

ORIGINAL

IN THE SUPREME COURT OF OHIO

|                                 |   |                                |
|---------------------------------|---|--------------------------------|
| Transtar Electric, Inc.,        | : |                                |
|                                 | : | Case No. 2013-0148             |
| Appellee,                       | : |                                |
|                                 | : | On Appeal from the             |
| v.                              | : | Lucas County Court of Appeals, |
|                                 | : | Sixth Appellate District       |
| A.E.M. Electric Services Corp., | : |                                |
|                                 | : | Case No. G-4801-CL-02012-01100 |
| Appellant.                      | : |                                |

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BRIEF OF AMICUS CURIAE THE AMERICAN SUBCONTRACTORS ASSOCIATION, INC., THE AMERICAN SUBCONTRACTORS ASSOCIATION OF OHIO, INC. AND THE OHIO/MICHIGAN CHAPTER OF THE NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION IN SUPPORT OF APPELLEE TRANSTAR ELECTRIC, INC.

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James P. Silk (0062463)  
 Spengler, Nathanson P.L.L.  
 Four Seagate, Suite 400  
 Toledo, OH 43604-2622  
 Phone: 419-252-6210  
 Fax: 419- 241-8599  
*jsilk@snlaw.com*

Counsel for Appellant A.E.M. Electric

R. Russell O'Rourke (0033705)  
 Debra J. Horn (0037386)  
 Meyers, Roman, Friedberg & Lewis  
 28601 Chagrin Blvd., Suite 500  
 Cleveland, OH 44122  
 Phone: 216-831-0042  
 Fax: 216-831-0542  
*rorourke@meyersroman.com*  
*dhorn@meyersroman.com*

Counsel of Amicus Curiae of the American Subcontractors Association, Inc., American Subcontractors Association of Ohio, Inc. and Ohio/Michigan Chapter of the National Electrical Contractors Association

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Luther L. Liggett, Jr. (0004683)  
 Heather Logan Melick (0068756)  
 Luper Neidenthal & Logan  
 50 West Broad Street, Suite 1200  
 Columbus, OH 43215-3374  
 Phone: 614-229-4423  
 Fax: 866- 345-4948  
*LLiggett@LNLattorneys.com*  
*HMelick@LNLattorneys.com*

Counsel for Appellee Transtar Electric

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## **STATEMENT OF THE INTEREST OF AMICUS CURIAE**

The American Subcontractors Association, Inc. (“ASA”) is a national non-profit corporation supported by membership dues paid by approximately 5,000 member companies throughout the country, including Ohio. Membership is open to all commercial construction subcontractors, material suppliers and service companies. ASA members represent the combined interest of both union and non-union companies, and range from the smallest private firms to the nation’s largest specialty contractors. Thousands of ASA’s member company employees live and work here in Ohio. ASA of Ohio is a statewide chapter of the national ASA. ASA of Ohio was formed in 2008 to consolidate the former Columbus, Cincinnati, and Cleveland chapters. The first ASA chapter formed in Ohio was the Cincinnati Chapter, which was originally filed in 1965.

The Ohio/Michigan Chapter of the National Electrical Contractors Association (“OH/MI NECA”) represents 102 signatory electrical contractors who perform work in Northwest Ohio and Southeast Michigan. Twelve counties in Northwest Ohio are within the jurisdiction of the OH/MI NECA. Last year, these signatory contractors performed 3,019,805 million man hours of electrical construction work. The OH/MI NECA is a nonprofit organization with the purpose of benefiting the advancement of the electrical construction industry and the consumers who use these services.

The issues set forth in this Appeal profoundly impact members of ASA, ASA of Ohio and OH/MI NECA, as well as the thousands of Ohioans who are gainfully employed by these companies and other construction contractors, subcontractors, and suppliers in Ohio. The ASA, ASA of Ohio and OH/MI NECA are especially interested in assisting the Courts of Ohio in interpreting and applying various construction contract provisions, Ohio’s Fairness in Construction Contracting Act as embodied in R.C. 4113.62, as well as the public policy in Ohio

as it relates to the tens of thousands of Ohioans employed by contractors, subcontractors and suppliers engaged in construction projects throughout Ohio. This Court's decision will impact construction across the State of Ohio where billions of dollars of construction work is in progress.

