

NO. A12-0370

State of Minnesota
In Court of Appeals

Westfield Insurance Company,

Appellant,

vs.

Safety Signs, LLC,

Respondent.

RESPONDENT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF THE ISSUES

I. DID THE DISTRICT COURT ERR IN CONCLUDING THAT SAFETY SIGNS PROVIDED TIMELY AND SUFFICIENT NOTICE OF ITS PAYMENT BOND CLAIM UNDER MINN. STAT. § 574.31?

Appellant argued that Respondent failed to (1) provide timely notice to Appellant of Respondent's payment bond claim and (2) provide notice to general contractor Niles-Wiese at the address listed for Niles-Wiese on the payment bond, and therefore Respondent forfeited its claim. The District Court correctly concluded that Respondent's notice was timely, and that Respondent sufficiently complied with Minn. Stat. § 574.31 in sending notice to Niles-Wiese at Niles-Wiese's business address.

RELEVANT AUTHORITIES:

- Minn. Stat. § 574.31
- *Wheeler Lumber Bridge & Supply Co. v. Seaboard Sur. Co.*, 16 N.W.2d 519, 522 (Minn. 1944)
- *Standard Oil Co. v. Enebak*, 222 N.W. 573, 574 (Minn. 1928).

II. CAN WESTFIELD NOW RAISE, FOR THE FIRST TIME ON APPEAL, AN ARGUMENT THAT SAFETY SIGNS SHOULD HAVE MADE ITS CLAIMS AGAINST AN ALLEGED SECOND BOND THAT IS NOT PART OF THE RECORD?

For the first time on appeal, Westfield argues that Safety Signs made its payment bond claim against the wrong payment bond. Westfield states that there was a second payment bond, neither disclosed in discovery, nor part of the record, that Safety Signs should have made its claim against, and that Safety Signs must lose its claim as a result. The District Court never considered this matter because it was never raised or even mentioned by Westfield before. Furthermore, the payment bond against which Safety Signs asserted its claim states on its face that is the bond for the entire project at issue in the case.

RELEVANT AUTHORITIES:

- *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).
- *Duenow v. Lindeman*, 27 N.W.2d 421, 425 (Minn. 1947)
- *Cochrane v. Tudor Oaks Condominium Project*, 529 N.W.2d 429, 432 (Minn. Ct. App. 1995).

III. DID THE DISTRICT COURT ERR IN REJECTING WESTFIELD'S ARGUMENT THAT SAFETY SIGNS "INTENTIONALLY OVERSTATED" ITS BOND CLAIM AND MUST LOSE THE CLAIM AS A RESULT?

Citing mechanic's lien law, not bond law, Westfield argued that Safety Signs "intentionally overstated" its bond claim and as a result must lose its entire claim. The District Court did not expressly address this argument, but tacitly rejected it, concluding that there was no evidence that Safety Signs's damages amount was invalid or that Safety Signs's minor reduction of the amount of its claim at the beginning of the litigation was material.

RELEVANT AUTHORITIES:

- Minn. Stat. §§ 574.26 *et seq.*
- Minn. Stat. § 514.74

IV. DID THE DISTRICT COURT ERR IN CONCLUDING THAT WESTFIELD DID NOT REASONABLY DISPUTE SAFETY SIGNS'S CLAIMED DAMAGES AND THEREFORE WESTFIELD IS ENTITLED TO 18% INTEREST?

Westfield argues that it should not have to pay 18% interest under the Minnesota Prompt Payment Act (Minn. Stat. § 336.10, subd. 3) on the \$27,119.65 in principal Safety Signs was undisputedly owed. The District Court correctly concluded that Westfield was required to pay 18% interest on the \$27,119.65 in principal.

RELEVANT AUTHORITIES:

- Minn. Stat. § 337.10, subd. 3

STATEMENT OF THE CASE

This case revolves around the failure of general contractor Niles-Wiese Construction Co., Inc.¹ to pay Respondent Safety Signs, LLC (“Safety Signs”) for work that Safety Signs performed, and the subsequent failure of Appellant Westfield Insurance Company (“Westfield”) to pay Safety Signs under the payment bond Westfield issued. Niles-Wiese was awarded the contract to construct the Owatonna Degner Regional Airport Project for the City of Owatonna (the “City”). As required by Minn. Stat. § 574.26 *et seq.*, Niles-Wiese obtained and submitted a payment bond from Westfield for the Project. Under the bond, Westfield covenanted to pay any subcontractors on the Project who were not paid for their work by Niles-Wiese.

Niles-Wiese and Safety Signs then entered into a subcontract pursuant to which Safety Signs would perform the traffic control work on the Project. It is undisputed that Safety Signs performed this work timely, responsibly, and properly, and that Niles-Wiese was paid in full for the work Safety Signs performed. Unfortunately, Niles-Wiese then simply kept the money and failed to pay Safety Signs for much of the work Safety Signs performed. Safety Signs accordingly made a claim against Westfield’s payment bond for the unpaid amounts. Westfield refused to pay Safety Signs, who accordingly brought suit to enforce the bond. Westfield moved for summary judgment, arguing that Safety Signs’s bond notice was (1) untimely and (2) in the case of the notice to Niles-Wiese, sent to the incorrect address. The District Court concluded that Safety Signs’s notice was

¹ Niles-Wiese has not appealed the default judgment entered against it and it is not a party to this appeal.

timely and sufficiently complied with the notice statute (Minn. Stat. § 574.31), and granted summary judgment *sua sponte* in favor of Safety Signs. Subsequently, Safety Signs moved for summary judgment on the remaining issues (liability and the amount of its damages). The District Court concluded that as Westfield presented no material evidence to oppose Safety Signs's evidence, summary judgment in favor of Safety Signs was appropriate. The District Court also awarded Safety Signs its attorneys fees pursuant to Minn. Stat § 574.26 and interest at 18% on the undisputed principal amount. Westfield appealed the decisions of the District Court.

STATEMENT OF THE FACTS²

Background of Project.

Niles-Wiese, as general contractor, entered into a contract with the City to perform the construction work at the Owatonna Degner Regional Airport – Construct Runway 5/23 and Taxiway B Project (the “Project.”). (A. 106, ¶ 2.) Westfield provided a payment bond (the “Bond”) on the Project, bond number 0051668. (*Id.*) The Bond states that it is for the “Owatonna Degner Regional Airport – Construct Runway 5/23 and Taxiway B.” (A.10). Such a bond is required by Minn. Stat. § 574.26 on all Minnesota public projects. The purpose of the bond is to ensure that subcontractors performing project work are paid for their work.

Niles-Wiese invited Safety Signs to bid to perform a portion of the work on the Project for traffic control and pavement marking work. ((R.App. 38, ¶ 5.) On April 29,

² Safety Signs will use the following citation references herein: Add. [Page No.] (Westfield's Addendum); A. [Page No.] (Westfield's Appendix); and R.App. [Page No.] (Respondent's Appendix.)

2008, Safety Signs submitted a quote. (R.App. 38 ¶ 6, R.App. 47-48.) Safety Signs set forth unit prices in the quote for different types of work. (*See id.*) Safety Signs then multiplied the unit prices by the quantities of units of work the Project documents estimated that Safety Signs would be called upon to perform on the Project. The quantities used by Safety Signs in its quote were those quantities established by the City, labeled as “Periodic Construction Estimates.” (R.App. 38 ¶ 7, R.App. 47-48, 49-51, 52-53.) Safety Signs’ bid included work for both Phase I and Phase 2 of the Project. The total amount of Safety Signs’ quote was \$130,307.26. (R.App. 38 ¶ 6, R.App. 47-48.)

Based on Safety Signs’ quote, Niles-Wiese then entered into a subcontract agreement (the “Subcontract”) with Safety Signs, dated June 2, 2008, pursuant to which Safety Signs was to provide traffic control services and pavement marking work on the Project, which was described as “Owatonna Degner Regional Airport...Construct Runway 5/23 and Taxiway B.” . (R. App. 38, 54-65, A. 109-121).

Safety Signs Was To Be Paid For The Work It Performed On the Project

Under the Subcontract, Niles-Wiese was to pay Safety Signs for the work that Safety Signs performed on the Project, as measured by the work item quantities utilized on the Project multiplied by the agreed upon unit prices for those work items. The unit prices were set forth in Safety Signs’ quote. (R.App. 38, 47-48, 59.) The Subcontract also provides, “The Contractor shall, so long as the Subcontractor is not in default and within ten (10) days after Contractor receives payment from the Owner, pay the Subcontractor for Work as the Engineer shall determine the Subcontractor has performed, at the prices set forth herein” less any retainage, if withheld by the City, until final

payment. (R.App. 59.)

Safety Signs Performed All Of its Work on the Project

Safety Signs performed its Project work in a timely and professional manner. Neither the Project owner nor Niles-Wiese made any complaints about Safety Signs's work or required that Safety Signs perform any corrective or punch list work. (R.App. 40.) Furthermore, it is undisputed that Niles-Wiese submitted payment requests to the City for and was paid by the City for Safety Signs's work (with a profit).³ (R.App. 127-28.) Unfortunately, Niles-Wiese did not use these payments to pay Safety Signs.

First Bond Claim.

