

IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

Beckering, P.J., and Hoekstra and Gleicher, J.J.

WYANDOTTE ELECTRIC SUPPLY CO.,

Supreme Court No. 149989

Plaintiff/Appellee,

Court of Appeals No. 313736

v

Wayne County Circuit Court No.
11-003015-CK

ELECTRICAL TECHNOLOGY SYSTEMS, INC.,

Defendant/Cross-Defendant,

and

KEO & ASSOCIATES, INC.,

Defendant/Cross-Plaintiff/Appellant

and

WESTFIELD INSURANCE CO.,

Defendant/Appellant.

BRIEF ON APPEAL OF PLAINTIFF/APPELLEE

ORAL ARGUMENT REQUESTED

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STATEMENT OF BASIS OF JURISDICTION

Plaintiff/Appellee, Wyandotte Electric Supply Company (“Wyandotte”), agrees with Defendants/Appellants, KEO & Associates, Inc. (“KEO”) and Westfield Insurance Company (“Westfield”), Statement of Jurisdiction.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether Wyandotte served on KEO the 30-day notice within the meaning of MCL 129.207.

Wyandotte answers, "Yes."

KEO and Westfield answer, "No."

Court of Appeals answered, "Yes."

Trial Court answered, "Yes."

2. Whether Wyandotte is entitled to damages that include a time-price differential and attorney fees.

Wyandotte answers, "Yes."

KEO and Westfield answer, "No."

Court of Appeals answered, "Yes."

Trial Court answered, "Yes."

3. Whether MCL 600.6013(7) is applicable to the judgment in this case.

Wyandotte answers, "Yes."

KEO and Westfield answer, "No."

Court of Appeals answered, "Yes."

Trial Court answered, "Yes."

I. INTRODUCTION

This case involves statutory service under the Public Works Bond Act, MCL 129.201 *et seq.* (the “PWBA”), as well as damages and post-judgment interest that an unpaid claimant is entitled to under the PWBA, the claimant’s unambiguous contract, and Michigan law. In this case, the PWBA operated and was interpreted exactly as the Legislature plainly intended. Plaintiff/Appellee, Wyandotte Electric Supply Company (“Wyandotte”), supplied materials for a public project and was not paid for supplying such materials. Wyandotte did everything it was statutorily required to do under the PWBA to perfect its claim for payment, and Wyandotte was awarded the unpaid amounts it was justly due under its contract – nothing more, and nothing less. Because Wyandotte strictly complied with the PWBA and was awarded all sums that were duly owed, this Court should affirm the lower courts.

First, service was proper under the PWBA. In MCL 129.207, the Legislature unambiguously provided that the 30-day notice at issue in this case “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.” Here, Wyandotte served its 30-day notice upon Defendant/Appellant, KEO & Associates, Inc. (“KEO”), the principal contractor on the public project, by mailing the notice by certified mail, postage prepaid, in an envelope addressed to KEO at a place where KEO maintained a business. Because Wyandotte served the 30-day notice in strict compliance with the plain statutory notice requirement, the Court of Appeals correctly ruled that Wyandotte’s 30-day notice was properly served under MCL 129.207. Nothing in MCL 129.207 requires actual receipt of the 30-day notice. As nothing in MCL 129.207 requires actual receipt, this Court should reject KEO and Defendant/Appellant, Westfield Insurance Company’s (“Westfield”),

request to engraft an actual receipt requirement onto the statute where the Legislature did not do so. Further, this Court's decision in *Pi-Con, Inc v A J Anderson Constr Co*, 435 Mich 375; 458 NW2d 639 (1990), is inapposite because this Court concluded in *Pi-Con* that a principal contractor's actual receipt of the 30-day notice is sufficient under MCL 129.207 where the claimant did not strictly comply with the statutory notice provision. In this case, Wyandotte strictly complied with MCL 129.207. Moreover, to the extent that *Pi-Con* can be read to stand for the proposition that actual receipt is required under MCL 129.207 in all instances, this Court should overrule *Pi-Con* because that decision irreconcilably conflicts with MCL 129.207's plain and unambiguous language.

Because Wyandotte properly served the 30-day notice, MCL 129.207 provides that Wyandotte is entitled to payment of all sums due. In this case, a contract establishes all sums due to Wyandotte, and such sums explicitly include a time-price differential and one-third of the unpaid balance for attorney's fees and costs. Central to this Court's contract jurisprudence is the right to contract freely. Accordingly, unambiguous contractual provisions must be enforced as written unless the provisions would violate law or public policy. Wyandotte's contract is plain, and nothing in MCL 129.207 precludes a contractual time-price differential or attorney fee provision. Rather, MCL 129.207 expressly provides that Wyandotte may obtain the amount unpaid and justly due. Because Wyandotte's contract unambiguously provides the amount justly due, and the contract amount unpaid at the time of this action included a time-price differential and attorney fees, Wyandotte is entitled to damages that include a time-price differential and attorney fees. KEO and Westfield's argument that Wyandotte is not entitled to such damages merely because KEO and Westfield were not in privity with Wyandotte must be rejected as it runs completely counter to MCL 129.207, whereby the Legislature expressly made KEO (the

principal contractor) and Westfield (the surety) liable to Wyandotte (a supplier) with whom they have no privity. The Court of Appeals therefore properly affirmed the trial court's inclusion of a time-price differential and attorney fee award in Wyandotte's judgment.

Finally, post-judgment interest pursuant to MCL 600.6013(7) applies to the judgment in this case. In post-trial proceedings, the trial court was called upon to decide what Wyandotte was entitled to for the period following entry of judgment until payment. Because the judgment was rendered on a written instrument evidencing indebtedness with a specified interest rate, namely, Wyandotte's written agreement that provided for a specified rate of 1½% per month, the trial court properly applied MCL 600.6013(7).

II. STATUTES AT ISSUE

A. The Public Works Bond Act

The PWBA was enacted to protect contractors and persons providing material (i.e., suppliers) in the public sector that were denied the security afforded under the mechanic's lien law to those in the private sector providing identical work or materials. *W T Andrews Co Inc v Mid-State Sur Corp*, 450 Mich 655; 545 NW2d 351 (1996). In the private sector, a contractor who does not get paid for his services can obtain a mechanic's lien on a private building to secure payment. *Id.* at 659. But contractors and suppliers cannot obtain a mechanic's lien on a public building. *Kammer Asphalt Paving Co, Inc v East China Twp Schs*, 443 Mich 176, 181; 504 NW2d 635 (1993). Accordingly, the PWBA is an exercise of the Legislature's police power by ensuring that governmental units and people who have provided services or materials in connection with a public project are not injured when contractors default on their obligations. *Id.* at 182. The PWBA therefore requires a principal contractor on a public project to furnish both a performance bond and a payment bond. MCL 129.201. The performance bond is solely for the

protection of the governmental unit awarding the public contract and ensures that the principal contractor will perform as promised. MCL 129.202. Further, the payment bond furnished by the principal contractor is solely for the protection of claimants supplying labor or materials to the principal contractor or the principal contractor's subcontractors. MCL 129.203; see also MCL 129.206 (statutorily defining "claimants"). Thus, if a claimant is not fully compensated in connection with its provision of materials on a public project, the claimant can make a claim on the payment bond. MCL 129.203 and MCL 129.207.

The absence of a direct contract between the unpaid claimant and the principal contractor does not preclude liability on the principal contractor's payment bond for such a claim. MCL 129.207. Rather, in MCL 129.207, the PWBA expressly sets forth the procedure by which a claimant not having a direct contractual relationship with the principal contractor may perfect a claim against the payment bond. MCL 129.207 is at issue in this case, and the statute provides:

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. [Emphasis added.]

