

NO. A12-0370

State of Minnesota
In Court of Appeals

Westfield Insurance Company,

Appellant,

vs.

Safety Signs, LLC,

Respondent.

**APPELLANT'S REPLY BRIEF
AND SUPPLEMENTAL ADDENDUM**

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ARGUMENT AND AUTHORITIES

Safety Signs made a claim against the wrong bond, sent its claim to the wrong address, identified its wrong last day of work and sought payment in the wrong amount. Nevertheless, Safety Signs contends that its effort was *good enough* to satisfy the bond statute. But the statute and the controlling case law are not as generous. Rather, unless a claimant *strictly* complies with the statute, it may not recover on its claim.

In support of its position, Safety Signs relies almost exclusively upon a case that is nearly 70 years old (*Wheeler*), a case that is nearly 85 years old (*Ilg Electric*) and cases interpreting the mechanic's lien statute, which is not at issue in this action. Straining to defend its position, Safety Signs contradicts decades of *modern* controlling precedent. Defying the clarity of those dispositive decisions, Safety Signs contorts itself to distinguish this case from those cases. According to Safety Signs, the "strict compliance" required in those cases merely obligated Safety Signs to "*attempt notice* – when it comes to the details of the notice, substantial compliance is sufficient." (Safety Signs Brief at 25) (emphasis in original). There is no support for Safety Signs' position. Rather, Safety Signs' multiple failures to strictly comply with the bond statute are fatal to its claim. Consequently, this Court should reverse the Judgments of the lower court.

I. SAFETY SIGNS FAILED TO DEMONSTRATE WHY ITS CLAIM IS TIMELY DESPITE MISSING ITS DEADLINE TO INITIATE THIS ACTION.

Through its original brief, Westfield explained that Safety Signs improperly sought payment for Phase II work through the First Bond,¹ which only applied to Phase I work. If Safety Signs intended to seek compensation for Phase II work, it was required to make a claim against the Second Bond. Safety Signs' last day of Phase I work was in May 2009. (A.47, A.80; Safety Signs Brief at 11 [noting that the only Phase I work for which it seeks compensation through the present Claim is the performance of work identified as "S0006 – Traffic Control" in the amount of \$15,900.00]). Safety Signs did not commence this action, however, until September 2010, which was more than one year after its last day of Phase I work. (A.1-20).

Although Safety Signs refers to the Second Bond as a "phantom" bond, Safety Signs was fully aware of its existence at the time that it made its Claim because it previously made a claim against the Second Bond. (Safety Signs Brief at 6; A.107, ¶ 5). Indeed, a June 23, 2010, letter sent by Westfield to Safety Signs regarding that prior claim identifies the First Bond as Bond No. 0051668 and the Second Bond as Bond No. 0051680. (A.122). That letter also identifies the First Bond as applying to Phase I and identifies the Second Bond as applying to Phase II. (*Id.*)

¹ All capitalized terms not defined herein are defined in Westfield's original Brief.

Furthermore, although Safety Signs contends that it did not designate the First Bond or the Second Bond through its Claim, Safety Signs' attached the First Bond to its Complaint as Exhibit 1. (A.10-14).

Finally, Safety Signs admits through its brief that it is only proceeding against the First Bond. (Safety Signs Brief at 4 ["Westfield provided a payment bond {the 'Bond'} on the Project, bond number 0051668."])

While it is true that it did not raise this precise issue below, Westfield is not precluded from now raising this defense because it demonstrates that this Court lacks jurisdiction to entertain Safety Signs' claims. Through its answer, moreover, Westfield asserted an affirmative defense that Safety Signs "failed to properly commence this action within the required one year period from the date of [its] last work on the Project." (A.23).

Interpreting the federal Miller Act, upon which Minnesota's bond statute is based, the Ninth Circuit noted that "[c]ompliance with the [one-year] limitation period is a condition precedent to maintaining an action [against the bond]." *United States for Use of Celanese Coatings Co. v. Gullard*, 504 F.2d 466, 468 (9th Cir. 1974). Noting that a surety could not waive such a defense by previously failing to raise it and reversing judgment for the bond claimant, the Ninth Circuit further held as follows: "The entry of preliminary judgment did not bar consideration or application of the . . . time limitation, a jurisdictional requirement that may be raised at any time, even for the first time on appeal." *Id.* at 468-69 (citing *United States ex rel. Soda v. Montgomery*, 253 F.2d 509 (3d Cir. 1958); Fed.R.Civ.P. 12(h)(3)).

Having failed to allege or establish that it supplied materials within the prescribed one year period before it filed its suit, Celanese cannot succeed against the Miller Act surety. Accordingly, the District Court's judgment for Celanese against Fireman's Fund is reversed; and upon remand, the complaint against Fireman's Fund will be dismissed.

Gullard, 504 F.2d at 469.

Similarly, the Minnesota Supreme Court reversed a judgment against a surety even though the surety did not raise a defense that a claimant failed to comply with statutory notice requirements until it moved for a new trial following a second trial of the action. *Mineral Resources, Inc. v. Mahnomen Constr. Co.*, 184 N.W.2d 780, 785-86 (Minn. 1971).