The Bond claim at issue in this litigation is the *second* time that Safety Signs had to make a claim on the Bond for Niles-Wiese's failure to pay Safety Signs for work it performed on the Project. Niles-Wiese first failed to pay Safety Signs \$14,915.31 for the work that Safety Signs performed in 2008-2009. (A. 107, ¶ 5.) As a result of this nonpayment, Safety Signs sent a notice of claim against the Bond (the "First Bond Claim") on February 13, 2009. (*Id.*) The notice was sent to Niles-Wiese at Niles-Wiese's address as listed by Niles-Wiese in the Subcontract: 112 South Main Street, P.O. Box 419, Medford, MN 55049. (A. 107, ¶ 5; 109-121.) This is also the address to which Westfield directed all its correspondence to Niles-Wiese. (A. 107, ¶ 6; 122.) It is also

³ In the District Court, Westfield argued that Safety Signs did not submit sufficient evidence that Niles-Wiese was paid by the City for Safety Signs's work. Safety Signs provided a supplemental affidavit of the City and exhibits showing that the City had paid Niles-Wiese for Safety Signs's work. Westfield has not raised this argument in its appeal.

the address to which Safety Signs sent all its invoices. (A. 107, ¶ 7.) Finally, it was the address listed by Niles-Wiese on its website for contacting Niles-Wiese. (R.App. 30.)

On the First Bond Claim, Safety Signs received two signed, certified-return receipts as evidence that its bond claim was received by both Niles-Wiese and Westfield. (A. 107-108, ¶ 8.) Safety Signs subsequently submitted a proof of claim as requested by Westfield. (*Id.*) In April 2009, Safety Signs received payment in the amount of \$14,915.31 from Niles-Wiese. (*Id.*) Neither Niles-Wiese nor Westfield indicated that Safety Signs' service of its bond claim on Niles-Wiese at its business address at 112 South Main Street, P.O. Box 419, Medford, MN 55049 was improper. (*Id.*)

Second Bond Claim.

In 2009, Safety Signs performed the second phase of the Project work. (A. 108, ¶ 9.) Safety Signs again fully performed its work in a timely and professional manner. (*Id.*) The Project owner paid Niles-Wiese for the work performed by Safety Signs. (*Id.*)

Nevertheless, Niles-Wiese again failed to pay Safety Signs in full for Safety Signs's work. (A. 108, ¶ 10.) Niles-Wiese again had no excuse whatsoever for nonpayment. (*Id.*) As a result of this nonpayment, Safety Signs made a second claim against the Bond (the "Bond Claim"), which is the bond claim at issue in this case. (*Id.*)

Safety Signs's Bond Claim amount was initially \$35,077.48. This amount was comprised of seven unpaid invoices totaling \$33,306.29 (\$252.94, \$1,590.00, \$1,830.00, \$1,590.00, \$1,590.00, \$22,215.49, and \$4,237.86) that Safety Signs had submitted to Niles-Wiese for its work on the Project, plus \$1,759.94 in interest that had accrued through January 29, 2010, plus the \$11.25 filing fee. (A. 45-52, A.135 ¶5; R. App. 38

¶6, A. 135 ¶4, A.45-52.)

Safety Signs's last day of work on the Project was September 11, 2009. (A. 108 ¶10.) Safety Signs sent the notice of claim to both Niles-Wiese and Westfield on January 7, 2010, by certified mail. (*Id.*) The notice was again sent to Niles-Wiese's business address and to Westfield's address listed on the Bond. (*Id.*) This second notice inadvertently stated that Safety Signs's last date of work on the Project was September 9, 2009. However, Safety Signs sent the notice to both Niles-Wiese and Westfield within 120 days of the mistaken date (September 9, 2009 + 120 days = January 7, 2010). Safety Signs also corrected this typographical error in a Revised Notice of Claim sent to both Niles-Wiese and Westfield by certified mail on or around March 22, 2010. (*Id.*) It is not disputed that Westfield received both notices.

Safety Signs's adjustment of its Bond Claim amount

After submitting its Bond Claim, in June 2010, Safety Signs provided Westfield a separate presentation of the amounts owed to Safety Signs, showing that the total contract price for Safety Signs' work was \$80,638.73:

<u>Contract Item#</u>	<u>Description</u>	<u>Quantity</u>	<u>Unit</u>	<u>Amount</u>
SP0006	Traffic Control	1	LS	\$15,900.00
SP0006	Traffic Control	1	LS	\$3,500.00
P62050	Obliterate Pavement Marking	11,350	SF	\$9,080.00
P62001	Painting White Waterborne Type 1	9,500	SF	\$3,420.00
P62009	Painting Yellow Waterborne Type 1	9,450	SF	\$3,402.00
P62025	Painting Black Waterborne Type 1	23,300	SF	\$8,388.00
P62041	Reflective Media	3,800	LB	\$1,520.00

<u>Contract Item#</u>	<u>Description</u>	<u>Quantity</u>	<u>Unit</u>	<u>Amount</u>
X62002	Temp Painting White Placement & Removal	15,100	SF	\$17,365.00
X62010	Temp Painting Yellow Placement & Removal	2,400	SF	\$2,760.00
X62026	Temp Painting Black Placement & Removal	10,600	LS	\$12,190.00
	Construction Sweeping	1	LS	\$2,043.96
	Airport Flags			\$1,069.77
TOTAL:				\$80,638.73

(A.136 ¶ 11.) The quantities listed in the third column are the quantities that were provided by the Owner in the Periodic Construction Estimates. (A.136 ¶12, R. App. 49-53.) This second presentation included accrued interest of \$3,073.23 and \$11.25 for the filing fee. (A. 136 ¶ 13.)

After submitting this information, Safety Signs was reminded by the City that, for Contract Item Numbers P62050, X62002, X62010, and X62026, the City had paid Niles-Wiese for quantities slightly lower than what had been included in the Periodic Construction Estimates, as follows:

<u>Contract Item#</u>	<u>Description</u>	<u>Billed Quantity</u>	<u>Paid Quantity</u>
P62050	Obliterate Pavement Marking	11,350	8,681
X62002	Temp Painting White Placement & Removal	15,100	14,394
X62010	Temp Painting Yellow Placement & Removal	2,400	1,841
X62026	Temp Painting Black Placement & Removal	10,600	9,484

(A.136-37, ¶14.)

Reducing these quantity amounts reduced Safety Signs' claim by \$4,873.35.

(A.137 ¶15.) Safety Signs also adjusted the amount for Airport Flags by \$816.83.

(A.137 ¶16.) These adjustments reduced the principal amount of Safety Signs' claim from \$33,306.29 to \$27,119.65 ($\$33,306.29 - \$4,873.35 - \$816.83 = \$27,119.65$).

(A.137 ¶17.) Safety Signs therefore created a third presentation for Westfield with the adjusted amounts. (R.App. 70.)

When Safety Signs commenced this action on September 8, 2010, to enforce its Payment Bond claim, it utilized the adjusted principal amount of \$27,119.65. (A.137 ¶ 18.) Although Safety Signs believes that it would be entitled to be paid the plan amounts set forth in the invoices sent to Niles-Wiese (which provided the original calculation for its Bond Claim), it reasonably adjusted its claim downward to reflect the information that it had received from the Owner as to amounts that the Owner actually paid to Niles-Wiese for Safety Signs's work. (*Id.* ¶ 19.)

Summary judgment on issue of bond claim notice

Westfield moved for summary judgment against Safety Signs on the grounds that (1) Safety Signs did not timely notify Westfield of the Bond Claim and (2) Safety Signs did not send the notification of the Bond Claim to Niles-Wiese at the correct address. The District Court denied Westfield's motion for summary judgment, concluding that Safety Signs had appropriately and timely notified both Westfield and Niles-Wiese – and, having so concluded, awarded partial summary judgment *sua sponte* in favor of Safety

Signs on these issues. (Add. 1-6.)

Summary judgment on amount of damages

Safety Signs then moved for summary judgment as to the remaining issues – entitlement and the amount of damages. (Add.7-12.) In support of its motion, Safety Signs provided detailed evidence that the principal amount that Niles-Wiese had failed to pay Safety Signs was \$27,119.65. (R.App. 37-41, R.App.47-77, A.136-137.) Safety Signs calculated the amount as follows: the total principal amount that Safety Signs was owed under its Subcontract for the work that it performed on the Project was \$74,948.55:

<u>Description</u>	<u>Quantity</u>	<u>Rate</u>	<u>Value</u>
Phase I – Base Bid			
S0006 – Traffic Control	1	\$15,900.00	\$15,900.00
Phase II – Alternate 3			
S0006 – Traffic Control	1	\$3,500.00	\$3,500.00
P62001 – Paint White Type 1	9,500	0.36	\$3,420.00
P62009 – Paint Yellow Type 1	9,450	0.36	\$3,402.00
P62025 – Paint Black Type 1	23,300	0.36	\$8,388.00
P62041 – Reflective Media Type 1	3,800	0.40	\$1,520.00
P62050 – Obliterate Pavement Marking	8,681	0.80	\$6,944.80
X62002 – Temp. Marking White	14,394	1.15	\$16,553.10
X62010 – Temp. Marking Yellow	1,841	1.15	\$2,117.15

<u>Description</u>	<u>Quantity</u>	<u>Rate</u>	<u>Value</u>
X62026 – Temp. Marking Black	9,484	1.15	\$10,906.60
Invoice 90814S – Airport Flags	1	252.94	\$252.94
Invoice 82194 – Sweeping	1	2,043.96	\$2,043.96
Total Principal Amount Owed			<u>\$74,948.55</u>

(R.App.40 ¶ 18, R.App.70.) Niles-Wiese, however, only paid \$47,828.90 to Safety Signs for Safety Signs’ work on the Project. (R.App.40 ¶19, R. App.71-74.) Thus, Safety Signs is still owed a principal amount of \$27,119.65 (\$74,948.55 - \$47,828.90) for its Work on the Project. (R.App.40 ¶18-21.)

