

STATE OF MICHIGAN  
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals  
Beckering, P.J., and Hoekstra and Gleicher, J.J.

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**WYANDOTTE ELECTRIC SUPPLY CO.,**

Plaintiff/Appellee,

v

**ELECTRICAL TECHNOLOGY SYSTEMS, INC.,**

Defendant/Cross-Defendant,

and

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

Defendants/Appellants.

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**Supreme Court No. 149989  
Court of Appeals No. 313736  
Wayne County Circuit Court  
Case No. 11-003015-CK**

**THE REPLY BRIEF OF APPELLANTS**

**\*\*\*ORAL ARGUMENT REQUESTED\*\*\***

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## **THE REPLY BRIEF OF APPELLANTS**

### **1. Correction of Certain Material Facts Asserted by Appellee.**

Written notice under MCL § 129.207 was not served upon or received by the principal contractor in this case, and as a consequence, a central issue to this Court's ruling is whether Wyandotte Electric Supply Co. ("Wyandotte"), the non-privity bond claimant, on the one hand, or KEO & Associates, Inc. ("KEO"), the principal contractor, and its surety, Westfield Insurance Company ("Westfield"), on the other hand, best bears the risk of insufficient notice under Section 7 of the Public Works Act, MCL § 129.201, et seq. ("PWBA"), which is intended to ensure that "*principal contractors* [have] knowledge regarding any possible claims to which their bonds might later be subjected."<sup>1</sup> As a result, it seems only logical that the party charged with providing written notice (i.e., the bond claimant) best bears the risk of insufficient service.

Wyandotte blushes at innocence when it claims, for the first time in its counter-statement of facts, that "[it] did not receive the mailing back from the post office as undeliverable and, thus, had no notice that the mailing to KEO – and only KEO – seemed to have disappeared."<sup>2</sup> The facts show otherwise. Wyandotte was well aware that its thirty day notice failed and was not served upon KEO. Wyandotte is the party that obtained, possessed and provided the failed tracking notice to Westfield in Wyandotte's letter of February 1, 2011<sup>3</sup> where Wyandotte admitted bad service:

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<sup>1</sup> *Grand Blanc Cement Products, Inc. v Insurance Company of North America*, 225 Mich App 138, 145; 571 NW2d 221 (1997), citing *Pi-Con*, p 383-384 (emphasis added).

<sup>2</sup> Appellee Brief, p 7 fn 1

<sup>3</sup> App 57a.

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.<sup>4</sup>

Wyandotte possessed post office records to confirm the fact that its notice was not delivered. Moreover, in the litigation, Wyandotte *conceded* that “no proof” existed that its thirty day notice was served on KEO,<sup>5</sup> and while that concession alone should have been dispositive in favor of KEO and Westfield under MCL § 129.207, the broader policy point for this Court to recognize is that a remote bond claimant will always know whether its written notice was first, attempted, and second, successful. Principal contractors are entitled to be “kept abreast of prospective claims on the surety.”<sup>6</sup> The PWBA imposes the obligation to serve written notice on the bond claimant, which is where the risk of insufficient service must be placed.

## **2. This Court should Reverse Because Wyandotte Did Not Serve Written Notice Under MCL § 129.207.**

KEO and Westfield are not promoting the “engraftment of an actual receipt requirement on MCL § 129.207.” To the contrary, KEO and Westfield simply request this Court to enforce the statute as written. It is not a novel premise for courts to deny bond claimant protection where written notice was not served.<sup>7</sup> For Wyandotte to

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<sup>4</sup> App 162a. Wyandotte’s reference to the Section 109 of the Michigan Construction Lien Act, MCL § 570.1101, *et seq.* is inapplicable and further demonstrates Wyandotte’s confusion and effort to overcome its failure to timely serve written notice under MCL § 129.207.

<sup>5</sup> App 113a-114a, fn1.

<sup>6</sup> Grand Blanc, p 146.

<sup>7</sup> See, e.g., *W T Andrew Co., Inc. v Mid-State Sur. Corp.*, 221 Mich App 438, 440; 562 NW2d 206 (1997); *Thomas Industries, Inc. v C&L Electric, Inc.*, 216 Mich App 603; 550 NW2d 558 (1996)

prevail, this Court would need to either ignore or overrule the well-established, straightforward, simple precedent requiring strict construction of notice requirements along with this Court's well-reasoned decision of *Pi-Con v A J Anderson Constr.*, 435 Mich 375; 458 NW2d 639 (1990). This Court should not endear that request of Wyandotte.

