

STATE OF MICHIGAN
SUPREME COURT

WYANDOTTE ELECTRIC SUPPLY CO.,

Plaintiff/Appellee,

v

Supreme Court No. _____
Court of Appeals No. 313736
Wayne County Circuit Court
Case Number: 11-003015-CK

ELECTRICAL TECHNOLOGY SYSTEMS, INC.,

Defendant/Cross-Defendant,

and

KEO & ASSOCIATES, INC., and
WESTFIELD INSURANCE COMPANY,

Defendants/Appellants.

AMICUS CURIAE BRIEF OF
ASSOCIATED GENERAL CONTRACTORS OF MICHIGAN

FACCA, RICHTER & PREGLER, P.C.

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

- I. Did the Court of Appeals err in its determination that Bond Claimants under MCL 129.201 et seq., do not need to prove the actual receipt by the Principal Contractor of the thirty (30) day written notice, to perfect a claim on a bond.

The court of appeals answer “no.”

The trial court answered “no.”

Appellants answers “yes.”

Amicus Curiae answers “yes.”

- II. Did the Court of Appeals err in ruling that a Bond Claimant, not in direct contract with the Principal Contractor was entitled to time price differential and attorney fees, as part of its claim against a statutorily required (MCL 129.201 et seq.) Public Works Labor and Material Payment Bond.

The court of appeals answer “no.”

The trial court answered “no.”

Appellants answers “yes.”

Amicus Curiae answers “yes.”

I. STATEMENT OF INTEREST OF AMICUS CURIAE.

The Associated General Contractors of Michigan (AGC-Michigan) is a statewide organization comprised of over four hundred (400) General Contractors, Construction Managers, Specialty Contractors, Design Professionals and other service organizations associated with the construction industry. The AGC-Michigan is a chapter of the nationwide organization known as the Associated General Contractors of America.

By way of background, on a public project the Contractor who is in direct contract with a public entity is required by statute, to supply a Performance Bond and a Labor and Material Bond. The bonds name the Contractor as the Principal and a company such as Westfield Insurance Company is the surety. In order to obtain a Performance Bond and a Labor and Material Payment Bond, a Contractor executes an Indemnity Agreement with the surety. The Indemnity Agreement typically requires the Contractor to indemnify the surety from any claims, and the indemnity is provided by the Contractor Corporation and in many cases, the individual owners of the corporation. Thus, in the event a surety pays a claim amount, the surety seeks indemnity from the Contractor and individual indemnitors.

In most cases involving a bond claim, on a Labor and Material Payment and payment by the surety, the Contractor and individual indemnitors actually pay the claim and under the terms of the Indemnity Agreement bear ultimate responsibility for any claim. It is based upon this background, the members of the Amicus Curiae have an interest in the decision in this matter by the Court of Appeals.

In a previous decision by the Michigan Supreme Court (*Pi-Con v A J Anderson*, 435 Mich 375 (1990)), the Court set forth the elements for a claimant asserting a claim pursuant to MCL 129.207. Specifically, this Court held that a Bond Claimant (not in contract with Principal Contractor) under MCL 129.207 could perfect its claim by establishing receipt of actual written

notice of a claim by the Principal Contractor. This Court ruled that receipt of actual notice by the Principal Contractor was an element for a Claimant to prove to perfect a bond claim. In the current decision by the Michigan Court of Appeals, the Court has determined the Bond Claimant (Wyandotte Electric) perfected its claim against the Labor and Material Payment Bond provided pursuant to MCL 129.201, even though the parties stipulated that the Principal Contractor did not receive the thirty (30) day written notice required by MCL 129.207.

Amicus Curiae, AGC-Michigan is concerned the effect of the current decision by the Michigan Court of Appeals combined with the previous decision by this Court in *Pi-Con*, supra. increases the financial exposure of its members on public works projects. Amicus Curiae is requesting the Michigan Supreme Court to establish certainty for its members in providing labor and materials payment bonds on Public Projects.

II. STATEMENT OF FACTS

Amicus Curiae relies on the Statement of Material Proceeding and Facts contained in Defendants-Appellants Application for Appeal.

III. STANDARD OF REVIEW

Standard of Review: When a motion for summary disposition is granted or denied, the appellate court reviews the trial court's decision under the de novo standard of review. *Ardt v Titan Ins. Co.*, 233 Mich App 685, 688; 593 NW 2d 215 (1999).

