

STATE OF MICHIGAN  
IN THE SUPREME COURT

H.A. SMITH LUMBER & HARDWARE  
CO., Michigan corporation,

Plaintiff/Counter-Defendant/Appellee,

vs.

S. C. No.

JOHN DECINA,

C.A. No. 238521

*op 3/3/05  
file 4/11/05*

Defendant/Cross-Defendant/Appellant,

C.C. No. 99-015436-CZ

~~vs.~~ *and*

*Oakland  
P. Jourdan*

JOHN DECINA DEVELOPMENT CO,  
a Michigan corporation,

Third Party Defendant/Cross-Defendant/  
Counter-Plaintiff/Appellant,

~~vs.~~ *and*

LINAS P. GOBIS and LYDIA K. GOBIS,

Defendants/Cross-Plaintiffs/Cross-Defendants/  
Counter-Defendants/Appellees,

~~vs.~~ *and*

WILLIAM GARDELLA d/b/a WILLIAMS  
GLASS COMPANY,

Defendant/Counter-Plaintiff/Cross-Plaintiff/  
Third Party Plaintiff/Appellees.

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*AM*

*5/17 5/24*

**APPELLANTS JOHN DECINA AND JOHN DECINA DEVELOPMENT CO.'S  
APPLICATION FOR LEAVE TO APPEAL**

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**JUDGMENT AND ORDERS APPEALED FROM AND RELIEF SOUGHT**

This Court has jurisdiction under MCR 7.301(A)(2) to determine the appeal of the Court of Appeals Opinion of March 3, 2005; the Court of Appeals Order of April 11, 2005 Denying Appellant/Defendant/Cross-Defendant John Decina (Decina) and Appellant/Third Party Defendant/Cross-Defendant/Counter-Plaintiff John Decina Development Co.'s (Decina Co) Motion for Reconsideration; and the November 7, 2001 Judgment of Visiting Sixth Judicial Circuit Court Judge J. Phillip awarding attorney fees of \$9,000.00 in favor of Appellee/Plaintiff H.A. Smith Lumber & Hardware Co. (Smith Lumber) and attorney fees of \$3,000.00 in favor of Appellee/Defendant/Cross-Plaintiff William Gardella d/b/a Williams Glass Company (Williams Glass).

The relief sought is a reversal of the Court of Appeals decision affirming the award of attorney fees to Smith Lumber of \$9,000.00 and Williams Glass of \$3,000.00 under the Michigan Construction Lien Act, MCL 570.1118(2), and a remand to the Trial Court for an evidentiary hearing to determine any award of attorney fees to Smith Lumber and Williams Glass for services rendered in enforcing their contract claims against Decina and Decina Co.

**STATEMENT OF QUESTION PRESENTED**

- I. DID THE COURT OF APPEALS ERR IN INTERPRETING MCL 570.1118(2) TO PERMIT SMITH LUMBER AND WILLIAMS GLASS TO RECOVER ATTORNEY FEES FOR PREVAILING IN THEIR CONTRACT CLAIMS AGAINST DECINA AND DECINA CO. ALTHOUGH THEY COULD NOT MAINTAIN AN EQUITABLE ACTION TO FORECLOSE THEIR LIENS AGAINST THE PROPERTY OF THE OWNERS [GOBISES]?

The Court of Appeals answered this question “No”.

Appellees Smith Lumber and Williams Glass contend the answer is “No”.

Appellant Decina contends the answer is “Yes”.

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## STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

The factual situation in this matter is fully set forth in Appellant's prior Application for Leave to Appeal, Docket No. 125193, filed on December 9, 2003. The following facts are pertinent for purposes of this Application for Leave to Appeal.

