

STATE OF MICHIGAN  
IN THE SUPREME COURT

RONNISCH CONSTRUCTION GROUP, INC.,

Plaintiff-Appellant, *et al*

v

LOFTS ON THE NINE, L.L.C.,

Defendant-Appellee *et al*

and

LOFTS ON THE NINE CONDOMINIUM  
ASSOCIATION, HOTLINE ELECTRIC, INC.,  
RAM CONSTRUCTION SERVICES OF  
MICHIGAN, INC., EAM ENGINEERS, INC.,  
MICHIGAN AIR PRODUCTS CO., STOCK  
BUILDING SUPPLY, L.L.C., WILLIAMS  
DISTRIBUTING CO., NORTH STAR  
PARTNERS, L.L.C., and THE STATE BANK,

Defendants.

FOR PUBLICATION

July 24, 2014

9:00 a.m.

No. 314195

Oakland Circuit Court

LC No. 09-105768-CH

*10-108657-CH*  
*S. Kumar*

*OK*

**APPELLANT LOFTS ON THE NINE, LLC'S APPLICATION  
FOR LEAVE TO APPEAL**

*150029*

*APL*

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*847346*

**FILED**

SEP - 4 2014

LARRY S. ROYSTER  
CLERK  
MICHIGAN SUPREME COURT

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**STATEMENT IDENTIFYING THE JUDGMENT OR ORDER APPEALED FROM,  
INDICATING THE RELIEF SOUGHT AND IDENTIFYING  
THE GROUNDS FOR APPEAL**

Appellant, Lofts on the Nine, LLC (“LON”), appeals the Court of Appeals’ Opinion, dated July 24, 2014, in which the Court of Appeals vacated the portion of the trial court’s Opinion and Order, dated April 24, 2012, denying Appellee, Ronnisch Construction Group, Inc.’s (“RCG”), request for attorneys’ fees under the Construction Lien Act (the “CLA”), MCL 570.1101 *et seq.* and remanding the case for further proceedings. This Court should reverse the judgment of the Court of Appeals and reinstate the trial court’s Opinion and Order in full.

The Court should grant leave to appeal the Court of Appeals’ Opinion because the: (1) issues in the published case involve legal principles of major significance to property owners and contractors in the state of Michigan; (2) Court of Appeals’ Opinion finding RCG as the “prevailing party” under the CLA is clearly erroneous and will cause material injustice; and (3) Court of Appeals’ Opinion directly conflicts with this Court’s decision in *HA Smith Lumber & Hardware Co v Decina*, 480 Mich 987 (2007). See MCR 7.302(B)(3) and (5).

This published case involves at least two (2) legal principles of major significance to Michigan’s jurisprudence:

- First, it concerns an erroneous interpretation of the CLA. Based on the Court of Appeals’ interpretation of the CLA, the only way for a property owner to avoid potential liability for attorneys’ fees under the CLA’s “prevailing party” provision is for the owner to pay the **full amount** demanded by a lien claimant, no matter how unwarranted, **prior** to adjudicating the propriety of the amount owed under the contract and the validity and priority of the alleged lien. The property owner is

then forced to pursue the lien claimant, in a separate lawsuit, for any amounts deemed overpaid.

- Second, the Court of Appeals' Opinion adversely affects Michigan's public policy favoring arbitrations by encouraging parties to disregard agreements to arbitrate all claims in favor of filing breach of contract claims coupled with lien foreclosure claims in the circuit court. As occurred here, the Court of Appeals' Opinion rewards parties that breach their arbitration agreements and initiate unnecessary and costly circuit court claims to take advantage of the attorneys' fees provision of the CLA. According to the Court of Appeals, merely filing a lien foreclosure action together with a breach of contract claim in the circuit court adds an attorney fee shifting provision to every construction contract, even if the contract previously contained no such bargain. This is true even if the party filing the breach of contract and lien foreclosure claims in the circuit court does so in breach of the arbitration agreement. This Court should not allow parties to misuse the CLA as a means to circumvent their agreements to arbitrate and with respect to litigants bearing their own fees and costs.

The Court of Appeals' Opinion is clearly erroneous and will result in material injustice because the Court of Appeals divested the trial court of its exclusive power to find facts when it improperly engaged in fact finding to deem RCG the "prevailing party" under MCL 570.1118(2). At a minimum, the Court of Appeals should have ordered the trial court, on remand, to determine whether, under the particular facts of this case, RCG "prevailed."

Significantly, the Court of Appeals Opinion also directly conflicts with this Court's unequivocal decision in *Decina, supra*, that:

**[t]o be awarded attorney fees (*sic*) as a ‘prevailing party’ under MCL 570.1118(2), the party must prevail on the lien foreclosure action . . . The language of MCL 570.1118(2) does not permit recovery of attorney fees (*sic*) on the contract action merely because it was brought together with the lien foreclosure action.**

*Decina, supra*, at 988. The trial court followed *Decina* and correctly denied RCG’s motion for attorneys’ fees, finding that RCG could not have prevailed on its lien foreclosure action because the Award had been satisfied and neither it nor the Arbitrator adjudicated RCG’s lien foreclosure claim. In contravention of the principles set forth by this Court in *Decina*, the Court of Appeals reversed the trial Court’s Opinion and Order, finding that a party need only obtain a net award in its favor on the breach of contract action to be deemed a “prevailing party” on the lien foreclosure action, regardless of whether the trial court or Arbitrator ever adjudicated the lien foreclosure claim.

