



# AGC Legal Brief

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They are intended to highlight a specific area of the law.  
This communication is not legal advice. The reader should  
consult an attorney to determine how the information applies  
to any specific situation.

## MORRIS PUMPS REVISITED

by Chris Parfitt cparfitt@DDP-LAW.com

A prior AGC Legal Brief has highlighted the case of *Morris Pumps v. Centerline Piping, Inc.*, 273 Mich.App. 187, 729 N.W.2d 898 (2006). The *Morris Pumps* case is a somewhat disturbing case from the general contractor's perspective. The general contractor had entered into a contract with the City of Detroit for construction on a wastewater treatment facility. The subcontractor, Centerline Piping, did not complete its work and the general contractor had to retain a replacement contractor and incurred in excess of \$380,000.00 in additional costs. Nevertheless, the general contractor was sued by suppliers to Centerline who argued that even though there was no contract between the general contractor and the suppliers, they were entitled to recovery under the equitable doctrine of unjust enrichment, which under certain circumstances, allows recovery when a person has been unjustly enriched at the expense of another. The Court of Appeals surprisingly held that the general contractor had retained the benefit of the materials and equipment provided by the suppliers and the result was "unjust." The general contractor argued that allowing the suppliers to recover against the general contractor was inconsistent with prior Michigan case law and also asserted that the suppliers could have proceeded against the payment bond provided by Centerline if they had bothered to give proper notice. Nevertheless, the Court of Appeals concluded that the suppliers had valid claims against the general contractor under the unjust enrichment theory even when there was no express contract between the parties.

The general contractor filed an application for leave to appeal to the Michigan Supreme Court with the goal being to convince the Supreme Court that the *Morris Pumps* result was bad law. The Supreme Court only decides to hear a limited amount of cases and unfortunately, they declined to grant the application for leave to appeal in the *Morris Pumps* matter. It is difficult to determine why the Supreme Court did not want to hear the case. It is conceivable that the Supreme Court concluded that the *Morris Pumps*' factual circumstances were unusual and that it was unlikely that similar cases would arise. However, the Supreme Court's decision is not helpful for purposes of protecting general contractors when the subcontractor does not pay its bills and is no longer in business. For the moment, *Morris Pumps* is the latest authority on the issue, but we hope it will not be the last. In the interim, it is important that general contractors be aware of the case and the possibility that they may have exposure to claims by unpaid suppliers or sub-subcontractors that they would not ordinarily expect. This fact makes it important that general contractors have safeguards in place to make sure that actual payments are flowing down to sub-subcontractors and suppliers.

## Payment Bond Claim — Notice Requirements

by Chris Parfitt cparfitt@DDP-LAW.com

On all public and many private projects, the general contractor must provide payment and performance bonds. If a subcontractor does not pay a supplier or sub-subcontractor, the general contractor does not want to see a claim against the payment bond. If the bonding company has to pay a claim, then it will seek reimbursement from the general contractor. Thus, the general contractor may have to pay twice if it has already paid the subcontractor, particularly if the subcontractor is no longer in business, just as in the *Morris Pumps* case discussed elsewhere in this Legal Brief. Faced with this potential double payment, the general contractor and its legal counsel need to be aware of the statutory notice requirements that claimants have to follow. The case of *Applegate, Inc. v. John M. Olson Company*, Not Reported in N.W.2d, 2008 WL 271397 (Mich. App.) pertains to this issue. The following discussion of the *Applegate* case is somewhat lengthy but the bottom line is that despite the tendency of some courts to be lenient with the notice provided by the supplier or sub-subcontractor, the general contractor and bonding company should maintain that strict compliance with notice requirements is necessary to perfect a bond claim. Indeed, when faced with such a bond claim, one of the very first issues that should be examined is whether the required statutory notice has been provided.

The *Applegate* case involves a payment bond claim made by a sub-subcontractor on a renovation to the Washtenaw Community College ("WCC") Liberal Arts/Science Building. John M. Olson Company ("Olson") was the general contractor. As required by the public works bond statute, MCL 129.201 et seq., Olson provided a surety bond with Federal



## Payment Bond Claim — Notice Requirements (Continued)

Insurance Company ("Federal") as surety. Olson's subcontractor, Metro Industrial Piping, Inc. ("Metro") hired Applegate, Inc. ("Applegate" or "Plaintiff") to perform sheet metal work on March 21, 2003. Applegate had done some minor pre-construction demolition during the week of March 5-12, 2003, prior to signing the contract.

On April 29, 2003, Applegate sent Olson a written "First Notice of Reliance on Bond" informing Olson that plaintiff contracted with Metro to "supply labor and materials for the sheet metal scope of work . . ." on the project. The notice was received by Olson on May 1, 2003. The following month, Metro submitted a pay application to Olson, which included the amount due to Applegate. On August 6, 2003, Olson paid Metro, but Metro did not pay Applegate.

