No. 2-16-0009

In the
Appellate Court of Illinois
Second Judicial District

AUI CONSTRUCTION GROUP, LLC,

Plaintiff-Appellant,

v.

LOUIS J. VAESSEN, et al.

Defendants-Appellees.

Appeal from the Circuit Court of the Fifteenth Judicial Circuit
Lee County, Illinois, Case No. 14 CH 38.
The Honorable **Daniel A. Fish**, Judge Presiding.

BRIEF OF AMICUS CURIAE THE AMERICAN SUBCONTRACTORS ASSOCIATION, INC.

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POINTS AND AUTHORITIES

OTHER:

TO THE HONORABLE SECOND APPELLATE DISTRICT COURT:

Amicus Curiae, The American Subcontractors Association, Inc. ("ASA") offers this brief in support of AUI Construction Group, LLC's Appeal of the ruling of the Circuit Court of the Fifteenth Judicial Circuit, Lee County, Illinois (the "Appeal").

INTEREST OF *AMICUS CURIAE* PURSUANT TO ILLINOIS SUPREME COURT RULE 345

ASA is a national organization representing the interests of 2,148 subcontractor member businesses in the United States, including 267 members located in Illinois and neighboring states. ASA members include the whole spectrum of businesses including large, midsize and small closely held corporations as well as sole proprietorships. These members provide labor and materials on construction projects throughout the United States of America. Subcontractors commonly perform approximately 80-90% of the work on commercial construction projects like the project at issue in this case. Jimmie Hinze & Andrew Tracey, *The Contractor-Subcontractor Relationship: The Subcontractor's View*, Vol. 120 J. Const. Eng'g & Mgmt. 274 (Issue 2 1994); Keisha Rutledge, *Subcontractors Building Recognition on the Job,* Tampa Bay Bus. J. (Mar. 12, 2001).[1] This has been the case for quite some time. Note, Mechanics' Liens and Surety Bonds in the Building Trades, 68 Yale L.J. 138 (1958).

ASA's primary focus is the equitable treatment of subcontractors in the construction industry. ASA acts in the interest of all subcontractors by promoting legislative action and by appearing as *amicus curiae* in significant legal actions that affect the construction industry at large, such as the circuit court's decision in this case.

[1] *Available at* www.bizjournals.com/tampabay/stories/2001/03/12/focus6.html.

The lower court's ruling will have devastating effects upon small to mid-sized businesses and it denies a remedy to small and mid-sized businesses who provide credit (in their labor and materials) to projects of great private and public importance but who can suffer severe harm from developments (an insolvency of their contracting partner or owner/disputes between the owner and prime contractor/loss of project funding from a bank) that they could not control. There needs to be a "safety valve" for courts to use to give contractors security in payment for their labor and materials.

And there is. The Illinois Mechanic's Lien Act, at 770 ILCS 60/0.01 *et seq.* (the "Mechanic's Lien Act" or "Act") is a legislatively created safety valve that provides broad payment security to contractors of all tiers to secure their right to payment for labor and materials provided in furtherance of a construction improvement.

ASA has extensive knowledge and experience with the interpretation and enforcement of mechanic's lien laws throughout the United States. The opinion of the circuit court in this matter in denying mechanic's lien rights to the Appellant is not consistent with the intent of the Illinois legislature as revealed in the plain language of the mechanic's lien law. ASA is deeply concerned that allowing the circuit court decision to stand will have severe implications to payment protection in the construction industry and is contrary to the intent of the Illinois Legislature in enacting the Mechanic's Lien law to provide security for payment to all who improve real property in this State. This Court should correct the circuit court's reasoning, which deprives the Appellant (and thousands of similarly situated contractors and suppliers) of mechanic's lien rights under the plain meaning and intent of the Mechanic's Lien Act.

