STATE OF MICHIGAN
IN THE SUPREME COURT

ORIGINAL

WYANDOTTE ELECTRIC SUPPLY COMPANY,

Plaintiff/Appellee,

vs.

ELECTRICAL TECHNOLOGY SYSTEMS, INC.,

Defendant/Cross-Defendant,

-and-

KEO ASSOCIATES, INC., and WESTFIELD INSURANCE COMPANY,

Defendants/Appellants.

Supreme Court No.: 149989
Case No: 11-003015-CK
(Wayne County Circuit Court)
Court of appeals No.:313736

149989

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PLAINTIFF-APPELLEE'S BRIEF IN RESPONSE TO APPLICATION FOR LEAVE TO APPEAL

EXHIBITS

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STATEMENT OF QUESTIONS PRESENTED

I. SHOULD LEAVE TO APPEAL BE DENIED, AS THE UNPUBLISHED COURT OF APPEALS DECISION SIMPLY APPLIES SETTLED PRINCIPLES OF CONTRACT AND STATUTORY INTERPRETATION?

Plaintiff-Appellee answers "YES".

II. WHERE PLAINTIFF COMPLIED WITH THE REQUIREMENT OF MCL 129.207 BY SERVING ON KEO THE REQUIRED 30 DAY NOTICE "BY MAILING THE SAME BY CERTIFIED MAIL, POSTAGE PREPAID, TO THE PRINCIPAL CONTRACTOR...", DID THE TRIAL COURT PROPERLY GRANT, AND COURT OF APPEALS AFFIRM, SUMMARY DISPOSITION TO PLAINTIFF AS TO LIABILITY AND PROPERLY DECLINE TO CREATE A "RECEIPT" REQUIREMENT NOT FOUND IN THE STATUTORY LANGUAGE?

Plaintiff-Appellee answers "YES".

III. SINCE THE MATERIALS PROVIDED FOR THE PROJECT WERE FURNISHED PURSUANT TO A CONTRACT PROVIDING FOR A TIME PRICE DIFFERENTIAL AND ATTORNEY FEES, DID THE TRIAL COURT CORRECTLY HOLD, AND COURT OF APPEALS AFFIRM, THAT DEFENDANTS, THE GENERAL CONTRACTOR AND SURETY, WERE LIABLE FOR THE AMOUNT DUE PLAINTIFF?

Plaintiff-Appellee answers "YES".

IV. DID THE TRIAL COURT ERR IN ALLOWING RECOVERY OF THE TIME PRICE DIFFERENTIAL UNTIL PAYMENT, SUBJECT TO THE 13% INTEREST LIMITATION OF MCL 600.6013(7)?

Plaintiff-Appellee answers "NO".

COUNTER-STATEMENT OF FACTS

Introduction

In its unanimous unpublished Opinion (Ex. 1), the Court of Appeals did nothing more earth shattering than to apply contract and statutory language in accord with the words used and their plain meaning. It held that the statutory requirement of notice which "must be served by mailing the same by certified mail" meant just that: Plaintiff complied by its certified mailing, regardless of whether the United States Postal Service mishandled the mail (Ex. 1, pp. 4-6). The Court held that the statutory liability of a general contractor and surety for the amount "justly due" a material supplier meant the entire debt due under the contract (Ex. 1, pp. 8-10). And, the Court held that a written contract is a "written instrument" as that term is used in MCL 600.6013(7).

Defendants seek leave to appeal to this Supreme Court from that decision. For reasons explained in the Argument section of this Brief, Plaintiff submits that the issues of statutory construction presented do not warrant discretionary Supreme Court review, and that the appellate court's decision is substantively unassailable.

Background

Defendant-Appellant KEO & Associates ("KEO") was the general contractor on a public construction project owned by the Detroit Public Library and known as the Detroit Public Library South Wing Renovation project. Pursuant to the Public Bond Act, MCL 129.201, et. seq., KEO was responsible for assuring that those who supplied materials to its project were paid. In turn, pursuant to the Act, Defendant Westfield Insurance

Company ("Westfield"), as surety, filed a payment bond for the project (Ex. 10).

KEO subcontracted with Electrical Technology Systems, Inc. ("ETS") to furnish all of the electrical labor and materials on the project. In turn, ETS purchased the electrical materials for the project from Plaintiff Wyandotte Electric Supply Co ("Wyandotte"), but failed to pay for them (Ex. 11, 16). Accordingly, under the Public Bond Act, Wyandotte sought recovery from KEO—the general contractor who ultimately benefitted from the electrical materials Wyandotte supplied—and Westfield, the surety.

ETS first applied for credit from Wyandotte by a 2003 Credit Application (Ex. 6; Tr. Ex. 3)[1]. On the Application ETS agreed to a time price differential of 1½% per month for all payments more than 30 days overdue (Ex. 6, p. 2). Under the terms of the Application, if it became necessary for Wyandotte to retain counsel for collection, ETS agreed to pay costs and a 33% attorney fee (Id).

ETS solicited a job quotation from Wyandotte. The Wyandotte quote to ETS (Ex. 7; Tr. Ex. 4) stated that, "Time/price differential charges of 1½ % per month will be calculated on all invoices that are not paid and past due over 30 days" (Id). ETS accepted the quoted terms by issuing a Purchase Order on February 19, 2010 (Ex. 8; Tr. Ex. 5). The Purchase Order notes "Per 5817201", referring to the number of Wyandotte's quote.

[1] A one day damage trial was held before Hon. Robert J. Colombo, Wayne County Circuit Court Judge, on September 4, 2012. The transcript of the trial is identified as "Tr.". The Court previously granted summary disposition as to liability following a motion hearing held on November 4, 2011, designated "Mot. 11/4/11", and found as Ex. 4. A post-trial hearing regarding entry of judgment was held on September 5, 2012, is identified as "Mot. 11/5/12", and is attached as Ex. 5. Plaintiff's trial exhibits 1-12 were admitted by stipulation (Tr., pp. 5-6), except Ex. 3, which was later admitted at trial (Tr. 18).