**STATEMENT OF THE BASIS OF JURISDICTION**

This Court has jurisdiction to consider RCG's Application pursuant to MCR 7.301(A)(2). The Court of Appeals issued its Opinion on July 24, 2014. RCG timely filed this Application within forty two (42) days of the date of the Opinion. *See* MCR 7.302(C)(2).

## STATEMENT OF QUESTIONS INVOLVED

I. Whether the Court of Appeals committed clear error when it disregarded the clear and unambiguous language of MCL 570.1118(2) that requires the Circuit Court to examine claims and defenses in an action to “enforce a construction lien through foreclosure” as a condition precedent to allowing a lien claimant to seek recovery of attorneys’ fees?

RCG answers “NO”  
LON answers “YES”

II. Whether the Court of Appeals committed clear error when it improperly engaged in fact finding and deemed RCG the “prevailing party” when the amount due stated in its lien is overstated by more than \$345,000.00?

RCG answers “NO”  
LON answers “YES”

III. Whether the Court of Appeals failed to follow this Court’s binding precedent in *HA Smith Lumber & Hardware Co v Decina*, 480 Mich 987 (2007) by finding RCG a “prevailing party” under the Lien Act just because it obtained a net award in its favor on its breach of contract claim and filed a lien foreclosure count with its breach of contract action?

RCG answers “NO”  
LON answers “YES”

IV. Whether the Court of Appeals’ opinion disregards the arbitration provisions of the parties’ AIA contract and undermines Michigan’s policy favoring the arbitration of disputes and swift payment of awards?

RCG answers “NO”  
LON answers “YES”

## STATEMENT OF STANDARD OF REVIEW

This Court's standard of review for this Application is governed by MCR 7.302(B)(3) and (5). The issues presented in this Application are reviewed by the lower courts under two (2) standards.

A trial court's decision to award attorneys' fees will be upheld absent an abuse of discretion. Specifically:

[t]he awarding of attorney (*sic*) fees is within the discretion of the trial judge, and it will be upheld absent an abuse of discretion.

*Superior Products Co v Merucci Bros, Inc*, 107 Mich App 153, 159 (1981).

It is well-settled that:

[a]n abuse of discretion occurs when a trial court chooses a result that falls outside the range of reasonable and principled outcomes.

*Isidore Steiner v Bonanni*, 292 Mich App 265, 269 (2011).

Statutory interpretation is a question of law that is reviewed *de novo*. See *GC Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 419 (2003).

## INTRODUCTION

This case concerns a straightforward breach of contract action in which the AIA contract at issue does not contain any type of attorney fee shifting provision. LON reasonably disputed paying the outstanding **10% balance** of a \$6 million contract due to RCG's numerous contractual breaches, including its defective and tardy construction of the building and attempt to overcharge LON for certain General Conditions. The parties arbitrated their dispute as mandated by the AIA contract.<sup>1</sup> There, the Arbitrator affirmed the reasonableness of LON's challenge to RCG's demand for final payment when he awarded RCG **56%** of the approximately \$800,000 it sought (exclusive of attorneys' fees, arbitration expenses and expert fees, which are the subject of this appeal) (**Exhibit 1**).<sup>2</sup> Critically, the Arbitrator denied RCG's claim for approximately \$173,000 in contract interest in its entirety and the Arbitrator did not adjudicate RCG's lien foreclosure claim.

Once the Arbitrator issued the Award, LON promptly paid it in full (including all applicable statutory interest) before RCG filed its motion with the trial court to confirm the Award and to request attorneys' fees as a prevailing lien claimant under MCL 570.1118(2) ("RCG's Motion"). Because LON expeditiously paid the Award and extinguished its debt, RCG never adjudicated its lien foreclosure claim in the circuit court.

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<sup>1</sup> As discussed, *infra*, prior to honoring its contractual commitment to arbitrate, RCG breached the AIA contract by filing a lawsuit in the Oakland County Circuit Court purporting to state claims for Breach of Contract, Foreclosure of Construction Lien and Unjust Enrichment. In response to LON's motion to compel arbitration, RCG ultimately stipulated to stay the litigation and proceed with AAA arbitration. It is this improperly filed lawsuit (in particular, the unadjudicated claim for lien foreclosure) upon which the Court of Appeals erroneously predicates its Opinion.

<sup>2</sup> The Award is also **56% of RCG's Claim of Lien** because the amount of RCG's Claim of Lien includes **not only** the \$626,163.73 specifically identified on its face, but also "interest on late payments pursuant to the contract." (**Exhibit 2**). Therefore, RCG's Claim of Lien is overstated by more than \$345,000.

