

Hodgkins in the context of (1) the trial court's repeated sustaining of Jungers' objections, evidentiary rulings, and admonitions to the State; (2) the jury instructions; and (3) the critical nature of the central issue for the jury—whether Jungers was telling the truth in (a) claiming the drugs were hers at the scene or (b) in claiming at trial that the drugs were not hers and that she had claimed possession at the scene merely to protect Hodgkins from returning to jail. In our view, the prosecutor's improper, uncured emphasis of the officer's stricken opinion (that Jungers and Hodgkins were both telling the truth about drug ownership at the scene) could reasonably have affected the jury's decision to abandon their role as judges of witness credibility, to overcome Jungers' presumption of innocence, and to find her guilty.

[12] ¶36 Finding there is a substantial likelihood that the cumulative effect of the prosecutor's improper conduct usurped the jury's fact-finding and credibility-determination functions, we hold that a mistrial was required to ensure Jungers a fair trial. Accordingly, we reverse and remand for a new trial.

¶37 A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

ARMSTRONG and VAN DEREN, JJ., concur.

[No. 30201-2-II. Division Two. February 15, 2005.]

COLORADO STRUCTURES, INC., *Respondent*, v. INSURANCE
COMPANY OF THE WEST, ET AL., *Appellants*.

- [1] **Guaranty and Suretyship — Contractor's Bond — Construction — Contract Principles.** A contractor's performance bond is a contract that governs the surety's liability to the obligee. The bond is interpreted using general principles of contract construction and performance.
- [2] **Guaranty and Suretyship — Contractor's Bond — Construction — In General.** A contractor's performance bond is construed as a whole and, if reasonably possible, in a way that effectuates all of its provisions. Unambiguous bond language is construed in accordance with the parties' plain intent. Bond language that is ambiguous is construed in favor of the surety's liability under the bond.
- [3] **Guaranty and Suretyship — Contractor's Bond — Condition — What Constitutes — Status as Promise — Breach — Remedies.** A contractor's performance bond can contain conditions as well as promises. A condition is an event that must occur or a circumstance that must exist in order for the promisor to have a duty to perform. A promise is a manifestation of intention to act or refrain from acting in a specified way. A condition is classified according to its origin and effect: it can be express, implied in fact, or constructive. A condition is "precedent" if its occurrence triggers a duty of performance that had not arisen previously. A condition is "subsequent" if its occurrence defeats a duty of performance that had arisen previously. When a contract provision is both a condition and a promise, the remedies available for its breach vary by whether the breach is "material." If the breach is "material," the promisee has an election: the promisee may treat the breach as a failure of a condition that excuses further performance and terminate the contract or the promisee may waive the condition, allow performance to continue, and sue for damages when performance is finished. Regardless of whether the breach is "material," the promisee may recover damages; i.e., any unjustified failure to perform when performance is due is a breach of contract that entitles the injured party to damages.
- [4] **Guaranty and Suretyship — Contractor's Bond — Condition — Performance of Contract — Effect — In General.** A contractor's performance bond containing language binding the surety to the obligee for a specified amount and stating that "the condition of this obligation is such that, if [the] principal shall promptly and faithfully perform said [contract] then this obligation shall be null and void; otherwise it shall remain in full force and effect," obligates the surety subject to only one condition: that the principal promptly and faithfully perform the contract. Use of the word "otherwise" expressly eliminates all other conditions. Read as a whole, the bond

states that the surety's obligation commences when it executes the bond and continues until the principal promptly and faithfully performs the contract.

- [5] **Guaranty and Suretyship — Contractor's Bond — Enforcement — Remedies Provision — Applicability — Specified Circumstances — Necessity.** A provision in a contractor's performance bond stating that the obligee is entitled to certain remedies and measures of damages if the obligee, having performed its own obligations under the contract, declares the principal to be in default under the contract applies only according to its strict terms; i.e., the provision applies only when (1) the principal is "in default under the contract," (2) the obligee declares the principal to be in default under the contract, and (3) the obligee has performed its own obligations under the contract. It does not apply, by negative but necessary implication, under other circumstances. Under such other circumstances, the common law defines the remedies and measures of damages that are available to the obligee.
- [6] **Guaranty and Suretyship — Contractor's Bond — Construction — Meaning of Words — "Breach" — "Default" — Response by Obligor — Effect.** The terms "breach" and "default" have distinct meanings in construction suretyship law. Not every breach of a construction contract constitutes a default sufficient to require the surety to step in and provide a remedy. To constitute a legal default, there must be a material breach or series of material breaches of such a magnitude that the obligee is justified in terminating the contract. When a material breach occurs that places the principal (or contractor) in default under the contract, the obligee is permitted (but not required) to terminate or cancel the contract. In such a case, the obligee "declares" the principal to be in default when, having elected to treat the breach as "material," the obligee announces an intent to terminate the contract. The obligee may, however, elect not to treat the breach as "material" and opt, instead, to continue the principal's performance under the contract and to seek damages after the work is concluded.
- [7] **Guaranty and Suretyship — Contractor's Bond — Enforcement — Declaration of Default — Necessity — Contractual Promise.** Where a contractor's performance bond gives the obligee the option, as opposed to the obligation, of declaring the principal to be in default upon a breach of the contract by the principal, thereby implicating certain specified remedies, the obligee does not fail to fulfill an obligation imposed by law or breach any promise made to the principal when, upon the principal's breach of the contract, the obligee does not declare the principal to be in default but, instead, allows the contract to remain in effect and then sues for damages following completion of the contract.

