

CONSTRUCTION LEGAL EDGE

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AAA SEEKS TO CONTAIN THE TIME AND COST OF ARBITRATING CONSTRUCTION DISPUTES

In an effort to render more predictable the time and cost of arbitration construction disputes, the American Arbitration Association (the "AAA") released its Supplementary Rules of Fixed Time and Cost Arbitration. These new optional rules will allow parties to calculate the maximum time to complete the arbitration, the number of hearing days, and the arbitrator costs. A single arbitrator shall be appointed regardless of the amount in controversy. The time allowed and maximum fees depend upon the amount in controversy. For example, if there are multiple claims, the amount of the larger claim or counterclaim determines the maximum duration, the maximum number of hearing days and the maximum costs for arbitrator compensation and AAA administrative fees. If the largest claim or counterclaim is \$300,000, arbitration must be completed within 180 days, there shall be a maximum of three hearing days, and the single arbitrator can charge no more than \$275.00 per hour for hearing and study time – with study time capped at 12 hours.

Placing limits on cost and time is a departure from existing practice which allows arbitrators to set their own hourly rates, and the time to completion is sometimes unnecessarily extended by one of the parties. In addition, AAA administrative fees are typically based upon the total amount of the claims or counterclaims and not capped based upon the amount of the largest claim or counterclaim. Use of the Supplement is most appropriate for cases with discrete issues that would benefit from limited document exchange and discovery. The Supplementary Rules envision the parties and their representatives working in a collaborative manner to move cases along within the required timeframes.

The Supplementary Rules were promulgated by the AAA in conjunction with the National Construction Dispute Resolution Committee (the “NCDRC”). The NCDRC was founded in 1966 by the AAA, in cooperation with the American Institute of Architects and other industry trade and professional associations.

Some of the key features of the Supplementary Rules are as follows:

SR-1 Two-party limitation – This limitation shall not apply to a surety that (a) is represented by the same counsel as its principal, and (b) has not asserted in the arbitration an independent claim against either its principal or the other named party.

SR-1 Complementing rules – The Supplementary Rules complement the AAA’s Construction Rules and Mediation Procedures (often referred to as the “Construction Industry Arbitration Rules”), and both sets of rules will apply to disputes arising out of contracts or agreements providing for arbitration under the Supplementary Rules.

SR-1 Exclusive administration – The AAA requires that arbitrations administered under these rules be exclusively administered by the AAA and that all arbitrators appointed to such arbitrations, including any arbitrator appointed by the parties, be members of the AAA’s National Roster of Construction Neutrals.

SR-5 Limitation of Length of Filings - A demand for arbitration must include a succinct statement of claim, limited to five pages in length. The Respondent’s Answer and Counterclaim, if any, is also limited to five pages in length.

SR-11 Mandatory Meet and Confer Conference – Parties and their representatives are expected to collaboratively determine the selection of the arbitrator, the number of hearing days allocated to each party and the extent of discovery or document exchange.

A copy of the Supplementary Procedures is available on the AAA website – www.adr.org.

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ARCHITECTURAL COPYRIGHTS RECEIVE SAME TREATMENT AS OTHER COPYRIGHTS

Copyrights traditionally serve to protect works of authorship, such as writings, music, and works of art that have been tangibly expressed. Authors are granted this limited protection, which is rooted in Article I, Section 8 of the United States Constitution, in order to encourage the creation of original works. An author who receives copyright protection enjoys the sole right to reproduce, adapt, distribute and display the work. This limited property right also gives the author a valid cause of action whenever an unauthorized party wrongfully copies

the protected work. Until recently, however, this right has not been consistently applied to architectural works.

In *Zalewski v. Cicero Builder Dev., Inc.*, Case No. 12-34488 (2d Cir., June 5, 2014), the United States Court of Appeals for the Second Circuit laid out the proper framework for assessing copyright infringement of a work of architecture. The Court held that architectural copyrights should be treated no differently than other copyrights and therefore should be evaluated based upon whether the protected – i.e. original – aspects of an architect’s design had been wrongfully copied.

The plaintiff-appellant, James Zalewski, was an architect who brought suit against several builders to whom Zalewski had previously licensed his designs for colonial homes. Zalewski claimed that the builders continued to use his designs after their licenses had expired and this conduct infringed his copyright. The district court granted summary judgment in favor of the builders, holding that the builders had copied only the unprotected aspects of Zalewski’s designs.

The Court of Appeals for the Second Circuit upheld the district court’s ruling, but in doing so, made clear that copyright infringement claims involving architectural designs should be evaluated using the same criteria as other copyright infringement claims. Therefore, an architect plaintiff must still prove that his work is protected by a valid copyright, the defendant copied the work, and the copying was wrongful. Moreover, with respect to wrongful copying, the well-established copyright doctrines of merger, public domain and scenes-a-faire apply in order to differentiate those aspects of a design that are original from those that are in the public domain.

Notably, the Second Circuit rejected the rationale used by the Court of Appeals for the Eleventh Circuit in a similar case. The Eleventh Circuit had reasoned that architectural works are compiled from many different elements that would not ordinarily receive copyright protection, and, therefore, should receive only a “thin” copyright based upon their “arrangement and coordination” of unoriginal elements. The Second Circuit rejected this narrow categorization of architectural works and noted that although all architectural designs contain some common elements, many also present something “entirely new.” Thus, when adjudicating a case involving an architectural design, a court must ultimately “determine what originated with the author and what did not.” As a result, an architectural copyright will receive greater protection under the Second Circuit’s framework.



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HOW CRITICAL IS THE CRITICAL PATH?

A CONSIDERATION OF THE LEGAL SYSTEM'S VIEWS ON SCHEDULING EXPERTS' METHODOLOGY

I. Background

In the fast paced world of construction, anyone in the industry knows that things do not always go according to plan. Invariably, the schedule for construction will be changed, modified, halted, accelerated, and ignored, and sometimes all of these things will happen at once. If, and when, a construction project is delayed, one of the first steps for an owner, general contractor, or project manager is to determine which, if any, contractor is responsible for the delay. Sometimes the delay may be caused by weather, unforeseen ground conditions, defective materials, or inefficiencies by a contractor, among other possibilities. If the contractor who is claimed to have delayed the project and the general contractor or owner are unable to agree on fault or damages (or more than likely both) litigation is a likely next step.