The summary of deliveries and payments (Ex. 11; Tr. Ex. 6)[2] reflects that Wyandotte first began supplying electrical materials to ETS for the Detroit Public Library project on March 3, 2010. That day, Wyandotte sent notices to both KEO and Westfield indicating that it had contracted with ETS on the Detroit Public Library project, and requesting a copy of the Westfield payment bond (Ex. 9). The following day, March 4, 2010, KEO provided the payment bond by facsimile (Ex. 10). The payment bond refers to P.A. 213 of 1963,[3] and provides:

> "NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION is such that if the Principal [KEO] shall promptly make payment to all claimants as defined in Act No. 213, who have complied with all the provisions of the Act No. 213, for labor and materials used in the performance of the Contract, then his obligation shall be void, otherwise it shall remain in full force and effect."

In short, there is no dispute that Westfield agreed to act as surety under MCL 129.203 for the protection of those supplying materials to KEO's subcontractors. Nor is there any dispute that, immediately when it began supplying electrical materials, Wyandotte notified both KEO and Westfield of its identity and role, and these Defendants had actual knowledge of Plaintiff's role.

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[2] The trial exhibit included, as subparts, the specific invoices corresponding to the deliveries. Since there is no dispute over the deliveries or invoices involved in this appeal, the invoices are not included.

[3] Public Act 213 is found as MCL 129.201-129.212. Under that Act, the general contractor of a project for a public building is required to file a payment bond, "for the protection of claimants...supplying labor or materials to the principal contractor or his subcontractors" (MCL 129.203).

The statute which is at the core of the appellate issues is MCL 129.207, which is reproduced as Ex. 12 for the Court's convenience. The statute calls for a material supplier to notify the general contractor "within 30 days after furnishing the first of such material". This notice, "shall be served by mailing the same by certified mail, postage prepaid, in an envelope addressed to the principal contractor...".

Accordingly, on March 10, 2010, Wyandotte sent to each of KEO, Westfield, the Detroit Public Library, and ETS its "Notice of Furnishing" (Ex. 13) by certified mail, return receipt requested. Plaintiff received signed receipts verifying that the Notice of Furnishing had been received by Westfield, Detroit Public Library, and ETS (Ex. 14). Plaintiff would learn, much later, that KEO had not received, or had not signed for, its copy of the Notice of Furnishing.[4] Investigation with the United States Postal Service confirmed that the letter had been received from Plaintiff at the Wyandotte post office at 10:23 a.m. on March 12, 2010, and had been received by the Detroit post office on March 13, 2010 at 6:24 a.m. (Ex. 15). It is unclear what happened to the certified mail to KEO after it was received by the Detroit office of the Postal Service. These background facts

[4] Although the record does not reveal what happened to the March 10th certified mail to KEO, Defendants have admitted receiving the November, 2010 certified mail. It is quite possible that KEO refused to accept, or failed to sign for, the "official" appearing March 10th certified mail. ETS and its sole owner, Martin Paris, failed to answer the Complaint (Tr. 4). Paris declared bankruptcy, and ETS went out of business [Paris dep. (Ex. 18), p. 4, admitted, Tr. 63-64]. The deposition transcript was admitted because Paris would not appear at trial despite a subpoena. These companies were not responsible businesses.

were further documented by the Affidavit of Julie Schneider (Ex. 16) filed in support of the motion for summary disposition.[5]

From March 3, 2010 to September 30, 2010, Wyandotte continued to deliver electrical materials to ETS for the project (Ex. 11; Tr. 19). Wyandotte received two payments from ETS totaling $20,037.49; a payment of $18,000 and one of $2,037.47, both in August of 2010 (Ex.19; Ex. 16, ¶10; Tr. 23). These were applied to the oldest invoices (Tr. 23).

ETS had provided Wyandotte with another check for $12,000 on October 30, 2010 (Tr. 26; Ex. 20). This was returned for insufficient funds (Id).

Additional electrical materials were needed by KEO to complete the project (Tr. 25). On December 3, 2010, KEO wrote a check jointly payable to ETS and Wyandotte (Ex. 21), which was signed over by ETS and credited to the account (Tr. 24-25). Consequently, Wyandotte made its final delivery of about $350.00 worth of equipment on January 10, 2011 (Ex. 11). Eighteen days later, on January 28, 2011, Plaintiff filed its Proof of Claim with Westfield (Ex. 22).

At trial, KEO and Westfield argued that it was unreasonable for Wyandotte to continue to extend credit to ETS (Tr. 96-97), an argument which Hon. Robert Colombo, Jr., the assigned Wayne County Circuit Court Judge, rejected (Tr. 105-106). Wyandotte supplied the electrical material, knowing that the obligation was bonded (Tr. 53, 69-70).

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[5] The documentation regarding the certified mailing of March 10, 2010 and Affidavit of Mrs. Schneider were also accompanied by her Supplement Affidavit (Ex. 17)

According to ETS's owner, Mr. Paris, KEO failed to pay what it owed ETS (Paris dep., p. 8). At trial, the KEO representative claimed that it had paid ETS more than was owed (Tr. 79). In either event, before paying ETS, KEO did not seek or obtain lien waivers from Wyandotte, or sworn statements from ETS confirming that Wyandotte had been paid (Tr. 79, 86, 104), even though standard practice and the KEO/ETS subcontract required that (Tr. 88; Paris dep., pp. 24, 37). As a result, Wyandotte remained unpaid.

Litigation History

Plaintiff's suit was assigned to Judge Colombo. A default judgment was taken against ETS (Tr. 4), but it was out of business (Tr., 9/14, 4; Paris dep., p. 6), and Paris filed for bankruptcy (Tr. 4). Accordingly, suit proceeded against KEO and its surety, Westfield.