As noted by the District Court, Westfield did not produce any material evidence opposing Safety Signs’s damages. (Add.9-10.) Therefore, on December 20, 2011, the District Court awarded summary judgment to Safety Signs on entitlement and damages as well, in the principal amount of \$27,119.64. (*Id.*) On January 30, 2012, the District Court added to the judgment an award of \$33,899.68 in attorney’s fees, costs, and 18% interest under the Prompt Payment Act. (Add.13, Minn. Stat. §337.10, Subd. 3.) Westfield’s appeal followed.

ARGUMENT

I. STANDARD OF REVIEW.

The District Court decided this case on summary judgment on undisputed facts, which is subject to *de novo* review on appeal. *All Parks Alliance for Change v. Uniprop*

Manufactured Housing Communities Income Fund, 732 N.W.2d 189, 193 (Minn. 2007)

(“The application of the law to undisputed facts is subject to *de novo* review.”)

Summary judgment is proper where, as here, the pleadings, depositions or other documents demonstrate there is no genuine issue as to any material fact. *See Betlach v. Wayzata Condominiums*, 281 N.W.2d 328 (Minn. 1979). The purpose of Rule 56 is to provide “a just, speedy, and inexpensive determination of any action – by allowing a court to dispose of an action on the merits if there is no genuine dispute regarding the material facts, and a party is entitled to judgment under the law applicable to such facts.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). There is no genuine issue for trial “[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party.” *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *DLH*, 566 N.W.2d at 69.

The non-moving party must present specific facts showing there is a genuine issue for trial. *DLH*, 566 N.W.2d at 70. “The mere existence of a scintilla of evidence in support of the [non-movant’s] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant].” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). While the Court must view the evidence in the light most favorable to the non-moving party, the non-moving party “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Id.* at 586-87; *Carlisle v. City of Minnesota*, 437 N.W.2d 712, 715 (Minn. Ct. App. 1989).

II. **AS THE DISTRICT COURT CORRECTLY CONCLUDED, SAFETY SIGNS COMPLIED WITH THE NOTICE PROVISIONS OF MINN. STAT. § 574.31.**

Minnesota Statutes §574.26 requires that the general contractor on a public construction project (here, Niles-Wiese) costing more than \$75,000 provide a payment bond to ensure that subcontractors are paid for their work. In the event that the general contractor fails to pay the subcontractor, the surety that issued the bond (here, Westfield) is required to pay the subcontractor.

In this case, it is not disputed that Safety Signs performed the work on the Project that Safety Signs claims it performed; that Niles-Wiese never paid Safety Signs for the work at issue in this case; or that Westfield provided a payment bond to the City guaranteeing that if Niles-Wiese did not pay its subcontractors on the Project, Westfield would.

Despite this, Westfield argues that it should not have to pay Safety Signs. Westfield first argues that Safety Signs failed to provide sufficient notice of its bond claim under the Bond Statute, Minn. Stat. §574.31. Westfield argues that Safety Signs (1) did not timely notify Westfield of the Bond Claim and (2) did not send Niles-Wiese's notice of the Bond Claim to the correct address.

As the District Court explained, Westfield's arguments fail because Safety Signs's notification of the Bond Claim was timely and Safety Signs substantially complied with the notice statute by sending its notice of bond claim to Niles-Wiese's normal business address (the same address to which Westfield directed its own correspondence with Niles-Wiese.) For these reasons, Safety Signs respectfully requests that this Court affirm

the judgment of the District Court.

A. Minnesota law on payment bond claims.

On a non-public project, when a subcontractor is not paid, that subcontractor may assert a mechanic's lien against the property on which the subcontractor performed the work for the value of the work. But public projects are normally performed on public property (here, a public airport), to which mechanic's liens cannot attach. *Wilcox Lumber Co. v. Sch. Dist. No. 268 of Otter Tail County*, 114 N.W. 262, 263 (Minn. 1907). Therefore, subcontractors have no mechanic's lien remedy if they are not paid for their work on public projects. To rectify this situation, the legislature enacted Minn. Stat. §574.26-32 (the "Bond Statute"), requiring that general contractors provide payment bonds for projects costing \$75,000 or greater. Minn. Stat. §574.26, subd.2.

The purpose of the Bond Statute is to ensure that all the subcontractors working on the project (such as Safety Signs) are paid for the work they perform. *Wilcox Lumber Co.*, 114 N.W. at 263. If the subcontractor is not paid, it can make a claim on the payment bond and receive payment from the surety. Since the statute was written with the goal of ensuring that subcontractors are paid for their work, the Bond Statute and case law discussing it is generous with the requirements it places on subcontractors. *See, e.g., Iowa Concrete Breaking Corp. v. Jewat Trucking, Inc.*, 444 N.W.2d 865, 868 (Minn.Ct.App. 1989) ("Generally, a surety bond is to be liberally construed in favor of the obligee.") "Being remedial, the act should be * * * 'liberally construed and only a substantial compliance exacted as a condition precedent to the maintenance of an action on the bond.'" *Wheeler Lumber Bridge & Supply Co. v. Seaboard Sur. Co.*, 16 N.W.2d

519, 522 (Minn. 1944) (applying Minn. Stat. §574.31) (internal citations omitted).

It should be noted that the notice statute was rewritten in 1994 to follow the mechanic's lien rules. Minn. Stat. §574.31 (1993) (amended 1994); *cf* Minn. Stat. §574.31 (1995). A previous requirement that the subcontractor file the bond notice with the county auditor was removed, and the time period for serving notice was changed to "120 days after completion, delivery, or provision by the person of its last item of labor and materials," the same time limit as is contained in the mechanic's lien statute. *Id.*; Minn. Stat. §514.08.

B. The District Court correctly concluded that Safety Signs served notice timely under Minn. Stat. §574.31.

Westfield argues that Safety Signs failed to timely serve notice of its bond claim, and that therefore, Safety Signs has lost its bond claim. The District Court disagreed. Minnesota Statutes §574.31 states that a bond claimant must serve written notice "within 120 days after completion, delivery, or provision by the person of its last item of labor and materials, for the public work...personally or by certified mail upon the surety that issued the bond and the contractor on whose behalf the bond was issued." Minn. Stat. §574.31.

Safety Signs served its Bond notice on January 7, 2010, by certified mail. (Add. 23-25.) Safety Signs' Bond notice initially stated that Safety Signs's last date of work on the Project was September 9, 2009. While in fact, as reflected in Safety Signs's amended notice of claim, Safety Signs's last date of work on the Project was actually September 11, 2009, this two day difference is irrelevant, as it is undisputed that Safety Signs sent

Westfield its written Bond claim notice by certified mail on January 7, 2010, within 120 days of either September date.

Westfield admits that service by January 7, 2010, is timely. Westfield argues, however, that Safety Signs's service of the notice of claim is measured not from the day on which Safety Signs *sent* the notice, but from the date on which Westfield *received* the notice, which Westfield claims was January 11, 2010.

Westfield is mistaken. As Westfield admits, the Bond Statute itself does not specify whether service of the notice is effective on mailing or receipt. *See* Minn. Stat. §574.31. Normally, service by mail is effective upon mailing. Minn. R. Civ. P. 5.02. Furthermore, while does not appear to be any Minnesota case law on this issue under the Bond Statute, there is case law on the matter under the mechanic's lien statute. The courts have stated that the Bond Statute has been written to mimic the mechanic's lien statute (Minn. Stat Chap. 514, "Mechanic's Lien Statute"), that it has the same purpose, and should be interpreted similarly. *See Bemidji Blacktop, Inc. v. Stamson & Blair, Inc.*, No. C6-00-1724, 2001 WL 345511, *1 (Minn. Ct. App. April 10, 2001); *Collins Elec. Systems, Inc. v. Redflex Traffic Systems, Inc.*, No. A07-0675. 2008 WL 933488, *2 (Minn. Ct. App. April 8, 2008) (purpose of bond is to protect parties who provide labor or materials in performing contract work for public bodies). Consequently, this court may find guidance in the courts' treatment of the mechanic's lien statement service requirement.

Under the Mechanic's Lien Statute, just as under the payment Bond Statute, a mechanic's lien statement must be served personally or by certified mail within 120 days

of the subcontractor's last day of work on the project. *Cf.* Minn. Stat. §§514.08, 574.31. Also like the Bond Statute, the Mechanic's Lien Statute does not specify whether service via certified mail is effective upon mailing the statement or upon the receipt of the statement. Examining the issue, the Minnesota Supreme Court concluded that service of a mechanic's lien statement is effective upon mailing. *Eischen Cabinet Co. v. Hildebrandt*, 683 N.W.2d 813, 816-18 (Minn. 2004); *Premier Bank v. Becker Development, LLC*, 785 N.W.2d 753, 759 (Minn. 2010). In so concluding, the *Eischen* court noted that "[w]hen the language of a mechanic's lien statute is unclear or ambiguous, we have liberally construed the statute in favor of the mechanic's lien claimant," because of the remedial nature of the statute:

The language of the statute is silent as to whether service by certified mail is effective upon mailing or upon receipt. It is clear, however, that the mechanics' lien statute is remedial in nature and its essential purpose is to reimburse laborers and material providers who improve real estate and are not paid for their services. *Guillaume & Assocs. v. Don-John Co.*, 336 N.W.2d 262, 263 (Minn.1983).

When we consider (1) the remedial purpose of the mechanics' lien statute; (2) the definition of certified mail provided by the U.S. Postal Service; (3) general legal authorities; (4) our own rules of civil procedure that provide that service by certified mail is effective upon mailing; and (5) our previous interpretation in *Schneider*, where the statutory notice provision was silent, that service by certified mail is effective upon mailing, we conclude that service by certified mail of a mechanics' lien claim statement, as permitted by Minn. Stat. § 514.08, subd. 1(2) (2002), **is effective upon mailing**.

