

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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CAPITOL EXCAVATING & PAVING  
COMPANY, and LANSING POURED WALL  
COMPANY,

Plaintiff/Counter-Defendant,

v

MARK K. CLOUSE,

Defendant/Counter-Plaintiff/Cross-  
Defendant-Appellee/Cross-  
Appellant,

and

COMMUNITY FIRST BANK, NATIONAL CITY  
BANK OF MICHIGAN,

Defendants/Cross-Defendants-  
Appellees,

JAMES RUNDQUIST d/b/a KINTNER  
PROPERTIES, ANDREAS CONSTRUCTION,  
INC.,

Defendants/Cross-Defendants,

and

W. S. DRYWALL, SPARTAN DRYWALL,  
CHUCKS BULLDOZING & BACKHOE, MPC  
CASHWAY LUMBER COMPANY, A 1  
MECHANICAL OF LANSING, JEFFREY W.  
MARRIOTT, GROESBECK LUMBER &  
SUPPLY, HOMEOWNERS CONSTRUCTION  
LIEN RECOVERY FUND, M & M OF  
MICHIGAN, INC., d/b/a LANSING ELECTRIC  
COMPANY,

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UNPUBLISHED  
May 20, 2003

No. 234178  
Clinton Circuit Court  
LC No. 99-008976-CZ

Defendants/Cross-Defendants/Cross-  
Plaintiffs,

and

KIRK R. BEVIER,

Defendant,

and

T. J. CERAMIC TILE SALES IMPORTS,

Defendant/Cross-Plaintiff/Cross-  
Defendant-Appellant/Cross-  
Appellee.

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Before: Gage, P.J., and Wilder and Fort Hood, JJ.

PER CURIAM.

Appellant T.J. Ceramic Tile appeals as of right the trial court's grant of appellee Mark K. Clouse's motion for summary disposition under MCR 2.116(C)(10).<sup>1</sup> Clouse cross-appeals as of right the trial court's refusal to sanction T.J. Ceramic Tile under MCR 2.114(E) and 2.313(D). We affirm.

The underlying facts of this case are generally undisputed. Clouse hired defendant James Rundquist as general contractor to build a house. T.J. Ceramic Tile provided tiling services for the project under a subcontract. Rundquist failed to finish the project or pay any of the subcontractors, including T.J. Ceramic Tile. The subcontractors thereafter filed construction liens against the property.

T.J. Ceramic Tile delivered its claim of lien to the Clinton County Register of Deeds office at 5:02 p.m. on March 11, 1999. The register of deeds, however, did not record the lien until 8:26 a.m. on March 12, 1999. Nevertheless, when an individual called the register of deeds office on March 12, 1999, to inquire about when the lien was received and the register of deeds informed him that it was recorded on March 12, 1999, at the request of the individual, the register of deeds manually stamped the lien as having been received at 5:02 p.m. on March 11, 1999.

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<sup>1</sup> Appellee/cross-defendants Community First Bank and National City Bank of Michigan/Illinois join Clouse in defending this appeal.

Two of the subcontractors on the project filed suit against Rundquist and Clouse demanding foreclosure of their construction liens. They then added the other subcontractors, including T.J. Ceramic Tile, as defendants to the suit. T.J. Ceramic Tile brought cross-claims against Clouse. All claims were eventually either dismissed or brought to judgment against Rundquist.

Clouse sought summary disposition against T.J. Ceramic Tile on the ground that its lien was not recorded within the ninety-day period as required by the Construction Lien Act, MCL 570.1111(1). The trial court granted Clouse's motion, finding that the register of deeds did not "receive" T.J. Ceramic Tile's claim of lien on March 11, 1999, when it accepted delivery of the lien at 5:02 p.m. on that date. Instead, the court found that the lien claim was accepted the following day, March 12, 1999, when the register of deeds recorded it. Because March 12, 1999, represented the ninety-first day after T.J. Ceramic Tile provided labor or material to Clouse's house, the trial court deemed the lien void and granted Clouse's motion for summary disposition. The trial court also denied Clouse's request for sanctions against T.J. Ceramic Tile.

We review de novo a trial court's grant of summary disposition under MCR 2.116(C)(10). *UAW-GM v KSL Recreation Corp*, 228 Mich App 486, 490; 579 NW2d 411 (1998). Also, this Court reviews de novo a question of statutory interpretation. *In re MCI Telecommunications*, 460 Mich 396, 443; 596 NW2d 164 (1999).

