STATE OF MICHIGAN

COURT OF APPEALS

WOODWORK SPECIALTIES CO.,

Plaintiff-Appellee,

v

KAREN SUE SAXTON,

Defendant-Appellee,

and

HOMEOWNERS CONSTRUCTION LIEN RECOVERY FUND,

Defendant-Appellant,

and

DUTCHMAN REMODELING, INC., NATIONAL LOAN SERVICE CENTER, STANDARD FEDERAL BANK, and FIRST OF AMERICA BANK, MICHIGAN, N.A.

Defendants.

UNPUBLISHED

No. 186190
Kalamazoo Circuit Court
LC No. 93-1292-CH

Before: Fitzgerald, P.J., and O'Connell and T.L. Ludington*, JJ.

FITZGERALD, P.J. (dissenting.)

I respectfully dissent from the majority's sua sponte decision to address issues that were raised neither before the trial court nor before this Court. Indeed, a review of the transcript from the hearing below reveals that perfection of the lien was not a disputed issue, and there is no indication that the

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* Circuit judge, sitting on the Court of Appeals by assignment.

parties dispute whether plaintiff complied with the requirements of the Homeowner Construction Lien Recovery Fund. The sole issue presented for our consideration is whether the trial court erred when it awarded plaintiff $1,350 in damages that the fund contends are consequential damages for the wrongful acts and omissions of the general contractor that are not recoverable under the construction lien act.[1]

The construction lien act provides in part:

> (1) A claim of construction lien shall not attach to a residential structure, to the extent payments have been made, if the owner or lessee files an affidavit with the court indicating that the owner or lessee has done all of the following:
>
> (a) Paid the contractor for the improvement to the residential structure and the amount of the payment.
>
> (b) Not colluded with any person to obtain a payment from the fund.
>
> (c) Cooperated and will continue to cooperate with the department in the defense of the fund. [MCL 570.1203; MSA 26.316(203).]

Defendant Saxton filed such an affidavit with the trial court in which she averred that she "paid to Dutchman Remodeling, Inc. all sums owed for the improvement of the residential structure for material furnished by Woodwork Specialties," that she did not collude with anyone to obtain payment from the fund, and that she would cooperate in the defense of the fund. Citing *Brown Plumbing & Heating, Inc v Homeowner Construction Lien Recovery Fund*, 190 Mich App 709, 713; 476 NW2d 657 (1991), rev'd on other grounds 442 Mich 179; 500 NW2d 733 (1993), the trial court granted judgment in favor of plaintiff and against the fund, as opposed to Saxton, on the basis that Saxton had filed the affidavit called for under § 203 of the construction lien act and in recognition that the act is designed to protect owners like Saxton from having to pay twice for the same work and materials. See also *Marinich, Inc v Mich Nat'l Bank*, 193 Mich App 447, 453; 484 NW2d 738 (1992).

The trial court's judgment serves the purpose of protecting an owner like Saxton from double payment. There is no dispute that Saxton paid for the supplies and materials that plaintiff delivered. The contract between Dutchman and Saxton specified a total price for labor and material of $14,300. While it is true that ultimately Saxton paid only $12,300, this figure included payment for the materials plaintiff delivered.[2]

Because the $2,000 that Saxton withheld was strictly for unfinished labor and for materials not supplied by plaintiff, it is clear that Dutchman should have paid plaintiff for the materials that plaintiff delivered out of the $12,300 that Saxton paid. The fund admitted as much at trial.[3] Accordingly, because Saxton paid Dutchman for all the materials that plaintiff delivered, I would conclude that the trial court properly awarded plaintiff recovery against the fund. *Marinich, supra* at 453.

II

The fund makes the technical argument that Saxton did not "pay for the improvement." Essentially, the fund's argument is that the test under the act is not whether Saxton paid for the materials that plaintiff delivered, but whether she paid for the improvement. MCL 570.1203(1)(a); MSA 26.316(203)(1)(a). The fund notes that the act defines "improvement" as "the result of labor or material provided by a contractor, subcontractor, supplier, or laborer . . . pursuant to a contract," MCL 570.1104(7); MSA 26.316(104)(7), and the contract here was for $14,300, of which Saxton paid only $12,300. Therefore, the fund argues, Saxton did not pay for the improvement. Instead she retained the $2,000, $1,350 of which was on the basis that Dutchman's work was unsatisfactory, implying that while the fund is a guarantor of payment for work completed, it is not a guarantor of the quality of that work.

A review of the fund's argument at trial is beneficial in understanding its position. At trial the fund argued as follows:

> The act does not refer to individual suppliers or material people, it refers to the improvement, which is the result. If you look at the definitions. The result of what has been done. This lady [Saxton] was $650 and change short of getting what she was entitled to, as far as physical improvement to her property.
>
> * * *
>
> I think the point is, is that she promised to pay fourteen three. He [Dutchman] promised to do certain things. The testimony is he did everything, although not well, but complete the chimney, which was a $650 estimate to finish it.
>
> * * *
>
> And clean[]up some stuff. So that was the improvement that they contracted for.
>
> * * *
>
> [I]t is the position of the Fund that our exposure is the difference between what she promised to pay Dutchman, and what she actually paid Dutchman less any credits for work that Dutchman did not complete. And as far as I know, that's [$]650 plus clean[-]up. . . .
>
> [T]he homeowner [Saxton] said the only thing they [she] didn't pay for, or the only thing that wasn't done at the time that Dutchman walked off is finishing the chimney and doing some clean[-]up.
>
> So clearly, that had yet to be done, that part of the improvement that was not completed, and they [Saxton] should get credited for that against the $2,000 because, but for that, they would have had the job done.