On September 11, 2011, Plaintiff filed a motion for summary disposition (Ex. 23). Defendants argued that MCL 129.207 required more than the certified mailing; that a "receipt" requirement should be read into the statute. Oral argument was held on November 4, 2011 (Transcript attached as Ex. 4). Following argument, Judge Colombo ruled (Mot. 11/4/11, pp. 3-4, 8-10):

> "The language of the statute is clear and unambiguous. It requires that notice be served by mailing a certified mail postage prepaid. It does not require a return receipt. There's nothing in the statute that says that actual notice must be received."

Defendants also argued that the time-price differential was unenforceable. The trial court rejected this argument as well, noting that this provision was part of the Purchase Order for which the surety was responsible under Price Brothers Company v CJ

Rogers Construction Co, 104 Mich App 369, 379 (1981) (Mot.,11/4/11, p. 11). Accordingly, an order of partial summary disposition was entered, leaving only the issue of damages for trial (Ex. 2).

At trial, Plaintiff presented the testimony of Julie Schneider, the financial manager at Wyandotte (Tr.13). Mrs. Schneider's husband owns Wyandotte, and she has worked for the company for 23 years (Tr. 13). In his verdict, Judge Colombo said, "I found Julie Schneider to be a very credible and believable witness, who knew what she was talking about" (Tr. 104). Mrs. Schneider explained the ETS/Wyandotte relationship and the relevant documentation, including the Statement of Account summary (Ex. 11) showing a principal balance due of $154,343.29 (Tr. 21-22). Judge Colombo found this summary to be accurate, and awarded the principal amount claimed (Tr. 105).

Although the credit application, quotation, and purchase order all allowed a time price differential for payments more than 30 days overdue (Ex. 6, Ex. 7, Ex. 8), the actual practice at Wyandotte was to give customers an additional 30 day grace period, charging the differential after 60 days (Tr. 28). Consistent with that practice, the time price differential in this case, with a 60 day period, reduced by $572.69 for an accounting error (Tr. 55, 105), yielded a time price differential recovery of $76,403.44 (Tr. 105; Ex. 3). The trial court awarded Wyandotte the time price differential of $76,403.44 and attorney fees of $30,000 for services performed through July 31, 2012 (Ex. 3)

Plaintiff also introduced the deposition testimony of Mr. Paris (Tr. 63-64; Ex. 18), the President and sole shareholder of ETS (Paris dep., p. 5), who did not dispute the arrearage claimed by Wyandotte (Paris dep., p. 36). He had no records of ETS, which

had folded, and had not filed any tax returns for 2008 or later (Paris dep., pp. 5-6). The ETS office was at his home and, he claimed, the records were on a computer which his estranged wife took (Paris dep., pp. 6-7).

Paris claimed that ETS had also paid an additional $50,000 check to Wyandotte for the Public Library project, but was unable to produce any documentation (Paris dep., p. 26). In response to the summary disposition motion and at trial, Defendants could present no evidence of a $50,000 payment (Tr. 91), but argued that Wyandotte had received this additional money. In his verdict, Judge Colombo rejected this unsupported defense (Tr. 104). The Court also found it "shocking" that KEO did not seek sworn statements or waivers from ETS (Tr. 104).

KEO presented its President, Mr. Onwuziriki, as a witness (Tr. 77). As of November 1, 2010, he knew of Wyandotte's bond claim (Tr. 83). However, he never got any waivers from Wyandotte (Tr. 86), even though ETS was contractually required to provide sworn statements and waivers for every payment from KEO (Tr. 88). Several of the KEO payments were made to ETS after November 22, 2010 (Tr. 89).

At a post-trial hearing of November 9, 2012 (Transcript found as Ex. 5), the Court ruled that Plaintiff was entitled to recover the time price differential until payment (Ex. 5, p. 5). At trial, Plaintiff was awarded $30,000 in attorney fees (Tr. 106), based on Mrs. Schneider's testimony about the amount paid through July of 2012 (Tr. 28-29). Since Defendants were liable for case evaluation sanctions under MCR 2.403, the Court allowed an additional $12,180.97 under that Rule for services after July 31, 2012 (Ex. 3), as requested (Mot. 11/5/12, p. 3). Defendants did not contest either the number of hours

or hourly rate, which were set forth in the Affidavit of Mr. Burnstein, Plaintiff's trial counsel (Mot. 11/5/12, pp. 6-7).

In short, Plaintiff was awarded, from the general contractor (KEO) and its surety (Westfield), the unpaid balance due for equipment furnished to KEO's Detroit Public Library project, the contractual time price differential before judgment, and interest up to a 13% maximum afterward (Ex. 3), as well attorney fees of $42,180.97. $30,000 under the contract and $12,180.97 under MCR 2.403(0).

Defendants appealed of right. The appeal was assigned to a panel comprised of Hon. Jane M. Beckering, Hon. Joel P Hoekstra, and Hon. Elizabeth L Gleicher. On July 15, 2014, the Court of Appeals issued its unanimous, unpublished decision (Ex. 1).

As they do here, Defendants argued in the Court of Appeals that Pi-Con v Anderson Const. Co., 435 Mich 375 (1990) created an implied "receipt" requirement, even when the claimant satisfied the "served... by mailing... by certified mail" requirement of MCL 129.207. The Court recognized that it was to apply the statutory language, and noted the purpose to protect material suppliers (Ex. 1, p. 4), citing decisions of this Court for both propositions. The Court of Appeals rejected Defendants' argument, noting that, in contrast to other statutes, MCL 129.207 contains no "receipt" requirement (Ex. 1, p. 5). Rejecting Defendants' Pi-Con argument, the Court of Appeals held (Ex. 1, p. 7):

> "There is no precedent for grafting an actual receipt requirement onto MCL 129.207 when the claimant used certified mail. Such a requirement is not within the statute's plain language. Therefore, the circuit court correctly determined that if the claimant uses the method of service

> outlined in the statute – certified mail – then proof of actual receipt is not required. The undisputed evidence showed that Wyandotte used certified mail to send the 30-day notice to KEO. It complied with the statute and was not required to prove actual receipt. As such, the circuit court correctly granted summary disposition on this issue."