Neither KEO nor Wyandotte should be required to superimpose language on MCL § 129.207 to succeed. The lower courts in this case simply failed to enforce the statute as written. *Thomas Industries, Inc. v C&L Electric, Inc.*, 216 Mich App 603; 550 NW 2d 558 (1996) previously held that a bond claimant must "serve" its written notice to obtain bond act protection.

[MCL § 129.207] requires the written notice to be 'served' on the principal contractor. The use of the term 'served' implies a more formal presentation of notice, rather than the informal and haphazard notice given through the use of a packing slip. . . the notice required under condition a of § 7 serves the purpose of giving the principal contractor the earliest possible notification that the materialman has not been paid for materials and supplies and that the materialman may make either a future demand for payment or future claim against the payment bond.<sup>8</sup>

Bond act protection was denied in *Thomas Industries* because, just as in this case, "There is no evidence that the [written notice was] received or seen by, or called to the attention of, the person or persons who would have received and been responsible for receiving the notice had it been properly served under the statute."<sup>9</sup> The

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<sup>8</sup> *Thomas*, p 609-610 citing *Pi-Con*, p 386

<sup>9</sup> *Thomas*, p 610

statutory term “serve” has meaning which the trial court and Court of Appeals *ignored*, while ostensibly claiming that the statute should be enforced as written.

Wyandotte looks to *Atkins v Suburban Mobility Authority for Regional Transp*, 492 Mich 707, 710; 822 NW2d 522 (2012), a case not involving the PWBA, for the proposition that, “[s]tatutory notice requirements must be interpreted and enforced as plainly written,” which is true, but Wyandotte fails to address *Tempco Heating and Cooling, Inc. v A. Rea Const., Inc.* 178 Mich App 181, 190; 443 NW2d 486 (1989) which held that bond claimants must strictly comply with the Act’s notice requirements,<sup>10</sup> and that since the bond claimant in *Tempco* “presented no proofs that the ninety-day notice requirement was satisfied as to the principal contractor,”<sup>11</sup> recovery was properly denied. The bond claimant did not strictly or timely comply with MCL § 129.207 and protection was denied.

Wyandotte’s difficult position is amplified by its reliance on *Skyhook Lift-Slab Corp v Huron Towers, Inc.* 369 Mich 36; 118 NW2d 961 (1963), which this Court decided under the repealed Mechanic’s Lien Act. Putting aside for the moment that *Skyhook* interpreted a repealed statute, Wyandotte’s effort to compare and rely upon notice provisions arising from privately owned improvements to a public works project should be rejected by this Court. The current Michigan Construction Lien Act, MCL § 570.1101, et seq. is more liberally construed than the public works bond act given the differences in the applicable areas of law involved.<sup>12</sup>

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<sup>10</sup> *Tempo*, p 190

<sup>11</sup> *Tempco*, p 192

<sup>12</sup> *Square D Environmental Corp v Aero Mechanical, Inc.*, 119 Mich App 740, 743; 326 NW2d 629 (1982)

Wyandotte even reverts back to the trial court's misplaced reliance on *Nowell v Titan Ins Co*, 466 Mich 478; 648 NW2d 157 (2002) to find proper notice under the PWBA.<sup>13</sup> However, even if this Court were to consider *Nowell* in the determination of this action, *Nowell* should be read to support KEO and Westfield's position.

MCL § 500.3020(1)(b) allows for an insurance policy to be "canceled at any time by the insurer *by mailing* to the insured" written notice of cancellation within a specific time frame.<sup>14</sup> Thus, this Court held in *Nowell* that the insured's policy could only have been properly cancelled if the insurer *mailed* written notice "so as to arrive at the insured's address at least ten days before the date specified for cancellation of the notice to be effective."<sup>15</sup> MCL § 500.3020(1)(b) allows for cancellation by "simple first class mailing."<sup>16</sup> To the contrary, MCL § 129.207 is more stringent, and requires that written notice be "served" on the principal contractor. "The use of the term 'served' implies a more formal presentation of notice," under the bond act.<sup>17</sup> *Nowell* instructs that the legislature's choice of words is important.

