STATE OF MICHIGAN

COURT OF APPEALS

WYANDOTTE ELECTRIC SUPPLY,

Plaintiff-Appellee,

v

ELECTRICAL TECHNOLOGY SYSTEMS, INC.,

Defendant/Cross-Defendant,

and

KEO & ASSOCIATES, INC.,

Defendant/Cross-Plaintiff-Appellant,

and

WESTFIELD INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
July 15, 2014

No. 313736
Wayne Circuit Court
LC No. 11-003015-CK

Before: BECKERING, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

An unpaid subcontractor on a public works project can obtain compensation from a bond posted pursuant to the public works bond act (PWBA), MCL 129.201 *et seq.* A subcontractor hired by the general contractor may proceed directly against the posted bond. A sub-subcontractor, however, must supply certain formal notices to the contractor before it may become eligible to recover on the bond.

The central issue in this case is the propriety of the 30-day notice of claim provided by sub-subcontractor, plaintiff Wyandotte Electric Supply, to general contractor, defendant KEO & Associates, regarding compensation owed by subcontractor, Electrical Technology Systems. Defendants challenge the circuit court's rulings that proper 30-day notice was provided, and that defendants waived their challenge to the 90-day notice by failing to raise the issue in response to Wyandotte's motion for summary disposition. Defendants also raise meritless objections to the amount of the indebtedness found by the trial court. We affirm.

I. BACKGROUND

The Detroit Public Library undertook a renovation project on the south wing of its main branch. The library engaged KEO & Associates, Inc. (KEO) as the general contractor on the job. KEO hired Electrical Technology Systems (ETS) as its electrical subcontractor. ETS entered into a sub-subcontract with Wyandotte Electric Supply (Wyandotte) for the supplies necessary for the job.

ETS and Wyandotte had a longstanding business relationship, beginning with the creation of an open account agreement in 2003. Under that agreement, ETS promised to pay Wyandotte for materials within 30 days of delivery. All late-paid invoices were subject to a 1.5% time-price differential and ETS agreed to pay one-third of any attorney fees Wyandotte accrued in collection efforts.

In August 2009, Wyandotte supplied a quote to ETS for the materials necessary to complete the library subcontract. This quotation expressly incorporated a 1.5% time-price differential. On March 3, 2010, Wyandotte supplied the first of the requested materials to the job site. Wyandotte immediately contacted KEO and Westfield (collectively defendants) by fax, requesting a copy of the payment bond obtained pursuant to the PWBA. One week later, Wyandotte sent notice by certified mail of its first supply of materials to ETS for the library renovation project. It is undisputed that Wyandotte's notice to KEO did not reach its destination.

ETS paid Wyandotte only sporadically. Wyandotte shipped materials without advance payment to ETS on July 22, 2010. Thereafter, Wyandotte required cash on delivery. ETS paid in advance for four shipments sent in September. The last materials were supplied to ETS on September 30, 2010.

On November 1, 2010, Wyandotte provided a "90 Day Notice of Furnishing" under MCL 129.207. The letter indicated that Wyandotte's "last date of furnishing electrical materials was September 30, 2010." The notice advised of the $150,762.33 balance due to Wyandotte, including "a time/price differential of 1.5% monthly accruing against invoices 61 days and older." KEO received this notice.

ETS failed to pay its accumulated debt to Wyandotte for the library project materials. Wyandotte filed suit directly against ETS and against defendants for recovery from the surety bond. ETS had gone out of business, however, and its president had declared personal bankruptcy, leaving Wyandotte to fall on the bond for its payment.

Before trial, the circuit court summarily disposed of certain issues on Wyandotte's motion. The court ruled that Wyandotte complied with MCL 129.207 when it notified defendants by certified mail within 30 days of first supplying materials to ETS and therefore was entitled to recovery from the surety bond. The court rejected defendants' attempt to engraft an actual receipt requirement onto the statute and held it irrelevant that the 30-day notice did not reach its destination. The court also ruled that Wyandotte was legally entitled to a 1.5% time-price differential on all late-paid invoices. There remained a question of fact for trial, the court concluded, regarding the exact amount of the remaining debt.

