

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**CITY OF KANSAS CITY, MISSOURI  
EX REL., AND FOR THE USE AND  
BENEFIT OF, LAFARGE NORTH  
AMERICA INC., AND  
QUICKSILVER 2005, LLC,**

**APPELLANTS,**

**v.**

**ACE PIPE CLEANING, INC. AND  
TRAVELERS CASUALTY AND  
SURETY COMPANY OF AMERICA,**

**RESPONDENTS.**

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DOCKET NUMBER WD73044

DATE: July 26, 2011

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Appeal From:

Jackson County Circuit Court  
The Honorable Joel F. May, Judge

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Appellate Judges:

Division Two: Thomas H. Newton, Presiding Judge, Victor C. Howard, Judge and Cynthia L. Martin, Judge

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Attorneys:

Jennifer A. Bierman and Robert B. Preston, St. Louis, MO and Scott R. Ast, Kansas City, MO, for appellants.

David A. Schatz, Albert S. Laferte and Derek T. Teeter, Kansas City, MO, for respondents.

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**MISSOURI APPELLATE COURT OPINION SUMMARY**

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AMERICA INC., AND  
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No. WD73044

Jackson County

Before Division Two: Thomas H. Newton, Presiding Judge, Victor C. Howard, Judge and Cynthia L. Martin, Judge

Lafarge North America Inc. and QuickSilver 2005, LLC (collectively "Lafarge") appeal from the trial court's judgment denying them the right to recover against statutory payment bonds acquired by a general contractor, Ace Pipe Cleaning, Inc., on public works projects in Kansas City, Missouri. The judgment held that in accordance with the Little Miller Act (RSMo Section 107.170), Lafarge was a supplier to Excel Trucking, Inc., a sub-subcontractor to US Constructall, Inc., and was thus too far removed from the general contractor to be an eligible claimant on the statutory payment bonds. The trial court also held that a theory referred to by Lafarge as "telescoping," (which looks at the substance and not the form of a party's relationship on a public works project to determine if one is indeed a subcontractor), though not inconsistent with the policy underlying the Little Miller Act, did not apply to the facts of this case to collapse US Constructall and Excel into a single contracting tier.

**Affirmed.**

(1) Because public property cannot be encumbered by mechanic's liens, the Little Miller Act requires general contractors to obtain statutory payment bonds for public works projects. Statutory payment bonds shift the ultimate risk of nonpayment from workmen and suppliers to the surety on public works projects.

(2) The Little Miller Act limits the class of eligible statutory payment bond claimants to those who have supplied materials or labor "whether by subcontractor or otherwise." The italicized phrase was interpreted in *Stone Creek Brick Co. v. Kaplan-McGowan Co.*, 108 S.W.2d 987 (Mo. App. 1937) to restrict recovery against statutory payment bonds to subcontractors and to providers of labor or materials to subcontractors.

(3) *Stone Creek's* construction of the Little Miller Act should not be abandoned. Though Missouri courts generally recognize that one of the purposes of the Little Miller Act is to afford those furnishing labor or material on public works projects the same measure of protection as is afforded by mechanic's lien laws on buildings or improvements that are not of a public nature, there are practical and policy reasons for permitting a larger class of mechanic's lien claimants than Little Miller Act statutory payment bond claimants.

(4) The Legislature has not amended the Little Miller Act to reflect an intent to permit a broader scope of eligible bond claimants than recognized in *Stone Creek*, although other portions of the Act have been amended in the seventy four years since *Stone Creek* was decided.

(5) Lafarge supplied concrete to Excel, a sub-subcontractor to US Constructall, who was a subcontractor to Ace. Lafarge was not an eligible claimant on the statutory payment bonds acquired by Ace from Travelers Casualty and Assurance Company of America on the subject public works projects.

(6) The trial court did not err when it held that the concept of "telescoping" is not inconsistent with the policy underlying the Little Miller Act. However, "telescoping" is not a novel theory requiring either adoption or rejection by Missouri Courts. There is no talismanic significance to the word "telescoping," which refers simply to the fact that trial courts must necessarily determine, based on the facts presented, whether one assigned the label of "subcontractor" on a public works project is, in fact, a "subcontractor," employing the definition of the term customary to the construction industry.

(7) The trial court's factual determination that Excel was a subcontractor to US Constructall for purposes of determining the number of tiers separating Lafarge from the general contractor, Ace, is consistent with the industry definition of "subcontractor," and is supported by substantial evidence and is not against the weight of the evidence.

Opinion by Cynthia L. Martin, Judge

July 26, 2011

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