

NO. A10-1149

State of Minnesota  
**In Court of Appeals**

Amcon Block & Precast, Inc.,

*Appellant,*

vs.

Michael Paul Suess,

*Respondent.*

**RESPONDENT MICHAEL PAUL SUESS' BRIEF, ADDENDUM  
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. Whether the District Court correctly held that Minn. Stat. §514.02 does not impose personal liability on Respondent where Respondent was an officer and sole shareholder of a corporation that failed to pay its subcontractor for work on a commercial project.**

The District Court held Minn. Stat. §514.02 does not create a civil cause of action against corporate officers for commercial projects.

Apposite Authority:

McClure v. Davis Engineering, LLC, 716 N.W.2d 354 (Minn. Ct. App. 2006)

Martinco v. Hastings, 122 N.W.2d 631 (Minn. 1963)

Minn. Stat. §514.02

## STATEMENT OF THE CASE

Respondent Michael Paul Suess was President of MSC Concrete, Inc. MSC was a contractor that worked almost exclusively on commercial projects. Appellant Amcon Block & Precast, Inc. is a company that manufactures concrete block and other concrete related material. MSC subcontracted with Appellant to provide material for a number of projects, including five projects at issue in this litigation, all of which Appellant agrees were commercial projects. MSC failed to pay Appellant for the material.

The contracts with the project owners were entered into by MSC, not Respondent. Similarly, the contracts for the purchase of materials from Appellant were between MSC and Appellant. Respondent did not personally receive any payments from the project owners for work performed on the projects. Appellant does not allege an alter ego theory and does not attempt to pierce the corporate veil.

Appellant initially pursued its legitimate remedies against MSC. Appellant commenced the instant action against Respondent attempting to abrogate corporate protections and hold Respondent liable for a corporate debt, when it was unable to collect its judgment against MSC. Appellant alleged Respondent is liable for civil theft under Minn. Stat. §514.02, Minnesota's "Theft by Contractor" statute. Resolution of Appellant's claims turns on the interpretation of the word "person" in the statute. Appellant argued that the term "person" necessarily extends to and includes shareholders in a closely held corporation. In other words, the term "person" cannot refer to a closely held corporation without also including its shareholders. Respondent argued the

principles of statutory construction do not support Appellant's interpretation. The Honorable Kris H. Davick-Halfen, Stearns County District Court, granted Respondent's Motion for Summary Judgment and dismissed Appellant's claims.

## STATEMENT OF FACTS

The relevant facts upon which the District Court based its decision are not in dispute. MSC Concrete, Inc. (“MSC”) was a contractor that worked almost exclusively on commercial projects. (RA-29). Appellant Amcon Block & Concrete, Inc. (“Appellant”) manufactures concrete block and other concrete related material. (RA-32). Appellant contracted with MSC to provide materials for a number of projects including five of MSC’s commercial improvement projects that are involved in this litigation. (RA-29, 32). Specifically, Appellant produced and supplied various types of concrete foundational block, half highs, concrete mix, mortar, conduit, and concrete brick, among other items. (RA-32). MSC failed to pay Appellant for the material. (RA-29, 32).

Respondent Michael Paul Suess (“Respondent”) was the President of MSC. (RA-29, 44). The contracts with the project owners were entered into with MSC, not Respondent. (RA-29). Similarly, the contract(s) for the purchase of materials from Appellant were between MSC and Appellant. (Id.). Respondent did not personally receive any payments from the project owners for work performed on the projects. (RA-44).

At all relevant times, MSC employed a full-time bookkeeper. (Id.). MSC’s bookkeeper was the primary individual responsible for depositing payments and reviewing and paying invoices from subcontractors. (Id.). MSC’s bookkeeper occasionally consulted Respondent regarding accounts payable and occasionally made an independent determination regarding when payments could be made. (Id.). All payments

MSC received from project owners were deposited into MSC's account. (Id.) No payments were ever deposited into Respondent's personal account. (Id.)