- [8] **Guaranty and Suretyship — Contractor's Bond — Enforcement — Declaration of Default — Necessity — Remedies Provision — Effect.** Under a contractor's performance bond that binds the surety unless and until the principal promptly and faithfully performs the contract but that also provides for specified remedies and measures of damages if the obligee declares the principal to be in default for a breach of the contract by the principal, the obligee is not required to declare the principal in default for a breach of the contract prior to substantial completion of the contract in order to be able to recover for the breach against the bond after the work under the contract is completed. The obligee has the option of allowing the principal to continue working despite the breach and to seek damages as a remedy therefor after the work is completed. A preceding declaration of default is not required when the obligee takes this approach.
- [9] **Guaranty and Suretyship — Contractor's Bond — Impairment of Collateral — Burden of Proof.** In an action to enforce a contractor's performance bond, the surety's claim that the obligee unreasonably impaired the surety's collateral requires proof by the surety of the existence and extent of the impairment.
- [10] **Guaranty and Suretyship — Contractor's Bond — Impairment of Collateral — Question of Law or Fact.** Whether the obligee of a contractor's performance bond unreasonably impaired the surety's collateral is a question of fact.
- [11] **Guaranty and Suretyship — Contractor's Bond — Action To Obtain Benefit of Bond — Expenses of Plaintiff — Attorney Fees — In General.** An obligee of a contractor's performance bond who is compelled to assume the burden of legal action to obtain the benefit of the bond is entitled to an award of reasonable attorney fees, at trial and on appeal, if the bond was issued by a corporate surety in exchange for a premium, the dispute is over a contractual right to coverage under the bond, and the obligee prevails in the action. The amount to award in fees is determined without regard to the amount of the bond.

Nature of Action: The prime contractor on a construction project sought to recover against a subcontractor's performance bond for additional costs incurred by the prime contractor in completing the work that the subcontractor was hired to perform.

Superior Court: The Superior Court for Clark County, No. 99-2-01395-0, Roger A. Bennett, J., on April 14, 2003, entered a judgment in favor of the plaintiff. The judgment included an award of attorney fees based on the terms of the construction subcontract, which was incorporated into the

performance bond. The court ruled that the plaintiff's total recovery of damages and attorney fees could not exceed the amount of the bond. The trial court denied the plaintiff's request for attorney fees on the equitable basis that the plaintiff was required to pursue legal action to obtain coverage under the bond.

Court of Appeals: Holding that the plaintiff was not required to have declared the subcontractor in default under the contract before substantial completion thereof in order to recover against the bond; that the plaintiff was entitled to an award of attorney fees on the equitable basis that the plaintiff was required to pursue legal action to obtain coverage under the bond; and that the attorney fee award, when added to the damages award, could exceed the amount of the bond, the court *affirms* the judgment in all respects except for the attorney fee award and *remands* the case for further proceedings regarding attorney fees.

Joseph C. Calmes and Magnus R. Andersson (of Hanson Baker Ludlow Drumheller, P.S.), for appellants.

Nell A. Oram; and Jeffrey K. Hanson (of Yazbeck Cloran & Hanson, L.L.C.), for respondent.

Ford D. Ruud on behalf of Surety Association of America, amicus curiae.

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2005 Wash. App. LEXIS 293

James F. Nagle et al., Washington Building Contracts & Construction Law

¶1 MORGAN, A.C.J.— This case requires us to construe a subcontractor's performance bond. The main question is whether the surety's liability was conditioned on the obligee's having declared, before the principal substantially completed the work, that the principal was in default under the subcontract. The trial court answered no, and so do we.