Having an idea or “judgment” as to the cause of delay on a construction project is one thing; being able to prove the cause of delay in court is another. In most cases, a plaintiff will be required to hire a scheduling expert to prove the cause of delay, the duration of the delay, the impact on the project as a whole due to the delay, and the damages caused by the delay. A scheduling expert is usually a project manager or engineer with experience with forensic scheduling analysis of delays on construction project. Scheduling experts use a variety methods to prove the plaintiff's case and most methodologies are extremely technical, mathematical, and complicated.

This article does not address the qualifications of the scheduling expert, only the methodology they employ. As will be shown below, courts have difficulty interpreting a scheduling expert's methodology and opinion. From a defense standpoint, it is important to recognize what methodologies courts consistently find to be reliable or unreliable to know under what circumstances a challenge to an expert's report can be made. And, of course, this knowledge will also help any attorney advise their own clients and experts on what methodology to employ and what considerations to take into account on current and future construction projects.

II. How a Scheduling Expert's Methodology Plays into the Legal System – The Daubert Standard

The admission of expert testimony in federal court is specifically governed by Federal Rule of Evidence 702 and the principles announced in *Daubert v. Merrell Dow Pharm., Inc.*,

509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) (although many states have also adopted the standard). Rule 702 of the Federal Rules of Evidence provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Under this Rule, the district court has a critical "gatekeeping" function under which it must "conduct an exacting analysis of the foundations of expert opinions to ensure they meet the standards for admissibility." See *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004). The gatekeeping role is "especially significant since the expert's opinion 'can be both powerful and quite misleading because of the difficulty in evaluating it.'" *Id.* (quoting *Daubert*, 509 U.S. at 595). An expert's "knowledge" "connotes more than subject belief or unsupported speculation." *Daubert*, 509 U.S. at 590.

The trial court must apply a "rigorous three-part inquiry" to determine whether:

- (1) the expert is qualified to testify competently regarding the matters he intends to address;
- (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*;
- and (3) the testimony assists the trier of fact, through the application of scientific, technical or specialized expertise, to understand the evidence or to determine a fact in issue.

Frazier, 387 F.3d at 1260 (quoting *City of Tuscaloosa v. Harco Chem., Inc.*, 158 F.3d 548, 562 (11th Cir. 1998)). "While there is inevitably some overlap among the basic requirements-qualification, reliability, and helpfulness-they remain distinct concepts and the courts must take care not to conflate them." *Frazier*, 387 F.3d at 1260. The trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. *Daubert*, 509 U.S. at 589.

Although experts commonly extrapolate from existing data, district courts are not required to admit opinion evidence that is connected to existing data only by the *ipse dixit* (because I said so) of the expert. See *Hendrix v. Evenflo Co., Inc.*, 609 F.3d 1183, 1194 (11th Cir. 2010). The burden is on the proponent of expert testimony to prove its admissibility under Federal Rule of Evidence 702. *Cook ex rel. Estate of Tessier v. Sheriff of Monroe Cnty., Fla.*, 402 F.3d 1092, 1107 (11th Cir. 2005) (stating that "the proponent of the expert testimony

carries a substantial burden under Rule 702”); *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004) (“The burden of establishing qualification, reliability, and helpfulness rests on the proponent of the expert opinion....”); *U.S. ex rel. Duncan Pipeline, Inc. v. Walbridge Aldinger Co.*, CV411-092, 2013 WL 1338392 (S.D. Ga. Mar. 29, 2013) (“The burden of establishing that these requirements are met rests with the proponent of the expert testimony, and not the Daubert challenger.”) citing *McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253, 1257 (11th Cir. 2002). Further, the admissibility of expert testimony must be proved by the proponent by a preponderance of the evidence. *Cook*, 402 F.3d at 1107.

Daubert’s reliability prong sets out four guideposts for a district court to consider in assessing the reliability of the expert testimony: (1) whether the expert’s methodology has been tested or is capable of being tested; (2) whether the technique has been subjected to peer review and publication; (3) the known and potential error rate of the methodology; and (4) whether the technique has been generally accepted in the proper scientific community. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149-50 (1999); *Hendrix*, 609 F.3d at 1194; *McDowell v. Brown*, 392 F.3d 1283, 1298 (11th Cir. 2004); *Hall v. Thomas*, 753 F. Supp. 2d 1113, 1129 (N.D. Ala. 2010). A court should meticulously focus on the expert’s principles and methodology, and not on the conclusions that they generate. See *Kumho Tire Co.*, *supra*. Courts may conclude that there is simply too great an analytical gap between the data and the opinion proffered. *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1315 (11th Cir. 1999) (internal citations omitted).

With these standards in mind, courts have been presented with the rigorous task of determining if a scheduling expert’s methodology is sufficiently reliable to be admitted into evidence. Many courts have found, or at least suggested, that a critical path analysis is a necessary prerequisite to the finding that an expert’s methodology is reliable.

III. What is the Critical Path

One of the most common methods of scheduling a construction project is called the Critical Path Method. As will be shown further, the critical path method is also a common methodology utilized by scheduling experts in litigation.

The CPM (Critical Path Method) scheduling technique is one which requires a breakdown of the entire work into individual tasks and an analysis of the number of days required to perform each task. The analysis is then programed into a computer which produces a chart showing the tasks and a line which controls the completion of the over-all work. The line through the nodes, the junction points for completion of essential tasks, is known as the critical path.

Appeal of Cont'l Consol. Corp., ENGBCA No. 2743, 67-2 B.C.A. (CCH) ¶ 6624 (Sept. 27, 1967).

[T]he critical path method is an efficient way of organizing and scheduling a complex project which consists of numerous interrelated separate small projects. Each subproject is identified and classified as to the duration and precedence of the work. (E.g., one could not carpet an area until the flooring is down and the flooring cannot be completed until the underlying electrical and telephone conduits are installed.) The data is then analyzed, usually by computer, to determine the most efficient schedule for the entire project. Many subprojects may be performed at any time within a given period without any effect on the completion of the entire project. However, some items of work are given no leeway and must be performed on schedule; otherwise, the entire project will be delayed. These latter items of work are on the critical path. A delay, or acceleration, of work along the critical path will affect the entire project.

