

CONSTRUCTION LAW UPDATE

October 2007

CONSTRUCTION SITE SAFETY – A CRIMINAL MATTER

By Aileen Leipprandt, Attorney

Courts may show little mercy when a construction company's site supervisor makes decisions that violate MIOSHA standards. Indeed, a supervisor who does not enforce MIOSHA regulations may create *criminal* liability for his/her employer for any tragedy that results.

The *Lanzo* Case

A case in point is *People v. Lanzo Construction Company*. Lanzo Construction hired a subcontractor to lay pipe on a sanitary sewer project. The subcontractor used its own crew to complete the work while a Lanzo's foreman oversaw that crew. The subcontractor worked in a deep trench with no protective shoring devices, a violation of MIOSHA regulations. It had rained sporadically creating a hazard with unstable soil. The subcontractor suggested to the Lanzo foreman that he stop the work; however the foreman ignored the advice. Tragically, the trench walls collapsed, killing a pipe layer.

Lanzo was charged with involuntary manslaughter and willful violation of the MIOSHA requirement that Lanzo furnish its employees a safe place to work free from recognized hazards. (A willful violation of MIOSHA occurs when an employer intentionally disregards a MIOSHA requirement or is knowingly and purposely indifferent to a MIOSHA requirement.)

The trial court acquitted Lanzo of manslaughter but convicted it of willfully violating MIOSHA. The court sentenced Lanzo to two years probation and imposed a \$10,000 fine. Lanzo appealed its conviction claiming it could not be held criminally liable for the misconduct of its foreman. The Court of Appeals disagreed.

Analysis of Appellate Court Decision

Because MIOSHA regulations do not contain any provision making an employer liable for the acts of its employees, the appellate court in *Lanzo* looked to general corporate law in assessing Lanzo's criminal liability.

As the court observed, one test for determining whether a corporation can be held criminally liable for the acts of its employee is whether the employee is a "high managerial agent having supervisory responsibility over the subject matter of the offense and acting within the scope of his employment..."

The court found that Lanzo's foreman was a "high management agent" because he had the ability to decide if the worksite was safe or if extra precautions were needed. The court also found that the foreman's supervisor was liable because the supervisor had supervisory authority over the safety of the worksite. The court concluded that "since there is no difference between the acts committed by the company and its management officials," Lanzo violated MIOSHA and therefore, was also criminally liable.

Lesson learned: Construction companies must educate their employees with safety supervisory authority over project sites regarding MIOSHA regulations and ensure that such employees are enforcing those standards; otherwise, that construction company many face *criminal* liability.

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RESIDENTIAL BUILDERS ARE NOT SUBJECT TO THE MICHIGAN CONSUMER PROTECTION ACT

By Tawanna D. Wright, Attorney

After 25 years of unsettled Michigan case law, the June 2007 ruling of the Michigan Supreme Court in *Liss v Lewiston-Richards, Inc.*, confirms that residential builders are not subject to the Michigan Consumer Protection Act (MCPA) for “transactions” that are “specifically authorized” for residential home builders by the Michigan Occupational Code (MOC).

“The MCPA was designed to protect consumers from damages resulting from material misrepresentations or omissions when making purchases of goods and services.” The clear intent of the MCPA is to protect consumers and it was enacted to enlarge the remedy for consumers that are harmed by deceptive business practices. The court’s ruling is quite significant, because a person who successfully asserts a violation of the MCPA can recover their actual damages, **and their attorneys’ fees.**

In *Liss*, Arthur and Beverly Liss entered into a contract with Lewiston-Richards, Inc. for the sale and construction of a home. The Lisses alleged that Lewiston-Richards did not complete construction on time and that the construction was not done in a workman-like manner. The Lisses sued Lewiston-Richards for breach of contract, breach of warranty, and violation of the MCPA. Lewiston-Richards asserted that residential home builders were exempt from MCPA claims, because the Act exempts any “transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States.”

The court stated that the general transaction at issue in the *Liss* case was “residential home building.” Residential builders are licensed under the MOC and are regulated by the Residential Builders’ and Maintenance and Alteration Contractors’ Board which oversees licensing and handles complaints filed against residential builders. Moreover, there is a set of administrative rules that regulate the licensing procedure. The court concluded that a residential builder is exempt from the MCPA for transactions that are explicitly sanctioned under the MOC.

Transactions so sanctioned include: engaging in the construction of a residential structure or a combination residential and commercial structure for a fixed sum, price or fee, and erecting, constructing, replacing, repairing, altering, adding to or subtracting from, improving, wrecking or demolishing a residential or combination residential and commercial structure. Additional transactions include manufacturing, assembling, constructing, dealing in, or distributing prefabricated, preassembled, precut, packaged, or shell housing.