On November 29, 2004, this Court entered the following Order determining the December 9, 2003 application:

On order of the Court, the application for leave to appeal the September 16, 2003 judgment of the Court of Appeals is considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we VACATE Part V of the Court of Appeals decision, which affirms the attorney fees awards and rules that they were granted pursuant to MCR 570.1118(2). The Court of Appeals clearly erred by finding that the Oakland Circuit Court's "final order stated that attorney fees were awarded against Decina pursuant to the CLA [Construction Lien Act, MCL 570.1101 *et seq*]" . 258 Mich App 419, 428-429 n 3 (2003). The attorney fee awards in the November 7, 2001 Oakland Circuit Court judgment neither refer to nor rely upon the CLA. The case is REMANDED to the Court of Appeals for further consideration consistent with this order. The Court of Appeals, on remand, may, while retaining jurisdiction, remand the case to the Oakland Circuit Court for additional proceedings or hearings if necessary. In all other respects, leave to appeal is DENIED.

On January 6, 2005, the Court of Appeals by letter stated that this matter had been resubmitted on remand to the panel issuing the September 16, 2003 Opinion and that no supplemental briefing was permitted without permission of the Court. The Court of Appeals did not remand this case to the Oakland Circuit Court for additional proceedings or hearings and issued their Opinion on March 3, 2005 in which the Court affirmed the award of attorney fees to Smith Lumber and Williams Glass and stated:

The trial court could have awarded attorney fees to Smith and Williams under the CLA because, in assessing attorney fees under the

CLA, “prevailing party” means one who prevails in a CLA claim or a claim in the alternative for the same injury or loss in the CLA claim. The CLA is remedial and should be construed literally to “secure the beneficial results, intents and purposes of this act.”

and then concluded:

Smith and Williams sought recovery for unpaid labor and materials under the CLA and, in the alternative, under a breach of contract claim. The trial court determined that Smith and Williams had valid liens that did not attach to the property because Linas and Lydia Gobis paid the entire contract amount to John Decina Developing (sic) Company. But the trial court determined that Decina breached the contracts with Smtih and Williams and so awarded them damages on their breach of contract claims. Therefore, because Smith and Williams were “prevailing parties” for purposes of the CLA, the trial court could have ordered Decina to pay them attorney fees pursuant to the CLA. This Court will not reverse when the trial court reached the right result for the wrong reason. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

On April 11, 2005, the Court of Appeals issued its Order Denying Appellants’ March 15, 2005 Motion for Reconsideration.

**Argument**

**THE COURT OF APPEALS ERRED IN INTERPRETING MCL 570.1118(2) TO PERMIT SMITH LUMBER AND WILLIAMS GLASS TO RECOVER ATTORNEY FEES AGAINST DECINA AND DECINA CO BY PREVAILING ON THEIR CONTRACT CLAIMS AGAINST THEM ALTHOUGH THEY COULD NOT MAINTAIN AN ACTION TO FORECLOSE THEIR LIENS AGAINST THE PROPERTY OF THE OWNERS [GOBISES].**

Questions of statutory interpretation are reviewed de novo. Oade v Jackson Nat’l Life Ins Co, 465 Mich 244, 250; 632 NW2d 126 (2001). When interpreting statutes, the court’s obligation is to discern and give effect to the Legislature’s intent as expressed in the statutory language. DiBenedetto v West Shore Hosp, 461 Mich 394, 402; 605 NW2d 300 (2000). If the language is unambiguous,

“we presume that the Legislature intended the meaning clearly expressed-----no further construction is required or permitted, and the statute must be enforced as written. *Id.* Similarly, courts may not speculate about an unstated purpose where the unambiguous text plainly reflects the intent of the Legislature.” Pohutski v City of Allen Park, 465 Mich 675, 683; 641 NW2d 219 (2002).

This case presents an issue of major significance to the jurisprudence of this state as it will be a published decision, which together with the prior published decision, HA Smith Lumber v Decina, 258 Mich 419; NW2d2 (2003), will consist of two published decisions inconsistent with the plain and unambiguous language of MCL 570.1118(2). The plain and unambiguous language of MCL 570.1118(2) pertains solely to the equitable action of a lien foreclosure and provides for an award of attorney fees to a prevailing lien claimant:

(2) In each action in which enforcement of a construction lien through foreclosure is sought, the court shall examine each claim and defense that is presented, and determine the amount, if any, due to each lien claimant or to any mortgagee or holder of an encumbrance, and their respective priorities. The court may allow reasonable attorneys’ fees to a lien claimant who is the prevailing party. (Emphasis supplied)

The Legislature is obviously aware of the general rule that attorney fees are not normally awarded to the prevailing party in an equitable action and, therefore, specifically provided this benefit to a prevailing lien claimant under the CLA.