Fireman's Fund Ins. Co. v. United States, 92 Fed. Cl. 598, 666 (Fed. Cl. 2010)(internal citations omitted); Morrison Knudsen Corp., v. Fireman's Fund Ins. Co., 175 F.3d 1221 (10th Cir. 1999) ("Critical Path Methodology' (CPM) is a term of art for a method of scheduling and administrating construction contracts. . . . CPM enables contractors performing complex projects to identify a critical path of tasks that must each be completed before work on other tasks can proceed.").

IV. Viewpoint From the Bench on Critical Path Methodology

CPM is so entrenched in the construction industry as to be a de facto analytical requirement and the failure to submit a CPM analysis with a delay claim may be grounds for the trier of fact to disregard expert testimony. 1 No. 1 Journal of the American College of Construction Lawyers 7; Morrison Knudsen Corp., 175 F.3d at 1221 ("CPM provides a useful, well-developed nomenclature and analytic framework for expert testimony. While CPM has generated a technical terminology, the legal requirement that it is used to analyze is general and commonsensical: a contractor must prove that a delay affected not just an isolated part of a project, but its overall completion.").

Taking into account the critical path is especially crucial because only work that delays the critical path is subject to recovery for damages. Fireman's Fund Ins. Co., 92 Fed. Cl. at 666; Wilner v. United States, 26 Cl. Ct. 260, 274 (1992) aff'd, 994 F.2d 783 (Fed. Cir. 1993) on reh'g, 24 F.3d 1397 (Fed. Cir. 1994) and vacated, on other grounds 24 F.3d 1397 (Fed. Cir. 1994) ("An ex post facto determination of the critical path is crucial to the calculation of delay damages in that only construction work on the critical path had an impact upon the time in which the project was completed.") (internal citations omitted); G.M. Shupe,

Inc. v. United States, 5 Cl. Ct. 662, 728 (1984) (“The reason that the determination of the critical path is crucial to the calculation of delay damages is that only construction work on the critical path had an impact upon the time in which the project was completed.”); see also Appeals of Santa Fe Engineers, Inc., ASBCA No. 28687, 94-2 B.C.A. (CCH) ¶ 26872 (Apr. 7, 1994) (stating that the court was unable to accept the delay’s expert’s opinion as reliable because of the expert’s decision to use an as-built analysis in lieu of a critical path analysis); Mega Const. Co., Inc. v. United States, 29 Fed. Cl. 396, 426-28 (Fed. Cl. 1993) (noting the importance of referencing the original project plan with the critical path because “one must have a starting point and the contractor’s original intent in order to show how and when the contractor intended to perform each phase of the work”).

Another crucial consideration when considering competing methodologies is whether or not the employed methodology eliminates the possibility of multiple delays occurring simultaneously. A common defense to delay claims is that there were concurrent delays to the project and the claimed delay cannot be untangled from the other concurrent delays. As such, the plaintiff cannot prove causation and damages. *Wilner v. United States*, 26 Cl. Ct. 260, 274 (1992) *aff’d*, 994 F.2d 783 (Fed. Cir. 1993) *on reh’g*, 24 F.3d 1397 (Fed. Cir. 1994) and vacated, *on other grounds* 24 F.3d 1397 (Fed. Cir. 1994) (“Without a critical path analysis, the court cannot exclude the possibility that the contractor caused concurrent delay on the project.”); *George Sollitt Const. Co. v. United States*, 64 Fed. Cl. 229, 241 (Fed. Cl. 2005) (“To recover for the delayed completion of the project, not only must plaintiff disentangle its delays from those allegedly caused by the government, but the delays must have affected activities on the critical path.”)(internal citations omitted); *Fireman’s Fund Ins. Co.*, 92 Fed. Cl. at 673 (“The expert’s analysis does not correct reflect the overall progress and interrelationships of the Project activities as it temporally links as critical the activities for which plaintiffs seek compensation, while discounting the impact of activities that occurred simultaneously or concurrently and that ran through the Project to its substantial completion.”); Bruner and O’Connor on Construction Law § 15:67 (“Because the party seeking damages for delay must prove that delay to the critical path would not have occurred but for an event within the control of the other party, proof of a concurrent cause of delay outside of the other party’s control precludes the recovery of damages.”).

Furthermore, courts have consistently discounted the use of alternative forensic scheduling methodologies. *Manuel Bros., Inc. v. United States*, 55 Fed. Cl. 8, 53 (Fed. Cl. 2002) *aff’d*, 95 F. App’x 344 (Fed. Cir. 2004) (The mere allegation that delays caused work to be disrupted or performed out of sequence, or caused costs to be increased, will not satisfy plaintiff’s burden of proof) (internal citations omitted); *Morganti Nat., Inc. v. United States*, 49 Fed. Cl. 110, 134 (Fed. Cl. 2001) *aff’d*, 36 F. App’x 452 (Fed. Cir. 2002) (finding that the expert’s total time approach which “simply takes the original and extended completion dates, computes therefrom the intervening time or overrun, points to a host of individual

delay incidents for which defendant was allegedly responsible and which ‘contributed’ to the overall extended time, and then leaps to the conclusion that the entire overrun time was attributable to defendant” is of no value). However, it has been noted that a critical path analysis is not necessary where the cause of delay is clear. See *David Hill Dev’t, LLC, v. City of Forest Grove*, No. 3:08-cv-266-AC, 2012 WL 5381555 (Oct. 30, 2012). However, on most large construction project, things are rarely clear.

V. Scheduling Requires Early and Frequent Analysis

While courts rely on after-the-fact analysis in litigation, the scheduling analysis during the project is as, if not more, important for success in a delay claim. It should go without saying that an expert cannot after the project is over utilize a critical path methodology to calculate delay damages if a proper scheduling was not in place during the project itself. Several courts have noted the importance of employing sound scheduling techniques during the construction project and how doing so translates to an expert’s ability to perform a proper forensic scheduling analysis after the fact.

For example, in *United States v. Metric Constr. Co., Inc.*, No. 02-1398JB, 2007 WL 1302606 (D. New Mex. Mar. 1, 2007) (applying California and federal law to issue of apportioning liquidated damages for delay), a subcontractor, Belt Con Constr., Inc., sued Metric for failure to pay related to its work on the construction of dormitories and physical training and security buildings in Artesia, New Mexico. *Id.* at *1. Metric alleged and counterclaimed that Belt Con was the cause of significant delay damages, including liquidated damages imposed by the General Services Administration (“GSA”) for delay. *Id.* After a bench trial, Metric filed a motion to alter or amend, asking the court to amend its decision regarding causation of the delay, as well as some scrivener’s errors.

