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NO. A12-0370

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State of Minnesota  
**In Court of Appeals**

Westfield Insurance Company,

*Appellant,*

vs.

Safety Signs, LLC,

*Respondent.*

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**APPELLANT'S 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 ISSUES

1. As a matter of law, is a statutory payment bond claim valid if a claimant fails to initiate an action to recover against a bond within one year of its last day of work on the Project covered by the bond?

Trial Court Held: In the affirmative

Apposite Statute:

Minn. Stat. § 574.31, subd. 2(c)

Apposite Case:

*Shandorf v. Standard Sur. & Cas. Co. of New York*, 268 N.W. 843 (Minn. 1936).

2. As a matter of law, is a statutory payment bond claim valid if the claimant fails to strictly comply with the statutory notice requirements by failing to serve the required notice on the general contractor at the address listed on the bond?

Trial Court Held: In the affirmative

Apposite Statute:

Minn. Stat. § 574.31, subd. 2(a)

Apposite Case:

*Spetz & Berg, Inc. v. Luckie Constr. Co., Inc.*, 353 N.W.2d 233 (Minn.App. 1984)

*Edward Kraemer & Sons, Inc. v. Ashbach Constr. Co.*, 608 N.W.2d 559 (Minn.App. 2000).

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3. As a matter of law, is a statutory payment bond claim valid if the claimant fails to strictly comply with the statutory notice requirements by ensuring that a surety receives its notice of the payment bond claim within 120 days of the claimant's last day of work on the bonded Project?

Trial Court Held: In the affirmative

Apposite Statute:

Minn. Stat. § 574.31, subd. 2(a)

Apposite Case:

*Edward Kraemer & Sons, Inc. v. Ashbach Constr. Co.*, 608 N.W.2d 559 (Minn.App. 2000).

4. As a matter of law, is a statutory payment bond claimant entitled to summary judgment in its favor if material factual issues exist as to whether it intentionally overstated its bond claim?

Trial Court Held: In the affirmative

Apposite Statute:

Minn. Stat. § 574.31, subd. 2(a).

5. As a matter of law, is a statutory payment bond claimant entitled to an award of 18 percent interest against a payment bond surety when the amount of the claimant's damages was reasonably disputed?

Trial Court Held: In the affirmative

Apposite Statute:

Minn. Stat. § 337.10, subd. 3.

## STATEMENT OF THE CASE

This appeal involves the claims of Respondent Safety Signs, LLC, (“Safety Signs”) against Appellant Westfield Insurance Company (“Westfield”). Safety Signs performed work as a subcontractor for Defendant Niles-Wiese Construction Co., Inc., (“Niles-Wiese”) on two separate public improvement projects. Alleging that it was not paid for its work by Niles-Wiese, Safety Signs sought payment from Westfield through a payment bond issued by Westfield for one of the projects. After Westfield denied Safety Signs’ claim, Safety Signs commenced this action.

The Steele County District Court, the Honorable Casey J. Christian, denied Westfield’s summary judgment motion seeking dismissal of Safety Signs’ claims. Later, based on substantially the same facts, Safety Signs successfully moved for summary judgment against Westfield. The Court granted judgment for Safety Signs against Westfield in the principal amount of \$27,119.64 plus 18% interest under the Prompt Pay Act, Minn. Stat. § 337.10, subd. 3. After reviewing Safety Signs’ subsequent petition for attorney’s fees, the Court issued an award of attorney’s fees, costs and disbursements in the amount of \$33,899.68 to Safety Signs against Westfield. The present collective amount of these Judgments exceeds \$70,000.00.

## STATEMENT OF THE FACTS

This action arose from two construction projects at the Owatonna-Degner Regional Airport for the City of Owatonna (“City”) in Steele County, Minn. (See October 3, 2011, Affidavit of David J. Beaver (“Beaver Aff.”), Ex. A; May 10, 2011,

Affidavit of Hannah R. Stein in Opposition to Westfield Insurance Company's Motion for Summary Judgment ("Stein Aff."), Exs. G, H). As a condition of being awarded the construction contract for Phase I of the project, pursuant to Minn. Stat. § 574.26, *et. seq.*, Niles-Wiese obtained and delivered to the City a statutory payment bond (the "First Bond"), which was issued by Westfield, as surety. (A. 10-14). The First Bond (Bond No. 51668) states that, in the event that Niles-Wiese failed to pay its subcontractors for Phase I work, Westfield would be liable to pay such subcontractors – provided that such unpaid subcontractors submitted timely claims in compliance with the First Bond. (*Id.*) Later, a second phase ("Phase II") was added to the project and a separate bond (the "Second Bond") (Bond No. 51680) was issued by Westfield on behalf of Niles-Wiese. (Beaver Aff., Ex. A; Stein Aff., Exs. G, H; A. 24). Although the Second Bond is not part of the current record, several pieces of record evidence demonstrate its existence and its applicability only to Phase II of the project. (A. 23; Beaver Aff., Ex. A; Stein Aff., Exs. G, H). For example, Safety Signs said this of its prior claim against the Second Bond: "Niles-Wiese first failed to pay Safety Signs \$14,915.31 in the 2008-2009 phase [II] of the Project." (A. 23).