B. Post-Judgment Interest Under MCL 600.6013(7)

Pursuant to the Revised Judicature Act, MCL 600.6013(1), post-judgment interest is allowed on a money judgment recovered in a civil action. The various subsections of MCL 600.6013 set forth the circumstances under which such interest is allowed, as well as how the interest is calculated. MCL 600.6013(7) is at issue in this case, and the statute provides:

For a complaint filed on or after July 1, 2002, if a judgment is rendered on a written instrument evidencing indebtedness with a specified interest rate, interest is calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate specified in the instrument if the rate was legal at the time the instrument was executed. If the rate in the written instrument is a variable rate, interest shall be fixed at the rate in effect under the instrument at the time the complaint is filed. The rate under this subsection shall not exceed 13% per year compounded annually.

III. COUNTER-STATEMENT OF FACTS

A. Factual Background

KEO was the principal contractor on a public renovation project for the Detroit Public Library. Appellants' Appendix ("App") at 21a-42a, 69a, 149a. As the principal contractor, and pursuant to the PWBA, KEO obtained a payment bond to ensure the protection of claimants supplying labor or materials to KEO or KEO's subcontractors. App 52a, 69a-70a, 149a. Westfield was the surety on the payment bond. *Id.*

For the public project, KEO subcontracted with Electrical Technology Systems (“ETS”) for ETS to be the electrical subcontractor. App at 21a-42a, 149a. As the electrical subcontractor, ETS would furnish all of the electrical labor and materials on the project. App at 40a-42a, 149a. In turn, ETS entered into a contract with Wyandotte, whereby ETS would purchase the electrical materials for the public project from Wyandotte.

ETS and Wyandotte had a longstanding business relationship, beginning with the creation of an open account agreement in 2003. App at 10a-11a. When ETS first applied for credit from Wyandotte, ETS agreed on the credit application to pay a time-price differential of 1½% per month for all payments more than 30 days overdue. App at 11a. ETS also agreed that if its account was sent to an attorney for collection, ETS would pay one-third of the unpaid balance for attorney’s fees together with applicable costs. *Id.* When ETS solicited a job quotation from Wyandotte for the electrical materials for the Detroit Public Library Project, Wyandotte’s quotation likewise expressly provided for a time-price differential of 1½% per month that would be calculated on all invoices that were more than 30 days overdue. App at 12a-14a. ETS accepted Wyandotte’s quotation via a purchase order dated February 19, 2010. App at 15a, 149a.

On March 3, 2010, Wyandotte supplied ETS with the first of the requested electrical materials for the public project. Appellee’s Appendix (“App”) at 28b. That same day, Wyandotte sent notices to both KEO and Westfield, and Wyandotte advised that it had contracted with ETS on the Detroit Public Library project. App at 16a, 143a, 149a. Wyandotte also asked for a copy of the payment bond. *Id.* Significantly, in response to Wyandotte’s request, it is undisputed that both KEO and Westfield faxed Wyandotte a copy of the payment bond the very next day – March 4, 2010. App at 143a.

On March 10, 2010, and pursuant to MCL 129.207, Wyandotte sent a “Notice of Furnishing” by certified mail, postage prepaid, to each of the following at their respective businesses: KEO, Westfield, Detroit Public Library, and ETS. App at 17a, 57a-60a, 143a. Wyandotte learned much later that KEO – and only KEO – did not receive the certified mailing of the notice. App at 149a.¹

From March 3, 2010 to September 30, 2010, Wyandotte supplied electrical materials for the public project to ETS. App at 143a, 151a; App at 28b. Early on, Wyandotte supplied ETS with electrical materials on credit. For example, on July 22, 2010, Wyandotte supplied ETS with electrical materials for the public project without advance payment. But ETS only paid Wyandotte sporadically, if at all. App at 25b. So after the July 22, 2010 delivery, Wyandotte required cash on delivery. Further, in August 2010, Wyandotte received two payments from ETS, and these payments were applied to the oldest invoices. App at 25b. Nonetheless, ETS still had an outstanding balance owed to Wyandotte. App at 7b-8b. In September 2010, ETS paid in advance for four shipments delivered that month, and the last of these materials were delivered to ETS on September 30, 2010. App at 28b. Subsequently, on October 30, 2010, ETS provided Wyandotte with another check. App at 7b-8b. This check was returned for insufficient funds. *Id.*; App at 26b.

On November 1, 2010, and pursuant to MCL 129.207, Wyandotte provided a “90 Day Notice of Furnishing” by certified mail, postage prepaid, to KEO, Westfield, and Detroit Public

¹ The record does not reveal what happened to the March 10, 2010 certified mailing to KEO and why KEO – and only KEO – did not receive the certified mailing. The post office in Wyandotte, Michigan received the certified mailing for KEO on March 12, 2010 at 10:23 a.m., and the mailing was received by the post office in Detroit, Michigan on March 13, 2010 at 6:24 a.m. for delivery to KEO. App at 129a, 143a. Wyandotte did not receive the mailing back from the post office as undeliverable and, thus, had no notice that the mailing to KEO – and only KEO – seemed to have disappeared. *Id.*

Library. App at 18a. The notice provided that Wyandotte's "last date of furnishing electrical materials was September 30, 2010." *Id.* The notice also advised of the \$150,762.33 balance due to Wyandotte from ETS, including a time-price differential of 1.5%. *Id.* There is no dispute that KEO received this notice via certified mail. App at 62a-67a.

KEO needed additional electrical materials to complete the Detroit Public Library project. App at 7b, 28b. Accordingly, on December 3, 2010, KEO wrote a check jointly payable to ETS and Wyandotte, which ETS signed over and Wyandotte credited to ETS's account. App at 7b-8b, 15b-23b, 27b.² Wyandotte therefore made a delivery of about \$350 worth of electrical materials for the public project on January 10, 2011. App at 28b. ETS still had an outstanding balance with Wyandotte. *Id.* Because Wyandotte remained unpaid in connection with the public project, Wyandotte filed a proof of claim with Westfield on January 28, 2011 against the payment bond. App at 163a.

B. Trial Court Proceedings

Wyandotte filed suit directly against ETS, as well as against KEO and Westfield for recovery on the payment bond pursuant to the PWBA. App at 46a. A default judgment was entered against ETS; however, ETS went out of business and its president had declared personal bankruptcy. App at 106a. Accordingly, Wyandotte's suit proceeded against KEO and Westfield on the payment bond.

² According to ETS's sworn testimony, KEO failed to pay what it owed to ETS. App at 10b, 32b-33b. In turn, KEO claimed that it had paid ETS more than what was owed. App at 12b-13b. At trial, however, KEO was unable to present any evidence whatsoever that such payment to ETS was made. App at 21b-24b. Moreover, before purportedly paying ETS, KEO did not seek or obtain lien waivers from Wyandotte or sworn statements from ETS confirming that ETS had paid Wyandotte. App at 19b-20b, 34b.