Here, because this Court lacks jurisdiction over Safety Signs' claims, it should dismiss them. Safety Signs' obfuscation regarding subject-matter jurisdiction is inapposite. Whether this Court deems the untimely nature of Safety Signs' action to preclude it from exercising personal jurisdiction or subject-matter jurisdiction, it is clear that the deadline is *jurisdictional* and it is proper to dismiss Safety Signs' claims on this basis. Again, although this issue was not raised below, this Court has discretion to address any issue as justice requires. Minn.R.Civ.App.P. 103.04. Even if this Court is unwilling to dismiss Safety Signs' claims on this basis, moreover, it should – in the interest of justice – reverse the Judgments previously entered in Safety Signs' favor.

II. “STRICT COMPLIANCE,” NOT “SUBSTANTIAL COMPLIANCE,” IS NECESSARY FOR A CLAIMANT TO RECOVER AGAINST A BOND.

To maintain a claim against a bond, Safety Signs contends that it must only substantially comply with statutory notice requirements. (Safety Signs Brief at 20).

Through this argument, Safety Signs is asking the Court to turn back the clock to the days of *Wheeler*, which was decided during World War II, when the “substantial compliance” doctrine was still alive. In its original brief, however, Westfield cited controlling, *modern* authority declaring that a claimant must demonstrate “strict compliance” with statutory notice provisions to prevail on a bond claim.

In pressing its substantial-compliance argument, moreover, Safety Signs offers a series of excuses for filing its claim against the wrong bond, sending its claim to the wrong address, identifying its wrong last day of work and seeking payment in the wrong amount. Despite Safety Signs’ attempt to confuse this issue, this Court’s task is simple. Because Safety Signs did not *strictly* comply with the statutory notice requirements, this Court should reverse the Judgments on each of the following independent bases: (1) Safety Signs failed to serve its Claim on Niles-Wiese at the address identified on the First Bond and (2) Safety Signs failed to serve its Claim upon Westfield within 120 days of its last day of work.

A. THIS COURT SHOULD REVERSE THE JUDGMENTS BECAUSE SAFETY SIGNS FAILED TO SERVE NILES-WIESE AT THE ADDRESS IDENTIFIED ON THE FIRST BOND.

Safety Signs contends that “strict compliance” with the statutory notice requirements is only necessary if a claimant completely fails to *attempt* service of its claim. (Safety Signs Brief at 21). According to Safety Signs, “the Bond statute is met through a reasonable good faith attempt at service.” (*Id.* at 24). This “close enough” standard contradicts the statute’s plain language and was expressly rejected in a litany of modern cases.

The bond statute provides, in relevant part, that a claimant must serve notice of its claim “upon the surety that issued the bond and the contractor on whose behalf the bond was issued at their addresses as stated in the bond.” Minn. Stat. § 574.31, subd. 2(a) (emphasis added).

Principles of statutory construction dictate that if a statute – construed according to ordinary rules of grammar – is unambiguous, a court need not engage in further statutory construction and should apply the statute’s plain meaning. *State by Beaulieu v. RSJ, Inc.*, 552 N.W.2d 695, 701 (Minn. 1996); see Minn. Stat. § 645.16 (“When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.”)

Roughly 30 years ago, moreover, the Minnesota Court of Appeals rejected the same argument that Safety Signs presents to this Court today. In that case, the following facts were undisputed:

- The surety received actual, timely, sufficient notice of a claim; and
- The surety claimed no prejudice by a claimant’s failure to also file its notice with the county auditor.

Spetz & Berg, Inc. v. Luckie Constr. Co., Inc., 353 N.W.2d 233, 235 (Minn.App. 1984), review denied, (Minn. Nov. 9, 1984).

Based on those facts, the claimant urged the appellate court to apply the substantial compliance doctrine and excuse its failure to strictly comply with the statute by failing to serve required notice upon the county auditor. *Id.* Rejecting the claimant’s invitation, the appellate court held as follows,

The Court is satisfied that the requirement of strict compliance with Section 574.31 is a condition precedent to the bringing of an action under well-established Minnesota law. Whether or not the Minnesota Supreme Court may in the future [choose] to overrule *Ceco* and *Mineral Resources*, this Court has no choice but to follow that well-established law.

Spetz & Berg, 353 N.W.2d at 235-36.

Despite this unambiguous holding, Safety Signs attempts to distinguish *Spetz & Berg*, *Ceco* and *Mineral Resources* by contending that the strict compliance doctrine only applies if a claimant fails to *attempt* service. (Safety Signs Brief at 25). In support of its position, Safety Signs relies upon *Wheeler*, *Benson*, *Standard Oil* and *Ilg Electric*. (Safety Signs Brief at 22-23, 26). Each of those cases, however, merely excuses a claimant's non-compliance with a *non-obligatory* aspect of the statute.

In *Ceco*, the plaintiffs – like Safety Signs – relied upon *Benson*, *Ilg Electric* and *Standard Oil*. But *Ceco* declared that those cases “are not helpful for the reason that under the statute as it then read . . . claimants were *not required* to file notice with the county auditor but were required to serve such upon the contractor and the sureties.” 294 N.W. at 213 (emphasis added). *Ceco* noted, moreover, that *Benson*, *Ilg Electric* and *Standard Oil* “related to the surety’s waiver of defects in the form of notice served,” continuing as follows:

If in the instant cases the law had remained as it was and plaintiffs had filed their notice with the country auditor but without giving the statutory notice to the contractor and his surety, would anyone contend that under the cited cases recovery might be had? We think not.