Defendants had not raised the adequacy of the 90-day notice in response to Wyandotte's summary disposition motion. They therefore sought reconsideration of the order. Defendants cited MCL 129.207's requirement that notice be served within 90 days of when the claimant "supplied the last of the material for which the claim is made." To fall within the "claim," defendants argued, the material charges must remain unpaid. And Wyandotte had since stipulated that the September 30, 2010 and three preceding shipments had been paid in advance. The last date of an unpaid material delivery was July 22, 102 days before the November 1, 2010 notice. This late notice precluded Wyandotte's claim for recovery, defendants argued. The circuit court denied the reconsideration motion, simply ruling that "the issue could have been, but was not raised when the Court addressed the original motion." Defendants attempted to reintroduce this issue at trial but were precluded from doing so by the court.

A one-day bench trial was conducted on September 4, 2012, to resolve the factual issues surrounding the amount of the ETS debt. Based on the evidence, the court awarded $154,343.29 in unpaid materials, $76,403.44 in time-price differential, and $30,000 in attorney fees. This appeal followed.

II. 30-DAY NOTICE

Defendants contend that the circuit court should not have summarily ruled that Wyandotte complied with the 30-day notice requirement. The circuit court properly construed the PWBA notice provision and determined from the undisputed evidence that Wyandotte complied with this requirement. Accordingly, the circuit court correctly granted summary disposition in Wyandotte's favor on this ground.

We review de novo a trial court's decision regarding a motion for summary disposition. *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010).

> A motion under MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183. [*Zaher v Miotke*, 300 Mich App 132, 139-140; 832 NW2d 266 (2013).]

Underlying the circuit court's summary disposition ruling was its interpretation and application of the statutory notice provision of the PWBA. We review de novo a lower court's interpretation of a statute. *Rose Hill Ctr, Inc v Holly Twp*, 224 Mich App 28, 32; 568 NW2d 332 (1997).

> When faced with questions of statutory interpretation, our obligation is to discern and give effect to the Legislature's intent as expressed in the words of the statute. We give the words of a statute their plain and ordinary meaning, looking outside the statute to ascertain the Legislature's intent only if the statutory language is ambiguous. Where the language is unambiguous, we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written. [*Harrison v Munson Healthcare, Inc*, 304 Mich App 1, 30-31; ___ NW2d ___ (2014) (quotations and citations omitted).]

However, we liberally construe the PWBA "to 'protect contractors and materialmen in the public sector to ensure that they do not suffer injury when other contractors default on their obligations.'" *Assemblers, Inc v American Mfrs Mut Ins Co*, 281 Mich App 599, 608; 761 NW2 399 (2008), quoting *W T Andrew Co, Inc v Mid-State Surety Corp*, 450 Mich 655, 659; 545 NW2d 351 (1996).

The PWBA "was enacted by the Legislature because materialmen and contractors cannot place liens on public buildings; by its own express terms, it is intended to protect parties who 'furnished labor, material, or both, used or reasonably required for use in the performance of the contract.'" *Assemblers*, 281 Mich App at 608, quoting MCL 129.206. For the protection of subcontractors and materialmen, the general contractor must post performance and payment bonds before construction can commence. *Kammer Asphalt Paving Co, Inc v East China Twp Schs*, 443 Mich 176, 181; 504 NW2d 635 (1993).

The PWBA includes specific requirements for a sub-subcontractor to collect payment under the general contractor's surety bond. MCL 129.207 requires two separate notices. A sub-subcontractor has no right of action to collect upon the bond unless

> he has within 30 days after furnishing the first of such material . . ., served on the principal contractor a written notice, which shall inform the principal of the nature of the materials being furnished or to be furnished, . . . and identifying the party contracting for such . . . materials and the site for . . . the delivery of such materials.

Under the second notice requirement, the sub-subcontractor has no right to pursue payment under the bond unless

> he has given written notice to the principal contractor and the governmental unit involved within 90 days from the date on which the claimant . . . supplied the last of the material for which the claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied . . . .

The statute continues that the notices must "be served by mailing the same by certified mail, postage prepaid, in an envelope addressed to the principal contractor, the governmental unit involved, at any place at which said parties maintain a business or residence."

The plain language of the statute makes no mention of actual receipt of the 30-day notice as a condition precedent to filing suit. Defendants highlight that the written notice "shall inform" the general contractor of certain information and aver that this language requires the general contractor to actually receive the information. This phrase taken in context, however, simply means that the written notice must include the listed information.

