

IN THE COURT OF APPEALS OF IOWA

FILED

OCT 22 1986

CLERK SUPREME COURT

LUMBERMAN'S WHOLESALE CO.,)

Plaintiff-Appellant,)

v.)

OHIO FARMER'S INSURANCE)
COMPANY, MIAMI CONSTRUCTORS,)
INC., et al.,)

Defendants-Appellees.)

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Filed October 22, 1986

IOWA PAINT MANUFACTURING)
COMPANY, INCORPORATED,)

Cross-Claimant-Appellant,)

v.)

OHIO FARMER'S INSURANCE)
COMPANY, MIAMI CONSTRUCTORS,)
INC., et al.,)

Cross-Claim Defendants-)
Appellees.)

6-300
86-189

Appeal from the Iowa District Court for Johnson County (No. 48758) -
William L. Thomas, Judge.

Plaintiff and cross-petitioner appeal from the court order dismissing their
claims filed pursuant to chapter 573 of the Iowa Code. **AFFIRMED.**

James L. Spellman, of Neiman, Neiman, Stone & Spellman, Des Moines,
Iowa, for appellants.

Allan J. Carew and Douglas M. Henry, of Fuerste, Carew, Coyle, Juergens
& Sudmeier, Dubuque, Iowa, for appellees.

Considered by Oxberger, C.J., and Snell, and Sackett, JJ.

OXBERGER, C.J.

Plaintiff Lumberman's Wholesale Company and cross-petitioner Iowa Paint Manufacturing Company appeal from the district court order dismissing their claims filed pursuant to chapter 573 of the Iowa Code. Lumberman's Wholesale contends that the district court erred in dismissing its complaint for failure to comply with the notice requirements of section 573.15. Iowa Paint maintains that the court erroneously dismissed its complaint for failing to establish that the materials for which it seeks payment were in fact furnished for use on the project in question. For the reasons stated below, we affirm.

I. STANDARD OF REVIEW

Our standard of review is at law, not de novo, because this case was filed and tried as an action at law. Beckman v. Carson, 372 N.W.2d 203, 206 (Iowa 1985); see also Menzel v. Morse, 362 N.W.2d 465, 470 (Iowa 1985). Accordingly, we view the district court's findings of fact with discretion, and give them the same weight as a jury verdict. H & S Ltd. v. Andreola, 363 N.W.2d 592, 595 (Iowa Ct. App. 1984).

II. NOTICE PROVISIONS OF IOWA CODE SECTION 573.15

Both Lumberman's Wholesale and Iowa Paint supplied materials to subcontractors for the construction of a public transit maintenance facility. The subcontractors purchased the supplies on account, but later proved unable to pay. Lumberman's and Iowa Paint then sought to recover the cost of the supplies by filing claims against the general contract retainage as provided in chapter 573.

Iowa Code section 573.15 sets forth the notice provisions that must be complied with in order to proceed upon a claim of this nature. That section provides that a claimant must either support his claim:

... by a certified statement that the general contractor had been notified within thirty days after the materials are furnished or by itemized invoices rendered to contractor during the progress of the work, of the amount, kind, and value of the material furnished for use upon the said public improvement....

Iowa Code § 573.15 (1985).

It is undisputed that Lumberman's did not notify Miami Constructors, the general contractor, within thirty days after the delivery of the supplies. The record discloses that the materials for which Lumberman's seeks payment, roof insulation items, were furnished to the construction site October 22, 1983; Lumberman's did not give Miami notice of its claim or invoices of the amount due until February 20, 1984.

Miami contends, and the district court agreed, that Lumberman's also failed to comply with the latter portion of section 573.15 concerning the provision of invoices "during the progress of the work." Miami asserts that this phrase refers only to the progress of the work regarding the materials at issue. In the instant case, the materials were completely installed by November 9, 1983, and the roof as a whole was finished December 15, 1983. Clearly, pursuant to Miami's construction of the statute, Lumberman's did not provide timely notice. Lumberman's contends, however, that "during the progress of the work" refers to the project as an entirety; as such, Lumberman's argues that its notice was timely because the project was not completed until July of 1984.

Because section 573.15 is susceptible to varying interpretations, we employ the rules of statutory construction in order to resolve its ambiguity. In Interest of G.R., 348 N.W.2d 627, 631 (Iowa 1984). Our goal is to give effect to the legislature's intent, which is gleaned from the statute as a whole, not merely from a particular portion. DeMore by DeMore v. Dieters, 334 N.W.2d 734, 737 (Iowa 1983). In ascertaining the legislature's intent, we may consider such factors

as the legislative history of the act, the consequences of a particular construction, the policy to be achieved, prior judicial decisions, and similar statutes. Id.; State v. Williams, 315 N.W.2d 45, 49 (Iowa 1982).

We have examined the legislative history of chapter 573, and conclude that the phrase in question refers to the incorporation of the specific materials into the project, and not to the completion of the project as a whole. Section 573.15 is titled an "exception" to the requirement that a portion of the general contractor's funds be retained in order to satisfy the claims of other contributors. See Iowa Code §§ 573.14-.15 (1985). After reading chapter 573 as a whole, we think it clear that the purpose of section 573.15 is to notify a general contractor of a subcontractor's failure to pay the materialman who has consequently claimed entitlement to the retained funds. The claimant is required to give the general contractor expedient notice so that he can protect himself before paying the subcontractor in full. See United States v. J.F. White Contracting Co., 649 F.2d 29, 31 (1st Cir. 1981); see also generally Iowa Code chapter 573 (1985); Comments on Recent Cases - Admissibility of Evidence - Federal Criminal Action - Confessions and Stolen Property, 30 Iowa L. Rev. 565, 572 (1945). If we were to adopt the construction of section 573.15 urged by the appellant, the purpose of the section would be negated.

