STATE OF MICHIGAN

IN THE SUPREME COURT

WYANDOTTE ELECTRIC SUPPLY CO.,

Plaintiff/Appellee,

v

ELECTRICAL TECHNOLOGY SYSTEMS, INC.,

Defendant/Cross-Defendant,

and

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

Defendants/Appellants.

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

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APPLICATION OF APPELLANTS KEO & ASSOCIATES, INC. AND WESTFIELD INSURANCE SEEKING LEAVE TO APPEAL UNDER MCR 7.302

SUMMARY OF ALLEGATIONS OF ERROR AND RELIEF SOUGHT

This is an appeal from a decision of the Court of Appeals that Appellee has requested the Court of Appeals to publish. This case involves important issues involving the proper application of the notice requirements of the Michigan Public Works Bond Act, MCL § 129.201, et seq. (PWBA) and whether the PWBA abrogates established common law principles of suretyship. The decision will have major significance upon construction contractors, sureties, and those that represent them throughout the community. As it stands, the lower court's outcome conflicts with Supreme Court precedent and other appellate decisions. It begs for this Court's grant of Application for Leave to affirm and reinforce the prima facie elements set forth in *Pi Con v A J Anderson Constr Co.,* 435 Mich 375; 458 NW2d 639 (1990).

This Court must reaffirm that bond claimants under the PWBA prove actual receipt of timely, written notice by the principal contractor when sent by certified mail. The Court of Appeals disregarded the clear holding of *Pi-Con v A J Anderson Constr Co.,* 435 Mich 375; 458 NW2d 639 (1990) which requires bond claimants to prove actual, timely receipt of written notice by the principal contractor to satisfy MCL 129.207 when it affirmed the judgment of the lower court. The conflict created by this case must be resolved to provide certainty to Michigan contractors, sureties, lower courts, and practitioners in prosecuting, defending and resolving bond claims on public works projects in Michigan.

This case also raises a square issue of first impression under MCL § 129.207 and that is whether the PWBA expands a principal and surety's liability to include contractual time-price differential and attorney fees as sums "justly due" that the principal contractor never agreed to pay to the bond claimant. The liability of a surety is limited and co-extensive with that of its principal as a matter of hornbook law. At no-point did the principal in this case ever agree to

the onerous credit terms and attorney fee provisions that have been thrust upon it by the lower court, over and above the actual value of improvements.

The PWBA should not be read to expand principal and surety's liability beyond their express agreements. Since 1898, Michigan courts have strongly avoided interpreting statutes in contradiction to common law principles. Public works construction contractors should not be forced to pay under non-bargained-for terms just because they provide statutory bonds under the PWBA. If Issue I is not dispositive to reverse and remand this case in favor of Appellants, because the principal did not receive statutory written notice, this Court should accept application to address this most important issue that affects principal public works contractors, sureties and their indemnitors throughout the state.

Lastly, this Court should provide clear guidance on whether a "written instrument evidencing indebtedness with a specified rate" under MCL § 600.6013(7) exists in this case. The Court of Appeals improperly held that a money judgment was not entered, and found the sale of goods contract between the bond claimant and subcontractor to be a "written instrument" with a "specified rate" of 18% per annum. The court erred when it held that same rate to be "time price differential" applied to the price of unpaid materials to bind the principal and surety under *Price Bros Co v C J Rogers Constr Co*, 104 Mich App 369, 379; 304 NW2d 584 (1981). The 18% per annum credit term cannot both be classified as a specified rate to evidence indebtedness, on the one hand for purposes of MCL § 600.6013(7), and time-price differential that enhanced the value of the bonded project, on the other hand. It must be one or the other. But either way, this Court should accept Application to guide others in determining whether the contract for the sale of goods between the bond claimant and subcontractor "evidenced indebtedness with a specified rate" where no debt is described in the contract. The Court of

Appeals should be reversed because there is no written instrument evidencing indebtedness in this case to support the judgment against KEO and Westfield.

Defendants – Appellants KEO & Associates, Inc. and Westfield Insurance Company requests that this Court:

A. In lieu of granting leave to appeal, enter an order reversing the Court of Appeals' decision and reversing the trial court's grant of summary disposition under MCR 2.116(C)(10) in favor of Plaintiff – Appellee Wyandotte Electric Supply Company based on the undisputed fact that the principal contractor did not receive timely, written notice under the PWBA in light of this Court's clear pronouncement in *Pi-Con* of such a requirement, and direct the trial court to enter judgment to dismiss the lawsuit in favor of Appellants Westfield Insurance Company and KEO & Associates, Inc.

B. In the alternative, grant leave to appeal, and upon full consideration, enter an order affording the relief stated above or one or more of the following:

   a. Enter an order reversing the Court of Appeals' decision and reversing the trial court's grant of summary disposition holding Defendant – Appellants KEO and Westfield liable for time-price charges and attorney fees that neither agreed to pay and that are not expressly provided by statute;

   b. Enter an order reversing the Court of Appeals' decision and reversing the trial court's ruling that MCL § 600.6013(7) applies to the money judgment that arose from a contract other than a written instrument evidencing indebtedness with a specified rate.

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Should this Court Grant Leave to Appeal Where, in a Decision Requested for Publication, the Court of Appeals Erred in its Determination that Bond Claimants Under the Public Works Act, MCL § 129.201, et seq. Need Not Prove the Timely, Actual Receipt of Written Notice by Principal Contractor Sent by Certified Mail to Recover Under the PWBA.

The court of appeals answered "no."

The trial court answered "no."

Appellants answers "yes."

II. Should this Court Grant Leave to Appeal Where, in a Decision Requested for Publication, the Court of Appeals Held, as a Matter of First Impression, that a Bond Claimant can Recover its Contractual Time-Price Differential and Attorney Fees from a Principal Contractor and Surety as Sums "Justly Due" Under the PWBA Even Though the Principal Did Not Contract to Pay Those Extraneous Charges.

The court of appeals answered "no."

The trial court answered "no."

Appellants answers "yes."

III. Should this Court Grant Leave to Appeal Where, in a Decision Requested for Publication, the Court of Appeals Held that a Money Judgment Was Not Entered in This Case, and Affirmed that Judgment Interest Should Accrue Under MCL § 600.6018(7) Even Though no Written Instrument Evidencing Indebtedness with a Specified Rate Exists.

The court of appeals answered "no."

The trial court answered "no."

Appellants answers "yes."

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

This is a statutory payment bond action arising under MCL § 129.201, et seq. commonly known as the Michigan Public Works Bond Act ("PWBA"). Plaintiff/Appellee Wyandotte Electric Supply Co. ("Wyandotte") is a material supplier that sold electrical materials to Electrical Technology Systems, Inc. ("ETS") on account. They were parties to a credit application from 2003.[1] Under their agreement, ETS agreed to pay 18% per annum to Wyandotte for the cost of goods sold but not timely paid by Wyandotte. ETS did not timely pay Wyandotte for goods supplied to ETS that were incorporated into the renovation of the South Wing of the Detroit Public Library (the "Project"). Wyandotte provided a quotation and ETS issued Wyandotte a purchase order to buy the materials.[2]

Defendant/Appellant KEO & Associates, Inc. ("KEO") was the principal contractor on the Project who engaged ETS as its electrical subcontractor. KEO and ETS had their own separate subcontract with comprehensive payment terms favorable to KEO.[3] At no time did KEO contract with Wyandotte.