This case represents not just a fight for payment by AUI, but a fight for the public good and the financial survival of numerous Illinois small businesses and construction companies. It also involves the landmark issue of whether subcontractors and suppliers still maintain lien rights for construction work on commercial construction projects that improve property where the improvement is on property that is subject to an easement and title retention agreement. This Court's decision in the matter will either: (a) further the letter and spirit of the Mechanic's Lien Act, to the benefit of subcontractors, suppliers, and the public at large; or (b) unduly erode those rights, driving prices up, lowering competition for construction projects on easements, and financially stressing – if not bankrupting – future subcontractors.

ISSUES PRESENTED FOR REVIEW

Whether a subcontractor maintains lien rights, under the Illinois Mechanic's Lien Act, for furnishing material, labor or work to an improvement to a Project where there is evidence: (a) the lien claimant was a subcontractor; (b) providing materials or performing labor or work; (c) to another contractor performing or carrying forward an improvement; and (d) the improvement was to property that was subject to a 50 year easement.

The answer is yes. The circuit court erred as a matter of Illinois law, and undermined the strong public policy behind the Mechanic's Lien Act, when it summarily dismissed the mechanic's lien claim of the subcontractor.

STATEMENT OF FACTS

AUI Construction Group ("Appellant" or "AUI") , the appellant in this case, was hired in 2011 by a now financially insolvent design-builder (Postensa Wind Structures U.S., LLC ("Postensa")) to construct and erect a 507 foot tall cast-in-place post-tensioned

concrete tower and foundation as part of a larger (multi-million dollar) wind energy conversion system project (the "Project"). GSG 7, LLC (the "Developer") was hired to build the Project on land (the "Property") owned by the estate of Louis and Carol Vaessen (the "Owner") in Sublette, Illinois. (C3-5) In 2007, the Owner and Developer entered into a 50-year Easement Agreement, which authorized the Developer to build and operate wind energy systems on the Property in exchange for certain benefits, including payments from the revenue generated by the Project. (C615-617, Windpark Easement Agreement, ¶¶ 1, 3.1, 3.3., 4.1, 4.2).

The Easement Agreement was not recorded until December 22, 2011. (C627-628) Before the Easement was recorded in the Lee County, Illinois Recorder's Office, a number of things happened: (1) the Developer contracted with Clipper Wind Power to design and build the Project; (2) Clipper contracted with Postensa for the design and build work for the Project; and (3) Postensa subcontracted with AUI to perform the construction portion of the Project work, including building the energy system's massive foundation and 507 foot tall tower, and AUI actually started its work on site (C3-5).

Appellant's scope of work included not just building the massive exterior, but an interior with exterior doors, multiple electrical cabinets, electrical outlets, a lighting system, a power supply system, an elevator, eleven work platforms, a hoist and ladders that extend from the base to the top of the Structure's tower. (C616, Windpark Easement Agreement, ¶ 3.1; C84, scope of Work for AUI). The Structure was connected to the utility power grid and a nearby transformer through a series of conduits. (C475, Affidavit of Mario Carbone, ¶ 13).

After completing its Subcontract Work, AUI was owed over $2 million (C122-133). To protect its ability to collect its unpaid billings for the improvements to the land, AUI exercised its right under Illinois law to perfect and enforce a mechanic's lien against the improved property. *Id.* At an arbitration over its claims, AUI received a substantial award for its unpaid bills. (C92-96, the Arbitrator's Final Award). When its contracting partner (Postensa) then filed for bankruptcy, AUI moved to foreclose its mechanic's lien and perfect the security interest it had in the improved property(C7-8; C627-628, Recording of the Easement Agreement).

The Developer and Owner, however, moved to dismiss the lien claims.(C252-260). Without conducting a trial or evidentiary hearing, the circuit court held as a matter of law that the Project was *not* an improvement to real property under the Mechanic's Lien Act and was simply a non-lienable trade fixture. (C546-548, the Circuit Court's Decision & Order dated April 15, 2015).