This Amicus Brief filed on behalf of the ASA, ASA of Ohio and OH/MI NECA focuses on the possible legal consequences to hardworking contractors and suppliers who struggle to get paid for their work in a marketplace that seems to have become embroiled in legalities. Only inequity and injustice will arise if large prime and general contractors are able to unjustly shift the entire financial risk of the construction industry on the small subcontractors and suppliers who can least afford to shoulder such risk.

The law and policy espoused by Appellant A.E.M. Electric Services Corp. ("A.E.M.") allows an unethical contractor to refuse to collect payment for the subcontractor's work from the owner, thereby leaving the subcontractor with no remedy. The policy also has the effect of shifting the risk of the project owner's insolvency onto subcontractors and suppliers who have absolutely no ability to gauge such risk, monitor the risk or control the risk as the project moves forward. Those duties and abilities are solely within the realm of the job description of the contractor, the only entity that can maximize its own benefit by placing all risk of loss on the subcontractor.

#### **STATEMENT OF THE CASE AND FACTS**

Amicus Curiae hereby adopts the Statement of Case and Facts set forth in the Brief of the Appellee, Transtar.

## SUMMARY OF THE ARGUMENT

A reversal of the Court of Appeals' decision that Transtar is entitled to be paid for the labor and materials supplied in furtherance of the construction project would have a catastrophic impact on Ohio's construction industry. In all construction projects, there is only one owner and generally only one prime contractor (Ohio law does permit multiple prime contractors in public work, but only one per construction trade). The prime contractor therefore enjoys a monopsony<sup>1</sup>, where the prime contractor is the only buyer and has the power to dictate inefficient, impossible, and illogical contract terms. Courts across the nation have long recognized and controlled the dangers posed by both monopolies and monopsonies. The "impossible" and "unworkable" terms of a forfeiture clause place subcontractors in an untenable position. Because of the monopsony enjoyed by the prime contractors, the choice for prospective subcontractors is either to go out of business for want of a reasonable contract, and thus no work, or risk going out of business when the contractor, for whatever reason, is not paid by the owner, and thus, is not paid for its labor and materials incorporated into the construction project.

A pay-if-paid clause makes payment by the owner to the prime contractor<sup>2</sup> a condition that must be satisfied before the prime contractor must pay its subcontractors. Such a clause

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<sup>1</sup> Similar to a monopoly, a monopsony exists where there is only one buyer, and that buyer dictates the terms of a transaction, whereas a monopoly exists when there is only one seller, and that seller therefore has the power to dictate all terms. See *Weyhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 320, 127 S. Ct. 1069, 166 L. Ed 2d 911 (2007); *White Mule Co. v. ATC Leasing Co. LLC*, 540 F. Supp. 2d 869, 878 (N.D. Ohio 2008), citing Blair & Harrison, Antitrust Policy and Monopsony, 76 Cornell L. Rev. 297 (1991).

<sup>2</sup> We refer to the contractor that has a contract directly with the project owner as the "prime" contractor to avoid the confusion which could be created by referring to such a contractor as a "general" contractor, which is more descriptive of a "general trades" contractor, an "original" contractor as it is referred to in the private construction sections of the Ohio Mechanic's Lien Law or a "principal" contractor as it is referred to in the public construction sections of the Ohio Mechanic's Lien Law.

shifts the risk of nonpayment by the owner from the prime contractor to its subcontractors. In many circumstances where such clauses are present, the subcontractors never receive payment. In essence, a pay-if-paid clause completely shifts the burden of financial risk for a delay or default on the job site from the prime contractor to its subcontractors. The less actual construction the prime contractor performs, the lower its level of risk. In the modern construction industry, a prime contractor may serve simply as a job broker while performing little if any actual construction work and passing all of the risk of non-payment by the owner to the subcontractors.