Some time after Niles-Wiese paid Safety Signs on its claim against the Second Bond, Safety Signs alleged that Niles-Wiese again failed to make timely payments. Consequently, Safety Signs submitted a claim ("Original Claim") against the *First Bond* seeking payment for Phase I work *and* Phase II work. (Add. 23). Through its Original Claim, Safety Signs identified (under oath) its last day of work as September 9, 2009. (*Id.*) But Westfield did not receive the Original Claim until January 11, 2010, which was

more than 120 days after the last day of work identified by Safety Signs in its Original Claim. (Add. 23-24).

Furthermore, this alleged last day of work related to Safety Signs' performance of *Phase II* work, which is not compensable under the First Bond. (A. 52, 76). As evidenced by Safety Signs' invoices, Safety Signs performed its last Phase I work no later than May 2009. (A. 47).

Additionally, Safety Signs did not serve the Original Claim upon Niles-Wiese at the address listed for Niles-Wiese on the First Bond. (A. 10; Add. 24-25). Although the First Bond identifies Niles-Wiese's address as 215 NE First Street, Medford, MN 55049, Safety Signs unsuccessfully attempted to serve Niles-Wiese at P.O Box 419, 112 S. Main St., Medford, MN 55049 (hereinafter, "the Main Street address"). (A. 10; Add. 24-25). Indeed, Niles-Wiese never received this notice because the mailing was returned as undeliverable. (Add. 25).

Roughly 2.5 months after submitting its Original Claim, and only after being told by Westfield that the Original Claim was not timely, Safety Signs conveniently provided Westfield with a document identified as a "Revised Notice of Claim on Payment Bond for Public Work" ("Revised Claim"), which identified (under oath) Safety Signs' last day of work as September 11, 2009. (Add. 26). Even if this Revised Claim somehow relates back, Westfield did not receive the Original Claim within 120 days of the last day of work on the Revised Claim. (Add. 24, 26).

Furthermore, through both the Original Claim and the Revised Claim (collectively hereafter, "the Claim"), Safety Signs made a demand upon Westfield – through sworn

statements made under penalty of perjury – for payment in the amount of \$35,077.48. (Add. 23, 26; A. 44). In support of the Claim, moreover, Safety Signs submitted to Westfield invoices and other information indicating that it was owed a principal amount of \$33,306.29, interest in the amount of \$1,759.94 and a filing fee in the amount of \$11.25, for a total claim amount of \$35,077.48. (A. 45-52). Later, Safety Signs asserted that it was entitled to a lump sum of \$83,723.21, which included amounts for work performed in the amount of \$80,638.73, interest in the amount of \$3,073.23 and a filing fee in the amount of \$11.25. (A. 53-55). This calculation acknowledged payments received from Niles-Wiese in a lump sum of \$48,645.77 and reflected a balance due of \$35,077.44. (A. 53-55).

After Westfield denied Safety Signs' Claim as untimely, Safety Signs commenced this action. (A. 1-20). Subsequently, Westfield sought summary judgment on the following bases: (1) Safety Signs failed to serve its claim upon Niles-Wiese at the address listed on the First Bond; and (2) Safety Signs failed to serve its claim upon Westfield within the statutory period. (A. 96).

In opposition to Westfield's motion, Safety Signs argued that Westfield waived Safety Signs' statutory obligation to serve Niles-Wiese at the Main Street address because Westfield previously sent correspondence to Niles-Wiese at the Main Street address. (A. 36-38). Through each letter cited by Safety Signs, however, Westfield expressly noted that it reserved all of its rights and defenses against Safety Signs' claims. (A. 122-23; Stein Aff., Ex. H; May 16, 2011, Second Affidavit of Jason C. Tarasek ("Tarasek 2d Aff."), Ex. A).

Ultimately, however, the lower court denied Westfield's motion. (Add. 1). As to Safety Signs' failure to serve its claim upon Niles-Wiese at the address listed on the First Bond, the lower court made the following findings of fact and conclusions of law, among others:

- Prior to making its present claim against the First Bond, Safety Signs made a claim against the Second Bond and served Niles Wiese at the Main Street address;
- Because neither Niles-Wiese nor Westfield objected to Safety Signs' use of the Main Street address to serve its claim against the Second Bond, it was "not unreasonable" for Safety Signs to serve its present claim against the First Bond at the Main Street address;
- "[N]otice of the [present] bond claim was . . . effective upon mailing, even though it did not reach Defendant Niles-Wiese"; and
- "Additionally, in the interest of fairness, it would not be appropriate to hold [Safety Signs] non-compliant with the statute, when clearly the purpose of the statute was accomplished."

(Add. 5-6).

As to Safety Signs' failure to timely serve its claim upon Westfield, the lower court stated, in relevant part, as follows:

- "The language of Minn. Stat. § 574.31 subd. 2(a) is almost identical to that of the mechanic's lien statute. Thus, the reasoning set forth in [*Eischen Cabinet Co. v. Hildebrandt*, 683 N.W.2d 813 (Minn. 2004)] is equally applicable here."
- "The parties agree that the notice of bond claim contained a typographical error regarding the date of work completion.<sup>1</sup> Regardless of this error, both dates fall within the 120 day notice requirement when calculated according to Minnesota Supreme Court rulings . . . , [which have held that] notice by

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<sup>1</sup> Westfield has never conceded that this was a mere "typographical error."

certified mail is complete upon the date of mailing. *See Eischen*, 683 NW 2d at 818. Therefore, [Safety Signs’] service was timely.”

(Add. 5).

Based on its findings and conclusions of law, the lower court noted – *sua sponte* – that “[b]ecause there are no issues of material fact, summary judgment in favor of [Safety Signs] is appropriate.” (Add. 3).