The court, in considering who did what to whom, and whether it mattered, specifically noted, “[a] major problem with the project was the lack of good scheduling.” *Id.* at *3. The court also repeatedly referenced the bad schedules as a hindrance to its decision, as well. See, e.g., *id.* at *3 (“This problem was also a difficulty for the Court trying to create a benchmark for all the parties.”), *4 (“Accordingly, not only was scheduling a problem for other subcontractors, the revised schedules were of minimal assistance to the Court in determining whether there were other delays, how long the additional delays lasted, and to whom the additional delays were attributable.”). Further, “One of the great hurdles for this project was the lack of good, reliable schedules.” *Id.* For example, Metric was required to submit updated schedules. Of the nineteen updated schedules submitted to the GSA by Metric, not one was accepted. *Id.* At trial, the court concluded “that Metric, as the contractor, was responsible for such poor scheduling.” *Id.* According to the court, as well, between the parties’ disputes and the scheduling issues, the two trial experts could not even

agree on what the critical path of the project was. *Id.* Eventually, in part because Metric had submitted a delay analysis that attributed all delay to the GSA, rather than to Belt Con, the court found Belt Con's expert witness to be credible, and found Metric's expert not to be credible.

In short, by not having a clear and proper schedule in place, and by failing to properly update and analyze the schedule, Metric gave the court room to analyze and interpret the schedules, losing the case before it even knew it had one.

VI. Importance of Making Common Sense of Critical Path

Courts have also expressed frustration with litigants who in their attempt to prove their case only confuse the Court and inundate them with unnecessary paper. For example, in *United States v. Harrop Construction Company* the court noted the trial was lengthy (and was interrupted by a hurricane), that expert reports were filed up to, and even during, the trial itself, and that the record was massive, including a paper war between the parties. *United States v. Harrop Constr. Co., Inc.*, 131 F.Supp.2d 882 (S.D. Tex.). Further, "The case would not have been complete without Safety Steel's lengthy and protracted Daubert attack of [Harrop's experts] who [were] engaged by Harrop to analyze and testify on the cause and extent of Safety Steel's failures." *Id.* "The court found that the methods used by [Harrop's experts] were within toleration limits of Daubert and construction delay analysis. The court admitted their testimony and overwhelmingly long reports." *Id.* The court's comments are a warning to all construction litigants that more does not always mean more effective. Construction schedules are already complicated. Experts, especially scheduling experts, need to be prepared to simplify them so that a jury (or a judge) is not overwhelmed by the information contained in the evidence.

The court in *Harrop* further recognized, "[c]onstruction cases are driven by detail and are expert dependent." *Id.* While the experts agreed on many conclusions, they disagreed as to the degree of these conclusions. For example, both sides' experts determined Safety Steel delayed the project, but they disagreed on how long the delay was. *Id.* In analyzing the delay, the court noted that it "has done its best to determine which of these experts is more likely to be correct than the other." *Id.* at 891. Further, "The Court feels no duty to be any more precise than the experts, and it is apparent to the Court that there is much judgment that must be applied by whomever is making the analysis and by what method." *Id.* Based on the multiple expert witnesses' testimony, the court determined that the overall project delays (for all three projects) "is in the neighborhood of four months." *Id.* That amount was slightly more than Safety Steel's expert estimated, slightly less than one of two reports prepared by Harrop, and about the same as the other of the two reports from Harrop's expert witness.

The decision by the court to, essentially, “split the baby” demonstrates the importance of providing the court with clear, concise information. Because the court was also the trier of fact, it had to make credibility determinations, as well as legal decisions. The opinion makes clear the court’s displeasure with the fairly inaccurate, or at least less than accurate, calculations and opinions of the various experts. More importantly, the comments make clear that the schedules were not used effectively in trial. Technical analyses, including scheduling, can be difficult to explain to any trier of fact. But Harrop makes clear the importance of overcoming that hurdle.

One example of a scheduling expert helping a trier of fact and the court is *Weitz Co., LLC., v. MH Washington, LLC*, No. 06-0559-CV-W-DGK, 2008 WL 8625902 (W.D. Mo. Aug. 19, 2008). MH moved to exclude the testimony of Weitz’s expert witness, because he used a “Windows” analysis of construction schedule and delay, rather than the critical path. *Id.* at *1. The expert, Brannon, compared the original Project schedule to updated schedules-events, prepared contemporaneously. *Id.* MH argued that any delay analysis had to begin with a critical path schedule. *Id.* at *2.

According to the court, MH exposed weaknesses in Brannon’s analysis, but not sufficient weaknesses to make his testimony “unreliable.” *Id.* at *3. Specifically, Brannon used what is referred to as a “Windows” analysis. *Id.* However, MH did “not dispute that ‘Windows’ analysis is common in the industry, and it is well-settled that all expert opinion will necessarily involve some speculation.” *Id.* Further, the court believed the Windows’ analysis would help a jury understand how construction projects are organized, and the importance of difference tasks. *Id.*

At trial, a jury awarded Weitz damages, attorneys’ fees, costs, and interest based, in part, on the testimony by Brannon regarding the delays caused by MH. On appeal, MH again argued that Brannon should not have been permitted to testify. *Weitz Co., v. MH Washington*, 631 F.3d 510 (8th Cir. 2010). “Brannon used a methodology known as “windows analysis,” which distinguishes activities on the ‘critical path,’ where a delay causes a delay in the overall project, and those activities with ‘float’ time, where a delay does not affect the overall job.” *Id.* at 526. The court noted that Brannon’s report “was sufficiently specific to allow MH . . . to identify specific documents that arguably demonstrated flaws in the delay analysis.” *Id.* at 527. Additionally, it noted that “at some point most construction activities become critical if they are all there is left to complete on the job.” *Id.* Therefore, the criticisms raised by MH went more to the weight, not the admissibility, of Brannon’s opinions.

No matter what method used, the jury apparently felt the evidence supported Weitz, not MH, and Brannon’s opinion presumably aided Weitz in convincing the jury. In both Windows

and CPM, technical information must be presented to a jury who may not be familiar with scheduling and may not have any background in construction. Having an expert, and an expert report, that can put that information into layman's language is essential to winning any case, but especially a construction case.