On November 13, 2003, Metro sent Olson a letter informing Olson that it would not perform the remainder of its contract because Metro was seeking chapter 11 bankruptcy protection. Metro also informed Applegate of the situation. Applegate continued to work directly for Olson on the project. Applegate's last day of work on the project was March 12, 2004. On April 13, 2004, Applegate sent WCC, Olson and Federal a "Second Notice of Reliance on Bond," which Olson received on April 14, 2004 and Federal received on April 22, 2004.

Applegate filed suit against Metro, Olson, and Federal on May 2004 and included a claim for payment on the bond. Applegate's complaint stated that its first day of work was April 2, 2003, and that it timely served its first notice on April 30, 2003. Applegate also stated that its last day of work was March 12, 2004, and that service of its second notice on April 13, 2004 was timely.

The case came to the Court of Appeals on the parties' cross motions for summary disposition. Applegate was appealing the November 13, 2006 order denying its motion for summary disposition and granting summary disposition to Olson and Federal on the ground that Applegate had not complied with the requirement to provide notice within 90 days of its last day of work (MCL 129.207) because the notice did not include the amount claimed. Olson and Federal, on the other hand, were appealing the January 20, 2006 order denying their motion for summary disposition and granting summary disposition to Applegate on the ground that Applegate did comply with the requirement to provide notice within 30 days of its first day of work.

The issue on appeal was whether Applegate complied with both notice requirements of MCL 129.207, which provides in pertinent part:

A claimant not having a direct contractual relationship with the principal contractor shall not have a right of action upon the payment bond unless (1) he has within 30 days after furnishing the first of such material or performing the first of such labor, served on the principal contractor a written notice, which shall inform the principal of the nature of the materials being furnished or to be furnished, or labor being performed or to be performed and identifying the party contracting for such labor or materials and the site for the performance of such labor or the delivery of such materials, and (b) *he has given written notice to the principal contractor and the governmental unit involved within 90 days from the date on which the claimant performed the last of the labor or furnished or supplied the last of the material for which the claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed.* Each notice shall be served by mailing the same by certified mail, postage prepaid, in an envelope addressed to the principal contractor, the governmental unit involved, at any place at which said parties maintain a business or residence. The principal contractor shall not be required to make payment to a subcontractor of sums due from the subcontractor to parties performing labor or furnishing materials or supplies, except upon the receipt of the written orders of such parties to pay to the subcontractor the sums due such parties. [Emphasis added.]

Olson and Federal argued that Applegate did not comply with the 90-day notice provision because the date that should have been used for Applegate's last day of work was November 13, 2003, the date that Metro terminated its contract with Applegate, rather than March 12, 2004, Applegate's actual last day of work on the project. Since the trial court did not grant summary disposition on this ground, the appellate Court declined to analyze this argument.

Olson and Federal also asserted that Applegate's 90-day notice was defective because it failed to state the amount claimed. The Court disagreed because while the notice requirement of MCL 129.207 is strictly enforced, the public works bond act is remedial in nature and should be "liberally construed" to "protect contractors and materialmen in the public sector." There are four elements to the notice provisions of MCL 129.207. "First, a claimant must prove that the principal contractor actually received notice. Second, the notice must relate to "the nature of the materials being furnished or to be furnished, or labor being performed or to be performed and identify the party contracting for such labor or materials and the site for the performance of such labor or the delivery of such materials.... Third, the notice sent must have been written. Fourth, the notice must have been received within the time limits prescribed by statute."

Here, while the 90-day notice did not state the amount claimed, Olson already knew how much Applegate was owed because of the pay application that Metro submitted to Olson on June 16, 2003, which was accompanied by a sworn statement that Applegate was to be paid \$306,360.00. When Metro did not forward the funds on to Applegate, Applegate also sent Olson a letter on August 14, 2003 reiterating its claim and threatening to pull off the project if it did not get paid. Then, on August 26, 2003, Applegate again sent Olson a letter advising Olson's controller that Applegate was Metro's subcontractor on the project, that Applegate did not receive payment from Metro from the June draw, and that a joint check agreement should be put in place. Subsequent letters were sent by Applegate and at least one meeting took place where Olson acknowledged that Applegate was owed \$306,360.00 for its work on the project.

Given these facts, the Court reversed the trial court's grant of summary disposition in favor of Olson and Federal "because the second notice and the documents discussed above suffice as the 'notice' mandated by the statute's second notice requirement." *Id.* at 5.