As principal contractor on a public works project, KEO supplied statutory payment and performance bonds pursuant to the PWBA. Defendant/ Appellant Westfield Insurance Company ("Westfield") was the surety that issued the statutory bonds for payment protection of those that improved the Project through labor and materials.[4] The statutory payment bond references the PWBA.

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[1] *See* Wyandotte / ETS Credit Agreement at **Ex. A**.
[2] *See* Wyandotte Quotation and ETS Purchase Order at **Ex. B**
[3] *See* ETS / KEO Subcontract Agreement at **Ex. C**.
[4] *See* Westfield Bond at **Ex. D**.

Wyandotte furnished electrical material from March 3, 2010 until January 10, 2011.[5] To preserve its rights under the PWBA, Wyandotte was required to serve its 30-day notice upon KEO within 30 days of March 3, 2010.[6]

Wyandotte did not obtain service of its statutory notice upon KEO within 30 days of its first supply of materials to the Project. Wyandotte's Credit Manager admitted that Wyandotte did not actually deliver its initial 30 day notice to KEO when writing on February 1, 2011:

> "With respect to your inquiry regarding the timeliness of our Notice of Furnishing, kindly find enclosed herewith the records received from the [USPS] for that item, *which does indeed indicate that the item was not delivered.* Nevertheless, we would refer you to MCL 570.1109, which provides that proper notice is effectuated upon deposit with the USPS."[7]

In addition to Wyandotte's admission that its initial notice was not delivered, counsel for Wyandotte conceded the fact in its Motion for Summary Disposition.[8] The fact that KEO did not receive Wyandotte's 30 day notice under MCL § 129.207 is undisputed. Moreover, no evidence was ever presented or hinted to show that KEO avoided, rejected, or interfered with Wyandotte's efforts to serve its statutory notice. Wyandotte knew well before KEO of the fact that its attempted service of statutory notice was insufficient.

During the Project, KEO terminated its subcontract with ETS because ETS failed to perform. However, prior to termination, KEO made progress payments to ETS of more than $248,000.00 with the funds intended to compensate ETS's laborers and material suppliers, including Wyandotte.[9] KEO's payments to ETS were made without Wyandotte timely serving written notice of its involvement in the Project to supply materials to ETS. KEO was unaware of its potential liability for double payment to a material supplier engaged by ETS.

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[5] *See* Stipulated Facts of Joint Final Pre-Trial Order, ¶ D at **Ex. E**.
[6] MCL § 129.207.
[7] *See* February 1, 2011 Letter of Wyandotte attached as Exhibit E to Wyandotte's Motion for Summary Disposition at **Ex. F** (emphasis added). Wyandotte referenced the incorrect statute in its February 1, 2011 letter to Westfield.
[8] *See* Wyandotte's Brief in Support of its Motion for Summary Disposition, pp 5-6, fn 1 at **Ex. G**.
[9] *See* Trial Transcript, p 79 at **Ex. H**.

Wyandotte sued ETS, KEO and Westfield for payment of materials supplied to ETS in the Wayne County Circuit Court before the Honorable Robert Colombo.[10] Wyandotte moved for summary disposition pursuant to MCR 2.116(C)(10) on the validity of its bond claim under the PWBA, and the inclusion of its onerous credit terms with ETS against the principal contractor and surety.[11] Despite Wyandotte's admitted failure to serve written notice upon KEO, and the inability of Wyandotte to satisfy the prima facie elements of *Pi-Con*, the lower court granted summary disposition in favor of Wyandotte.[12]

The trial court found the statutory language of PWBA was "clear and unambiguous" but relied on *Nowell v Titan Ins. Co.*, 466 Mich 478; 648 NW2d 157 (2002) which interprets provisions of Michigan's Insurance Code that simply do not apply to this case. The trial court ruled that *Pi-Con* was distinguishable on its facts from this action[13] even though *Pi-Con* is a Michigan Supreme Court opinion that interprets MCL § 129.207 to guide lower courts on the substantive elements a bond claimant must satisfy to recover under the statute.

The trial court also ruled that Wyandotte could recover 18% per annum time-price differential charges and attorney fees against KEO and Westfield under MCL § 129.207. The trial court relied on *Price Bros Co v C J Rogers Const Co*, 104 Mich App 369; 304 NW2d 584 (1981), but did not recognize the important distinction between *Price Bros.*, where the principal on the bond contractually agreed to pay time-price differential charges to the bond claimant, versus here, where the principal did not agree to pay time-price differential.[14]

KEO and Westfield timely filed a Motion for Reconsideration which focused on the failure of Wyandotte to timely serve its required 90-Day notice under MCL § 129.207 within 90 days of

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[10] Wyandotte and KEO obtained default judgments against the electrical subcontractor ETS who is not party to any appellate proceeding.
[11] **Ex. G.**
[12] *See* KEO and Westfield Response to Motion for Summary Disposition at **Ex. I**; *See* Order at **Ex. J.**
[13] *See* November 4, 2011 Hearing Transcript, pp 9-11 at **Ex. K.**
[14] **Ex. K**, pp 11-12.

the last shipment for which the claim was made. The trial court refused to reconsider and denied the motion, and that issue is not subject to this Application for Leave although it was addressed by the Court of Appeals and remains an important unresolved area of jurisprudence under the PWBA.

The case proceeded to bench trial to determine the unpaid price of Wyandotte's materials sold to ETS on account. In advance of trial, the parties presented a set of Stipulated Facts, which were included in the Pre-Trial Order and were fully adopted by the court as findings of fact.[15]

Judgment was entered after bench trial. The Court found that Wyandotte was owed the principal amount of $154,343.29, time-price differential charges of $76,403.44 and that it had also incurred attorney fees in the amount of $30,000.[16] The money judgment required KEO and Westfield to pay the foregoing amounts arising from the Project.

Wyandotte moved for entry of a judgment against KEO and Westfield. Its request included the above-listed amounts with post-judgment interest to accrue pursuant to MCL § 600.6013(7).[17] KEO and Westfield objected because MCL § 600.6013(7) should not apply where there is no "written instrument evidencing indebtedness with a specified interest rate."[18] The trial court ruled in favor of Wyandotte and entered judgment with post-judgment interest against KEO and Westfield to accrue pursuant to MCL § 600.6013(7) at Wyandotte's time price differential of 18% per annum with ETS, subject to the statutory cap of 13%.[19]

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[15] **Ex. E**; **Ex. H**, p 101.
[16] **Ex. H**, pp 105-106.
[17] *See* Wyandotte Motion for Entry of Judgment at **Ex. L**.
[18] *See* KEO and Westfield Response in Opposition to Wyandotte Motion for Entry of Judgment at **Ex. M**.
[19] *See* Judgment at **Ex. N**.

KEO and Westfield timely filed their Claim of Appeal. After oral argument, the Court of Appeals affirmed all of the lower court's rulings and judgment in an unpublished opinion.[20] Wyandotte has since requested the opinion be published.[21]

The Court of Appeals held that Wyandotte need not prove KEO's actual receipt of its written notice under the PWBA despite the clear language of the statute and holding of *Pi-Con.* The Court of Appeals disregarded the trial court's misplaced reliance on *Nowell,* but held, in contradiction to *Pi-Con,* that so long as "the claimant uses the method of service outlined in the statute – certified mail – then proof of actual receipt is not required," and that, "There is no precedent for grafting an actual receipt requirement onto MCL 129.207 when the claimant uses certified mail."[22] The Court of Appeals interpreted certain limited verbiage of the statute (in contradiction to *Pi-Con*) while ignoring the statute's mandate for the bond claimant to "serve" the statutory notice on the principal contractor.