Subsequently, Safety Signs sought summary judgment. In support of its motion (“Motion”), Safety Signs asserted that it was only entitled to \$27,119.65, which was nearly \$8,000.00 less than the amount that Safety Signs previously demanded – under penalty of perjury – from Westfield. (A. 76). According to the calculation included with its Motion, Safety Signs sought payment through the First Bond for Phase I work in the amount of \$15,900.00 *and* Phase II work in the amount of \$59,048.55, for a total principal amount owed of \$74,948.55. (*Id.*) Contrary to its previous sworn statements, Safety Signs asserted through its Motion that Niles-Wiese had only paid it \$47,828.90. (*Id.*) For its part, Niles-Wiese said it had paid Safety Signs a total of \$48,681.97. (A. 56-58).

Westfield opposed Safety Signs’ Motion, in part, by asserting that Safety Signs initially intentionally overstated its Claim through its prior sworn statements. (A. 128-130). Westfield also argued that Safety Signs was not entitled to an award of 18 percent interest against Westfield pursuant to the Prompt Pay Act because the amounts owed to Safety Signs were disputed. (A. 132-33).

In further opposition to Safety Signs' Motion, Westfield asserted that Safety Signs failed to provide the Court with adequate evidence supporting its damages calculation. (A. 130-31). Rather than deny the Motion, the Court allowed Safety Signs to submit additional evidence on damages through subsequent letter briefs. (A. 134-142; Beaver Aff.)

Through its letter briefs, Safety Signs continued to wrongfully seek payment for Phase II work under the First Bond (that covered only Phase I work). (A. 134-142; Beaver Aff.) Despite this, the lower court granted summary judgment to Safety Signs. (Add. 7).

Among the lower court's conclusions were the following:

- The inconsistencies between the amounts listed on the bond claim, Safety Signs' damages spreadsheet and the damages sought through the Motion "do not create a material issue of fact."
- Because the First Bond expressly incorporates all of the terms of the subcontract, which itself incorporates the Prompt Pay Act, Minn. Stat. § 337.10, subd. 3, the First Bond "requires the payment of 1-1/2 percent monthly interest (18% annually) by Westfield when payment is not made within 10 days of the contractor receiving payment from the City of Owatonna."
- "Defendant Westfield argues that it is not obligated to pay interest under Minn. Stat. § 337.10, subd. 3 because interest only applies to 'undisputed' amounts not paid on time. However, the 'undisputed' language regards a dispute between the prime contractor and the subcontractor, not a dispute between the subcontractor and the surety. At no time has Niles-Wiese disputed the amount it owes [Safety Signs] on the project; therefore, the amount owed is 'undisputed' for the purposes of Minn. Stat. § 337.10, subd. 3."

(Add. 9-11).

After issuing summary judgment to Safety Signs, the lower court issued a separate order awarding judgment to Safety Signs for the attorney's fees, costs and disbursements it incurred in prosecuting its bond claim. (Add. 13). Subsequently, the lower court entered each of these Judgments. (Add. 14-15). The total present amount of the Judgments exceeds \$70,000.00. (Add. 7, 13).

### SUMMARY OF ARGUMENT

**I. Safety Signs Is Not Entitled to Payment Under the First Bond Because Its Claim Was Untimely and Improperly Served.**

Through its Claim, even though only Phase I work is covered under the First Bond, Safety Signs sought payment for thousands of dollars of work it performed on Phase II of the Project. Because Safety Signs performed its last Phase I work in May 2009, moreover, its Claim is untimely because it did not initiate this action until more than one year after that date. Nevertheless, the lower court awarded summary judgment to Safety Signs for Phase I work *and* Phase II work.

Furthermore, Safety Signs failed to serve its Claim upon Niles-Wiese at the address listed for Niles-Wiese on the First Bond. Although Minnesota courts require strict compliance with statutory requirements such as this, the lower court excused Safety Signs' error.

Finally, Safety Signs failed to ensure that Westfield received its Claim within 120 days of its last day of work as required by statute. This is particularly true because Safety Signs calculated its last day based on its last day of *Phase II* work, which is not even covered under the First Bond.

Because the lower court awarded Judgment to Safety Signs even though it failed to comply with the rigid statutory conditions precedent necessary to maintain a claim, the lower court committed reversible error.

**II. Safety Signs Forfeited Its Right To Recover Against the First Bond By Intentionally Overstating Its Claim.**

On several occasions prior to initiating this action, Safety Signs demanded – through sworn statements made under penalty of perjury – payment from Westfield in the amount of roughly \$35,000.00. In opposition to Safety Signs’ Motion, Westfield asserted that factual issues existed regarding whether Safety Signs intentionally, fraudulently sought more than it was owed from Westfield because Safety Signs ultimately sought principal damages of only roughly \$27,000.00. Furthermore, of this amount, only \$15,900.00 was Phase I work; the remainder represented Phase II work, which is not compensable under the First Bond. The undisputed facts demonstrate, therefore, that Safety Signs intentionally inflated its initial damages demand by roughly \$20,000.00.

Declaring that Safety Signs’ repeated demands for overstated amounts were mere “inconsistencies,” however, the lower court awarded summary judgment to Safety Signs. As such, the lower court committed reversible error by concluding that no reasonable factfinder could have concluded that Safety Signs forfeited its right to recover under the First Bond by initially overstating its Claim.