Next, the statute provides that service must be made by "certified mail, postage prepaid, in an envelope addressed to the principal contractor." The statute does not say that service is perfected by proof of receipt. The Legislature has demonstrated its ability mandate actual receipt. Many statutes require "steps which are reasonably calculated to give actual notice." See MCL 125.2335(3); MCL 445.1539; MCL 487.3224(1); MCL 487.123113; MCL 554.837; MCL 559.181(2). Other statutes expand the requirement of certified mail to "registered or certified mail with return receipt demanded" or "requested." See MCL 168.565; MCL 168.711; MCL 213.181; MCL 600.2950(18); MCL 600.2950a(18). MCL 400.111a(7)(e) and MCL 400.111c(1)(c)(i) require "registered mail, receipted by the address." Others necessitate a "verified return of service." MCL 290.725(3). MCL 500.2034 calls for "the return postcard receipt for" a statement under the statute as "proof of the service." See also MCL 600.8405 ("Where service by certified mail is made, it shall be made by the clerk and the receipt of mailing together with the return card signed by the defendant shall constitute proof of service."). The Legislature omitted such proof of actual receipt in MCL 129.207 and we may not read that term into the statute. See *Ykimoff v W A Foote Mem Hosp*, 285 Mich App 80, 111; 776 NW2d 114 (2009) ("[A] court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.").

Defendants argue that *Pi-Con v A J Anderson Constr Co*, 435 Mich 375; 458 NW2d 639 (1990), creates an actual receipt requirement even for claimants who comply with the statute. In *Pi-Con*, 435 Mich at 380-381, our Supreme Court looked to caselaw construing the federal counterpart of the PWBA: the Miller Act, 40 USC 270b.[1] "The notice requirements of the Miller Act," noted the Court, "are nearly identical with those of the statute at issue here, except the federal statute requires notice to the general contractor of a public works project only once, within ninety days from the date on which the subcontractor completes its work." *Pi-Con*, 435 Mich at 381. Our Supreme Court agreed with *Fleisher Engineering & Constr Co v United States ex rel Hallenbeck*, 311 US 15, 19; 61 S Ct 81; 85 L Ed 12 (1940), interpreting the Miller Act, "that substantial compliance with the notice requirements was sufficient to perfect an action on the bond." *Pi-Con*, 435 Mich at 381-382. Accordingly, the Court held:

> a claimant on a bond may maintain an action on the bond upon establishing compliance with four substantive elements of the notice provisions of MCL 129.207 . . . . First, a claimant must prove that the principal contractor actually received notice. Second, the notice must relate "the nature of the materials being furnished or to be furnished, or labor being performed or to be performed and

[1] This provision has since been relocated to 40 USC 3133. Congress subsequently added a verification of delivery requirement in subsection (b)(2) of the act.

> identify[] the party contracting for such labor or materials and the site for the performance of such labor or the delivery of such materials . . . ." Third, the notice sent must have been written. Fourth, the notice must have been received within the time limits prescribed by the statute. [*Id.* at 382.]

In relation to the first element—actual notice—the Court noted *Fleisher*'s determination that the purpose of the Miller Act's notice requirement "was to assure receipt of the notice." *Id.* at 383 (quotation and citation omitted). The Court continued in greater detail:

> The purpose behind the thirty-day notice required by MCL 129.207 . . . is to provide principal contractors with detailed notice of a subcontractor's involvement on a project before, if not soon after, the commencement of that involvement. Such notice is necessary to ensure principal contractors knowledge regarding any possible claims to which their bonds might later be subjected and to assure that principal contractors are not prejudiced by having to pay out of a bond for labor or materials performed by third parties after already paying their subcontractors for that same labor or materials. So long as the principal contractors receive notice, the intent of the Legislature is fully complied with. [*Id.* at 383-384.]

Therefore, *Pi-Con* reasoned, courts should excuse a sub-subcontractor from providing notice by certified mail as long as the notice actually reaches the general contractor. *Id.* at 384. See also *WT Andrew Co*, 221 Mich App at 441 (citation omitted) ("Generally, strict adherence to the statutory notice requirements is mandatory. However, strict adherence to the certified mailing requirement is not mandatory where the principal contractor received timely and otherwise sufficient, actual notice.").

In *Pi-Con*, 435 Mich at 380, the claimant had submitted the 30-day notice by regular first-class mail, instead of certified mail as required by the statute. Cases similar to or relying upon *Pi-Con* also involve a claimant who failed to use the statutorily required service method.