Every other member of the construction team may suffer if the prime contractor fails to manage or otherwise control the job. The owner may suffer from delays, reduce quality and increase costs. The subcontractor cannot pay its employees or material suppliers. Suppliers may have cash flow problems. Workers may lose their jobs if subcontractor employees are forced out of business because of slower or no payment. Fringe benefit payments including payments to union pension funds on behalf of laborers may go unpaid because that same subcontractor that has not been paid by its prime contractor has been forced out of business.

Such clauses frequently work a hardship even when a subcontractor or supplier believes that the company is protected by a well-known, highly creditworthy contractor, a payment bond, or a mechanics lien. Despite the creditworthy contractor, if that contractor has no obligation to pay its subcontractor, a pay-if-paid clause works as a forfeiture for the right of the subcontractor or supplier to be paid. If the surety bond is in place, the surety will step into the shoes of the contractor and raise as a defense the contractor's pay-if-paid clause. If the subcontractor chooses to file a mechanics lien to protect its right to be paid, the owner will defend by saying that the subcontractor's or supplier's right to file a mechanics lien is based in contract, and it has no

contractual right to be paid. Even more, if the mechanic's lien claimant prevails on its argument that it has a valid and enforceable lien, the subcontractor or supplier is often left with little or no recourse in the event of a project failure and sale at foreclosure as the lien of the construction mortgage will prime all mechanic's liens.<sup>3</sup> The subcontractor or supplier is left at best with an uphill battle and at worst no right whatsoever to be paid for its labor and materials.

The owner has a direct contractual relationship with the prime contractor rather than the subcontractor. Therefore, the subcontractor has no legal recourse through which to collect payment should the owner fail to pay the prime contractor. When a prime contractor inserts a pay-if-paid clause in its subcontract, it asks the subcontractor to assume the entire risk of nonpayment by the owner. If the subcontractor signs the subcontract, it is essentially extending credit to the owner and the prime contractor with no available avenue through which to either effectively analyze the creditworthiness of the owner or collect payment from the project owner or the prime contractor. Accordingly, ASA, ASA of Ohio and OH/MI NECA take the position that "pay-if-paid" clauses are inequitable and against public policy.<sup>4</sup>

When the subcontractor is not paid, it nonetheless is still obliged to pay its subcontractors, suppliers, and laborers. Thus, if subjected to a pay-if-paid clause where the owner fails to pay, the companies that built the building may have to fully pay for the building without recourse for any payment to themselves.

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<sup>3</sup> R.C. 1311.14(A).

<sup>4</sup> In this case, A.E.M. presented Transtar with a take-it-or-leave-it form contract, as evidenced by the fact that the wording was not even changed to reflect that the work was performed in Ohio, not Minnesota. The contract was simply a contract of adhesion, given the lack of bargaining power and that the payment clause, if enforced as a pay-if-paid clause, "would unreasonably impose upon the non-bargaining party burdens which were wholly inequitable." *Glaspell v. Ohio Edison Co.*, 29 Ohio St. 3d 44, 47, 505 N.E.2d 264 (1987); *Williamsburg Homes, Inc. v. Kuhns*, 11th Dist. No. 90-G-1608, 1991 Ohio App. LEXIS 5475 (Nov. 15, 1991).

As the Court of Appeals held, the Transtar contract language was ambiguous enough to mislead the unwitting subcontractor. This Court should affirm and hold that Transtar has the right to be paid on its contract for the work performed on this construction project. Additionally, this Court can take the next step and find that risk-shifting clauses such as pay-if-paid clauses are inherently unreasonable, holding all pay-if-paid clauses void and unenforceable as against public policy.