**III. Safety Signs Is Not Entitled to 18 Percent Interest Against Westfield.**

Opposing summary judgment, Westfield argued that Safety Signs was not entitled to an award of 18 percent interest against Westfield pursuant to the Prompt Pay Act because the amount of Safety Signs' principal damages was not "undisputed".

As discussed above, the undisputed facts demonstrate that – after it commenced this action – Safety Signs reduced its principal damages demand by roughly \$8,000.00. Because the Prompt Pay Act only allows a claimant to recover 18 percent interest on undisputed amounts, Safety Signs was not entitled to an interest award.

Ignoring these facts and misconstruing the law, the lower court committed reversible error by awarding 18-percent interest to Safety Signs against Westfield.

## **ARGUMENT AND AUTHORITIES**

### **Standards of Review**

#### **A. Standard of Review for Summary Judgment**

This Court reviews a grant of summary judgment *de novo* to determine whether there is a disputed issue of material fact. *Zip Sort, Inc. v. Comm'r of Rev.*, 567 N.W.2d 34, 37 (Minn. 1997); *see* Minn. R. Civ. P. 56.03.

On appeal from a grant of summary judgment, this Court must determine whether any genuine issues of material fact exist and whether the lower court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). On appeal, moreover, this Court views "the evidence in the light most favorable to the party against whom the motion was granted, but need not defer to the district court's application of the law." *Van Vickle v. C.W. Scheurer and Sons, Inc.*, 556 N.W.2d 238, 241 (Minn.App. 1996).

Westfield anticipates that Safety Signs will assert that Westfield failed to affirmatively offer admissible evidence in opposition to the Motion. In this regard, the lower court held that “merely asserting that the evidence does not prove what it purports to, does not create a material issue of fact.” (Add. 10). This is a misstatement of law.

Rather, when the movant would bear the burden of proof at trial, it must demonstrate the absence of an issue of material fact with regard to every element essential to its claims. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Indeed, “[s]ince . . . all factual inferences must be drawn against the movant for summary judgment, it follows that, even where the movant’s supporting documents are uncontradicted, they may in themselves be insufficient to sustain [its] burden of proof.” *O’Malley v. Ulland Bros.*, 549 N.W.2d 889, 897 (Minn. 1996) (quoting *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955)).

In this regard, the summary judgment standard mirrors the directed verdict standard. *Celotex*, 477 U.S. at 323.

#### **B. Standard of Review for Interpretation of a Statute.**

Proper construction of a statute is a question of law, which this Court reviews *de novo*. *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 383 (Minn. 1999).

#### **I. THE LOWER COURT COMMITTED REVERSIBLE ERROR BY CONCLUDING THAT SAFETY SIGNS WAS ENTITLED TO PAYMENT UNDER THE FIRST BOND.**

Applying the aforementioned standards of review, the lower court erroneously granted summary judgment to Safety Signs, which is not entitled to payment under the First Bond because (1) this action is untimely; (2) it failed to properly serve its Claim

upon Niles-Wiese; and (3) it failed to serve its Claim upon Westfield within the statutory period.

**A. The Lower Court Erred by Allowing Safety Signs to Recover on an Untimely Claim.**

As indicated above, this case involves two separate construction projects involving two separate bonds. Westfield issued the First Bond for work on Phase I and it issued the Second Bond for work on Phase II. (A. 10-14; Beaver Aff., Ex. A; Stein Aff., Exs. G, H). Through this action, however, Safety Signs wrongfully seeks payment for Phase II work under the First Bond. (A. 76). Furthermore, Safety Signs performed the last of its Phase I work more than one year before it commenced this action. (A. 47, 76). Even accepting the evolving last day of work identified on Safety Signs' Original Claim *or* Revised Claim, it failed to ensure that Westfield received its notice of the Claim within 120 days of either date. (Add. 23-24, 26). Consequently, Safety Signs' Claim is improper, untimely and should be dismissed.

Minnesota's bond statute, Minn. Stat. § 574.26, *et. seq.*, is among those statutes commonly known as the "Little Miller Acts." *See* Bruner & O'Connor on Construction Law ("Bruner & O'Connor"), § 8:155 (2002). Such statutes are so named because they are based on a similar federal law known as the Miller Act of 1935. *See id.*

Pursuant to Minnesota's bond statute, an action to enforce a bond claim against a surety must be commenced within one year of the claimant's last day of work on the project covered by the bond. Minn. Stat. § 574.31, subd. 2(c). If a claimant fails to

timely initiate litigation, therefore, its claim is barred. *See, e.g., Shandorf v. Standard Sur. & Cas. Co. of New York*, 268 N.W. 843, 843-44 (Minn. 1936).

Courts strictly enforce this one-year requirement to ensure that a surety has prompt notice of nonpayment issues so it can take immediate steps:

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

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

Federal courts interpreting the federal Miller Act have declared that this one-year limitation period is "jurisdictional." *United States for Use of Celanese Coatings Co. v. Gullard*, 504 F.2d 466, 468 (9th Cir. 1974). In other words, bringing an action within the limitations period is a condition precedent to maintaining an action under the bond. *Id.* If a claimant misses its deadline, therefore, it loses all of its rights under the bond. *United States v. Daniel, Urbahna, Seelye and Fuller*, 357 F.Supp. 853, 861-62 (N.D.Ill. 1973); *see also* Bruner & O'Connor, § 8:175 ("Time limitations for the commencement of suit . . . are strictly enforced. Failure to commence suit within the mandatory period bars recovery.")