In *Fleisher*, 311 US at 18, for example, the claimant was required under the Miller Act to send the notice by registered mail. The general contractor admitted receipt of the notice sent by regular mail, however. *Id.* The Supreme Court ruled:

> In giving the statute a reasonable construction in order to effect its remedial purpose, we think that a distinction should be drawn between the provision explicitly stating the condition precedent to the right to sue and the provision as to the manner of serving notice. The structure of the statute indicates the distinction. The proviso, which defines the condition precedent to suit, states that the material-man or laborer "shall have a right of action upon the said payment bond upon giving written notice to said contractor" within ninety days from the date of final performance. The condition as thus expressed was fully met. Then the statute goes on to provide for the mode of service of the notice. "Such notice shall be served by mailing the same by registered mail, postage prepaid," or "in any manner" in which the United States marshal "is authorized by law to serve summons." We think that the purpose of this provision as to manner

> of service was to assure receipt of the notice, not to make the described method mandatory so as to deny right of suit when the required written notice within the specified time had actually been given and received. In the face of such receipt, the reason for a particular mode of service fails. It is not reasonable to suppose that Congress intended to insist upon an idle form. Rather, we think that Congress intended to provide a method which would afford sufficient proof of service when receipt of the required written notice was not shown. [*Id.* at 18-19.]

In *Thomas Indus, Inc v C & L Electric, Inc*, 216 Mich App 603, 605; 550 NW2d 558 (1996), the sub-subcontractor provided no mailing to the general contractor within 30 days of first providing materials for the public project. Rather, the claimant sent each material shipment with a packing slip. This Court held that although the packing slips contained all the requisite information for a notice under MCL 129.207, *id.* at 608, the requirement that notice be "served" on the general contractor, requires "a more formal presentation of notice, rather than the informal and haphazard notice given through the use of a packing slip." *Id.* at 609. The 30-day notice provision "serves the purpose of giving the principal contractor the earliest possible notification that the materialman has not been paid for materials and supplies and that the materialman may make either a future demand for payment or future claim against the payment bond." *Id.* at 610. The purpose of a packing slip, on the other hand, is simply to inform the receiver of the shipment of its contents. This does not fulfill the purpose of the notice statute. *Id.*

There is no precedent for grafting an actual receipt requirement onto MCL 129.207 when the claimant uses certified mail. Such a requirement is not within the statute's plain language. Therefore, the circuit court correctly determined that if the claimant uses the method of service outlined in the statute—certified mail—then proof of actual receipt is not required. The undisputed evidence showed that Wyandotte used certified mail to send the 30-day notice to KEO. It complied with the statute and was not required to prove actual receipt. As such, the circuit court correctly granted summary disposition on this issue.

III. 90-DAY NOTICE PROVISION

Defendants further contend that the circuit court should have granted its motion for reconsideration of the summary disposition order based on Wyandotte's alleged failure to comply with the 90-day notice requirement. The circuit court acted within its discretion in denying defendants' motion, however. Defendants made no mention of the 90-day notice requirement in response to Wyandotte's summary disposition motion despite that the necessary evidence was available to them.

We generally review a trial court's reconsideration decision for an abuse of discretion. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 629; 750 NW2d 228 (2008). An abuse of discretion occurs when a court selects an outcome outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). But "[w]here an issue is first presented in a motion for reconsideration, it is not properly preserved." *Vushaj v Farm Bureau Gen Ins Co*, 284 Mich App 513, 519; 773 NW2d 758 (2009).

MCR 2.119(F)(3) governs motions for reconsideration as follows:

> Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

A trial court acts within its discretion when it declines to consider issues or arguments in a reconsideration motion that could have been raised before the challenged order. *Woods*, 277 Mich App at 630, citing *Charbeneau v Wayne Co Gen Hosp*, 158 Mich App 730, 733; 405 NW2d 151 (1987).

Here, defendants had sufficient information at the time of the summary disposition motion to raise the 90-day notice defense. Wyandotte attached a statement of its account with ETS to its complaint, revealing the August payments that defendants claim were earmarked for the September deliveries. Accordingly, the circuit court did not abuse its discretion in denying defendants' attempt to reconsider the summary disposition ruling.