...

The law giving plaintiffs their cause of action required strict observance on their part of the filing of such notice with the proper officer.

Ceco, 294 N.W. at 213.

In other words, the Minnesota Supreme Court held that a surety could waive *non-obligatory* aspects of a notice but a surety could not waive statutory *requirements*.

Whatever right of action was in the claimant or liability on the part of the surety was conditioned upon the use of the statutory remedy. Divorced from that remedy, the right and the liability are nonexistent.

Id. (internal citations, quotation omitted); *see Spetz & Berg*, 353 N.W.2d at 235 (noting that strict compliance, not substantial compliance, with statutory notice requirements is a condition precedent that a claimant must satisfy to maintain a claim against a bond).

Later, in *Mineral Resources*, a claimant similarly failed to serve *required* notice upon the county auditor. 184 N.W.2d at 785. Asserting that a surety waived the requirement, the claimant cited *Standard Oil*. *Id.* Rejecting this argument, the Minnesota Supreme Court held as follows:

As we stated in [*Ceco*], the *Standard Oil* case is not in point on the issue of whether there can be waiver of the defense of noncompliance with [Minn. Stat. § 574.31] as it now reads[.]”

Id.

Noting that “under no circumstances” may a surety waive a notice *requirement*, *Mineral Resources* affirmed a lower court’s decision to preclude the claim. *Id.* at 786. “[A] materialman’s right to bring an action on the bond is nonexistent in the absence of strict compliance with the statutory requirement of filing notice.” *Id.* Because the claimant failed to serve its notice upon the county auditor, therefore, *Mineral Resources* held that the claimant was “barred from maintaining [its] action against [the surety].” *Id.*

As demonstrated by *Spetz & Berg*, *Ceco* and *Mineral Resources* (the last of which was decided in 1984), therefore, the substantial compliance standard applied by *Ilg Electric*, *Wheeler*, *Benson* and *Standard Oil* (the last of which was decided in 1944), no longer exists.

Furthermore, there is no support for Safety Signs' contention that so long as a claimant *attempts* service – no matter how feeble the attempt – it sufficiently complies with the statute. (Safety Signs Brief at 21). Indeed, such a position is expressly refuted by *Spetz & Berg*. In that case, the claimant attempted to serve notice by serving a mechanic's lien statement upon the surety's agent "together with a request that the lien be satisfied pursuant to the terms of the bond." *Spetz & Berg*, 353 N.W.2d at 233-34. Despite the claimant's *attempt* to serve notice of its bond claim on the surety, the Minnesota Court of Appeals held that the claimant's failure to strictly comply with the statute was fatal to its claim. *Id.* at 235-36.

Here, Safety Signs failed to serve Niles-Wiese at the address identified in the First Bond. (Safety Signs Brief at 8). Indeed, Niles-Wiese never received Safety Signs' notice. (Add.25). The statute clearly requires that a claimant – as a condition precedent to maintaining a bond claim – must serve the contractor at its address identified in the bond.

As demonstrated by *Spetz & Berg*, *Ceco* and *Mineral Resources*, a surety may not waive a claimant's failure to comply with such a statutory notice requirement. Safety Signs' reliance upon *Wheeler*, *Benson*, *Standard Oil* and *Ilg Electric* is misplaced because those cases do not address a claimant's failure to satisfy statutory *requirements*.

Safety Signs lost its bond rights when it failed to strictly comply with such requirements. By excusing Safety Signs' failure to serve Niles-Wiese, therefore, the lower court committed reversible error.

B. THIS COURT SHOULD REVERSE THE JUDGMENTS BECAUSE SAFETY SIGNS FAILED TO SERVE ITS CLAIM UPON WESTFIELD WITHIN 120 DAYS OF ITS LAST DAY OF WORK.

In addition to failing to serve Niles-Wiese by mailing its notice to the wrong address, Safety Signs also failed to ensure that Westfield received notice of its Claim within 120 days of its last day of work. (Add.23-24, 26; A.47; A.76). By excusing such untimely notice, the lower court offended the plain language of the statute and undermined one of the main purposes of the bond statute.

The statute provides, in relevant part, as follows:

no action shall be maintained on the payment bond unless, within 120 days after completion, delivery, or provision by the person of its last item of labor and materials, for the public work, the person serves written notice of claim under the payment bond personally or by certified mail *upon the surety* that issued the bond and the contractor on whose behalf the bond was issued

(Add.27 [Minn. Stat. § 574.31, subd. 2(a)]) (emphasis added).

The purpose of the statutory notice requirement is to ensure that a surety receives prompt notice of nonpayment issues so it can take immediate steps to:

- (1) protect its interests by withholding payment from the non-paying party;
- (2) timely investigate the claim; and
- (3) establish a date to commence the running of interest on the surety's bond liability.

Bruner & O'Connor on Construction Law, § 8:175 (2002) (citing *United States for Use and Benefit of Blue Circle West, Inc. v. Tucson Mech. Contracting, Inc.*, 921 F.2d 911, 914 (9th Cir. 1990)).

A bright-line 120-day rule is necessary, therefore, to fulfill the statute's purpose to protect a surety. *See Benson v. Barrett*, 214 N.W. 47, 48 (Minn. 1927) (noting that the purpose of the statutory notice provision is to timely inform the surety of its principal's default).

