

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF LABOR AND INDUSTRY

In the Matter of Wayne A. and Deborah K.  
Derosier's Verified Application for  
Compensation from the Contractor  
Recovery Fund

**FINDINGS OF FACT,  
CONCLUSIONS  
AND ORDER**

Administrative Law Judge Bruce H. Johnson conducted a hearing in this matter beginning at 9:30 a.m. on August 2, 2010, at the Saint Paul offices of the Office of Administrative Hearings. The parties presented no testimony at the hearing; rather, parties stipulated that the hearing record consisted of joint Exhibits 1-17. The parties submitted post-hearing memoranda on August 23, 2010, and reply memoranda on September 7, 2010. The record closed on September 7, 2010.

Christopher M. Kaisershot, Assistant Attorney General, appeared on behalf of the Department of Labor and Industry (Department). Charles C. Kallemeyn, attorney at law, Kallemeyn & Kallemeyn, PLLC, appeared on behalf of the Respondents Wayne A. Derosier and Deborah K. Derosier (Respondents).

**STATEMENT OF ISSUES**

Whether Respondents' application for recovery from the Contractor Recovery Fund should be granted, and if so, in what amount?

The ALJ concludes that the Respondents' application for recovery should be granted in the amount of \$23,265.96.

Based upon all of the files, records and proceedings herein, the Administrative Law Judge makes the following:

**FINDINGS OF FACT**

1. On August 22, 2008, the Respondents contracted with Damont, Inc. (Damont), to remodel their home. The Respondents paid Damont a total of \$109,930.00 for construction work, and Damont completed the work specified by the contract.<sup>1</sup>

---

<sup>1</sup> Ex. A at 11, 14-21.

2. David Monte was the contractor licensee and owner of Damont. He died on February 5, 2009 after completing the Respondents' remodeling work.<sup>2</sup>

3. Damont had hired various subcontractors to provide material for the project. Among them was Spring Lake Park Lumber Company (SLPL), which supplied lumber and building materials. However, Damont had failed to pay SLPL for those building materials. As a result, on February 10, 2009, SLPL filed a \$23,687.55 mechanic's lien statement against Respondents pursuant to Minn. Stat. ch. 514.<sup>3</sup>

4. On May 21, 2009, the Anoka County District Court appointed a receiver to collect Damont's corporate assets, to discharge its corporate obligations, and to dissolve the corporation.<sup>4</sup>

5. On June 23, 2009, the Respondents sued Damont. The complaint was served upon the Secretary of State on August 3, 2009. As their sole cause of action, the Respondents alleged that Damont had failed to pay \$23,687.55 to SLPL for the building materials that SLPL had supplied for the Respondents' remodeling project.<sup>5</sup>

6. On October 23, 2009, SLPL, in turn, initiated a civil action against Respondents and Damont seeking \$23,687.55 for unpaid materials, plus interest, costs and attorneys fees.<sup>6</sup>

7. On January 20, 2010, the Respondents obtained a \$23,587.55 default judgment against Damont.<sup>7</sup> It is unclear from the record why the judgment was \$100 less than the mechanic's lien.

8. Thereafter, on January 25, 2010, the Respondents, through their attorney, notified the Department that SLPL had placed a lien on their property, that Damont was now in receivership, that they had obtained a judgment against Damont, and that Damont's receiver had indicated that some funds would be available to pay a portion of Damont's judgment debt to them. The Respondents then asked the Department whether they should immediately submit an application to the Fund for recovery or wait until they received a portion of Damont's judgment debt from the receiver.<sup>8</sup> The Department subsequently advised the Respondents that the Department's "position is that your clients may pursue application to the Fund at this time."<sup>9</sup>

9. Sometime in early 2010, the receiver collected approximately \$200,000 from the proceeds of a life insurance policy that had been issued to Damont. On April 2, 2010, the receiver paid each unsecured creditor, including the Respondents and

---

<sup>2</sup> Ex. 1; Ex. 3.

<sup>3</sup> Ex. A at 22-23.

<sup>4</sup> Ex. 12; Ex. 13.