IV. TIME-PRICE DIFFERENTIAL AND ATTORNEY FEES

Defendants challenge the circuit court's award of the time-price differential and attorney fee award outlined in Wyandotte's open account credit agreement with ETS. The contractual time-price differential and attorney fee provisions increase the cost of the goods if payment is late. They represent sums "justly due" to Wyandotte under the contract. Accordingly, the circuit court correctly determined that defendants were liable for those amounts.

We review de novo issues of contract interpretation.

> In interpreting a contract, our obligation is to determine the intent of the contracting parties. If the language of the contract is unambiguous, we construe and enforce the contract as written. Thus, an unambiguous contractual provision is reflective of the parties' intent as a matter of law. Once discerned, the intent of the parties will be enforced unless it is contrary to public policy. [*Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003).]

On July 17, 2003, ETS filled out an application for open account with Wyandotte. The terms of the agreement provided: "Time price differential charges of 1-1/2% per month (18% per annum) are calculated on all invoices that are not paid and past due 30 days or more. You will be issued a separate invoice detailing these (finance) charges." The agreement continued, "In the event your account is placed in the hands of an attorney for collection after default, the customer agrees to pay 33% of the unpaid balance for attorney's fees together with applicable costs." In signing the application, ETS stated its "understand[ing] that this agreement covers past, present and future unpaid accounts receivable balances."

On August 13, 2009, Wyandotte prepared a quote for ETS for the cost of supplying materials for the library project. That document stated, "Time/Price differential charges of 1½%

per month will be calculated on all invoices that are not paid and past due over 30 days." Each purchase order between ETS and Wyandotte referenced the job quotation.

Contrary to defendants' contention, the 2003 application is the contract between ETS and Wyandotte, even in regards to the 2010 supply of materials for the library project. Absent the credit application and accompanying agreement, ETS would have no open account with Wyandotte and Wyandotte would not have supplied materials to ETS. It is the foundation of the relationship between ETS and Wyandotte. And the agreement clearly requires ETS to pay Wyandotte a 1.5% time differential for all items past due for more than 30 days and one-third of its attorney fees in the collection efforts. Wyandotte admitted that it did not impose the time-price differential until day 61.

Defendants' reliance on their lack of privity with Wyandotte to avoid the contractual time-price differential and attorney fee provisions is completely inconsistent with the PWBA. MCL 129.207 makes a general contractor and surety liable to a remote sub-subcontractor with which they have no contractual privity; that is the purpose of the statute. Under defendants' theory, they could avoid paying a remote material supplier the agreed-upon price for the materials or the contracted-for cost of delivery.

Also contrary to defendants' interpretation, nothing in MCL 129.207 precludes time-price differentials and attorney fees from the amount due from the surety. The statute provides that the claimant "may sue on the payment bond for the amount, or the balance thereof, unpaid at the time of institution of the civil action, prosecute such action to final judgment for the sum justly due him and have execution thereon." The time-price differential and attorney fees were amounts unpaid when the action was instituted.

In *Price Bros Co v Charles J Rogers Constr Co*, 104 Mich App 369, 371; 304 NW2d 584 (1981), the defendant was the general contractor for a sewer project in Bay City. The defendant entered into a subcontract with the plaintiff for the necessary supplies. The defendant also secured a surety bond from Aetna Casualty and Surety Company. The plaintiff won its claim for unpaid sums against the defendant and the court found Aetna liable for not only the cost of labor and materials, but also "unpaid service charges." *Id.* at 371-372. The contract between the plaintiff and the defendant included the following clause:

> "Payment shall be due 30 days after the date of the statement. A service charge of 1-1/2 percent per month on the unpaid balance will be due on all amounts unpaid for 30 days after the due date. A 5% cash discount is applicable if paid within 30 days of the date of statement providing no other indebtedness to Price Brothers Company is delinquent." [*Id.* at 376.]

The *Price Bros* Court noted that the bond also specifically referenced MCL 129.207. The Court then quoted the above language regarding the amounts available for recovery under the statute. *Id.* at 376-377.

The *Price Bros* Court went on to define the "service charge" described in the contract as a "time price differential," defined as "an integral part of the transaction." *Id.* at 377.