In its April 24, 2012 Opinion and Order denying RCG's Motion, the trial court found that: (1) neither it nor the Arbitrator adjudicated RCG's lien foreclosure claim and (2) LON satisfied the Award. Consequently, the trial court correctly applied the clear and unambiguous language of MCL 570.1118(2), which only allows a court to consider awarding attorneys' fees to a "prevailing party" lien claimant in a lien foreclosure action, when it ruled that it lacked discretion to award RCG any attorneys' fees under the CLA. Said another way, because RCG did not "prevail" on its lien foreclosure claim, the trial court had no discretion to award RCG attorneys' fees.

The trial court also properly determined that under this Court's decision in *HA Smith Lumber & Hardware Co v Decina*, 480 Mich 987 (2007) the fact that RCG merely filed a lien foreclosure claim in tandem with its breach of contract claim is not sufficient to overcome the reality that RCG is not a "prevailing party" lien claimant (*i.e.* a party is not entitled to an award of attorneys' fees simply because it filed both a breach of contract and lien foreclosure suit). RCG subsequently appealed the Trial Court's Opinion and Order.

In an Opinion dated July 24, 2014, the Court of Appeals erroneously vacated that portion of the trial court's Opinion and Order denying RCG's request for attorneys' fees and remanded the case for further proceedings consistent with the Opinion. To arrive at its decision, the Court of Appeals: 1) failed to adhere to the clear and unambiguous language of MCL 570.1118(2); (2) improperly engaged in fact finding; (3) refused to follow the binding precedent of this Court as articulated in *Decina, supra*; and (4) disregarded the parties' agreement to arbitrate all disputes.

## STATEMENT OF FACTS

### A. **RCG's Defective and Incomplete Construction of the Building.**

LON and RCG entered into a contract for RCG to competently and timely construct a high-end condominium building. RCG's price to construct the building came to \$6,071,645.20. During the course of construction, it is undisputed that LON paid RCG \$5,445,481.47 or 90% of the contract price. In other words, this action arises out of a dispute over the **remaining 10% balance** of the construction contract.

RCG breached the contract by, among other things: (1) defectively constructing the building (e.g. shoddy masonry work); (2) dishonestly charging LON for certain General Conditions; and (3) failing to complete the Project on-time or at all (resulting in LON incurring unnecessary financing charges). As a result, LON justifiably disputed payment of the remaining \$626,163.73 RCG claimed under the contract.

### B. **The 2009 Lawsuit.**

RCG recorded its Claim of Lien, on June 2, 2009, to memorialize LON's purported debt under the parties' AIA contract. The Claim of Lien states the following with respect to the debt alleged by RCG:

[RCG's] contract amount, including extras, is \$6,071,645.20. [RCG] has received payment thereon in the total amount of \$5,445,481.73, and therefore claims a construction lien upon the above described real property **in the amount of \$626,163.73. This amount is also subject to interest on late payments pursuant to the contract.**

**(Exhibit 2).**

On or about November 25, 2009, rather than filing the AAA arbitration demand required by the AIA Contract, RCG filed a Complaint in the Oakland County Circuit Court (the "2009 Case"), a full six (6) months after RCG maintains it completed work on the building. **(Exhibit**

3). RCG's Complaint in the 2009 Case sets forth three (3) counts, Count I (Breach of Contract), Count II (Foreclosure of Lien) and Count III (Unjust Enrichment/Quantum Meruit). (*Id.*)<sup>3</sup>

In its Complaint, RCG conceded that the trial court (not the Arbitrator) would only adjudicate Count II (Foreclosure of Lien): (1) following arbitration and (2) if and only if LON failed to pay the amount of a net arbitration award in RCG's favor. Specifically, the "Wherefore" clause of Count II (Foreclosure of Lien) states:

WHEREFORE, [RCG] prays that this Honorable Court:

A. Enter a judgment in favor of RCG and against [LON] in at least the amount of \$626,163.73, together with interest, costs and attorney (*sic*) fees and any other relief that the Court deems appropriate; or

B. In the alternative, after Defendants file their respective answers, enter an Order staying this matter so that claims may be heard in (*sic*) American Arbitration Association after which the award of the arbitrator(s) may be Confirmed (*sic*) by the Court in accordance with MCR 3.602(I); and

C. **After either of the foregoing**, [RCG] requests that:

1) This Court determine the rights and respective priorities of each lien claimant . . .

2) RCG be adjudged to have a valid lien upon the Property . . . for \$626,163.73 . . .

3) **Upon default of the payment of said amount**, this Honorable Court order the Property . . . sold in accordance with the statute . . .

(*Id.*) Simply put, despite its current position, RCG knew when it filed its Complaint that its lien foreclosure claim could only be adjudicated by the trial court following arbitration and only in the event LON failed to satisfy a net arbitration award entered against it.

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<sup>3</sup> RCG not only seeks to recover its attorneys' fees in the 2009 Case, which was the subject of the arbitration, but also its attorneys' fees in another case involving the architect and engineer for the Project (the "2010 Case"), which does not directly concern the claims arbitrated between LON and RCG.