We affirm, except that we modify the trial court's award of attorney fees.

¶2 Colorado Structures, Inc., (CSI), contracted with Wal-Mart to build a large retail store in Vancouver, Washington. CSI was to finish by September 1998, so that the store could open on October 14, 1998. CSI was subject to significant penalties if the store did not open on time.

¶3 In February 1998, CSI formed two subcontracts with Action Excavating and Paving, Inc. (Action). One was for offsite work, and the other was for onsite work.

¶4 The offsite subcontract is the one primarily in issue here. It required Action to build a sewer system for \$472,290. Action was to start in May and finish in July. The city of Vancouver was to test and approve the work. The offsite subcontract provided in part:

If, in the opinion of the Contractor [CSI], the Subcontractor [Action] . . . fails to carry on the Work in a manner acceptable to the Contractor, then the Contractor shall have the right and may . . . after giving the Subcontractor two (2) days written notice thereof, terminate this Subcontract whereupon the Contractor may take over and complete the performance of the Work by whatever method and means it may deem expedient^[1]

¶5 On April 8, 1998, Insurance Company of the West (ICW) issued a performance bond and a payment bond in exchange for \$8,034. In the performance bond, ICW guaranteed to CSI that Action would perform the offsite subcontract.² In the payment bond, ICW guaranteed to CSI that Action would pay the laborers and materialmen on the offsite contract. The performance bond is the one in issue here, and it reads as follows:

[A] Action Excavating & Paving, Inc. . . . , hereinafter called Principal, and Insurance Company of the West . . . , hereinafter called Surety, are held and firmly bound unto CSI Con-

¹ 2 Clerk's Papers (CP) at 72 (§ 6(b)(12)).

² Cf. 17 AM. JUR. 2D *Contractors' Bonds* § 1 at 730 (performance bond guarantees performance).

struction Co. . . . , hereinafter called Obligee, in the amount of . . . \$472,290 . . .

[B] WHEREAS, Principal has . . . entered into a subcontract with Obligee . . . , which subcontract is by reference made a part hereof, and is hereinafter referred to as the subcontract, NOW THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH THAT, if Principal shall promptly and faithfully perform said subcontract, then this obligation shall be null and void; otherwise it shall remain in full force and effect.

[C] Whenever Principal shall be, and declared by Obligee to be in default under the subcontract, the Obligee having performed Obligee's obligations thereunder:

(1) Surety may promptly remedy the default, subject to the provisions of paragraph 3 herein, or;

(2) Obligee after reasonable notice to Surety may, or Surety upon demand of Obligee may arrange for the performance of Principal's obligation under the subcontract subject to the provisions of paragraph 3 herein;

(3) The balance of the subcontract price, as defined below, shall be credited against the reasonable cost of completing performance of the subcontract. If completed by the Obligee, and the reasonable cost exceeds the balance of the subcontract price, the Surety shall pay to the Obligee such excess, but in no event shall the aggregate liability of the Surety exceed the amount of this bond. If the Surety arranges completion or remedies the default, that portion of the balance of the subcontract price as may be required to complete the subcontract or remedy the default and to reimburse the Surety for its outlays shall be paid to the Surety at the times and in the manner as said sums would have been payable to Principal had there been no default under the subcontract. The term "balance of the subcontract price," as used in this paragraph, shall mean the total amount payable by Obligee to Principal under the subcontract and any amendments thereto, less the amounts heretofore properly paid by Obligee under the subcontract.

[D] Any suit under this bond must be instituted before the expiration of two (2) years from date on which final payment under the subcontract falls due.

[E] No right of action shall accrue on this bond to or for the use of any person or corporation other than the Obligee named

herein or the heirs, executors, administrators or successors of Obligee.³

For ease of reference, we have inserted capital letters at the beginning of each major paragraph.

¶6 Action began the offsite work and claimed progress payments that CSI made. By the end of June, however, Action was "seriously behind schedule."⁴ CSI decided not to terminate Action's contract, but instead to help Action perform. CSI supplemented Action's crews and took other steps intended to minimize expense and delay.