It is unsurprising, moreover, that a surety is not obligated to pay a claimant for work that is not covered by the bond. *See United States ex rel. Carter-Schneider-Nelson, Inc. v. Campbell*, 293 F.2d 816, 818 (9th Cir. 1961).

Here, only Phase I work is compensable under the First Bond. (A. 10-14; Beaver Aff., Ex. A; Stein Aff., Exs. G, H). Safety Signs may not seek payment, therefore, for *Phase II* work under the First Bond. Safety Signs failed, moreover, to initiate this action (for recovery under the First Bond, which covers only Phase I work) within one year of its last performance of Phase I work in May 2009. (A. 1-20, 47). By missing this deadline, Safety Signs lost its bond rights and the courts lack subject-matter jurisdiction over Safety Signs' claim against Westfield.

Westfield anticipates that Safety Signs will contend that this argument is improper because it was not raised below. Despite this, this Court may dismiss Safety Signs' bond claim. Subject-matter jurisdiction, which goes to the court's authority to hear a case, may be raised at any time, including for the first time on appeal. *See Cochrane v. Tudor Oaks Condo. Project*, 529 N.W.2d 429, 432 (Minn.App. 1995), *review denied*, (Minn. May 31, 1995) (citing Minn. R. Civ. P. 12.08(c) ("Whenever it appears . . . that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.")).

Although the lower court decided Westfield's motion based on other facts, therefore, the record establishes – as a matter of law – that Safety Signs' claim against Westfield should be dismissed as untimely.

**B. The Lower Court Erred by Allowing Safety Signs to Recover Despite Its Failure to Strictly Comply With Statutory Notice Requirements.**

In addition to strictly enforcing the limitations period for bond claims, Minnesota courts require strict compliance with the notice provisions of the bond statute. Significantly, moreover, the claimant bears the burden of proving its compliance with the

statute.

The undisputed facts demonstrate that Safety Signs failed to serve its Claim upon Niles-Wiese at its address listed on the First Bond. (A. 10; Add. 24-25). Indeed, the undisputed facts show that Niles-Wiese never received Safety Signs' notice of its Claim. (Add. 25).

Ignoring controlling precedent mandating *strict* compliance with the statute, the lower court concluded that Safety Signs' Claim was valid because it "substantially complied" with the statute. (Add. 6). This constitutes reversible error.

As to service of notice of a bond claim, the governing bond statute provides as follows:

In the event of a claim on a payment bond by a person furnishing labor and materials, no action shall be maintained on the payment bond unless, within 120 days after completion, delivery, or provision by the person of its last item of labor and materials, for the public work, the person serves written notice of claim under the payment bond personally or by certified mail upon the surety that issued the bond ***and the contractor*** on whose behalf the bond was issued ***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. . . . For the purpose of this section, notice is sufficient if served personally or via certified mail to ***the addresses of the contractor*** and surety ***listed on the bond***. . . .

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

In one illustrative case demonstrating the exacting statutory compliance required by Minnesota courts, a claimant served notice of a *mechanic's lien* upon an owner but failed to provide notice of its *bond claim*. *Spetz & Berg, Inc. v. Luckie Constr. Co., Inc.*, 353 N.W.2d 233, 233-34 (Minn.App. 1984). Contending that it "substantially complied" with the bond statute, the claimant asserted that its notice was proper. *Id.* at 234.

Rejecting this argument, the court held that “strict compliance” with the bond statute’s notice requirement was a “condition precedent” necessary to maintain an action on the bond. *Id.* at 235; see *Edward Kraemer & Sons, Inc. v. Ashbach Constr. Co.*, 608 N.W.2d 559, 561-62 (Minn.App. 2000) (holding that strict compliance with the statutory notice provisions was a condition precedent to maintain a claim against the bond); *Alexander Const. Co., Inc. v. C&H Contracting, Inc.*, 354 N.W.2d 535, 538 (Minn.App. 1984) (same). Significantly, moreover, *Spetz & Berg* held that it is impossible for a surety to waive a claimant’s performance of such a condition precedent. 353 N.W.2d at 235; see *Mineral Resources, Inc. v. Mahnomen Constr. Co.*, 184 N.W.2d 780, 786 (Minn. 1971) (holding that “under no circumstances” can a surety waive the statutory-notice requirement because “a materialman’s right to bring an action on the bond is nonexistent in the absence of strict compliance with the statutory requirement of filing notice”).

In a case decided by the Minnesota Supreme Court, moreover, a claimant alleged that a surety waived the notice requirement by acknowledging receipt of a letter advising the surety of its claim. *Ceco Steel Products Corp. v. Tapager*, 294 N.W. 210, 211 (Minn. 1940). Pursuant to the version of the statute existing at the time, however, the claimant was also required to timely file notice of its claim with the county auditor. *Id.* at 212. As a preliminary matter, the court held that it was the claimant’s burden to demonstrate its compliance with the statute. *Id.* at 213. The Court then held that the claimant’s failure to file its notice with the county auditor nullified its bond claim. *Id.* at 212-13. Noting that there is “no room for construction” of a “clear and unambiguous” statute, the Minnesota Supreme Court held that, “The law giving [the claimant its] cause of action required strict

observance on [its] part of the filing of such notice with the proper officer.” *Id.* at 213 (internal citation, quotation omitted); see *Grazzini Bros. & Co. v. Builders Clinic, Inc.*, 160 N.W.2d 259, 261 (Minn. 1968) (citing *Ceco Steel*, holding that “[c]ompliance with the statute is a condition precedent to an action on the bond by a materialman”).