The trial court disposed of certain issues on Wyandotte's motion for summary disposition. App at 107a-146a, 178a-180a. Notably, while KEO and Westfield argued that MCL 129.207 required actual receipt of the 30-day notice in addition to it being sent by certified mail, App at 154a, 174a, the trial court ruled that MCL 129.207 was clear and unambiguous, nothing in the statute provided for an actual receipt requirement, and Wyandotte's 30-day notice sent by certified mail complied with MCL 129.207. App at 174a-176a. Thus, the trial court ruled that Wyandotte was entitled to recover on the payment bond. *Id.* The trial court also ruled that Wyandotte was entitled to a 1½% time-price differential on all late-paid invoices. App at 176a. But because the trial court concluded that there remained a question of fact for trial regarding the exact amount of the remaining debt, the trial court granted Wyandotte partial summary disposition and set the matter for trial on this issue. App at 176a-180a. Following trial and a post-trial hearing, see App at 217a, the trial court awarded Wyandotte the unpaid balance for the electrical materials supplied for the public project (\$154,343.39), the contractual time-price differential through the date of judgment (\$76,403.44), and post-judgment interest up to a maximum of 13% pursuant to MCL 600.6013(7). App 253a-254a. The trial court also awarded Wyandotte \$30,000 in attorney's fees, which was less than the contractual attorney fee provision of one-third of the unpaid balance for attorney's fees and costs. App at 254a.³ KEO and Westfield appealed.

³ The trial court also awarded Wyandotte attorney fees in the amount of \$12,180.97 pursuant to MCR 2.403(O) as case evaluation sanctions. App at 254a.

C. Court of Appeals Proceedings

In an unpublished per curiam opinion, the Court of Appeals affirmed the trial court. *Wyandotte Electric Supply v Electrical Technology Sys*, unpublished opinion per curiam of the Court of Appeals issued July 15, 2014 (Docket No. 313736). First, the Court of Appeals held that Wyandotte's 30-day notice was properly served under MCL 129.207 and, therefore, rejected KEO and Westfield's arguments "for engrafting an actual receipt requirement onto MCL 129.207 when the claimant uses certified mail. Such a requirement is not within the statute's plain language." *Id.* at 7. Indeed, the Court of Appeals determined that the "undisputed evidence showed that Wyandotte used certified mail to send the 30-day notice to KEO." *Id.*⁴ Next, the Court of Appeals affirmed the trial court's award of the contractual time-price differential and attorney fees outlined in Wyandotte's agreement with ETS. *Id.* at 8. Relying on *Price Bros Co v C J Rogers Constr Co*, 104 Mich App 369, 377; 304 NW2d 584 (1981), and rejecting KEO and Westfield's attempt to differentiate *Price Bros*, the Court of Appeals reasoned that nothing in MCL 129.207 precludes contractual time-price differential and attorney fee provisions; such amounts were justly due to Wyandotte under its contract; and the time-price differential and attorney fee provisions enhanced the value of the public project because if ETS had paid on time, such a timely payment would have lowered the costs of the materials and those saving would have been passed onto KEO. *Wyandotte, supra* at 8-10. Finally, the Court of Appeals held that the trial court's reliance on MCL 600.6013(7), as opposed to MCL 600.6013(8), in awarding post-judgment interest was proper because the various contractual

⁴ The Court of Appeals also held that the trial court properly acted within its discretion in denying KEO and Westfield's motion for reconsideration regarding Wyandotte's 90-day notice because KEO and Westfield "made no mention of the 90-day notice requirement in response to Wyandotte's summary disposition motion despite that the necessary evidence was available to them." *Id.*; see also App at 207a.

documents between Wyandotte and ETS constituted “a written instrument evidencing indebtedness with a specified interest rate;” namely, the 1½% time-price differential. *Id.* at 10-11. The Court of Appeals concluded that “[j]ust because the finance charge is combined with the cost, does not mean that it is not a finance charge, or an interest rate depending on the language of the case. And there is a specified rate in the ETS-Wyandotte contract: 1.5%.” *Id.* at 11.

D. This Court’s Grant Order

KEO and Westfield timely filed an application for leave to appeal with this Court. This Court granted the application and expressly ordered:

The parties shall include among the issues to be briefed: (1) whether the plaintiff served on the principal contractor the 30-day notice within the meaning of MCL 129.207; (2) whether the plaintiff is entitled to damages, if any, that include a time-price differential and attorney fees; and (3) whether MCL 600.6013(7) is applicable to the judgment in this case. [*Wyandotte Electrical Supply v Electrical Technology Systems, Inc*, unpublished order of the Supreme Court issued February 4, 2015 (Docket No. 149989)]

IV. ARGUMENT

A. Wyandotte Served on KEO the 30-Day Notice Pursuant to MCL 129.207

1. Under the Plain Language of MCL 129.207, the 30-Day Notice was Properly Served on KEO

Because MCL 129.207 unambiguously provides that the 30-day notice shall be served by certified mail, and Wyandotte served the 30-day notice on KEO by certified mail, enforcing MCL 129.207 as written dictates that the 30-day notice was properly served. It is well established that the “proper interpretation of a statute is rendered by reference to its plain language.” *Adair v Michigan*, 497 Mich 89, 104; 860 NW2d 93 (2014). Indeed, “[w]hen construing a statute, we consider the statute’s plain language, and we enforce clear and unambiguous language as written.” *Hannay v Dep’t of Transp*, 497 Mich 45, 57; 860 NW2d 67 (2014). In MCL 129.207, the Legislature unambiguously provided that the 30-day notice at

issue in this case “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.” Wyandotte served the 30-day notice on KEO by mailing the notice by certified mail, postage prepaid, in an envelope addressed to KEO at a place where KEO maintained a business. Because Wyandotte served the 30-day notice in compliance with the plain statutory notice requirement, Wyandotte’s 30-day notice was properly served under MCL 129.207.

2. It is Well Established that Statutory Notice Provisions, Such as MCL 129.207, Must be Applied as Written

KEO and Westfield’s invitation to engraft an actual receipt requirement onto MCL 129.207 must be rejected because their invitation is at odds with the plain language of MCL 129.207 and Michigan law. Under Michigan law, “[s]tatutory notice requirements must be interpreted and enforced as plainly written.” *Atkins v Suburban Mobility Authority for Regional Transp*, 492 Mich 707, 710; 822 NW2d 522 (2012). This is not a new legal principle. See, e.g., *In re Wilkie’s Estate*, 314 Mich 186, 195-196; 22 NW2d 265 (1946) (“It is a general rule that, if a statute prescribes a method for serving process, the method must be followed.”) (internal citation omitted).

For example, in *Skyhook Lift-Slab Corp v Huron Towers, Inc*, 369 Mich 36, 37; 118 NW2d 961 (1963), the plaintiff furnished labor to a principal contractor in connection with an apartment building in Washtenaw County. The plaintiff brought suit against the defendant owners to foreclose upon a mechanic’s lien for unpaid indebtedness. *Id.* The parties stipulated that the plaintiff sent notice by mail to the owners in Wayne County, and this notice was received in Wayne County. *Id.* at 38. The parties also stipulated that (a) no notice to the owners was made in Washtenaw County, (b) there was no service upon any agent of the owners in

Washtenaw County, and (c) there was no posting on the property located in Washtenaw County. *Id.* The owners moved to dismiss, arguing that the plaintiff's lien was defective because service was not properly made. *Id.* at 38. At the time of the action, the mechanic's lien law provided in pertinent part:

Every person recording such statement or account as provided in the preceding section, except those persons contracting or dealing directly with the owner, part owner or lessee of such premises, shall within 10 days after the recording thereof, serve on the owner, part owner or lessee of such premises, if he can be found within the county or in case of his absence from the county, on his agent having charge of such premises, within the county wherein the property is situated, a copy of such statement or claim; but if neither of such persons can be found within the county where such premises are situated, then such copy shall be served by posting in some conspicuous place on said premises within 5 days after the same might have been served personally, could the principal or agent, as aforesaid, have been found. [*Id.* at 38-39 quoting 1958 PA 213 (emphasis added).]

