bond, which did not occur, at the earliest, until the panel's interim award on June 19, 2019.

The appellate court reviewed the following relevant bond language:

> § 7 When a Claimant has satisfied [certain procedures], the Surety shall promptly and at the Surety's expense take the following actions:
>
> § 7.1 Send an answer to the Claimant, with a copy to the Owner, within sixty (60) days after receipt of the Claim, stating the amounts that are undisputed and the basis for challenging any amounts that are disputed; and
>
> § 7.2 Pay or arrange for payment of any undisputed amounts.

The appellate court found that the plain language of section 7.2 of the bond conditions stated that the sureties' payment obligations were limited to undisputed amounts. Accordingly, the existence of undisputed amounts triggered the sureties' obligations, and that was also the time prejudgment interest began accruing. The appellate court affirmed the circuit court's summary judgment ruling that prejudgment interest began on June 19, 2019, when the arbitration panel resolved the dispute and issued its interim award in Concrete Structures' favor.

On appeal, Concrete Structures also argued that the plain language of the bond required an award of additional attorney fees. Defendants contended that the bond allows attorney fees only if PD3 and the sureties had violated the bond's terms. The appellate court found that the defendants did not breach section 7.1 nor section 7.2 of the bond. Additionally, once the arbitration panel resolved the dispute as to the amount owed, CBOP promptly paid Concrete Structures. For these reasons, the appellate court found that the defendants did not owe Concrete Structures any additional attorney fees under the bond, and affirmed the circuit court's summary judgment ruling that Concrete Structures was not entitled to any additional attorney fees.

Concrete Structures/Sachi, J.V. v. Clark/Bulley/OVC/Power, 2024 IL App (1st) 240082.

About the Authors

Amy Doig is an attorney in *Cozen O'Connor's* Commercial Litigation Department. She represents architects and engineers in litigated matters often concerning disputes such as breach of contract, property damage, personal injury, design defects, construction defects, construction management, and design professional's work. Ms. Doig also practices in the area of insurance coverage with a concentration on errors and omissions, directors and officers, property and general liability insurance policies.

Katie A. Fulara Vinge is a partner at *HeplerBroom LLC* in its Chicago, Illinois office. Her practice focuses on defense of multi-party commercial construction litigation involving construction injury, construction defects, risk transfer and construction contracts. She is licensed in Illinois and is an IDC Construction Law Committee member. She earned her B.A. from The University of Iowa and earned her J.D. from University of Illinois Chicago School of Law.

Sarah B. Jansen is an associate at *HeplerBroom LLC* in Crystal Lake, Illinois. She primarily focuses her practice in the areas of construction contract, commercial general liability coverage and risk transfer, as well as construction litigation, and complex civil and commercial litigation. Ms. Jansen earned her B.A. from Illinois

Wesleyan University and her J.D. from Notre Dame Law School, *cum laude*. She is admitted to practice in the states of Illinois and Wisconsin, the United States Supreme Court, the U.S. Court of Appeals for the 7th Circuit, and U.S. District Courts for the Northern District of Illinois and Eastern District of Wisconsin. Ms. Jansen is a member of the Illinois Defense Counsel and serves on the Construction Law Committee.

Jamie M. Rein is a partner at *HeplerBroom LLC* in Crystal Lake, Illinois. She primarily focuses on her practice in the areas of construction contract and risk transfer, construction litigation, complex civil and commercial litigation, commercial general liability coverage, municipal and government law as well as commercial and residential real estate. She earned her B.A. from Illinois State University and earned her juris doctorate from John Marshall Law School. She has been admitted to practice in the State of Illinois, State of Illinois Supreme Court, and U.S. District Court, Northern District of Illinois. Ms. Rein is an active member of the Illinois Defense Counsel and the McHenry County Bar Association.

Sagar P. Thakkar concentrates his practice in civil and commercial litigation matters. Mr. Thakkar represents individuals and corporate clients in a broad range of civil complex commercial litigation including contract disputes, labor/employment disputes, landlord/tenant disputes, construction negligence and insurance coverage disputes, torts litigation, and construction law. Throughout his career, he has represented clients in civil litigation matters from inception through post-judgment enforcement. He earned his B.S. in political science and economics from the University of Illinois at Chicago, and his J.D. with from IIT – Chicago-Kent College of Law.

Stephanie W. Weiner is a partner at *HeplerBroom LLC* in its Chicago and Crystal Lake, Illinois offices. Her practice focuses on defense of complex, multi-party commercial construction litigation involving construction injury, construction defects, automobile and trucking litigation, insurance litigation, risk transfer, construction contract, risk management, and general liability coverage issues. She earned her B.S., with honors, from University of Illinois, Urbana-Champaign and earned her J.D. from Loyola University, Chicago. She is admitted to practice in Illinois and Wisconsin. Ms. Weiner is an active member of the Illinois Defense Counsel and IDC Construction Law Committee member.

Holly C. Whitlock-Glave is a professor in the Legal Studies Department at College of Lake County and licensed attorney in Illinois. Prior to teaching, Holly's legal practice focused primarily on complex civil litigation, representing a wide variety of international and national companies in state and federal courts across Illinois. In addition to her academic and legal work, she serves on the IDC's Board of Directors and as managing editor of the IDC's *Survey of Law* annual publication. In IDC, she has served as an author, speaker and chair of the construction law committee, as well as received the IDC's Volunteer of the Year award in 2018. She also received a Best Lawyers – Ones to Watch in America designation in 2022.

Kevin H. Young is an associate attorney in Chicago office of *Cassiday Schade LLP*. Mr. Young focuses his practice on a wide range of civil litigation defense and has extensive experience handling transportation and construction matters. Prior to joining Cassiday Schade, Mr. Young worked as an attorney where he honed his litigation skills in the areas of premises and products liability. Mr. Young earned his J.D. from Loyola University School of Law and is a member of the Illinois bar.

CONSTRUCTION LAW COMMITTEE

Hillary L. Weigle, Chair
Hinshaw & Culbertson, LLP
HWeigle@hinshawlaw.com
312-704-3014

Katie A. Fulara Vinge, Vice Chair
HeplerBroom LLC
katie.fularavinge@heplerbroom.com
312-205-7724

MEMBERS

Denise Baker-Seal | *Brown & James, P.C.*
C. William Busse | *Busse & Busse, P.C.*
R. Mark Cosimini | *Rusin Law, Ltd.*
Amy Doig | *Cozen O'Connor*
Donald Patrick Eckler | *Freeman, Mathis & Gary, LLP*
Michael Hallock | *McCoy Leavitt Laskey LLC*
Kasia Nowak | *Gordon Rees Scully Mansukhani LLP*
Jamie M. Rein | *HeplerBroom LLC*
Bruce H. Schoumacher | *Querrey & Harrow, Ltd*
Bradley J. Smith | *Keefe, Campbell, Biery & Associates, LLC*
Sagar P. Thakkar | *Rock, Fusco & Connelly, LLC*
John F. Watson | *Craig & Craig, LLC*
Stephanie W. Weiner | *HeplerBroom LLC*
Holly C. Whitlock-Glave | *College of Lake County*
Kevin H. Young | *Cassiday Schade LLP*