To recover under the Construction Lien Act, a claimant must record the lien within ninety days of the last date of furnishing material or labor:

Notwithstanding section 109 [MCL 570.1109], the right of a contractor, subcontractor, laborer, or supplier to a construction lien created by this act shall cease to exist unless, within 90 days after the lien claimant's last furnishing of labor or material for the improvement, pursuant to the lien claimant's contract, a claim of lien is recorded in the office of the register of deeds for each county where the real property to which the improvement was made is located. A claim of lien shall be valid only as to the real property described in the claim of lien and located within the county where the claim of lien has been recorded. [MCL 570.1111(1).]

The parties agree that March 11, 1999, constituted the ninetieth day after which T.J. Ceramic Tile last provided labor or material for the project. Therefore, March 11, 1999, was the last day for which T.J. Ceramic Tile could "record" its lien against the property. The parties disagree, however, with regard to whether T.J. Ceramic Tile met the ninety-day requirement. Therefore, the issue here is whether T.J. Ceramic Tile "recorded" its claim of lien on March 11, 1999, within the requisite ninety days after the last day it provided labor or materials to Clouse's house.

In *Vugterveen Sys v Olde Millpond Corp*, 454 Mich 119, 121; 560 NW2d 43 (1997), the Supreme Court addressed the purpose of the Construction Lien Act and determined that the act "was intended to protect the interests of contractors, workers, and suppliers through construction liens, while protecting the owners from excessive costs." *Id.* Further the Court stated that the act should be "liberally construed to effectuate these purposes." *Id.* The Construction Lien Act contains a substantial compliance provision, MCL 570.1302(1), which provides:

This act is declared to be a remedial statute, and shall be liberally construed to secure the beneficial results, intents, and purposes of this act. Substantial compliance with the provisions of this act shall be sufficient for the validity of the construction liens provided for in this act, and to give jurisdiction to the court to enforce them.

In *Northern Concrete Pipe, Inc v Sinacola Cos-Midwest, Inc*, 461 Mich 316, 322; 603 NW2d 257 (1999), our Supreme Court addressed the substantial compliance provision of the Construction Lien Act. The Court instructed that:

[t]he scope of a statutory “substantial compliance” provision requires an analysis, on a case-by-case basis, of the following logically relevant factors among others: the overall purpose of the statute; the potential for prejudice or unfairness when the apparent clarity of a statutory provision is replaced by the uncertainty of a “substantial compliance” clause; the interests of future litigants and the public; the extent to which a court can reasonably determine what constitutes “substantial compliance” within a particular context; and, of course, the specific language of the “substantial compliance” and other provisions of the statute. [*Id.* at 321.]

The Court then held that the substantial compliance provision does not apply to the ninety-day deadline provision. The Court held that mere substantial compliance cannot work to extend the ninety-day deadline because an extension of the statutory deadline would create uncertainty about property rights and potentially prejudice those who purchased or mortgaged a property in the absence of a recorded claim. *Id.*

More recently, however, in *Central Ceiling & Partition, Inc v Dep’t of Commerce*, 249 Mich App 438, 442; 642 NW2d 397 (2002), the majority of this Court held that although the substantial compliance provision does not apply to the ninety-day deadline, it can be applied to determine if a lien claimant has met the ninety-day requirement. Specifically, the majority held that “filing within the ninety-day statutory period, and acceptance of a lien claim by the register of deeds, substantially complies with the act’s requirement of recording the lien claim.”<sup>2</sup> *Id.* Regardless whether the substantial compliance exception would apply in a case where the lien claimant filed a lien within the requisite ninety days but the lien was not recorded within that time, in this case, T.J. Ceramic Tile did not file the lien within the ninety-day deadline.

T.J. Ceramic Tile contends that the register of deeds “received” the lien claim on March 11, 1999; therefore, it should have been considered recorded on that date. MCL 565.25 governs when a claim of lien is considered “recorded” by the register of deeds. It provides in pertinent part:

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<sup>2</sup> We note that the Supreme Court granted leave to appeal this Court’s decision in *Central Ceiling & Partition, Inc v Dep’t of Commerce*, 249 Mich App 438; 642 NW2d 397 (2002), on March 23, 2003. Therefore, we make no determination with regard to whether the substantial compliance provision applies in this case.

In the entry book of levies the register shall enter all levies, attachments, liens, . . . noting in the books, the day, hour, and minute of receipt, and other particulars, in the appropriate columns in the order in which the instruments are respectively received.

\* \* \*

(4) The instrument shall be considered as recorded at the time so noted and shall be notice to all persons except the recorded landowner subject to subsection (2), of the liens, rights, and interests acquired by or involved in the proceedings.