Issues of statutory interpretation are reviewed de novo. *Sotelo v Grant Twp.*, 470 Mich 95, 100; 680 NW2d 381 (2004). The primary goal of judicial interpretation of statutes is to discern and give effect to the intent of the Legislature. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004).

Where reasonable minds may differ about the meaning of a statute, we look to the objective of the statute and the harm it is designed to remedy and apply a reasonable construction that best

accomplishes the legislature's purpose. *Grand Blanc Cement Products, Inc. v Ins Co of North America*, 225 Mich App 138, 143; 571 NW2d 221 (1997) citations omitted. Literal constructions that produce unreasonable and unjust results that are inconsistent with the purpose of the act should be avoided. *id.*

IV. ARGUMENT

(A) The Court of Appeals erred in its determination and affirmation of the Lower Court that Bond Claimants under MCL 129.207 et seq. do not need to prove the actual receipt by the Principal Contractor of the thirty (30) day written notice requirement to perfect a claim on a bond.

MCL 129.207 contains the following requirements for Bond Claimants:

129.207. Enforcement of claims; notice of supplier to principal contractor or governmental unit; payment to subcontractor

Sec. 7. A claimant who has furnished labor or material in the prosecution of the work provided for in such contract in respect of which payment bond is furnished under the provisions of section 3, and who has not been paid in full therefor before the expiration of a period of 90 days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which claim is made, may sue on the payment bond for the amount, or the balance thereof, unpaid at the time of institution of the civil action, prosecute such action to final judgment for the sum justly due him and have execution thereon. A claimant not having a direct contractual relationship with the principal contractor shall not have a right of action upon the payment bond unless (a) he has within 30 days after furnishing the first of such material or performing the first of such labor, served on the principal contractor a written notice, which shall inform the principal of the nature of the materials being furnished or to be furnished, or labor being performed or to be performed and identifying the party contracting for such labor or materials and the site for the performance of such labor or the delivery of such materials, and (b) he has given written notice to the principal contractor and the governmental unit involved within 90 days from the date on which the claimant performed the last of the labor or furnished or supplied the last of the material for which the claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Each notice shall be served by mailing the same by certified mail, postage prepaid, in an envelope addressed to the principal contractor, the governmental unit involved, at any place at which said parties maintain a business or residence. The principal contractor shall not be required to make payment to a subcontractor of sums due from the

subcontractor to parties performing labor or furnishing materials or supplies, except upon the receipt of the written orders of such parties to pay to the subcontractor the sums due such parties.

A Bond Claimant who does not have a direct contract with the Principal Contractor is required to serve two (2) written notices, the first being within thirty (30) days of the first day of supplying materials or labor and the second being within ninety (90) days of the last day of supplying labor and/or materials. Each notice is to be served by certified mail. The notice requirements of the Public Works Bond Act have been strictly enforced by the Michigan Courts. *W.T. Andrews, v Mid State Surety*, 221 Mich App 438 (1997), *Charles W. Anderson v. Argonaut, Inc.*, 62 Mich App 650 (1975). The written notice requirement is important to a Principal Contractor, in particular the thirty (30) day notice requirement. The reason the thirty (30) day notice requirement is important to the Principal Contractor, is it provides the Principal Contractor an opportunity to protect itself, from having to pay twice for the same material or labor. For example on a typical project, the Public Owner makes payment to the Principal Contractor, and the Principal Contractor makes payment to the subcontractor (which includes payment of suppliers), and the subcontractor would pay its supplier, such as Wyandotte. If the subcontractor does not pay its supplier, and the supplier perfects its claim on the Payment Bond, the Principal Contractor will pay a second time for the same materials. The importance of receipt of the thirty (30) day written notice is to allow the Principal Contractor an opportunity to avoid paying twice for the same materials.

