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Indiana Revisits Interpretation of AIA Standard Construction Contract

This week we take a trip down memory lane. Back on October 25, 2013, we ran one of our most well read posts to date: *Indiana Court of Appeals Once More Asked to Interpret AIA Standard Construction Contract*. The discussion was based around the case *Allen County Public Library v. Shambaugh & Son, L.P.* that interpreted an American Institute of Architects (AIA) standard contract. We return to that discussion because the losing Defendants in that case sought rehearing with the court of appeals. This is a fairly common procedure utilized when a party thinks that the court failed to address a specific argument or aspect of the case. Although this is a common procedure, it is fairly rare for the court to actually grant a rehearing and thereby issue a new opinion. Ladies and gentlemen, this is just one of those rare circumstances. Thus, because we thought the topic merited a post and the court of appeals thought there was more to discuss, we return to *Allen County Public Library v. Shambaugh & Son, L.P.*

The case stems from a construction project on the Allen County Public Library. For those readers unfamiliar with Indiana geography, the Library is located in Fort Wayne, Indiana: the original home of the now-Detroit Pistons (NBA). The court, on rehearing, briefly summarized the facts.

> To summarize, this case concerns an effort by the Allen County Public Library ("the Library") to recoup from the Defendants the costs of cleaning up diesel fuel that leaked from underground pipes that were installed by the Defendants as part of a project to expand and renovate the main Library branch building. The Library collected $5,000 from Great American Insurance Group toward the cleanup costs under a "Builders Risk Plus" insurance policy the Library took out specifically for the renovation and addition project. However, the Library alleges that the total cost of remediating the diesel fuel has already exceeded $490,000 and will continue to increase. The Defendants assert that the Library could only look to the $5,000 in pollution cleanup coverage from Great American to cover the remediation costs.

The original decision looked to the contract governing the construction project: "the standard AIA construction contract." Importantly, the court looked to section 11.3.7:

> Waivers of Subrogation. The Owner and Contractor waive all rights against each other and against the Construction Manager, Architect, Owner's other Contractors and own forces described in Article 6, if any, and the subcontractors, sub-subcontractors, consultants, agents and employees of any of them, for damages caused by fire or other perils to the extent covered by property insurance obtained pursuant to this Paragraph 11.3 or other property insurance applicable to the Work, except such rights as the Owner and Contractor may have to the proceeds of such insurance held by the Owner as fiduciary . . . .

Looking to two prior Indiana cases interpreting the same provision, the court concluded that the Library could seek recovery for the cleanup from the Defendants because the harm extended beyond what the contract defined to be "the Work." The "Work" was defined to mean,

> [T]he construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or part of the Project.

On rehearing, the Defendants raised two issues for further consideration. Though the court found that both arguments had been waived – because the Defendants had not previously made these arguments despite ample opportunity – the court still considered them. The first was the contention that "only 'Work'

property was damaged by the diesel fuel leak[.]" This argument is important because the original decision was based on the then-uncontested argument of the Library that the damage spread beyond the "Work." The second argument was that the interpretation adopted in the original opinion represents a minority view – *id est* the less frequently adopted view among courts.

After first noting the Defendants' failure to raise the "only 'Work' property" argument in its initial pleadings and recognizing that "a party cannot raise an argument for the first time in a rehearing petition," the court considered the issue. An important note is that if this argument would have been a basis for reversing the decision, the court would almost certainly have not discussed it as the argument had been waived. Nevertheless, the court examined the issue and noted that whether the damage extended beyond the "Work" was at least an issue of fact to be decided upon further proceedings.

This conclusion was limited due to the procedural posture in which the case reached the court. It arose upon review of summary judgment in favor of the Defendants against the Library. Because the standard for defeating summary judgment is, in broad terms, that there be genuine issues of material fact that need to be decided at trial, the court did not need to make a more specific finding to ensure the same result.

The second argument – that the court had adopted a minority view – was a bit more complicated. This argument, just as the "only 'Work'" argument, was waived in part due to the failure to make the argument before. The chief portion of the argument that was subject to waiver was the critique of one of the cases that the court relied upon in its original opinion. The case, *Midwestern Indemnity Co. v. Systems Builders, Inc.*, was a 2004 Indiana Court of Appeals case that set the groundwork for the original opinion. Defendants now sought to challenge the *Midwestern* decision. The court noted that even though the Library relied heavily upon *Midwestern*, at no point had the Defendants argued that *Midwestern* was improperly decided prior to their petition for rehearing.

Despite finding that the Defendants' argument was "too little, too late" and the issue waived, the court still examined whether application of the "so-called 'majority view'" would alter the outcome. The cases relied upon by Defendants "make no distinction between damages to 'work' and 'non-work' property." The court found that "virtually every single one of the 'majority view' cases" relied upon by the Defendants were cases in which the property owner had a pre-existing property insurance policy. One of the opinions specifically recognized that if, as was the case for the Library, the property owner had "procured a specific policy, such as a 'builder's risk' policy the protection of which was limited to the Work itself" the

result may have been different from what the Defendants wanted. Finding this distinction meaningful, the court concluded that even if the "majority view" were different from the court's original opinion, the outcome would be no different.

As a result, the court affirmed its prior decision in its entirety. The takeaway from the rehearing decision is the winnowing of arguments that can be used by Defendants. Nevertheless, in the future, if the "majority view" is necessary for a defendant, that option may still be open. The court of appeals only decided that even if the "majority view" had been utilized, it would not have changed **this** case. It certainly did not foreclose future attempts to attack *Midwestern* on the grounds that the Defendants tried here.

As a bit of a footnote to this post, there is a very meaningful footnote in this decision, at least for the time being. Indiana Appellate Rule 65(D) bars the use of unpublished court decisions from being cited before any court. The full boundaries of this rule have never been fully explored. It goes without saying that Indiana memoranda decisions cannot be cited to in Indiana courts. But, until this case, there was virtually no guidance as to whether unpublished decisions from other states could be cited to. The only discussion of which I am aware was in a footnote of *Weldon v. Asset Acceptance, LLC* that noted the court's refusal to consider an unreported New York case. In the rehearing decision for *Allen County*, the court quoted directly to an unpublished Iowa case. In footnote 2 of the opinion, the court explains: "In Iowa, unlike in Indiana, unpublished decisions may be cited as authority so long as they are readily accessible electronically, though they are not controlling upon other Iowa courts." The irony of this footnote is that New York unpublished opinions are citable in New York. In short, it looks like *Allen County* now indicates that unpublished decisions can be cited to Indiana courts so long as the decision could have been cited in the jurisdiction that originated it.

The reason I added the qualifier "for the time being" to the importance of the decision is because there is a strong move to allow citation to Indiana unpublished decisions. There is a proposed rule change that has been offered by the Indianapolis Bar Association to allow for the citation of unpublished Indiana decisions beginning with cases decided after January 1, 2015. Despite the strong likelihood of a change to Indiana's appellate rules in the near future, for procedural rule nerds such as myself, this is a meaningful footnote.

Join us again next time for further discussion of developments in the law.

Sources

- *Allen Cnty. Pub. Library v. Shambaugh & Son, L.P.*, 997 N.E.2d 48 (Ind. Ct. App. 2013), *on reh'g*, ---N.E.2d---, No. 02A04-1302-PL-78, 2014 WL 297344 (Ind. Ct. App. Jan. 28, 2014).
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