T.J. Ceramic Tile argues that we cannot read into the statutes that to be filed or recorded, the lien must be received within normal business hours. When interpreting a statute, this Court must begin by examining the language of the statute itself. *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 158; 627 NW2d 247 (2001). We acknowledge that the term “within normal business hours” is not written into the statutes. However, it is only logical from the statutes that the register of deeds office must be open for documents to be officially received.<sup>3</sup>

In this case, the evidence establishes that T.J. Ceramic Tile delivered its lien claim at 5:02 p.m. on March 11, 1999. Carol Wooley, the Clinton County Register of Deeds, testified that the office of the register of deeds is open from 8:00 a.m. until 5:00 p.m. Wooley testified that on the day in question, she had closed the office at 5:00 p.m., had shut down the computers and turned off the lights, and was walking out the door when a courier walked up and handed her a package. She recalled that the courier noted in his logbook that the delivery time was 5:02 p.m. Wooley testified that she opened the package and saw that it was a claim of lien and then put it in a cabinet and left for the evening. Wooley testified that on the following morning, March 12, 1999, she “received in” the lien claim and at 8:26 a.m., it was recorded and assigned a liber and page number. She acknowledged that the only reason she later stamped the lien as received at 5:02 p.m. March 11, 1999, was because an individual later called and requested that she do so.<sup>4</sup>

When questioned at the hearing on the motion for summary disposition about the procedures at the register of deeds office, Wooley explained that the office is open from 8:00 a.m. until 5:00 p.m. Wooley explained that normally the office does not note the time when a

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<sup>3</sup> We note MCR 1.108, which provides that in computing the period of time prescribed by court rules or statutes, the last day the period is included unless it is a Saturday, Sunday, legal holiday or holiday on which the court is closed pursuant to court order. If the last day falls on one of the days that the court is closed, the period runs until the end of the next day that is not a Saturday, Sunday or holiday. Because the last day of the period cannot fall on a day that the court is closed, it is implied that in order for documents to be filed, the court must not be closed.

MCR 8.105 provides the office of the clerk of every court of record must be open, and the clerk or deputy clerk must be in attendance, during business hours on all days except Saturdays, Sundays, and legal holidays.

<sup>4</sup> Wooley did testify that she thought the “received” time stamp may have been somehow necessary for the lien’s validity.

document is delivered, but notes when a document is “receipted in.”<sup>5</sup> When specifically asked, Wooley stated that if the lien claim had been delivered at 4:59 p.m., she probably would have recorded it that day. She explained that at the time the lien was delivered in this case, the office was closed, therefore she put it in a cabinet to process the next day.

T.J. Ceramic Tile argues that because Wooley accepted delivery of the lien claim on March 11, 1999, it was received by the office on that date and should have been recorded on that date pursuant to MCL 565.25, regardless of the office hours. In rendering its decision, the trial court placed great weight on the fact that the register of deeds would have recorded the lien immediately if she had received it before 5:00 p.m. We agree that the timing in this case is critical.

The evidence established that the lien claim was delivered at 5:02 p.m. This means that the lien was delivered two minutes after the register of deeds office closed. Even though Wooley took possession of the lien claim and put it into a cabinet at the register of deeds office, she merely opened the package to see its contents. There is no evidence that Wooley analyzed the lien to see if it comported with all the necessary recording requirements or “receipted it in,” the evidence established that this was not done until the following day. In fact, if the lien had not met the proper requirements for recording, the register of deeds could have rejected it.

T.J. Ceramic Tile puts great emphasis on the fact that Wooley stamped the lien as “RECEIVED March 11 5:02 PM '99.” According to T.J. Ceramic Tile, by stamping the lien, Wooley effectively acknowledged that she officially received it for filing at that time. We acknowledge that by stamping the lien as received on March 11, 1999, the register of deeds complicated this issue somewhat. However, even though the register of deeds stamped it as received at 5:02 p.m. on March 11, 1999, this does not refute the fact that the office closed at 5:00 p.m. The register of deeds made a conscious decision to do nothing with the lien because the office was closed when the lien was delivered. During the hearing on the motion for summary disposition, Wooley explicitly testified that had the lien been delivered before 5:00 p.m. she probably would have recorded it for that day. She testified that she had stayed late on previous occasions to record documents that were delivered on a certain date but had not yet been recorded, but she had never stayed late to record a document that had been delivered after 5:00 p.m. Therefore, it is clear that the register of deeds can record a lien after 5:00 p.m. that was delivered before 5:00 p.m., but there is nothing to establish that the register of deeds should record a deed on that date if it was delivered after 5:00 p.m. on that date.