Neither Minn. Stat. § 574.31, subd. 2(a) nor Minnesota case law declare whether service of notice "upon the surety" is effective upon mailing or receipt. Another subpart of Minn. Stat. § 574.31, subd. 2, provides, however, that service is only effective upon receipt. Minn. Stat. § 574.31, subd. 2(d) (declaring that the date of a surety's receipt of notice triggers the period during which a surety must object to a claimant's request to extend a limitations period).

Safety Signs would like this Court to believe that the receipt requirement of Minn. Stat. § 574.31, subd. 2(d), does not help this Court decide whether service is effective upon mailing or receipt. (Safety Signs Brief at 19). To the contrary, principles of statutory construction provide that a court may rely upon such neighboring language when construing a provision. *See Kachman v. Blosberg*, 87 N.W.2d 687, 692 (Minn. 1958) (rules of statutory construction require a court to read a particular provision in context with other provisions in the same statute to determine the meaning of the particular provision); *ILHC of Eagan, LLC v. County of Dakota*, 693 N.W.2d 412, 419 (Minn. 2005) ("no word, phrase, or sentence should be deemed superfluous, void or

insignificant”) (quotation omitted).

Applying such principles of statutory construction, therefore, it is unnecessary to look beyond the four corners of the bond statute for this Court to conclude that service upon a surety is effective only upon receipt. If this Court decides to look beyond the statute, however, it should reject Safety Signs’ suggestion to rely upon general procedural rules or the mechanic’s lien statute. (Safety Signs Brief at 17-19). Rather, this Court should rely upon interpretations of the federal bond statute, upon which Minnesota’s statute is based. In this regard, federal courts interpreting the federal Miller Act conclude that service is only effective upon receipt. *See, e.g., Pepper Burns Insulation, Inc. v. Artco Corp.*, 970 F.2d 1340, 1342-43 (4th Cir. 1992) (“Given its plain meaning, the language ‘giving written notice to said contractor’ requires receipt of the notice by the contractor. Mailing does not fully accomplish the condition to ‘giv[e] . . . notice’”); *United States for Use and Benefit of B&R, Inc. v. Donald Lane Const.*, 19 F.Supp.2d 217, 223 (D.Del. 1998) (mailing of notice prior to deadline is insufficient to satisfy deadline); *see also Bruner & O’Connor* § 8:175 (“This notice must be received – not just mailed – within the [statutory] period.”)

Here, Safety Signs admits that Westfield did not *receive* notice until more than 120 days after Safety Signs’ last date of work. (Safety Signs Brief at 16-17). Because the only work compensable through the First Bond was Phase I work, moreover, Westfield did not receive the notice until more than 180 days after Safety Signs completed its Phase I work in May 2009. (A.47, 76). As discussed in the preceding section, strict compliance with statutory notice requirements is a condition precedent for

a claimant to maintain a claim against a bond. This Court should reverse the Judgments, therefore, because Safety Signs failed to timely serve notice of its Claim upon Westfield.

III. SAFETY SIGNS MAY NOT ESCAPE RESPONSIBILITY FOR FAILING TO STRICTLY COMPLY WITH THE STATUTE.

Recognizing its failure to strictly comply with the statute, Safety Signs contends that: (1) Westfield waived the statutory notice requirements; (2) Westfield lacks standing to complain of Safety Signs' failure to serve Niles-Wiese; and (3) that the parties – through their course of dealing – released Safety Signs from its obligation to strictly comply with the statute. As discussed below, these arguments lack merit.

A. WESTFIELD DID NOT WAIVE THE STATUTORY NOTICE REQUIREMENTS AND, IN ANY EVENT, SUCH A WAIVER IS IMPOSSIBLE.

Safety Signs contends that Westfield waived its right to challenge Safety Signs' failure to serve Niles-Wiese at the proper address. (Safety Signs Memo at 29). In presenting its argument, however, Safety Signs relies upon ancient precedent that has been superseded by modern authority.

The Minnesota Supreme Court summarized the law of waiver as follows:

The definition of a waiver most commonly accepted is that it is a voluntary relinquishment of a known right. Both intent and knowledge, actual or constructive, are essential elements.

...

The question of waiver is largely one of intention. It need not be proved by express declaration or agreement, but may be inferred from acts and conduct not expressly waiving the right. Waiver is ordinarily a question of fact for the jury.

Engstrom v. Farmers & Bankers Life Ins. Co., 41 N.W.2d 422, 424 (Minn. 1950) (citations omitted); see *Flaherty v. Ind't Sch. Dist. No. 2144*, 577 N.W.2d 229, 232 (Minn.App. 1998), *review denied*, (Minn. June 17, 1998).

Emphasizing that a waiver should not be inferred unless such an inference is undisputable, the Minnesota Supreme Court held as follows:

The intent is . . . rarely to be inferred as a matter of law. Conduct indicating a waiver may be so inconsistent with a purpose to stand upon one's rights as to leave no room for a reasonable inference to the contrary. Then the intent to waive appears as a matter of law.

Farnum v. Peterson-Biddick Co., 234 N.W. 646, 647 (Minn. 1931).