<sup>5</sup> Ex. A at 11-13.

<sup>6</sup> Ex. A at 48-52.

<sup>7</sup> Ex. A at 7-10.

<sup>8</sup> Ex. 1.

<sup>9</sup> Ex. 2.

SPPL, a pro rata payment equal to 19.73%, or approximately \$.20 on the dollar. The Respondents received \$3,735.88, and SLPL received \$5,009.66. Shortly after distributing those payments, the receiver dissolved Damont in accordance with the provisions of Minn. Stat. § 302A.701.<sup>10</sup>

10. The check that the Respondents obtained from the receiver contained the following language on the back:

This payment is made in full and final satisfaction and settlement of all debts and obligations of Damont, Inc. to payee whose endorsement and negotiation of this check shall signify its acceptance of these terms and its release of all claims against Damont, Inc. and its receiver.<sup>11</sup>

11. The Respondents endorsed the check and thereby accepted \$3,735.88 from the receiver in full and final payment for all claims against Damont.<sup>12</sup>

12. On April 22, 2010, the Respondents issued a check in the amount of \$27,001.84 to SLPL to satisfy its claims against them.<sup>13</sup> The payment reflected the following amounts:

Mechanic's Lien Amount	\$23,687
Interest to March 3, 2009	\$515.85
Costs	\$705
Attorney's Fees	\$3,903.25
Interest from March 3, 2009, to April 2, 2010	\$3,077.05
Interest from April 2, 2010, to April 22, 2010	\$122.80
Credit for Payment from Receivership	(\$5,009.66)
Total	\$27,001.84

13. The \$515.86 in interest, \$705.00 in costs, and \$3,903.25 in attorneys fees described above were not costs or expenses that the Respondents incurred but rather costs and expenses that SLPL had incurred in perfecting its mechanic's lien and in the civil action against the Respondents seeking to reduce that mechanic's lien to judgment.

14. On May 20, 2010, the Respondents filed an application to recover \$23,265.96 from the Fund.<sup>14</sup> Respondents calculated their loss as the amount they paid SLPL to discharge the mechanic's lien, less the amount they recovered from the receiver (\$27,001.84 - \$3,735.88 = \$23,265.96). Respondents' application for recovery

<sup>10</sup> Ex. 3, spreadsheet p. 3, lines 11 and 47.

<sup>11</sup> See Ex. 3.

<sup>12</sup> Ex. 5.

<sup>13</sup> Ex. A at 53.

<sup>14</sup> Ex. A at 1-5.

therefore included the \$3,715.70 in interest, \$705 in costs, and \$3,903.25 in attorney's fees that SLPL had incurred in the course of pursuing its claim against the Respondents.<sup>15</sup>

15. Based on the fact that Respondents had discharged their claims against Damont when they accepted the payment from Damont's receiver, the Fund denied Respondents' application for recovery, concluding that Respondents did not meet the statutory eligibility requirements because they had been "paid in full satisfaction of [their] judgment" against Damont.<sup>16</sup>

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

### CONCLUSIONS

1. The Administrative Law Judge had authority to consider this matter under Minn. Stat. §§ 14.50 and 326B.89, subd. 8 (2008).

2. The Respondents received due, proper and timely notice of the hearing and this matter is, therefore, properly before the Administrative Law Judge.

3. The Department complied with all relevant procedural legal requirements.

4. The purpose of the Contractor Recovery Fund is to compensate eligible homeowners and lessees who have suffered economic loss as a result of a licensed contractor's fraudulent or deceptive practices, or failure to perform under a contract.<sup>17</sup>

5. Minn. Stat. § 326B.89, subd. 6, provides that to be eligible to receive compensation from the Fund, a homeowner or lessee must submit an application to the Commissioner and verify the following information:

- (a) the specific grounds upon which the owner or lessee seeks to recover from the fund;
- (b) that the owner or lessee has obtained a final judgment in a court or competent jurisdiction against a licensee under section 326B.83;
- (c) that the final judgment was obtained against the licensee on the grounds of fraudulent, deceptive, or dishonest practices, conversion of funds, or failure of performance that arose directly out of a contract directly between the licensee and the homeowner or lessee;
- (d) the amount of the owner's or lessee's actual and direct out-of-pocket loss on the owner's residential real estate;

---

<sup>15</sup> Ex. A at 1-5.

