

# Commonwealth of Kentucky

## Court of Appeals

NO. 2005-CA-000319-MR

T.S.P. CO.; EQUIPMENT  
CONCEPTS, INC.

APPELLANTS

v.

APPEAL FROM GRANT CIRCUIT COURT  
HONORABLE STEPHEN L. BATES, JUDGE  
ACTION NOS. 04-CI-00306, 04-CI-00358

MOREL CONSTRUCTION COMPANY, INC.;  
GRANT COUNTY BOARD OF EDUCATION

APPELLEES

### OPINION AFFIRMING

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BEFORE: ACREE, DIXON, AND KELLER, JUDGES.

DIXON, JUDGE: Appellants, T.S.P. Company, Inc. and Equipment Concepts, Inc.,  
appeal from an order of the Grant Circuit Court granting a CR 12.03 judgment in favor of  
Appellees, Morel Construction Company and the Grant County Board of Education.

Finding no error, we affirm.

This case arises from a construction project in Grant County, Kentucky.  
Morel Construction (“Morel”) was awarded a contract to construct a new central office

for the Grant County Board of Education (“Board”). Morel hired Appellants as subcontractors to perform the masonry work on the project. On May 8, 2004, T.S.P. Company, Inc. (“T.S.P.”) filed a lien in the amount of \$50,974.88 against the funds held by the Board. Similarly, on June 24, 2004, Equipment Concepts, Inc. (“ECI”) also filed a lien against the funds held by the Board. Thereafter, Morel filed with the Board an official written protest of the liens. The Board mailed the protest of the T.S.P. lien to T.S.P. on June 10, 2004, with a service date of June 16, 2004, and mailed notice of the protest of the ECI lien to ECI on July 14, 2004, with a service date of July 19, 2004.

After receiving the written protest, both Appellants filed complaints in the Grant Circuit Court seeking enforcement of the liens against the funds held by the Board. Specifically, T.S.P.'s suit was filed on July 15, 2004, and the summons was served on the Board on July 20, 2004. ECI's suit was filed on August 16, 2004, and its summons served on August 19, 2004. Appellants' complaints were subsequently consolidated.

Morel then intervened in the case and filed a motion for a judgment on the pleadings pursuant to CR 12.03, claiming that Appellants' lien rights were invalid because they had failed to follow the requirements of the Kentucky mechanics' lien statute, KRS 376.250. The trial court granted Morel's motion, ruling that Appellants' failure to timely perfect their liens within thirty days of receiving the protest as required by KRS 376.250(4) rendered the liens unenforceable. This appeal ensued.

Kentucky's Mechanics' lien statute, KRS 376.250, provides in relevant part:

(4) If suit is not instituted by the lien claimant for the enforcement of the lien and summons in the suit is not served on the public authority or its chairman within thirty (30) days

after the written notice of the protest is mailed to the claimant, then the lien shall automatically be released and the funds withheld pursuant to the filing of the lien statement shall be released and promptly paid to the contractor. If suit is filed and summons served within the time provided, the payment of the funds shall be withheld until ordered to be released or paid over by an order or judgment of the court, and then paid as directed by the order or judgment.

The recent decision in *3D Enterprise and Contracting Corporation v. Louisville Metropolitan Sewer District*, 174 S.W.3d 440 (Ky. 2005), squarely addresses the statutory lien requirements of KRS 376.250. At issue in *3D Enterprise* was the construction of two bioroughing towers that were employed in the wastewater treatment process by the Louisville and Jefferson County Metropolitan Sewer District (“MSD”). When one of the subcontractors, American Surfpac Corporation (“Surfpac”), did not receive payment from the general contractor, 3D Enterprises Contracting Corporation (“3D”), it filed a mechanic's lien against the funds due to 3D from MSD pursuant to KRS 376.210 *et seq.* 3D thereafter filed a protest<sup>1</sup>. Pursuant to the statute, Surfpac then had thirty days from the date of 3D's protest to institute suit for the enforcement of the lien, and to serve a copy of the complaint on MSD. While Surfpac filed suit within the statutory period, it failed to timely serve the complaint.