Appellant obtained a judgment against MSC for the damages at issue in this case. Appellant commenced the instant action when it was unable to collect from MSC. (RA-1). Appellant argued Respondent is liable for MSC's debt under Minnesota's "Theft by Contractor" statute, Minn. Stat. §514.02.

Two categories of people are potentially guilty of theft under Minn. Stat. §514.02. In the commercial context, the "person" who received payment but failed to pay subcontractors or suppliers may be guilty of theft. See Minn. Stat. §514.02, Subd. 1. For improvements to residential real estate, a shareholder, officer, director, or agent of a corporation who is responsible for the theft shall be guilty of theft. (Id.) None of the projects at issue in this case are residential projects. (RA-11-13, 29). Consequently, this case turns on the definition of the term "person" in the statute.

Appellant essentially argued that, in instances involving a closely held corporation, one of the shareholders must be the "person" guilty of theft. Respondent's position was that MSC is a corporation, a legal entity formed pursuant to Minnesota statutes, with the attendant limitations on liability afforded by statute. Thus, in the absence of specific circumstances, a corporate entity is designed to shield its shareholders from liability. Consequently, MSC is the "person" liable for any theft under Minn. Stat. §514.02.

After serving discovery requests and receiving responses to his requests for admissions, Respondent agreed to provide Appellant an extension of time to respond to

Respondent's remaining discovery requests based on Respondent's belief that he was entitled to summary judgment. (RA-32). Respondent did not, however, agree that Appellant was entitled to summary judgment under any circumstances at this early stage of the litigation. (Id.). Indeed, Respondent argued that if the District Court adopted Appellant's interpretation of the statute, questions of fact remained regarding whether Respondent was liable under the statute. (Id.). The District Court granted Respondent's motion for summary judgment and, thus, reached no finding on this issue. (Appellant Addendum at pp. 1-9).

## ARGUMENT

### I. STANDARD OF REVIEW.

Summary judgment is appropriate when a district court determines that “there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.” Reiling v. City of Eagan, 664 N.W.2d 403, 407-408 (Minn. Ct. App. 2003)(citing Minn. R. Civ. P. 56.03)). An appellate court reviews a grant of summary judgment de novo to determine whether evidence in the record, viewed in the light most favorable to the party against whom judgment was granted, is sufficient to raise a genuine issue of material fact regarding the essential elements of that party’s claims. Midwest Sports Mktg., Inc. v. Hillerich & Bradsby of Canada, Ltd., 552 N.W.2d 254, 260 (Minn. Ct. App. 1996)(citation and internal quotations omitted), review denied (Minn. Sept. 20, 1996). No genuine issue of material fact exists “[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party.” Reiling, 664 N.W.2d at 408 (citation omitted). An appellate court may affirm a grant of summary judgment if it can be sustained on any ground. Winkler v. Magnuson, 539 N.W.2d 821, 828 (Minn. Ct. App. 1995), review denied, (Minn. Feb. 13, 1996).

The District Court’s decision resulted from its interpretation of Minn. Stat. §514.02. Statutory interpretation is a question of law subject to de novo review. Pawn America Minnesota, LLC v. City of St. Louis Park, --- N.W.2d ---, 2010 WL 3339157 \*4 (Minn. Ct. App. 2010)(citing Calm Waters, LLC v. Kanabec County Board of Comm’rs, 756 N.W.2d 716, 719 (Minn. 2008)).