> If the buyer pays cash, the seller receives the money immediately and no burden is placed on him. If the buyer elects to purchase on credit, the seller is burdened by the interruption to its cash flow, and so the buyer may pay a "price" for the benefit of receiving the materials without paying for them immediately. [*Id.*]

The "service charge" in the parties' contract enhanced the value of the materials to the project—if the general contractor paid earlier, it paid less. If the general contractor chose to pay later, the "service charge" was included in the cost. This higher cost was "an integral part of the contract" between the parties and the surety was liable for that amount. Accordingly, the higher cost was an amount "justly due" to the material supplier under MCL 129.207. *Id.* at 378-379.

Defendants' attempt to differentiate *Price Bros* is unavailing. In *Price Bros*, the surety was attempting to avoid extra cost measures under a remote contract. Here, both the surety and the general contractor are trying to avoid the same thing. Just as in *Price Bros*, the time-price differential and one-third attorney fee provisions enhance the value of the project. If the subcontractor paid on time, it would lower the costs of the materials and those savings would be passed on to the general contractor. ETS chose to pay late (or not at all), burdening Wyandotte, making the material cost rise. That increased material cost was the amount "justly due" to Wyandotte. Accordingly, the circuit court did not err in finding Wyandotte entitled to the time-price differential and one-third of its attorney fees accumulated in the collection effort.

V. POSTJUDGMENT INTEREST

Defendants finally challenge the circuit court's reliance on MCL 600.6013(7), rather than (8), in awarding postjudgment interest. The court's award was correct, however, as the judgment was based on a written instrument evidencing indebtedness and including a specified interest rate. This issue is based on statutory interpretation and application. Our review is therefore de novo. *Yaldo v North Pointe Ins Co*, 457 Mich 341, 344; 578 NW2d 274 (1998).

First, contrary to Wyandotte's claim, defendants did not request that judgment interest be calculated under MCL 600.6013(7). Rather, defendants argued that postjudgment interest should be calculated under MCL 600.6013(8). Defendants specifically contended that the bond claim was not on a "written instrument evidencing indebtedness with a specified interest rate," because it did not contain such an interest rate. In the event the court disagreed and applied subsection (7), however, defendants argued that interest should run at 1.5% (the time-price differential in the "written instrument") and be capped at 13% annually.

The two provisions considered in this case provide as follows:

> (7) For a complaint filed on or after July 1, 2002, if a judgment is rendered *on a written instrument evidencing indebtedness with a specified interest rate*, interest is calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate specified in the instrument if the rate was legal at the time the instrument was executed. . . . The rate under this subsection shall not exceed 13% per year compounded annually.
>
> (8) Except as otherwise provided in subsections (5) and (7) and subject to subsection (13), for complaints filed on or after January 1, 1987, interest *on a*

> *money judgment recovered in a civil action* is calculated at 6-month intervals from the date of filing the complaint at a rate of interest equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, according to this section. . . . [Emphasis added.]

This case does not involve a mere money judgment recovered in a civil action. The civil action was for recovery from the bond based on the contract between Wyandotte and ETS. A written contract can be a written instrument, as long as it evidences indebtedness and includes a specified interest rate. As noted by defendants, MCL 600.6013's definition of "written instrument" was amended based on Justice Clifford Taylor's dissent in *Yaldo*, 457 Mich 341. In that dissent, Justice Taylor impliedly recognized that a contract can be a "written instrument" but argues that the particular judgment interest provision applies only when the "written instrument" is "interest bearing," despite that the statute had yet to include that term in the definition. See *id.* at 355-356.

The contract in this case is actually comprised of various documents. It includes the original open account application with accompanying terms, the project quotation, and the purchase orders under the quotation. The contract evidences a debt, the accumulated balance of payments due under the purchase orders. The only question is whether the 1.5% time-price differential is a specified interest rate. The fact that *Price Bros* treated a similar service charge as a "time-price differential" does not mean that the item was not also an interest rate. As noted in *Price Bros*, "finance charges may be seen as inextricably related to the enhanced value of the project and thus properly included within the terms of the payment bond." *Price Bros*, 104 Mich App at 379. Just because the finance charge is combined with the cost, does not mean it is not a finance charge, or an interest rate depending on the language of the case. And there is a specified rate in the ETS-Wyandotte contract: 1.5%.

Accordingly, the circuit court correctly determined that MCL 600.6013(7) applied in this case and awarded interest at the rate of 1.5% per month, capped at 13% per year.

We affirm.

/s/ Jane M. Beckering
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher