SUPREME COURT OF KENTUCKY

CASE NOS. 2015-SC-00204; 2015-SC-000635; 2015-SC-00636

APPEAL FROM KENTON CIRCUIT COURT NO.: 07-CI-03886
APPEAL FROM THE KENTUCKY COURT OF APPEALS NOS.:
2012-CA-000440; 2012-CA-000441; 2012-CA-000494 and 2012-CA-000495

SUPERIOR STEEL, INC.

and

BEN HUR CONSTRUCTION COMPANY, INC. — **APPELLANTS/ CROSS-APPELLEES**

v.

THE ASCENT AT ROEBLING'S BRIDGE, LLC, CORPOREX DEVELOPMENT & CONSTRUCTION MANAGEMENT, LLC, DUGAN & MEYERS CONSTRUCTION COMPANY

and

WESTCHESTER FIRE INSURANCE COMPANY — **APPELLEES/ CROSS-APPELLANTS**

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AMICUS CURIAE BRIEF FOR THE AMERICAN SUBCONTRACTORS ASSOCIATION IN SUPPORT OF APPELLANTS

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CERTIFICATE OF SERVICE

It is hereby certified that copies of this *Amicus Curiae* Brief were mailed on July 12, 2016 to Griffin Terry Sumner, J. Kendrick Wells IV, Frost Brown Todd LLC, 400 W. Market St., 32nd Fl., Louisville, KY 40202; D. Scott Gurney, Frost Brown Todd, LLC, 3300 Great American Tower, 301 E. 4th St., Cincinnati, OH 45202; Thomas J. Kirkwood, Kimberly E. Raimundo, Heather M. Hawkins, Thompson Hine LLP, 312 Walnut St., 14th Fl., Cincinnati, OH 45202; Gerald F. Dusing, Adams, Stepner, Woltermann & Dusing PLLC, 40 W. Pike St., P.O. Box 861, Covington, KY 41011; Mark T Hayden, Taft, Stettinius & Hollister, 425 Walnut St., Ste. 1800, Cincinnati, OH 45202; Hon. Gregory M. Bartlett, Kenton Circuit Court, Justice Center 230 Madison Avenue, 7th Floor, Covington, KY 41011; Clerk, Kenton Circuit Court, Justice Center, 230 Madison Avenue, Covington, KY 41011; and Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601.

Thomas R. Yocum
BENJAMIN, YOCUM & HEATHER, LLC
300 Pike Street, Suite 500
Cincinnati, Ohio 45202
Counsel for Amicus Curiae, *The American Subcontractors Association*

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF FACTS

Amicus Curiae, The American Subcontractors Association ("ASA") adopts Appellants' statement of the case as relevant to the argument herein.

INTRODUCTION

The Kentucky Court of Appeals' ruling, which reversed the judgment of the Kenton Circuit Court, raises significant concern among the members of ASA, and the thousands of Kentuckians who are gainfully employed by subcontractors in the construction industry. In substituting its judgment for that of a Kenton County jury, the Court of Appeals denied Appellants any meaningful remedy and permitted The Ascent at Roebling's Bridge, LLC ("The Ascent" or "Owner") to benefit from valuable extra-contractual work provided by Appellants without payment.

The Court of Appeals erroneously reversed the Kenton Circuit Court on two bases. First, it held that because Appellants entered into subcontracts with the general contractor, Appellee Dugan & Meyers Construction Company ("D&M"), Appellants could not, as a matter of law, prevail on an unjust enrichment theory against the Owner. The Court of Appeals so held *despite the undisputed fact that neither Appellant* ***ever*** *entered into* ***any*** *contract with Owner*. Second, the Court of Appeals held that a pay-if-paid clause in the subcontract between Appellant Superior Steel, Inc. and the D&M (the "Subcontract") precluded Appellants from recovering payment for their extra-contractual work. Thus, in one fell swoop, the Court of Appeals completely and erroneously eviscerated Appellants' right of recovery for the significant labor and materials incorporated into the project.

The Court of Appeals' decision to deny recovery against the Owner based upon an unjust enrichment theory, even where there was no contract between Appellants and

Owner, is contrary to well-established precedent in Kentucky and throughout the nation. Its approval of Appellees' incorrect claim that no case in the country holds that the owner is responsible under unjust enrichment when a contract is in place is erroneous where, as here, there was no contract in place between Appellants and the party who was unjustly enriched (the Owner in this case).

