COURT OF APPEALS
DECISION
DATED AND FILED

October 21, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 97-3046

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

WILLIAM R. DAVIS, D/B/A SCHOOL TECH,

PLAINTIFF-APPELLANT,

V.

MIRON CONSTRUCTION CO., INC., A WISCONSIN CORPORATION, AND SCHOOL DISTRICT OF SUPERIOR,

DEFENDANTS-RESPONDENTS,

COSSALTER ELECTRIC COMPANY, INC., A MINNESOTA CORPORATION,

DEFENDANT.

APPEAL from an order of the circuit court for Winnebago County: ROBERT A. HAWLEY, Judge. *Reversed and cause remanded.*

Before Snyder, P.J., Brown and Anderson, JJ.

BROWN, J. This case concerns a supplier of a subcontractor to a public construction contract who did not get paid because of the subcontractor's financial problems. The question is, as between the public entity, the prime contractor and the supplier, who bears the risk of loss when the public entity chooses to waive the bond set forth in § 779.14(1m)(b), STATS., 1993-94?[1] We interpret that statute to require a public entity to protect suppliers either by bond or through contractual guarantees with the prime contractor. We reverse the trial court's ruling to the contrary.

In July 1994, Miron Construction Co., Inc. (Miron) entered into a contract with the School District of Superior (the District) to build two new elementary schools and remodel the high school. Miron subcontracted a portion of the electrical work to Cossalter Electric Company, Inc. (Cossalter), which in turn ordered and received electrical supplies known as tech walls from William R. Davis, doing business as School Tech (Davis). Cossalter ordered the tech walls in August 1994, and they were supplied sometime before the end of the year. Miron, the prime contractor, paid Cossalter for its labor and materials, including the tech walls. But, Cossalter never paid Davis for the tech walls. This failure to pay was due to Cossalter's serious financial problems, which ultimately resulted in Cossalter's filing chapter 7 bankruptcy. Unable to collect from Cossalter, Davis requested payment from Miron and the District. Miron and the District both denied any obligation to pay Davis, since neither contracted directly with Davis. The trial court sided with Miron and the District. Davis appeals.

[1] Unless otherwise indicated, all statutory references are to the 1993-94 statutes.

This case turns on the interpretation of the waiver provision in the public works statute, § 779.14(1m)(b), STATS. We initially note that the application of a statute to an undisputed set of facts is a question of law we review de novo. *See* ***Kania v. Airborne Freight Corp.***, 99 Wis.2d 746, 758, 300 N.W.2d 63, 68 (1981). When interpreting a statute, our goal is to give effect to the legislative intent. *See* ***Golden Valley Supply Co. v. American Ins. Co.***, 195 Wis.2d 866, 873, 537 N.W.2d 58, 60 (Ct. App. 1995). To determine legislative intent, we look to the statute; we resort to secondary material only if the statute is ambiguous on its face. *See* ***id.***

Section 779.14(1m)(b), STATS., requires, as did its 1931 predecessor, that in order to contract for public works, a prime contractor must furnish a surety bond to cover the price of the contract. *See* § 289.16(1), STATS., 1931; § 779.14(1m). However, since 1931, the statute has been amended in two significant ways: (1) suppliers and subcontractors of subcontractors were brought under the protection of the bond and (2) the public entity was given the ability to waive the bond requirement "if guarantees or warranties deemed adequate by the [public entity] are provided for by the contract." Section 779.14(1m)(b)1, 2. *See* 1987 Wis. Act 399, § 472j (specifying that payment to all subcontractors and suppliers is required under the bond); 1989 Wis. Act 290, § 38g (extending ability to waive bond, which formerly only pertained to the department of administration on state contracts, to any public board or body authorized to enter into a public

works contract).[2] At issue in this case is the scope of protection of the "guarantees or warranties" referred to in paragraph (b). Miron and the District apparently read this provision to grant the public body discretion as to what amount of protection the contract provides and to whom this protection extends. Davis, on the other hand, argues that this provision means that some guarantee must be included in the contract for payment of all claims that would be protected under the bond.

A statute is ambiguous if reasonable persons could disagree as to its meaning. *See* ***Hauboldt v. Union Carbide Corp.***, 160 Wis.2d 662, 684, 467 N.W.2d 508, 517 (1991). Here, the statute is silent as to the appropriate year from which to compute the cost of living increase. Because reasonable persons could differ as to the statute's meaning, we conclude that it is ambiguous. *See* ***id.*** We thus trace the history of the statute, beginning with the lead case interpreting it.

The public works statute "was calculated to assist those engaged upon public works who would be protected if employed in private building contracts." ***Gilson Bros. Co. v. Worden-Allen Co.***, 220 Wis. 347, 352, 265 N.W. 217, 219 (1936). The statute at issue in ***Gilson*** was § 289.16, STATS., 1931, the precursor to § 779.14, STATS. In ***Gilson***, a supplier of a subcontractor sought payment from the prime contractor after the subcontractor was declared insolvent, a situation parallel to the present case. *See* ***Gilson***, 220 Wis. at 349, 265 N.W. at 218. At that time, the prime contractor on a public works project was required to

[2] The statute has been amended further since the beginning of this case. In 1995, the legislature removed the ability to waive the bond requirement. *See* 1995 Wis. Act 395, § 4. Then, in 1997, the ability to waive the bond was revived, but this time without the body having to provide "guarantees or warranties." *See* 1997 Wis. Act 27, § 5163e. However, under the new version, the public body must have written standards for waiver which the contract must meet. *See* ***id.*** § 5163m. While these subsequent amendments do not affect the result of this case, we note them.

