

IN THE SUPREME COURT OF MISSOURI
EN BANC

ENVIRONMENTAL ENERGY)	Circuit Court No. CV199-1168CC
PARTNERS, INC.,)	
)	Court of Appeals Nos. SD26521 &
)	SD26702
Plaintiff/Respondent/)	
Cross-Appellant,)	
)	Supreme Court No. _____
vs.)	
)	Court of Appeals, Southern District
SIEMENS BUILDING)	
TECHNOLOGIES, INC., et al.,)	Circuit Court for Jasper County
)	
Defendants/Appellants/)	
Cross-Respondents.)	

**SUGGESTIONS OF AMICUS CURIAE AMERICAN CONTRACTORS
ASSOCIATION IN SUPPORT OF APPLICATION FOR TRANSFER**

The American Subcontractors Association (“ASA”) is a national trade association representing thousands of member companies throughout Missouri and the United States. ASA is vitally interested in the potential impact this decision will have on the rights of subcontractors to file and enforce mechanics lien claims. The Southern District’s decision held that a clause in the subcontract agreement between the general contractor (“EEP”) and subcontractor (“Siemens”) stating that the subcontractor was not entitled to be paid until the general contractor was paid for the subcontractor’s work by the owner (“St. John’s”) could be used as the basis for the general contractor making a claim against the subcontractor for tortious interference if the subcontractor filed a mechanic’s lien against the owner’s property and later settled its lien claim with the owner. It should be emphasized that the subcontractor in this case, Siemens, was found to be entitled to the

full amount of its lien claim, though it was reduced by a set off. In spite of its valid lien, it was found to be liable for tortious interference with the general contractor's contract with the owner principally because of the clause requiring that the general contractor is first paid by the owner.

The mechanic's lien statutory scheme is an integral part of the subcontracting community's economic lifeline. Subcontractors are dependent on using their lien rights to stay in business. For example, in St. Louis County and St. Louis City, more than 800 liens were filed during the last 12 months.

The Southern District's decision fails to address three statutes that speak directly to the issues before the Court. This failure puts subcontractors in unnecessary harm and risk of being exposed to unintended liability. The statutory framework not addressed by the Southern District's decision is as follows:

- A subcontract clause that provides that a payment from a general contractor to a subcontractor is contingent upon receipt of payment from the owner is no defense to a claim to enforce a mechanics lien, per § 431.183 RSMo.
- A contingent payment clause in a subcontract agreement that has the effect of denying a subcontractor the right to file a mechanics lien is void and unenforceable, per § 429.005 RSMo.
- An owner who is faced with defending a mechanics lien filed by a subcontractor may withhold from the contractor the amount of money for which the lien is filed and upon settlement of the subcontractor's claim the owner shall be entitled to

recover from the general contractor any amount so paid by the owner for which the contractor was originally the party liable, per § 429.140 RSMo.

Statutory Right To Enforce Lien When Faced With A Contingent Payment Clause

§ 431.183 RSMo. authorizes Siemens to prosecute its mechanics lien claim even though it had a clause in its subcontract stating that it may not be paid until St. John's paid EEP. This statute states that a contingent payment clause "is no defense to a claim to enforce a mechanics lien..." The Court of Appeals did not discuss this statute. In the early 1990s, ASA sought enactment of this statute so that there would be no doubt that subcontractors' lien rights were not lost in the face of contingent payment clauses. The Court of Appeals' failure to consider this statute is the equivalent of silent judicial repeal of statutory rights granted by the Legislature. Rights granted by the Legislature should not be ignored by the courts. We ask this Court to consider this statute's application to the facts of this case.

Contingent Payment Clauses Violate Public Policy

In 1992, the Missouri Legislature enacted § 429.005. This statute says that any contract clause requiring a subcontractor to waive its lien rights as a condition to being awarded its subcontract is unenforceable.

The Court of Appeals failed to address § 429.005 RSMo. The decision of the Southern District is in direct conflict with the policy as set forth in § 429.005 because if the subcontractor has to wait until the general contractor is paid by the owner before filing its lien, it may have lost its lien rights because liens can only be filed within the first six months after subcontractor's work is completed. § 429.080 RSMo. Thus, a

clause requiring a subcontractor to wait more than six months to file its lien denies the subcontractor its right to file a lien against the owner's property and the clause is therefore void and unenforceable.

New York, like Missouri, has a statute stating that contract clauses preventing a subcontractor from enforcing a mechanics lien are void and unenforceable. New York's highest appellate court, the New York Court of Appeals, issued a decision declaring "pay if paid" clauses in construction contracts to be a violation of New York public policy as that policy is set forth in its statutes. *See, e.g., West-Fair Electric Contractors v. Aetna Casualty and Surety Company*, 661 N.E. 2d 967 (New York 1995).

New York is not the only state in the country to declare contingent payment clauses void and unenforceable because of public policy. For example, California's Supreme Court has ruled that contingent payment clauses in subcontracts violate the public policy of that state. *Wm Rm. Clarke Corp. v. Safeco Ins. Co. of Am.*, 938 P.2d 372 (Cal. 1997). In addition, two states—North Carolina and Wisconsin—have enacted statutes declaring these types of contract clauses unenforceable. N.C.GEN.STAT. § 22 C-2 (West 2003); WIS.STAT.ANN. § 779.135 (3) (West 2003).¹

Owner's Right To Settle Lien Claims

§ 429.140 specifically authorizes an owner, such as St. John's, to withhold money from its general contractor if a subcontractor files a lien. The owner's right to withhold is

¹ For a review of enforceability of contingent payment clauses see: I Mo. Construction Law §§ 1.42-1.49 (MoBar 2nd ed. 2004).

meaningless if the owner does not also have the right to settle directly with the subcontractor. Indeed, the statute says that if an owner has settled a lien claim, the owner shall be entitled to recover back from the contractor any amount paid by the owner for which the contractor was liable. It is obviously in subcontractors' best interest for owners to have rights to settle subcontractors' lien claims. That is exactly what Siemens and St. John's did. That the exercise of this right would serve as the basis for a tortious interference claim against the subcontractor is unimaginable and is precisely what § 429.140 RSMo. sought to avoid. Shockingly, the effect of the Court of Appeals' decision will be to discourage parties from settling claims. That should not be the policy of Missouri. The Court of Appeals did not consider § 429.140 RSMo. Moreover, the Court of Appeals' decision disallowed the owner a credit against the amount it owed its general contractor for the sum St. John's paid to Siemens. This is in direct conflict with the statute. We ask the Court to accept transfer in order to consider the impact of § 429.140 RSMo.

Conclusion

If the decision is allowed to stand, it will have a devastating effect on subcontractors who will be faced with legal precedent that opens them up to tortious interference claims for no reason other than choosing to exercise the statutory rights given to them by the Missouri Legislature. Missouri's public policy of allowing subcontractors to enforce lien rights when faced with a contingent payment clause should not be thwarted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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