Defendants also argued that they were not required to pay the time-price differential agreed to by ETS and Plaintiff. The appellate court, citing Quality Prods & Concepts Co v Nagel Precision, Inc, 469 Mich 362, 375 (2003), recognized that Defendants, statutorily responsible for the amount "justly due", were required to pay the full debt (Ex. 1, pp. 8-10).

MCL 600.6013(7) provides for interest "on a written instrument evidencing indebtedness with a specific interest rate". Applying the plain language, the Court of Appeals recognized that the contractual documents between Wyandotte and ETS, with a time-price differential, constituted a "written instrument" (Ex. 1, pp. 10-11).

Defendants now seek leave to appeal. For the reasons which follow, Plaintiff asks that the Court deny the Application.

ARGUMENT

I. LEAVE TO APPEAL SHOULD BE DENIED, AS THE UNPUBLISHED COURT OF APPEALS DECISION SIMPLY APPLIES SETTLED PRINCIPLES OF CONTRACT AND STATUTORY INTERPRETATION

Defendant's Application stresses that decisions in the field of public work bonds are rare. If that is so, it is likely because bond litigation is itself rare. If so, this simply underscores that the issues are not of widespread application or jurisprudential significance, a factor militating against Supreme Court review.

The fact that few bond cases reach the Court of Appeals also disproves any contention that the issues now presented are so controversial or conflicted as to require Supreme Court intervention. The bond procedure may appear complicated to those who do not practice in the field, but the statutory language is fairly clear. Other material suppliers, general contractors and sureties seem to have no difficulty discerning the meaning of terms like "justly due" or "shall be served by mailing [the notice] by certified mail postage prepaid".

When all is said and done, the Court of Appeals decision is based on the principle that statutory and contractual language is to be applied as written. The decision cites Supreme Court authority for this elementary principle, a principle stated, reiterated, and reaffirmed by decisions too numerous to count. There is no reason for this Court to review an appellate decision that simply, and faithfully, applies the language adopted by the Legislature and the decisional law of this Court.

II. WHERE PLAINTIFF COMPLIED WITH THE REQUIREMENT OF MCL 129.207 BY SERVING ON KEO THE REQUIRED 30 DAY NOTICE "BY MAILING THE SAME BY CERTIFIED MAIL, POSTAGE PREPAID, TO THE PRINCIPAL CONTRACTOR...", THE TRIAL COURT PROPERLY GRANTED, AND COURT OF APPEALS AFFIRMED, SUMMARY DISPOSITION TO PLAINTIFF AS TO LIABILITY AND PROPERLY DECLINED TO CREATE A "RECEIPT" REQUIREMENT NOT FOUND IN THE STATUTORY LANGUAGE

It is beyond dispute that KEO and Westfield had written notice, when Wyandotte first began to supply electrical materials to the project, that Wyandotte was ETS's electrical supplier. This was made clear by the request for the payment bond of March 3, 2010 (Ex. 9). Defendants can make no claim that they were ignorant of Wyandotte's identity or that it was the electrical supplier entitled to payment for the materials used by KEO, for which KEO was paid by the Detroit Public Library.

Nor can there be any doubt that, on March 10, 2010, Wyandotte sent the required 30 day written notice to KEO, Westfield, and Detroit Public Library (Ex. 13, Ex. 14). It did so by "certified mail, postage prepaid, in an envelope addressed to the principal contractor, the governmental unit involved, at [a] place at which [they] maintain a business...". The quoted language comes directly from MCL 129.207, which states, as here pertinent:

> "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...served on the principal contractor a written notice of the materials being furnished or to be furnished..."

* * *

> "This 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." (emphasis added).

Judge Colombo properly granted partial summary disposition because Wyandotte served the 30 day notice exactly as prescribed by the statute, "by mailing the same by certified mail, postage prepaid, in an envelope addressed to [KEO]". The Court declined the request of Defendants, repeated in this Court, to create an "actual receipt" requirement which the Legislature chose not to include in the statute. The circuit court correctly construed and applied the statute as written, as did the Court of Appeals.

A. Standard of Review

Plaintiff's summary disposition motion was supported by the Affidavit of Mrs. Schneider (Ex. 16) and the documentation showing that the 30 day notice had been mailed to KEO by certified mail (Ex. 13, Ex. 14). With this submission, Defendants were required to present admissible evidence to the contrary. MCR 2.116(G)(4); Maiden v Rozwood, 461 Mich 109 (1999). Defendants offered no evidence to contest, and do not now dispute, that Plaintiff mailed a timely 30 day notice, in the statutorily required form, to KEO, by certified mail, return receipt requested.

The trial court's summary disposition ruling based on those facts is reviewed de novo applying the same standards which govern a trial court's decision. Spiek v Dept. of Transportation, 456 Mich 331, 339 (1998); Ardt v Titan Insurance Co, 233 Mich App

685, 688 (1999); Maskery v U of M Bd of Regents, 468 Mich 609, 613 (2003); Walsh v Taylor, 263 Mich App 618, 621 (2004).

Here, the questions posed focus on the meaning of the language employed by the Legislature. Those questions of statutory construction are reviewed de novo. In re: MCI, 400 Mich 396, 413 (1999); Shinholster v Annapolis Hospital, 471 Mich 540, 548 (2004).