LAW AND ARGUMENT

I. STANDARD OF REVIEW

The circuit court's decision here is reviewed *de novo* both because courts review a grant of summary judgment *de novo*, and because the dispute turns on the construction of provisions of the Mechanic's Lien Act, and issues of statutory construction present questions of law subject to *de novo* review. *See Pielet v. Pielet,* 2012 IL 112064, ¶ 30. When construing a statute, the court's primary objective is to "give effect to the legislative intent." *People v. Perry*, 224 Ill. 2d 312, 323 (2007). The best indicator of the legislature's intent is the statutory language. *Wilkins v. Williams*, 2013 IL 114310, ¶ 14. Legislative intent may also be determined by considering the reason and necessity for the

law, the evils to be remedied, and the objects and purposes to be obtained. *Carter v. SSC Odin Operating Co*., 2012 IL 113204, ¶ 37.

II. THE CIRCUIT COURT ERRED IN CONCLUDING THAT AUI'S MECHANIC'S LIEN WAS INVALID AND IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANTS.

In Illinois, a mechanic's lien is a legally created right under Chapter 770 ILCS 60/1 *et seq*. (the "Mechanic's Lien Act" or "Act"). The Mechanic's Lien Act is a strong expression of long held Illinois public policy to "protect those who in good faith furnish material or labor for construction of buildings or public improvements". *Lawn Manor Sav. & Loan Assn. v. Hukvari*, 78 Ill. App. 3d 531, 532 (2d Dist. 1979).

Unless corrected on appeal, the impact of the reasoning of the circuit court will reverberate throughout Illinois, to the detriment of the public and the construction industry.

A. The circuit court's ruling is contrary to the public policy and purposes underlying the Mechanic's Lien Act.

Mechanic's lien laws in the United States and Illinois have a long and impressive pedigree. In 1791, at the urging of Thomas Jefferson and James Madison, the Maryland General Assembly enacted the nation's first mechanic's lien law to encourage construction in the new capital city of Washington, D.C. *See Barry Properties v. Fick Bros. Roofing Co.*, 277 Md. 15, 353 A.2d 222, 224 (1976)(citations omitted).

In 1825, Illinois followed suit, enacting its first mechanic's lien statute, creating a contractor's lien for improvements to private property. 1825 Ill. Laws 101. In 1863, the Illinois Legislature expanded the lien law to provide a remedy for subcontractors. *See* 1863 Ill. Laws 57. Though Illinois' lien statutes have been amended numerous times since then (including expansion of the lien right to a lien on funds for labor or materials

to public improvements) the underlying idea from the founding fathers time to present has been to encourage construction and ensure that subcontractors and suppliers would be paid for the value they add to real estate improvements.

Similar to how a mortgage secures the right of a lender for the purchase of property, a mechanics lien—by statute—gives those who improve property security for payment for their work by creating what has been called "an extraordinary right to claim a security interest in another's property and to assert a claim against the owner of that property when such parties may not otherwise have a legal basis to do so." *See* Rowe, Heidi Hennin, and Steven D. Wheelhouse, *An Overview of Illinois Mechanic's Lien Law*, Business Credit, p. 50 (Feb. 2006).

It does this by allowing those who improved property to have "a lien upon premises where a benefit has been received by the owner and where the value or condition of the property has been increased or improved by reason of the furnishing of labor and materials." *First Federal Savings & Loan Ass'n v. Connelly*, 97 Ill. 2d 242, 246 (1983), quoting *Colp v. First Baptist Church*, 341 Ill. 73, 76-77 (1930).

Because the mechanic's lien remedy was not recognized at common law, but exists "only by virtue of statutes creating them and providing a method for their enforcement, such statutes must be strictly construed with reference to those requirements upon which the right depends." *Schmidt v. Anderson*, 253 Ill. 29, 33 (1911). However, once the claimant has complied with the statutory prerequisites to preserve and enforce its lien, the Mechanic's Liens Act "shall be liberally construed as a remedial act." 770 ILCS 60/39.

Indeed, the plain language of the Act evidences the far reaching remedy the Legislature intended. The Act provides that:

> (a) **Any person** who shall by any contract … express or implied … with the owner of a lot or tract of land, **or with one whom the owner has authorized or knowingly permitted to contract, to improve the lot or tract of land** or for the purpose of improving the tract of land, **or to manage a structure under construction thereon**, is known under this Act as a contractor and **has a lien upon the whole of such lot or tract of land** … **for the amount due to him or her** for the material, fixtures, apparatus, machinery, services or labor, **and interest at the rate of 10% per annum from the date the same is due**. This lien extends to an estate in fee, for life, for years, or any other estate or any right of redemption or other interest that the owner may have in the lot or tract of land at the time of making such contract or may subsequently acquire and this lien attaches as of the date of the contract.