The trial court dismissed the action, concluding that service by mail on the owners in Wayne County was improper. *Skyhook Lift-Slab*, 369 Mich at 38. This Court affirmed. *Id.* at 42.

In *Skyhook Lift-Slab*, this Court concluded that the statute was "clear and unambiguous," and the plaintiff was therefore required to serve a copy of the claim on the owners within Washtenaw County. *Id.* at 39. In reaching this conclusion, this Court aptly observed: "We are dealing with a special statutory proceeding and the requirements imposed by the legislature for the perfection of the lien must be observed. In no manner has the legislature said, or suggested, the possibility of service by mail or service in any other county except wherein the property is situated." *Id.* The same result must be reached in this case. MCL 129.207 is unambiguous, the Legislature's requirements for perfection of the statutory claim must be observed, and actual receipt is not a legislative requirement.

More recently, this Court in *Nowell v Titan Ins Co*, 466 Mich 478; 648 NW2d 157 (2002), reaffirmed the principle that unambiguous statutory notice provisions are to be applied as written. In *Nowell*, the defendant insurer mailed a notice of policy cancellation to its insured driver on February 20, 1997. *Id.* at 480. The notice provided that the policy would be cancelled effective March 5, 1997 at 12:01 a.m. unless the driver paid \$240 before the effective date. *Id.* The driver did not make the payment. *Id.* After the effective date and time set forth in the cancellation notice, the driver was involved in an automobile accident. *Id.* The plaintiff was the driver's passenger, and the plaintiff was injured. *Id.* The defendant declined to provide insurance coverage for the driver. *Id.* 466 Mich at 480. In turn, the plaintiff brought suit against the defendant for coverage. *Id.* The plaintiff argued that the policy for the driver was not properly cancelled because while the cancellation notice was delivered to the driver's address, the driver did not actually receive or learn of the notice until after the accident. *Id.* The defendant, however, argued that under MCL 500.3020(1)(b), proper mailing of a cancellation notice makes the notice effective regardless of whether the insured actually received the notice. *Id.* at 482. Based on the plain language of MCL 500.3020(1)(b), this Court held that actual notice to the insured is not required to effectuate the cancellation of an insurance policy. *Nowell*, 466 Mich at 479-480.

MCL 500.3020(1)(b) provides that "the policy may be canceled at any time by the insurer by mailing to the insured at the insured's address last known to the insurer or an authorized agent of the insurer, with postage fully prepaid, of not less than 10 days' written notice of cancellation with or without tender of the excess of paid premium or assessment above the pro rata premium for the expired time." (Emphasis added.) Accordingly, this Court concluded that the "plain language of MCL § 500.3020(1)(b), which allows cancellation by a simple first-class mailing

precludes a conclusion that an insured must receive some type of actual notice, i.e., be aware of the issuance of a notice of cancellation by the insurer, in order for an insurer's cancellation of the insured's policy to be effective." *Nowell*, 466 Mich at 482-483. Indeed, the plain import of the statutory language providing that an insurance policy may be cancelled at any time by mailing means that "such a mailing does not require proof of service or even a delivery receipt." *Id.* at 483. Again, the same result must be reached in this case. Nothing in MCL 129.207's plain language requires actual receipt or proof thereof.

Similarly, the principle that unambiguous statutory notice provisions are to be applied as written was reaffirmed in *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007). *Rowland* is instructive because it also demonstrates the impropriety of judicially engrafting additional requirements onto a plain statutory notice provision. *Rowland* involved the notice provision applicable to the defective highway exception to governmental immunity, MCL 691.1404(1). *Rowland*, 477 Mich at 200. MCL 691.1404(1) provides in pertinent part: "As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, . . . shall serve a notice on the governmental agency of the occurrence of the injury and the defect." In *Rowland*, 477 Mich at 201, the plaintiff served her notice on the defendant on the 140th day after the accident, filed a lawsuit against the defendant, and asserted the defective highway exception to governmental immunity. The defendant moved for summary disposition, arguing that the plaintiff failed to serve her notice within 120 days as required under MCL 691.1404(1). *Id.* Relying on *Hobbs v Dep't of State Hwys*, 398 Mich 90; 247 NW2d 754 (1976), and *Brown v Manistee Co Rd Comm*, 452 Mich 354; 550 NW2d 215 (1996), the trial court denied the defendant's motion for summary disposition, and the Court of Appeals affirmed. *Rowland*, 477 Mich at 201. This Court reversed,

concluding that the plain language of MCL 691.1404(1) must be enforced as written. *Id.* at 200. Moreover, this Court overruled *Hobbs* and *Brown*, which held that absent a showing of actual prejudice to the governmental agency, failure to comply with the statutory notice provision is not a bar to claims filed pursuant to the defective highway exception. *Id.* This Court's analysis in *Rowland* is instructive.

This Court's analysis in *Rowland* began, as it must, with the plain language of MCL 691.1404(1). *Id.* at 203-205. Observing that the plaintiff did not serve her notice within MCL 691.1404(1)'s prescribed 120 days, this Court reasoned that “[g]iven that the plain language of the statute requires such notice as a condition for recovery for injuries sustained because a defective highway, one merely reading the statute might assume that plaintiff’s complaint would have been dismissed.” *Id.* at 204. But because *Hobbs* and *Brown* “engrafted an actual prejudice component onto the statute, the trial court could not dismiss the case.” *Id.* Accordingly, this Court surveyed its cases concerning statutory notice provisions. *Rowland*, 477 Mich at 205-209.

First, after examining its cases involving notice statutes, this Court concluded that its precedent “enforced governmental immunity mandatory notice provisions according to their plain meaning.” *Id.* at 205. This Court historically did so because the right to recover for injuries arising from the lack of repair to sidewalks, streets, and the like was purely statutory and conferred upon injured persons by legislative grace. *Id.* at 205-206. Because the right to recover was statutory, that right was subject to the Legislature’s limitations. *Id.* at 205. Moreover, and importantly, notice provisions regarding the statutory right to recovery were viewed as economic or social legislation. *Id.* at 207. And as long as the statutes were constitutionally permissible, this Court would “usurp legislative authority” by not applying the statutes as written. *Id.* at 206. Beginning in 1970 and culminating with *Hobbs* and *Brown*, however, this Court noted that it

began to judicially engraft amendments to the statute, which resulted in the so-called actual prejudice requirement. *Rowland*, 477 Mich at 206-209.

This Court next concluded that *Hobbs* and *Brown* were wrongly decided because MCL 691.1404 was social legislation, the statute was constitutional because it had a rational basis, and the engrafting of the actual prejudice requirement was entirely indefensible. *Id.* at 211-212. Indeed, this Court rightly determined that “common sense counsels that inasmuch as the Legislature is not even required to provide a defective highway exception to governmental immunity, it surely has the authority to allow such suits only upon compliance with rational notice limits.” *Id.* at 212. Having concluded that *Hobbs* and *Brown* were wrongly decided and fundamentally at odds with the plain language of MCL 691.1404, this Court analyzed considerations of stare decisis and retroactivity, ultimately holding that *Hobbs* and *Brown* must be overruled with full retroactivity. *Id.* at 214-223.