The Michigan Supreme Court in *Pi-Con v A J Anderson*, 435 Mich 375 (1990) defined the substantive elements for a Claimant on a bond, to comply with MCL 129.207. Specifically, the Court provided the following interpretation of MCL 129.207:

Applying *Fleisher's* reasoning to Michigan's public works bond statute as illuminated by prior case law, we hold that a claimant on a bond may maintain an action on the bond upon establishing compliance with four substantive elements of the notice provisions of MCL 129.207; MSA

5.2321(7). First, a claimant must prove that the principal contractor actually received notice. Second, the notice must relate “the nature of the materials being furnished or to be furnished, or labor being performed or to be performed and identify [] the party contracting for such labor or materials and the site for the performance of such labor or the delivery of such materials....” Third, the notice sent must have been written. Fourth, the notice must have been received within the time limits prescribed by the statute. (page 382)

* * *

We look to *Fleisher* in establishing the first element, that the principal contractor must actually receive notice in order for a claimant to perfect its right on the bond. *Fleisher* determined that the purpose behind the Miller Act’s provisions regarding the method of mailing notice “was to assure receipt of the notice” *Id.* at 19.

* * *

The purpose behind the thirty-day notice required by MCL 129.207; MSA 5.2321(7) is to provide principal contractors with detailed notice of a subcontractor’s involvement on a project before, if not soon after, the commencement of that involvement. Such notice is necessary to ensure principal contractors knowledge regarding any possible claims to which their bonds might later be subjected and to assure that principal contractors are not prejudiced by having to pay out of a bond for labor or materials performed by third parties after already paying their subcontractors for that same labor or materials. So long as the principal contractors receive notice, the intent of the Legislature is fully complied with. To insist that the notice be given by certified mail would require insisting on “idle form.” *Fleisher* at 19.

In this matter, the Court of Appeals simply did not apply the elements established by the Michigan Supreme Court, in particular receipt of the written notice by the Principal Contractor. In this case, there is no dispute that the Principal Contractor did not receive thirty (30) day written notice from Wyandotte. (Exhibit E attached to Wyandotte Motion for Summary Disposition and Exhibit G Wyandotte’s Brief in Support of Motion for Summary Disposition.) If the first element, prove the Principal Contractor actually received the notice, is applied to this case, the decision of the Court of Appeals should be reversed.

(B) The Court of Appeals erred in ruling that a Bond Claimant, not in direct contract with the Principal Contractor was entitled to recover time price differential and attorney fees against a statutorily required (MCL 129.201 et seq.) Public Work Labor and Material Payment Bond.

MCL 129.206 entitled definition contains the following:

A “claimant” means a person having furnished labor, material or both, used or reasonably required for use in the performance of the contract. “Labor and material” includes that part of water, gas, power, light, heat, oil, gasoline, telephone service or rental of equipment directly applicable to the contract.

The act which regulates contractors’ bonds for public works was enacted to safeguard and protect contractors and materialmen in the public sector who were denied the security afforded by the mechanics’ lien law to contractors and materialmen who provided identical work or materials in the private sector. Adamo Equipment Rental Co. v. Mack Dev. Co., 122 Mich. App. 233, 333 N.W.2d 40, 1982 Mich. App. LEXIS 3735 (Mich. Ct. App. 1982).

The term “material” as applied to construction contracts refers to those items consumed by construction of or which become part of a finished structure, absent a specific statutory definition. Kmh Equip. Co. v Chas J Rogers, 104 Mich. App. 563, 305 N.W.2d 266, 1981 Mich. App. LEXIS 2819 (Mich. Ct. App. 1981), app. denied, 411 Mich. 1079, 1981 Mich. LEXIS 323 (Mich. 1981).

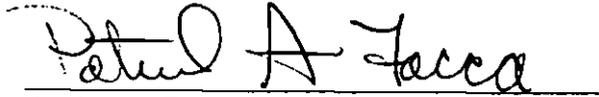
The Public Work Bonds Act is designed to cover labor and materials used for the project. The term material as defined by statute, refers to materials which become part of a finished structure. The definition of material does not include time price differential of 18% per annum, which in reality is an interest charge for late payment. Since MCL 129.206 does not include time price differential or interest charges, the ruling by the Michigan Court of Appeals that 18% time price differential is included as part of a claim against the Payment Bond, to be paid by a Principal Contractor and Surety, should be reversed.

CONCLUSION

Amicus Curiae, ASSOCIATED GENERAL CONTRACTORS OF MICHIGAN, requests this Court to grant the Application for Leave to Appeal, Grant Amicus Curiae Motion to file Briefs in this Appeal, and reverse the Ruling by the Michigan Court of Appeals.

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