Additionally, *Ceco Steel* held that the surety investigated the bond claim pursuant to a “complete reservation of rights” and, therefore, it did not waive the statutory notice requirements. 294 N.W. at 213.

Here, although the First Bond identifies Niles-Wiese’s address as 215 NE First Street, Medford, MN 55049, Safety Signs attempted to serve Niles-Wiese at the Main Street address. (A. 10; Add. 24-25). Indeed, the undisputed facts demonstrate that Niles-Wiese never received Safety Signs’ notice because the mailing was returned as undeliverable. (A. 25).

Despite these undisputed facts, the lower court held as follows:

Defendant Westfield’s argument that [Safety Signs] forfeited its right to pursue the bond claim because it failed to properly serve notice on Defendant Niles-Wiese at the address listed on the bond is insufficient when the remedial purpose of the statute is considered in its entirety.

...

In the present case, even though [Safety Signs] served notice on Defendant Niles-Wiese at its primary company address instead of the address listed on the bond, Defendant Westfield still received notice of the bond claim. Thus, the purpose of the statute was accomplished, as the *surety* was notified of the *principle’s* [sic] nonpayment. [Safety Signs’] service of notice was therefore valid under the statute.

(Add. 5) (emphasis in original).

Contrary to the lower court's decision, Minnesota courts require strict compliance with the bond statute, which requires that a claimant serve its notice of claim "upon the surety that issued the bond and the contractor on whose behalf the bond was issued at their addresses as stated in the bond." Minn. Stat. § 574.31, subd. 2(a) (emphasis added).

As noted by the Minnesota Supreme Court in *Ceco Steel*, the statute is clear and unambiguous; there is no room for construction. Despite this, the lower court denied Westfield's summary judgment motion because it concluded that only "substantial compliance" with the statute is necessary. (Add. 6). Finding that Safety Signs "substantially complied" with the statute and finding that Safety Signs' service of its claim was "proper and timely," the lower court denied Westfield's motion. (*Id.*) This conclusion directly conflicts with a mountain of controlling precedent. More than 70 years ago, *Ceco Steel* held that a claimant must strictly comply with the statute's notice provisions. *Ceco Steel*, *Grazzini Bros.*, *Alexander Const. Co.* and *Edward Kraemer & Sons* each held, moreover, that such strict compliance is a "condition precedent" for a claimant to maintain a claim against a bond. Nearly 30 years ago, the Minnesota Court of Appeals expressly rejected the lower court's theory by holding that "substantial compliance" with the statute was insufficient and that "strict compliance" was necessary. *Spetz & Berg*, 353 N.W.2d at 235-36. Indeed, the Minnesota Supreme Court held that a claimant's bond rights simply cease to exist if the claimant fails to strictly comply with the statutory notice provisions. *Mineral Resources*, 184 N.W.2d at 786.

The lower court also erred by holding that Westfield waived the statutory notice provisions. Minnesota courts such as *Spetz & Berg* and *Mineral Resources* have held that it is *impossible* for a surety to waive such notice provisions. Furthermore, the record evidence establishes that Westfield – rather than waiving its rights – reviewed each of Safety Signs’ claims pursuant to a full reservation of rights. (A. 122-23; Stein Aff., Ex. H; Tarasek 2d Aff., Ex. A).

By applying a substantial compliance standard, ignoring the controlling strict compliance standard and concluding that Westfield waived statutory notice requirements, the lower court committed reversible error.

**C. The Lower Court Erred by Allowing Safety Signs to Recover Despite Undisputed Facts Demonstrating That Westfield Did Not Receive Notice of Safety Signs’ Claim Until More Than 120 Days After Safety Signs’ Last Day of Work On The Project Covered By The Bond.**

In addition to failing to serve Niles-Wiese, Safety Signs also failed to serve its notice upon Westfield within 120 days of its last day of work on the bonded project. (Add. 23-24, 26; A. 47, 76). Through its Original Claim, Safety Signs identified its last day of work as September 9, 2009. (Add. 23). To comply with the statute, Safety Signs was required to serve its Notice upon Westfield and Niles-Wiese within 120 days of that date (i.e., no later than January 7, 2010). Westfield did not receive the Notice, however, until January 11, 2010. (Add. 24). Furthermore, as indicated above, Safety Signs’ claimed last day of work was for Phase II work that is not covered under the First Bond. (A. 45-52, 76). Because the undisputed facts establish that notice was untimely, the lower court committed reversible error by granting summary judgment to Safety Signs.

The statute provides, in relevant part, as follows:

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

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

In construing this language, a court should rely upon the neighboring language in the same statutory subdivision. *See Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000) (“We are to read and construe a statute as a whole and must interpret each section in light of the surrounding sections to avoid conflicting interpretations”); *Kachman v. Blosberg*, 87 N.W.2d 687, 692 (Minn. 1958) (rules of statutory construction require a court to read a particular provision in context with other provisions in the same statute to determine the meaning of the particular provision); *ILHC of Eagan, LLC v. County of Dakota*, 693 N.W.2d 412, 419 (Minn. 2005) (“no word, phrase, or sentence should be deemed superfluous, void or insignificant”) (quotation omitted); Minn. Stat. § 645.16 (every law should be construed to give effect to all its provisions).