B. The Applicable Principles of Statutory Construction

There are two sentences in MCL 129.207 now relevant: the sentence requiring a 30 day notice, and the sentence prescribing the method of notice. They are to be read together. Bailey v Oakwood Hospital, 472 Mich 685, 693 (2005); Macomb County Prosecutor v Murphy, 464 Mich 149, 159 (2001).

As this Supreme Court has often stressed, where legislative language is clear, the judicial duty is to apply the literal language, regardless of how wise the legislation may seem. Sun Valley Foods v Ward, 460 Mich 230, 236 (1999); Mudel v Great A&P Tea Co, 461 Mich 691, 706 (2000).

As a corollary to that principle, a court cannot create judge-made exceptions or limitations which the drafters did not decide to include. In re: Hurd-Marvin Drain, 331 Mich 504, 509 (1951); Ford Motor Co v Unemployment Compensation Commission, 316 Mich 468, 473 (1947); Alexander v MESC, 4 Mich App 378, 383 (1963).

C. Overview of the Michigan Policy Protecting Material Suppliers

Those who provide materials and labor on a construction site can do so most efficiently and inexpensively if assured of payment. Furthermore, it is essential to the

orderly progress of a construction site that materials are provided, and labor performed, in a timely fashion. To foster this process, and to avoid disruption of the project over payment disputes, Michigan law and policy have been designed, even before statehood, to protect workers and suppliers. WT Andrews Co v Mid-State Surety, 450 Mich 655, 659, 668-669 (1996); Milbrand Co v DDS, 117 Mich App 437, 440 (1982). This is accomplished by two parallel, but distinct, statutory schemes which impose the burden of assuring payment on the entities ultimately benefitting from those labors and materials, the owner and general contractor.

For private sector construction, the supplier of materials or labor is entitled to a lien on the owner's property, MCL 570.1107, to secure payment under the Construction Lien Act, MCL 570.1101, et. seq. The enforcement of a valid lien is by foreclosure on the owner's property. To satisfy or avert the lien, the owner is to obtain from the contractor a sworn statement identifying unpaid laborers and material suppliers, MCL 570.1110, so that the owner can make sure that they are paid from the owner's payments to the contractor. Altman, Inc v Saginaw Plumbing, 42 Mich App 747, 755 (1972).

For self-evident policy reasons, one who furnishes labor or materials for a public project is not allowed to foreclose on publicly owned property. Kammer Asphalt Paving Co v East China Twp Schools, 443 Mich 176, 181-182 (1993). Instead, the general contractor is required, as a condition of obtaining the contract, to provide a payment bond which is "for the protection of claimants...supplying labor or materials to the principal contractor or his subcontractors...", MCL 129.203.

For both private projects, MCL 570.1108, and public projects, MCL 129.207, there is a first 30 day notice of furnishing provision. In each instance, service may be made by certified mail. MCL 570.1109(1) ("...service is complete upon mailing"); MCL 570.1111(5) (same); MCL 129.207 ("notice shall be made by mailing the same by certified mail"). The purpose is to notify the owner or general contractor of the identity of those providing labor or materials potentially giving rise to a claim, so that the owner can assure that funds paid to the contractor are used to discharge labor or material debts. Wallach Lumber Co v Golds, 375 Mich 323, 328-329 (1965); Saginaw Lumber Co v Stirling, 305 Mich 475, 478-479 (1943); Rasmussen v Bolyard Lumber Co, 45 Mich App 377, 380 (1973).

D. The Trial Court And Court of Appeals Rulings Correctly Apply MCL 129.207 As Written

This Court and the lower courts are required to construe and apply unambiguous statutory language as written. Mudel, supra; Sun Valley Foods, supra. The Court of Appeals recognized, under different facts, in Airedale of North America, Inc v Mid America Mechanical, Inc, Ct. of App # 234311, rel'd 6/24/03 (Ex. 24), that MCL 129.207 and its notice provisions are clear and must be construed and applied as written.

The pertinent statute does not make the material supplier a guarantor of "delivery", or "actual receipt" as Defendants urge. Wyandotte did all it could, and all the statute requires, by sending the notice to KEO by certified mail, return receipt requested. Plaintiff is not responsible for shortcomings of the United States Postal Service in Detroit, or for a contractor's failure or refusal to accept certified mail. To adopt

Defendants' argument would allow general contractors to circumvent their obligations by refusing to accept certified mail. For very potent policy reasons, the Legislature did not condition payment on actual receipt of mail, which would undermine the purposes of the statute.

More to the point, and policy aside, the Legislature focused not on matters beyond the power of the claimant but instead imposed on the claimant a procedural requirement which could not guarantee delivery, but which the Legislature thought sufficient. Since Plaintiff provided the 30 day notice in conformance with the plain language of the statute, it preserved its claim. Therefore, the trial court and Court of Appeals rulings correctly carry out the judicial obligation to apply statutes as written, without creating limitations which the Legislature chose not to impose.

This Court addressed essentially the same issue, in a different context, in Nowell v Titan Ins Co, 466 Mich 478 (2002). In that case, regarding cancellation of an insurance policy under MCL 500.3020(1)(b), the critical language allowed cancellation by the insurer, "by mailing to the insured at the insured's address last known...with postage fully prepaid...written notice of cancellation". The plaintiff contended that, "actual notice is necessary for a notice of cancellation sent pursuant to this statutory provision to be effective" (466 Mich at 482). Thus was framed the very issue presented in this case: whether a statute which requires notice by mailing in a specific fashion contains an unstated requirement of delivery. Addressing that question, the Supreme Court held (466 Mich at 479-480, 482-483):

> "We conclude that actual notice to the insured is not required to effectuate the cancellation of an insurance policy under MCL 500.3020(1)(b)..."
>
> * * *
>
> "We conclude that the most basic principles of statutory construction resolve this matter. First, the plain and unambiguous language of a statute must be applied as written. Second, provisions of a statute that could be in conflict must, if possible, be read harmoniously.
>
> 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..." (footnotes omitted).