This Court’s decision in *Rowland* comports with the unremarkable principle that statutory notice provisions must be enforced as written. As this Court more recently concluded in *Atkins*, 492 Mich at 710, “[s]tatutory notice requirements must be interpreted and enforced as plainly written.” Accordingly, in *Atkins*, this Court held that the notice provision of the Metropolitan Transportation Authorities Act, MCL 124.419, requiring notice of a tort claim within 60 days of the accident as a condition precedent to maintaining such a claim, must be enforced as written, and a common carrier’s presumed institutional knowledge of an injury cannot relieve a claimant of the obligation to provide the notice required by the statute. *Id.* at 710-711. See also *McCahan v Brennan*, 492 Mich 730, 732; 822 NW2d 747 (2012) (expressly reaffirming and applying the principle articulated in *Rowland* to MCL 600.6431, the notice provision of the Court of Claims Act). This Court should adhere to *Rowland*, *Atkins*, and *McCahan*.

Because suppliers and contractors may not obtain a lien on a public building, the Legislature enacted the PWBA to provide protection in the construction of public buildings and to fulfill the State's basic policy to protect laborers and workers. *Kammer*, 443 Mich at 182 n 11 quoting *Milbrand Co v Dep't of Social Servs*, 117 Mich App 437, 440; 324 NW2d 41 (1982); see also *Kammer*, 443 Mich at 184 (concluding that this Court's interpretation of MCL 129.208 was "aligned with [the statute's] avowed purpose to protect subcontractors in the absence of mechanics' liens for public works"). Accordingly, under the PWBA, the Legislature created a statutory right to recover against a payment bond in favor of suppliers and contractors, expressly providing that payment bonds are "solely for the protection of claimants . . . supplying labor or materials to the principal contractor or his subcontractors in the prosecution of the work provided in the contract." MCL 129.203; see also *Kammer*, 443 Mich at 182; MCL 129.206 (defining "claimant" to include suppliers such as Wyandotte). Because the right to recover is statutory, that right is subject to the Legislature's limitations. *Rowland*, 477 Mich at 205. In MCL 129.207, the Legislature limited and regulated a claimant's statutory right to recovery by conditioning that right upon, among other things, the claimant providing the 30-day notice at issue to the principal contractor "by mailing the same by certified mail, postage prepaid, in an envelope addressed to the principal contractor . . . at any place at which said parties maintain a business or residence." Such a notice requirement is constitutionally permissible and, therefore, must be applied as written. See, e.g., *Square D Environmental Corp v Aero Mechanical, Inc*, 119 Mich App 740; 326 NW2d 629 (1982) (holding that the "notice provision [of the PWBA] bears a reasonable relation to the legislative objective of establishing an orderly and systematic presentment of claims. We conclude that the statute is constitutional."); *Rowland*, 477 Mich at 206; *McCahan*, 492 Mich at 733; *Atkins*, 492 Mich at 714-715 ("It is well established that

statutory notice requirements must be interpreted and enforced as plainly written and that no judicially created saving construction is permitted to avoid a clear statutory mandate.”); *Electronic Data Sys Corp v Flint Twp*, 253 Mich App 538, 549-551; 656 NW2d 215 (2002) (holding that statute requiring tax appeal petitions to be filed by certified mail was constitutional and rationally related to a legitimate governmental purpose).

Remarkably, KEO and Westfield argue that the Court of Appeals “erroneously disregarded the statute’s plain words.” Appellants’ Brief, p 10. According to KEO and Westfield, the term “serve” is “undefined in the statute” and “implies a more formal presentation of notice.” *Id.* (emphasis added). KEO and Westfield’s argument must be rejected because the statute expressly provides how the 30-day notice is to be served in this case: certified mail, postage prepaid, in an envelope addressed to KEO at any place KEO maintains a business. Because KEO and Westfield’s argument lacks merit and Wyandotte strictly complied with MCL 129.207, this Court should affirm the lower courts and apply MCL 129.207 as written.

3. This Court’s Decision in *Pi-Con* is Inapplicable

Likewise, KEO and Westfield’s reliance upon *Pi-Con*, *supra*, is grossly misplaced. See Appellants’ Brief, pp 12-15. The Court of Appeals correctly concluded that this Court’s decision in *Pi-Con* was inapposite because the *Pi-Con* claimant’s notice was not sent by certified mail as required by MCL 129.207. In *Pi-Con*, 435 Mich at 378, the claimant sent the notice to the principal contractor “by ordinary mail, but not, as required by statute, by certified mail.” See also *id.* at 380 (“The notice was sent by ordinary first-class mail and not, as required by the statute, by certified mail.”). Here, *Pi-Con* is inapplicable because, unlike the *Pi-Con* claimant, Wyandotte strictly complied with MCL 129.207 and sent the 30-day notice by certified mail. *Pi-Con* simply has no bearing on this case.

KEO and Westfield’s counter-argument that *Pi-Con* applies is fundamentally flawed and inconsistent with *Pi-Con* itself. *Pi-Con* was meant to offer protection in those instances where a claimant did not strictly comply with MCL 129.207’s statutory notice requirement but the “intent” of the PWBA was nonetheless followed. *Pi-Con* was therefore meant to act as a shield. *Pi-Con*, 435 Mich at 378 (“as long as Pi-Con timely sent the notice . . . and Pi-Con proves by a preponderance of the evidence that Anderson received notice, Pi-Con’s failure to send notice via certified mail will not preclude recovery on the bond.”). In this case, KEO and Westfield are attempting to use *Pi-Con* as a sword to penalize Wyandotte for strictly complying with MCL 129.207. KEO and Westfield’s tortured reading and application of *Pi-Con* cannot stand.

4. To the Extent *Pi-Con* Applies, this Court Should Overrule *Pi-Con*

To the extent *Pi-Con* can be read to mean that MCL 129.207 requires actual receipt of the 30-day notice requirement in all instances, as KEO and Westfield argue, *Pi-Con* must be overruled. Indeed, and as explained by one court, *Pi-Con* started from a faulty premise:

It is true that the Michigan Court of Appeals has held that the *notice provisions* of the Michigan Public Works Act should be strictly construed. Nevertheless, the Michigan Supreme Court has not followed this rule of law, and in both *Pi-Con, Inc. v. A.J. Anderson Constr. Co.*, 435 Mich. 375, 458 N.W.2d 639 (1990), and *Kammer Asphalt Paving Co. v. East China Twp. Schools*, 443 Mich. 176, 504 N.W.2d 635 (1993), has ignored the Court of Appeals’ pronouncements and analyzed the Michigan statute with reference to the U.S. Supreme Court’s treatment of the federal Miller Act, 40 U.S.C. § 270a, *et seq.*, holding that the state statute should be liberally construed. *See Pi-Con*, 435 Mich. at 380-82, 458 N.W.2d 639 (substantial compliance with notice requirements sufficient to perfect action on construction bond); *Kammer*, 443 Mich. at 195-97, 504 N.W.2d 635 (acknowledging similarity between M.C.L. § 129.207 and Miller Act and analyzing state statute in light of federal treatment of Miller Act). [*Trustees for Mich Laborers’ Health Care Fund v Warranty Builders, Inc.*, 921 F Supp 471, 473 (ED Mich, 1996).]