The Legislature also knows that a lien claimant can pursue a contract action in law as they made it clear that this right could not be denied, MCL 570.1302(2):

(2) Construction, prohibition. This act shall not be construed to prevent a lien claimant from maintaining a separate action on a contract.

It is reasonable to presume that the Legislature also knows that a prevailing party in a contract action normally is not awarded attorney fees and would have specifically provided for this if this was their intent. In short, it is pure speculation on the part of the Court of Appeals to rule that the Legislature intended that their grant of attorney fees to a prevailing lien claimant in an equitable action was intended to be awarded to a party prevailing in a contract action in law.

Without resorting to the above logical analysis, the error of the Court of Appeals is demonstrated by the plain and unambiguous language of MCL 570.1118(2). There are 39 sections of the CLA and only one section, MCL 570.1118(2), contains the words “prevailing party” and “reasonable attorney fees”. There can be no doubt that the whole tenor of MCL 570.1118(2) is devoted to the equitable action of a lien foreclosure and it defies imagination to contend that the Legislature intended MCL 570.1118(2) to apply to a contract action in law.

Netting v Touscany, 247 Mich 279, 282; 225 NW 556 (1929), makes it clear that an action on the contract is separate and distinct from an action to foreclose a lien:

A common-law action to recover a personal judgment and an equitable proceeding to enforce a mechanic’s lien are concurrent remedies, and either may be brought while the other is pending.

Dana Constr, Inc. v Royal’s Wine & Deli, Inc, 192 Mich App 287, 292-293; 480 NW2d 343 (1991), reaffirms the distinction between an action on the contract and an action to foreclose the lien:

Although the proceeding to foreclose on the construction lien originates from the contract, it is an action directed at the property rather than the person or entity who contracted for the services and is separate and distinct from an action for breach of contract. (Citation omitted) The enforcement of the lien through foreclosure is a cumulative remedy that may be pursued simultaneously with an action on the contract from which the lien arose. (Citations omitted)

Old Kent v Whitaker Constr Co, 222 Mich App 436, 439-440; 566 NW2d 1 (1997), involved an in personam action in law against the owners and an equitable action against their property and the Court held that a judgment in one action does not extinguish the other:

Thus, the plain language of the statute persuades us that not only did the Legislature contemplate that two actions such as those involved in the instant case could be pursued, but also that a judgment on or a settlement of one action would not extinguish the other.

If the lien action and contract action can be pursued simultaneously, it follows that they need not be filed simultaneously, or even filed. This fact exposes the fallacy of the Court of Appeals decision. Assuming arguendo that a subcontractor elects to file only a contract action in law and prevails, can attorney fees be awarded under MCL 570.1118(2), which authorizes such a payment in an equitable action of foreclosure? Assuming arguendo that the subcontractor fails to perfect a lien and prevails in a contract action in law, can attorney fees be awarded to the prevailing contract claimant under MCL 570.1118(2)? The obvious answer is that under the plain and unambiguous language of MCL 570.1118(2) attorney fees can be awarded only to a prevailing lien claimant in the equitable action to foreclose the construction lien.

#### **Relief Requested**

Appellants Decina and Decina Co. respectfully request this Honorable Court for the following relief:

(1) reversal of the attorney fee awarded to Appellee's Smith Lumber and Williams Glass pursuant to MCL 570.1118(2);

(2) remand to the trial court to determine attorney fees for services rendered by Smith Lumber and Williams Glass under their contracts with Decina and Decina Co. if it is determined that

attorney fees can be properly awarded under their contracts.

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Dated: April 26, 2005  
Decina/HA Smith SC App.wpd