The predecessor statute of MCL § 500.3020(1)(b) compelled an insurer to *give* written cancellation of a notice.<sup>18</sup> "There is a significant distinction between requiring the 'giving' of notice and requiring the 'mailing' of notice."<sup>19</sup> The same rationale applies here in favor of KEO and Westfield, because MCL § 129.207 requires the "service" of

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<sup>13</sup> Interestingly, the Court of Appeals totally ignored *Nowell* in its opinion and order, which was the primary case relied upon by the trial court to grant summary disposition in favor of Wyandotte.

<sup>14</sup> MCL § 500.3020(1)(b)(emphasis added)

<sup>15</sup> *Nowell*, p 484

<sup>16</sup> *Nowell*, p 482

<sup>17</sup> *Thomas*, p 609-610 citing *Pi-Con*, p 386

<sup>18</sup> *Nowell*, p 486

<sup>19</sup> *id.*

notice, not simply "mailing" the notice. *Nowell's* rationale supports KEO and Westfield's reliance of the term "serve" in Section 7 and this Court's reversal of the Court of Appeals and trial court.

Likewise, *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007) also supports reversal. *Rowland* overruled *Hobbs v Dep't of State Hwys*, 398 Mich 90; 247 NW2d 754 (1976) and *Brown v Manistee Co Rd Comm*, 452 Mich 354; 550 NW2d 215 (1996) for the similar reasons why this Court should reverse in this case. *Hobbs* and *Brown* essentially negated statutory notice requirements, because those cases held that service of written notice under MCL § 691.1404 was *not required* unless the beneficiary of the written notice could demonstrate actual prejudice arising from the lack of service.

Just like Wyandotte in this case, the plaintiff in *Rowland* could not prove, and conceded, that it failed to serve timely written notice under MCL § 691.1404.<sup>20</sup> In *Rowland*, this Court reviewed the line of cases developed over the years arising under statutory exceptions to governmental immunity for defective highway cases and identified an "abrupt departure" in 1970 from prior holdings.<sup>21</sup> From there, case law developed as an extension of the "abrupt departure" including but not limited to the incorrectly decided matters of *Hobbs* and *Brown*. This Court held that both *Hobbs* and *Brown* were wrongly decided because they were premised on incorrect constitutional theory and "engrafting [a] prejudice requirement onto the statute was entirely

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<sup>20</sup> *Rowland*, p 204

<sup>21</sup> *Rowland*, p 206

indefensible."<sup>22</sup> The case presently before the Court is far different from the considerations present in *Rowland* where this Court overruled *Hobbs* and *Brown*. Indeed, this Court's rationale in *Rowland* actually supports the affirmation of *Pi-Con*, and reversal of the Court of Appeals and trial court.

*Pi-Con* does not represent anything close to an "abrupt departure" of prior holdings under the PWBA. In setting forth the four (4) substantive elements of compliance of MCL § 129.207, the *Pi-Con* court recognized that elements (2) – (4) were already established in prior Michigan case law.<sup>23</sup> To establish element one (1), where a bond claimant must prove actual receipt of written notice by the principal, this Court properly looked to *Fleisher Engineering & Construction Co. v United States ex rel. Hallenbeck*, 311 U.S. 15; 61 S.Ct. 81; 85 L.Ed. 12 (1940).<sup>24</sup> The purpose of the notice provision is to assure the principal *receive receipt of the notice*.<sup>25</sup> The legislature said that bond claimants must "serve" written notice, and *Pi-Con* merely established that a bond claimant must prove "actual receipt" by the principal contractor by a preponderance of the evidence.

*Pi-Con* must apply to the determination of this action. It has guided public works participants, contractors, sureties and their counsel since 1990 to instruct that service and receipt of written notice is of paramount importance when determining bond act compliance. KEO and Westfield's reliance on *Pi-Con* is fundamental; not "grossly

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<sup>22</sup> *Rowland*, p 211

<sup>23</sup> *Pi-Con*, pp 382-384 (citations omitted)

<sup>24</sup> "*Fleisher* construed the Miller Act, 40 U.S.C. 270b(a), the federal public works bond on which Michigan's statute is modeled. The notice requirements of the Miller Act are nearly identical with those of the statute at issue here, except the federal statute requires notice to the general contractor of a public works project only once, within ninety days from the date on which the subcontractor completes its work." *Pi-Con*, p 381

<sup>25</sup> *Pi-Con*, p 383

misplaced.”<sup>26</sup> Written notice is to advise the *principal contractor* of potential claims against its bond, such as that of Wyandotte. Section 7’s notice requirement is not a “sword”<sup>27</sup> of principals and sureties, it is a shield.