Safety Signs cites *Standard Oil* as support for its theory that a surety may waive a defense to a claimant's defective service of its bond claim. (Safety Signs Brief at 29-30). In that case, unlike here, the surety did not review a claim pursuant to a complete reservation of rights. *Standard Oil*, 222 N.W. at 574. Through its investigation of Safety Signs' prior claim against the First Bond and the Second Bond, Westfield expressly stated that it was conducting such review pursuant to a complete reservation of rights. (A.122). In response to Safety Signs' present claim against the First Bond, moreover, Westfield included the following language in one of its letters to Safety Signs:

This letter and submission to you of the Proof of Claim form is neither an admission of liability nor a waiver of the rights and defenses of the surety or principal, all of which are expressly reserved.

(Supp'l Add. 2).

Unlike in *Standard Oil*, therefore, Westfield did not waive but – to the contrary – expressly preserved its rights to challenge any aspect of Safety Signs' Claim.

In this regard, the Minnesota Supreme Court has declared that when a surety investigates a claim pursuant to such a reservation of rights, it waives none of its defenses. *See Ceco*, 294 N.W. at 213 (rejecting contention that surety waived statutory notice requirements because the surety's letters expressly noted that it was investigating the claims "under a *complete* reservation of rights") (emphasis in original).

The Minnesota Supreme Court also expressly declared that "the Standard Oil case is not in point on the issue of whether there can be waiver of noncompliance with § 574.31 as it now reads" *Mineral Resources*, 184 N.W.2d at 785-86 (citing *Ceco*, 294 N.W. at 213). "The general rule is that if a condition precedent prevents the accrual of a right, performance of the condition precedent may not be waived by a defendant to an action." *Mineral Resources*, 184 N.W.2d at 786; *see Grazzini Bros. & Co. v. Builders Clinic, Inc.*, 160 N.W.2d 259, 261 (Minn. 1968) (citing *Ceco*, holding that "[c]ompliance with the statute is a condition precedent to an action on the bond by a materialman").

And if the rule was not sufficiently clear, the Minnesota Supreme Court delivered the killing blow to Safety Signs' waiver argument, by stating as follows:

[P]laintiff contends that [*Ceco*] did not hold that there could under no circumstances be waiver of the notice requirement. However, we think that such a holding necessarily follows from our statement there that a materialman's right to bring an action on the bond is nonexistent in the absence of strict compliance with the statutory requirement of filing notice.

Mineral Resources, 184 N.W.2d at 786.

In other words, it is *impossible* for a surety to waive a claimant's strict compliance with statutory notice requirements.

Here, by investigating Safety Signs' claims pursuant to a reservation of rights, Westfield did not waive its right to challenge Safety Signs' Claim based on its failure to strictly comply with the statutory notice requirements. Even if Westfield had tried to waive its rights, moreover, such a waiver would be ineffective in light of the nature of Safety Signs' obligation to comply with the statute as a condition precedent to maintain a claim against the bond. Consequently, Safety Signs' waiver argument fails and this Court should reverse the Judgments.

B. AS THE LOWER COURT CONCLUDED, WESTFIELD HAS STANDING TO CONTEST SAFETY SIGNS' FAILURE TO SERVE NILES-WIESE.

Safety Signs contends that Westfield lacks standing to contest the Claim based on Safety Signs' failure to serve Niles-Wiese. (Safety Signs Brief at 27-28). This argument was expressly rejected by the lower court and Safety Signs did not appeal from that decision. (Add.4). As such, it is improper for this Court to consider this argument. In any event, Westfield has standing to challenge Safety Signs' failure to serve Niles-Wiese.

The lower court held as follows:

[Safety Signs'] argument that Defendant Westfield does not have standing to contest the service on Defendant Niles-Wiese is unpersuasive. The statute clearly states that both the contractor and surety must be notified of the bond claim. See Minn. Stat. § 574.31 subd. 2(a). Accordingly, both have the right to contest the bond claim. The Minnesota Supreme Court has allowed sureties to contest bond claims where the claimant failed to serve a party as required by statute. See *Spetz*, 353 N.W.2d at 235-36; *Mineral Res.*, 184 N.W.2d at 785-86; *Ceco Steel*, 294 N.W. at 212-13. Therefore, Defendant Westfield has standing to contest service on Defendant Niles-Wiese.

Id.

Safety Signs did not appeal from this aspect of the lower court's order. It is barred, therefore, from making an argument to this Court that was expressly rejected by the lower court. *See City of Ramsey v. Holdberg*, 548 N.W.2d 302, 305 (Minn.App. 1990), *review denied*, (Minn. Aug. 6, 1996) (issue decided against respondent is not properly before appellate court if respondent failed to appeal). On this point, the Minnesota Court of Appeals noted as follows:

Even if the judgment below is ultimately in its favor, a party must file a notice of review to challenge the district court's ruling on a particular issue. If a party fails to file a notice of review pursuant to Minn.R.Civ.App.P. 106, the issue is not preserved for appeal and a reviewing court cannot address it.

City of Ramsey, 548 N.W.2d at 305 (citations omitted); *see Singer v. City of Minneapolis*, 586 N.W.2d 804, 806 (Minn.App. 1998) (refusing to entertain challenge of order that was not timely appealed).