....[N]ot done well, but it was done.

The fund's argument is not supported by the terms of the act. The fund's argument hinges on the notion that, in answering the question whether Saxton paid for the improvement, "improvement" is equivalent to the full contract price. The complete definition of "improvement" contained in the act is as follows:

> "Improvement" means the result of labor or material provided by a contractor, subcontractor, supplier, or laborer, including, but not limited to, surveying, engineering, and architectural planning, construction management, clearing, demolishing, excavating, filling, building, erecting, constructing, altering, repairing, ornamenting, landscaping, paving, leasing equipment, or installing or affixing a fixture or material, pursuant to a contract. [MCL 570.1104(7); MSA 26.316(104)(7).]

The cardinal rule of statutory construction is to determine and effectuate the Legislature's intent. *Marinich, supra,* 193 Mich App 452. The Legislature expressly declared the act to be a remedial statute that shall be liberally construed to secure the beneficial results, intents, and purposes of the act. MCL 570.1302(1); MSA 26.316(302)(1). If reasonable minds can differ regarding the meaning of a statute, judicial construction is appropriate; however, where the plain language of the statute is clear, judicial construction is neither necessary nor permissible. *Heinz v Chicago Rd Investment Co,* 216 Mich App 289, 295; 549 NW2d 47 (1996). Unless defined in the statute, words are to be accorded their plain and ordinary meaning; technical terms which are defined are to be regarded according to those definitions. *People v Lee,* 447 Mich 552, 557-558; 526 NW2d 882 (1994).

Nothing in the act's definition of improvement equates "improvement" with price. The thrust of the definition is to indicate the breadth of the services and materials that can constitute an improvement. *Marinich, supra* at 456-457. Despite the absence of any reference to price in the act's definition of the term "improvement," the fund suggests a connection between "improvement" and the contract price, claiming,

> The term "improvement" . . . as used in the act can only reasonably be construed to include the value of materials supplied by a lien claimant as measured by the contract price . . . . [I]t is the value of the materials which comprise the improvement which is the proper measure of the monetary value of the lien and not the price which either the homeowner or the builder place on the improvement.

The fund's support for its argument is *Erb Lumber Co v Homeowner Construction Lien Recovery Fund,* 206 Mich App 716; 522 NW2d 917 (1994). However, a panel of this Court in *Erb* stated that the term "improvement" "does not fix or define the extent of [a] lien," but serves only to identify those individuals who can claim a lien; it "is not helpful in determining which sums can properly be included in a construction lien." *Id.* at 720.

The fund cites no cases analogous to the present one where any panel of this Court held that a homeowner like Saxton had not "paid for the improvement" because he or she did not tender the

original, full contract price. In fact, quite the contrary is indicated by the language of the act itself. Specifically, the act defines the term "contract" to include "any and all additions to, deletions from, and amendments to the contract." MCL 570.1103(4); MSA 26.316(103)(4). *See Marinich*, *supra* at 457.

Finally, the fund's argument fails on the ground that Saxton, in fact, paid Dutchman the original, full contract price of $14,300. According to Saxton, she offered the final $2,000 draw to Dutchman, but Dutchman refused it. Dutchman chose instead to terminate work on the project.

In sum, because Saxton paid Dutchman for all the materials that plaintiff delivered, through Saxton's payment of $12,300 to Dutchman, I would hold that the trial court properly awarded plaintiff recovery against the fund and would affirm.

/s/ E. Thomas Fitzgerald

[1] I assume, for purposes of this decision, that the lien was properly perfected. The majority states that if the lien was properly perfected, the "particular facts of this case may not have arisen and, therefore, there would be no reason to address the legal issue presented on appeal." However, the majority fails to explain its rationale for this statement.

[2] This is known deductively because the $2,000 which Dutchman essentially refunded to Saxton was expressly for labor and not for any materials, with the exception of two pieces of material which Saxton paid for separately from, and in addition to, the original contract price.

[3]

> THE COURT: When all his [plaintiff's] lumber was in there, he should have been paid out of that, that [$]12,300.
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> FUND'S COUNSEL: I believe that.
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> * * *
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> THE COURT: But she [Saxton] has paid for all of the improvements that Woodwork Specialties has got anything to do with.
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> FUND'S COUNSEL: Uh-huh.
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> * * *
>
> THE COURT: And Christianson [Dutchman], that Christianson was "paid in full" for -- at the time, for all the terms that the Woodworking Specialties put in there. ...[T]his follow-up stuff with other, with other people is irrelevant to his work. To his material. It was all in there. He [plaintiff] should have been paid for it out of the [$]12,300.

FUND'S COUNSEL: Well, I think it is probably a fair statement