Eischen, 683 N.W.2d at 816-18 (emphasis added) (internal footnotes omitted).

The court's reasoning in *Eischen* applies equally here, especially as this portion of the Bond Statute was expressly modeled on the Mechanic's Lien Statute and serves the

same purpose for public projects as the mechanic's lien serves on private projects - ensuring that subcontractors and suppliers are paid. *Wilcox Lumber Co.*, 114 N.W. at 263; *see also Nelson Roofing*, 245 N.W.2d at 868 (same). Furthermore, the Minnesota Supreme Court has expressly stated that “[The Bond] statute should not receive a stricter construction than the statute prescribing the contents of a mechanic’s lien statement.” *Standard Oil Co. v. Enebak*, 222 N.W. 573, 574 (Minn. 1928).

Westfield’s argument that Minn. Stat. §574.31, subd. 2(d), which allows the surety 30 days after its “receipt” of the claim notice to take certain actions somehow supports is argument that “serves” (as stated in subd. 2(a) for claim on the bond) somehow means “receipt” does not make any sense. Rather, all the use of the “receipt” in subdivision 2(d) means is that the legislature knows how to say “receipt” when it means receipt. The legislature did not say “receipt” with regard to when service of notice was effective. *See e.g., In re Stadsvold*, 754 N.W.2d 323, 328-29 (Minn. 2008) (“Moreover, distinctions in language in the same context are presumed to be intentional, and we apply the language consistent with that intent.”).

Westfield’s citation to the federal Miller Act is similarly inapposite because the language of the Miller Act is decidedly different from the Bond Statute. In the Miller Act, a person bringing a bond claim must “give” notice of the claim within 90 days of its last date of labor. 40 U.S.C. §3133(b). In contrast, the Bond Statute states that the notice must be “served.” Minn. Stat. §574.31, subd. 2(a). Again, under both the Federal Rules and Minnesota Rules of Civil Procedure, “service by mail is complete upon mailing.” Minn.R.Civ.P. 5.02; Fed.R.Civ.P. 5(b).

Under the express terms of the statute and Minnesota case law, Safety Signs's service of the notice of claim was effective upon mailing. Mailing by certified mail took place on January 7, 2010, within the 120 day deadline set by statute. (Add. 24.) The District Court did not err in concluding that Safety Signs's service of the notice of claim was timely.

C. **The District Court correctly concluded that Safety Signs sufficiently complied with the Minn. Stat. §574.31 in sending its notices of bond claim.**

Safety Signs, as required by Minn. Stat. §574.31 to attempt to notify Niles-Wiese of its bond claim, sent Niles-Wiese notice of its Bond Claim at Niles-Wiese's business address – the address listed in Niles-Wiese's Subcontract, its website, and to which Westfield sent its own letters to Niles-Wiese. (A.107, ¶5; 109-121; 107, ¶6; 122; R.App. 30.) But Westfield argues that Safety Signs's service of its notice was insufficient because Safety Signs sent the notice to Niles-Wiese's business address instead of the address provided for Niles-Wiese on the Bond.

Westfield's hyper-technical argument fails for five reasons: first, as the District Court concluded, as long as the bond claimant strictly complies with the statute's requirement that it attempt notice, Minnesota law requires only substantial compliance with the details of the notice requirements. Safety Signs sufficiently complied with the Bond Statute by sending the notice to Niles-Wiese's business address.

Second, the Minnesota courts have repeatedly held that the purpose of the notice requirement is that the *surety* be appropriately served and made aware of the bond claim,

not the contractor. Safety Signs's service fulfilled the purpose of the Bond Statute and is therefore sufficient.

Third, Westfield has no standing to protest that Safety Signs did not sufficiently serve notice on another party. It is undisputed that Westfield itself was correctly served.

Fourth, given the parties' course of dealing, Westfield waived its rights to protest defects in the service of the notice at Niles-Wiese's business address under Minnesota law.

Fifth, Westfield and Niles-Wiese altered the terms of the Bond through their course of dealing, in which they had previously permitted service of the Bond Claim on Niles-Wiese at its business address.

For these reasons, Safety Signs respectfully request that this Court affirm the decision of the District Court.

1. The District Court correctly concluded that Safety Signs sufficiently complied with Minn. Stat. § 574.31 in serving notice on Niles-Wiese.

As the District Court concluded, Safety Signs sufficiently complied with the statute in serving notice on Niles-Wiese. Safety Signs attempted notice, and substantially complied with the Bond Statute with respect to notice. Minnesota courts have concluded that, while parties must strictly comply with the requirement that they *attempt* notice, defects in that notice that result in technical noncompliance with the statute's notice requirements are not fatal to a bond claimant's claim so long as the purpose of the notice statute is effectuated.

- a. Safety Signs's good faith attempt at notice constitutes substantial compliance with the Bond Statute, which is all that is required.

Westfield argues that because Safety Signs sent the notice of bond claim to Niles-Wiese at Niles-Wiese's normal business address instead of the address listed on the Bond itself, Safety Signs failed to comply with the Bond Statute. (Westfield Brief pp.14-19.)

But as explained by the District Court:

[t]he Minnesota Supreme Court has held that as long as notice is served and the purpose of the statute is accomplished, a slight deficiency in the notice will not bar a bond claimant from pursuing a claim under the statute. *Benson v. Berrett*, 214 N.W. 47, 48 (Minn. 1927) (although plaintiff served notice on surety's main office in another state, plaintiff's claim was not barred, as notice was sufficient to inform the *surety* of the *principle's* [sic] default on the bond) (emphasis added).

(Add. 5.)

The District Court is correct. As Minnesota Supreme Court explicitly stated in *Wheeler*, “[b]eing remedial, the [Bond Statute] should be * * *liberally construed and **only a substantial compliance** exacted as a condition precedent to the maintenance of an action on the bond.” 16 N.W.2d at 522 (quoting *Ilg Electric Ventilating Co. v. Conner*, 215 N.W. 675, 675 (Minn. 1927)). Just such a situation arose in *Ilg Electric*. While the statute considered in *Ilg Electric* was different in many respects from the current version, it still contained the requirement that the bond claim specify “the nature and amount of [the] claim and the date of furnishing the last item thereof[.]”⁴ But despite the fact that

⁴ Minn. Stat. § 574.31 provides in relevant part:

[N]o action shall be maintained on the payment bond unless, within 120 days after completion, delivery, or provision by the person of its last item

the statute specifically required the bond claimant to provide “the date of furnishing the last item [of labor]” in the bond claim, the court in *Ilg Electric* held that notice was sufficient even though the bond claimant had not included this information. 215 N.W. 675, 675 (Minn. 1927). The court stated, “[t]he only basis for a plausible claim that the notice does not comply with the statute quoted is that it does not specify the date on which the last item was furnished. This omission occurs to us not to be a substantial defect, considering that, as the statute now reads, the date [of the last date of work] has no bearing upon the rights of the parties.” *Id.* The *Ilg Electric* decision makes clear that substantial compliance with the statute is sufficient, even if technicalities specifically stated in the statute are not complied with. *Id.*; see also *Benson*, 214 N.W. at 48.

Similarly, here, the fact that Safety Signs addressed the notice to Niles-Wiese’s business address as opposed to the bond address did not prejudice the parties and did not hinder the rights of the parties or the purpose of the notice provision. There is no evidence in this case of prejudice at all; Westfield simply seeks to dismiss Safety Signs’s claim on any technicality. Westfield, in particular, suffered no ill effects.

Additionally, the District Court further noted that the fact that the notice to Niles-Wiese did not reach Niles-Wiese did not mean that Safety Signs’s notice was improper. The District Court pointed out that in *Eischen*, the Minnesota Supreme Court held that

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 at their addresses as stated in the bond specifying the nature and amount of the claim **and the date the claimant furnished its last item of labor and materials for the public work.**

service by certified mail occurred even though it was returned to the sender. (Add. 6, citing 683 N.W.2d at 817.) The District Court further noted:

The Minnesota Court of Appeals held notice was effective when certified mail was properly directed at an intended recipient, even though not actually delivered. *Carolina [Holdings Midwest, LLC v. Copouls]*, 658 N.W.2d [236] at 240 [Minn.App. 2003]. In *Carolina*, the certified mail was sent to the address that the appellants had used to obtain a mortgage, *Id.* The court held that given the use of the address, it was not unreasonable for respondents to assume that mail sent to that address would reach appellants. *Id.*

In the present case, notice of the bond claim was still effective upon mailing, even though it did not reach Defendant Niles-Wiese. Plaintiff clearly directed its notice at Defendant Niles-Wiese, as this address was the one listed on its Agreement with Defendant Niles-Wiese, to which all previous invoices were sent. Furthermore, it was the address used when Plaintiff served its first notice of bond claim on Defendant Niles-Wiese, to which it received a certified-return receipt as evidence that its bond claim was received at that address. It was also the address listed on Defendant Niles-Wiese's website under its contact information, which Defendant Westfield used in its correspondence with Defendant Niles-Wiese. No objection to the use of the address was raised by either Defendant, so it was not unreasonable for Plaintiff to continue using the address.

(Add. 6.) In other words, the Bond Statute is met through a reasonable good faith attempt at service. Because Safety Signs's attempted notice on Niles-Wiese (and actual notice on Westfield) substantially complied with the statute's requirements, Safety Signs respectfully requests that this Court uphold the decision of the District Court.