The case eventually reached the Kentucky Supreme Court, which held, in relevant part:

The record reveals that Surfpac failed to serve its complaint on MSD within the thirty-day time limit of KRS 376.250(4): service was required as of June 27, 1994, but did not occur until June 28, 1994. According to the statute, the lien should

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<sup>1</sup> 3D also filed cross-claims against Surfpac and MSD. However, the other issues are not pertinent to the case herein.

have been automatically released and the funds withheld should have been paid to 3D.

In Kentucky, liens are created by statute, and therefore the operation, extent, and rights created by the lien must be determined by the language of the statute. “Kentucky adheres to the rule that the statutory provisions for perfecting a lien must be strictly followed.” *Laferty v. Wickes Lumber Company*, 708 S.W.2d 107, 108 (Ky.App. 1986) (construing mechanic's lien statutes). Moreover, this Court has specifically rejected arguments that the lien statutes should be liberally construed: “While it may be argued that the mechanic's lien statutes may be liberally construed, we recognize ... that the better rule is to require strict adherence to the statutory provisions for perfecting a lien.” *Middletown Engineering Company v. Main Street Realty, Inc.*, 839 S.W.2d 274, 276-77 (Ky. 1992) (construing mechanic's lien statutes). KRS 376.250(4) clearly and unequivocally states that a lien is “automatically released” if the procedural requirements are not met. In *Jim Skaggs, Inc. v. Smith*, 799 S.W.2d 585 (Ky.App. 1990), a general contractor filed its written protest two days after the KRS 376.250(2) deadline, though the matter proceeded nonetheless and the contractor was permitted to present defenses to summary judgment on the merits. The Court of Appeals determined that all of the contractor's defenses were precluded by its failure to strictly comply with the statute's time limitations. *See also In re Excel Engineering, Inc.*, 224 B.R. 582 (Bankr.W.D.Ky. 1998) (subcontractor's failure to strictly comply with requirements of KRS 376.250 by filing complaint two days late was fatal to its claim that a valid lien existed). Therefore, as Surfpac failed to timely serve its complaint on MSD, the lien was automatically released as of June 28, 1994.

*3D Enterprise, supra*, at 445- 46.

While Appellants concede that this case is legally and factually analogous to *3D Enterprise*, they argue that the inclusion of the service of summons within the rigid thirty-day statutory time restriction violates basic Due Process concepts, a question not addressed in *3D Enterprises*. However, a review of the record reveals that a

constitutional argument was not presented to the lower court. In fact, the issue argued by all parties below was whether the phrase “is mailed” contained in KRS 376.250(4) refers to the date on which mail, in this case the written protest, is sent or the date on which it is received by the lien claimant.<sup>2</sup> Only the Board argued that regardless of when Appellants' complaints were filed, the summons was served outside of the statutory time period.

In its order granting Morel's motion, the trial court first concluded that “the statutory scheme is best served by reading the statute to mean that the mailing referred to in subparagraph (4) is to be determined by the date of receipt by the addressee as reflected by the return receipt.” However, the trial court found that the plain language of the statute required that the summons be served within thirty days after the written notice of the protest was received. The trial court made no reference to the constitutionality of KRS 376.250(4).

Thus, it is clear that Appellants' constitutional challenge to the statute was not raised in the trial court. It goes without saying that questions not raised or adjudicated in the court below cannot be considered when raised for the first time in this Court. *Skaggs v. Assad*, 712 S.W.2d 947, 950 (Ky. 1986); *see also Kennedy v. Commonwealth*, 554 S.W.2d 219, 222 (Ky. 1976) (“[A]ppellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court.”)

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<sup>2</sup> It was Morel's position that because Appellants' complaints were filed more than thirty days after the written protest was *mailed*, they failed to comply with KRS 376.250(4).

We conclude that the reasoning in *3D Enterprise, supra*, applies equally to the case herein and, as such, Appellants' liens were automatically released upon their failure to strictly comply with KRS 376.250(4)'s procedural requirements.

The judgment of the Grant Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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