The Court of Appeals' decision to deny Appellants' equitable unjust enrichment remedy was predicated on the assumption that Appellants had a contractual remedy against D&M. However, that remedy was illusory under the Court of Appeals' erroneous interpretation of the pay-if-paid clause in the Subcontract. When the Owner did not pay D&M, and D&M did not seek to compel payment from the Owner, Appellants' contractual remedy vanished. In effect, the Court of Appeals held that Appellants must live with D&M's decision not to seek payment from the Owner for work completed by Appellants.

The Court of Appeals' erroneous decision created a vicious circle wherein, under the Court of Appeals' reasoning, the Owner's failure to pay for Appellants' work was the reason that Appellants' were not entitled to be paid for their work. Judge Maze, in his concurring opinion below, correctly characterized this behavior, along with Owner's and D&M's course of dealing throughout this Project, as "unconscionable." *Dugan & Meyers Constr. Co. Inc. v. Superior Steel, Inc.* 2012-CA-000495, 2012-CA-000441, 2012-CA-00494-MR (Jan 9, 2015) at 51 (J. Maze concurring).[1] This Court should not condone such unconscionable and brazen behavior. Kentucky statutory law, case law, and public policy dictate that the Court of Appeals' misguided opinion be reversed.

[1] The Court of Appeals Opinion below may be referred to as "Ct. App. Op." from time to time throughout this Brief.

ARGUMENT

I. The Unjust Enrichment Award Should Be Upheld.

The equitable doctrine of unjust enrichment "is applicable as a basis of restitution to prevent one person from keeping money or benefits belonging to another." *Rose v. Ackerson*, 374 S.W.3d 339, 343 (Ky. App. 2012) quoting *Haeberle v. St. Paul Fire and Marine Ins. Co.*, 769 S.W.2d 64, 67 (Ky. App. 1989). A party must prove three elements to establish an unjust enrichment claim: (1) a benefit was conferred upon defendant at plaintiff's expense; (2) a resulting appreciation of the benefit by defendant; and (3) inequitable retention of benefit **without payment for its value**. *Jones v. Sparks*, 297 S.W.3d 73, 78 (Ky. App. 2009); *Collins v. Ky. Lottery Corp.*, 399 S.W.3d 449, 455 (Ky. App. 2012) (emphasis added). Besides these requirements, in the context of a construction project, a subcontractor making an unjust enrichment claim must demonstrate that the owner paid no person for the work performed. *Brock v. Pilot Corp.*, 234 S.W.3d 381, 384 (Ky. App. 2007). Because Appellants met each of these requirements, the Court of Appeals' opinion must be reversed.

A. Appellants Have Proven All Elements Of Unjust Enrichment.

Here, the jury correctly concluded that Appellants completed extra-contractual work at the request of the Owner with assurances of proper payment from Owner and D&M. The trial court then exercised its proper role and applied the elements of unjust enrichment to the facts the jury found in the case. *Javier Steel Corp v. Central Bridge Co., LLC,* 353 S.W.3d 356, 359 (Ky. App. 2011) (unjust enrichment is an equitable doctrine, and application of the equitable doctrine to the facts is a question of law for the court). It is undisputed that Owner directed extra work to be done, assured Appellants that they

would be paid for their work, and received an appreciable benefit through added value in the project. It is also undisputed that Owner never paid anyone for that work.

In vacating the Trial Court's judgment, the Court of Appeals erroneously held that the mere existence of *any* written contract precluded, as a matter of law, application of the equitable doctrine of unjust enrichment. In reaching its conclusion, the Court of Appeals relied upon a case which held that unjust enrichment, as an equitable doctrine, is not available where there is a contractual relationship between the party seeking payment ***and the party that received the benefit.*** *Codell Constr. Co. v. Comm.*, 566 S.W.2d 161 (Ky. App. 1977) (emphasis added). The Court of Appeals' reliance on *Codell* was misplaced.