LON filed a motion with the circuit court to stay the circuit court litigation and to compel arbitration. Subsequently, RCG entered into a stipulated order staying the circuit court litigation pending the outcome of arbitration between RCG and LON.<sup>4</sup>

**C. The Arbitration and the Award.**

Following a multi-day arbitration in which both sides were provided ample leeway to introduce evidence and testimony, the parties submitted their final claim summaries to the Arbitrator for consideration. RCG asked the Arbitrator to award it approximately \$800,000 in contract damages (including more than \$173,000 in contract interest), plus attorneys' fees, expert fees and AAA expenses. **(Exhibit 4)**.

On January 26, 2012, the Arbitrator issued a net Award of \$450,820.36, plus statutory and post-award interest, to RCG. **(Exhibit 1)**.<sup>5</sup> By only awarding RCG approximately 56% of its total contract claim and Claim of Lien, the Arbitrator validated the reasonableness of LON's payment dispute. **(Id.); (Exhibit 2)**. Notably, the Arbitrator characterized the overwhelming majority of the net amount of the Award as “[d]irect damages for work performed under the **Construction Contract.**” **(Exhibit 1)**. Moreover, the Arbitrator denied RCG's claim for more than \$173,000.00 in contract interest in its entirety. **(Id.)**. Nowhere in the Award does the Arbitrator make any findings with respect to the validity or priority of RCG's purported lien.

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<sup>4</sup> Because the contract contains a valid and enforceable arbitration clause, LON and RCG agreed to arbitrate their dispute before a single private arbitrator pursuant to the applicable rules of the American Arbitration Association.

<sup>5</sup> LON disputes the appropriateness of the methodology the Arbitrator used to calculate pre and post-judgment interest. The Arbitrator's procedure for calculating such interest, which appears on the face of the Award, results in a situation in which interest is improperly calculated upon interest. LON, however, determined that it was more cost-effective to bring this matter to a close by immediately paying the Award, rather than filing a motion, pursuant to MCR 3.602(K), to modify or correct the Award.

To calculate the net amount of the Award, the Arbitrator first awarded RCG \$636,058.72, primarily on its breach of contract claim, and then deducted from that amount an award in LON's favor, in the amount of \$185,238.36, for, among other things: (1) RCG's defective construction of the building (*e.g.* an award for Masonry Repair); (2) failure to complete the building on-time or at all (awards for Delay Interest and Punchlist [I]tems [R]emaining [I]ncomplete); and (3) RCG's questionable billing practices (an award for Adjustments to General Conditions). (*Id.*).

Importantly, the Award also contains the following provisions governing the sharing of arbitration fees and the finality of the Award:

The administrative fees of the American Arbitration Association totaling \$16,000.00 and the compensation of the arbitrator totaling \$34,350.00 shall be borne equally . . . .

Other than as stated above, this Award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby denied.

(*Id.*).<sup>6</sup>

**D. LON'S Payment of the Award In Full and RCG's Desperate Attempt to Preserve its Now Invalid Claim of Lien.**

On February 17, 2012, RCG paid the Award in full (including pre and post-judgment interest) by wiring \$485,319.76 to the client trust account of RCG's counsel. (**Exhibit 5**). LON paid the Award in-full to satisfy the Award, preclude entry of a judgment against LON and to discharge RCG's Claim of Lien and *Lis Pendens*. Consistent with the language of the Award, LON paid the Award "in full settlement of all claims and counterclaims submitted to this Arbitration." (**Exhibit 1**).

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<sup>6</sup> The portion of the Award "stated above" refers to RCG's claim for attorneys' fees.

Realizing that payment of the Award would render its lien foreclosure claim moot and invalidate its Claim of Lien, RCG's counsel asked LON to enter into a stipulated order agreeing that payment of the Award would not terminate RCG's Claim of Lien or result in the dismissal of its lien foreclosure claim. **(Exhibit 6)**. LON's counsel refused to sign the proposed stipulated order. RCG never attempted to return LON's payment.

**E. The Trial Court Denies RCG's Motion for Attorneys' Fees.**

On February 21, 2012, RCG filed its Motion. Despite its misleading title, RCG's Motion was, in reality, a poorly camouflaged motion for partial summary disposition on Count II (Foreclosure of Lien) of RCG's Complaint. **(Exhibit 3)**. RCG, likely, filed its Motion as a generic seven (7) day motion on the trial court's general motion call docket to avoid the inconvenient reality that it did not have a valid construction lien to foreclose because LON promptly and unconditionally satisfied the Award such that there was no outstanding amount for a construction lien to secure.

LON filed its Response to RCG's Motion on February 27, 2012. On February 29, 2012, the trial court heard oral argument on RCG's Motion.

The trial court denied RCG's Motion, in its entirety, when it issued its Opinion and Order. **(Exhibit 7)**. Significantly, the trial court made the following findings and determinations in its Opinion and Order:

RCG's lien foreclosure claim was not adjudicated by this Court or the Arbitrator in the AAA Case. Instead, the Arbitrator ruled solely upon RCG's contract claim. In addition, [LON] paid the monies it owed to RCG under the [Award] within weeks of the Award being issued.