See 770 ILCS 60/1 (emphasis added).

Contractor's liens rights in Illinois are particularly broad. While many states require prospective lien claimants to take some affirmative action to create and preserve their mechanic's lien rights, in Illinois the **simple existence of a construction contract** (express *or* implied) creates an inchoate mechanic's lien on the property. The lien thus exists as a matter of law, and a claimant need only follow the steps necessary to perfect its lien.

Monies a contractor is owed for "material, fixtures … machinery, services or labor" provided to improve a tract of land or manage the construction thereon are plainly lienable. And there is no limitation on the right to file a lien based on whether the improved property is subject to an easement.

B. Mechanic's lien rights are vital to the industry.

As noted by the appellate court in *Sanaghan v. Lawndale Nat'l Bank*, 90 Ill. App. 2d 254 (1st Dist. 1967) "[i]t is common knowledge that the construction industry operates

on credit, and this was understood by those who prepared and enacted the Mechanic's Lien Act." *Id*. at 262. Mechanic's lien rights serve a vitally important role in the industry. They both provide important protection and security for contractors, further competition, and keep construction costs down. They do this in a number of ways.

First, the legislature has created a potent weapon for construction contractors to secure their right to payment because the Act allows contractors to look beyond their immediate contract to be paid for the fruits of their labor. In construction, this is vitally important given the complexity of most construction projects and the many tiers of contractors, specialty trades, and suppliers who are needed to efficiently and cost-effectively build projects.

Mechanic's lien rights are the backbone of the construction industry in Illinois and beyond. This is because most all construction is funded by pay applications that are submitted and processed as the work progresses. On most jobs, payment delays of 30-45 days or more are common, and if the state does not prohibit general contractors from using "pay if paid" payment clauses (tying the subcontractor's right to payment to payment from the owner) payments can be held up potentially indefinitely. Projects where the Owner or General Contractor is holding retainage on its contractors further eat into the subcontractor's ability to collect its money.

But while waiting for payment, construction contractors must still pay their bills in a timely manner. Employees must be paid every week or biweekly. Rent or mortgage bills are due every month. Taxes, electricity, phone, gas and equipment lease or invoices also continue to need to be paid. What this means is that construction projects are financed by the subcontractors performing the work. And the chance of payment delays

or non-payment increases with each contracting tier in the process because the lower tiers are reliant on the timely flow of money from above, as well as the solvency of the parties in the privity chain above them.

i) Mechanic's lien rights are important to the economy and public as a whole.

If mechanic's lien rights did not exist, or did not exist on certain projects, the economy would suffer. Competition would be reduced because many subcontractors would choose not to bid on jobs where they had concerns over the solvency of an owner or party in the privity of contract chain above them. Other subcontractors may still bid the work, but would increase their bid by a risk contingency commensurate with the risk they felt they were assuming on the job. Less sophisticated subcontractors, or those in desparate need of work, may bid regardless. But the net effect of this is a smaller pool of bidders, higher bid prices, and reduced competition.

As this happens, not only would overall construction prices climb, but the quality of the work will suffer as the more experienced or sophisticated trades either decline to bid or price themselves out of the work with bids that include a risk contingency. The less sophisticated trades, or those in more dire need of jobs to stay in business, may well still bid as a sheer matter of financial survival. But … given the realities of the economic market, those contractors are now are far more likely to bear the brunt of financial losses if payment is delayed (or never comes), the mechanic's lien remedy does not exist, and they are left with contract and common law remedies the Legislature already found inadequate when it enacted the Lien Act. As recognized long ago by the Illinois Legislature, the right of a broad mechanic's lien is necessary for the good of both the general public, the economy, and the construction contractors who build Illinois.