Even if this Court entertains Safety Signs' argument, it should conclude that Westfield has standing to challenge Safety Signs' claim based on its failure to serve Niles-Wiese. As indicated above, there is abundant case law demonstrating that a surety may challenge a claim if a claimant fails to serve another party. *See, e.g., Spetz & Berg*, 353 N.W.2d at 235-36 (affirming summary judgment for surety because claimant failed to file its notice with county auditor); *Mineral Resources*, 184 N.W.2d at 785-86 (same); *Ceco*, 294 N.W. at 212-13 (same).

Interpreting the federal Miller Act, moreover, the Ninth Circuit rejected a similar argument. *Gullard*, 504 F.2d at 469. In that case, a claimant asserted that a surety lacked standing to appeal a judgment because its principal did not also appeal. *Id.* The court

concluded that such a contention “has no merit whatsoever.” *Gullard*, 504 F.2d at 469.

Here, this Court should reject Safety Signs’ standing argument because it did not appeal from the lower court’s rejection of an identical argument. This Court should also reject Safety Signs’ argument because case law establishes that a surety may challenge a claim based on a claimant’s failure to serve notice upon another party.

C. THE PARTIES’ COURSE OF DEALING DID NOT RELEASE SAFETY SIGNS FROM ITS OBLIGATION TO COMPLY WITH THE STATUTE.

Safety Signs contends that this Court should excuse its failure to serve Niles-Wiese because – through the parties’ course of dealing – Westfield released Safety Signs from its obligation to strictly comply with the First Bond and the bond statute. (Safety Signs Brief at 31-32).

Firstly, this Court should reject this argument because it is just another form of Safety Signs’ waiver argument that the courts – as discussed above – have expressly rejected.

Secondly, as discussed above, Westfield reviewed the Claim pursuant to a complete reservation of rights. Even if – *arguendo* – some of its conduct could be interpreted to establish a course of dealing that released Safety Signs from its statutory obligations, therefore, Safety Signs was not justified in relying upon such conduct in the presence of such an express reservation of rights. *See Pollard v. Southdale Gardens of Edina Condo. Ass’n*, 698 N.W.2d 449, 453-54 (Minn.App. 2005) (analyzing party’s course-of-dealing argument in tandem with equitable estoppel, which requires – as a necessary element – that the party reasonably relied upon the other’s conduct).

Here, Safety Signs' citation of general notions of contract law is misguided in light of the facts and the unambiguous, non-waivable requirements of the bond statute. As such, this Court should reject Safety Signs' course-of-dealing argument and reverse the Judgments.

IV. FACTUAL ISSUES REGARDING SAFETY SIGNS' INTENTIONAL OVERSTATEMENT OF ITS BOND CLAIM PROVIDE AN INDEPENDENT BASIS FOR THIS COURT TO REVERSE THE JUDGMENTS.

Safety Signs dedicates more than six pages of its Statement of Facts in an attempt to explain why its damages calculation kept changing during this dispute. (Safety Signs Brief at 7-12). After trolling through Safety Signs' long-winded excuses, this fact remains: Safety Signs initially demanded – *under penalty of perjury* – payment in the amount of roughly \$35,000.00 from Westfield. (*Id.* at 7). Later, however, Safety Signs reduced this demand by roughly \$8,000.00 (nearly 25 percent of its original demand). (*Id.* at 10). The facts demonstrate, moreover, that – at most – Safety Signs is only entitled to roughly \$16,000.00 because payment for Phase II work is not compensable through the First Bond. Safety Signs' original demand was overstated, therefore, by nearly \$20,000.00.

Asserting that the bond statute does not include an “overstatement” provision, Safety Signs contends that a claimant is free to overstate its claim in whatever fanciful amount it can imagine without voiding its claim. (*Id.* at 40). This cannot be true.

Although the bond statute does not contain an “overstatement” provision, it does require that a claimant provide notice – through a sworn statement made under penalty of

perjury – of the *amount* of its claim. Minn. Stat. § 574.31, subd. 2(a). This provision would be rendered meaningless unless there was an accompanying penalty for intentional overstatement. This Court may infer, therefore, that the Legislature intended that there be a punishment for a claimant’s overstatement of its bond claim. *See* Minn. Stat. § 645.16(3) (noting that if a statute’s language is not explicit, a court may ascertain the legislature’s intent by considering, among other things, the “mischief to be remedied”); *LaFreniere-Nietz v. Nietz*, 547 N.W.2d 895, 898 (Minn.App. 1996) (“[A] court may supplement statutes with equitable principles.”)

Furthermore, courts interpreting the federal bond statute have declared that a claimant must have a reasonable belief that the amount demanded through its claim is accurate. *United States for Use and Benefit of Balzer Pac. Equip. Co. v. Fidelity and Deposit Co. of Maryland*, 895 F.2d 546, 550-51 (9th Cir. 1990).