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In the instant case RCG's lien was satisfied (without being adjudicated by the AAA or this Court) when RCG accepted [LON's] payment of the monies due under the [Award].

\*\*\*

As [LON] paid RCG the amount [LON] owed pursuant to the Arbitration Award on February 16, 2012 and RCG's lien foreclosure claim was not adjudicated by this Court or the Arbitrator in the AAA case, RCG cannot be deemed to be a prevailing lien claimant in this matter. Therefore, the Court does not have the discretion to award RCG its attorney (*sic*) fees and costs under the Michigan Construction Lien Act.

(*Id.*, pp. 7, 9 and 11). The trial court also found that the Award "was approximately 56% of RCG's original contract claim" and:

that "[t]he Arbitrator characterized the Award as '[d]irect damages for work performed under the Construction Contract.' In addition, the Arbitrator denied RCG's claim for contract interest.

(*Id.*, p.4).

RCG appealed the trial Court's Opinion and Order.

**F. The Court of Appeals' Opinion.**

On July 24, 2014, the Court of Appeals issued its Opinion vacating the portion of the trial court's Opinion and Order dealing with attorneys' fees and remanding for further proceedings consistent with the Opinion. (**Exhibit 8**). In short, the Court of Appeals erroneously determined that a party substantially prevailing **solely on its breach of contract claim** may automatically seek attorneys' fees under MCL 570.1118(2), so long as it filed a concomitant lien foreclosure claim even if: (1) the parties agreed to arbitrate all disputes such that the filing of the circuit court contract action breached the parties' arbitration agreement; (2) the Award secured by the lien were promptly paid in full without the need for enforcement; and (3) neither the Arbitrator nor Circuit Court adjudicated the lien foreclosure claim. (*Id.*).

To reach its flawed decision, the Court of Appeals: (1) failed to adhere to the clear and unambiguous language of MCL 570.1118(2); (2) improperly engaged in fact finding; (3) refused

to follow the binding precedent of this Court as articulated in *Decina, supra*; and (4) disregarded the parties' agreement to arbitrate all disputes.

LON now seeks leave to appeal the Court of Appeals' Opinion.

### ARGUMENTS

**I. The Court of Appeals Committed Clear Error When it Disregarded the Clear and Unambiguous Language of MCL 570.1118(2) That Requires the Circuit Court to Examine Claims and Defenses in an Action to "Enforce a Construction Lien Through Foreclosure" as a Condition Precedent to Allowing a Lien Claimant to Seek Recovery of Attorneys' Fees.**

The Court of Appeals committed reversible error when it disregarded the clear and unambiguous language of MCL 570.1118(2) to deem RCG a prevailing party lien claimant.

Pursuant to MCL 570.1118(2):

[i]n an action to **enforce a construction lien through foreclosure**, the court shall examine each claim and defense that is presented and determine the amount, if any, due to each lien claimant . . . The court may allow reasonable attorneys' fees to a lien claimant who is the **prevailing party**.

MCL 570.1118(2). Thus, under the plain language of the statute, **before** a trial court may even weigh whether an award of reasonable attorneys' fees is within its discretion, the trial court must first: (1) find that there is an action to enforce a construction lien through foreclosure; (2) examine claims, defenses and amounts due; **and** (3) determine whether a lien claimant is the "prevailing party." *See GC Timmis & Co, supra*, at 420. Absent these threshold findings, there is no basis for the trial court to exercise any discretion whatsoever with respect to an award of attorneys' fees. The Court of Appeals erred when it ignored these conditions and incorrectly interpreted MCL 570.1118(2) as though it reads "in any case in which a claim for foreclosure of a construction lien is asserted . . ."

It is undisputed that the trial court never engaged in any such analysis required by the Act. The Court did not examine each claim or defense or determine an amount due RCG or the priority or validity of the other nine (9) lien claimants/mortgage holders that were parties to the 2009 Case or the 2010 Case. Absent an analysis of the competing lien claims or amount due RCG, there was no action on the enforcement of RCG's lien "through foreclosure."

Here, the parties arbitrated their dispute and LON promptly paid the Award. RCG received full payment on the Award without having to take any lien enforcement action. Accordingly, there was no debt to secure, lien to foreclose, judgment to enter or Award to confirm when RCG made its Motion. *See* MCL 570.1118(2).<sup>7</sup> In Michigan, "[a] construction lien . . . is not a substitute for a debt but is only a security interest given to facilitate satisfaction of the debt." *Old Kent Bank of Kalamazoo v Whitaker Constr Co*, 222 Mich App 436, 439 (1997). Once the underlying debt is extinguished, so too is the security interest. *See Fox v Mitchell*, 302 Mich 201, 212 (1942).