Applying these statutory-construction principles to Section 574.31, subd. 2(a), it is significant that another portion of the same statutory subdivision uses the date of a surety’s **receipt** of notice to trigger the period during which a surety must object to a claimant’s request to extend the limitations period. *See* Minn. Stat. § 574.31, subd. 2(d).

As discussed above, these statutory notice provisions are strictly construed. In an analogous case, a claimant sent its notice 122 days after its last day of work. *Edward*

*Kraemer & Sons, Inc.*, 608 N.W.2d at 560. Without deciding whether service was effective upon mailing or receipt, the appellate court affirmed the denial of the claim as untimely, noting that the claimant was obligated to strictly comply with the statute. *Id.* at 561-62; *see also Benson v. Barrett*, 214 N.W. 47, 48 (Minn. 1927) (noting that purpose of statutory notice provision was to inform the surety of its principal's default).

No known Minnesota case addresses whether service of notice of a bond claim by certified mail is effective upon mailing or upon receipt. Federal courts interpreting the federal Miller Act routinely conclude, however, that service is ineffective until it is actually received. *See, e.g., Pepper Burns Insulation, Inc. v. Artco Corp.*, 970 F.2d 1340, 1342-43 (4th Cir. 1992) (“Given its plain meaning, the language ‘giving written notice to said contractor’ requires receipt of the notice by the contractor. Mailing does not fully accomplish the condition to ‘giv[e] . . . notice’”); *United States for Use and Benefit of B&R, Inc. v. Donald Lane Const.*, 19 F.Supp.2d 217, 223 (D.Del. 1998) (mailing of notice prior to deadline is insufficient to satisfy deadline); *see also Bruner & O’Connor* § 8:175 (“This notice must be received – not just mailed – within the [statutory] period.”)

Here, in deciding this issue, this Court should apply principles of statutory construction and conclude that, because a neighboring statutory subdivision deems service complete only upon receipt, service pursuant to Section 574.31, subd. 2(a), is effective only upon receipt. Such an interpretation is consistent with the views of other courts applying similar bond statutes. Applying this interpretation, Safety Signs’ Claim is untimely because Westfield did not receive notice until more than 120 days after Safety Signs’ last date of work. (Add. 23-24). This is particularly true because, as discussed

above, Safety Signs performed its last Phase I work no later than May 2009 and Westfield did not receive Safety Signs' Claim until January 2010. (A. 47, 76). It was reversible error, therefore, for the lower court to award Judgment to Safety Signs despite its failure to timely serve notice of its Claim upon Westfield.

**II. THE LOWER COURT COMMITTED REVERSIBLE ERROR BY AWARDING SUMMARY JUDGMENT TO SAFETY SIGNS DESPITE GENUINE ISSUES OF MATERIAL FACT REGARDING WHETHER SAFETY SIGNS INTENTIONALLY OVERSTATED ITS CLAIM.**

As indicated above, in support of its Claim, Safety Signs initially provided a spreadsheet to Westfield indicating it was owed \$33,306.29 on its invoices, \$1,759.94 in interest and \$11.25 for a filing fee, for a total claim amount of \$35,077.48. (A. 45-52). Later, Safety Signs provided Westfield with a damages claim for \$35,077.44 (four cents less than its original demand). (A. 53-55). Through its Motion, however, Safety Signs only sought principal damages in the amount of \$27,119.65. (A. 76).

In its answer to the Complaint, Westfield asserted an affirmative defense that Safety Signs' claim was barred because it "intentionally states false information and, therefore, constitutes a fraudulent claim." (A. 23). In opposition to the Motion, moreover, Westfield argued that Safety Signs was not entitled to summary judgment because it "intentionally, fraudulently sought payment in excess of the amount to which it was actually entitled." (A. 130). In granting summary judgment to Safety Signs, however, the lower court declared that the \$8,000.00 difference between Safety Signs' original demands and its subsequent demand was a mere "inconsistenc[y]" that "[did] not create a material issue of fact." (Add. 9-10). The lower court committed reversible error

by concluding that genuine factual issues did not exist regarding whether Safety Signs intentionally overstated its Claim.

Minnesota's bond statute requires a claimant to serve a Notice of Claim upon the surety and the contractor that specifies – under penalty of perjury – the amount of the claim. Minn. Stat. § 574.31, subd. 2(a).

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

Although there are no known Minnesota cases addressing whether intentional overstatement voids a bond claim, cases interpreting Minnesota's mechanic's lien statute are instructive on this issue. *Twin City Pipe Trades Service Ass'n, Inc. v. Peak Mech., Inc.*, 689 N.W.2d 549, 553 (Minn.App. 2004) (noting similarities between bond statute and mechanic's lien statute).

In this regard, one Minnesota court interpreting the mechanic's lien statute held that a claimant "is precluded from seeking foreclosure" if it "intentionally overstates the amount due." *Delyea v. Turner*, 118 N.W.2d 436, 440-41 (Minn. 1962). "To deprive the claimant of [the] right to a lien under [the] statute, there must be a showing of fraud, bad faith or an intentional demand for an amount in excess of that due." *Witcher Constr. v. Estes II Ltd. P'Ship*, 465 N.W.2d 404, 407 (Minn.App. 1991), *review denied*, (Minn. March 15, 1991) (citation, quotation omitted); *Bierlein v. Gagnon*, 96 N.W.2d 573, 578 (Minn. 1959). "Whether a claimant has intentionally overstated a lien claim is a fact

question for the [district] court and the [district] court's determination will not be overturned unless clearly erroneous." *Witcher Constr.*, 465 N.W.2d at 407 (citing *Cox v. First Nat'l Bank of Aitkin*, 415 N.W.2d 385, 388 (Minn.App. 1987), *review denied*, (Minn. Jan. 20, 1988)). Whether a party acted in good faith is a credibility question. *Tonka Tours, Inc. v. Chadima*, 372 N.W.2d 723, 728 (Minn. 1985).

In one case applying this rule, the Minnesota Supreme Court upheld a finding of bad faith because a contractor "necessarily knew that [it was] attempting to acquire a lien for material not furnished and for labor not performed." *Lyons v. Jarnberg*, 150 N.W. 1083, 1084 (Minn. 1915).

Here, Safety Signs asserted – under penalty of perjury – that it was entitled to payment from Westfield in the amount of \$35,077.48. (Add. 23). Later, Safety Signs recalculated its entitlement as \$35,077.44. (A. 53-55). In each case, Safety Signs intentionally, fraudulently sought payment in excess of the amount to which it was actually entitled. This is clear because, through the Motion, Safety Signs only sought payment of principal damages in the amount of \$27,119.65. (A. 76). Furthermore, only roughly \$16,000.00 of Safety Signs' work was Phase I work compensable under the First Bond. (*Id.*) A genuine factual issue existed, therefore, as to whether Safety Signs intentionally overstated the amount of its Claim and whether such overstatement negated its right to recover against the First Bond. By granting summary judgment to Safety Signs, therefore, the lower court committed reversible error.

**III. THE LOWER COURT COMMITTED REVERSIBLE ERROR BY CONCLUDING THAT SAFETY SIGNS WAS ENTITLED TO AN AWARD OF 18 PERCENT INTEREST THROUGH THE PROMPT PAY ACT.**

Prompt-pay interest is recoverable only on “undisputed” amounts. (Add. 30). In this regard, as discussed above, Safety Signs reduced its initial demand from more than \$35,000.00 to roughly \$27,000.00 after it launched this action. At least \$8,000.00 of Safety Signs’ initial demand, therefore, was undeniably *disputed*. Furthermore, through a letter dated March 11, 2010, Westfield told Safety Signs that it “disputes the entire amount” of the Claim. (Tarasek 2d Aff., Ex. A). Additionally, Westfield’s opposition was based, in part, on Niles-Wiese’s contention that that it paid more money to Safety Signs than acknowledged by Safety Signs. (A. 126). By awarding prompt-pay interest to Safety Signs on a disputed amount, therefore, the lower court committed reversible error.

The prompt-pay statute provides, in relevant part, that “[t]he 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.” (Add. 30 [Minn. Stat. § 337.10, subd. 3 (emphasis added)]).

Furthermore, other courts applying similar prompt-pay statutes have held that interest is not recoverable against a surety because the purpose behind the bond statute does not include paying such interest. *Vaughn Excavating and Const., Inc. v. P.S. Cook Co.*, 981 P.2d 485, 488 (Wyo. 1999) (applying Wyoming statute).

Despite the above, the lower court concluded that the First Bond “requires the payment of 1-1/2 percent monthly interest (18% annually) by Westfield when payment is not made within 10 days of the contractor receiving payment from the City of

Owatonna.” (Add. 11). Furthermore, the lower court held as follows:

[T]he ‘undisputed’ language regards a dispute between the prime contractor and the subcontractor, not a dispute between the subcontractor and the surety. At no time has Niles-Wiese disputed the amount it owes [Safety Signs] on the project; therefore, the amount owed is ‘undisputed’ for the purposes of Minn. Stat. § 337.10, subd. 3.

*(Id.)*

Here, a claimant is not entitled to recover prompt-pay interest from a surety. Furthermore, such interest is not recoverable on disputed amounts. In this case, Safety Signs’ damages were disputed by Westfield and Niles-Wiese. Significantly, moreover, Safety Signs reduced its original demand by nearly \$8,000.00 after it commenced this action.

It was non-sensical for the lower court to conclude that Westfield, as surety, stands in the shoes of Niles-Wiese, as principal, for certain purposes (such as paying Safety Signs) but does not stand in Niles-Wiese’s shoes to contest Safety Signs’ demand for prompt-pay interest. Because prompt-pay interest is not recoverable from a surety and because the amount of Safety Signs’ damages was disputed, Safety Signs was not entitled to recover 18-percent interest from Westfield. By holding otherwise, the lower court committed reversible error.

### CONCLUSION

Westfield respectfully requests that this Court reverse the Judgments of the lower court because genuine factual issues exist regarding: (1) the timeliness of Safety Signs’ Claim; (2) whether Safety Signs strictly complied with statutory notice requirements; and

(3) whether Safety Signs ensured that Westfield received its Claim within 120 days of its last day of Phase I work compensable under the First Bond.

Furthermore, this Court should reverse the Judgments because factual issues exist regarding whether Safety Signs intentionally overstated its Claim and whether Safety Signs was entitled to an award of 18-percent interest against Westfield.

Respectfully submitted,

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Dated: March 30, 2012

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**CERTIFICATION**

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

Monospaced font – Times New Roman, font size 13. This Brief contains 634 lines of text, 7,138 words, and 27 pages.

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