### ARGUMENT

#### **THE COURT OF APPEALS CORRECTLY FOUND THAT THE PAYMENT AGREEMENT BETWEEN THE PARTIES WAS A “PAY-WHEN-PAID” PROVISION RATHER THAN A “PAY-IF-PAID” PROVISION**

The leading case in the country on the pay-when-paid and pay-if-paid clauses is the Sixth Circuit Court of Appeals decision in *Thos. J. Dyer Co. v. Bishop Int’l Eng’g Co.*, 303 F.2d 655 (6th Cir. 1962). The *Dyer* court found that, in the construction industry, a general contractor normally assumes the credit risk of the owner. As a result, the subcontract must expressly and unequivocally state an intent to alter this common understanding. The *Dyer* court also noted that conditions precedent are especially disfavored when the obligee has no control over the occurrence of the event in question. This is true of the subcontract situation, since the subcontractor has no control over the owner’s payment to the general contractor. The *Dyer* court explained:

It is, of course, basic in the construction business for the general contractor on a construction project of any magnitude to expect to be paid in full by the owner for the labor and material he puts into the project. He would not remain in business for long unless such was his intention and such intention was accomplished. That is a fundamental concept of doing business with another. The solvency of the owner is a credit risk necessarily incurred by the general contractor, but various legal and contractual provisions, such as mechanic’s liens and installment payments, are used to reduce this to a minimum. These evidence the intention of the parties that the contractor be paid even though the owner may ultimately

become insolvent. This expectation and intention of being paid is even more pronounced in the case of a subcontractor whose contract is with the general contractor, not with the owner. In addition to his mechanic's lien, he is primarily interested in the solvency of the general contractor with whom he has contracted. He looks to him for payment. Normally and legally, the insolvency of the owner will not defeat the claim of the subcontractor against the general contractor. Accordingly, in order to transfer this normal credit risk incurred by the general contractor from the general contractor to the subcontractor, the contract between the general contractor and the subcontractor should contain an express condition clearly showing that to be the intention of the parties.

*Dyer*, 303 F.2d at 660-61 (citations omitted). Thus, in *Dyer*, the Court held that it saw no reason to shift the credit risk of the owner's insolvency assumed by the contractor on the subcontractor. The Court reasoned that, if that was the intention of the parties, the payment clause at issue could have expressed that intention "in unequivocal terms dealing with the possible insolvency of the owner. [The payment clause] of the subcontract does not refer to the possible insolvency of the owner" and therefore was treated as a pay-when-paid clause. *Id.* at 661.

Relying on the *Dyer* decision, the Transtar Court of Appeals likewise found that using "magic words" of "condition precedent" were not sufficient to invoke the dire consequences of a pay-if-paid clause. Instead, the Court of Appeals held that ordinary, plain language must be used and that the language must indicate unambiguously that the risk of payment is shifted to the subcontractor such that the subcontractor must ultimately look to the owner of the project for payment.

Subcontractors and suppliers are not in a position to properly assess such risk at the time that they are bidding a new project. A subcontractor such as Appellee Transtar Electric, Inc. ("Transtar") bids on projects to expend funds in reliance on receipt of payment from a project owner whose financial wherewithal is typically unknown to the subcontractor. During the bidding process, when the contractor has the unbridled right to accept a bidder's bid, a project

owner does not provide an audited financial statement to subcontractors and suppliers with whom it is not under contract in order for a subcontractor to knowingly assess the risk of nonpayment.<sup>5</sup>

Further, because the bidding subcontractor cannot possibly see or comprehend the big picture of the financial considerations of the project itself, even if the bidding subcontractor was cognizant of the financial condition of the project owner, including the owner's perceived ability to pay for the contract work, it is not in a position to assess those issues because the owner and the contractor are in sole control of the construction contract. The bidding subcontractor has no idea of the terms of the contract that are being offered to the owner by the contractor. This risk and reward as the sole province of the contractor, yet the bidding subcontractor is bound to perform under the *Wargo* Rule. Even more, the contractor can then dictate the terms of the contract, including pay-if-paid clauses, without prior notice to the bidding subcontractor, as long as the terms of the contract were "customary in the industry."<sup>6</sup> When a bidder has little or no negotiating power and no statute to stop contractors from imposing unreasonable clauses, all abusive clauses have the likelihood of becoming "customary in the industry" shifting all risk to those with the least ability to control it, the subcontracting companies that are performing the labor and supplying the equipment and materials to build our construction projects.