The trial court accurately found that it **did not** adjudicate RCG's lien foreclosure claim because LON promptly paid the Award (*i.e.* the debt) in full prior to the filing of RCG's Motion. In addition, the trial court properly found that the Arbitrator **never** ruled on RCG's lien foreclosure claim at any time. Specifically, the trial court made the following findings:

**RCG's lien foreclosure claim was not adjudicated by this Court or the Arbitrator in the AAA Case . . . In addition, [LON]**

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<sup>7</sup> Pursuant to MCR 3.602(I) and (J), a party may seek confirmation of an arbitration award and entry of a judgment by the trial court based upon the confirmed award. *See* MCR 3.602(I) and (J). However, a party, such as RCG, should not be allowed to move a circuit court for confirmation of an arbitration award and entry of a judgment on the award if the arbitration award is paid prior to the request for confirmation. *See Martin v Auto Club Ins Ass'n*, 204 Mich App 138, 139 (1994).

paid the monies it owed to RCG under the [Award] within weeks of the Award being issued

\*\*\*

In the instant case **RCG's lien was satisfied (without being adjudicated by the AAA or this Court)** when RCG accepted [LON's] payment of the monies due under the [Award]

\*\*\*

As [LON] paid RCG the amount [LON] owed pursuant to the Arbitration Award on February 16, 2012 and **RCG's lien foreclosure claim was not adjudicated by this Court or the Arbitrator in the AAA case, RCG cannot be deemed to be a prevailing lien claimant in this matter.**

(Exhibit 7, pp. 7, 9 and 11). Importantly, the Arbitrator expressly issued the Award “in full settlement of all claims and counterclaims submitted to this Arbitration.” (Exhibit 1).

Once the trial court correctly concluded that neither it nor the Arbitrator adjudicated RCG's lien foreclosure claim and that the Award had been fully paid without the need for enforcement of the lien, such that RCG was not a “prevailing party” lien claimant, it could only make one correct determination in accordance with the clear and unambiguous language of MCL 570.1118(2) – that “the Court does not have the discretion to award RCG its attorney (*sic*) fees and costs under the Michigan Construction Lien Act.” (Exhibit 7, p. 11). Any decision to the contrary would have rendered meaningless the explicit language of MCL 570.1118(2), which requires a party that recovers attorneys' fees to have been a “prevailing party” lien claimant in an adjudicated lien foreclosure action. *See* MCL 570.1118(2).<sup>8</sup>

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<sup>8</sup> “When construing a statute, the Court's primary obligation is to ascertain the legislative intent that may be reasonably inferred from the words expressed in the statute. If the language of the statute is unambiguous, the Legislature is presumed to have intended the meaning expressed.” *GC Timmis & Co, supra*, at 420. Nothing is more clear and unambiguous than the first sentence of MCL 570.1118(2), which states “[i]n an action to enforce a construction lien through foreclosure . . .”

Simply put, the Court of Appeals failed to adhere to the clear and unambiguous language of MCL 570.1118(2) and, essentially, conflated RCG's breach of contract and lien foreclosure claims and re-wrote the statute to arrive at the erroneous determination that substantially prevailing on the breach of contract claim **by itself** is sufficient to trigger potential liability under MCL 570.1118(2). It is axiomatic that the Court of Appeals cannot rewrite MCL 570.1118(2) under the guise of interpretation.

**II. The Court of Appeals Committed Clear Error When it Improperly Engaged in Fact Finding and Deemed RCG the "Prevailing Party" When the Amount Due Stated in its Lien is Overstated by More Than \$345,000.00.**

The Court of Appeals also committed reversible error when it engaged in impermissible fact finding to deem RCG the "prevailing party" by concluding that:

contrary to the circuit court's view, [RCG] substantially prevailing on the **amounts** it sought under the claim of lien made it a prevailing party under the Construction Lien Act, and the circuit court had the discretion under MCL 570.1118(2) to award attorney (*sic*) fees.

**(Exhibit 8, at p. 5).**

Specifically, it improperly compared only the dollar amount stated on the face of RCG's claim of lien (\$626,163.73) to the amount of the net Award (\$450,820.36) to find RCG substantially prevailed on its lien foreclosure claim because the net amount of the Award constituted 72% of its claim of lien. **(Exhibit 8, at p. 3, fn 3 and p. 6).** However, RCG actually sought a contract balance/lien amount of nearly \$800,000 (\$626,163.73, plus more than \$173,000 in contract interest). Consequently, the amount of the net Award is only **56%**, not 72% of the total amount RCG claimed due in its claim of lien.<sup>9</sup>

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<sup>9</sup> RCG's lien is overstated by more than \$345,000. In Michigan, a court may deem an overstated lien void and unenforceable. *See Sacchetti v Recreation Co*, 304 Mich 185 (1943).

Not only did the Court of Appeals error in its factual comparison (*i.e.* RCG received an award of **56%** of the amount claimed due, **not** 72%, as discussed above), but also by engaging in factual finding in the first place. Factual finding is the exclusive province of the trial court. At a minimum, the Court of Appeals should have remanded the case to the trial court to determine whether a net award in favor of RCG of **56%** of its claim of lien entitles RCG to the designation of a prevailing party lien claimant. *See Vugterveen Sys, Inc v Olde Millpond Corp*, 454 Mich 119, 133-134 (1997). Moreover, nothing in the express language of MCL 570.1118(2) provides that a lien claimant achieves “prevailing party” status by obtaining a net award in its favor equal to a given percentage (72% or 56%) of its lien claim.