In holding that AUI's work did not give rise to mechanic's lien rights, the circuit court erroneously neglected to liberally construe the Act to effectuate its remedial purposes. Instead, the circuit court primarily based its decision on two facts: (1) the Easement agreement allowed the Developer to (a) retain title to the Structure and remove it before the 50-year easement period expired, and (b) to remove a portion of the Structure at the end of the 50-year period; and (2) the Easement Agreement was recorded before AUI recorded its mechanic's lien. (C546-548, the Circuit Court's Decision & Order dated April 15, 2015)

Both of the circuit court's reasons are misplaced and do great damage to the intent of the Lien Act.

C. Mechanic's liens are given for improvements to real property, and do not depend on the outcome of a title search.

Under Illinois law, the central inquiry into whether an improvement gives rise to mechanic's lien rights is whether the claimant's labor and materials improved or benefited the property. *See, e.g., Weather-Tite, Inc. v. Univ. of St. Francis*, 233 Ill. 2d 385, 391 (2009)(the purpose of the Act is to "protect contractors and subcontractors providing labor and materials for **the benefit of** an owner's property.")(emphasis added). It is well established that performance of work or the furnishing of materials that constitute an improvement on the land is the touchstone for creating mechanic's lien rights, and "the focus of inquiry remains whether the work performed has enhanced the value of the land to be charged with the lien." *S.M. Foley Co. v. North West Federal Savings & Loan Ass'n.,* 122 Ill. App. 3d 411, 416 (1st Dist. 1984).

Here, the circuit court erred in essentially creating a bright line rule that recording of the Easement Agreement in the land recorder's office (an action that occurred *after*

AUI agreed to build the structure and commenced its work on the Project), somehow provided the subcontractors on the Project with notice that their efforts fell outside the extremely broad range of projects to which the Act provides a mechanic's lien remedy.

First, the circuit court's opinion in this regard is not supported by the text of the Act, which makes no exception for improvements on property that is the subject of a recorded easement. Equally flawed is the circuit court's conclusion that AUI's work did not give rise to mechanic's lien rights because the title retention agreement provided that portions of the Structure could be "removed."

The facts in the record demonstrate that regardless of what the Owner and Contractor's Easement or title retention agreement may have said about removability, the court's focus on that language was misplaced because virtually all construction on any job can be removed, it is only a question at what cost. As an Ohio appellate court noted, in rejecting a defendant's similar argument (that construction improvements to a commercial factory did not give rise to mechanic's lien rights), the theoretical ability to detach or remove construction work from property "is probably true of any structure, temporary or permanent, given enough time and money." *Mid-Ohio Mech., Inc. v. Carden Metal Fabricators, Inc*., 169 Ohio App. 3d 225, 230, 862 N.E.2d 543, 547 (Ohio Ct. App., Guernsey County 2006).

Here, in concentrating its analysis on words in the title retention agreement and the theoretical "removability" of the massive Structure, the circuit court mistakenly ignored the text of the Mechanic's Lien Act and its duty to focus on whether the labor and materials **benefitted** the property as the central analysis to determine whether the work gave rise to mechanic's lien rights. Had it done so, there can be little doubt the

subcontractors' work benefitted the Property. AUI's labor and materials were an essential part of building a valuable, unique and massive commercial structure to facilitate the wind energy plant that would serve the public and financially benefit the Owner.

In short, the circuit court erred by focusing myopically on the language in the Easement Agreement (and the conclusion that a title search is necessary) to determine whether the Project was for a construction improvement. To reach its decision—a decision at odds with the expectations of the subcontractor—it had to overlook the considerable facts that supported a finding consistent with the remedial purpose of the Act. The following facts, all of which historically have been part of the analysis under Illinois law whether an improvement benefitted the Property, include but are not limited to:

(a) the considerable nature of the Structure's attachment to the property,

(b) the Structure's inability to be removed without substantial damage and expense,

(c) the impracticality if not impossibility of removing the entire Structure (including foundation);

(d) the long term (50 years) of the Easement Agreement;

(e) the financial benefits to the Owner from the Project; and

(f) the taxability of the Structure as real property under Illinois law.