The bargained-for contractual time price differential and attorney fee provisions between Wyandotte and ETS were also awarded against KEO and Westfield under the PWBA. The Court of Appeals determined the lack of privity between KEO and Wyandotte for the inclusion of the time price differential in the judgment to be "unavailing" even though that critical fact should be dispositive in favor of the Appellants under common law principles of suretyship and statutory construction.[23] Without proper citation, and as a matter of first impression, the Court of Appeals held the extraneous sums as "justly due" under the PWBA when the issue has never been squarely addressed by this Court.

The Court of Appeals also affirmed judgment interest pursuant to MCL § 600.6013(7) and found that written instruments evidencing indebtedness with a specified rate existed in this

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[20] *Wyandotte Electric Supply v Electrical Tech Sys, Inc.*, unpublished opinion per curiam of the Court of Appeals, issued July 15, 2014 (Docket No. 313736) at **Ex. O**.
[21] *See* Wyandotte's Request for Publication at **Ex. P**.
[22] *Wyandotte*, p 7
[23] *Wyandotte*, p 10

case based on the various documents that composed the contract between Wyandotte and ETS for the sale of goods.[24] The trial court improperly relied on superseded precedent when entering its judgment, and the analysis set forth by the Court of Appeals begs for clarification because it attempts to identify the existence of "indebtedness" based on a contract for the sale of goods; not a loan. The Court of Appeals found that the time price differential could also be treated as a rate of interest "depending on the language of the case."[25] The Court of Appeals cited no authority for its holding on this issue and appears to have disregarded the legislative intent behind the enactment of MCL 600.6013(7). The grant of Application is proper in this case on this issue that frequently arises amongst courts throughout the state regardless of practice area.

ARGUMENT

Introduction: This case presents important issues involving the construction and surety industry in Michigan. The Court of Appeals should not have affirmed any aspect of the judgment in favor of the bond claimant. The outcome of this case directly conflicts with *Pi-Con* and will create confusion and uncertainty within the public construction contracting community.[26] This Court should affirm *Pi-Con's* holding to require bond claimants to prove that principal contractors actually receive written notice under MCL 129.207 when exposing them to liability to parties required to serve written notice under MCL § 129.207.

The PWBA regulates those who make improvements to public projects by requiring that principal contractors supply payment and performance surety bonds. This Court's decision in *Pi-Con* has been regarded as the proverbial last word on MCL § 129.207 to require lower-tiered trades that did not contract with the principal contractor to plead and prove the principal contractor actually received written notice prior to the perfection of a bond claim, regardless of

[24] *Wyandotte*, p 11
[25] *id.*
[26] MCR 7.302(B)(5)

whether the notice was sent by certified or first class mail.[27] Now, as a result of the decision in this case, sureties, contractors, suppliers, attorneys, and lower courts are faced with needless confusion.

A one paragraph order from this court can eliminate the confusion by reaffirming the prima facie elements to recover under MCL § 129.207, including the "actual receipt" principal of *Pi-Con.* This Court should direct the lower court to enter judgment in favor of Appellants KEO and Westfield based on the undisputed fact that KEO did not actually receive the written notice even though it was sent by certified mail. If *Pi-Con* is not dispositive of this matter because Wyandotte sent its notice by certified mail, this court should provide clear guidance on exactly what actions constitute compliance with MCL 129.207 under the PWBA when notice is sent certified mail, and why *Pi-Con* is not applicable under these facts.

This case presents an equally compelling issue of first impression that requires this Court's attention if Issue I is not dispositive. KEO, as principal contractor, and its surety, Westfield, have been ordered to pay the bond claimant Wyandotte's extraneous time-price differential charges and attorney fees despite the undisputed fact that KEO did not directly contract with Wyandotte and never agreed to pay those extra charges. The Court of Appeals casually held those extra sums, that are significantly above and beyond the actual value of materials supplied to improve the Project, were "justly due" under the statute, without a proper analysis of the issue or consideration of hornbook suretyship law, or the ramifications of holding principal contractors and their sureties liable to pay time-price differential or other charges that they never agreed to pay.

The Court of Appeals termed the critical, dispositive distinction between *Price Bros. Co v C J Rogers Constr Co.*, 104 Mich App 369; 304 NW2d 584 (1981) and this case as "unavailing"

[27] *Pi-Con*, pp 383-384.

even though the distinction goes to the very heart of the relationship between surety and principal. In *Price Bros.,* the bond claimant directly contracted with the principal who agreed to pay time-price differential, whereas in this case, KEO did not. The Court of Appeals created new law under the PWBA that greatly expands liability of principal contractors, sureties (and their indemnitors) without so much as acknowledging century old surety and statutory interpretation maxims of Michigan common law that should have been followed to reverse the lower court judgment. No case law exists in Michigan to support the decision of the Court of Appeals to hold a non-contracting party bound to the terms of others' unique contract terms.

It does not appear this court has ever addressed what sums are "justly due" under the PWBA. The lower court held that all of the amounts sought by Wyandotte pursuant to its contract with the defunct subcontractor to be "justly due" to bind the principal contractor and surety, without any precedent or citation to applicable law. The ruling could lead to absurd and drastic results in the construction industry where bond claimants could assert a host of damage claims against the principal and surety that have no relation to the improvement of public works.

Sureties and principal contractors must know what elements are to be satisfied, and what exposure they face under the PWBA when assessing their potential liability to claimed unpaid remote subcontractors or suppliers. As it stands, significant confusion exists on the issues created by the decision of the Court of Appeals on issues of significant public interest.[28]

This Court should also take the opportunity to clarify and provide definitive guidance on what documents establish a "written instrument evidencing indebtedness" for purposes of calculating post-judgment interest pursuant to MCL § 600.6013(7) for which no square answer

[28] MCR 7.302(B)(3) and (5)

seems to exist.[29] Practitioners on a daily basis seek post-judgment interest on money judgments and written instruments. The Court of Appeals' decision takes tremendous leaps of logic to affirm the judgment of the lower court on this issue to avoid imposing interest under the typical money judgment section of MCL § 600.6013(8).

The Court of Appeals improperly ruled that a money judgment was not entered against KEO and Westfield for the payment of a sum of money when that is precisely what happened.[30] The Court of Appeals found the credit application, quotation and purchase orders between Wyandotte and ETS for the sale of goods, collectively, evidenced a "debt" because at any given time, a balance due for unpaid goods under the contract exists. It also held the 18% per annum time price differential was a specified rate for purposes of post-judgment calculations. The holding flies against the legislative intent behind the enactment of MCL 600.6013(7), and defies plain sense because the contract did not document the existence of debt on its face. This Court should reverse the Court of Appeals' holding that a money judgment was not involved and order judgment interest to accrue, if any, pursuant to MCL § 600.6013(8).

A. The Court of Appeals Incorrectly Affirmed the Lower Court's Granting of Summary Disposition in Favor of Wyandotte where Wyandotte Did Not Plead and Prove that KEO Actually Received Written Notice under MCL § 129.207.

Standard of Review: When a motion for summary disposition is granted or denied, the appellate court reviews the trial court's decision under the de novo standard of review.[31]

Issues of statutory interpretation are reviewed de novo.[32] The primary goal of judicial interpretation of statutes is to discern and give effect to the intent of the Legislature.[33]

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[29] MCR 7.302(B)(5)
[30] *Wyandotte*, p 11
[31] *Ardt v Titan Ins. Co.*, 233 Mich App 685, 688; 593 NW 2d 215 (1999).
[32] *Sotelo v Grant Twp.*, 470 Mich 95, 100; 680 NW2d 381 (2004).
[33] *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004).

"Statutory language should be construed reasonably, keeping in mind the purpose of the statute . . . If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written."[34] Nothing will be read into an unambiguous statute that is not within the manifest intention of the Legislature as derived from the language of the statute itself.[35]

Where reasonable minds may differ about the meaning of a statute, we look to the objective of the statute and the harm it is designed to remedy and apply a reasonable construction that best accomplishes the legislature's purpose.[36] Literal constructions that produce unreasonable and unjust results that are inconsistent with the purpose of the act should be avoided.[37] However, appellate courts review for clear error a trial court's finding that plaintiff complied with the notice requirements of the PWBA.[38]

Applicable Law: This case arises from Wyandotte's claim for payment as an unpaid material supplier on a public works project subject to the PWBA, where KEO was principal contractor and Westfield its surety. Materialmen and contractors may not obtain a mechanic's lien on a public building.[39] Therefore, the PWBA requires principal contractors to provide bonds assuring payment to subcontractors and materialmen furnishing supplies, labor, or equipment for public construction projects.[40] Payment bonds are "solely for the protection of claimants . . .

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[34] *USAA Ins Co v Houston Gen Ins Co.*, 220 Mich App 386, 389; 559 NW2d 98 (1996).
[35] *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).
[36] *Grand Blanc Cement Products, Inc. v Ins Co of North America*, 225 Mich App 138, 143; 571 NW2d 221 (1997) citations omitted.
[37] *id.*
[38] *W T Andrew Co., Inc. v Mid-State Sur. Corp.*, 221 Mich App 438, 440; 562 NW2d 206 (1997) citing MCR 2.613(C); *Tempco Heating & Cooling, Inc. v A Rea Constr., Inc.*, 178 Mich App 181, 191; 443 NW2d 486 (1989).
[39] *Kammer*, p 181 citations omitted.
[40] *Grand Blanc*, p 144 citing *W T Andrew Co., Inc. v Mid-state Surety Corp.*, 450 Mich 655, 658; 545 NW2d 351 (1996); *Thomas Industries, Inc. v C & L Electric, Inc.*, 216 Mich app 603, 606; 550 NW2d 558 (1996).

supplying labor or materials to the principal contractor or his subcontractors in the prosecution of the work provided for in the contract."[41]

The PWBA is to be "liberally construed" to "protect contractors and materialmen in the public sector."[42] However, to qualify for PWBA statutory protection, MCL § 129.207 provides:

> "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."

A claimant not engaged directly by the principal contractor must "serve" two (2) written notices, the first being within thirty (30) days after first furnishing labor or materials, the second being within ninety (90) days from the last supply of labor or materials.[43] Each of the notices must be served by certified mail.

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[41] *Kammer Asphalt Paving Co. v East China Twp. Schools,* 443 Mich 176, 182; 504 NW2d 635 (1993) citations omitted, footnote omitted.

[42] *id.* citing *W T Andrew,* p 659; *Adamo Equipment rental Co. v Mack Development Co., Inc.*, 122 Mich App 233, 236; 333 NW2d 40 (1982).

[43] *W T Andrew,* 221 Mich App at 440.

Notice requirements under the PWBA are strictly enforced.[44] Indeed, to ensure that "principal contractors [have] knowledge regarding any possible claims to which their bonds might later be subjected," MCL § 129.207 requires subcontractors and materialmen to "inform the principal of the nature of the material being furnished or to be furnished . . . and identifying . . . the site for . . . delivery of such materials."[45]

In *Pi-Con*, this Court established the prima facie elements of proper notice under MCL § 129.207 when it held:

> [T]hat a claimant on a bond may maintain an action on the bond upon establishing compliance with four substantive elements of the notice provisions of MCL 129.207; MSA 5.2321(7). First, a claimant must prove that the principal contractor actually received notice. Second, the notice must relate to "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 statute.

Pi-Con held a principal contractor's actual receipt of written notice is a critical, substantive element under the PWBA. This Court relied heavily on the United States Supreme Court case of *Fleisher Engineering & Construction Co. v United States ex rel. Hallenbeck*, 311 U.S. 15; 61 S.Ct. 81; 85 L.Ed. 12 (1940). *Fleisher* construed the federal Miller Act, 40 U.S.C. 270b(a), which is the federal public works bond statute on which Michigan's PBWA is modeled.[46]

The *Fleisher* court interpreted the "certified mailing" requirement of the federal Miller Act to hold that, "We think that the purpose of this provision [notice by certified mail

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[44] *Pi-Con, Inc. v A J Anderson Construction Co.*, 169 Mich App 389, 394; 425 NW2d 563 (1988); *Grand Blanc*, p 144 citing *Tempco*, p 190; *Charles W. Anderson Co. v Argonaut Ins. Co.*, 62 Mich App 650, 651-654; 233 NW2d 691 (1975).

[45] *Grand Blanc*, p 145 citing *Pi-Con*, p 383-384.

[46] *Pi-Con*, p 381.

requirement] as to manner of service was to assure receipt of the notice..." And, further that, "It is not reasonable to suppose that Congress intended to insist upon an idle form."[47]

This Court in *Pi-Con* further expounded on the notice requirements under the PWBA when it explained that:

> We view the certified mail requirement as substantive. The Legislature, recognizing the vagaries of ordinary first-class mail, required certified mailing as a way to better ensure actual receipt of the notice. The Legislature intended to protect public works bonds from claims by materialmen and subcontractors of whose participation on the project the general contractor was not notified.[48]

The *Pi-Con* holding is unequivocal:

> We look to *Fleisher* in establishing...that the principal contractor must actually receive notice in order for a claimant to perfect its right on the bond.[49]

Courts and practitioners alike have relied on the holding enunciated in *Pi-Con* when evaluating whether a bond claimant has perfected a claim for payment under the PWBA. So has the Court of Appeals in other cases. As an example, on remand from this Court, the Court of Appeals in *W T Andrew Co., v Mid-State Sur. Corp.,* 221 Mich App 438; 562 NW2d 206 (1997) relied on the elements of *Pi-Con* to determine whether the bond claimant had satisfied the notice requirements under the PWBA. The bond claimant in *W T Andrew* never served notice and produced "no evidence that [it] notified the principal, surety or the [owner] within thirty days of first delivery." Therefore, the Court of Appeals properly held that the bond claimant was not in compliance with the statute.[50]

Pi-Con is controlling precedent on point to require actual notice under the PWBA. However, the Court of Appeals in this case affirmed the lower court's entry of judgment despite

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[47] *Fleisher*, p 19.
[48] *Pi-Con*, p 386.
[49] *Pi-Con*, p 383.
[50] *W T Andrew Co., Inc.*, 221 Mich App at 441.

the undisputed fact that KEO, as principal contractor, did not receive any written notice. Wyandotte has requested the opinion to be published. This Court should preemptory reverse to reaffirm the principals set forth in *Pi-Con.* Judgment in favor of Appellants KEO and Westfield should be entered.

Argument: Wyandotte conceded that KEO did not receive the initial written notice required of MCL § 129.207 within thirty (30) days of its first supplying material to the project.[51] Therefore, according to the plain language of the PWBA and this Court's holding in *Pi-Con,* the claim of Wyandotte should have been dismissed.

The Court of Appeals seems to have tasked this Court to once again clarify the state of the law, despite this Court's detailed analysis in *Pi-Con* which clearly mandates that "the principal contractor must actually receive notice in order for a claimant perfect its right on the bond." [52] Indeed, the Court of Appeals' holding renders the notice requirement of MCL § 129.207 to be "idle" because it alleviated the actual receipt requirement upon the principal contractor in clear contradiction to this Court's holding in *Pi-Con.* The facts of *Pi-Con* are dissimilar from this case in that the bond claimant in *Pi-Con* served its statutory notice by first class mail, and not certified mail as required by the statute. However, the distinction between methods of service did not play a role in this Court's holding of *Pi-Con* because the opinion does not limit its holding to situations only where the bond claimant attempts to serve the principal by first class mail. That is not what the opinion says.

Pi-Con went farther to unambiguously announced four substantive elements a bond claimant must satisfy to perfect its claim under MCL § 129.207. *Pi-Con* did not create an exception to apply only in circumstances where the bond claimants provide notice by first class mail. Rather, this Court held:

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[51] **Ex. G**, pp 5-6 footnote 1; **Ex. F**.
[52] *Pi-Con*, p 383.

> [T]hat a claimant on a bond may maintain an action on the bond upon establishing compliance with four substantive elements of the notice provisions of MCL 129.207; MSA 5.2321(7). First, a claimant must prove that the principal contractor actually received notice. Second, the notice must relate to "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 statute.

Even so, the Court of Appeals affirmed the lower court's judgment on the grounds that the statute does not contain an actual receipt requirement of a bond claimant's written notices.

The Court of Appeals chose to emphasize that:

> The plain language of the statute makes no mention of actual receipt of the 30-day notice as a condition precedent to filing suit. Defendants highlight that the written notice "shall inform" the general contractor of certain information and aver that this language requires the general contractor to actually receive the information. This phrase taken in context, however, simply means that the written notice must include the listed information.[53]

This Court should reject the Court of Appeals' interpretation of MCL § 129.207. First, this Court has already precisely spoken on the issue when it announced the prima facie elements a bond claimant must satisfy to perfect its notice under MCL § 129.207.[54] Under the doctrine of stare decisis, "principles of law deliberately examined and decided by a court of competent jurisdiction should not be lightly departed." Indeed, in order to " 'avoid an arbitrary discretion in the courts, it is indispensable that [courts] should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them....'" As the United States Supreme Court has stated, the doctrine "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on

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[53] *Wyandotte*, p 5.
[54] *Pi-Con*, p 383-384.

judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[55] The Court of Appeals' decision in this case departs from the prior precedent of *Pi-Con* and should be reversed.

Second, the interpretation of the lower court would result in absurd results and creates needless confusion. Should the decision stand, bond claimants that provide written notice by certified mail need *not* prove the principal contractor received the notice, but those that disregard the statute's certified mailing requirement, must prove actual receipt or actual notice pursuant to *Pi-Con*. Obviously, bond claimants are in the best position to ensure principal contractors receive written notice because bond claimants are in control over serving the notice. Notice requirements under the PWBA are strictly enforced.[56] Indeed, to ensure that "principal contractors [have] knowledge regarding any possible claims to which their bonds might later be subjected," MCL § 129.207 requires subcontractors and materialmen to "inform the principal of the nature of the material being furnished or to be furnished . . . and identifying . . . the site for . . . delivery of such materials."[57] Any risk of insufficient service should be imposed on the party that is *responsible* for serving the notice, i.e. the party with whom the principal did not contract: the remote bond claimant.

Pi-Con and the statute's plain language require the written notice be "served" on the principal. The Legislature intended to protect public works bonds from claims by materialmen and subcontractors of whose participation on the project the general contractor was not notified.[58] The Court of Appeals' decision departs from legislative intent. Receipt of timely, written notice should be reinforced.

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[55] *McCormick v Carrier*, 487 Mich 180, 209-210; 795 NW2d 571 (2010).
[56] *Pi-Con, Inc. p* 394; *Grand Blanc*, p 144 citing *Tempco*, p 190; *Charles W. Anderson, pp 651-654.*
[57] *Grand Blanc*, p 145 citing *Pi-Con*, p 383-384.
[58] *Pi-Con*, p 386.

Third, the Court of Appeals did not read MCL § 129.207 as a whole. It disregarded the statute's mandate that a bond claimant "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 . . ." Where reasonable minds may differ about the meaning of a statute, courts look to the objective of the statute and the harm it is designed to remedy and apply a reasonable construction that best accomplishes the legislature's purpose.[59]

The term "serve" is not defined in the PWBA so therefore, courts may consult a dictionary to ascertain the meaning of the term.[60] To "serve" means to "present (a person) with a notice or process as required by law <the defendant was served with process>."[61] Technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.[62] By analogy, KEO was never "presented" with any written notice from Wyandotte for purposes of describing, and was therefore, never "served"

The Court of Appeals' sole focus on how the written notice "shall inform" the principal of the "nature of materials" and other required information *ignores* the statute's equally important, and perhaps greater requirement, that the notice shall first be "served" on the principal contractor. The Court of Appeals' comparison of service methods between MCL § 129.207 and a host of other statutes where "return receipt demanded" or some other form of delivery is enunciated misses the point. MCL § 129.207 unequivocally requires the notice be *served* on the principal.

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[59] *Grand Blanc Cement*, p 143 citations omitted.
[60] *Consumers Power Co. v Public Service Comm.*, 460 Mich 148, 163, n. 10; 596 NW2d 126 (1999) citing MCL § 8.3a.
[61] Black's Law Dictionary (7th ed).
[62] MCL § 8.3a; *Yaldo v North Pointe Ins Co.*, 457 Mich 341, 357; 578 NW2d 274 (1998).

The Court of Appeals' erred when it held no requirement exists in MCL § 129.207 to confirm actual receipt, because it *ignored* the statute's requirement the notice be "served." And again, it bears repeating this Court's prior holding that a principal contractor must actually receive notice in order for a claimant to perfect its right on the bond under MCL § 129.207.[63] Here, it is undisputed that KEO did not receive actual notice under MCL § 129.207, and furthermore, KEO paid $248,000.00 to ETS without knowledge of Wyandotte's involvement in the Project. KEO could not protect itself from double payment because it did not receive written notice from Wyandotte under MCL § 129.207. This Court should reaffirm the actual receipt requirement enunciated in *Pi-Con.*

This Court should enter a preemptory order to reverse the Court of Appeals and remand to direct entry of judgment in favor of KEO and Wyandotte pursuant to *Pi-Con* given the undisputed fact that KEO, as principal contractor, did not receive actual notice under MCL § 129.207 and Wyandotte otherwise failed to establish the prima facie elements necessary to support its claim.

B. The Court of Appeals Incorrectly Affirmed the Lower Court's Judgment Against Appellants to Include Time-Price Differential and Attorney Fees that the Principal Contractor Never Agreed to Pay and that are Independent of the Bond Claimant's Value of Improvements to the Public Project.

Standard of Review: When a motion for summary disposition is granted or denied, the appellate court reviews the trial court's decision under the de novo standard of review.[64]

Issues of statutory interpretation are reviewed de novo.[65] The primary goal of judicial interpretation of statutes is to discern and give effect to the intent of the Legislature.[66]

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[63] *Pi-Con*, p 383.
[64] *Ardt*, p 688.
[65] *Sotelo v Grant Twp.*, 470 Mich 95, 100; 680 NW2d 381 (2004).
[66] *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004).

"Statutory language should be construed reasonably, keeping in mind the purpose of the statute . . . If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written."[67] Nothing will be read into an unambiguous statute that is not within the manifest intention of the Legislature as derived from the language of the statute itself.[68]

Where reasonable minds may differ about the meaning of a statute, we look to the objective of the statute and the harm it is designed to remedy and apply a reasonable construction that best accomplishes the legislature's purpose.[69] Literal constructions that produce unreasonable and unjust results that are inconsistent with the purpose of the act should be avoided.[70]

Applicable Law: This is an issue of first impression for the courts of this state. *Price Bros Co v C J Rogers Constr Co*, 104 Mich App 369, 379; 304 NW2d 584 (1981) does not speak to these facts, where a principal is being held to onerous contract and credit payment terms to which it did not agree on a public works project. The PWBA should not broadly consider extraneous time-price differential charges or attorney fees as sums "justly due" to enhance the value of the project where the principal did not agree to pay them.

A suretyship contract requires three parties; a principal, an obligee, and a surety.[71] "A surety is one who undertakes to pay money or take any other action if the principal fails therein."[72] "The liability of a surety is limited by the scope of the liability of its principal and the precise terms of the surety agreement."[73]

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[67] *USAA Ins Co v Houston Gen Ins Co.*, 220 Mich App 386, 389; 559 NW2d 98 (1996).
[68] *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).
[69] *Grand Blanc*, 143.
[70] *id.*
[71] *Will H. Hall & Son, Inc. v Ace Masonry Const Inc.*, 260 Mich App 222, 228; 677 NW2d 51 (2003).
[72] *id.*, p 228-229.
[73] *id.*(citation and quotation marks omitted)

As this Court stated in *Ann Arbor v Massachusetts Bonding & Ins. Co.,* 282 Mich 378, 380; 276 NW 486 (1937):

> The undertaking of a surety is to receive a strict interpretation. The surety has a right to stand on the very terms of the contract. To the extent and in the manner and under the circumstances pointed out in his obligation, the surety is bound, and no further. The liability of a surety is not to be extended by implication beyond the terms of his contract. (citation omitted) A surety cannot be held beyond the precise terms of his agreement. (citation omitted). As said by Chancellor Kent, "The claim against a surety is *strictissimi juris.*" (citation omitted)

A surety has the right to raise any defense of its principal:

> Generally, a surety may plead any defense available to its principal and if no action can be maintained by the obligee against the principal, none can be maintained against the surety.[74]

In addition, as the Court stated in *Will H. Hall & Son,* supra at pages 228-229:

> "The liability of a surety is limited by the scope of the liability of its principal and the precise terms of the surety agreement." In general, *a surety may plead any defense available to the principal,* and the liability of the surety is coextensive with the liability of the principal in the bond and can be extended no further. (emphasis in original, citations omitted).

The obligations of a payment bond surety are usually limited to the terms of the particular bond, subject to any applicable statutory provisions.[75] However, the cardinal rule of statutory construction, [is] that statutes will not be extended by implication to abrogate the established rules of common law.[76] The legislature should speak in no uncertain manner when it seeks to abrogate the plain and long-established rules of the common law.[77]

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[74] 23 Mich. Civil Jurisprudence, Suretyship, § 47, p 100; *Ackron Contracting Co. v Oakland County,* 108 Mich App 767, 772; 310 NW2d 874 (1981).

[75] *The Law of Payment Bonds,* Lybeck & Shreves, Editors, Tort and Insurance Practice Section, American Bar Association, 1998.

[76] *Silver v International Paper Co.,* 35 Mich App 469; 192 NW2d 535, 536 (1971), citing *Bandfield v Bandfield,* 117 Mich 80; 75 NW 287 (1898).

[77] *Bandfield v Bandfield,* 117 Mich 80, 82; 75 NW 287 (1898).

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.[78] No statute, court rule or contractual provision between the principal contractor, surety, or bond claimant exists in this case to hold either KEO or Westfield liable for attorney fees.

Price Bros Co v C J Rogers Constr Co, 104 Mich App 369, 379; 304 NW2d 584 (1981) did not run afoul of the American rule or the well established common law principal that the liability of the surety is co-extensive with that of its principal, because the court in *Price Bros.* bound the surety to the principal's obligation to pay time price differential. The agreement between the principal and bond claimant in *Price Bros.* required the principal to pay "service charge of 1 ½ percent per month on the unpaid balance . . ." for materials supplied to improve the bonded project.[79] The court determined the time price differential to be a "flexible price factor" and "integral part" of the transaction between principal and bond claimant.[80]

Price Bros. is an important decision for construction and surety professionals. The statutory bond in *Price Bros.* referenced the PWBA and the Court of Appeals determined time price differential charges were related to the project "on a purely hypothetical plane."[81] The court's holding comes down to the last paragraph of the opinion which says:

> On a purely hypothetical plane, finance 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,

[78] *Watkins v Manchester*, 220 Mich App 337, 342; 559 NW2d 81 (1996).
[79] *Price Bros.*, p 376.
[80] *Price Bros.*, p 377.
[81] *Price Bros.* p 376.

> given that it was clearly an integral part of the contract between plaintiff and Rogers.

The last sentence makes clear that the time-price differential was the integral part of the contract *between bond claimant and principal* that bound the surety. The court did not hold the surety liable to pay the time price differential because they were sums "justly due" under MCL § 129.207. The principal undertook an obligation to pay based on credit, which likewise bound the surety.

Even so, the rationale of *Price Bros.* is difficult. The remote time-price differential charge between Wyandotte and ETS in this case certainly did not "enhance the value" of the Project. Wyandotte continued shipping material to the bonded project well after its 2003 credit terms with ETS should have been revoked. Wyandotte failed to adhere to its own credit terms.[82] It eventually required and received cash on delivery payments for its final shipments to the project.[83]

Wyandotte's onerous 18% per annum credit terms with ETS did not enhance the project's value beyond the principal value of the materials furnished and incorporated into the Project. ETS is no longer in business with Wyandotte and KEO having obtained default judgments against it. KEO *never* agreed to purchase materials on credit terms with Wyandotte, and while the value of materials incorporated into the bonded contract are certainly "justly due" for purposes of principal and surety liability under the PWBA, remote contract terms for time price differential and attorney fees are not.

Equity plays a very large role in determining this case. General contractors take great pains to obtain favorable contract terms with its subcontractors and suppliers through direct negotiation. It is not fair to hold principal contractors and their sureties liable for damage claims

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[82] Ex. A.
[83] Ex. E, ¶ I.

of remote second tier trades that are asserted for sums above and beyond the value of the unpaid improvement. Based on this Court of Appeals opinion, remote bond claimants will assuredly argue that principal contractors must pay a host of other damage claims often asserted on public works projects, such as changed conditions, damages for delay, interference, and other consequential damage claims as sums "justly due." Those claims, which could arise by matter of contract between parties other than the principal, should certainly not be considered a sum "justly due" to bind the non-contracting principal contractor. Time price differential credit terms in a sale of goods contract is no different.

KEO contracted ETS with payment terms that *favored* KEO. The subcontract between them included a pay when paid provision that did not require KEO to pay ETS until KEO received payment.[84] To the contrary, ETS obtained no such agreement from Wyandotte to purchase materials. KEO did not agree to purchase materials on credit.

Beyond the non-bargained for liability imposed on the principal contractor and surety arising from the Court of Appeals' decision, this Court should be very mindful that individuals behind the principal owe strict indemnity obligations to the surety. Westfield's statutory payment bond is *not* a policy of insurance. Personal indemnitors are liable for all costs and losses incurred by the surety in defending and resolving bond claims. Essentially, should this decision stand, Michigan courts will be requiring individual indemnitors to incur time-price differential risk and other charges and terms that were never contemplated and its companies never agreed to pay on the bonded project. The PWBA should not be read to consider time-price differential or attorney fees "justly due" under these circumstances where the principal contractor did not agree to pay them.

[84] **Ex. C**, p 5 Section 5.5

To the contrary, if the individuals that control the principal contractor *agree upon and decide to engage* onerous credit terms with a material supplier, those terms could be imposed against the principal, surety and ultimately, the individual indemnitors, pursuant to the PWBA, common law and *Price Bros.* However, this Court should not allow the PWBA to blanketly bind the principal contractor and surety to remote contract terms. The PWBA is silent on the point and this Court's affirmation of the holding in this case would violate basic tenets of surety law in Michigan. A surety's liability is always coextensive with its principal and the terms of the surety contract must be strictly construed.

The Court of Appeals did not reference *Grand Blanc Cement Products v Ins Co of North America*, 225 Mich App 138, 150; 571 NW2d 221 (1997) in its opinion even though it appears to be one of the closest on-point decisions. The Court of Appeals affirmed a lower court's refusal to include time-price service charges in its judgment against a surety *because* the bond claimant did not directly contract with the principal.[85] The supplying bond claimant's contract in *Grand Blanc* included a time-price differential charge. The claimant obtained judgment against the surety under the public works act, but the lower court did not include time-price differential in the judgment for reasons unknown in the record.[86]

The supplier appealed. It requested the Court of Appeals time-price charges awarded, but the Court of Appeals affirmed the lower court's ruling not to include them. It cited some of the surety maxims cited herein. While MCL § 129.207 entitles a claimant under the bond act to prosecute its suit for a judgment for the amount unpaid at the time of the civil action, "the

[85] *Grand Blanc*, p 150.
[86] *id.*

liability of the sureties is coextensive with the liability of the principal in the bond, and can be extended no further than his."[87] The same holds true here.

The Court of Appeals in this case misidentified the issue. The issue is not whether MCL 129.207 "*precludes* time-price differentials and attorney fees from the amount due the surety,"[88] but rather, whether the statute *provides* for the inclusion of amounts above and beyond the value of improvements against the principal as a clear departure from common law. It does not, and the lower courts erred to hold otherwise.

If the legislature had intended to bind principal contractors to others' contract terms, it should have said so. "The legislature should speak in no uncertain manner when it seeks to abrogate the plain and long–established rules of the common law. Courts should not be left to construction to sustain such bold innovations. The rule is thus stated in 9 Bac. Abr. tit. "Statutes," I, p. 245: "In all doubtful matters, and when the expression is in general terms, statutes are to receive such a construction as may be agreeable to the rules of the common law in cases of that nature; for statutes are not presumed to make any alteration of the common law, further or otherwise than the act expressly declares. Therefore in all general matters the law presumes the act did not intend to make any alteration; for, if the parliament had that design, they should have expressed it in the act."[89]

This Court must cautiously consider this matter and refuse to endorse the abrogation of common-law principals of suretyship while increasing transaction costs and risk to principal contractors, their sureties and indemnitors on public works projects. While the credit terms between ETS and Wyandotte may have been "integral" in the contract between them, they did not exist with respect to KEO, the principal contractor. Michigan's public works act should not

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[87] *Grand Blanc,* p 150; *In re MacDonald Estate*, 341 Mich 382, 386; 67 NW2d 227 (1954), quoting *Ward v Tinkham,* 65 Mich 695, 703; 32 NW 901 (1887); see also *Timmerman v Hartford Accident & Indemnity Co.,* 243 Mich 338, 342, 220 NW 752 (1928); *Ackron Contracting Co. v Oakland Co.,* 108 Mich App 767, 772; 310 NW2d 874 (1981).
[88] *Wyandotte*, p 9.
[89] *Bandfield v Bandfield*, 117 Mich 80, 82; 75 NW 287 (1898).

bind principal contractors, their sureties, and indemnitors to pay upon credit or other terms to which they never agreed as sums "justly due," especially where the principal contractor did not receive timely written notice under MCL § 129.207, as what occurred in this case.

C. The Court of Appeals Incorrectly Affirmed Judgment Interest Pursuant to MCL § 600.6013(7) where a Money Judgment was Entered and No Written Instrument Evidencing Indebtedness with a Specified Interest Rate Exists.

Standard of Review: This issue is based on statutory interpretation and application and is therefore reviewed de novo.[90]

Applicable Law: The Court of Appeals incorrectly affirmed application of MCL § 600.6013(7) under the judgment interest statute. MCL § 600.6013 provides in pertinent part:

> (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.
>
> (8) 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. 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.

[90] *Yaldo v North Pointe Ins Co.*, 457 Mich 341, 344; 578 NW2d 274 (1998).

"The goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature."[91] If the statutory language is unambiguous, this Court will enforce the statute as written. Statutes are to be read as a whole and courts are to avoid a construction that renders any part of the statute surplusage or nugatory.[92] "Individual words and phrases, while important, should be read in the context of the entire legislative scheme."

In *Phinney v Perlmutter,* 222 Mich App 513, 540–541; 564 NW2d 532 (1997), the Court of Appeals stated that the purpose of prejudgment interest is to compensate the prevailing party for expenses incurred in bringing actions for money damages and for any delay in receiving such damages. In addition, the prejudgment interest statute is a remedial statute to be construed liberally in favor of the plaintiff.[93] As such, prejudgment interest can be awarded in cases that involve a "money judgment," which has been defined by courts, using Black's Law Dictionary, as "one which adjudges the payment of a sum of money, as distinguished from one directing an act to be done or property to be restored or transferred."[94]

Holland v Earl G Graves Publishing Company, Inc. 32 F Supp 2d 581 (ED Mich 1988) was former precedent improperly relied upon by the trial court and subsequently overruled when the pre-judgment interest statute was amended. In *Holland,* the federal court applied the ruling of *Yaldo v North Pointe Ins Co,* 217 Mich App 617; 552 NW2d 657, *aff'd* 457 Mich 341; 578 NW2d 274 (1998), which had been decided five months earlier in May of 1998. In *Yaldo,* the court was required to construe the old subsection (5), which read:

> "For complaints filed on or after January 1, 1987, *if a judgment is rendered on a written instrument,* interest shall be calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate of 12% per year compounded annually, unless the instrument has a higher rate of interest. In that case

[91] *In re Townsend Conservatorship,* 293 Mich App 182, 187; 809 NW2d 424 (2011).
[92] *Mich Props, LLC v Meridian Twp.,* 491 Mich 518, 528; 817 NW2d 548 (2012).
[93] *McKelvie v Auto Club Ins. Ass'n,* 203 Mich App 331, 339; 512 NW2d 74 (1994).
[94] *Moore v Carney,* 84 Mich App 399, 404; 269 NW2d 614 (1978).

> interest shall be calculated at the rate specified in the instrument if the rate was legal at the time the instrument was executed. The rate shall not exceed 13% per year compounded annually after the date judgment is entered." *Yaldo* at 246-247. (Emphasis added).

The *Yaldo* court held that an insurance contract was a "written instrument," and applied the 12% rate to a judgment against the carrier. Justice Taylor, dissenting, gave an exposition on the history of that particular statutory provision, and argued the statute was intended only to apply to instruments of indebtedness that carried a specified rate of interest, in order to discourage debtor parties from purposefully defaulting to take advantage of the lower statutory judgment interest rate, which at the time was much lower than market interest rates. The legislature reacted to the decision.

Public Act 175 of 2001 added Section 7 to MCL 600.6013, and clarified the applicable phrase to read, "written instrument *evidencing indebtedness with a specified interest rate."* The Legislature clearly responded to *Yaldo,* enacting HB 4448, which added the verbiage, "...evidencing indebtedness at a specified rate" after the words "written instrument." The House Legislative Analysis for HB 4448[95] explained the purpose of the new section of the statute:

> The defendant insurance company in Yaldo argued that "written instrument" in this section of the Revised Judicature Act must be defined as a writing that expressly contains a rate of interest, such as a negotiable instrument. The dissenting opinion in Yaldo agrees, arguing in part that the legislative history of this section of the RJA shows that "written instrument" was intended to cover only interest bearing instruments. The bill would statutorily affirm the dissenting opinion in Yaldo...

The legislature "statutorily affirmed" the dissenting opinion of *Yaldo.* HB 4448 became effective as PA 175 of 2001 in March of 2002 to create the new subsection (7) to apply only to written instruments evidencing indebtedness with a specified rate of interest, which does not

[95] *See* The House Legislative Analysis for HB 4448 at **Ex. Q**.

apply to the money judgment entered in this case. Therefore, the judgment interest in this case is controlled by subsection (8), *not* the old subsection (5) or new subsection (7).

Argument: The Court of Appeals erred when it held that a money judgment was not involved in this case. Its refusal to apply MCL 600.6018(8) to the money judgment should be reversed if any judgment is to withstand against KEO and Westfield. By applying MCL 600.6018(7), the Court of Appeals disregarded the intent of the legislature when it enacted the new subsection to statutorily affirm the dissent of *Yaldo*.

The Court of Appeals erroneously held that, "This case does not involve a mere money judgment recovered in a civil action."[96] Michigan courts recognize a money judgment as "one which adjudges the payment of a sum of money, as distinguished from one directing an act to be done or property to be restored or transferred."[97] In this case, a money judgment was entered. The money judgment directs KEO and Westfield to pay a sum of money for the benefit of Wyandotte.[98] The judgment does not direct KEO or Westfield to perform any particular act. The fact that judgment was entered under the PWBA based on Westfield's statutory bond does not alter the judgment being one for the payment of a sum of money. Therefore, MCL §600.6013(8) is applicable because a money judgment was entered in this case. The Court of Appeals erred.

The Court of Appeals compounded its error when it found that under MCL § 600.6013(7), "A written contract can be a written instrument, as long as it evidences indebtedness and includes a specified interest rate."[99] The Court held the contract between Wyandotte and ETS qualified under the statute, even though that agreement was for the sale of goods *i.e.*, electrical materials that Wyandotte sold to ETS that were incorporated into the

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[96] *Wyandotte*, p 11.
[97] *Moore v Carney*, 84 Mich App 399, 404; 269 NW2d 614 (1978).
[98] **Ex. N.**
[99] *Wyandotte*, p 11

Project. The Court of Appeals believed the "contract" to be comprised of the open account application, project quotation, and purchase orders[100] and that Wyandotte "recovered from the bond *based* on the contract between Wyandotte and ETS."[101]

The Court erred because judgment should have been entered, if at all, against KEO and Westfield under the statute and bond, alone. Judgment was not and could not have been entered against KEO and Westfield based on the contract between Wyandotte and ETS, because they were not parties to the contract and they assumed no contractual obligations thereunder merely by virtue of their participation in a public works project. The statutory bond does not evidence any indebtedness and contains no rate of interest.[102] Thus, on Wyandotte's money judgment against KEO and Wyandotte, statutory interest calculated at 6 month intervals under MCL 600.6018(8) should apply. The money judgment against KEO and Westfield was rendered on a statutory bond.

Even if this Court affirms judgment against KEO and Wyandotte based on Wyandotte's sale of goods contract with ETS, the contract does not evidence indebtedness with a specified rate for purposes of MCL § 600.6013(7). Without citation, the Court of Appeals affirmed the lower court with little words. It held that "The contract evidences a debt, the accumulated balance of payments due under the purchase orders."[103] However, the Court of Appeals erred because there was no debt to evidence at the time of contract formation between Wyandotte and ETS. The contract was merely an agreement for the sale of goods on credit terms between the contracting parties. Account balances were anticipated between them, for sure, but Wyandotte did not loan any money to ETS. In other words, the purpose of the credit application, quotation and purchase order to supply electrical materials was *not* to document a

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[100] *id.*
[101] *Wyandotte,* p 11 (emphasis added).
[102] **Ex. D.**
[103] *Wyandotte,* p 11

debt. It does not evidence any indebtedness on its face. The contract was intended to govern a sale of goods transaction.

In addition, it is very difficult to reconcile the Court of Appeals' binding KEO and Westfield to pay time price differential under the inappropriate "project enhancement" theory of *Price Bros.,* as discussed *supra*, yet alternatively, classify the same charge as a "rate of interest" for purposes of MCL §600.6013(7). *Price Bros.* characterized the time price differential as a "flexible price factor."[104] Therefore, this Court should not endorse a so-called "flexible price" under *Price Bros.* to also be considered a rate of interest under MCL § 600.6013(7). It cannot be both. And, as it relates to KEO, as a bargained-for term strictly between Wyandotte and ETS, the 18% credit term is neither a time price differential nor a rate of interest. KEO is not a party to the contract and never agreed to the term.

The Court of Appeals erred when it affirmed the judgment against KEO and Wyandotte with post-judgment interest to accrue pursuant to MCL § 600.6013(7). This Court should accept Application to address this most important issue given the clear confusion and improper analysis set forth by the Court of Appeals in this case.

[104] *Price Bros.*, p 377

RELIEF REQUESTED

Defendants – Appellants KEO & Associates, Inc. and Westfield Insurance Company requests that this Court:

A. In lieu of granting leave to appeal, enter an order reversing the Court of Appeals' decision and reversing the trial court's grant of summary disposition under MCR 2.116(C)(10) in favor of Plaintiff – Appellee Wyandotte Electric Supply Company based on the undisputed fact that the principal contractor did not receive timely, written notice under the PWBA in light of this Court's clear pronouncement in *Pi-Con* of such a requirement, and direct the trial court to enter judgment to dismiss the lawsuit in favor of Appellants Westfield Insurance Company and KEO & Associates, Inc.

B. In the alternative, grant leave to appeal, and upon full consideration, enter an order affording the relief stated above or one or more of the following:

   a. Enter an order reversing the Court of Appeals' decision and reversing the trial court's grant of summary disposition holding Defendant – Appellants KEO and Westfield liable for time-price charges and attorney fees that neither agreed to pay and that are not expressly provided by statute;

   b. Enter an order reversing the Court of Appeals' decision and reversing the trial court's ruling that MCL § 600.6013(7) applies to the money judgment that arose from a contract other than a written instrument evidencing indebtedness with a specified rate.

Dated: August 26, 2014

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1866.48/082614 Application for Leave