Specifically, in *Pi-Con*, this Court held that “so long as [the claimant] timely sent notice which otherwise complies with the notice requirements of the [PWBA] . . . , and [the claimant] proves by a preponderance of the evidence that [the general contractor] timely received notice, [the claimant’s] failure to send notice via certified mail will not preclude recovery.” *Pi-Con*, 435 Mich at 378. In reaching this holding, this Court was “guided by the decision of the United States Supreme Court in *Fleisher Engineering & Construction Co v United States ex rel Hallenbeck*, 311 US 15; 61 S Ct 81; 85 L Ed 12 (1940), which “construed the Miller Act, 40 USC 270b(a), the federal public works bond on which Michigan’s statute is modeled.” *Pi-Con*, 435 Mich at 380-381. This Court observed that the notice requirements of the Miller Act were “nearly identical” to MCL 129.207 and *Fleisher* held that substantial compliance with the notice requirements of the Miller Act was “sufficient.” *Id.* at 381. Applying *Fleisher*’s reasoning to MCL 129.207, the *Pi-Con* Court held that a claimant may maintain an action on the bond if four elements are met:

First, a claimant must prove that the principal contractor actually received the 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. [*Pi-Con*, 435 Mich at 382 (internal footnote omitted).]

This Court further noted, “We look to *Fleisher* in establishing the first element 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.’” *Id.* at 383-384 quoting *Fleisher*, 311 US at 19.

Just like *Hobbs* and *Brown* erroneously engrafted an actual prejudice requirement onto the statute, *Pi-Con* erroneously engrafted an actual receipt requirement onto MCL 129.207. *Rowland*, 477 Mich at 213. And just as *Hobbs* and *Brown* were overruled, so must *Pi-Con* be overruled. Nothing in the plain language of MCL 129.207 supports *Pi-Con*'s holding. "The Legislature is presumed to have intended the meaning it has plainly expressed, and if the expressed language is clear, judicial construction is not permitted and the statute must be enforced as written." *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002). MCL 129.207 requires notice to be served as directed, and notice is proper if it is served by certified mail and otherwise complies with MCL 129.207's requirements, no matter whether the principal contractor claims lack of actual receipt.

Moreover, *Pi-Con*'s central reliance on the Miller Act and federal cases for an actual receipt requirement was misplaced because neither the Miller Act nor federal cases can serve as a basis to rewrite MCL 129.207. See, e.g., *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 283-284; 696 NW2d 646 (2005) (concluding that "[w]hile federal precedent may often be useful as guidance in this Court's interpretation of laws with federal analogues, such precedent cannot be allowed to rewrite Michigan law."); see also *Peden v Detroit*, 470 Mich 195, 216; 680 NW2d 857 (2004) (concluding that where Michigan's statutes are similar to their federal counterparts, federal precedent is persuasive authority but not binding). In *Chambers v Trettco, Inc*, 463 Mich 297; 614 NW2d 910 (2000), this Court explained these well-established principles in connection with Michigan's Civil Rights Act as follows:

We are many times guided in our interpretation of the Michigan Civil Rights Act by federal court interpretations of its counterpart federal statute. However, we have generally been careful to make it clear that we are not compelled to follow those federal interpretations. Instead, our primary obligation when interpreting Michigan law is always "to ascertain and give effect to the intent

of the Legislature, . . . ‘as gathered from the act itself.’” Although there will often be good reasons to look for guidance in federal interpretations of similar laws, particularly where the Legislature has acted to conform Michigan law with the decisions of the federal judiciary, we cannot defer to federal interpretations if doing so would nullify a portion of the Legislature’s enactment. [*Id.* at 313 (internal citations and quotations omitted).]

Here, the PWBA plainly and unambiguously provides that 30-day notice is served by certified mail; actual receipt is not legislatively required. To hold otherwise, as *Pi-Con* did, nullifies a portion of the Legislature’s enactment.

KEO and Westfield suggest that under the doctrine of stare decisis, this Court is required to follow *Pi-Con*. KEO and Westfield’s suggestion is incorrect. In determining whether to overrule a prior case, this Court first considers whether the prior case was wrongly decided. *Robinson v Detroit*, 462 Mich 439, 463-468; 613 NW2d 307 (2000). As set forth above, *Pi-Con* was wrongly decided because it does not comport with the plain language of MCL 129.207. Because *Pi-Con* was wrongly decided, this Court should then consider any reliance interests, whether *Pi-Con* defies “practical workability,” whether *Pi-Con* has become “embedded,” whether changes in the law or facts no longer justify *Pi-Con*, and whether *Pi-Con* misread or misconstrued MCL 129.207. *Robinson*, 462 Mich at 464-467. Because *Pi-Con* patently misconstrued and misread MCL 129.207, *Pi-Con* left MCL 129.207 less workable in that statutory reliance has been circumvented and citizen expectations have been confounded. See, e.g., *Rowland*, 477 Mich at 219. “[W]hen dealing with an area of the law that is statutory . . . , that it is to the words of the statute itself that a citizen first looks for guidance in directing his actions.” *Robinson*, 462 Mich at 467, This is precisely what Wyandotte did when it looked to MCL 129.207. Wyandotte, like all citizens, should be able to expect that the clear words of MCL 129.207 “will be carried out by all in society, including the courts.” *Id.* *Pi-Con* confounds those legitimate expectations by misreading MCL 129.207 and, therefore, it is *Pi-Con* “itself that

has disrupted the reliance interest.” *Id.* As this Court explained in *Robinson*:

When that happens, a subsequent court, rather than holding to the distorted reading because of the doctrine of stare decisis, should overrule the earlier court’s misconstruction. The reason for this is that the court in distorting the statute was engaged in a form of judicial usurpation that runs counter to the bedrock principle of American constitutionalism, i.e., that the lawmaking power is reposed in the people as reflected in the work of the Legislature, and, absent a constitutional violation, the courts have no legitimacy in overruling or nullifying the people’s representative. [*Id.* at 468.]

Therefore, to the extent *Pi-Con* can be read to mean that MCL 129.207 requires actual receipt of the 30-day notice requirement in all instances, *Pi-Con* must be overruled.

B. Wyandotte is Entitled to Damages That Include a Time-Price Differential and Attorney Fees

MCL 129.207 expressly provides in pertinent part that a claimant is entitled to “prosecute such action to final judgment for the sum justly due him and have execution thereon.” Here, the sum justly due to Wyandotte is established by contract. This Court has repeatedly held that the straightforward language of a contract must control. *Terrien v Zwit*, 467 Mich 56, 71; 648 NW2d 602 (2002) (“The general rule [of contracts] is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts.”) (citation omitted); *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 52; 664 NW2d 776 (2003) (“The notion, that free men and women may reach agreements regarding their affairs without government interference and that courts will enforce those agreements, is ancient and irrefutable.”); *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 370; 666 NW2d 251 (2003) (“[T]he freedom to contract principle is served by requiring courts to enforce unambiguous contracts according to their terms “); *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005) (“[A] court must construe and apply unambiguous contract provisions as written.”); *Bloomfield Estates Improvement Ass’n, Inc*

v City of Birmingham, 479 Mich 206, 212; 737 NW2d 670 (2007) (“We ‘respect[] the freedom of individuals freely to arrange their affairs via contract’ by upholding the ‘fundamental tenet of our jurisprudence . . . that unambiguous contracts are not open to judicial construction and must be enforced as written’”) (citation and emphasis omitted). Because Wyandotte’s contract unambiguously provides that it is entitled to a time-price differential and attorney fees, Wyandotte’s is justly entitled to damages that include a time-price differential and attorney fees.