On a related point, Safety Signs contends that cases interpreting the mechanic’s lien statute are not useful to this Court in deciding whether Safety Signs’ Claim is valid despite its overstatement. (Safety Signs Brief at 39-40). Safety Signs apparently believes that this Court should rely upon cases interpreting the mechanic’s lien statute when it serves Safety Signs’ interests but ignore such cases if it hurts Safety Signs. Indeed, in discussing the bond statute’s notice requirements, Safety Signs relies heavily upon cases interpreting the mechanic’s lien statute. (*Id.* at 17-18). According to Safety Signs, “[t]he courts have stated that the Bond statute has been written to mimic the mechanic’s lien statute . . . , that it has the same purpose, and should be interpreted similarly.” (*Id.*) As Safety Signs admits, therefore, this Court may rely upon cases interpreting the

mechanic's lien statute when construing the bond statute. In this regard, although there are no known Minnesota cases addressing whether intentional overstatement voids a bond claim, cases interpreting Minnesota's mechanic's lien statute hold that a claimant loses its claim if it intentionally overstates the amount due. *See Delyea v. Turner*, 118 N.W.2d 436, 440-41 (Minn. 1962); *Witcher Constr. v. Estes II Ltd. P'Ship*, 465 N.W.2d 404, 407 (Minn.App. 1991), *review denied*, (Minn. March 15, 1991) (citation, quotation omitted); *Bierlein v. Gagnon*, 96 N.W.2d 573, 578 (Minn. 1959); *Lyons v. Jarnberg*, 150 N.W. 1083, 1084 (Minn. 1915).

Here, as indicated above, Safety Signs initially demanded payment by Westfield in the amount of roughly \$35,000.00. Later, it reduced this demand by nearly \$8,000.00. Safety Signs is only entitled, moreover, to a claim – at most – in the amount of \$16,000.00. It was error for the lower court to conclude, therefore, that no reasonable factfinder could decide that Safety Signs intentionally overstated its Claim. This error is particularly glaring because a claimant's overstatement of its claim is a fact question that turns upon a claimant's credibility. *See Witcher Constr.*, 465 N.W.2d at 407 (citing *Cox v. First Nat'l Bank of Aitkin*, 415 N.W.2d 385, 388 (Minn.App. 1987), *review denied*, (Minn. Jan. 20, 1988)); *Tonka Tours, Inc. v. Chadima*, 372 N.W.2d 723, 728 (Minn. 1985).

Despite the lower court's error, Safety Signs cites the lower court's ruling as support for its contention that a non-moving party may not successfully oppose summary judgment unless it affirmatively offers contrary evidence. (Safety Signs Brief at 41). This is plainly wrong. A non-moving party may defeat summary judgment by

demonstrating that the moving party's evidence does not establish what the moving party contends it establishes.

In this regard, the Minnesota Supreme Court held as follows:

A motion for summary judgment may be granted pursuant to Rule 56.03 only if, after taking the view of the evidence most favorable to the nonmoving party, the movant has clearly sustained his burden of showing that there is no *genuine issue* as to any *material fact* and that he is entitled to judgment as a matter of law. It is essential to bear in mind that the moving party has the burden of proof and that the nonmoving party has the benefit of that view of the evidence which is most favorable to him Since . . . all factual inferences must be drawn against the movant for summary judgment, it follows that, even where the movant's supporting documents are uncontradicted, they may in themselves be insufficient to sustain his burden of proof.

Bradford Schools, Inc. v. Maetzold, 397 N.W.2d 427, 429 (Minn.App. 1986) (quoting *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955)) (emphasis in original) (footnotes omitted).

Ignoring the onerous summary judgment standard, the lower court declared that the \$8,000.00 difference between Safety Signs' original demand and its subsequent demand was a mere "inconsistenc[y]" that "[did] not create a material issue of fact." (Add.9-10). For all the afore-mentioned reasons, the lower court committed reversible error by concluding that genuine factual issues did not exist regarding whether Safety Signs intentionally overstated its Claim. Consequently, this Court should reverse the Judgments.

V. PROMPT-PAY INTEREST IS NOT RECOVERABLE AGAINST A SURETY OR ON A DISPUTED AMOUNT.

In its original brief, Westfield asserted that prompt-pay interest is not recoverable

on a disputed amount. Westfield also contended that such interest, the purpose of which is to compel a contractor to make timely payments to its subcontractors, is not recoverable against a surety. Opposing Westfield's position, Safety Signs asserts that if only part of a claim is disputed, prompt-pay interest is recoverable on the full amount of the claim. (Safety Signs Brief at 46). Safety Signs also contends (without supporting authority) that such interest is recoverable against a surety. (*Id.* at 46-47).

The express language of the prompt-pay statute provides that 18 percent annual interest is only recoverable on an "undisputed amount." Minn. Stat. § 337.10, subd. 3. In this regard, upon receipt of Safety Signs' Claim, Westfield advised Safety Signs that it "disputes the entire amount" of the Claim. (Supp'l Add. 1-4). For its part, moreover, Niles-Wiese asserted that the amount of Safety Signs' Claim was inaccurate. (A.126). By awarding prompt-pay interest to Safety Signs on a disputed amount, therefore, the lower court committed reversible error.

Additionally, the majority view is that prompt-pay interest constitutes a "penalty" that is not recoverable from a surety. *See R.W. Sidley, Inc. v. U.S. Fid. & Guar. Co.*, 319 F.Supp.2d 554, 560 (W.D.Pa. 2004) (classifying Pennsylvania's prompt-pay interest as "penalty interest" that is not recoverable against a payment bond); *City of Independence for Use of Briggs v. Kerr Constr. Paving Co., Inc.*, 957 S.W.2d 315, 324-25 (Mo.App. 1997) (surety not liable for penalties incurred because of its principal's violation of the prompt-pay statute); *New Design Constr. Co., Inc. v. Harmon Contractors, Inc.*, 215 P.3d 1172, 1185 (Col.App. 2008) (surety not liable for statutory penalty interest).