While the specific statutes are different, the principle of Nowell is controlling. Where a statute requires a method of mailing, compliance with that method is sufficient, regardless of whether the mailing was received.

As an aside, while beside the point in view of the statutory language of MCL 129.207 and Nowell, this result comports with the purpose of the statutory scheme and its imposition of the risk of nonpayment on to the general contractor. Wyandotte did exactly what the statutory language required it to do. The material it furnished was for the ultimate benefit of KEO, which was paid by Detroit Public Library for this facet of the job. From the outset, KEO and its surety knew Wyandotte was the electrical material supplier. If KEO has followed ordinary, prudent practice, it would have assured that ETS paid Plaintiff from any payments made to it by KEO.

In this case, the certified mail notice was never returned. Plaintiff did not learn of non-delivery until long after the 30 day period. The courts below correctly rejected Defendants' position which, if adopted, would forfeit recovery even when the creditor

fully complied with the statutory requirements, and could do nothing more to provide "notice" to KEO, which already knew of Wyandotte and its role from the exchanges of March 3rd and March 4th, when it supplied Wyandotte a copy of the payment bond.

In the final analysis, Plaintiff did what the 30 day notice feature of MCL 129.207 requires. The trial court correctly granted summary disposition, and the Court of Appeals correctly affirmed.

E. The Lower Court Rulings Are Not Inconsistent With Pi-Con v Anderson Construction, 435 Mich 375 (1990)

Defendants have relied heavily on the pre-Nowell decision in Pi-Con v Anderson Construction, 435 Mich 375 (1990). Judge Colombo correctly concluded that it was readily distinguishable (Mot. 11/4/11, pp. 9-10) and that Pi-Con did not hold that compliance with the statutory process was insufficient in the absence of receipt. The Court of Appeals correctly reached the same conclusion.

First and foremost, Pi-Con was not a case in which the claimant complied with the statutory "certified mail" requirement. To the contrary, Pi-Con "fail[ed] to send notice via certified mail" (435 Mich at 378). The ultimate holding was that, despite non-compliance, it could still recover if it "timely sent notice which otherwise complies with...MCL 129.207" and the contractor "timely received notice" (Id). Upon proof of "otherwise compl[iance]" and "timely received notice", "Pi-Con's failure to send notice via certified mail will not preclude recovery on the bond" (Id). In short, Pi-Con articulated exceptional circumstances in which recovery would be allowed, without

compliance with the "certified mail" requirement. It does not preclude recovery where, as here, the statutory "certified mail" requirement is met.

There, the court "agree[d]" (435 Mich at 382) with a United States Supreme Court decision holding that "substantial compliance with the notice requirements was sufficient to perfect an action on the bond" (435 Mich at 381). Thus, Pi-Con expanded, not contracted, the grounds for recovery. It is in that context that the court allowed proof of "receipt" (435 Mich at 382), as an alternative ground for recovery, by a claimant who failed to comply with the "certified mail" requirement.

Pi-Con did not create a non-statutory "actual receipt" hurdle for those like Plaintiff who fully complied with the "certified mail" requirements of MCL 129.207. To have done so would violate the settled principle, emphasized since Pi-Con, that statutes are to be applied as written. Indeed, any dicta favorable to Defendants in Pi-Con would be superceded by those authorities and the later Nowell decision. In the final analysis, Wyandotte did all that MCR 129.207 requires: mail the notice in a timely fashion, to the correct address, by certified mail, return receipt requested. The trial judge therefore correctly granted summary disposition on that facet of the case, and the Court of Appeals correctly affirmed.

III. THE MATERIALS PROVIDED FOR THE PROJECT WERE FURNISHED PURSUANT TO A CONTRACT PROVIDING FOR A TIME PRICE DIFFERENTIAL AND ATTORNEY FEES, AND THE TRIAL COURT CORRECTLY HELD, AND COURT OF APPEALS AFFIRMED, THAT DEFENDANTS, THE GENERAL CONTRACTOR AND SURETY, WERE LIABLE FOR THE AMOUNT DUE PLAINTIFF

MCL 129.207 expressly allows suit on the bond, "for the amount, or balance thereof, unpaid at the time of the institution of the civil action". The claimant may obtain judgment "for the sum justly due him". A later sentence provides that "The principal contractor shall...be required to make payments to a subcontractor of the sums due from the subcontractor to parties...furnishing materials or supplies...upon the receipt of the written orders of such parties to pay to the subcontractor the sums due all parties".

Here, the contract between ETS and Wyandotte included a "time price differential" provision, as well as an attorney fee provision (Ex. 6, Ex. 7, Ex. 8). These are lawful contractual provisions (sub-section A, infra), and the "sum justly due" Wyandotte includes those contractual obligations, which the trial court correctly included in the Judgment (Ex. 3). Contrary to Defendants' arguments, the purpose, language, and case authorities regarding MCL 129.207 permit the supplier of materials to a subcontractor to recover from the general contractor and surety.

A. THE AMOUNT "JUSTLY DUE" INCLUDES THE CONTRACTUAL TIME PRICE DIFFERENTIAL AND ATTORNEY FEE PROVISIONS

The Credit Application, Job Quotation and Purchase Order pursuant to which the electrical supplies were delivered unquestionably contain an "attorney fee" provision and "time price differential" provision. Provisions by which the parties contractually agree that the breaching party is responsible for attorney fees incurred because of its breach are customary in commercial contracts and are legally valid and enforceable. Zeeland Farm v JBL Enterprises, 219 Mich App 190, 195 (1996); Central Transport, Inc v Fruehauf Corp, 139 Mich App 536, 548 (1984). In this case, the attorney fee provision protected

Wyandotte from that business expense, enabling it to sell the electrical supplies at a reduced cost reflecting freedom from attorney fee expenses.