¶7 "Action continued performing . . . and substantially completed it[s] work on or about October 14, 1998."⁵ The City allowed Wal-Mart to open the same day. The City required, however, that CSI put money into escrow to insure that defects in Action's work would be repaired. CSI ultimately paid an additional \$417,172 "to complete and repair Action's Off-site work."⁶

¶8 Meanwhile, on September 9, 1998, CSI copied ICW on a letter stating that although Action would finish "by . . . September 18, 1998,"⁷ it would leave many defective and incomplete items. On September 18, 1998, CSI notified ICW that the City had rejected some of Action's work, that CSI was still supplementing Action's crews, and that CSI would "be looking to the ICW Group for compensation of costs which exceed Action Excavating's subcontract agreement and change orders."⁸ On October 9, 1998, CSI notified ICW that the cost of supplementing Action's performance would exceed the remaining balance on the offsite subcontract, and that CSI would be asking ICW to pay the difference. On November 25, 1998, CSI declared that Action

³ 2 CP at 82 (capitalization removed).

⁴ 2 CP at 138.

⁵ 5 CP at 663 (Findings of Fact 27).

⁶ 5 CP at 662-63 (Findings of Fact 22).

⁷ 2 CP at 146-47.

⁸ 2 CP at 149.

was in default and demanded that ICW pay as provided in the performance bond. ICW refused to pay because CSI had not formally declared Action to be in default before Action had substantially completed the work.

¶9 CSI sued ICW, Action, and Action's owner. ICW answered and denied liability. Action and its owner defaulted.⁹ The trial court denied ICW's motion for summary judgment, and this court denied discretionary review.

¶10 A bench trial was held. ICW again took the position that it was not liable because CSI had not formally declared Action in default before Action had substantially completed the work on the offsite subcontract. ICW also contended that CSI had paid Action too much in progress payments, thereby impairing ICW's security and reducing ICW's liability. CSI claimed prejudgment interest. CSI also claimed reasonable attorney fees based on the offsite subcontract, which the performance bond incorporated, and on the *Olympic Steamship*¹⁰ case. The trial court ruled that "Action was in material breach" of the offsite subcontract; that CSI had not been required to formally declare a "default"; that CSI had given ICW "adequate notice" of Action's problems; that CSI had not "unreasonably impaired ICW's collateral"; that CSI had incurred damages of \$417,172; and that CSI could not claim prejudgment interest because its damages had not been "liquidated" until trial.¹¹ The trial court granted reasonable attorney fees to CSI under the subcontract, which the bond incorporated, but ruled that the combination of damages and fees could not exceed the amount of the bond. The trial court denied CSI's claim for reasonable attorney fees under the *Olympic Steamship*¹² case. The trial court entered judgment for \$417,172, plus reasonable attorney fees of \$55,118, for a total of \$472,290.

⁹ 1 CP at 10. Action went out of business and is not party to this appeal.

¹⁰ *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991).

¹¹ 5 CP at 663-65; 4 CP at 522.

¹² 117 Wn.2d 37.

¶11 ICW appeals, and CSI cross-appeals. ICW claims (1) that it is not liable on its bond, and (2) that even if it is, it is not liable for as much as the trial court assessed. CSI claims that it is entitled (1) to prejudgment interest, and (2) to reasonable attorney fees under *Olympic Steamship* even if such fees exceed the amount of the bond.

I

¶12 The first issue is whether ICW is liable on its bond. ICW claims it is not, "because CSI did not declare Action in default before substantial completion of the bonded offsite contract."¹³ According to ICW, its "liability on its bond was conditioned on a declaration of default from CSI," CSI did not make such a declaration, and thus ICW cannot now be liable.¹⁴ CSI responds in part that it declared Action to be in default.

[1] ¶13 A bond is a contract that governs the surety's liability to the obligee.¹⁵ It is interpreted using general principles of contract construction and performance.¹⁶ Here then we (A) review relevant contract principles, (B) examine the bond's terms, and (C) apply the results to ICW's claim.

A

[2] ¶14 We turn first to relevant contract principles. A contract, including a bond, should be construed as a whole¹⁷ and, if reasonably possible, in a way that effectuates all of

¹³ Br. of Appellant at 13 (emphasis omitted).

¹⁴ Br. of Appellant at 13 (emphasis omitted).

¹⁵ *Joint Admin. Bd. v. Fallon*, 89 Wn.2d 90, 94, 569 P.2d 1144 (1977); *Walter Concrete Constr. Co., v. Lederle Labs.*, 99 N.Y.2d 603, 758 N.Y.S.2d 260, 788 N.E.2d 609 (2003).

¹⁶ *Fallon*, 89 Wn.2d at 94.

¹⁷ *McCombs Constr., Inc. v. Barnes*, 37 Wn. App. 91, 93, 678 P.2d 837, review denied, 102 Wn.2d 1002 (1984); *McIntyre v. Fort Vancouver Plywood Co.*, 24 Wn. App. 120, 127, 600 P.2d 619 (1979).