- b. Minnesota courts have limited "strict compliance" to requiring that bond claimants make a valid attempt at service.

Westfield tacitly admits that Safety Signs substantially complied with the statute. But Westfield argues that substantial compliance is not enough; instead, it states, Safety Signs was required to "strictly comply" with the Bond Statute. As a result, Westfield

argues, Safety Signs's minor defect in its notice, which harmed neither Westfield nor Niles-Wiese, invalidates Safety Signs's Bond Claim, despite Safety Signs's substantial compliance with the statute.

While the case law may seem at first blush to support Westfield's position, as the District Court pointed out, a closer reading shows that neither the statute nor the case law supports Westfield's contention. The "strict compliance" the courts require in those cases is compliance with the requirement that bond claimant *attempt notice* – when it comes to the details of the notice, substantial compliance is sufficient. As the District Court pointed out, all the case law Westfield cites to support its contention that strict compliance is necessary deals with situations wherein the bond claimants failed to make **any attempt** to notify the county auditor of the bond claim. *Ceco Steel Products Corp. v. Tapager*, 294 N.W. 210, 211-12 (Minn. 1940) (neither plaintiff filed its claim with the county auditor); *Mineral Resources, Inc. v. Mahnomen Const. Co.*, 184 N.W.2d 780, 785 (Minn. 1971) (same); *Spetz & Berg, Inc. v. Luckie Const. Co., Inc.*, 353 N.W.2d 233, 234 (Minn. Ct. App. 1984) (same). The point made by the courts in those cases was that a bond claimant cannot simply fail to attempt notice and then make a claim under the bond. *Id.* "Strict compliance" applied to the question of whether notice was sent *at all*. (*Id.*) The equivalent here would be if Safety Signs made no effort whatsoever to notify Niles-Wiese. In contrast, in the cases cited in Section II(C)(1)(a) above, the bond claimants made an attempt at notice, but the notice did not exactly meet the statutory requirements in some way. In those cases, the courts noted that substantial compliance was sufficient.

Similarly, here, Safety Signs attempted notice reasonably and in good faith; its notice simply failed to meet one of the technical criteria in the statute.

While Westfield claims that strict compliance with the *technical details* of the statute is a “condition precedent” for maintaining an action under a bond, the Minnesota Supreme Court explicitly stated in *Wheeler* that “[b]eing remedial, the act should be * * *liberally construed and only a substantial compliance exacted as a condition precedent to the maintenance of an action on the bond.” 16 N.W.2d at 522. There is further no mention in the statute of any need for strict compliance, and the case law discussed above specifically states that substantial compliance with the details of the statute is sufficient.

Second, the cases cited by Westfield deal with a county auditor notification requirement that has been discarded from the Bond Statute. As discussed above, the Bond Statute has been reworked to mimic the mechanic’s lien statute, and deserves the same generous treatment. *Eischen Cabinet*, 683 N.W.2d at 816-18; *Standard Oil Co.*, 222 N.W. at 574.

Third, Minnesota courts have specified that “our duty is to construe the [Bond Statute’s] statutory language so as to give effect to the legislative intent.” *Wheeler*, 16 N.W.2d at 522. As the District Court noted, the statutory intent of the Bond Statute is remedial, and the intent is to ensure that subcontractors attempt to notify the general contractor and surety that a bond claim is being made. It is undisputed that Safety Signs made such an attempt. Therefore, the purpose of the Bond Statute has been satisfied. Safety Signs should be permitted to collect against the Bond.

Because Safety Signs strictly complied with the statutory requirement to attempt notice, and substantially complied with the form of the notice, effecting the purpose of the statute, the District Court did not err in concluding that Safety Signs's bond claim sufficiently complied with Minn. Stat. §574.31.

2. Westfield has no standing to protest that some other party was not sufficiently served with notice of the bond claim.⁵

Westfield's argument that the Bond claim is invalid because *Niles-Wiese*, not Westfield, was not served using the address for Niles-Wiese on the Bond fails because Westfield has no standing to protest lack of appropriate service to a another party. It is undisputed that Westfield itself was notified of the claim at the address listed on the Bond. (Tarasek Aff., Exs. A, C.)

An individual or entity does not have standing to protest a wrong done to someone else absent special circumstances. For instance, in *God's Helping Hands v. Taylor Investment Corp.*, Nos. C7-99-624, C4-99-631, 1999 WL 759991, *3 (Minn. Ct. App. Sept. 28, 1999), the Minnesota Court of Appeals concluded that the bank lacked standing to assert the claim because the specific provision of the Internal Revenue Code at issue, the notice requirement, was designed to protect the taxpayer, not third parties. *See also Fidelity & Guaranty Ins. Co. v. Blount, slip op.*, Nos. 2008-CA-01931-SCT, 2008-CA-01248-SCT, 2011 WL 1048247, *11 (Miss. March 24, 2011) (sureties lacked standing to

⁵ The district court's order and judgment can be affirmed on any ground, even one not considered by the district court. "Appellate courts are free to affirm for reasons other than those on which a decision is based." *Williams v. National Football League*, 794 N.W.2d 391, 395 (Minn.Ct.App. 2011)

contest the alleged lack of notice to principal). If the principal waives a known right, or by acts or representations is bound by estoppel, then the surety bound as well. *See id.*

Niles-Wiese has not protested that it was not appropriately served with notice of the claim. Westfield itself was undisputedly served at the correct address. Westfield has no standing to assert Niles-Wiese's service objections.

The District Court concluded that Westfield had standing to protest that Niles-Wiese was not served because, in previous cases brought before the payment Bond Statute was amended in 1994, Minnesota courts had allowed sureties to protest bond claims if the claimant did not file its notice *with the county auditor*. *Spetz*, 353 N.W.2d at 234-35; *Mineral Res.*, 184 N.W.2d at 785-86; *Ceco*, 294 N.W. at 212. However, there is no evidence that any party ever raised the *issue* of standing in these prior cases. Safety Signs respectfully requests that this Court conclude that Westfield does not have standing to protest the alleged failure of service on another party.

3. The courts have concluded that the purpose of the statute is that the surety receive notice of the claim; here, the purpose was effectuated, and therefore service was appropriate.

Finally, Safety Signs' service upon Niles-Wiese was appropriate because it fulfilled the Bond Statute's purpose, as stated by the Minnesota courts:

The clear intent of Minn.Stat. § 574.31, subd. 2(a) is that a bond claimant be **required to give notice to a surety** within a prescribed time to be allowed to pursue the claim. If a claimant is to be held to the notice requirement, he needs to know how, to whom, and where to give notice. Minn.Stat. § 574.31, subd. 2(a) requires personal service or service by certified mail to the surety's address listed on the bond. Minn.Stat. § 574.28 requires that the surety's address be listed on the bond. **We agree with the district court that these provisions are intended to facilitate the giving of the requisite notice to the surety.**

Edward Kraemer & Sons, Inc. v. Ashbach Const. Co., 608 N.W.2d 559, 562-63 (Minn. Ct. App. 2000) (emphasis added). It is indisputable that the surety, Westfield, received notice of Safety Signs's bond claim and that Safety Signs served Westfield using the address provided for Westfield on the Bond. (Add. 24.) Westfield was served the notice within the required time period. The purpose of the statute – to notify the surety – was effectuated, and now the second purpose of the statute should be effectuated – Safety Signs, the subcontractor who timely and professionally performed its work on the Project, should finally be paid for that work.

Because, for the above reasons, the District Court did not err in concluding that Safety Signs timely and sufficiently served its bond claim notice, Safety Signs respectfully requests that this Court affirm the decision of the District Court.

4. Westfield has waived its right to object to Safety Signs's service on Niles-Wiese at Niles-Wiese's contractual address.

Westfield has also waived any right it had to protest Safety Signs's service of notice on Niles-Wiese because both Westfield and its principal (Niles-Wiese) permitted service of bond claims on Niles-Wiese previously at Niles-Wiese's alternative, regular business address.

The Minnesota Supreme Court has stated that defects in the form of notice of bond claims under the Bond Statute may be waived by a surety. *Standard Oil Co. v. Enebak*, 222 N.W. 573, 574 (Minn. 1928). In *Standard Oil Company*, the supplier timely served a written notice of its bond claim, but the notice was technically insufficient. However, upon receipt of the notice, the surety conducted itself so as to lead the supplier to believe

that the notice was adequate and sufficient. The court concluded, “We think the defect, if any, in the notice, was waived by respondent.” *Id.* at 116, 222 N.W. at 574. The court explained:

We are not confronted with the question whether a written notice of this sort could be waived, or the time waived, but simply whether a defect in the one timely served could be waived. And we are of opinion that it can be and clearly was. * * * We are unable to discover any good reason why a defect in a notice required to be given as a condition precedent to suit under a contract may be waived and a similar defect in a notice required to be given as condition precedent under a statutory remedy cannot be. * * *

Standard Oil Co., 222 N.W. at 574.

Just as in *Standard Oil*, here, notice was timely served – merely technically deficient. This technical defect could be, and was, waived by Westfield. Safety Signs submitted its first February 9, 2009, notice to the same address for Niles-Wiese that Westfield now claims was not the correct address, and Westfield did not object (nor did Niles-Wiese). Furthermore, *Westfield itself* used that address for its bond-related communications with Niles-Wiese. (A. 107, ¶ 6; 122.) Westfield’s previous conduct, like the conduct of the surety in *Standard Oil Co.*, lead Safety Signs to believe that the 112 South Main Street address was acceptable. Consequently, Westfield is estopped from now claiming that Safety Signs’s use of Niles-Wiese’s address at 112 South Main Street was defective.