Because Minnesota's prompt-pay statute is penal in nature, moreover, it must be strictly construed. See *Gullings v. State Bd. of Dental Examiners*, 273 N.W. 703, 705 (Minn. 1937); *Bushland v. Corner Pocket Billiard Lounge of Moorhead, Inc.*, 462 N.W.2d 615, 616 (Minn.App. 1990). Furthermore, when applying a statute that is penal in nature, "it is to be strictly construed in the sense that it cannot be enlarged beyond its definite scope" *Beck v. Groe*, 70 N.W.2d 886, 891 (Minn. 1955) (emphasis added).

In an analogous case, a federal court interpreting a Pennsylvania prompt-pay statute found that the statute's purpose was to encourage contractors to promptly pay their subcontractors. *R.W. Sidley, Inc.*, 319 F.Supp.2d at 560. In light of the statute's purpose, the court held as follows:

[T]he plain meaning of the [statute] is that a subcontractor may seek penalty payments and attorneys' fees against a contractor according to the provisions of their subcontract agreement. However, this Court also finds that the plain meaning of the [statute] does not address, or provide for, the recovery of such damages against a surety

Id. at 561.

Similarly, an appellate court in Missouri noted that Missouri's prompt-pay statute was silent as to whether a surety could be held responsible for prompt-pay interest. *City of Independence*, 957 S.W.2d at 324-25. The court noted that the prompt-pay statute "places responsibility for prompt payment solely on the contractor" and "does not contain a requirement of a bond to insure prompt payment. *Id.* Consequently, the court concluded that the surety was not liable for penalty interest. *Id.* at 325.

Here, Safety Signs' asserts that the Prompt Pay Act was incorporated by reference into its contract with Niles-Wiese and that such contract was itself incorporated into the

bond. This three-tiered incorporation-by-reference argument is too attenuated to hold Westfield responsible for prompt-pay interest. This is especially true because such a conclusion would not advance the purpose of Minnesota's prompt-pay statute, which aims to ensure that a contractor promptly pays its subcontractors. This purpose would not be served by imposing penalty interest against a surety, moreover, because a surety has no control over whether a contractor promptly pays its subcontractors.

Furthermore, as a penal statute, this Court must strictly construe the prompt pay statute. Applying this standard of review, this Court should not enlarge the scope of the statute beyond that expressly intended by the Legislature. Notably, in this regard, the statute is silent as to a surety's liability for a contractor's failure to promptly pay its subcontractors. For all these reasons, this Court should not impose such penalty interest upon Westfield and it should reverse the Judgments.

CONCLUSION

Safety Signs advances the following list of excuses for its failure to strictly comply with the bond statute: (1) *substantial* compliance is good enough; (2) serving only the surety is good enough; (3) Westfield lacks standing to object to Safety Signs' failure to serve Niles-Wiese; and (4) through the parties' course of dealing, Westfield either waived or modified the strict statutory requirements embodied in the First Bond. As indicated above, each of these excuses lacks merit.

First, this Court should dismiss Safety Signs' Claim or reverse the Judgments because Safety Signs failed to initiate this action within one year of its last day of work.

Even though Westfield did not raise this issue below, such a jurisdictional defense may be raised on the first time on appeal and, significantly, is dispositive of the Claim.

Second, this Court should reverse the Judgments because Safety Signs failed to serve Niles-Wiese at the address identified on the First Bond.

Third, Safety Signs failed to ensure that Westfield received notice of its Claim within 120 days of its last day of work.

Fourth, this Court should reverse the Judgments because fact questions exist as to whether Safety Signs intentionally overstated its Claim. It was reversible error for the lower court to conclude that no reasonable factfinder could conclude that an initial \$8,000.00 overstatement does not preclude Safety Signs from recovering on its Claim.

Finally, this Court should reverse the Judgments because prompt-pay interest is not recoverable from Westfield because it would neither advance the statute's purpose and because such recovery is not expressly provided for through the statute.

Safety Signs' list of excuses do not alter the conclusion that – in a variety of egregious ways – Safety Signs failed to strictly comply with the bond statute and, consequently, is not entitled to maintain a claim against the First Bond.

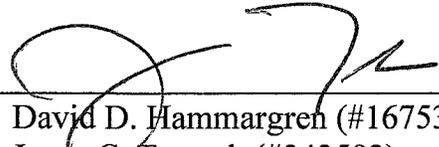
Safety Signs wants this Court to declare a rule that excuses a claimant from strictly complying with the statute so long as the claimant attempts service – no matter how feeble the attempt. Such a rule would belie the express language of the bond statute and offend decades of modern controlling precedent.

For all these reasons, Westfield seeks a reversal of the Judgments.

Respectfully submitted,

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Dated: 5/14/12

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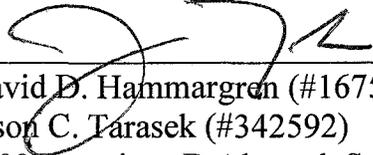
CERTIFICATION

I certify that this Brief conforms to Minnesota Rule of Civil Appellate Procedure 132.01 and was prepared using Microsoft Office Word 2007 as follows:

Monospaced font – Times New Roman, font size 13. This Brief contains 634 lines of text, 7,108 words, and 29 pages.

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