(C461)

All the above factors have historically been used by Courts to determine whether mechanic's lien rights exist.

Photos in the record graphically illustrate the unique and massive construction improvement built at great expense by AUI's construction workers. (C475, Affidavit of Mario Carbone, ¶¶ 12; 14; C482-489).[2] The energy system was a 507-foot tall cast-in-place post-tensioned concrete tower. (C475, Affidavit of Mario Carbone, ¶ 11) AUI performed all the construction required of it to lay the 4,000+ square foot foundation (extending approximately 12 feet below grade) for the system, and erect the 507 foot tall concrete tower to support the wind turbine. (C475, Affidavit of Mario Carbone, ¶¶ 11-14; C482-489).

Even if portions of the Structure built by AUI could be removed, this does not alter the conclusion that its work was an "improvement" for purposes of the Mechanic's Lien Act. Indeed, the Illinois Supreme Court "has allowed lien claims for work that neither became a constituent part of the improvement nor was directly consumed in the process of construction." *Luise, Inc. v. Vill. of Skokie*, 335 Ill. App. 3d 672, 683-684 (1st Dist. 2002) (citing *Alexander Lumber Co. v. City of Farmer City,* 272 Ill. 264 (1916). Even providing rental equipment for use in construction site has been held to be covered by the mechanics lien statute. *Aluma Systems, Inc. v. Frederick Quinn Corp*., 206 Ill. App. 3d 828, 853 (1st Dist. 1990)("[W]e find no reason to believe that [the contractor's] claim should be excluded because its equipment was rented, rather than supplied to and consumed in the building project. There is authority for the conclusion that that, either by virtue of having provided rental equipment for use in the construction process (see *New*

[2] If "a picture is truly worth a thousand words," then ASA suggests the Court simply view certain photos in the record, which conclusively demonstrate the massive and permanent nature of the Structure and improvements, and the considerable labor and materials (still unpaid) invested by AUI in performing its subcontract Work. *See* C475, C482-489.

Erie Coal Co. v. H. McMullen & Sons (1928), 247 Ill. App. 515), or by virtue of having provided equipment used in the process of concrete form work (see *D.D. Kennedy, Inc. v. Lake Petersburg Association* (1964), 54 Ill. App. 2d 85, 107-08, 203 N.E.2d 145, 152-53), [the subcontractor's] claim for the rental value of its equipment is within the ambit of the Mechanics' Liens Act.").

The circuit court's holding creates an unwarranted restriction on mechanic's lien rights that the Legislature did not create. There is nothing in the text of the Act that states that labor or materials provided to an improvement are not lienable if they are removable. As such, the decision was in error and should be reversed.

D. The circuit court decision erodes mechanic's liens protections for contractors, which are essential to protect them and encourage economic development.

i) The effect of this case on the small businesses in the construction industry.

The circuit court's ruling unduly erodes mechanic's lien rights to the detriment of the greater public. Small construction businesses, in particular, will pay the heaviest price. Most of those small businesses will be subcontractors. Make no mistake, if the circuit court's ruling goes undisturbed the reasoning and rationale of that case will reverberate across Illinois, to the detriment of this State's economy.

The construction industry forms a significant part of Illinois' economy. In 2014, commercial construction starts in Illinois totaled $25 billion dollars and employed 6.4 million workers. *See* Ken Simonson, *Associated General Contractors of America* "*The Economic Impact in Construction in the United States and Illinois*," by Ken Simonson, available at http://files.agc.org/files/economic_state_facts/ILstim.pdf (September 22, 2015).

On the vast majority of this economic activity in Illinois (except only those on federal construction, where Miller Act payment bonds typically act as a substitute for the security of a mechanic's lien) the contractors and subcontractors performing the construction work have mechanic's lien rights. This is why the circuit court's ruling has the attention of construction industry in Illinois and elsewhere.