Westfield argues that “*Speltz & Berg* and *Mineral Resources* have held that it is *impossible* for a surety to waive such notice provisions.” (Westfield Brief p. 19.) Westfield misinterprets these cases. Both these cases concluded that the surety could not waive the bond claimant’s statutory obligation to *make an attempt* to notify the county

auditor of the bond claim. *Mineral Res.*, 184 N.W.2d at 787; *Speltz*, 353 N.W.2d at 235. In other words, as *Standard Oil* agreed, the surety cannot waive the notice requirement altogether. 222 N.W. at 574. As *Standard Oil* continued, however, the surety *can* waive a *defect* in notice. *Id.* There is no question that Safety Signs made an attempt to notify Niles-Wiese of the bond claim. The question is simply whether Westfield waived a minor *defect in that notice*: specifically, that the notice was served on Niles-Wiese's business address rather than at the address noted on the Bond.

Because Westfield *did* waive its objections to the address used by Safety Signs for service on Niles-Wiese, summary judgment in favor of Safety Signs concluding that Safety Signs sent acceptable notice to Niles-Wiese was proper on this ground as well.

5. Westfield and Niles-Wiese further altered the Bond through their course of dealing to permit service of the bond claim on Niles-Wiese at its normal business address.

Section 574.31 of the Bond Statute states that the bond claimant should serve the bond claim notice to the contractor at its address listed in the bond. But a bond is a written contract, subject to change by agreement between the parties, and Niles-Wiese's address in the contract was part of the contract. "It is well settled that a written contract may be modified by subsequent acts and conduct of the parties to the contract." *Pollard v. Southdale Gardens of Edina Condominium Ass'n., Inc.*, 698 N.W.2d 449, 453 (Minn. Ct. App. 2005) (emphasis added). In such situations, the contract is considered changed and the party permitting the modified course of dealings is estopped from later protesting that the letter of the contract was not adhered to. *Pollard*, 698 N.W.2d at 454-55.

Here, the address provided for Niles-Wiese on the Bond was originally 215 1st Street Northeast, Medford, Minnesota, 55049. (Add. 18.) However, the Defendants' acts and conduct modified the Bond to permit service on Niles-Wiese at 112 South Main Street, P.O. Box 419, Medford, MN 55049, the address to which Safety Signs sent the first bond notice. (A. 107, ¶ 5; 109-121.) This was the address Niles-Wiese listed as its address in its contract with Safety Signs. (A. 109.) It was the address that Niles-Wiese listed on its own website. (R.App. 30.) Safety Signs sent its invoices to that address without objection by Niles-Wiese. (A. 107, ¶7.) *Westfield itself* used that address for its bond-related communications with Niles-Wiese. (A. 107, ¶6; 122-23.) Most importantly, Safety Signs had previously sent a bond claim notice to that address without any objection by either Niles-Wiese or Westfield. (A. 107, ¶8; R.App. 31-34.) Both Defendants, through course of dealing, presumptively agreed to change the address listed for Niles-Wiese on the Bond and/or permit service of bond claims on Niles-Wiese at that address.

Therefore, even if strict compliance under the statute is necessary, Safety Signs strictly complied in its service of notice on Niles-Wiese at the changed address, and the District Court did not err in awarding summary judgment to Safety Signs.

III. WESTFIELD'S ARGUMENT THAT SAFETY SIGNS MADE ITS CLAIM AGAINST THE WRONG BOND WAS NOT RAISED BELOW AND CANNOT BE PROPERLY EXAMINED.

Westfield next argues that the District Court's decision should be overturned on a ground never raised before the District Court: that Safety Signs made its claim against the wrong bond. Westfield argues that a second, phantom bond, never produced in discovery

or even hinted at before, exists somewhere, and this bond is the actual bond that Safety Signs “should have” made its claim against. Westfield’s argument was never even mentioned (let alone formally raised) in the District Court, is impossible to validate, relies on evidence never produced in discovery or made part of the record, and should consequently be rejected as waived. Furthermore, even if considered, Westfield’s argument is without merit; all evidence, including the face of the Bond produced, indicates that Safety Signs properly made its bond claim.

A. Westfield indefensibly failed to raise the “phantom bond” argument below; therefore, Westfield has waived this argument.

Westfield has waived its argument that a second, unseen bond exists that is the actual bond against which Safety Signs should have made its claim. Under Minnesota law, an appellate court “may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below.” *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Westfield never produced (or even mentioned) this alleged second bond before the District Court. There is no such “second bond” in the record. It still has not been produced, and indeed cannot be produced now, on appeal. Furthermore, because Westfield never raised this claim previously, the District Court had no opportunity to examine any evidence in support of this claim or to rule upon it. Under *Thiele*, it is not appropriate for this Court to consider Westfield’s claim as it is outside the record and was never raised below.

Westfield admits that it never raised this argument below or introduced evidence related to it, and presents no excuse for its failure to do so. Westfield would presumably

know which bonds it issued for the Project. Yet it never asserted any defense alleging that Safety Signs made its claim against the wrong bond. Westfield did not mention this in its Answer to the Complaint. It did not disclose a second bond in response to document requests, or reference it in interrogatory responses. It did not mention a second bond in its summary judgment motion, or in response to Safety Signs's discovery motion. Westfield had a year in the District Court to raise this argument and produce this alleged bond; it did not, and it has lost its opportunity to do so.

Permitting Westfield to withhold evidence in discovery, through summary judgment, and only to raise the alleged evidence on appeal without any excuse is expressly contrary to settled precedent. This Court should not permit parties to flaunt the rules of discovery and the finality of court judgments in this way. Safety Signs respectfully requests that this Court conclude that Westfield has waived its opportunity to raise this new claim by failing to introduce it or submit any evidence supporting it into the record below.

B. This Court has subject matter jurisdiction over this case; therefore, Westfield cannot raise its “second bond” argument after failing to do so in any way in the District Court.

Westfield argues instead that this Court must consider the late-submitted argument anyway, because, Westfield claims, it is a challenge to the District Court's “subject-matter jurisdiction” and therefore can be considered at any stage of litigation.

Westfield's argument belies credulity and shows a deep misunderstanding of subject matter jurisdiction. “Subject matter jurisdiction has been defined as not only authority to hear and determine a particular class of actions, but authority to hear and

determine the particular questions the court assumes to decide.” *Duenow v. Lindeman*, 27 N.W.2d 421, 425 (Minn. 1947) (quoting *Sache v. Wallace*, 112 N.W. 386, 387 (Minn. 1907)). Westfield argues that if Safety Signs did not fully comply with the Bond Statute, this Court *does not have jurisdiction* over the case to decide it one way or another – just as, for example, a district court would not have the jurisdiction to hear a case that should be in juvenile court.

But a party’s alleged failure to fulfill its obligations under a Minnesota statute is in no way a matter outside this Court’s subject-matter jurisdiction. For instance, in *Cochrane v. Tudor Oaks Condominium Project*, the defendant argued that if the plaintiff did not bring its claim within the statute of limitations, the claim ceased to exist and the court no longer had jurisdiction over the claim. 529 N.W.2d 429, 432 (Minn. Ct. App. 1995). The court rejected the defendant’s argument and explained that, instead, the plaintiff’s failure simply divests the plaintiff of *capacity to sue* for fraud. The court retains jurisdiction to decide and dispose of the case. Similarly, here, if Safety Signs were found to have made its Bond Claim incorrectly, the District Court’s decision would not have been to dismiss the case for lack of jurisdiction. It would have been to award summary judgment against Safety Signs.

Accordingly, Minnesota courts have repeatedly ruled on whether a claimant sufficiently complied with the Bond Statutes with no mention whatsoever of jurisdictional problems. Westfield can present no law to support its argument apart from some errant language in a case from the United States Ninth Circuit Court of Appeals, which is not precedential and did not even consider Minnesota’s Bond Statute. See

United States for Use of Celanese Coatings Co. v. Gullard, 504 F.2d 466, 468 (9th Cir. 1974), which only states that bringing action on a bond claim within one year is a condition precedent to maintaining an action on the bond. The other language cited by Westfield only indicates that a failure to comply with the bond law simply results in the plaintiff losing its bond claim. *United States v. Daniel, Urbahna, Seelye and Fuller*, 357 F.Supp. 853, 861-62 (N.D.Ill. 1973); *United State ex rel Carter-Schneider-Nelson, Inc. v. Campbell*, 293 F.2d 816, 818 (9th Cir 1961). None of these cases say anything about subject matter jurisdiction. At best, all these cases (if they applied) require is that litigation on a bond claim occur within one year of the claimant's last date of work; here it is undisputed that Safety Signs commenced its litigation on September 8, 2010 (A.1-A.20), which is within one year of its last date of work. Thus, any "jurisdictional" prerequisite has been met. Moreover, Westfield's own actions belie its argument – even here, Westfield does not argue that the case should be dismissed for lack of subject-matter jurisdiction. Westfield argues, instead, that it should be allowed to offer new arguments that it failed to make before the district court.

Because there is no valid question of subject matter jurisdiction, Safety Signs respectfully requests that this Court conclude that Westfield cannot raise its alleged bond argument herein because it did not bring the argument in the District Court.

C. Westfield's argument is without merit, as Safety Signs did claim against the correct bond.

Westfield states that the Bond in the record is the bond only for Phase 1 of the Project, and that there is some other bond issued for Phase 2, which is not in the record.