1. Wyandotte is Entitled to Damages that Include Attorney Fees Because that is What the Contract Expressly Provides

KEO and Westfield admit that “Michigan follows the ‘American rule,’ which provides that, unless a statute, court rule, or contractual provision specifically provides otherwise, attorney fees are not to be awarded by the court.” Appellants’ Brief, p 26. This is correct. Curiously, however, KEO and Westfield then principally argue that Wyandotte is not entitled to attorney fees as damages because the PWBA includes no reference to attorney fees. *Id.* Such an argument ignores KEO and Westfield’s prior admission that attorney fees are to be awarded where a contractual provision specifically so provides. Here, a contractual provision provides that if ETS’s account was sent to an attorney for collection, ETS would pay one-third of the unpaid balance for attorney’s fees together with applicable costs. This contractual provision must be enforced as written. Moreover, attorney fees awarded under contractual provisions are considered damages, not costs. See *Central Transp, Inc v Fruehauf Corp*, 139 Mich App 536; 362 NW2d 823 (1984). Therefore, KEO and Westfield’s principal argument must be rejected because Wyandotte’s contract expressly contains an attorney fee provision, and such attorney fees are considered damages. See, e.g., *Hub Elec Co Inc v Gust Constr Co Inc*, 585 F2d 183, 187 (CA 6, 1978); *Sentry Ins v Lardner Elevator Co*, 153 Mich App 317; 395 NW2d 31 (1986).

Tacitly acknowledging that its principal argument lacks merit and ignores Wyandotte's contract, KEO and Westfield then argue that Wyandotte is not entitled to damages that include attorney fees because KEO and Westfield were not in privity of contract with Wyandotte. Appellants' Brief, p 26. In making this argument, KEO and Westfield concede that ETS contractually "agreed to pay [attorney fees]" to Wyandotte and this indeed was the "bargain between those entities". *Id.* at 27. Nonetheless, KEO and Westfield argue that they should not be "held liable to pay Wyandotte's attorney fees merely because ETS agreed to pay them." *Id.* Such a "privity" argument must be rejected because it circumvents the PWBA.

The contractual attorney fees were amounts unpaid and justly due to Wyandotte. MCL 129.207 expressly provides that a principal contractor and surety are statutorily liable to a claimant with whom the principal contractor and surety have no contractual privity. Specifically, MCL 129.207 explicitly provides that a "claimant not having a direct contractual relationship with the principal contractor shall not have a right of action upon the payment bond unless" Wyandotte followed such statutory procedures, and the Legislature expressly mandated that KEO and Westfield are statutorily liable to Wyandotte via the payment bond for all amounts justly due to Wyandotte even though Wyandotte did not have "a direct contractual relationship with" KEO. Therefore, KEO and Westfield's "privity" argument must be rejected because it is fundamentally at odds with the plain language of MCL 129.207. Moreover, KEO and Westfield's privity argument circumvents the Legislature's stated purpose for the payment bond itself: "The payment bond shall be . . . solely for the protection of claimants . . . supplying labor or materials to the principal contractor or his subcontractors in the prosecution of the work provided for in the contract." MCL 129.203 (emphasis added). The attorney fee provision is

part of the price of the contract, and KEO and Westfield cannot pick and choose which contract provisions should be part of the price that ETS contractually and unambiguously agreed to pay.

2. Wyandotte is Entitled to Damages that Include a Time-Price Differential Because that is What the Contract Expressly Provides

Similar to their arguments in connection with the contractual attorney fee provision, KEO and Westfield concede that a contractual provision entitled Wyandotte to a time-price differential but nonetheless assert that they should not be liable to Wyandotte via the payment bond for a time-price differential because KEO and Westfield were not in direct contractual privity with Wyandotte. See Appellants' Brief, p 33 (asserting that "this [C]ourt should hold that time price differential are not sums 'justly due' from the principal and surety where not agreed to by the principal."). As set forth above, KEO and Westfield's "privity" argument must be rejected because it is fundamentally at odds with the plain language of MCL 129.207. Further, because Wyandotte was unambiguously entitled to a time-price differential under the contract, and this unambiguous contract must be enforced as written, the time-price differential is justly due to Wyandotte and, therefore, part of Wyandotte's damages.

KEO and Westfield's discussion of surety law, as well as their suggestion that Wyandotte would receive more than it is justly due, misses the mark. KEO and Westfield are correct in arguing that a surety's liability generally cannot be greater than that of its principal. See, e.g., *Grand Blanc Cement Prods, Inc v Ins Co of North America*, 225 Mich App 138, 150; 571 NW2d 221 (1997). KEO and Westfield, however, fail to acknowledge that a surety under the PWBA is liable to pay a time-price differential because a surety guarantees payment of all indebtedness of a principal contractor, including the cost of the materials and time-price differential associated with payments that are not made within the period stated in the contract. *Price Bros*, 104 Mich App 369. This is true because where the claimant's contract establishes a different price for

materials depending on when those materials are paid for—that is, a “time-price differential” for delayed payment—that time-price differential is properly included in the unpaid amount. See, e.g., *Erb Lumber Co v Homeowner Constr Lien Recovery Fund*, 206 Mich App 716, 721-722; 522 NW2d 917 (1994).

A time-differential is the difference between the price of a particular item and the price of that same item sold on credit, the latter being higher. *Thelan v Ducharme*, 151 Mich App 441, 447; 390 NW2d 264 (1986). A time-price differential is therefore an integral part of the cost of a transaction. *Price Bros*, 104 Mich App at 377. If the buyer fully pays for the item upon purchase, the seller receives the money immediately and no burden is placed on him. *Id.* If the buyer elects to purchase on credit, however, the seller is burdened by the interruption of its cash flow. *Id.* Accordingly, the buyer must pay a “price” for the benefit of receiving materials immediately on credit. *Id.* In turn, suppliers rely on a time-price differential as part of the price to ensure timely and full payment, particularly on public projects where gross profit margins are typically low. Because gross profit margins are low and public projects are intended to be cost effective, a time-price differential inures to the benefit of all involved, including the public. If a time-price differential was not considered part of the price, contractors would have no incentive to timely pay suppliers and, thus, suppliers may be compelled to increase material prices on public projects. This benefits no one. Therefore, the contract price, which includes a time-price differential, is the amount justly due to Wyandotte under the contract and MCL 129.207. A contrary conclusion would incentivize contractors not to pay suppliers in a timely fashion because a reduced price that was not contractually agreed to would be substituted for the price that was, in fact, agreed to when a claim is made on the payment bond. To avoid this perverse result, the unambiguous contract must be enforced as written.

C. MCL 600.6013(7) is Applicable to the Judgment in This Case

The trial court's judgment in this case for Wyandotte included the unpaid balance for the electrical materials supplied for the public project (\$154,343.39) and the contractual time-price differential through the date of judgment (\$76,403.44). Post-trial, Wyandotte contended to the trial court that the contractual time-price differential likewise applied post-judgment as a continuing element of damages. In turn, KEO and Westfield argued that post-judgment interest should be calculated pursuant to MCL 600.6013(8).⁵ The trial court, however, characterized the time-price differential set forth in Wyandotte's contract as interest, thereby reducing the post-judgment compensation owed to Wyandotte from the contractual 18% per annum time-price differential to the statutory maximum of 13% under MCL 600.6013(7). In affirming the trial court, the Court of Appeals concluded that a written instrument existed, although comprised of various documents, and the instrument's 1½% time-differential set forth a specified interest rate such that MCL 600.6013(7) applied. Notably, citing *Price Bros, supra*, the Court of Appeals determined that whether a time-price differential may be labeled a finance charge or interest rate

⁵ MCL 600.6013(8) provides:

Except as otherwise provided in subsections (5) and (7) and subject to subsection (13), for complaints filed on or after January 1, 1987, interest on a money judgment recovered in a civil action is calculated at 6-month intervals from the date of filing the complaint at a rate of interest equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, according to this section. Interest under this subsection is calculated on the entire amount of the money judgment, including attorney fees and other costs. In an action for medical malpractice, interest under this subsection on costs or attorney fees awarded under a statute or court rule is not calculated for any period before the entry of the judgment. The amount of interest attributable to that part of the money judgment from which attorney fees are paid is retained by the plaintiff, and not paid to the plaintiff's attorney.

is not dispositive because there was indeed a specified interest rate in Wyandotte's contract with ETS. The Court of Appeals rationale is correct.