As long as residential builders engage in activities that are expressly permitted under the Michigan Occupational Code, they are not subject to MCPA claims.

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FAILURE TO PERFORM CONDITION PRECEDENT CAN ELIMINATE OWNERS OBLIGATION TO PAY

By Steven K. Stawski, Attorney

The Michigan Court of Appeals' recently decided to reinforce the principle that a party's failure to satisfy condition precedents may bar recovery in a breach of contract action. So what is a condition precedent and what happens if you fail to satisfy its requirements?

A contract is merely a set of enforceable promises. For example, one party to a construction contract promises to supply labor and/or materials, and in return, the other party promises to pay for the labor and/or materials provided.

A condition precedent is "a fact or event that the parties intend must take place before there is a right to performance." In other words, a promise itself may be conditional; a specific event that must happen before that promise is enforced.

The Michigan Court of Appeals denied a contractor's action to recover payment of approximately \$42,000 for the demolition of eleven houses. While the contractor did, indeed, demolish eleven houses, the Court denied its suit for payment because that contractor did not satisfy a condition precedent in the contract.

Specifically, the contract with the owner required that the contractor obtain a "letter to proceed" from the City of Pontiac before performing the demolition. The contract specifically required that

"the contractor must, on the date that the anticipated services will be performed (mandatory), contact the [City] to secure written approval to proceed with said services." The compensation portion of the contract provides: "If the 'Letter to Proceed' for each demolished property is not provided, the contractor forfeits any payment under the terms of this contract."

Michigan law requires the enforcement of unambiguous contracts as they are written. Here, the subcontractor's right to receive payment was contingent upon the submittal of the required letters to proceed. As the Court noted, the "contractual language unambiguously sets forth the condition, and clarifies its importance, and the consequences of the party's failure to comply with the condition."

In its ruling, the Court also ruled that the failure to obtain a Letter to Proceed constituted a substantial breach of the agreement. Ultimately, the Court denied the contractor's request for payment despite the fact that it performed the work.

This Court of Appeals' decision reinforces the need to read and comply with all provisions of a contract, and especially those clauses that can be interpreted and enforced as a condition precedent.

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LEGISLATURE LIMITS AMENDMENTS TO CONSTRUCTION LIEN ACT TO RESIDENTIAL PROJECTS

In 2006, the Construction Lien Act was significantly amended for the first time since 1982. These changes, which went into effect in January 2007, required an owner or lessee to notify subcontractors, suppliers and laborers upon receiving a sworn statement from a contractor. One of the amendments also required an owner or lessee to verify lien waivers before accepting them. Following the enactment of this law, there was a great deal of confusion as to whether these newly created requirements applied to both commercial and residential projects. It appeared that the revisions were primarily intended to address concerns in the residential construction context, and

many argued that the new requirements were an unnecessary burden in commercial projects. The Michigan legislature responded to these concerns and recently passed an amendment which limited these requirements to residential projects. Thus, owners and lessees of commercial projects are not required to give notice to subcontractors, suppliers or laborers when they receive sworn statements and are not required to verify lien waivers if produced by someone other than the lien claimant before relying on them. Of course, these requirements still apply in residential projects.

SHRR NEWS

Chip Behler, Ben Hammond, Aileen Leipprandt, Craig Noland, Steve Stawski, and Tawanna Wright will participate in the American Bar Association's "Sticks and Bricks," a forum on the construction industry on November 8 in Chicago. The program is designed to give those outside the construction industry the knowledge to better identify legal issues for their clients.

Aileen Leipprandt was featured in "West Michigan Business Women", a special section of the August issue of *MiBiz*. She also presented "Construction Liens," a lunch-and-learn Seminar for Chicago Title in September, "Protect Your Business: Liens," for the Home & Building Association of Grand Rapids in September, and "Construction Documents-What do they all mean?," for the Real Property Section Summer Conference of the State Bar of Michigan in July.

Congrats to Construction Industry Team members **TJ Ackert, Chip Behler, and Craig Noland** for being selected for inclusion in the *2007 Michigan Super Lawyers* listing.

Steve Stawski recently attended the Defense Research Institute's Construction Law Seminar, a national conference on industry-based issues and trends such as design professional liability associated with "green-building" initiatives.

Save-the-date! The Construction Industry Team will host a seminar in Grand Rapids on January 24 and in Traverse City on February 28. Topics will include the updated AIA construction contracts, ConsensusDOCS, green building, building information modeling (BIM), rules of the road, and more. Look for your invitation soon.

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