Even if Westfield had not waived this argument, the record contradicts it. The plain language of the Bond indicates that it is for the entire Project. (Add. 18, stating that the bond is “for the construction of: Owatonna Degner Regional Airport – Construct Runway 5/23 and Taxiway B.”) Safety Signs’s own Subcontract with Niles-Wiese similarly indicates that it is for the entire Project and describes it in the same terms as provided in the Bond. (A.109.) Safety Signs’ Subcontract was indisputably for both Phase I and Phase II. (*Id.*) If there is a second bond, Westfield has provided no evidence that it had anything to do with Safety Signs’ scope of the work. Indeed, Niles-Wiese would not have been permitted under the bond law to submit a bond for only part of the Project at the beginning; it is required to submit a bond for the full amount of the Project work. Minn. Stat. Sec. 574.26, Subd. 3 (“The penalty of each bond must not be less than the contract price.”)

It is also worth noting that Safety Signs’ Bond Claim does not reference a bond number at all. (A.15-A.16) Thus, any argument that Safety Signs made a claim on the wrong bond is nonsensical in any event. There is no requirement under the Bond Statute for the Bond Claim to reference a bond number. *See* Minn. Stat. §574.31, subd. 2(a).

Because the undisputed evidence shows clearly that the Bond covered the entire Project, not just part of it, even if Westfield’s argument were not waived by its failure to raise it below, Westfield would still not succeed on its claim that Safety Signs made its claim against the wrong bond. Safety Signs therefore respectfully requests that this Court affirm the decision of the District Court.

IV. THE DISTRICT COURT CORRECTLY CONCLUDED THAT SAFETY SIGNS DID NOT “INTENTIONALLY OVERSTATE” ITS CLAIM.

As shown in the fact section above, Safety Signs submitted substantial evidence of its entitlement to its claimed damages to the District Court, including affidavits from Safety Signs and the City with firsthand testimony showing that Safety Signs performed its work and a raft of documents to support the amount of claimed damages. In response, Westfield introduced no evidence at all to contradict either the merit or quantum of Safety Signs’s claim. (Add. 10.) Consequently, the District Court granted summary judgment to Safety Signs, pointing out that to survive summary judgment, “the nonmoving party may not rely upon mere averments in the pleadings or unsupported allegations but must come forward with specific facts to satisfy its burden[.]” (Add. 10.)

On appeal, Westfield does not dispute that Safety Signs performed all of its Contract work, appropriately, timely, and completely. Instead, although Westfield could present no evidence that Safety Signs’s damages numbers are incorrect,⁶ Westfield argues

⁶ Westfield argued below that an email from Niles-Wiese, attached to the affidavit of Jason Tarasek, Westfield’s counsel, called into question the damages calculations. The email, apparently from a Niles-Wiese employee (her position is unspecified), provided some numbers indicating that Niles-Wiese paid Safety Signs slightly more than Safety Signs claimed it was paid (less than \$1,000 more.) As Safety Signs pointed out, Mr. Tarasek obviously had no firsthand knowledge of how much Niles-Wiese had paid to Safety Signs. Because Mr. Tarasek did not have personal knowledge of facts stated in the email (or any of the other submitted documents), they were hearsay, lacked appropriate foundation, and not admissible. Minnesota Rule of Civil Procedure 53.05 requires that “[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” Mr. Tarasek’s affidavit did not meet this standard. No affidavit from Niles-Wiese established the

that Safety Signs's small adjustment to its damages raises a question of material fact regarding whether Safety Signs initially "intentionally overstated" its claim. Citing a provision in the mechanic's lien law that is not contained in the Bond Statute, Westfield argues that if Safety Signs "intentionally overstated" its claim, Safety Signs should lose its entire claim.

Westfield's argument has no basis in law or in fact. First, while under mechanic's lien law there is a specific statutory provision stating that a lienholder may lose its lien if it intentionally overstates the lien amount, there is no such provision in the Bond Statute. Second, even if there were such a provision in bond law, Safety Signs presented substantial uncontested evidence that it did not "overstate" its bond claim, let alone "intentionally overstate" the claim.

A. Under Minnesota law, overstatement of bond claim does not result in a forfeiture of the claim.

In arguing that Safety Signs's entire Bond Claim is forfeit if Safety Signs "intentionally overstated" the claim, Westfield relies solely on the Minnesota mechanic's lien statute. A section of that statute titled "Inaccuracies in Lien Statement" states that a *mechanic's lien* may be unenforceable if the lien is intentionally overstated. *See* Minn. Stat. § 514.74.

The problem with Westfield's argument is that the Bond Statute contains no similar provision. The Bond Statute does not say anything whatsoever about

amount. Westfield, though mentioning the information repeated from the email in its fact section, does not raise it in its argument as a basis for challenging Safety Signs's damages amount – presumably because Westfield knows that the information in the email was never properly authenticated. (Westfield Brief p. 6, 22-24.)

overstatements, much less about bond claimant losing their claims in the event of overstatements.

It is true that the Bond Statute was in part modeled after the Mechanic's Lien Statute and therefore interpretation of the Bond Statute may be guided by case law on the Mechanic's Lien Statute for provisions that are similar between the two statutes. But that does not mean that Westfield may rewrite the Bond Statute to include a provision that is not there. Where the Bond Statute contains no provision similar to one in the Mechanic's Lien Statute, there is no basis to look to the Mechanic's Lien Statute in interpreting the Bond Statute. *See also Mon-Ray, Inc. v. Granite Re, Inc.*, 677 N.W.2d 434 (Minn. Ct. App. 2004) (noting case law discussion the relationship between the mechanic's lien and payment Bond Statute, but not making the analogy where the two statutes do not contain parallel language).

In other words, Westfield's argument is not simply looking to the Mechanic's Lien Statute for guidance in the interpretation of the Bond Statute, it is attempting to rewrite the Bond Statute to include a new provision not contained in the statute. Thus, Westfield's reliance on cases such as *Delyea v. Turner*, 264 Minn. 169, 175, 118 N.W.2d 436, 440 (1962), which discuss Minn. Stat. § 514.74 (Mechanic's Lien Statute) is misplaced, and Westfield's arguments that Safety Signs' Bond Claim is not enforceable because it is intentionally overstated should be rejected.

B. There is no genuine issue of material fact that Safety Signs did not overstate its bond claim.

Even if Minn. Stat. §514.74 applied to bond claims, Westfield provided no evidence that Safety Signs intentionally overstated its Bond Claim. “Before a lien claimant may be deprived of his lien under this statute there must be some showing of fraud, bad faith, or an intentional demand for an amount in excess of that due.” *Bierlein v. Gagnon*, 255 Minn. 143, 148, 96 N.W.2d 573, 578 (1959). Westfield’s sole ground for its claim of bad faith is the simple fact that Safety Signs adjusted its claim slightly downward when it commenced litigation. But in *Cox v. First Nat’l Bank of Aitkin*, a case cited by Westfield itself, this Court stated that “[a]n initial overstatement of the amount is insufficient to require a finding of bad faith as a matter of law.” 415 N.W.2d 385 (Minn. Ct. App. 1987). In *Cox*, the initial mechanic’s lien stated that the lien was for \$89,500, but amount foreclosed on was \$42,925.96. *Id.* at 388. In this case, the adjusted difference was less than \$5,000.

In short, Westfield cannot defeat summary judgment by simply pointing out that Safety Signs adjusted its claim slightly downward and speculating that possibly Safety Signs had hidden bad-faith motives. Rather, Westfield is obligated to come forth with specific facts that demonstrate bad faith by Safety Signs.

There is no such evidence. To the contrary, Safety Signs has provided substantial evidence of its good-faith reasons for the minor adjustment. Safety Signs submitted its bond claim to Westfield after Safety Signs had attempted for several months to obtain payment of its outstanding invoices from Niles-Wiese. (R.App.40, ¶ 23-24, A.134, ¶2.)

Niles-Wiese never questioned Safety Signs' invoices. It simply failed to pay them. (A.134, ¶3.)

After Niles-Wiese failed to pay Safety Signs, Safety Signs submitted its Payment Bond claim in the amount of \$35,077.48, which was comprised of the unpaid invoices that Safety Signs had submitted to Niles-Wiese for its work on the Project, plus interest that had accrued through January 29, 2010, and the filing fee. (A.135, ¶4, A.45-52.) There were seven invoices, totaling \$33,306.29 (\$252.94, \$1,590.00, \$1,830.00, \$1,590.00, \$1,590.00, \$22,215.49, and \$4,237.86) that had not been paid by Niles-Wiese at the time that Safety Signs gave notice of its Payment Bond claim to Westfield. (A.45-52; A.135 ¶5.) In Safety Signs' Payment Bond notice, it also included \$1,759.94 in interest because the invoices were overdue and \$11.25 for filing fee costs that Safety Signs had incurred. (A.135 ¶6.) The total of all of these amounts equals \$35,077.48, which is the amount that Safety Signs stated in its Payment Bond claim. (*Id.* ¶7.) Safety Signs submitted the breakdown showing the outstanding invoices, plus the \$1,759.94 in interest and \$11.25 in filing fee costs to Jim Walker of Westfield.⁷ (A.45-52.)

After submitting its Payment Bond Claim, Safety Signs provided a separate presentation of the amounts owed to Safety Signs, which showed the total amounts owed to Safety Signs on the Project as determined by the Project quantities multiplied by the unit prices: (A. 136 ¶¶10, 11(see also in Fact section above for detailed chart.)) The quantities listed in the new presentation were the quantities that were provided by the Owner in the Periodic Construction Estimates, (A. 136 ¶ 12, R.App. 49-53.) This second

⁷ Jim Walker is the Senior Bond Claims Counsel for Westfield. (A. 135 ¶ 8.)

presentation was submitted to Westfield in June 2010, and added in accrued interest of \$3,073.23 and \$11.25 for the filing fee. (A. 136 ¶ 13.)