In addition, we think it significant that throughout the chapter when the project as a whole as referred to, the word "improvement" is used; section 573.15, however, uses the word "work." It is well-settled that when different words are used within a single statute with respect to the same subject matter, it is presumed that a different meaning was intended. 82 C.J.S. Statutes § 316 (1964).

Moreover, the supreme court has often looked to the federal counterpart of chapter 573, the Miller Act, 40 U.S.C. §§ 270a-d (1986), in interpreting chapter

573. See Lennox Industries, Inc. v. City of Davenport, 320 N.W.2d 575, 577 (Iowa 1982); Dobbs v. Knudson, Inc., 292 N.W.2d 692, 695 (Iowa 1980); First Federal State Bank v. Town of Malvern, 270 N.W.2d 818, 820 (Iowa 1978). We think that section 270b(a) of the Miller Act sheds additional light upon the wording in question in this case. Section 270b(a) provides a federal cause of action for persons supplying labor or materials to recover from a payment bond secured from the general contractor of a federal project. In pertinent, it reads:

... any person having direct contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such 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.

40 U.S.C. § 270b(a)(1986)(emphasis added). We find it significant that section 270b(a) says nothing about providing notice after the completion of the project, but rather refers only to the particular services or supplies in question. See also United States v. J.F. White Contracting Co., 649 F.2d at 31; United States v. Home Indemnity Co., 489 F.2d 1004, 1005 (7th Cir. 1973).

We hold that Iowa Code section 573.15 requires a claimant to notify the general contractor either within thirty days after the receipt of the materials in question or to provide itemized invoices while such items are being installed. Although the statute is remedial and liberally construed, the provision of notice within the prescribed time is a condition precedent to maintaining an action pursuant to the chapter. See United States v. Home Indemnity Co., 489 F.2d

at 1005. Accordingly, we affirm the district court's dismissal of Lumberman's claim.¹

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Lumberman's also contends that because several other claimants had already filed claims under chapter 573, it was not necessary for either Lumberman's or Iowa Paint to notify Miami pursuant to section 573.15. As authority for this proposition, Lumberman's cites Cities Service Oil Co. v. Longerbone, 232 Iowa 850, 6 N.W.2d 325 (1942). The Cities Service case is, however, distinguishable; Cities Service concerned the filing of late claims. It is clear that certain late claims may be "attached" to timely claims as provided in the current section 573.11; this section has no applicability to untimely notice. Accordingly, we conclude that Lumberman's contention is without merit.

III. THE CLAIM OF CROSS-PETITIONER IOWA PAINT

Iowa Paint contends that the trial court erred in dismissing its complaint for failing to establish that the materials for which it seeks payment were in fact furnished for use on the transit facility project. We think that this claim is governed by the principles enunciated in Grady v. S.E. Gustafson Construction Co., 251 Iowa 1242, 103 N.W.2d 737 (1960). In Grady, the supreme court noted that when the parties to an action filed pursuant to chapter 573 disagree as to the amount of materials actually furnished for use on the project, the claimant bears the burden of proof:

To sustain his burden of proof by a preponderance of the evidence plaintiff must offer evidence in support of his claim, which when fully and fairly considered produces the stronger impression and be more convincing

¹Lumberman's contends that this case is governed by the supreme court's decision in Economy Forms Corp. v. City of Cedar Rapids, 340 N.W.2d 259 (Iowa 1983). We find that case factually distinct from the case at bar; it concerned the allegedly deficient filing of a claim. Although the court in Economy Forms briefly discussed the notice issue, no facts were set forth lending an analogy to the issue presented in the instant case. See 340 N.W.2d at 262-64.

when weighed against the evidence introduced in opposition thereto.

Grady v. S.E. Gustafson Construction Co., 251 Iowa at 1247, 103 N.W.2d at 739. See also Christensen v. Iowa State Highway Commission, 252 Iowa 1351, 110 N.W.2d 573 (1961).

We find credible evidence in the record supporting the district court's conclusion that Iowa Paint failed to meet its burden of proof in the instant case. The defendant Miami Constructors remitted in excess of \$8,000 to Iowa Paint for the materials allegedly utilized in connection with the transit facility; Iowa Paint contends that Miami owes an additional \$3,858.47. Of the sixty-one invoices submitted by Iowa Paint in support of its total claim, however, only one-third are positively attributable to the project. Iowa Paint contends that the remaining invoices are chargeable to Miami because the paint was furnished to Ed Starks, the subcontracting painter; Iowa Paint presented no evidence indicating that Starks took the paint for the transit facility. Moreover, Miami presented evidence indicating that generally only twenty-five or thirty percent of the contract price is attributed to the cost of materials; by contrast, the cost of materials claimed by Iowa Paint is nearly fifty percent of the contract price. Furthermore, the evidence reveals the cost of materials asserted by Iowa Paint exceeds that urged by the subcontracted painter by nearly \$2,000. In these circumstances, we cannot say that the trial court erred in dismissing the complaint.

Because we affirm the trial court's determination that both the plaintiff and cross-petitioner have failed to establish claims under chapter 573, we similarly deny their request for attorney's fees pursuant to section 573.21.

AFFIRMED.