In *Codell*, an excavator entered into a contract directly with the Kentucky Highway Department. *Id.* at 163. The contract expressly disclaimed the accuracy of information provided by the Highway Department. *Id.* During its work, the contractor encountered more rock than expected, and had to perform more work than anticipated in order to complete its contract. *Id.* After the contractor sued the Highway Department, the Court of Appeals held that the equitable doctrine of unjust enrichment was unavailable where "**there is an explicit contract which has been performed.**" *Id.* at 165 (emphasis added).

This case differs from *Codell* in several key ways. In *Codell*, there was an explicit contract between the contractor **and the owner**. Here, it is undisputed that there was **no** contract between either Appellant and the Owner. Nor were Appellants made a third party beneficiary of the prime contract between Owner and D&M, which states, unequivocally that "...no Subcontract shall create privity between any Subcontractor and Owner."[2]

[2] Construction Agreement, Section 3.8(f). Section 2.5 of the subcontract between D&M and Superior contains similar language: "Nothing in this Agreement shall be construed to create a contractual relationship between persons or entities other than Contractor and Subcontractor."

Second, in *Codell,* the Highway Department did not order extra or additional work. In contrast, here, Owner and D&M directly ordered work outside the scope of Appellant Superior Steel's Subcontract with D&M and promised that Appellants, mere subcontractors, would be paid for their work. Third, in *Codell*, the Court of Appeals found that "the contractor bid and entered into a bad bargain in the analysis...." Here, **everyone**, even the Court of Appeals, agreed that extra work was ordered and Appellants should be paid for it. Thus, Appellants did not simply enter into a "bad bargain," as the contractor did in *Codell.*

The holding in *Codell* does not apply to the facts of this case. The Court of Appeals misapplied its holding while ignoring other more applicable precedent. This warrants reversal. In *Dirt & Rock Rentals, Inc. v. Irwin & Powell Construction, Inc.*, a supplier entered into a machine rental contract with a general contractor, who had been hired by a landowner to construct homes. *Dirt & Rock Rentals, Inc. v. Irwin & Powell Const., Inc.*, 838 S.W.2d 412, 413 (Ky. App. 1992). When the general contractor did not pay the supplier's rental fee, the supplier asserted contract claims against the general contractor and an unjust enrichment claim against the owner. *Id.* After the trial court dismissed the unjust enrichment claim against the owner, the Court of Appeals reversed, finding that a factual question existed as to whether the owner paid the general contractor for the machinery rented from the supplier. *Id.* at 414.

In *Dirt & Rock Rentals, Inc.*, the Court of Appeals acknowledged that a subcontractor could make an unjust enrichment claim against the owner, despite the existence of a subcontract with a general contractor, if the owner had not paid for the benefit conferred by the lower tier contractor. This is **precisely** what occurred in the instant

case. Owner concedes that it has not paid Appellants for their work. Kentucky law does not, and should not, reward project owners for not paying their contractors, subcontractors, and suppliers. The doctrine of unjust enrichment exists precisely to discourage such wrongful conduct. Unjust enrichment is the appropriate remedy under Kentucky law to assure payment and avoid inequity. Because all elements of unjust enrichment were met, this Court should reverse the Court of Appeals and reinstate the unjust enrichment award.

B. Numerous Jurisdictions Permit Unjust Enrichment Where The Owner And Subcontractor Are Not In Contractual Privity.

The Court of Appeals' opinion barring Appellants' unjust enrichment claim is in direct conflict with numerous other jurisdictions that have considered the issue. In a case nearly identical to the one at bar, the Massachusetts Court of Appeals held that an air conditioning subcontractor, Mike Glynn and Company ("Glynn"), which had a contract only with the project's general contractor, Howell Management ("Howell"), could recover from the project owner, Hy-Brasil Restaurants, Inc. ("Hy-Brasil"), on an unjust enrichment theory for extra work performed. *Mike Glynn & Co. v. Hy-Brasil Rests., Inc.*, 914 N.E.2d 103 (Mass. Ct. App. 2009). While Glynn did not have a direct contract with Hy-Brasil, Glynn performed work outside of its subcontract with Howell on the promise from Hy-Brasil that it would pay Glynn for its extra work. *Id.* at 109. Thus, even though it had a contract with Howell, Glynn was permitted to recover from the project owner. *Id.*

Massachusetts' approach is consistent with Kentucky law and numerous other jurisdictions that have considered the issue. *See e.g. Pella Windows & Doors, Inc. v. Faraci,* 580 A.2d 732, 732-33 (1990) (Absent an express contractual relationship, a court may require restitution for unjust enrichment if it is unconscionable to retain benefit); *Redd Iron v. Int'l Sales & Services*, 200 P.3d 1133, 1137 (Colo. Ct. App. 2008) (subcontractor

may recover from owner upon proof of elements of unjust enrichment and a showing of injustice), *Flooring Systems, Inc. v. Radisson Group, Inc.*, 772 P.2d 578, 581 (Ariz. 1989) (subcontract did not preclude subcontractor's unjust enrichment claim against owner); *Haz-Mat Response, Inc. v. Certified Waste Servs. Ltd.*, 910 P.2d 839, 847 (Kan. 1996) (subcontractor could assert unjust enrichment claim against owner upon showing that subcontractor was misled by owner); *Paul Davis Restoration of Lawrence v. Raney Props., L.P.*, 157 P.3d 7 (Kan. App. 2007) (same); *Gleason & Son Signs v. Rattan*, 335 P.3d 1196 (Kan. Ct. App. 2014) (permitting subcontractor's unjust enrichment claim despite possible contract claim); *Nation Contracting, LLC v. St. Dimitrie Romanian Orthodox Church*, 74 A.3d 474, 481 (Conn. Ct. App. 2013) (affirming award in favor of subcontractor an against owner based upon unjust enrichment); *Unerstall Founds., Inc. v. Corley*, 328 S.W.3d 305 (Mo. Ct. App. 2010) (subcontractor's equitable *quantum meruit* claim against homeowner permitted where there was no evidence that owner paid for work). *See also First Presbyterian Church of Ypsilanti v. H.A. Howell Pipe Organs, Inc.*, No. 07-13132, 2010 WL 419972, at *9 (E.D. Mich. Feb. 1, 2010) (Church permitted to assert unjust enrichment claim against successor company despite express contract with predecessor company); *Morris Pumps v. Centerline Piping, Inc.* 729 N.W.2d 898, 903 (Mich. Ct. App. 2006) (lower-tier subcontractor, which had contract with higher-tier subcontractor, could recover from general contractor with whom lower-tier subcontractor had no contract).

Other jurisdictions have held that the existence of a contract between a general contractor and a subcontractor is not a complete bar to unjust enrichment against the owner, but just one factor to be weighed when making an equitable determination. In *South County Post & Beam, Inc. v. Brian T. McMahon*, a subcontractor sued a homeowner for unjust

enrichment after it was not paid for extra-contractual work. *S. Cty. Post & Beam, Inc. v. McMahon*, 116 A.3d 204 (R.I. 2015). The subcontractor did not sue the general contractor, with whom it had a contract. *Id.* at 207. The Rhode Island Supreme Court affirmed the trial court's unjust enrichment award to the subcontractor, finding that neither the contract with the general contractor, nor the fact that the subcontractor had not first attempted to collect from the general contractor, precluded an equitable award from the owner. *Id.* at 212-213. Rather, the existence of a subcontract with the general contractor was simply one of many factors that the trial court weighed in making its equitable award. *Id.*

Here, the Court of Appeals erred in finding that the existence of a contract, even if the contract was not between the subcontractor and the owner, precludes an unjust enrichment award. The correct rule (the one that the courts of Kentucky and those throughout the nation have applied) is that unjust enrichment against the owner is precluded only where there is a direct contractual relationship between the owner and the party asserting unjust enrichment. That is not the case here. The Court of Appeals decision is simply wrong. It deprives Appellants of a remedy for the valuable work they performed, eviscerates the role of equity, and leaves small subcontractors throughout Kentucky without a remedy.

II. Appellants Are Left With No Contractual Remedies.

Precluding Appellants' equitable unjust enrichment claim essentially leaves them with no contractual remedy. On one hand, neither has a direct contract with The Ascent. On the other hand, D&M refuses to seek payment from the Owner and, instead, hides behind the pay-if-paid clause contained in its Subcontract with Superior.