## Payment Bond Claim — Notice Requirements (Continued)

Olson and Federal also sought summary disposition on the ground that Applegate's 30-day notice was not timely because Applegate performed some minor demolition work on the project prior to signing the contract with Metro. Applegate argued that despite the pre-contract demolition work, its first day of work for Metro was actually April 2, 2003, and was supported by its subcontract agreement with Metro, the affidavit of Applegate's controller, various administrative documents, Metro's first "Contractor Notarized Sworn Statement," minutes from Olson's subcontractor meetings, various correspondences, an emergency phone listing, and some other documents. The trial court held that all of this evidence was sufficient to cause the court to hold that Applegate had substantially complied with the 30-day notice requirement of MCL 129.207. Applegate was determined to have substantially complied with both notice requirements of MCL 129.207.

Although some courts will be more lenient with the notice that subcontractors and suppliers are required to provide, the general contractors and bonding companies should nonetheless require strict compliance with notice requirements to perfect a bond claim and compliance with notice requirements is one of the first issues that should be examined.

## Negligence Claims and the Common-Law Duty of Reasonable Care

by Deborah Walter [dwalter@DDP-LAW.com](mailto:dwalter@DDP-LAW.com)

Prior Legal Briefs have discussed the cases of *Ormsby v. Capital Welding* and *Funk v. General Motors Corporation*. The issues are whether a general contractor is responsible for job site injuries to employees of independent subcontractors in "common work areas" and whether an owner can be responsible only if it "retained control" of the project and assumed the "unique duties and obligations of a general contractor" and then only if the injury occurred in a common work area. Apart from the issues discussed in these two well known cases, owners, general contractors, and subcontractors must also be aware of the fact that the common law duty of reasonable care may also lead to liability in the context of a construction site. Pursuant to Michigan case law, there is nothing in the State's jurisprudence which absolves an owner, general contractor, or subcontractor of liability under the common law theory of active negligence. The common law imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to govern his actions so as not to unreasonably endanger the person or property of others.

In the case of *Beavers v. Barton Malow Company et al*, Not Reported in N.W. 2d, 2008 WL 2117113 (Mich. App.), Jenkins Construction Company ("Jenkins") was hired by the Detroit Public School Project Management Team ("DPSPMT") as general contractor for asbestos abatement and demolition of old buildings in the district. Robert Smith was an employee of DPSPMT who agreed to tour the Tanner building with Rick Beavers, Jenkins' representative, to see what had to be done prior to demolition. The Tanner building had been vacant and Beavers was reluctant to go into the building, but Smith reassured Beavers that he had been in the building many times and the electricity was on so there would be lights. Smith also had a flashlight, so Beavers did not need one. While they were touring the building, Smith and Beavers stopped in an area with asbestos and oil drums. Smith pointed his flashlight at something to his left to point it out to Beavers, who was located to the right and behind Smith. When Beavers stepped around Smith, Beavers fell three or four feet from a loading dock and sustained injuries.

Pursuant to the defendants' motion for summary disposition under MCR 2.116(C)(10), the trial court concluded that the defendants owed no duty to Beavers and dismissed the case. Beavers sought to appeal, and while the procedural history of the request to appeal is somewhat convoluted, Beavers was ultimately granted an appeal on the issue of whether the defendants in this situation owed him a duty of reasonable care. Beavers argued that the trial court should not have dismissed the case because DPSPMT's agent, Smith had a duty of reasonable care, a key element of a negligence claim, because he "(1) was familiar with the site, (2) agreed to take plaintiff on a tour of the building, (3) knew about the dangerous condition and, (4) should have warned plaintiff of the drop off in light of the foreseeable and serious harm it posed to plaintiff." *Beavers supra* at 2.

The rule is that an employer is usually the party responsible for safety on a job site. *Id.* at 3, citing *Johnson v. A & M Custom Built Homes*, 261 Mich.App 719, 721; [683 NW2d 229 \(2004\)](#). However, every person engaged in an activity has an obligation to use reasonable care so as not to injure other persons or property. *Id.*, citing [Clark v. Dalman, 379 Mich. 251, 261; 150 NW2d 755 \(1967\)](#).

The court held that, on these facts, DPSPMT and its agent, Smith, did owe Beavers a duty of reasonable care because:

Smith, defendants' environmental contact person, agreed to lead plaintiff on a tour of the building knowing plaintiff had never been inside. Smith told plaintiff that he had been inside the building numerous times. Smith also told plaintiff that he would not need a flashlight-Smith had one. Smith eventually led plaintiff down dark stairs to a loading dock that Smith knew was there. As plaintiff stood behind Smith in the darkness, on the last step, Smith moved a flashlight right to left pointing out aspects of the building Smith felt would be of interest to plaintiff. Plaintiff, who did not know about the loading dock and could not see it, stepped around Smith to see what he was pointing at and fell three or four feet to the floor below.