Subcontractors typically have the most capital at risk in construction.. Subcontractors perform the 80-90% of the work on commercial construction projects. Hinze & Tracey, *The Contractor-Subcontractor Relationship, supra;* Rutledge, *Subcontractors Building Recognition on the Job, supra*. Subcontractors furnish the majority of the materials, provide most of the skilled trade workers and payroll, and bear the primary responsibility of meeting scheduled completion deadlines on a project. Rutledge, *supra*.

It follows that subcontractors are most vulnerable to financial losses caused by the restriction, erosion, or extinction of mechanic's lien rights Without mechanic's lien rights, if funds for the Project dry up or do not reach the subcontractors for any reason (e.g., the owner or prime contractor becomes financially insolvent or bankrupt; the construction lender pulls project funding; the owner and prime contractor or others in the privity chain become embroiled in a dispute), subcontractors will bear the brunt of these developments. Unanticipated losses can be substantial, and threaten the survival of small to mid-sized subcontractors.

In the industry, there undoubtedly are large construction companies, including subcontractors. But they are not the norm. In Illinois, there were approximately "28,100 construction firms in 2014, of which 94% were small [businesses] (<20 employees)."

Simonson, *The Economic Impact in Construction in the United States and Illinois*, *supra.* Illinois is no different in this respect than the rest of the nation, where small family-owned or closely held, companies comprise the overwhelming majority (92% of 658,500 construction firms) of the subcontracting industry. *Id*.

These small businesses are the companies that will disproportionately absorb the impact if the mechanic's lien rights the Legislature created for them are taken away by an unduly restrictive judicial interpretation of an Act. Small business subcontractors–who are the backbone of the Illinois economy—will end up paying the price for circumstances that are not their fault. There is no compelling justification to leave these contractors without the vital protections of the Mechanic's Lien Act—protections they have come to expect are in place, and protections intended by the Illinois legislature.

(a) The circuit court's ruling paves a way for owners and developers to "contract around" mechanics lien rights.

Finally, the circuit court decision erodes lien rights by creating an incentive for private parties to "contract around" mechanic's lien laws by using easements. As agreements around and regarding construction projects have grown increasingly complex, the use of easements, leaseholds, and other contractual agreements to govern the agreements of the owners and its prime contractor has grown. Though most specialty trade contractors working in the industry are undoubtedly proficient at their trades, they are not lawyers and lack the resources that large companies may have to retain an army of lawyers at their disposal to perform title searches and run down, and review and analyze these complicated agreements. And they should not have to.

The terms of the Mechanic's Lien Act have been, and should continue to be, the touchstone for whether a contractor's labor or materials have satisfied the Act's

requirement to create mechanic's lien rights. To allow the circuit court's reasoning to remain would not only undermine this but create an incentive at odds with the Act and the strong public policy behind it. The circuit court decision should be reversed.

CONCLUSION

The short-term future of Illinois' construction industry and the rights of numerous small and other businesses in the industry hang in the balance in this case. The circuit court's holding that the improvements AUI performed (in building and installing the foundation, structure, and related Project work) did not benefit or improve the property for purposes of the Mechanic's Lien Act was in error. The circuit court decision grossly distorts long standing law, undermines the plan text of the Act, and will destabilize the construction industry and public interests the Illinois legislature has recognized for almost 200 years since enacting this state's first mechanic's lien statute.

For all the reasons set forth herein, , the circuit court improperly granted summary judgment against AUI and its Judgment to that effect must be reversed. This Court should prevent the circuit court's ruling from being used as authority in a way that would leave many small businesses without a remedy that the Illinois legislature enacted for their security and the interests of the Illinois public. Reversing the circuit court's decision and reaffirming the Mechanic's Lien Act applies to situations like the dispute at bar accomplishes this purpose. As such, ASA respectfully asks that this Court reverse the decision of the circuit court.

Respectfully Submitted,

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SUPREME COURT RULE
341(c) CERTIFICATE OF COMPLIANCE

Pursuant to Supreme Court Rule 341(c), I certify that this Amicus Brief conforms to the requirements of Supreme Court Rules 341(a) and (b). The length of this Amicus Brief is 18 pages.

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