Should this Court find *Pi-Con* inapplicable to this case, the “abrupt departure” of bond act cases will then have occurred, especially in comparison to the careful treatment of statutory language exhibited in *Nowell* and *Rowland*. This Court should reverse and hold that Wyandotte’s failure to serve and prove receipt of notice under Section 7 on the principal contractor was fatal to its bond act claim.

**3. KEO Did Not Contract with Wyandotte and Neither KEO nor Westfield Should Be Held Liable for Contractual Attorney Fees or Time Price Differential to which KEO Never Agreed to Pay.**

Sums justly due a non-privity bond claimant should not include attorney fees and time price differential charges where the principal contractor never agreed to pay those charges itself. Public works principal contractors freely contract with subcontractors and suppliers and choose to bear risk according to their terms. They neither bargain for nor assume risk of their subcontractor’s payment terms with others.

KEO’s written subcontract with ETS in 2010 held favorable payment terms for KEO, nothing like the onerous credit application between ETS and Wyandotte in 2003. Yes, Michigan follows the “American Rule” and Wyandotte can clearly enforce its attorney fee provision against ETS pursuant to their contract, but the issue is whether the credit application between Wyandotte and ETS is enforceable against KEO and Westfield, merely because KEO and Westfield complied with public bond act regulation

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<sup>26</sup> Appellee Brief, p 19

<sup>27</sup> Appellee Brief, p 20

in providing the statutory payment bond. That cannot be so, especially where the PWBA does not expressly provide for the recovery of attorney fees.

Wyandotte fails to address why KEO should pay Wyandotte's 1.5% per month finance charge for unpaid goods despite their lack of privity. Wyandotte argues that "contractors would have no incentive to timely pay suppliers" if time price differential were not part of the price of the goods,<sup>28</sup> but that is not the issue. ETS did agree to Wyandotte's time price differential as part of *their* price, and even despite that provision, ETS still failed to pay Wyandotte with monies received from KEO. This Court should not penalize KEO and Westfield to pay time price differential (\$76,403.44 in the money judgment) of Wyandotte because ETS breached its contract.

This Court should not endorse the "purely hypothetical plane" of *Price Bros Co v C J Rogers Constr Co*, 104 Mich App 369, 379; 304 NW2d 584 (1981) for the broad proposition that sureties are automatically liable for time price differential payments under the bond act, even where its principal never agreed to pay those charges.<sup>29</sup> *Price Bros.* should have been resolved on the simple premise that since the principal agreed to pay the time price differential price, the surety was properly held liable for those same charges.

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<sup>28</sup> Appellee Brief, p 28

<sup>29</sup> Wyandotte's apparent reliance on how the Lien Act permits recovery of time price differential in validly recorded construction liens should be dismissed by the Court. A construction lien grants a security interest against privately held real estate that requires judicial foreclosure. This case involves construction of the PWBA and common law contract and surety analysis. And, the Lien Act specifically contemplates for the recovery of time price differential in MCL 570.1107(1) whereas the PWBA is silent.

**4. MCL 600.6013(7) Does Not Apply to the Money Judgment Because A Written Instrument with a Specified Rate Evidencing Indebtedness Does Not Exist in this Case.**

Wyandotte's argument that MCL 600.6013(7) applies to its money judgment fails, because it rests on an incomplete reading of the statute. While Wyandotte argues that "written instruments" with "specified rates" exist in this case, Wyandotte makes no effort to identify which "written instrument" should be read to "evidence indebtedness," because none exist. The credit application, quotation and purchase order between Wyandotte and ETS evidenced a sale of goods transaction for electrical materials. Their agreement was not a loan or other transaction to memorialize or "evidence" debt. Likewise, the payment bond supplied by Westfield does not evidence debt. It is a statutory surety bond upon which judgment was (wrongfully) entered. This Court should reverse because MCL § 600.6013(7) does not apply.

**RELIEF REQUESTED**

Defendants – Appellants KEO & Associates, Inc. and Westfield Insurance Company respectfully request this Court to grant the relief requested in Appellants' Brief on Appeal.

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Dated: May 26, 2015