

STATE OF MICHIGAN
COURT OF APPEALS

CENTRAL CEILING & PARTITION, INC.,

Plaintiff-Appellee,

v

DEPARTMENT OF COMMERCE,

Defendant-Appellant,

and

KITCHEN SUPPLIERS, INC.,

Defendant-Appellee,

and

CAPPY HEATING AND AIR CONDITIONING,
INC.,

Intervening-Plaintiff-Appellee,

and

PRIMEAU HOMES, INC.,

Defendant

FOR PUBLICATION

January 29, 2002

9:15 a.m.

No. 225378

Wayne Circuit Court

LC No. 98-810597-CH

Updated Copy

April 12, 2002

Before: Neff, P.J., and Wilder and Cooper, JJ.

WILDER, J. (*dissenting*).

I respectfully dissent. In *Northern Concrete Pipe, Inc v Sinacola Cos—Midwest, Inc*, 461 Mich 316, 321, 323-324; 603 NW2d 257 (1999), our Supreme Court held that the substantial compliance provision of the Construction Lien Act, MCL 570.1302(1), does not apply to the statutorily mandated ninety-day recording deadline found in MCL 570.1111(1). Because the liens asserted by Central Ceiling & Partition, Inc. (Central), Kitchen Suppliers, Inc. (KSI), and Cappy Heating and Air Conditioning, Inc. (Cappy) were not *recorded* within the ninety-day

deadline, they ceased to exist, and the lower court judgment in favor of Central, KSI, and Cappy should be reversed.

I

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) (emphasis added).]

To resolve the dispute in this case, we must determine what constitutes "recording" a claim of lien in the office of the register of deeds. This determination is a matter of statutory interpretation, a question of law that we review de novo. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 469; 628 NW2d 577 (2001), citing *Oakland Co Bd of Co Rd Comm'rs v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998); *In re S R*, 229 Mich App 310, 314; 581 NW2d 291 (1998). Our Supreme Court in *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 158; 627 NW2d 247 (2001), observed:

In considering a question of statutory construction, this Court begins by examining the language of the statute. We read the statutory language in context to determine whether ambiguity exists. If the language is unambiguous, judicial construction is precluded. We enforce an unambiguous statute as written. Where ambiguity exists, however, this Court seeks to effectuate the Legislature's intent through a reasonable construction, considering the purpose of the statute and the object sought to be accomplished. [Citations omitted.]

Unless defined in the statute, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used, *Phillips v Jordan*, 241 Mich App 17, 22-23, n 1; 614 NW2d 183 (2000), citing *Western Michigan Univ Bd of Control v Michigan*, 455 Mich 531, 539; 565 NW2d 828 (1997). Further, the language must be applied as written, *Camden v Kaufman* 240 Mich App 389, 394; 613 NW2d 335 (2000); *Ahearn v Bloomfield Charter Twp*, 235 Mich App 486, 498; 597 NW2d 858 (1999), and nothing should be read into a statute that is not within the manifest intent of the Legislature as indicated by the act itself. *In re S R*, *supra* at 314.

The majority concludes that the filing of a lien within ninety days and the acceptance of the lien filing by the register of deeds substantially complies with the act's requirement to record the lien claim. Because this conclusion is contrary to the plain meaning of the term "recorded" as used in the act, I disagree.

First, while the term "recorded" is not defined in the Construction Lien Act, there is ample evidence in the act as well as other statutes with regard to its intended meaning. MCL 565.25, relating to entry books, the effect of entry by the register of deeds, recording of certain instruments of encumbrance, perfection, or conditions, application, nonexempt persons, and penalties, provides in relevant part:

(1) . . . In the entry book of levies the register *shall enter* all . . . liens [and] other instruments of encumbrances, and documentation required under subsection (2), 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.* [Emphasis added.]

MCL 600.2567 provides in relevant part:

(1) A register of deeds is entitled to the following fees . . .