<sup>16</sup> Ex. A at 57-61.

<sup>17</sup> Minn. Stat. § 326B.89, subd. 4.

- (e) that the residential real estate is located in Minnesota;
- (f) that the owner or the lessee is not the spouse of the licensee or the personal representative of the licensee;
- (g) the amount of the final judgment, any amount paid in satisfaction of the final judgment, and the amount owing on the final judgment as of the date of the verified application;
- (h) that the owner or lessee has diligently pursued remedies against all the judgment debtors and all other persons liable to the judgment debtor in the contract for which the owner or lessee seeks recovery; and
- (i) that the verified application is being served within two years after the judgment became final.

6. Upon review of the Commissioner's decision, the Respondents bear the burden of proving their eligibility under Minn. Stat. § 326B.89, subd. 6, by substantial evidence.<sup>18</sup>

7. Respondents satisfied the eligibility requirements for compensation under Minn. Stat. § 326B.89, subd. 6.

8. Minn. Stat. § 326B.89, subd. 6, further provides:

[T]he owner's and the lessee's actual and direct out-of-pocket loss shall not include attorney fees, litigation costs or fees, interest on the loss, and interest on the final judgment obtained as a result of the loss. *Any amount paid in satisfaction of the final judgment shall be applied to the owner's or lessee's actual and direct out-of-pocket loss.* An owner or lessee may serve a verified application regardless of whether the final judgment has been discharged by a bankruptcy court. [Emphasis supplied.]

9. Minn. Stat. § 326B.89, subd. 7, provides that when making disbursements from the fund to injured claimants, the Commissioner "shall not be bound by any prior settlement, compromise, or stipulation between the owner or the lessee and the licensee."

10. Minn. Stat. § 326B.89, subd. 10, further provides:

**Right of subrogation.** If the commissioner pays compensation from the fund to an owner or a lessee pursuant to an agreement under subdivision 7, clause (1), or a final order issued under subdivision 7, clause (2), or subdivision 8, then the commissioner shall be subrogated to all of the rights, title, and interest in the owner's or lessee's final judgment in the amount of compensation paid from the fund and the owner or the lessee

---

<sup>18</sup> Minn. Stat. § 326B.89, subd. 8.

shall assign to the commissioner all rights, title, and interest in the final judgment in the amount of compensation paid. The commissioner shall deposit in the fund money recovered under this subdivision.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

### **ORDER**

**IT IS HEREBY ORDERED THAT** the Respondents application for recovery from the Contractor Recovery Fund is GRANTED in the amount of \$23,265.96.

Dated: September 28, 2010

s/Bruce H. Johnson  
\_\_\_\_\_  
BRUCE H. JOHNSON  
Administrative Law Judge

Reported: Digitally recorded.

### **NOTICE**

Pursuant to Minn. Stat. § 326B.89, subd. 8, this order constitutes the final decision of the agency in this case. The Commissioner of the Department or any person aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

### **MEMORANDUM**

#### **Respondents Are Not Barred from Recovering from the Fund**

The Department argues that Respondents are not entitled to recover any amount from the Fund because they settled and discharged Damont's obligations to them—more specifically that the satisfaction of the underlying obligation precludes Respondents from obtaining any recovery from the Fund. According to the Department, it is a fundamental element to any recovery claim that a licensee owes a current obligation that has been reduced to judgment, but that has not been paid or otherwise satisfied. The Department suggests that if the licensed contractor does not owe any current obligation to the claimant the claimant cannot, as a matter of law, obtain recovery from the Fund. In this case, Respondents agreed to discharge any and all obligations owed to them by Damont when they received and deposited the check from

the receiver. The Department argues that the Respondents thereby discharged Damont's obligations to them without express acquiescence from the Fund, and therefore, because no obligations are owed to them by a licensee, their claim is ineligible and the Fund is not liable as a matter of law.

The Department's arguments are supported neither by the language of statute, its purpose, or the legislature's intent. First of all, although Minn. Stat. § 326B.89, subd 7, provides that in determining the disbursements to be made from the Fund, the Commissioner is "not bound by any prior settlement, compromise, or stipulation between the owner or the lessee and the licensee," the statute does not explicitly prohibit recovery from the Fund if an owner has entered a settlement with the licensed contractor. Second, Minn. Stat. § 326B.89, subd. 7, expressly provides that "[a]ny amount paid in satisfaction of the final judgment shall be applied to the owner's ... actual out-of-pocket loss," thereby explicitly contemplating situations where an owner and licensed contractor have previously entered into a settlement, compromise or stipulation.

Additionally, Minn. Stat. § 326B.89, subd. 6(8), specifically requires an owner to "diligently pursue remedies against all the judgment debtors and all other persons liable to the judgment debtor." Here, Respondents attempted to collect the debt from David Monte's estate and sued Damont for the amount due to SLPL. If they had refused the partial payment from the receiver, they would not have collected all funds available from alternative sources. Legislative intent controls interpretation of statutes, and legislative intent can be ascertained by considering, among other things "the consequences of a particular interpretation."<sup>19</sup> Moreover, in ascertaining legislative intent, there is a presumption that "the legislature intends the entire statute to be effective and certain."<sup>20</sup> The Department's interpretation would diminish and render uncertain the effect of Minn. Stat. § 326B.89, subd. 6(8).

The purpose of the Fund is to compensate aggrieved homeowners who obtain a final judgment against a residential contractor for insufficient, fraudulent or negligent performance where the contractor does not possess sufficient assets to reimburse the homeowners for their loss.<sup>21</sup> The Department's position that Respondents are barred from recovering therefore is contrary to the remedial purpose of the statute, as well as a reasonable reading of the statutory language.<sup>22</sup>

Finally, the Department has not been damaged by the Respondents' decision to accept the receiver's payment to them rather than waiting until after an application was filed and asserting the Department's subrogated right against the receiver. The receiver

---

<sup>19</sup> Minn. Stat. § 645.16(6).

<sup>20</sup> Minn. Stat. § 645.17(2).

<sup>21</sup> See Minn. Stat. § 326B.89, subd. 4, and subd. 6; see also *Legg v. Gauge Construction Management & Development, Inc.*, 2009 WL 1182041, at \*1 (Minn. App.) (citing Minn. Stat. § 326.975 (predecessor statute)).

<sup>22</sup> See *S.M. Hentges & Sons, Inc. v. Mensing*, 777 N.W.2d 228 (Minn. 2008) ("remedial statutes are generally entitled to liberal construction in favor of the remedy the statutes provide or the class they benefit").

marshaled all funds available to Damont, Inc., and under court supervision, paid all the unsecured creditors an equal percentage of their claims. Damont, Inc., was dissolved and no further funds exist to collect, even if the Fund attempted such recovery. In view of the foregoing, the ALJ concludes that the Respondents have met all of the criteria set forth in the statute and they are entitled to a recovery from the Fund.<sup>23</sup>

The Respondents also contended that they are entitled to a recovery from the fund under the doctrine of equitable estoppel. Because the ALJ has concluded that the Respondents are eligible for a recovery from the fund as a matter of law, it is unnecessary to consider whether the doctrine of equitable estoppel applies to this case.

### **Amount of Recovery**

The Department contends that if Respondents are allowed any recovery from the fund, they should only be allowed to recover \$14,942.01, representing the principal amount of what Damont owed SLPL for building materials used on the Respondents' project, less what the Respondents and SLPL both obtained from the receiver. The Department argues that the statute precludes the Respondents from recovering the \$3,715.70 in interest, the \$3,903.25 in attorney's fees, and the \$705 in costs that they paid to SLPL in order to obtain the release of SLPL's mechanic's lien on their property. The Respondents contend that they are entitled to recover the additional \$8,323.95 in attorney's fees, costs, and interest that SLPL was entitled to receive in exchange for satisfaction of its mechanic's lien, for a total recovery of \$23,265.96