**II. THE DISTRICT COURT CORRECTLY HELD THAT MINNESOTA'S THEFT BY CONTRACTOR STATUTE DOES NOT IMPOSE PERSONAL LIABILITY ON AN OFFICER AND SOLE SHAREHOLDER OF A CORPORATION THAT FAILED TO PAY ITS SUBCONTRACTOR FOR WORK ON A COMMERCIAL PROJECT.**

The general rule in Minnesota is that shareholders, directors, and officers of a corporation have limited liability. See Minn. Stat. §307A.425; Groves v. Dakota Printing Services, Inc., 371 N.W.2d 59, 62 (Minn. Ct. App. 1985). Minn. Stat. §514.02 provides a limited exception to the protections provided to individuals by corporate entities and imposes personal liability in certain limited circumstances.<sup>1</sup>

The statute provides that a civil action may be brought:

- (1) against the **person who committed the theft under subdivision 1**; and
- (2) for improvements to **residential** real estate made by a person licensed, or who should be licensed, under section 326B.805, against a shareholder, officer, director, or agent of a corporation who is not responsible for the theft but who knowingly receives proceeds of the payment as salary, dividend, loan repayment, capital distribution, or otherwise.

Minn. Stat. §514.02, Subd. 1a (emphasis added). That is, a civil action may be brought against the “person” who committed the theft for all types of projects.<sup>2</sup> Id. For residential projects, a civil action may also be brought against a shareholder, officer, director, or agent of a corporation who knowingly receives proceeds of the payment. Id. Appellant claims only that Respondent is personally liable as the “person who committed the theft” under Minn. Stat. §514.02, Subd. 1a(1). Appellant makes no claim that the projects were

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<sup>1</sup> Appellant did not allege, or provide evidentiary support for, piercing the corporate veil. Appellant’s claim was solely a civil claim for theft under Minn. Stat. §514.02.

<sup>2</sup> As set forth in detail below, in circumstances where a corporation entered into a contract and received the proceeds of payments, the corporation is the “person” who committed the theft.

residential in nature and, thus, the second exception does not apply. Resolution of Appellant's claim rests solely on the Court's interpretation of the meaning of Minn. Stat. §514.02, Subd. 1a(1), i.e. who is the "person who committed the theft."

"The plain meaning of a statute's language should guide a court's interpretation of the statute." McClure v. Davis Engineering, LLC, 716 N.W.2d 354, 357 (Minn. Ct. App. 2006)(citing ILHC of Eagan, LLC v. County of Dakota, 693 N.W.2d 412, 419 (Minn. 2005)). To determine whether a statute has a plain meaning, the Court should review its content in the full context of the act or provision. State v. Holmes, --- N.W.2d --- (Minn. Ct. App. Aug. 17, 2010)(citing Christensen v. Dep't of Conservation, Game & Fish, 285 Minn. 493, 499-500, 175 N.W.2d 433, 437 (1970)). Sections of a statute must be considered together to determine meaning. Id. (citing Chanhassen Estates Residents Ass'n v. City of Chanhassen, 342 N.W.2d 335, 339 (Minn. 1984)). Courts apply rules of statutory construction only where a statute is ambiguous. McClure, 716 N.W.2d at 358. Appellant would like the Court to ignore the statutory language and expand the statute's limited exception to the protections afforded corporate entities. Appellant's position is not supported by the plain language of the statute.<sup>3</sup>

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<sup>3</sup> Appellant claims Respondent has argued that a corporate officer can never be civilly liable under Minn. Stat. §514.02, Subd. 1, for theft of funds subject to the statutory trust. (Appellant's Brf. at p. 6). Appellant misconstrues Respondent's argument. Respondent acknowledges the statutory exception that holds corporate officers liable for theft of funds on **residential** projects. Respondent simply argues the same exception does not apply to **commercial** projects. In addition, Respondent does not contend that there are no other causes of action that may have been available to Appellant.

**A. Respondent is Not the “Person Who Committed the Theft” Under Subdivision 1 of Minn. Stat. §514.02.**

Appellant alleges Respondent is the “person” responsible for Appellant’s nonpayment. However, contrary to Appellant’s assertions, MSC is the “person” who committed the alleged theft and is the “person” that is potentially guilty of theft under the statute because MSC is the “person” that contracted with Appellant and received proceeds of payments for the projects.