(a) For entering and recording a deed . . . or other instrument, \$5.00 for the first page and \$2.00 for each additional and succeeding page. . . . The fee shall be paid *when the . . . instrument is left for record.* . . .

(2) In addition to any other fees proscribed in subsection (1) or (5) , a register of deeds shall collect a fee of \$2.00 for entering and recording a deed . . . or other instrument. The fee shall be paid *when the instrument is left for record.* [Emphasis added.]

In MCL 570.1109, which describes notices of furnishing under the act, a sample form is provided:

(4) The notice of furnishing, if not given on the form attached to the notice of commencement, shall be in substantially the following form:

NOTICE OF FURNISHING

To: _____

(name of designee (or owner or lessee) from notice of commencement)

(address from notice of commencement)

Please take notice that the undersigned is furnishing to _____

(name and address of other contracting party)

certain labor or material for _____,

(describe type of work)

in connection with the improvement to the real property described in the notice of commencement *recorded in liber*, _____ *on page* _____ *(name of county)* records,

It is apparent from these statutes that the recording of a lien does not take place until an entry has been made in the book of levies, with the assignment of a liber and page number noting the date, hour, and minute the lien is entered. As both MCL 565.25 and MCL 600.2567 make clear, the leaving of the instrument for record, i.e., filing, *does not* constitute the recording of the document. See *People v Madigan*, 223 Mich 86, 89; 193 NW 806 (1923); *Hollis v Zabowski*, 101 Mich App 456, 457; 300 NW2d 597 (1980); see also 36A CJS, File, pp 396-398 (a paper or document is filed when it is delivered to or received by the proper officer to be kept on file, and the endorsement of the officer with whom it is filed is but evidence of the time of filing). The purpose of recording is made clear in MCL 565.25(4): the recording of a lien constitutes notice to all persons except as provided in subsection 2 that a lien claim is being asserted. The majority's conclusion that the filing and acceptance of the lien within the ninety-day statutory period substantially complies with the Construction Lien Act's requirement that the lien be recorded within that time frame defeats the purpose of the requirement and is inconsistent with the plain meaning of the term "recorded."

Precedent from our Supreme Court also recognizes that entry in liber must occur to record a document. In *Balen v Mercier*, 75 Mich 42, 48; 42 NW 666 (1889), the Court stated that "[o]ur statutes contemplate that any instrument which is entitled to be recorded shall first be entered by the register in the entry book, *and then it is deemed recorded.*" (Emphasis added.) In *Brigham v Brown*, 44 Mich 59, 61-62; 6 NW 97 (1880), the Supreme Court held that delivery of a mortgage to the register of deeds did not constitute recording and that recording did not occur until the actual copying of the mortgage into the record book took place. While the statutes at issue in these cases obviously are different from the Construction Lien Act that we interpret here, it is clear that in these prior cases as well as the instant case the purpose of recording is to give official notice of assertion of a claim on land title.

Further support for the conclusion that filing does not constitute recording is found in the precedent of several states. In *State v Noren*, 621 P2d 1224, 1225 (Utah, 1980), the Utah Supreme Court held: "Although the words 'file' and 'record' have occasionally been used somewhat interchangeably they have more frequently been interpreted as implying or requiring different things. 'Recorded' has been held to signify 'copied or transcribed into some permanent book' while 'filing' signifies merely delivery to the proper official." *Id.*, citing *Beatty v Hughes*,

61 Cal App 2d 489, 492; 143 P2d 110 (1943) and *Maryland Dep't of Natural Resources v Hirsch*, 42 Md App 457, 502; 401 A2d 491 (1979).

In *Markham v Markham*, 80 Hawaii 274, 281; 909 P2d 602 (1996), the Intermediate Court of Appeals of Hawaii, quoting Black's Law Dictionary (6th ed), found that "[a] document or instrument is considered recorded when it is 'commit[ted] to writing, . . . printing, . . . or the like[,] 'or transcribe[d], or enter[ed] in a book, file, docket, register, computer tape or disc, or the like, for the purpose of preserving authentic evidence . . . [and] for the purpose of giving notice.'" [Emphasis added.]