The Department relies on the statutory provisions limiting recovery from the Fund to claimants' "actual and direct out of pocket loss"<sup>24</sup> and explicitly providing that the owner's compensable or "out-of-pocket" loss shall not include fees, costs or interests.<sup>25</sup> Minnesota courts have defined the phrase "out of pocket loss" to mean the "difference between the actual value of the property and the price paid for the property," and any special damages, including expenses incurred in mitigating damages.<sup>26</sup> The out-of-pocket loss rule is routinely applied to calculate damages arising in cases of misrepresentation. Under the out-of-pocket rule, loss is not a question of what the plaintiff might have gained through the transaction but what was lost by reason of defendant's deception.<sup>27</sup>

In other words, the Department argues that the statute precludes the recovery of *any* attorney's fees, interest and costs, not just the fees, costs and interests incurred by the claimants. The Department therefore maintains the attorney's fees, interest and costs SLPL accrued in filing and executing its mechanic's lien are not recoverable from the Fund.

---

<sup>23</sup> See *Legg*, 2009 WL 1182041, at \*6 (determining that the claimants' execution of a *Pierringer* release did not restrict their ability to collect from the Fund).

<sup>24</sup> Minn. Stat. § 326B.89, subd. 6(4).

<sup>25</sup> Minn. Stat. § 326B.89, subd. 6.

<sup>26</sup> See e.g., *B.F. Goodrich v. Mesabi Tire Co.*, 430 N.W.2d 180, 182 (Minn. 1988).

<sup>27</sup> *Lewis v. Citizens Agency of Madelia, Inc.*, 235 N.W.2d 831, 835 (1975).

However, the express language of the statute again does not support the Department's position. Minn. Stat. § 326B.89, subd. 6(9) explicitly states that the owner's compensable or "out-of-pocket" loss shall not include "attorney fees, litigation costs or fees, interest *on the loss*." [Emphasis supplied.] the "loss" to which the statute refers is clearly the owners' loss. The fees, costs, and interest that the Department is challenging here are not fees, costs and interest that the Respondents incurred. Rather, the challenged amounts were incurred by SLPL, the lien holder, and those amounts represented losses that SLPL incurred in obtaining satisfaction of its mechanic's lien. The Respondents' or owners' loss was the total amount that they had to pay out-of-pocket in order to obtain a release of SLPL's lien, and a portion of the Respondents' out-of-pocket loss was the fees, costs, and interest that SLPL had incurred.

As previously noted, there is a presumption that the legislature intends all of the provisions of statute to be effective and certain.<sup>28</sup> Interpreting the statutory bar to recovery of fees, costs and interest to cover those incurred by a third party, such as a lien holder, is not only unsupported by the statute's text, it also does not give full effect to the provision allowing recovery of the owner's "out-of-pocket" expense. Here, Respondents are not seeking to recover any attorney's fees or costs the interest incurred on the judgment they obtained against Damont or their litigation costs. They are only seeking to recover costs that would have been assessed against them and merged in a judgment.

In summary, the Respondents' actual out-of-pocket cost is not the amount that the Respondents were unable to obtain from the receiver in satisfaction of their judgment against Damont, but the cost of satisfying SLPL's mechanic's lien. The costs of satisfying that lien totaled \$32,011.50. The receiver paid \$5,009.66 to SLPL and SLPL accordingly reduced the lien to \$27,001.84 (\$32,011.50 - \$5,009.66). Respondents paid \$27,001.84 to obtain release of the lien. The receiver also paid \$3,735.88 to the Respondents. According to the statute, any amount paid in satisfaction of the final judgment shall be applied to the owner's actual and direct out-of-pocket loss.<sup>29</sup> The out-of-pocket loss should therefore only be reduced by the amount received from the receiver (\$27,001.84 - \$3,735.88 = \$23,265.96). The ALJ therefore concludes that the Respondents should recover \$23,265.96 from the Fund.

**B. H. J.**

---

<sup>28</sup> Minn. Stat. § 645.17(2).

<sup>29</sup> Minn. Stat. § 326B.89, subd. 9.