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<sup>5</sup> *Wargo Builders, Inc. v. Douglas L. Cox Plumbing & Heating, Inc.*, 26 Ohio App.2d 1, 268 N.E.2d 597 (8th Dist., 1971), at paragraph two of the syllabus, the court held as follows:

A subcontractor who makes a "bid" or "quote" which constitutes an offer to a general contractor, who submits a bid in reliance upon such offer, is bound to perform in accordance with the terms of that offer when the general contractor (1) is awarded the contract and (2) within a reasonable time thereafter notifies the subcontractor that the offer is accepted. Under such circumstances the subcontractor is liable in damages to the general contractor for failure to perform.

<sup>6</sup> *Lichtenberg Constr. & Dev., Inc. v. Paul W. Wilson, Inc.* 1st Dist. No. C-990533, 2000 WL 33250695 (Mar. 10, 2000).

A.E.M. claims that the “court of appeals’ decision stands contract interpretation on its head” is belied by the principles set forth in *Dyer* above. While it is recognized that courts from other states have held that the language “condition precedent” is sufficient to interpret a contract provision as a pay-if-paid clause, that view is not universal. For example, *Titan Stone, Tile & Masonry, Inc. v. Hunt Construction Group, Inc.*, D. N.J. No. 05-3362, 2007 U.S. Dist. LEXIS 19489 (D. N.J. March 19, 2007), involved a contract provision that stated that “Final Payment by the Owner to Hunt shall be an **express condition precedent** to Hunt’s duty to make Final Payment to [Titan].” *Id.* at \*18 (emphasis added). The district court, relying on *Dyer*, held that, in the absence of any explicit indication in the agreement that the subcontractor had agreed to assume the risk of non-payment by the owner, a material fact existed precluding summary judgment in favor of the contractor. *See also Mrozik Constr., Inc. v. Lovering Assoc., Inc.*, 461 N.W.2d 49, 51-52 (Minn. App. 1990) (court held that contract provision payment be made by the general contractor to the subcontractor “to the extent that the contractor has been paid on the subcontractor’s account” did not unequivocally shift the risk of the owner’s insolvency to the subcontractor).

### CONCLUSION

As the Court of Appeals held, “pay-if-paid” clauses are disfavored under Ohio law as well as under the laws of jurisdictions around the country. This is because such contract terms will often cause a forfeiture of properly earned contract dollars, funds subcontractors and suppliers have already expended for the materials supplied and labor performed to fulfill the contractor’s obligation to the owner. Most courts in Ohio and around the country hold that such forfeiture provisions must clearly and unambiguously condition payment to the subcontractor on

receipt of payment from the owner. Some courts have outright voided pay-if-paid provisions as being unenforceable as against public policy.

Strong public policy weighs in favor of strict limitations on the use of “pay-if-paid” clauses and moreover, against their continued use in construction subcontracts because such clauses harm all members of the construction community including project owners, prime contractors, subcontractors, material suppliers, laborers, and even labor unions. These clauses unreasonably and improvidently transfer the risk of loss from the party best able to analyze and control the loss and their own profit, the prime contractor, to all of the other parties in the construction process. Therefore, such clauses result in unnecessarily higher prices for each construction project since owners must cover the risk of nonpayment on their upcoming projects.