**1. Respondent did not receive the proceeds of payments.**

Minn. Stat. §514.02, provides, in part, that “proceeds of payments received by a person contributing to an improvement to real estate . . . shall be held in trust by that person for the benefit of those persons who furnished the labor, skill, material, or machinery contributing to the improvement.” Minn. Stat. §514.02, Subd. 1 (a). Minn. Stat. §514.02 does not define the term “person.” Id. Consequently, the Court must look to Minn. Stat. §645.44 in interpreting the meaning of the term.

Minn. Stat. §645.44 sets forth definitions to be applied in interpreting Minnesota statutes unless another intention clearly appears. Minn. Stat. §645.44, Subd. 1. The statute defines “person” as follows: “Person may extend and be applied to bodies politic and corporate, and to partnerships and other unincorporated associations.” Id. at Subd. 7. Thus, in the absence of a clear intention that the term “person” only apply to natural persons, the term also includes business entities. McClure, 716 N.W.2d at 357. Minn. Stat. §514.02 contains nothing to indicate the legislature intended the term to apply only

to natural persons. As a result, the term “person” includes both individuals and business entities.

In this case, MSC, not Respondent, is the “person” that contributed to the improvement to real estate and, assuming MSC was paid for that contribution, is the “person” obligated to hold the proceeds of the payment in trust for the benefit of its subcontractors and materialmen.

## **2. Respondent is Not Guilty of Theft.**

Two categories of people are potentially guilty of theft in the event a contractor fails to use the proceeds of payments to pay subcontractors and materialmen. In the commercial context, the “person” who received payment but failed to pay for labor, skill, material and machinery, knowing that the same remains unpaid, is guilty of theft of the proceeds of the payment. Minn. Stat. §514.02, subd. 1(b). For an improvement to **residential** real estate, “a shareholder, officer, director, or agent of a corporation who is responsible for the theft shall be guilty of theft of the proceeds.” Id. (emphasis added). Again, Appellant does not claim that the projects were residential and thus, a shareholder, officer, director, or agent of a corporation is not “guilty of theft” under this statute.

Because Respondent did not enter into any contracts for the improvement of real property in his individual capacity, did not personally enter into any subcontracts, and did not receive the proceeds of any payments, Respondent can only be guilty of theft if Appellant’s projects were for the improvement of residential real property. (RA-29). Since none of the relevant projects are “residential,” Respondent cannot be guilty of theft

under the plain and unambiguous language of the statute. The District Court found that to hold otherwise would render the statutory distinction meaningless.<sup>4</sup> (Appellant Addendum at p. 9); see also Minn. Stat. §§645.16-.17 (statutes should be construed to give effect to all provisions).

**B. The Statute Does Not Allow a Civil Action Against Respondent.**

Appellant appears to take the position that the statute plainly provides for a civil action against all persons responsible for the theft, regardless of who entered into the contract and who received the proceeds. That simply is not the case. Again, Minn. Stat. §514.02, Subd. 1a provides that a civil action may, for commercial projects, be brought “against the person **who committed the theft under subdivision 1.**” (emphasis added). In defining who is guilty of theft under the statute, the legislature distinguished between commercial and residential projects and imposed individual liability for corporate officers in cases involving residential projects. See id.; see also The Statutory Pierce: New Remedy for Contractor Conversion, Brian H. Liebo, Bench and Bar of Minnesota, July 2001 (“The new provisions allow these entities to pursue individual owners, directors, and officers of a corporate contractor through a civil action in cases where the owners of **residential** properly paid their contractor for their construction project, and the contractor converted the funds for its own use, rather than pay its subcontractors for the value of their contributed improvements to the homeowners’ property.”)(emphasis added). The

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<sup>4</sup> Respondent argues that the District Court suggested the language imposing individual liability for residential projects “was intended to constrict criminal liability for corporate officers for commercial projects.” (Appellant’s Brf. at p. 8). The District Court made no such finding.

statute plainly limits civil liability to those individuals that “committed the theft” as set forth in Subdivision 1. Thus, this provision cannot be interpreted independent of an analysis of Subdivision 1.