VII. Conclusion

At the beginning of this article we acknowledged the reality that events on a construction site do not always (or more than likely, never) go according to plan. We recommend that all construction experts have a plan and that the scheduling expert analyzes that plan in conducting their methodology. Based on a review of the applicable case law, it appears that the trend is to employ a critical path methodology when assessing delay damages by scheduling experts. Because a construction schedule is always changing, and, as a consequence the critical path may always be changing, it is especially crucial to update the critical path during the project itself. After the project and during litigation, employing a scheduling expert who can make common sense of the critical path methodology is especially crucial. For the defense, the goal is always to exclude the testimony of the plaintiff's expert and make sure your scheduling expert's methodology does not fall victim to the same pitfalls. Hopefully this article brings to your attention some of the key cases involving scheduling expert's methodology and helps you understand that utilizing the critical path methodology really is critical.

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CAN A CONTRACTOR BE RESPONSIBLE FOR DEFECTS IN PLANS?

Nearly 100 years ago the United States Supreme Court set forth one of the most quoted sentences by lawyers handling construction litigation cases: "But if [a] contractor is bound to build according to plans and specifications prepared by the owner, a contractor will not be responsible for the consequences of defects in the plans and specifications." *United States v. Spearin*, 248 U.S. 132, 136 (1918). In what became known as the Spearin Doctrine the United States Supreme Court set forth one of the few "bright line" tests available to litigators in any field, particularly in a field where the facts can be so complex as in litigation involving construction projects with general contractors, subcontractors, owners, design professionals, construction managers, and constantly changing tasks and specifications prepared and executed by each of the interested parties in any major construction project. Contractors have generally been able to rely on the Spearin Doctrine to insulate themselves from claims of design failure. Contractors who discover perceived design flaws often suggest changes to design plans and specifications, typically for the better, but doing so often reduces

or eliminates the protection to contractors available under the Spearin Doctrine.

A recent decision by a federal judge in the Eastern District of Kentucky should remind contractors that the Spearin Doctrine protections can be lost by contractors trying to be helpful. In *American Towers, LLC v. BPI, Inc.*, (U.S. D.C. E.D. Ky. Aug. 4, 2014), American Towers, an operator of wireless communications towers, accepted a bid from BPI to construct a new tower. After breaking ground on the project, BPI discovered a problem with American Towers' plans for the access road to the tower. BPI proposed a solution that American Towers approved. Less than one (1) year later, the access road collapsed.

American Towers sued BPI for breach of contract, and BPI moved for summary judgment. BPI argued that its contract with American Towers required American Towers to issue written instructions regarding how to proceed after BPI discovered the flaw in American Towers' original plans. BPI argued in the classic tradition of Spearin that American Towers was obliged to consult an engineer before telling BPI what to do and that American Towers must therefore bear the consequences of its own design failure.

The court recognized that BPI's contract provided that when BPI encountered a problem, it need only inform American Towers and wait for instructions. However, BPI "apparently did more than the contract required" and "proposed a new plan to American Towers." Because BPI's contract required it to complete its work with the "highest degree of skill and care," and an expert witness for American Towers opined that such a degree of skill required BPI to consult an engineer, then BPI could be liable for the design flaw. The court therefore denied BPI's motion for summary judgment and has sent the case to a jury trial to determine BPI's level of responsibility for the road collapse.

The American Towers case provides a clear cautionary tale for contractors. Where a contractor has agreed to construct according to an owner's design plans, and a contractor finds a design flaw in those plans, in order to protect itself, the contractor should hold owner to its required contractual duty to provide the plans. Where a contractor has the expertise to provide suggestions to the plans which could keep the project on track and save the owner significant costs in delays, the contractor should still require the owner to seek the necessary review and approval by qualified experts. In this case, had BPI demanded that American Towers consult with an engineer to certify the sufficiency of the plans, BPI probably would not have been liable to American Towers.

In every construction project the particular facts of the problem should be reviewed in conjunction with each party's contractual requirements to determine the best course of action. Usually, such problems can be resolved or mitigated with a quick phone call and a short review of each party's obligations. Taking such action during the project can significantly reduce the likelihood of litigation costs and potential liability as exemplified by the American Towers case.



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TECHNOLOGY AND SIMPLE TRICKS FOR REDUCING CONSTRUCTION LITIGATION DOCUMENT REVIEW COSTS

Construction corporations often endure high discovery costs in litigation because attorneys frequently must search through vast document collections trying to find responsive documents. As President of a company specializing in technology assisted discovery, I am pleased to describe recent trends in approaches being used to reduce costs in construction company litigation.

Nearly everyone in their everyday lives now uses cloud services like Amazon.com for shopping, music services like Pandora and iTunes, and social media like LinkedIn and. At the heart of innovations like these are smart search algorithms which make finding information in data sets which are staggering in size, so that people can find what they want and need by use of the smart phone from virtually anywhere. If you think of the challenges of finding information and compare them to what lawyers do in lawsuits, you might ask yourself whether lawyers can evolve to use tools in a similar manner to find information during discovery in litigation or in AAA arbitrations. New tools such as Predictive Coding or Technology Assisted Review work much like a spam filter operates. They group documents based on similarity to documents which you want to find instead of documents that you don't want to find. Unlike email spam filters, such tools can and must be "trained" on the subject matter of the litigation in order for them to work.

Most of the cases reported using these tools have been extremely contentious and some in the legal field argue whether the proposed savings from using the tools are worth the fights and delays encountered when trying to use technology to support the review effort. My company, Review Less assisted in creating the workflow in a construction case (Global Aerospace Inc. v. Landow Aviation LP d/b/a Dulles Jet Center) where predictive coding was contested. The case involved the 2011 collapse of the Dulles Jet Center hanger, which contained jets valued at \$400 million. Shortly after this loss, all the data, approximately 2,000,000 individual records, at the construction company was put under a litigation hold. The anticipated litigation related to sorting out responsibility for the collapse and determining who would be paid from various insurance policies.

There were over 2,000,000 records in the collection. After spending some time trying to figure out the key words which seemed to have the most hits for the responsive documents we would need to turn over in the discovery process, we realized that words which one would think would be responsive actually contained a high percentage of irrelevant words. Examples included "Jet Center" (64% irrelevant), "hangar" (33% irrelevant), "column" (53% irrelevant), and "inspection" (85% irrelevant). Using predictive coding technology to find the patterns between words, we reviewed 5,000 documents in this exercise and trained the predictive coding tool to predict approximately 140,000 records that were responsive. Even after adding back document family members like email strings which didn't contain a responsive document, still 90% of the records did not have to be physically reviewed by expensive attorneys and were eliminated from expensive document review. It was a highly efficient review process.

Despite successes such as the case described above, many lawyers have trouble taking the plunge into using more technology to facilitate review. Additionally, some attempts to use predictive coding have been less successful because lawyers fight about the correct process for

using the technology and how much about the training needs to be shared with the other side. Recognizing this challenge, in 2014 Review Less adopted its focus from training lawyers in each market as the need arised to instead using teams of remotely located, but highly trained document review attorneys on projects. Using testing and experience filters to identify the best review attorneys across the country, we have been able to control costs by picking attorneys who demonstrated their proficiency in the initial review based on quality metrics. There is a definite advantage of sourcing reviewers across markets because it is usually very difficult or impossible to recruit a great review team from a single market. On a recent construction case, we used 20 attorneys in 7 different cities. The project was originally estimated to last eight weeks, but our team was able to complete it in three and one-half weeks. This approach used a low cost document review platform to reduce costs and a traditional review approach based on batching documents which had hit certain key words and letting the lawyers review the documents. Since each of the attorneys used in the project came from lower cost review markets such as Pittsburgh, Cincinnati, Columbus, Detroit, and Nashville, the cost of hiring the review teams was much less than in the large city where the case was litigated. More impressively, the review team comprised of highly experienced document review attorneys required little clean-up work for their first pass review. This also kept the costs well under budget.

We have also used this approach on simple employment cases as small as 14,000 documents in total where a client concerned about the costs agreed to produce all documents that hit certain key words. Even with a streamlined review, the potential review cost projected by the law firm was \$42,000. Review Less was contacted as an alternative and after identifying a small team of 5 highly experienced reviewers in 4 cities, we completed the review in 3 days at a cost which was less than 2/3rd what had been proposed, with very high accuracy.

Document review can be very expensive. Consequently, it pays to experiment with review to figure out ways to continuously improve the process and reduce costs. As shown above, document review costs can be controlled with technology and by improving the quality of the document review attorneys who work on a project.

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NEW LAW GIVES LENDERS AND TITLE INSURERS SUPER-PRIORITY OVER MECHANICS' LIENS IN PENNSYLVANIA

On September 7, 2014, an amendment to the Mechanics' Lien Law of 1963 took effect. The amendment liberally defines the "costs of construction" and gives lending institutions and title insurers a super-priority over mechanics' liens claims. Pursuant to the new law, if a construction loan has been secured by an open-end mortgage "where at least sixty percent (60%) of the proceeds are intended to pay or are used to pay all or part of the costs of construction," the lender's lien takes priority.

It is believed that the Pennsylvania Superior Court's 2012 decision in the *Commerce Bank/Harrisburg, N.A. v. Kessler* case was the catalyst for the recent amendment. In *Kessler*, the Superior Court essentially said that an open-end mortgage would not take priority over a mechanic's lien where construction work begins before the open-end mortgage is recorded and where any amount of the mortgage was used for purposes other than construction, erection, alteration or repair of the mortgaged property.

Contractors and subcontractors need to be aware of the changes. The new law allows the lenders and title insurers the super priority even where the visible commencement of work starts before the recording of the open-end mortgage. As stated above, the new law provides an expansive definition of the "costs of construction," stating: "all costs, expenses and reimbursements pertaining to erection, construction, alteration, repair, mandated off-site improvements, government impact fees and other construction-related costs, including, but not limited to, costs, expenses and reimbursements in the nature of taxes, insurance, bonding, inspections, surveys, testing, permits, legal fees, architect fees, engineering fees, consulting fees, accounting fees, management fees, utility fees, tenant improvements, leasing commissions, payment of prior filed or recorded liens or mortgages, including mechanics liens, municipal claims, mortgage origination fees and commissions, finance costs, closing fees, recording fees, title insurance or escrow fees, or any similar or comparable costs, expenses or reimbursements related to an improvement made or intended to be made to the property. For purposes of this definition, reimbursement includes any such disbursements made to the borrower, any person acting for the benefit or on behalf of the borrower or to an affiliate of the borrower."



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PROJECT INSURANCE: OWNER'S PROFESSIONAL LIABILITY EXPOSURES AND SOLUTIONS

Owners of construction projects face many risk management challenges – whether building new, adding on to existing facilities, or performing rehabilitations. For a project owner, managing construction risk is significantly different from managing risks inherent in their daily operations. One difference of particular concern is professional liability risk associated with execution of design and other professional services.

Construction-related professional liability insurance is rapidly changing and has often been underinsured relative to the exposures created when commencing a new project. Even on a

modestly sized project, an owner can have significant exposure to cost overruns, time delays, and re-work from faulty design, negligent construction management, or errors from other disciplines performing professional services on the project. Losses suffered by project owners can prove to be very costly, confusing to litigate, and difficult to calculate. The following example illustrates the complex nature of these exposures.

EXPANSION PROJECT SHRINKS HOSPITAL'S BOTTOM LINE

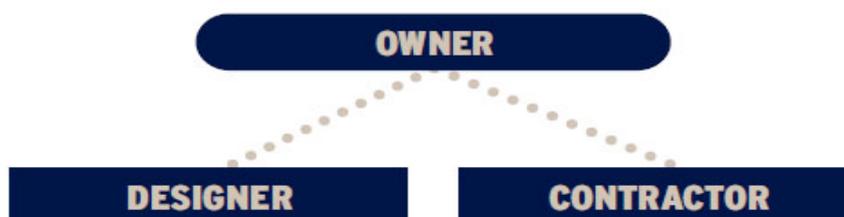
A city medical center and its board of trustees issued separate contracts for the design and construction of a two-year, \$150 million expansion to its children's hospital wing. The architect was responsible for procuring all design services and was required by the owner to evidence \$5 million in professional liability insurance limits from their annual practice professional liability insurance program. The project took three months longer than anticipated and went over budget by \$10 million. Along with the delay and cost overruns, numerous other problems were discovered in the HVAC and electrical systems – all attributable to the design team.