First, under MCL 600.6013(7), the statutory term "written instrument" includes writings such as the ETS credit agreement, Wyandotte's quotation, and ETS's purchase order accepting the quotation. Individually and collectively, the writings constitute a "written instrument" under MCL 600.6013(7). See, e.g., MCL 440.2204; MCL 440.2206; MCL 440.2207.

Second, the characterization of a time-differential as wholly a finance charge or wholly interest is not dispositive in determining whether MCL 600.6013(7) applies to the judgment in this case. Stated differently, there exists no practical difference between the time-price differential at a specified rate for purposes of the judgment and interest at a specified rate for purposes of post-judgment interest under MCL 600.6013(7). For example, in *Brede v Rose*, 236 Mich 651, 654; 211 NW2d 58 (1926), this Court disallowed the inclusion of overhead and profits from the plaintiff's mechanic's lien because such overhead and profit were not part of the value of the work done and material provided. Many years later, the Court of Appeals examined *Brede* in *Erb Lumber*, 206 Mich App at 722. In *Erb Lumber*, the Court of Appeals held that the plaintiff was "entitled to seek a lien which included a sum representing the time-price differential" under the Construction Lien Act, MCL 570.1101 *et seq.* *Id.* Relying on MCL 570.1107(1), which provides that a lien under the Act shall not exceed the amount of lien claimant's contract less payments made on the contract, the Court of Appeals distinguished *Brede* and determined that the proper inquiry was whether the time-price differential was part of the contract where the plaintiff proceeded on a contract theory as opposed to quantum meruit, as the claimant did in *Brede*. *Id.* at 721. Under *Erb Lumber*, a claimant's lien may therefore properly include the charge of interest, and there is no practical difference if such interest is

labeled as “time-price differential,” as in *Erb Lumber*, or a “service charge” as in *Michigan Pipe & Valve-Lansing, Inc v Hebelor Enterprises, Inc*, 292 Mich App 479, 487-491; 808 NW2d 323 (2011). By including a time-price differential in its contract, Wyandotte relied upon the time-price differential to establish the costs and price of the contract, as well as to establish a specified interest rate. As the Court of Appeals concluded in *Michigan Pipe*, 292 Mich App at 488, on the basis of the Construction Lien Act, “any distinction between a time-price differential and service charge, when contained in the contract, is a distinction without a difference for purposes of MCL 570.1107(1).”

The Construction Lien Act, MCL 570.1107(1), is instructive on this point. MCL 570.1107(1) provides that a lien “shall only include an amount for interest, including, but not limited to, a time-price differential or a finance charge, if the amount is in accordance with the terms of the contract” Accordingly, under the Construction Lien Act, interest, time-price differentials, and finance charges arguably constitute different mechanisms, but they are treated the same. As the Court of Appeals reasoned in *Michigan Pipe*, 292 Mich App at 490, “the specific types of interest that are listed in subsection (7), time-price differentials and finance charges, are specific examples of interest that may be included in the claim of lien and not an exhaustive list.” (Emphasis added.) In this case, the Court of Appeals correctly determined that whether a time-price differential may be labeled a finance charge or interest is not dispositive because there was indeed a specified interest rate in Wyandotte’s contract with ETS and, therefore, MCL 600.6013(7) applied to calculate the post-judgment interest.

The dangers of labels was explored in *Town & Country Dodge, Inc v Dep't of Treasury*, 118 Mich App 778, 782; 325 NW2d 577 (1982), wherein the petitioners were operators of new car dealerships, and some of the petitioners' sales involved dealer financing. The customers who engaged in such financing would execute notes to the petitioners and incur an obligation to pay an amount in excess thereof, which represented the cost of financing. *Id.* In turn, the petitioners assigned the notes to lending institutions at a price that was greater than the purchase price of the cars but less than the full face value of the note. *Id.* The customers would then pay the lending institutions in monthly installments. *Id.* Periodically, the lending institutions would rebate to the petitioners a small portion of the monthly payments representing the amount by which the full face value of the note was discounted. *Id.* The Michigan Department of Treasury characterized such an amount as a rebate or a finder's fee, which the Department concluded was business income subject to tax. *Id.* at 782-783. In turn, the petitioners argued that the rebate amounts represented a small portion of the interest on the notes and, therefore, were tax deductible. *Id.* at 783. The Michigan Tax Tribunal ("MTT") ruled that the rebate amounts were finance charges and the terms "finance charge" and "interest" were mutually exclusive. *Id.* Accordingly, the MTT ruled in favor of the Department and determined that the finance charges were taxable. *Id.* The petitioners appealed, and the Court of Appeals affirmed but for different reasons.

The Court of Appeals concluded that because the payments made by the lending institutions to the petitioners were basically payments for performing the paper work and bringing the notes to the institutions, such payments were in the nature of business income. *Id.* at 786-787 (concluding "Though paid out of funds which the lending institution received as income, the payment itself is for services rendered. To hold otherwise elevates form over the realities of the marketplace."). Notably, the Court of Appeals reasoned that the MTT "painted

with too broad a brush” when the MTT reasoned that “the total amount of the note over and above the cost of the automobile is a finance charge or time-price differential, *no part* of which is interest.” *Id.* at 787 (emphasis in original). Indeed, the Court of Appeals concluded that payments made by a customer to the lending institution were payments for the buyer’s use of money. *Id.* The payments “certainly are, if not interest, at least in the nature of interest to the lending institution. But the payment by the buyer of interest to the lending institution is not dispositive of whether the rebate by the lending institution to the dealer of a portion of said payment is interest income. Instead, it is a payment for labor and services rendered which pass to the economy.” *Town & Country Dodge*, 118 Mich App at 787. Cf. *In re Allen-Morris*, 523 BR 532, 540 (ED Mich, 2014) (concluding that “[u]nder Michigan’s criminal usury statute, a time-price differential in itself is not interest.”); *Price Bros*, 104 Mich App at 372; *Erb Lumber Co*, 206 Mich App at 722; *Silver v Int’l Paper Co*, 35 Mich App 469, 471; 123 NW2d 478 (1971).

In short, the Court of Appeals reached the right result for the right reasons. Judgment was rendered on a written instrument evidencing indebtedness with a specified interest rate, 1½%. Whether labeled a time-price differential, service charge, finance charge, or interest, the contractually specified interest rate applies for purposes of MCL 600.6013(7). This was the compensation fixed by the contract for the loss of money by one who is entitled to its use (Wyandotte), as well as the amount owed by the one granted the privilege of purchasing goods on credit (ETS). Therefore, the specified rate set forth in Wyandotte’s contract falls squarely within the language of MCL 600.6013(7).

V. CONCLUSION

In this case, the PWBA operated and was interpreted exactly as the Legislature plainly intended. Wyandotte supplied materials for a public project and was not paid for supplying such materials. Wyandotte did everything it was statutorily required to do under the PWBA to perfect its claim for payment, and Wyandotte was awarded the unpaid amounts it was justly due under its contract – nothing more, and nothing less. Because Wyandotte strictly complied with the PWBA and was awarded all sums that were duly owed, this Court should affirm the lower courts.

Respectfully submitted,

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