Key to the Court of Appeals' opinion reversing the Trial Court was the claim that, in case of non-payment, each party up the chain of contracts, from Ben Hur at the bottom to The Ascent at the top, had a contractual remedy against the other. Thus, if Ben Hur, at the bottom, was not paid, it could assert a contract claim against its direct contractual privy, Superior. Superior would then seek payment through its contract with D&M, which would seek payment from the Owner. Yet, when presented with applications for payment from Appellants, D&M never paid Appellants (despite assurances to Appellants that it would) and never sought direct payment from the Owner. Instead, it elected to invoke the pay-if-paid provision of its contract with Superior, claiming that since it was not paid by Owner, it did not have to pay Appellants. Because D&M invoked the pay-if-paid provision, under the Court of Appeals' reasoning, Appellants were effectively left without a contractual remedy.

A. D&M Waived The Condition Precedent Contained In The Pay-If-Paid Clause.

Kentucky law does not and should not allow a party to be left without a remedy through no fault of its own. While this Court has not, to date, taken up the legality of pay-if-paid clauses, such clauses are, nevertheless, widely used throughout Kentucky. The presumed validity of pay-if-paid clauses in Kentucky is based upon the 6th Circuit Court of Appeals case *A.L. Pickens, Inc. v. Youngstown Sheet & Tube Co.* In *Pickens*, a salesman was to receive a commission from his employer for each product the salesman sold. *A. L. Pickens Co. v. Youngstown Sheet & Tube Co.*, 650 F.2d 118, 119 (6th Cir. 1981). The contract contained a pay-if-paid clause, which stated that the commission would only be paid to the salesman once the invoices for the products were paid in full. *Id.* The 6th Circuit noted that the clause would be enforceable only if it were sufficiently clear and

unambiguous that payment of the invoices was a condition precedent to payment to salesman. *Id.* 121-122.

Since *Pickens* was decided, Kentucky courts have had few opportunities to examine the applicability of pay-if-paid clauses. However, what is true of all contractual condition precedents in Kentucky is that they are generally disfavored, especially where to enforce them would result in inequitable consequences. *Id.* at 121 citing *Mock v. Trustees of First Baptist Church of Newport*, 67 S.W.2d 9, 11 (Ky. 1934). Here, enforcement of the pay-if-paid provision, which is fashioned as condition precedent, would have the inequitable consequence of denying Appellants payment where all parties agree that payment is rightfully due. By hiding behind the pay-if-paid provision, Owner is making the circular argument that because it did not pay D&M in the first place, it has no responsibility to pay either D&M or Appellant at all.

The inequity does not stop there. By invoking the pay-if-paid provision without first seeking payment from either Corporex or The Ascent, [3] D&M has intentionally defeated the condition precedent to payment. Kentucky law has long held that a party cannot intentionally defeat its own condition precedent to escape making payment:

> **If the fund is to be produced by the efforts of the obligor, or to result from his acts, he is under a duty to exercise reasonable care and diligence to produce the fund or to bring about the result.** *Owens v. Curd*, 192 Ky. 146, 232 S. W. 639; *Fox v. Buckingham*, 228 Ky. 176, 14 S.W.(2d) 421; same case, second appeal 237 Ky. 415, 35 S.W.(2d) 897; *Hibbs-Kiefer Hat Co. v. Schneiderhan*, 236 Ky. 470, 33 S.W.(2d) 304. **And, if it be shown that the party obligated has prevented the creation of the conditions under which the payment would be due, without fault on the part of the other party, he is estopped to avail himself of a situation brought about by his own wrong.** An obligation of mutual good faith and fair dealing is imposed by law because of the contractual relations of the parties.

[3] As explained in Appellants' Merit Brief, Corporex Development & Construction Management, LLC ("Corporex") is a design builder affiliated with The Ascent. Corporex is a party to these proceedings.

Odem Realty Co. v. Dyer, 242 Ky. 58, 45 S.W.2d 838, 840 (Ky. 1932) (emphasis added).

Odem offers two lessons pertinent to the pay-if-paid provision here. First, D&M, as matter of law, may not simply stand by, allow Owner not to pay it, and then assert the pay-if-paid provision as a defense. To do so, would be, in the words of Judge Maze's concurrence, "unconscionable" and contrary to basic contract law in Kentucky. Ct. App. Op. at 51 (J. Maze concurring). D&M had a duty to reasonably seek payment from Owner. It did not. Instead, the only action it took in the proceedings below was to make a claim for indemnity against Corporex and The Ascent. It did so only after Appellants had demanded and been denied payment and filed a lawsuit. D&M failed to abide by its duty of good faith and fair dealing when it intentionally let the condition precedent lapse.

Second, *Odem* teaches that because D&M intentionally allowed the condition precedent to lapse, it is "estopped from availing itself of the situation brought about by its own wrong." *Id.* By intentionally allowing the condition to fail, **D&M has waived its defense under the pay-if-paid provision.** In the years since the *Odem* decision, Kentucky courts have routinely held that parties cannot benefit from the failure of conditions brought about by that party's own fault. *Carroll Fiscal Ct. v. McClorey*, 455 S.W.2d 547, 549 (Ky. 1970) ("We do not believe the fiscal court could thus avoid its potential obligation by its own default."); *Anderson v. Rudder*, No. 2007-CA-000303-MR, 2008 WL 540859, at *2 (Ky. Ct. App. Feb. 29, 2008) (Agreeing that a party can "most assuredly" not take advantage of the failure of a condition brought about by that party's own actions); *James T. Scatuorchio Racing Stable, LLC v. Walmac Stud Mgmt., LLC*, No. CIV.A. 5:11-374-DCR, 2014 WL 2113096, at *8 (E.D. Ky. May 20, 2014) (noting rule that party cannot bring about the failure of its own condition precedent).

Indeed, "[a]lmost two hundred years of Kentucky case law provides that if the failure of a condition 'is caused by the party against whom the condition operates to impose a duty,' the nonoccurrence or nonperformance of that condition is excused." *Crestwood Farm Bloodstock, LLC v. Everest Stables, Inc.*, 864 F. Supp. 2d 629, 636 (E.D. Ky. 2012) quoting *Estate of Riddle ex rel. Riddle v. S. Farm Bureau Life Ins. Co.*, 421 F.3d 400, 406–07 (6th Cir.2005) (interpreting Kentucky law). Under Kentucky law, D&M cannot stand idly by and allow Appellants to go unpaid. If it wishes to avail itself of the condition precedent in the pay-if-paid clause, then it must use reasonable efforts to ensure that the payment condition is fulfilled. Because it failed to use such good faith in its dealings with Appellants, D&M has waived the protection of the pay-if-paid clause. Because the Court of Appeals misinterpreted this vital tenet of Kentucky law, its opinion must be reversed.

B. Pay-If-Paid Clauses Do Not Apply Where Extra Work Is Performed.

It is undisputed that, at the request of Owner and D&M, Appellants performed work outside the scope of their original subcontracts. Because this work was performed outside the scope of the original subcontracts, it was not subject to the pay-if-paid clause in the written Subcontract between Appellant Superior and D&M. The Michigan Court of Appeals' recent decision in *Macomb Mechanical, Inc. v. LaSalle Group, Inc.* illustrates this point. In *Macomb*, a subcontractor performing plumbing and mechanical work on a dining hall at a military base encountered unforeseen site conditions that required its work to be extended from six to fifteen months. *Macomb Mech., Inc. v. LaSalle Grp., Inc.*, No. 319357, 2015 WL 1880189, at *1 (Mich. Ct. App. Apr. 23, 2015). While extra work was performed, no written change orders were issued. *Id.* at *9. When the subcontractor requested additional payment of $172,049.00 over and above the original $270,000.00

contract, the general contractor refused to pay, citing, among other contract provisions in the subcontract, the pay-if-paid clause. *Id.* The Michigan Court of Appeals reversed the trial court's grant of summary judgment, finding there were genuine issues of material fact as to whether the work the subcontractor performed exceeded the scope of the original contract. *Id.* at 9. Importantly, the Court of Appeals took time to discuss the implications of extra work where there is a pay-if-paid clause in the written subcontract:

> **Because no change order was issued with respect to the additional work and costs allegedly necessitated by the drawing discrepancies, the additional work and costs may reasonably be found to fall outside the scope of the sub-subcontract and therefore not be subject to the sub-subcontract's pay-if-paid clause.** LaSalle would then be required to pay Macomb within a reasonable time. *Smith*, 163 Mich.App. at 184, 414 N.W.2d 374. Accordingly, the circuit court erred in dismissing Macomb's claim for $172,049 in additional work.

Id. at *9 (emphasis added).