furnish a bond to guarantee payment to subcontractors and suppliers *of the prime contractor*. *See* § 289.16; ***Gilson***, 220 Wis. at 353, 265 N.W. at 220. The question for the court was whether the bond covered a subcontractor or supplier *of a subcontractor*. *See* ***Gilson***, 220 Wis. at 351, 265 N.W. at 219. The court ruled that the statute did not cover subcontractors and materialmen of remote degree, as such were not protected in the private realm when the statute was passed. *See* ***id.*** at 352-53, 265 N.W. at 219-20. The ***Gilson*** court wrote that even though coverage under the mechanic's lien statute had been broadened since the public works statute was passed, this did not expand coverage under the public works statute. *See* ***id.*** at 353, 265 N.W. at 219-20. This is because the legislature, when passing the public works statute, incorporated the mechanic's lien statute existing at the time of enactment. *See* ***id.*** at 352-53, 265 N.W. at 219. The court determined that the classification was not broadened by subsequent alterations in the mechanic's lien statute, despite the court's belief that the intent of the legislature was to protect public works contractors in the same way they were protected when dealing with a private entity. *See* ***id.*** at 351, 353, 265 N.W. at 219, 219-20. The court concluded that any change in protection from the time of adoption must be effected by legislation. *See* ***id.*** at 353, 265 N.W. at 219.

In our view, that change in protection has now been effected. The statute now clearly requires the bond to cover subcontractors and suppliers of subcontractors whose labor or materials are provided pursuant to the prime contractor's contract with the public entity. *See* ***Golden Valley***, 195 Wis.2d at 875, 537 N.W.2d at 60 (referring to drafting records indicating that the 1987 amendment was aimed at furnishing subcontractors and suppliers of subcontractors with the same protection as they receive under construction bond in the private sector).

Miron and the District point out, however, that in ***Golden Valley***, as in ***Gilson***, a bond was required, there was a bond, and the questions were all about the scope of coverage under the bond. *See generally* ***Golden Valley***, 195 Wis.2d at 866, 537 N.W.2d at 58; ***Gilson***, 220 Wis. at 347, 265 N.W. at 217. Here, our inquiry is the extent of coverage when there is no bond because the bond requirement has been waived. In such a case, the question is, who should bear the risk of loss—the public entity, the prime contractor or the supplier of a subcontractor?

According to Miron, it is the supplier to the subcontractor who bears the risk of loss when the subcontractor becomes insolvent. By making the bond waivable, Miron argues, the legislature chose to require suppliers to "take reasonable precautions in dealing with the subcontractor because there would not necessarily be a bond to protect them." According to Miron, this is a normal business risk taken daily in commercial transactions.

The District argues that if anyone besides Davis should bear his loss, it is the prime contractor. The decision to waive the bond is left to the discretion of the public body, and thus cannot give rise to liability. The District, by choosing a reputable prime contractor, deemed that there were adequate guarantees that the subcontractors would be paid. That is all that is required under the statute. Furthermore, even when there is a bond, the subcontractor only has a cause of action against the prime contractor and the surety on the bond—not the public body. *See* § 779.14(2)(a), STATS. This shows that the legislature did not intend to put the risk on the public body.

We must read § 779.14(1m)(b)1, STATS., the section that requires the bond and then allows it to be waived, in pari materia with § 779.14(1m)(b)2,

the list of conditions required in the bond. The second bond condition is the "payment to every person, including every subcontractor or supplier, of all claims." ***Id.*** Thus, the protection of the bond, were there one, would clearly extend to suppliers of subcontractors. Subdivision (b)1 allows the public body to waive the requirement of a bond only if "guarantees and warranties deemed adequate ... are provided for by the contract." The protection these guarantees afford should protect those who would have been covered under the bond. To read the statute otherwise would create an anomaly: the legislature would be throwing a life-line to materialmen only to allow the public body to pull it back whenever it wishes to save money by not requiring the bond. We will not read a statute to create an absurd result. *See* ***Golden Valley***, 195 Wis.2d at 873, 537 N.W.2d at 60. Thus, whatever guarantees and warranties the public body deems adequate must extend to claims by suppliers of subcontractors.

We hold that the District, by waiving the bond requirement, took the risk of loss upon itself if the guarantees it deemed adequate turned out not to be so. Here, they were not adequate, as Davis did not get paid for the materials he supplied. The District had a choice: protect those building its schools by bond or by contract. It chose to do so by contract. If there is no language in the contract making Miron liable for claims to subcontractors and suppliers of subcontractors, then the District is liable. That subcontractors do not have a cause of action against the District when there is a bond, but may only pursue the prime contractor or the surety on the bond, is entirely consistent with our holding. *See* § 779.14(2), STATS. (allowing a cause of action against the prime contractor or surety on the bond). If the District fulfills the bond requirement, it passes on liability to others—that is the point of the bond. When it chooses not to invest in this insurance, it takes the risk of loss upon itself.

Either the District or Miron is liable for Davis' loss. While Davis and Miron claim that there is no language in the contract making Miron liable, the District has made no such concession. Because the details of the contract between Miron and the District are not before this court and the parties have not argued this issue, we remand for a determination of liability.

By the Court.—Order reversed and cause remanded.

Not recommended for publication in the official reports.