Respondent is not the person who committed the theft under Subdivision 1. As set forth in detail above, Respondent, as an officer and shareholder of MSC, is only potentially guilty of theft under Subdivision 1, if the projects were improvements to residential property. As none of the projects were “residential” as defined by the statute, only MSC is potentially guilty of theft of the proceeds under Subdivision 1. Consequently, Subdivision 1a(1) does not allow a civil action against Respondent. Again, Appellant ignores this statutory limitation.

Respondent has not located a single case where civil liability for theft was imposed against a shareholder, officer, director or agent of the corporation for failure to pay a subcontractor with proceeds from a commercial project. Furthermore, the plain language of the statute does not support such liability.

Although not binding authority, this issues was previously considered by Hennepin County District Court Judge Charles Porter in Enervation v. Lakeland Mechanical, Inc. and Harlan Perron, Court File No. 27-CV-08-31623 (June 11, 2009), which may provide guidance in resolving the issues in this case. (RA-15-28). In that case, Enervation brought suit against Lakeland Mechanical and its sole shareholder, officer and director for payment related to twenty-five commercial projects to which Enervation provided labor and materials. (RA-16). Enervation alleged Perron should be liable as the “person” responsible for the theft. (RA-17). Enervation argued “Minn. Stat.

§514.02, allows for a civil action against *all* persons responsible for the theft, including a sole owner, officer, or board member of a corporation . . . without having to pierce the corporate veil.” (RA-20). The court rejected that argument. (RA-24). The court found that the corporate defendant was the “person” responsible for the theft and the “person” liable in a civil action. (Id.). The court dismissed the claims against Perron finding:

In this case, Plaintiff entered into contracts with Defendant Lakeland to perform work on various projects that were all commercial in nature, and it was Defendant Lakeland who failed to pay Plaintiff after receiving payments. Imposing civil liability on Defendant Perron based on Minn. Stat. §514.02 would extend the specific statutory limitation beyond its plain meaning and intended purpose. Since Defendant Perron was not the person responsible for Plaintiff’s non-payment, he is not liable under Minn. Stat. §514.02. Consequently, summary judgment against Defendant Perron must be denied.

(Id.).

Similarly, MSC, not Respondent, was the “person” responsible for paying Appellant. Imposing personal liability on Respondent would extend the specific statutory limitation on shareholder liability beyond its plain meaning and intended purpose. The District Court properly dismissed Appellant’s claims.

**C. The District Court’s Ruling Has No Impact on a Corporate Officer’s Potential Criminal Liability.**

Appellant repeatedly argues that the District Court’s interpretation of Minn. Stat. §514.02 restricts potential criminal liability for corporate officers who commit theft or who aid and abet theft. That simply is not the case. The District Court made no findings regarding potential criminal responsibility. Moreover, this is a civil case and does not

involve criminal allegations against Respondent.<sup>5</sup> The District Court's findings were limited to the narrow issue of whether there exists a civil cause of action against a corporate officer for theft under Minn. Stat. §514.02 for work involving a commercial project. The District Court correctly held that Minn. Stat. §514.02 does not create such a cause of action.

Contrary to Appellant's arguments, the statute does not impose civil liability on a corporate officer in every situation where there is potential criminal liability. Consequently, the cases cited by Appellant discussing a corporate officer's potential criminal liability are inapposite. Not only do the cases cited by Appellant fail to provide an analysis of the civil liability provisions in the statute, they deal with residential, as opposed to commercial, projects.

**D. The Legislature Intended to Differentiate Between Commercial and Residential Construction.**

The statute specifically differentiates between commercial and residential projects and limits a corporate officer's civil liability to cases involving residential construction. See Minn. Stat. §514.02, Subd. 1. Moreover, the bill amending the statute to create a civil claim intentionally distinguished between residential and commercial real estate. (RA-46-48).

Rep. Bishop: [S]o the bill is only relative to residential real estate?

Rep. Storm: That's right.

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<sup>5</sup> Although not an issue in this case, it is notable that there is no evidence Respondent is criminally liable for theft.