Importantly, despite the Court of Appeals’ declaration to the contrary, the instant action is not factually analogous to *Bosch v Altman Constr Corp*, 100 Mich App 289 (1980), the case upon which the Court of Appeals’ Opinion primarily relies. (**Exhibit 8, at pp. 4-5**). In its detailed recitation of the facts of *Bosch*, the Court of Appeals failed to recognize that the circuit court “granted formal judgment” for Bosch on its lien foreclosure claim (*i.e.* the circuit court adjudicated Bosch’s lien foreclosure claim). *See Bosch, supra*, at 294. That, of course, is not what occurred in this case.

Likewise, the instant action is not analogous to *Solution Source, Inc v LPR Assoc Ltd Partnership*, 252 Mich App 368 (2002), upon which the Court of Appeals also relies. In *Solution Source*, the defendants did not satisfy a default judgment for four (4) years after judgment was entered. *See Solution Source, supra*, at 381. Here, LON paid the Award within days and without RCG taking any action to enforce the Award.

**III. The Court of Appeals Failed to Follow this Court's Binding Precedent in *HA Smith Lumber & Hardware Co v Decina*, 480 Mich 987 (2007) by finding RCG a "Prevailing Party" under the Lien Act Just Because it Obtained a Net Award in its Favor on its Breach of Contract Claim and Filed a Lien Foreclosure Count with its Breach of Contract Action.**

Recognizing the distinctive nature of a breach of contract claim and a lien foreclosure action, the trial court followed this Court's decision in *Decina* and correctly concluded that RCG is not entitled to seek recovery of its attorneys' fees under MCL 570.1118(2) as a "prevailing party" lien claimant when: (1) LON satisfied the Award without the need for RCG to enforce its construction lien and (2) neither the Arbitrator nor the trial court adjudicated RCG's lien foreclosure claim (**Exhibit 7, at p. 9-11**). Under *Decina*, merely filing a lien foreclosure claim with a breach of contract action does not vest a trial court with discretion to award (or even consider) attorneys' fees pursuant to MCL 570.1118(2). Yet, the Court of Appeals failed to follow this Court's binding precedent. (**Exhibit 8, at p. 6**).

As cogently articulated by this Court:

**[t]o be awarded attorney fees (*sic*) as a 'prevailing party' under MCL 570.1118(2), the party must prevail on the lien foreclosure action . . . The language of MCL 570.1118(2) does not permit recovery of attorney fees (*sic*) on the contract action merely because it was brought together with the lien foreclosure action.**

*Decina, supra*, at 988 (reversing lower court orders awarding attorney's fees).<sup>10</sup> Said another way, breach of contract and lien foreclosure actions are separate and distinct. Even RCG's Complaint recognized this precept by seeking foreclosure of its construction lien only in the event LON failed to satisfy the Award. (**Exhibit 3, at p. 7, ¶(C)(3)**). This general principle is

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<sup>10</sup> In *H.A. Smith Lumber & Hardware Co v Decina*, 265 Mich App 380, 384 (2005), the Court of Appeals held "that, in assessing attorney (*sic*) fees under the CLA, 'prevailing party' means one who prevails in a CLA claim or a claim brought in the alternative for the same injury or loss raised in the CLA Claim." This Court expressly overturned that holding in *H.A. Smith Lumber & Hardware Co v Decina*, 480 Mich 987 (2007), discussed *supra*.

not, as the Court of Appeals wrongly concluded, dependent upon the specific facts of *Decina*. **(Exhibit 8, at p. 6)**. Nothing in *Decina* suggests that it is limited to the facts of that particular case. Rather, it is a general tenet of Michigan construction law, which the Court of Appeals declined to follow. On that basis alone, this Court should grant RCG's Application. *See* MCR 7.302(B)(5).

At its core, this a breach of contract dispute between two sophisticated businesses entities over the final 10% of the contract price to construct the Project. The Award, as set forth above, is based almost entirely upon RCG's breach of contract claim and LON's counterclaims for breach of the same contract. RCG cannot change that fact by including a companion lien foreclosure count in its Complaint.<sup>11</sup>

Yet, the Court of Appeals' Opinion disregards *Decina* and wrongly decides that the lien foreclosure statute, somehow, automatically entitles RCG to seek attorneys' fees simply because it obtained a net award on its breach of contract claim and included a lien foreclosure count in the Complaint it filed with the circuit court (in breach of the AIA contract). According to the Court of Appeals, it does not matter whether LON paid the Award such that the lien should have been discharged and there is no Award for the lien to secure or lien to foreclose. **(*Id.*, at pp. 4-5)**. All that matters is that RCG obtained some net monetary award and RCG's improperly filed Complaint includes a count entitled "Foreclosure of Lien." The Court of Appeals' Opinion runs counter to this Court's binding precedent and creates an untenable situation for property owners that dispute paying for work not completed or adequately performed.

