

## COA Opinion: Drilling test well constitutes “actual physical improvement” under Construction Lien Act, and contract determines amount of the lien

4. May 2011 By Nicole Mazzocco

In *Michigan Pipe & Valve-Lansing, Inc. v. Hebelor Enterprises, Inc.*, No. 294530, the Michigan Court of Appeals held that a test well drilled on a development property constituted an “actual physical improvement” under the Construction Lien Act, and that the lien amount includes all interest charges contemplated by the underlying construction contract.

Defendant Windy Pines View, LLC (“Windy Pines”) intended to develop a residential subdivision on its property. To secure project financing, Windy Pines granted a mortgage to Defendant Firstbank-St. Johns, which was subsequently recorded on February 10, 2005. Two days before the mortgage was recorded, a contractor drilled a well on the property in order to obtain a water sample. The well was subsequently capped after Windy Pines decided to rely on the Township for its water supply. In 2007, the property owner contracted with Defendant Hebelor Enterprises, Inc. (“Hebelor”) to build infrastructure and roads for the proposed subdivision. Hebelor purchased materials from Defendant Grand River Infrastructure, Inc. (“GRI”) and Plaintiff Michigan Pipe & Valve (“MPI”) to complete the project. Although Windy Pines paid in full for Hebelor’s work, Hebelor failed to pay both GRI and MPI, which filed claims of lien in 2008. GRI and MPI foreclosed on the liens, claiming priority over the mortgage under the Construction Lien Act.

The trial court held that the liens indeed had priority over the mortgage, reasoning that the well was an “actual physical improvement” under MCL 570.1103(1), and that the liens had priority over all other interests in the property, including the mortgage, under MCL 570.1119(3). The trial court awarded GRI the value of its lien, plus “sums representing the time-price differential charges of 1.5 percent per month” as provided in the contract between GRI and Hebelor. The trial court similarly awarded MPV the value of its lien, but held that it was not entitled to the 1.5 percent per month “service charge,” because it did not constitute “interest” as defined in the Construction Lien Act.

The Court of Appeals affirmed in part and reversed in part. The Court affirmed that the well was indeed an “actual physical improvement,” because the well was a readily visible, physical, and permanent change to the property, and that due to its permanency, the Construction Lien Act’s exception for “labor which is provided in preparation for [] change or alteration” to the property was not applicable. The Court reversed the trial court’s determination that MPV’s “service charge” was not included in its lien, however. The Court reasoned that the service charge was “an amount owed in return for the privilege of purchasing goods . . . with credit,” and therefore was an “interest” charge that was properly included in MPV’s lien under the Construction Lien Act.