The majority rejects application of the plain meaning of the term "recorded," under the circumstances of this case, as inconsistent with both the intent of the Legislature and the holding of *Northern Concrete Pipe*, *supra*. I disagree with this conclusion because the Supreme Court's holding in *Northern Concrete Pipe*, *supra*, adopts the strict compliance rule.

It is a cardinal rule of statutory construction that a clear and unambiguous statute warrants no further interpretation and requires full compliance with its provisions, as written. Within the Construction Lien Act, however, the Legislature provided an exception to that rule, in the form of the "substantial compliance" provision. As an exception, this provision should not be interpreted to nullify altogether the general rule that statutes should be interpreted consistent with their plain and unambiguous meaning. [*Id.* at 320-321 (citations omitted).]

In interpreting § 111, the Supreme Court noted in *Northern Concrete Pipe*, *supra*, that because the statute emphasizes that the lien "'cease[s] to exist' if not recorded within the ninety-day deadline . . . [the provision is] not . . . well suited to a 'substantial compliance' application" *Id.* at 323. The Court goes on to state that

[t]he case before us is a clear instance in which the Legislature could not have imposed a more precise requirement. MCL 570.1111(1); MSA 26.316(111)(1) states *without qualification* that a subcontractor's right to a lien ceases to exist if not recorded in the county office of the register of deeds within ninety days after the last furnishing of labor or material. [*Id.* at 323-324 (emphasis added).]

In my view, interpreting the term "recorded" to mean entry in the book of levies not only is consistent with the plain meaning of the statute but is consistent with the Legislature's intent to require strict compliance with this particular notice provision of the act. On the other hand, property owners and subsequent purchasers who check the book of levies after ninety days and find no recordation of a claim of lien will lack notice of a claim merely "filed," and thus will lack certainty of title under the result reached by the majority. As pointed out by the Supreme Court, "certainty of title could only be achieved [under these circumstances] by researching the complete history of improvements with respect to a particular parcel of property and painstakingly obtaining waivers of lien from each contractor, subcontractor, materials supplier, and laborer." *Id.* at 322.

The majority also concludes that attributing delays in recording by the register of deeds to lien claimants would lead to absurd and unfair results not contemplated by the Legislature. I

agree that the Legislature likely did not contemplate that the register of deeds would fail to timely perform the duties imposed on the register by statute. However, departure from the literal construction of the Construction Lien Act is a diversion from this Court's proper task of determining the Legislature's expressed intent. *People v McIntire*, 461 Mich 147, 156, n 2; 599 NW2d 102 (1999). As such, I cannot accept the majority's conclusion that the rules of statutory construction permit the tacit understanding that the term "recorded" in the act really means filed. *Macomb Co Prosecutor, supra*. A goose simply is not a duck, even if it may sound as though it has a quack.

Where a lien claimant files the claim before the ninety-day recording deadline (as Central, KSI, and Cappy did in this case), the lien claimant is not without remedies to ensure timely recording. The claimant, which unlike all others knows the claim has been filed, can examine the book of levies before the ninety-day deadline expires to determine whether recording has occurred. Where the deadline is near expiration and the lien has yet to be recorded, the lien claimant can request immediate action from the register or seek extraordinary remedies in the circuit court. In any case, the difficulties attendant in determining whether the register is timely performing the duties of the office are not justification for this Court to redefine the commonplace and unambiguous statutory term "recorded." *McIntire, supra* at 156, n 3. The policy choice with regard to whether notice under these circumstances should be provided by recording or filing is best left to the Legislature.

For the above reasons, I would reverse the judgment of the lower court and remand for entry of an order granting summary disposition in favor of defendant Department of Commerce.

/s/ Kurtis T. Wilder