The total damages alleged by the owner were \$17.5 million. During discovery it was found that the prime architect only had \$4 million remaining in its practice professional liability program because of defense and claim payments from the firm's engagement on other projects during the policy period. The other liable members of the design team (the mechanical and electrical engineers) each had their full professional liability limits of \$1 million available. However, after defense costs eroded the remaining limits during litigation, only \$5 million in combined policy limits were available from the architect's and the design firm's insurance policies. Furthermore, the firms had little or no assets to collect beyond their professional liability policies. The medical center settled immediately for the \$5 million in remaining policy limits and incurred a \$12.5 million loss to its bottom line.

This not uncommon scenario raises some questions: Are insurance solutions available that offer construction owners better control over the cost, scope and security of professional liability coverage? Could the medical facility have financed this exposure with an insurance product and collected its own insurance proceeds rather than incur this loss? The answer is 'yes,' and the following information outlines these solutions.

TRADITIONAL SOLUTIONS

Most projects constructed in the U.S. use some form of the design-bid-build delivery system. In that type of scenario, the owner assumes a central role by virtue of contracting separately with design entities and contractors. The owner first hires a designer to provide the design and later the general contractor is hired to build the project. The illustration below depicts this standard relationship.



Since the design-bid-build delivery system separates the design contract from the construction contract, the owner serves as an intermediary between the design and construction entities and takes on significant risk by contracting directly with the architect. Other delivery systems, such as design-build (D/B) or engineer-procure-construct (EPC) and emerging methods such as integrated project delivery (IPD), public private partnerships (P3) and LEAN construction, also pose various professional liability challenges and exposures. This article focuses on the design-bid-build delivery.

The most common and simplest mechanism for an owner to mitigate the professional liability risk associated with its project is to contractually require the primary design professionals to maintain **annual practice policies** at prescribed limits. These policies provide professional liability coverage with limits that the owner deems adequate to cover claims that might arise from the design team's work on the project. However, coverage under the design professional's policy is in the name of the design professional and does not provide any protection directly to the owner, which cannot be named as an additional insured. Renewal of the annual practice policy by the design professional is not guaranteed and could be terminated prior to a contractually agreed post-completion insurance requirement. Claims made on projects unrelated to the owner's project (as shown in the hospital project claim scenario) may erode or exhaust the limits of liability available under the design professional's practice policy. This could leave the owner with an uninsured design professional and no source of recovery.

A second approach is for the owner to purchase a **project specific professional liability policy** (PSPL) that covers the prime architect and its sub-consultants for the specific job. This option provides dedicated limits to the project, includes an extended reporting period for post-project completion, and replaces the design professional's annual practice policies, although the annual policies possibly could be excess of the PSPL for the designer's interests. While a viable risk management solution, there are drawbacks in this approach.

The cost of PSPL programs is significant due to the insurance industry's experience, which has historically been unprofitable. The cost can often be 1-1.25% of the construction value of a project. The policy does cover the design professionals for the specific job; however, it does not typically extend to construction management. The policy is purchased for the design team and therefore is defended by the insurance carrier for the design team and not the owner. Defense costs can often erode the limits of these policies rather quickly allowing for smaller-than-anticipated recoverable indemnification amounts for the owner.

THE OWNER'S PROTECTIVE ALTERNATIVE

A third option to mitigate project professional liability exposures is for the owner to purchase an **owner's protective policy**. The policy appeals to owners that directly subcontract the design separately from the construction under the design-bid-build delivery system, as discussed earlier. The owner's protective policy addresses financial risks associated with the performance of professional services through dedicated project-specific limits similar to the PSPL. However, this solution provides the project owner with protection when a subcontracted design professional or other project consultant's professional liability coverage is insufficient or not available. The owner still requires the primary design firm to evidence its annual practice professional liability policy at minimum limits via the contract as outlined in the first option above, but the owner then purchases a protective policy to sit excess over the design firm's

annual policy. The named insured on the policy is the project owner allowing control over the insurance acquisition and claim process.

The protective policy is a first-party indemnification policy and third-party professional liability policy intended to indemnify the owner for economic damages, bodily injury, and/or property damage due to the negligent performance of its subcontracted design professionals and provide coverage for the owner from third-party claims.

In a first-party loss scenario, the owner notifies its protective policy carrier at the same time that it brings a claim against its subcontracted design professional. The protective policy is then triggered when the design professional's limits are exhausted.

For a third-party claim, the owner notifies the carrier when it receives notice of a claim from a third party which triggers coverage under the protective policy. As stated above for first-party losses, the policy sits in an excess position above the subcontracted design professional's annual practice policy, and if there is no underlying insurance available at the time of a claim or the limits have been exhausted from claims on other projects (again, as seen in our previous example), the protective policy will drop down and pay on a first-dollar basis or excess of any self-insured retention specified on the policy. For third-party claims, the protective policy responds in excess of a self-insured retention.

The policy covers retroactively the design phase, runs through the construction period, and an extended reporting period (ERP) in which to report claims. The ERP is for work that was undertaken during the active policy period or any design or work performed to put the project to its intended use.

Owners also benefit by broadening the field of acceptable design firms as they can lower the required limits of insurance of their subcontractors/consultants knowing they have the protective coverage in place. At the same time the owner can have confidence that the subcontractors/consultants are delivering the appropriate standard of care because their annual practice policies remain in place and are subject to first-dollar exposure.

The owner's protective policy is often purchased for projects greater than \$50M in hard construction costs. It can be put in place for a variety of projects, including commercial, institutional, schools and colleges, hospitals, airport expansions or renovations, rail, roads/highway transportation or other civil projects, correctional facilities, casinos, hotels and resorts, residential/commercial grade-construction, water, waste water and sewage, and municipal facilities.

This insurance approach, while dedicating broader limits to a specific project, is typically much more cost-effective than buying PSPL coverage due to the first-dollar nature of the PSPL vs. the excess approach used with an owner's protective policy. The unique first-party and third-party coverages put the owner in a very favorable recovery position in the event of a loss and provides enhanced control over the claim process. With the current state of economic uncertainty and expense management protocols, the owner's protective policy has quickly become the coverage of choice for managing owners' professional liability exposures on construction projects.

While risk management challenges for the owner of a construction project can be significantly different from those encountered in daily operations, multiple solutions exist to manage professional liability exposures. Losses from the negligent performance of professional services are extremely costly, complex and can destroy the success of a construction project. Purchasing an owner's protective policy or another risk transfer mechanism to protect your project – and your bottom line – is a viable solution that should be considered well in advance of contract development.