T.J. Ceramic Tile argues that there remain questions of fact with regard to whether the office was closed at the time the courier delivered the lien claim. Again, Wooley testified that the office hours for the register of deeds were 8:00 a.m. to 5:00 p.m. She testified that on the day in question, at the time the courier brought the package, the office was closed, the computers were turned off, the records had been closed out, and they were walking out the door. The courier testified that the lights were still on and the door was unlocked at the time he delivered

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<sup>5</sup> Wooley explained that when a document is received by the office it is looked over to ensure that it complies with the recording requirements and then is receipted in. After the document is receipted in, it is time stamped and then given a liber page.

the package. Even accepting T.J. Ceramic's evidence as true, however, the courier admitted that he arrived after 5:00 p.m. on March 11, 1999. The register of deeds testified without contradiction that the office closed at 5:00 p.m., and that the office had already shut down its entry computers. The uncontradicted testimony of both Wooley and the courier was that the lien was not delivered until after 5:00 p.m. There was no evidence presented that the lien was delivered before 5:00 p.m. Therefore, because the office officially closes at 5:00 p.m., and the uncontradicted testimony establishes that the lien was delivered after 5:00 p.m., even viewing the evidence in the light most favorable to T.J. Ceramic Tile, there is no question of fact with regard to whether the office was closed.<sup>6</sup>

Based on the uncontradicted facts, the result is clear. Even if we were to assume that the register of deeds "received" the lien claim at 5:02 p.m. on March 11, 1999, this was two minutes past the closing time of the office. Therefore, the register of deeds did not "receive" the lien for recording on that day.<sup>7</sup> Instead, the register of deeds took delivery of the lien for filing on the following day. Strict compliance is necessary with regard to the ninety-day requirement. *Northern Pipe, supra*. Because T.J. Ceramic Tile did not file the lien claim within the requisite ninety days, the trial court did not err in granting summary disposition to Clouse.<sup>8</sup>

We acknowledge that the result in this case appears harsh. We also acknowledge that the Construction Lien Act is intended to protect the contractors and suppliers through construction liens. But the potential holder of a construction lien has the responsibility of properly obtaining the lien. We note the testimony of Dan Hall, the courier who delivered the lien claim to the register of deeds office. Hall testified that he was not told of the time sensitive nature of the package being delivered. He was never informed that the package had to arrive by 5:00 p.m. on March 11, 1999. Hall acknowledged that had he known the package had to be delivered on that day by 5:00 p.m., he may have been able to attempt to get it there sooner. It was T.J. Ceramic Tile's decision to use a courier to deliver the lien claim. Although the outcome of this case may seem harsh, T.J. Ceramic Tile had the responsibility to ensure that the lien claim got to the office of the register of deeds before the office closed. It was T.J. Ceramic Tile's choice to rely on a courier service to deliver the lien claim on the last day of the statutory period.

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<sup>6</sup> The uncontradicted testimony is that the register of deeds last record on March 11, 1999 occurred at 3:51 p.m. There is no evidence that the late delivery of this lien was the fault of the register of deeds office. We render no opinion with regard to the result of this case had the late delivery been attributable somehow to the register of deeds office, such as the courier arrived before 5:00 p.m. but had to wait in a line that caused actual delivery to occur after 5:00 p.m.

<sup>7</sup> Any other result would create a plethora of issues with regard to when a document can be filed. We agree that just because a warm body is found at an office does not mean that a document can be filed with the office. We note that several circuits have court rules establishing that all documents must be filed by a certain time or will be considered filed the following day.

<sup>8</sup> The ninety-day period of limitation advances policies of preventing stale claims, protecting defendants from protracted litigation and giving notice of lien that has been filed. *Northern Concrete Pipe, Inc v Sinacola Cos-Midwest, Inc*, 461 Mich 316, 322; 603 NW2d 257 (1999). In this case, had an individual called at 5:00 p.m. on March 11, 1999, to inquire whether a lien had been filed on the instant property, there would be no record of a lien having been filed because the lien claim did not arrive until after the office had closed.

Clouse also cross-appeals the trial court's refusal to grant him sanctions under MCR 2.114(D), which declares that an attorney's signature on a document certifies it as "not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation." MCR 2.114(D)(3). If the trial court finds that a party or its attorney violated MCR 2.114, then the trial court must award sanctions to the opposing party. *Contel Systems Corp v Gores*, 183 Mich App 706, 711; 455 NW2d 398 (1990). Therefore, the award of sanctions turns on whether the trial court found that the party's actions constituted a violation. *Id.* This Court reviews for clear error a trial court's ruling that a party did or did not violate MCR 2.114. *Id.*

The record demonstrates that Clouse failed to present any evidence that T.J. Ceramic or its counsel altered any documents or perpetrated any fraud on the court. Therefore, the trial court correctly refrained from sanctioning T.J. Ceramic Tile. We likewise find Clouse's other arguments for discovery sanctions unsupported by the record.

Affirmed.

/s/ Hilda R. Gage  
/s/ Kurtis T. Wilder  
/s/ Karen Fort Hood