Similarly, the time price differential incentivized ETS to pay the billings promptly, allowing Wyandotte to avoid payment delay and the costs of financing its business while awaiting payment. The ETS Purchase Order expressly referenced Wyandotte's Job Quotation based on the 1½% monthly time price differential. This contract term provided a measure of compensation to Wyandotte if payment delay denied it access to the amounts due or required it to incur its own finance charges to operate the business. As with attorney fee provisions, time price differential provisions are commonplace in supply contracts and are deemed enforceable by the Michigan courts. Price Brothers Company v CJ Rogers Construction Co, 104 Mich App 369, 379 (1981); Silver v International Paper Co, 35 Mich App 469, 470-471 (1971); Erb Lumber v Lien Fund, 206 Mich App 716, 720-721 (1994). As the Court explained in Erb Lumber:

> "[P]laintiff here relies on the terms of the contract to establish its costs. By including a time price differential, plaintiff essentially set differing costs for the materials depending on when they were paid for after delivery. Following Brede, since the contract terms established the cost of the materials, and profit and overhead were included, plaintiff is entitled to recover the time price differential as well. Furthermore, the statute here clearly contemplates that recovery is based on the value of the contract less amounts already paid."

Simply put, the amount due Plaintiff includes the attorney fees and the time price differential contracted for. Moreover, this unpaid balance is recoverable from KEO and Westfield.

B. UNDER MCL 129.207, DEFENDANTS ARE LIABLE TO PLAINTIFF FOR THE AMOUNT OWED TO PLAINTIFF

The gist of Defendants' argument is that, because there is no contractual privity between them and Wyandotte, they are not responsible for the balance due Plaintiff from their subcontractor, ETS. That assertion is refuted by the statutory language, the statutory purpose, and the case law.

(1) The Statutory Language

The sole significance of the lack of "privity" under MCL 129.207 is that the 30 and 90 day mailing requirements are imposed on a claimant "not having a direct contractual relationship with the principal contractor". The very reason for that requirement is that the general contractor and surety can be held liable for the subcontractor's debt—that is exactly why the "mailing by certified mail" requirement exists. With that exception, the statutory language does not absolve the general contractor and surety of responsibility.

To the contrary, MCL 129.207 specifically allows suit "on the payment bond for the amount, or the balance thereof, unpaid at the time". The language does allow recovery against the surety ("on the payment bond") and uses the obligation of the debtor as the amount ("the amount...unpaid"). As the "amount unpaid" includes the attorney fees and time price differential (sub-section A, supra), the plain statutory language makes the surety liable, despite the absence of "privity", in the amount owed to Plaintiff by the debtor.

That statutory meaning is reinforced by the language quantifying the amount of the "judgment" recoverable: "final judgment for the sum justly due him". That "justly due" sum includes attorney fees and time price differential. The statutory language includes those elements of recovery in the "judgment" permitted by MCL 129.207.

Finally, Defendants' thesis that a general contractor cannot be held liable to the supplier of its subcontractor is dispelled by the final sentence. That sentence specifically envisions "The principal contractor" "mak[ing] payment" of "sums due from the contractor to parties performing labor or furnishing materials or supplies".

(2) The Purpose of the Statute

The purpose of this Act is to provide material suppliers with recovery when the party with which they have contracted fails to make payment. That is why a surety is required: to protect material suppliers, MCL 129.203 ("for the protection of claimants...supplying labor or materials to the principal contractor or his subcontractors"). If Defendants were not required to pay the attorney fee and time price differential components of the ETS obligation, they could escape liability for the product cost component as well. To adopt that view would effectively render the entire statutory scheme a nullity and would defeat its very purpose.

And, the statute imposes the burden on the general contractor that is the ultimate beneficiary of the supplies and materials provided by the Plaintiff. In Price Brothers, the Court explained why a time price differential or finance charges may lower the cost of materials which enhance the value of the project (104 Mich App at 378-378):

> "[T]he differential is an integral part of the cost of the transaction. If the buyer pays cash, the seller receives the money immediately and no burden is placed on him. If the buyer elects to purchase on credit, the seller is burdened by the interruption to its cash flow, and so the buyer may pay a 'price' for the benefit of receiving the materials without paying for them immediately."
>
> * * *
>
> "[F]inance charges may be seen as inextricably related to the enhanced value of the project and thus properly included within the terms of the payment bond. If the contractor's agreement to pay finance charges is in fact a condition precedent to delivery without simultaneous cash payment (COD), then the value of the property or project on which the materials are used is enhanced by such agreement. Otherwise, the materials supplier may refuse to deliver the goods and the project is stalled until another supplier is found. As such, we are persuaded that the surety is liable for the service charge, given that it was clearly an integral part of the contract between plaintiff and Rogers" (emphasis supplied).

(3) The Case Law

The language from Price Brothers just quoted bears repeating: "the surety is liable for the service charge". The trial judge correctly followed the Price Brothers decision "on all fours". Like this case, Price Brothers involved a public project (sewer lines for Bay City, 104 Mich App at 371), governed by MCL 129.207 (cited at 104 Mich App at 376-377), which the Price Court construed in holding the surety responsible for the service charges.

The Pi-Con case on which Defendants depend for their "30 day notice" argument (Issue II) is also instructive. That case was brought by a material supplier to a subcontractor, "on a public works project" (435 Mich at 378). The court allowed suit to proceed (and, with sufficient proof, recovery to be made) against the general contractor,

Anderson. Without addressing the elements of recovery, Pi-Con nonetheless recognizes that MCL 129.207 allows recovery from the general contractor by an unpaid supplier to a subcontractor. And, Grand Blanc Cement Products v Ins Co of North America, 225 Mich App 138, 149 (1997) directly holds that a surety is liable to the supplier of materials to a subcontractor without privity to the general. See also Andrews (material supplier to subcontractor may enforce claim against project owner, University of Michigan); Kammer (allowing recovery against governmental entity by subcontractor).