This case is the same. No written change orders were issued with respect to additional work. In fact, Appellants were encouraged by D&M and Owner to complete the extra work without submitting change orders. As in *Macomb*, the work here fell outside the confines of the written contract, and therefore, outside of the purview of the pay-if-paid clause. A contractual provision cannot and should not apply to extra-contractual work. Accordingly, the Court of Appeals' decision should be reversed.

C. Pay-If-Paid Clauses Are Void Under The Kentucky Fairness In Construction Act.

Pay-if-paid clauses have the effect of stripping a subcontractor of its mechanic's lien rights and are, therefore, void under KRS 376.405(2)(b), Kentucky's Fairness in Construction Act ("KFCA").[4] Pursuant to Kentucky's Mechanic's Lien Statute, "any

[4] Although the contracts here predate the effective date of the KFCA, the KFCA itself is a manifestation of Kentucky's longstanding public policy of assuring lien rights for those who furnish labor and materials on

person who performs labor or furnishes materials for the erection, altering, or repairing of a house or other structure ... shall have a lien thereon..." KRS 376.010(1). The purpose of KRS 37.010(1) is to ensure suppliers and laborers "financial security in collecting their contract price by allowing the real property to be encumbered for the amount of the debt." *Bee Spring Lumber Co. v. Pucossi,* 943 S.W.2d 622, 623 (Ky. 1997). Accordingly, "it has been the policy of Kentucky law to construe mechanic's liens liberally to protect those who furnish labor and materials." *Id.* at 624. Because of this strong public policy in preserving the rights of laborers and materialmen, KRS 371.405(2)(b) voids, with limited exception, any contract provision which "purports to waive, release, or extinguish rights provided by KRS Chapter 376." KRS 371.405(2)(b).

Applied here, enforcement of the pay-if-paid clause of the Subcontract has the practical effect of eviscerating Appellants' lien rights. Appellants' mechanic's liens, which have been bonded off, are now left solely dependent on the outcome of this appeal. If the pay-if-paid clause is held applicable, and the Appellees are found not liable as a result, the effect is to strip Appellants of their lien rights. Such a result is wholly incongruous with Kentucky's strong public policy toward protecting the lien rights of suppliers and laborers. *Middletown Eng'g Co. v. Main St. Realty, Inc.*, 839 S.W.2d 274, 275 (Ky. 1992).

Both New York and California have voided pay-if-pay clauses on the basis that they substantially restrict mechanic's lien rights. The New York Court of Appeals held that, "a pay-if-paid provision which forces a subcontractor to assume the risk that the owner will fail to pay the general contractor is void and unenforceable as contrary to public policy set forth in [New York's mechanic's lien statutes]." *West-Fair Elec. Contractors v. Aetna*

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construction projects. Therefore, ASA submits that the KFCA is relevant and helpful to this Court's determination of the issues presented in this case.

Cas. & Sur. Co., 661 N.E.2d 967, 971 (N.Y. 1995). Similarly, California's Supreme Court has held that pay-if-paid clauses are inconsistent with California's mechanic's lien statutes because they render any reservation of mechanic's lien rights illusory where contractual liability cannot be proven solely because of the defense afforded by a pay-if-paid clause. *Wm. R. Clarke Corp. v. Safeco Ins. Co. of Am.*, 938 P.2d 372, 378 (Cal. 1997). Because the policy of the New York, California, and Kentucky mechanic's lien statutes, and the KFCA, are perfectly aligned, this Court should reverse the Court of Appeals and find that the pay-if-paid clause, as applied here, is void as a matter of law and public policy.

CONCLUSION

This case represents a gross misapplication of Kentucky law. The equitable doctrine of unjust enrichment against an owner applies to subcontractors who do not have contracts with the owner, even where a contract exists **between the subcontractor and the general contractor.** Further, the pay-if-paid clause cannot preclude Appellants' recovery since it is either void or has been waived. For these reasons, ASA respectfully urges this Court to reverse the ruling below and reinstate the trial court's judgment.

Respectfully submitted,

Thomas R. Yocum (79431)
R. David Weber (96002)
BENJAMIN, YOCUM & HEATHER, LLC
The American Book Building
300 Pike Street, Suite 500
Cincinnati, Ohio 45202
Telephone: (513) 721-5672
Counsel for Amicus Curiae, *The American Subcontractors Association*