Because Ohio law “abhors a forfeiture,” and because the greater weight of equities and public-policy implications weigh in favor of Transtar’s position, this Court should affirm the decision of the Sixth District Court of Appeals. If the Court fails to do so, it will cause much harm to construction contractors, subcontractors, construction suppliers and the thousands of employees of companies who live in Ohio and work in the construction industry. Overturning the decision would ultimately harm construction project owners, the coffers of the State of Ohio and the people who fill those coffers: the taxpayers.

Prime contractors operate in a monopsonistic atmosphere; one where they are a single buyer who has the ultimate authority to force non-negotiable terms on prospective subcontractors much like a contract of adhesion. Monopsonies are like monopolies that are disfavored and highly controlled in Ohio and throughout the United States. The ability of a general contractor to force bidding subcontractors into such a situation places an impossible burden on the subcontractor. Specifically, if the subcontractor does not bid on projects where it can be forced

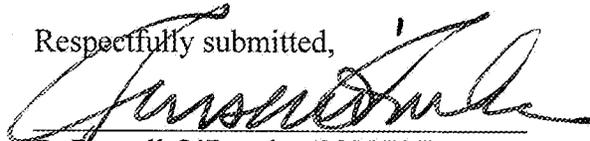
nonnegotiable pay-if-paid term, his or her employees may be unemployed and the company is out of business. If the subcontractor does expose itself to being forced into contracts with the nonnegotiable terms, and for whatever reason, be it the financial instability of the project owner or the bad business practices of the prime contractor, the project owner fails to pay the prime contractor, the subcontractor is again out of business and its employees out of work.

By affirming the Court of Appeals' decision or even extending it to eliminate pay-if-paid clauses completely, it will serve as a stark warning that this sort of gamesmanship will be seen for what it is and will be prohibited by the laws of the State of Ohio. Alternatively, by reversing the decision, it will only serve to embolden prime contractors and allow them to dictate impossible, nonnegotiable terms on subcontractors.

Therefore, the ASA, ASA of Ohio and OH/MI NECA urge this Court to affirm the Court of Appeals' decision determining that pay-if-paid clauses should either be extraordinarily explicit so as to convey the inherent risk of nonpayment by the project owner, a condition completely uncontrolled by the subcontractor, or eliminated as a method of subjugation of subcontractors as being void and unenforceable as against public policy.

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Respectfully submitted,



R. Russell O'Rourke (0033705)

Débra J. Horn (0037386)

Meyers, Roman, Friedberg & Lewis

28601 Chagrin Blvd., Suite 500

Cleveland, OH 44122

Phone: 216-831-0042

Fax: 216-831-0542

*rourourke@meyersroman.com*

*dhorn@meyersroman.com*

Counsel of *Amicus Curiae* for the American Subcontractors Association, Inc., American Subcontractors Association of Ohio, Inc. and Ohio/Michigan National Electrical Contractors Association

**CERTIFICATE OF SERVICE**

The foregoing Brief of Amicus Curiae American Subcontractors Association, Inc., American Subcontractors Association of Ohio, Inc. and the Ohio/Michigan Chapter of the National Electrical Contractors Association in support of Appellee Transtar Electric, Inc. was sent by ordinary U.S. Mail, postage prepaid, this <sup>10<sup>th</sup></sup> day of June, 2013 to the following:

James P. Silk  
Spengler, Nathanson  
Four Seagate, Suite 400  
Toledo, OH 43604  
Counsel for Appellant A.E.M. Electric

Luther L. Liggett, Jr.  
Heather Logan Melick  
Luper Neidenthal & Logan  
50 West Broad Street, Suite 1200  
Columbus, OH 43215-3374  
Counsel for Appellee Transtar Electric



R. Russell O'Rourke (0033705)

Debra J. Horn (0037386)

Meyers, Roman, Friedberg & Lewis

28601 Chagrin Blvd., Suite 500

Cleveland, OH 44122

Phone: 216-831-0042

Counsel of *Amicus Curiae* for the American Subcontractors Association, Inc., American Subcontractors Association of Ohio, Inc. and Ohio/Michigan National Electrical Contractors Association