The relationship of the parties was such that Smith essentially acted as the leader of the inspection, invited plaintiff to trust his experience and guidance in the matter, and controlled where the parties went, as well as what plaintiff saw in the dark. It was reasonably foreseeable that plaintiff could fall off the loading dock because (1) it was dark, (2) plaintiff did not know that he was standing at its edge, and (3) Smith was directing plaintiff's attention to an area that plaintiff could not see without stepping out from behind Smith. The burden on Smith, who knew of the drop off, was minimal as he could have informed plaintiff of the situation by simply giving him a warning. And any such burden on Smith was outweighed by the potential serious danger to plaintiff from unexpectedly falling several feet below to a concrete floor.

From this case, it is evident that general contractors and subcontractors should be aware that they and their employees or agents are expected to exercise reasonable care for the safety of others on a job site.



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## UNAMBIGUOUS INDEMNIFICATION AGREEMENT INTERPRETED ACCORDING TO TERMS

by Anthony Vittiglio [avittiglio@DDP-LAW.com](mailto:avittiglio@DDP-LAW.com)

Prior AGC legal briefs have discussed contractual indemnification in the construction setting. However, indemnification is worth mentioning again since disputes and suits seem to arise on a regular basis involving owners, general contractors, subcontractors, and insurance companies. As a rule, contracts with the owner have an indemnity provision and in turn, subcontracts should always have indemnity language obligating the subcontractor to indemnify the general contractor for certain risks. Michigan has a statute that states:

### 691.991 Building industry; certain contracts for indemnification void

Sec. 1. A covenant, promise, agreement, or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance, including moving, demolition and excavating connected therewith, purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee or indemnitee, his agents or employees, is against public policy and is void and unenforceable.

Indemnity claims are common and the following case discusses an injury where both the general contractor and the subcontractor were found to be negligent.

In the case of *Zahn v. Kroger Company of Michigan*, Not Reported in N.W.2d, 2008 WL 821606 (Mich. App.), Timothy Zahn ("Zahn") was an employee of Cimarron Services, Inc. ("Cimmaron"), the drywall subcontractor to F.H. Martin Construction Company ("Martin") for the renovation of a Kroger store in Flushing, Michigan. Zahn was injured when he fell off scaffolding while installing some drywall on the project. Zahn had protested that the scaffolding was unsafe, but Cimmaron ordered him onto the scaffolding. The trial court determined that Cimmaron and Martin were both negligent, and that Cimmaron's negligence constituted 'negligence attributed to such acts or omissions by Subcontractor' under the indemnity clause in the subcontract agreement between Martin and Cimmaron such that Cimmaron was not required to indemnify Martin for Martin's negligence in failing to inspect the scaffolding or make it safe. Cimmaron was found to be more negligent than Martin because Cimmaron ordered Zahn to get on the scaffolding, so Cimmaron was ordered to indemnify Martin for 80% of the amount that Martin paid to settle Zahn's claim.

Cimarron appealed and argued that the trial court had incorrectly interpreted the indemnification clause and Cimarron should not be required to reimburse Martin. The Court of Appeals disagreed, pointing out that Cimarron assumed, without exception, every duty imposed on Martin, and that Cimmaron was responsible for everything except Martin's exclusive negligence when Cimmaron agreed to the language of indemnification clause, which provided as follows:

**Indemnity** – To the fullest extent permitted by law, Subcontractor shall defend, indemnify and hold Martin, the Owner and Others (required by the Contract Documents) harmless from all claims for bodily injury and property damage that may arise from the performance of the Subcontract work to the extent of the negligence attributed to such acts or omissions by Subcontractor, or anyone employed or contracted by Subcontractor for whose acts any of them may be liable. In no event shall the indemnity contained herein be deemed to cover damages arising exclusively through the negligence of Martin.

The Court stated that the language of an indemnification clause should be construed just like any other contract term and, if unambiguous, should be interpreted according to its terms. In this case, the indemnification clause was unambiguous and required Cimarron to indemnify Martin for "all claims for bodily injury ... that may arise from the performance of the Subcontract work." *Zahn v. Kroger Company of Michigan*, Not Reported in N.W.2d, 2008 WL 821606 at 2 (Mich. App.). These conditions were satisfied because Zahn sustained and sought damages for a bodily injury that resulted from the performance of work under the subcontract. The indemnification was limited by the 20% negligence attributed exclusively to Martin by the trial court. The trial court's decision was affirmed.

General contractors and subcontractors should review any indemnity provision carefully to be sure they understand the scope of the provision.

*This article is intended to highlight a specific area of the law. This communication is not legal advice. The reader should consult an attorney to determine how the information applies to any specific situation.*

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