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THE PENNSYLVANIA SUPREME COURT CLARIFIES THE EXTENT OF A CONTRACTORS' LIABILITIES UNDER THE DOCTRINE OF THE IMPLIED WARRANTY OF HABITABILITY

The rule of law to be taken away from the Pennsylvania Supreme Court's recent decision in Conway v. Cutler, 2014 WL 4064261, -- A.3d -- (Pa. 2014) is of interest to the construction industry – particularly in understanding the extent of a general contractor's exposure to claims of subsequent purchasers (homeowners).

In August 2014, the Pennsylvania Supreme Court took up the issue of “whether a builder's implied warranty of habitability, which protects those who purchase a newly constructed home from latent defects, may also be invoked by subsequent purchasers of the home.” *Id.*

In answering this question, the Supreme Court held “that a subsequent purchaser of a previously inhabited residence may not recover contract damages for breach of the builder's implied warranty of habitability.” *Id.*

What this means in practice is straightforward and rather practical in nature. Under the laws of the Commonwealth of Pennsylvania, the implied warranty of habitability may only be extended between the contractor/builder and the first owner who resides in the home. Should a latent (undisclosed) defect be detected by the first owner of the home, then the homeowner may be able to successfully assert a cause of action under the doctrine of the implied warranty of habitability. The primary reason is that “an action for breach of the implied warranty requires contractual privity between the parties (the builder and the homeowner).

The next point to be taken away is that subsequent homeowners are still protected under the law from instances when they also encounter latent defects – the difference is that this protection is not under the implied warranty of habitability – but instead through Pennsylvania state statute, specifically the Real Estate Seller Disclosure Law, 68 Pa. C.S. §§ 7301 – 7315.

As Justice Max Baer acknowledged in his concurrence, the Real Estate Seller Disclosure Law was enacted by the Pennsylvania legislature requiring “the seller, as opposed to the builder of a residence, to disclose to the buyer any material defects with the property.” 68 Pa. C.S. § 7303. The Real Estate Seller Disclosure Law enumerates sixteen subjects requiring disclosure, relating to various aspects of the property, including inter alia, the roof, basement, termites, sewage,

electrical and heating systems, as well as the presence of hazardous substances.” Id. at § 7302 (providing that the Real Estate Seller Disclosure Law does not generally apply to “transfers of new residential construction that has not been previously occupied”). Rather, the original purchaser is protected by the implied warranty of habitability.

The application of the holding in Conway v. Cutler ensures fundamental protection to the original homeowners and points to the protections found in the Real Estate Seller Disclosure Law for subsequent home buyers.



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JURY AWARDS \$15.8 MILLION IN ALLEGHENY COUNTY CONSTRUCTION ZONE CASE

On Monday September 15, 2014, an Allegheny County Common Pleas jury awarded the plaintiff a \$15.8 million verdict in a lawsuit centered on a 2009 crash in a Route 51 construction zone in the Pleasant Hills suburb of Pittsburgh. The accident occurred when the plaintiff's son, driving the car in which the plaintiff was a passenger, made a left turn into the parking lot of a restaurant where the family was meeting for a wedding rehearsal dinner. The car was struck by an oncoming car emerging from a merge point in the construction zone, where traffic had been backed up. A driver in the left lane stopped for the plaintiff's vehicle to turn but the defendant driver drove on from the right lane and collided. The Plaintiff suffered severe and permanent physical and cognitive injuries. The defendant driver was convicted of moving violations in connection with the accident.

The defendants at trial were PennDOT, its construction contractor, and the other driver. The plaintiff contended that the PennDOT and the contractor failed to improve the construction zone after prior accidents in the area. Although PennDOT and the contractor argued that the construction zone signage was proper, the plaintiff's expert contended zone should have included rumble strips or message boards, and prohibited left turns.

The jury found the defendant driver 42 % negligent, PennDOT 40% negligent and the construction company 18% negligent. It is reported that PennDOT and the defendant driver settled prior to trial, leaving the construction company with the \$15.8 million verdict, since the case predated the Fair Share Act.

Contractors who follow government specifications can assert the government contractor defense. The Supreme Court of Pennsylvania has recognized that public works contractors who perform in conformity with government specifications for contracted work are insulated from liability to third parties seeking consequential damages in certain tort actions. *Conner v. Quality Coach, Inc.*, 561 Pa. 397, 750 A.2d 823, 833 (2000).

This rule was explained in *Valley Forge Gardens, Inc. v. James D. Morrissey, Inc.*, 385 Pa. 477, 123 A.2d 888 (1956), holding, “if the contractor, in privity with the State or its instrumentality, performs the contract work which the State is privileged to have done, the privilege operates to relieve the contractor from liability to third persons except for negligence or willful tort in performance of the work. The Supreme Court later explained that the theory

underlying the Valley Forge Gardens decision is that the Commonwealth has a privilege to have highways constructed, and that such privilege insulates a contractor who complies with the Commonwealth's plans and specifications from liability for damage caused by such construction, unless the contractor performs his work tortiously. *Lobozzo v. Adam Eidemiller, Inc.*, 437 Pa. 360, 263 A.2d 432, 435 (1970).

More recently the Superior Court held that a public work contractor may be insulated from liability by its compliance with a contract, but only if the record does not support a question of negligence arising from the contractor's performance of the contracted work. *Coolbaugh v. Commonwealth of Pennsylvania, Department of Transportation*, 816 A.2d 307, 313 (Pa. Super. 2002).

In *Coolbaugh*, the Superior Court reversed summary judgment granted to a highway contractor in a case involving an auto accident caused by water runoff because the plaintiff's two expert reports raised a question of material fact as to whether the contractor performed under the contract in a non-negligent manner, specifically whether the contractor graded the road surface properly. It held "if at the completion of discovery, the evidence raises a question of material fact concerning the manner and extent to which the contractor breached a duty to the plaintiff, the contract specifications defense is not grounds for summary judgment."

Plaintiff's attorneys thus retain experts to opine that contractors, although following the state's specifications, were negligent in some other way, often citing industry standards. Contractors must be ready to prove, not only that they complied with the government's specifications, but also must consider retaining an expert to support the work as not otherwise negligent.



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