After submitting this information, Safety Signs was reminded by the Project's Owner that, for Contract Item Numbers P62050, X62002, X62010, and X62026, it had paid Niles-Wiese quantities less than what had been included in the Periodic Construction Estimates as follows:

<u>Contract Item#</u>	<u>Description</u>	<u>Billed Quantity</u>	<u>Paid Quantity</u>
P62050	Obliterate Pavement Marking	11,350	8,681
X62002	Temp Painting White Placement & Removal	15,100	14,394
X62010	Temp Painting Yellow Placement & Removal	2,400	1,841
X62026	Temp Painting Black Placement & Removal	10,600	9,484

(A.136-37 ¶ 14.)

Reducing these quantity amounts reduced Safety Signs' claim by \$4,873.35. (A.137 ¶ 15.) Used on these reductions, Safety Signs created a third presentation. (R.App. 70.) Safety Signs also reduced the amount for Airport Flags by \$816.83. (A.137 ¶16.) Making both of these adjustments reduced the principal amount of Safety Signs' claim from \$33,306.29 to \$27,119.65 ($\$33,306.29 - \$4,873.35 - \$816.83 = \$27,119.65$). (*Id.* ¶17.) When Safety Signs commenced this action to enforce its Payment Bond claim, it used the adjusted principal amount of \$27,119.65 to reflect these changes. (*Id.* ¶18.)

In short, Safety Signs' original claim was not intentionally overstated or made in bad faith. It could have asserted its claim based on the unpaid invoices. Rather, it made

a correction when provided information from the City that it had paid Niles-Wiese at slightly smaller quantities. Westfield's arguments to the contrary are without evidentiary basis. Accordingly, while Westfield's argument is moot as set forth above, it also fails substantively.

C. **Though Safety Signs chose to adjust its bond claim, Safety Signs's initial bond claim was not overstated because Niles-Wiese was liable for that amount under the doctrine of Accounts Stated.**

Although Safety Signs voluntarily adjusted its claim to reflect the quantities paid by the Project's Owner when it commenced this enforcement action, it should be noted that Safety Signs does not consider its original claim of \$33,306.29 to be overstated at all. Safety Signs believes it would be entitled to be paid \$33,306.29, the total of its outstanding invoices, under the doctrine of accounts stated. (Compl., Count V.)

"A party's retention without objection for an unreasonably long time of a statement of account rendered by the other party is a manifestation of assent." *American Druggists Ins. v. Thompson Lumber Co.*, 349 N.W.2d 569, 573 (Minn.Ct.App.1984). Here, Niles-Wiese has had Safety Signs' invoices, totaling \$33,306.29, for nearly two years and has not objected. (A.134, ¶3; A.45-52.) Because Niles-Wiese has not objected to Safety Signs' invoices, Safety Signs should be paid these amounts and its Payment Bond Claim based on these amounts is not an overstatement, even if the question of overstatement were legally relevant here.

V. **THE DISTRICT COURT CORRECTLY CONCLUDED THAT SAFETY SIGNS IS ENTITLED TO 18% INTEREST UNDER THE PROMPT PAYMENT ACT.**

Under the Minnesota Prompt Payment Act (Minn. Stat. § 337.10 subd. 3), Safety Signs is entitled to interest in the amount of 1-1/2 percent per month (18% annually) because Niles-Wiese failed to pay Safety Signs even though Niles-Wiese had been paid by the City for Safety Signs' Work. In pertinent part, Minn. Stat. 337.10 subd. 3 states:

Prompt payment to subcontractors. A building and construction contract shall be deemed to require the prime contractor and all subcontractors to promptly pay any subcontractor or material supplier contract within ten days of receipt by the party responsible for payment of payment for undisputed services provided by the party requesting payment. The contract shall be deemed to require the party responsible for payment to pay interest of 1-1/2 percent per month to the party requesting payment on any undisputed amount not paid on time.

Minn. Stat. § 337.10, subd. 3 (emphasis added) (hereinafter, sometimes referred to as the "Prompt Payment Statute"). As neither Niles-Wiese nor Westfield had any ground on which to dispute the bond claim, the District Court concluded that Westfield was liable for 18% interest on Safety Signs's \$27,119.65 in principal.

Westfield argues that the District Court erred because, Westfield argues, Safety Signs originally asserted a bond claim of \$35,077.48, and later amended its bond claim to \$27,119.65. The approximately \$8,000 gap, Westfield argues, was "disputed," and therefore Safety Signs is not entitled to 18% interest on *any* of its claim.

Westfield's argument is without basis, because the statute specifically states that interest may be assessed on any "undisputed amount" not paid on time. The District Court ordered Westfield to pay interest only on the "undisputed amount" – the

\$27,119.65 in principal that Westfield could not produce any evidence to dispute. The District Court did not order any interest paid on the \$8,000 gap amount. There is no basis in the statute for Westfield's implied argument that if some small portion of a subcontractor's claimed total due is disputed, the surety or the contractor may withhold even undisputed amounts due. Indeed, by stating that 18% interest accrues on "any undisputed amount" the statute implies that undisputed amounts must be promptly paid even if other amounts are in dispute.

Next, Westfield argues, Westfield and Niles Wiese both specifically stated that they were disputing the claim, and therefore it is automatically "disputed" and the 18% interest cannot apply. But simply stating that a claim is disputed does not mean the claim is, in fact, legitimately disputed. If Westfield's argument were to prevail, general contractors and sureties could simply send out form letters stating that any and all invoices were disputed and they would never be required to pay Prompt Payment interest.

Finally, Westfield argues that the Prompt Payment Act should not apply to sureties. As the District Court pointed out, the case law Westfield cites is from Wyoming discussing Wyoming's Prompt Payment Act, which has entirely different language from the Minnesota Prompt Payment Act. *Vaughn Excavating and Const., Inc., v. P.S. Cook Co.*, 981 P.2d 485, 487 (Wyo. 1999). In that case, the bond at issue did not incorporate the interest penalties or attorney's fees of the Wyoming Prompt Payment Act. But as the District Court pointed out, unlike the Wyoming Act, the Minnesota Prompt Payment Act states that its provisions are deemed to be included in any building or construction

contract between a contractor and subcontractor, such as the Subcontract between Niles-Wiese and Safety Signs. Minn. Stat. § 336.10, subd. 3.

Minnesota Statutes §574.26 requires a payment bond be obtained for the payment of “all just claims.” *Id.* at subd. 2. Safety Signs’ claim for 18% annual interest is a “just claim” within the meaning of the Bond Statute. Furthermore, under the Bond, Westfield bound itself “to make payment to all persons, firms, SUBCONTRACTORS and corporations furnishing materials for or performing labor in the prosecution of the WORK provided for in such Contract, and any authorized extension or modification thereof.” (Add. 18) Where the Prompt Payment Statute is incorporated into every subcontract, it is incorporated into the Bond. *See also Waukesha Concrete Products Company, Inc. v. Capitol Indemnity Corporation*, 379 N.W.2d 333, 336 (Wis. App. 1985); *Suamico Sanitary District No. 1 v. Midwest Contractors, Inc.*, 2002 WL 1752204, *2 (Wis. App. July 30, 2002); *D&L Construction Co. v. Triangle Electric Supply Co.*, 332 F.2d 1009, 1013 (8th Cir. 1964). Thus, the Bond itself requires the payment of 18% interest by Westfield when Safety Signs is not timely paid by Niles-Wiese.

Because Westfield is obligated to pay Safety Signs 18% interest under the express terms of the Prompt Payment Act and its own Bond, the District Court did not err in assessing that interest on the undisputed principle amount of \$27,119.65.

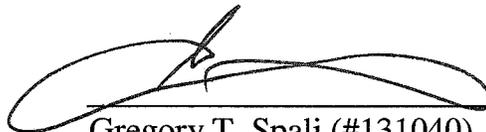
CONCLUSION

For the foregoing reasons, Safety Signs respectfully requests that this Court affirm the summary judgment granted by the District Court with costs and Safety Signs’ attorneys’ fees taxed against Appellant. Pursuant to Minn. Stat. § 574.26 and case law

including *American Druggists Insurance v. Thompson Lumber Co.*, 349 N.W.2d 569, 575 (Minn.Ct.App. 1984), Safety Signs is entitled to its attorneys' fees on appeal. Safety Signs requests that it be able to submit an affidavit of its attorneys' fees within the time set by this Court.

Dated: April 30, 2012

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Gregory T. Spalj", is written over a horizontal line. The signature is stylized with a large loop at the end.

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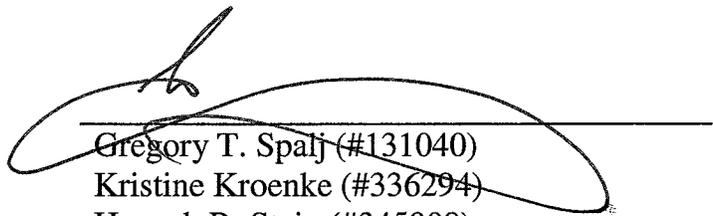
**ATTORNEYS FOR RESPONDENT
SAFETY SIGNS, LLC**

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The brief was prepared using Microsoft Word 2007, utilizes 13 point type, a Times New Roman font and contains 12,997 words.

Dated: April 30, 2012

FABYANSKE, WESTRA, HART &
THOMSON, P.A.

A handwritten signature in black ink, appearing to read 'Gregory T. Spalj', is written over a horizontal line. The signature is stylized and loops back under the line.

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