C. SUMMARY

For these reasons, the Court of Appeals correctly upheld the trial court's judgment for attorney fees and time price differential. Pursuant to Central Transport, the contractual attorney fee liability extends to fees incurred on appeal. Accordingly, Wyandotte asks that the Court deny leave to appeal so that the case can be returned to the circuit court for determination of appellate attorney fees recoverable under the contract and Central Transport, up to 33% of the other elements of recovery.

IV. THE TRIAL COURT DID NOT ERR IN ALLOWING RECOVERY OF THE TIME PRICE DIFFERENTIAL UNTIL PAYMENT, SUBJECT TO THE 13% INTEREST LIMITATION OF MCL 600.6013(7)

In post-trial proceedings, the trial court was called upon to determine what Wyandotte was entitled to for the period following entry of the Judgment until payment. Plaintiff contended that the contractual time price differential applied post-judgment as a continuing element of recoverable damages. The trial court characterized the time price differential as "interest", thereby reducing the post-judgment compensation for the

delayed use of the money from the contractual 18% time-price differential to the statutory maximum of 13% under MCL 600.6013(7):

> "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."

Accordingly, the Judgment (Ex. 3) includes:

> "...interest after September, 2012 at the rate of 1.5% per month but not to exceed 13% per year compounded annually pursuant to MCL 600.6013(7)."

Defendants now complain of the post-judgment interest rate of 13%.[6]

To begin with, the trial court's characterization of the time price differential as "interest" subject to MCL 600.6013 benefits KEO and the insurer. Cases such as Erb Lumber and Price Brothers recognize that the price differential is, as the name reflects, a different principal price, not "interest". As such, a time price differential does not constitute "interest" as that term is used in usury statutes, Silver v International Paper Co,

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[6] The apparent purpose of using the interest rate agreed to by the parties is to honor their contractual agreement (up to 13% maximum). Otherwise, contracting parties would be encouraged to intentionally shirk their payment responsibilities, necessitating litigation, to avoid their interest promises and profit by the lower rates of MCL 600.6013 (8).

35 Mich App 469, 470-471 (1971);[7] Attorney General v Contract Purchase Corporation, 327 Mich 636, 643 (1950); Matthews v Aluminum Acceptance Corp, 1 Mich App 570, 577 (1965).

The trial court could quite properly have concluded that, as an element of damages, the time price differential continued as long as Defendants continued to withhold payment. That he did not do so, instead characterizing that component post-judgment as "interest", benefitted KEO and the insurer. Having successfully persuaded the Court to regard 1½% per month as "interest", Defendants are in error in complaining that the Court erred in applying the "interest" provision of MCL 600.6013(7).

For cases such as this, filed after July 1, 2002, the 13% maximum applies if a "judgment is rendered on a written instrument evidencing indebtedness with a specified interest rate". This case falls squarely within that language. Parsing these words, the term "written instrument", retained in the current version, is to be broadly construed, Yaldo v North Pointe Ins Co, 457 Mich 341, 346-347 (1988) (insurance policy is a "written instrument" for purposes of the interest statute); Holland v Earl G. Graves Publishing Co, 33 F Supp 2d 581, 583 (ED Mich, 1998) ("The term 'written instrument' encompasses written contracts"). For present purposes, the trial court correctly held that the statutory term "written instrument" clearly includes writings such as the ETS credit application (Ex. 6) and purchase order (Ex. 8), adopting the quotation (Ex. 7).

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[7] After Silver, in the context of real estate transactions, MCL 438.31c(6) was enacted, defining "interest" as including "finance charges". Thelen v Ducharne, 151 Mich App 441, 447 (1986).

The added phrase, "evidencing indebtedness with a specified interest rate", is also satisfied. The documents (Ex. 6, Ex. 7, Ex. 8) "evidence indebtedness"—ETS is unquestionably required to pay for materials ordered through the credit applied for. And, there is a "specified interest rate": 1½% per month. The transactional documents in this case fall squarely within the language of MCL 600.6013(7), allowing a 13% interest rate on recoveries for failure to pay money for which the debtor has agreed to a specified interest rate.

Arguing otherwise, Defendants contend that there was no contractual privity between them and Wyandotte. As discussed in Argument III above, the very purpose and language of the statutory scheme, and case law on point, make the general contractor and surety responsible for the amount owed to the supplier, regardless of "privity".

Defendants' alternative argument suggests that the Court should ignore the transactional documents between Plaintiff and ETS and consider only the payment bond which, they note, does not itself "evidenc[e] indebtedness at a specified interest rate". The bond itself is expressly in conformance with and subject to the statute, the language of which, renders Defendants liable for the contractual time price differential.

More to the point, MCL 600.6013(7) is triggered by judgment on "a written instrument", rather than "the written instrument". Courts are required to respect the use of contrasting language which, for present purposes, allows 13% when the judgment is based on any written instrument. Robinson v City of Detroit, 462 Mich 439, 460-461 (2000); Macomb County Prosecutor v Murphy, supra. Defendants' focus on the payment

bond as the exclusive determinant of 13% interest is untenable in light of the Legislature's "a written instrument" phraseology.

Here, the Judgment was "rendered on" the liability of ETS to Wyandotte, evidenced by contractual writings establishing indebtedness to Plaintiff including a "specified interest rate" of 1½% per month. MCL 600.6013(7) permits a 13% post-Judgment interest rate that continues until payment.

For these reasons, the Court of Appeals correctly affirmed the Judgment against KEO and Westfield for the amount owed to Wyandotte for the materials provided for the benefit of KEO and its project. Leave to appeal should be denied

RELIEF SOUGHT

WHEREFORE, Plaintiff WYANDOTTE ELECTRIC SUPPLY COMPANY prays that this Honorable Court deny Defendants' Application for Leave to Appeal.

Respectfully submitted,

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