

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 30, 2002

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 02-0929-FT
STATE OF WISCONSIN**

Cir. Ct. No. 00-CV-1401

**IN COURT OF APPEALS
DISTRICT III**

SUAMICO SANITARY DISTRICT No. 1,

PLAINTIFF,

v.

**MIDWEST CONTRACTORS, INC., NATURAL GAS SYSTEMS,
INC., PITTSBURGH PIPE & SUPPLY, TRIPLE P.,
INC., D/B/A PETERS CONCRETE COMPANY, L & H
UTILITY CONTRACTORS, INC., AMERICAN CONCRETE
PIPE COMPANY, INC. AND DAVIES WATER EQUIPMENT
COMPANY OF WISCONSIN,**

DEFENDANTS,

STATEWIDE INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

RAMCO SERVICES, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County:
MARK A. WARPINSKI, Judge. *Reversed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Ramco Services, Inc., appeals a portion of a partial summary judgment denying its request for prejudgment interest on the damages the trial court ordered Statewide Insurance Company, the surety, to pay Ramco, a subcontractor.¹ We conclude that Statewide owes Ramco interest because the contract between Ramco and Midwest Contractors, Inc., the general contractor, provides for it. We therefore reverse the judgment.

BACKGROUND

¶2 Midwest contracted with the Suamico Sanitary District No. 1 to construct a sewer extension. Statewide issued both a performance and a payment bond on the project. The payment bond provides coverage for nonpayment claims by subcontractors, among other things. In the bond, Statewide promised to pay subcontractors, such as Ramco, the amounts due to them on their subcontracts if Midwest defaulted.

¶3 Midwest then contracted Ramco to work on the project as a subcontractor. The subcontract between Ramco and Midwest imposed a 1-1/2% monthly service charge (18% per annum) if Midwest failed to pay Ramco's invoice within ten days. Ramco completed its work in April 2000, but Midwest

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 1999-2000 version.

made no payment on the outstanding balance until after the trial court granted judgment in favor of Ramco.

¶4 Originally, Suamico brought an action alleging that Midwest defaulted on the contract for the sewer construction project. Because Suamico had made payments to Midwest but Midwest had not paid the subcontractors, Suamico made Statewide and all of the subcontractors parties to the action. Ramco cross-claimed against Statewide for the amounts Midwest owed pursuant to its subcontract with Ramco.

¶5 Ramco filed a motion for summary judgment against Statewide for the amount of its unpaid subcontract with Midwest, together with interest. The trial court ordered Statewide to pay Ramco the unpaid balance Midwest owed Ramco. However, the court denied Ramco's request for prejudgment interest.

STANDARD OF REVIEW

¶6 When reviewing a summary judgment, we perform the same function as the trial court and our review is de novo. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08.

DISCUSSION

¶7 Ramco argues that it is entitled to recover interest from Statewide pursuant to its subcontract with Midwest. We agree and conclude that, under *Waukesha Concrete Prods. v. Capitol Indem. Corp.*, 127 Wis. 2d 332, 379

N.W.2d 33 (Ct. App. 1985), Statewide is bound to pay the interest provided for in the contract between Ramco and Midwest.²

¶8 In *Waukesha Concrete*, as in this case, a subcontractor brought an action against the surety for money the general contractor owed it. *Id.* at 336. The court in *Waukesha Concrete* acknowledged the time value of money and concluded that the plain language of the contracts and bonds construed together indicated that the surety was liable to the subcontractor for interest provided for in the contracts. *Id.* at 339-40.

¶9 A surety's obligation is derived from its principal, and the liability of the surety is measured by the liability of the principal. *Id.* at 339. The surety's liability on a bond is fixed by the terms of the bond. *Id.* We construe together the bond issued by the surety and the surety's contract with the principal. *Id.* The purpose of contract construction is to ascertain the true intent of the parties as expressed by the contract language. *Id.* The construction of a written contract is a question of law we review without deference to the trial court. *Id.*

¶10 Here, the contract between Ramco and Midwest provides, "Payment is to be made as follows: net 10 days after billing with 1-1/2% service charge every month thereafter." Also, Statewide's bond, like five of the bonds in *Waukesha Concrete*, includes payment to subcontractors for all amounts due for labor and material supplied on the project. *Id.* at 337. In *Waukesha Concrete*, there were

² Ramco alternatively argues that it is entitled to prejudgment interest under WIS. STAT. § 138.04 because its damages were "readily determinable." See *Wyandotte Chems. Corp. v. Royal Electric Mfg. Co.*, 66 Wis. 2d 577, 582, 225 N.W.2d 648 (1975). Statutory interest applies only where the parties have not contracted for interest. WIS. STAT. § 138.04. Because we conclude that Ramco is entitled to interest under its contract with Midwest, we need not address this argument. See *Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

seven separate bonds, five of which stated that payment shall be made for “labor and materials supplied to the principal.” *Id.* The two remaining bonds had additional language stating that the surety was obligated to “defend, indemnify and save harmless ... against ... charges of any kind” *Id.*

¶11 In *Waukesha Concrete*, the court based its decision, in part, on the fact that the bond did not contain language limiting the surety’s liability under the contract to only the general contractor. *Id.* at 340. Similarly, Statewide’s bond does not limit its liability to only the general contractor. In fact, it explicitly mentions payments to subcontractors.

¶12 The trial court attempted to distinguish *Waukesha Concrete* from this case. It claimed that the bond in *Waukesha Concrete* was “more expansive” and that the surety there had obligated itself to pay for “any charges,” citing the language from the remaining two additional bonds in that case. This analysis, however, fails to account for the *Waukesha Concrete* holding in light of the five bonds that did not contain the more expansive language. We do not view the *Waukesha Concrete* holding as dependent upon the “special language” in two of the seven bonds. Rather, the decision is based on the fact that there was not an exclusion in the bond for the contract interest. Nor is there one here.

¶13 In *Waukesha Concrete*, the general contractor and subcontractor agreed to interest on labor and materials in their contract. *Id.* at 336. That interest on labor and materials was part of the indebtedness covered by the bonds. The same is true here. Ramco is entitled to recover interest on the unpaid amount due because the provision for interest was part of the contract for labor and materials. It is, in fact, part of the labor and materials.

¶14 Statewide attempts to distinguish between performance and payment bonds and argues that *Waukesha Concrete*'s holding is based on the performance bond. However, while *Waukesha Concrete* quoted from a performance bond in the background, its analysis did not involve the quoted language. The analysis did not refer to or rely on the “charges of any kind” language in the performance bond. Rather, the decision relied on what was not in the surety bond—an exclusion for prejudgment interest. Also, Statewide does not convincingly address why the difference between a performance bond and a payment bond is material in light of the clear application of the principles in *Waukesha Concrete* and the salient factual similarities.³

By the Court.—Judgment reversed.

This opinion will not be published. See WIS. STAT. RULE § 809.23(1)(b)5.

³ Statewide raises other arguments we need not address because *Waukesha Concrete Prods. v. Capitol Indem. Corp.*, 127 Wis. 2d 332, 379 N.W.2d 33 (Ct. App. 1985), controls. See *Sweet*, 113 Wis. 2d at 67.