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<sup>11</sup> It is undisputed that the AIA contract at issue does not contain a fee shifting provision authorizing the award of attorneys' fees to any party.

If the published Court of Appeals' Opinion is permitted to stand, then any breach of contract action in which a plaintiff also pleads a lien foreclosure claim could result in an award of attorneys' fees to the plaintiff. Parties to a contract are entitled to dispute issues in good faith without exposure to incurring attorneys' fees that are properly borne by the opposing party. Indeed, in light of the Court of Appeals' Opinion, the only way for an owner (such as LON) to avoid potential liability for attorneys' fees under the Construction Lien Act would be for the owner to pay the full amount demanded by the lien claimant (such as RCG), no matter how unwarranted the claim. Where, as here, the lien is subsequently found to have been overstated because the lien claimant failed to properly perform its work, the Court of Appeals' Opinion would place the burden on the lienee (*i.e.* LON) to recover the unjustified overpayment in a separate lawsuit. Such an absurd result is not tenable under Michigan law or public policy. Granting LON's Application is more than warranted.

**IV. The Court of Appeals' Opinion Disregards the Arbitration Provisions of the Parties' AIA Contract and Undermines Michigan's Policy Favoring the Arbitration of Disputes and Swift Payment of Awards.**

It is well-settled that Michigan public policy favors arbitrations. *See Jozwiak v Northern Michigan Hospitals, Inc*, 207 Mich App 161, 165 (1994). The arbitration process delineated in the AIA contract worked as the parties in this case intended. Two parties with a well-founded and genuine contractual dispute adjudicated their issues before a private Arbitrator with minimal use of the State's judicial resources. After the Arbitrator determined that RCG's claims were substantially overstated (awarding RCG 56% of its contract claim and lien amount), LON promptly paid the Award in-full and without any need for RCG to petition the trial court to confirm or enforce the Award. Had LON not paid the Award, the CLA would have protected RCG by allowing it to recover its attorneys' fees in connection with an action in the circuit court

to foreclose its lien. This is the procedure negotiated between LON and RCG for the resolution of disputes. Michigan Courts enforce express contracts between sophisticated business entities, such as LON and RCG, as written. See *Quality Products and Concepts v Nagel Precision, Inc*, 469 Mich 362, 375 (2003).

Moreover, pursuant to the express language of the parties' AIA contract, RCG never should have initiated its action by filing a Complaint in the circuit court. Rather, RCG should have followed the terms of the AIA contract to which it agreed and first filed its demand for arbitration with the AAA. By agreeing to enter into a stipulated order to arbitrate its claims when faced with a motion to enforce the parties' agreement to arbitrate, RCG' affirmed the proprietary of arbitration as the only proper forum in which to resolve its dispute with LON. RCG could then have expeditiously arbitrated its dispute and obtained prompt payment of any net award in its favor without ever appearing before the circuit court.<sup>12</sup> By filing first in the Circuit Court, RCG caused numerous parties to spend money needlessly to appear in a circuit court action RCG never had to file.

The Court of Appeals Opinion, however, discourages arbitration and encourages the filing of lien foreclosure actions with the circuit court (even when the parties agree to arbitrate all claims) because the Court of Appeals bases its erroneous decision in favor of RCG, in large measure, on the fact that RCG simply filed a Complaint that includes a lien foreclosure claim.

Moreover, the Court of Appeals' Opinion conflicts the terms of the AIA contract, which did not include any type of fee shifting provision. The parties bargained for each to bear their

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<sup>12</sup> RCG waited almost six (6) months between the recording of its Claim of Lien and the filing of the 2009 Case. (**Exhibits 2 and 4**). RCG's lien foreclosure action only needs to be filed within one (1) year of the recording of the claim of lien. Arguably, RCG could have timely filed its arbitration demand, arbitrated the amount due, and received payment, all before filing of a lien foreclosure action became necessary.

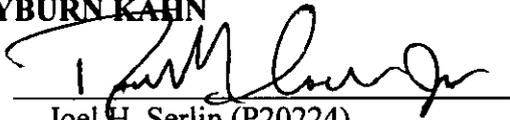
own attorneys' fees in the event of a dispute. Yet, the Court of Appeals' Opinion abrogates the parties' bargain and inserts an attorney fee shifting provision where there had been none. Under Michigan law, sophisticated commercial parties are free to enter into contracts of their choosing with the knowledge that courts will subsequently enforce their clear and unambiguous terms.

### CONCLUSION

Under the circumstances set forth above, the trial court would have abused its discretion had it granted RCG's Motion. Because the Court of Appeals: (1) failed to adhere to the clear and unambiguous language of MCL 570.1118(2); (2) improperly engaged in fact finding; (3) refused to follow the binding precedent of this Court as articulated in *Decina, supra*; and (4) disregarded the parties' agreement to arbitrate all disputes, this Court should enter a peremptory order vacating the Court of Appeals Opinion and reinstating the Trial Court's Opinion and Order. At a minimum, the Court should grant LON's Application. See MCR 7.302(H)(1).

Respectfully submitted,

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