\* \* \*

Rep. Bishop: [A]nd I just don't understand why you have closed the door to – and said that this has to be residential . . .

Rep. Storm: [M]y understanding is that for commercial there are different statutes that cover commercial contractors . . . 514.01 is for residential contractors and remodeling and . . . if we need to do this for commercial, we can do another bill with those statutes.

Rep. Bishop: Rep. Storm, you're comfortable with creating a separate standard for residential property . . .?

Rep. Storm: Yes I am.

(Id.)(House Civil Law Committee, March 8, 2000). The legislators' distinction between commercial and residential project was considered and intentional. See Martinco v. Hastings, 122 N.W.2d 631, 638 (Minn. 1963)(“the courts cannot supply that which the legislature purposely omits or inadvertently overlooks”); State ex. rel. Coduti v. Hauser, 17 N.W.2d 504, 507-508 (Minn. 1945)(“The Legislature is at liberty to ignore logic and perpetuate injustice so long as it does not transgress constitutional limits. So if the law, as it stands, results in injustice, it is for the Legislature to remove the cause. It must be done by amendment rather than construction, there being no ambiguity in the later law.”).

For projects involving residential construction, the legislators decided to allow litigants to pierce the corporate veil and bring an action against corporate officer, directors, shareholders and agents who are not responsible for the theft but who receive part of the proceeds.<sup>6</sup> The legislators apparently thought it was important to provide

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<sup>6</sup> The legislature does not use the language “not responsible for the theft” to indicate those individuals had no involvement in managing the corporate finances. Rather, the language is present because the corporate entity is “responsible for the theft” under

additional protections in projects that often involve a risk that innocent individuals may lose their homes through foreclosure of mechanic's liens. The legislature decided not to provide those same protections for commercial projects, likely because commercial projects often involve larger, more sophisticated parties that enter contracts fully appraised of the attendant risks.

**E. This Court's Decision in T.E.S. Construction, Inc. v. Chicilo Does Not Support Appellant's Position.**

Finally, Appellant argues that this Court's recent decision in T.E.S. Construction, Inc. v. Chicilo, supports its position. However, T.E.S. is readily distinguished from this case. The primary distinction is that T.E.S. involved residential construction. It was not necessary for the Court to consider the distinction between residential and commercial projects. Moreover, the primary issue considered in T.E.S. was whether a criminal conviction for theft was a prerequisite to a civil cause of action. This Court held that it is not. However, this Court's interpretation of that provision of the statute provides no guidance in this case. Respondent is not arguing a civil action is unavailable because he was not criminally convicted of theft. Rather, Respondent argued that Minn. Stat. §514.02 does not create a civil cause of action against a corporate officer where, as here, the project involved commercial construction. The District Court agreed and dismissed Appellant's claims.

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Subdivision 1(a). Litigants are simply allowed to pierce the corporate veil and bring a civil action in cases involving residential projects where those individuals receive proceeds of payments.

## CONCLUSION

Appellant has not presented any authority that supports its interpretation of Minn. Stat. §514.02. Rather, Appellant makes an equitable argument, urging the Court to abrogate corporate protections and expand the provisions of the statute to impose individual liability. Appellant's position is not supported by Minnesota law or the principles of statutory construction. Respondent respectfully requests that this Court affirm the District Court's judgment.

September 7, 2010

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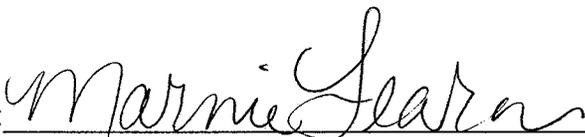
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## CERTIFICATE OF COMPLIANCE

I hereby certify that Respondent's Brief conforms to the requirements of Minn. R. Civ. P. 132.01, subds. 1 and 3. The length of this brief is 3,964 words. This brief complies with the typeface requirement of the above rule. This brief was prepared using Microsoft Word 2003.

September 7, 2010

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