

No. A23-0664

STATE OF MINNESOTA
IN SUPREME COURT

Central Specialties, Inc.,

Petitioner,

vs.

Minnesota Department of Transportation,

Respondent.

**APPLICATION OF THE ASSOCIATED GENERAL CONTRACTORS OF
MINNESOTA AND MINNESOTA ASPHALT PAVEMENT ASSOCIATION TO
PARTICIPATE AS *AMICI CURIAE* AND FOR LEAVE TO FILE JOINT BRIEF**

Associated General Contractors of Minnesota (“AGC”) and Minnesota Asphalt Pavement Association (“MAPA”) (collectively “Applicants”), respectfully bring this Joint Request for Leave to Participate as *amici curiae* in the above captioned matter pursuant to Rule 129.01 of the Minnesota Rules of Appellate Procedure.

This case questions a party’s right to unilaterally change a construction contract after the contract is finalized. If permitted, Applicants will help the Court appreciate how the Court of Appeals’ decision changes contract law to the extent that it undoes the construction industry’s time-tested practices for evaluating business risks, bidding, and contracting. Therefore, Applicants will ask for reversal.

I. IDENTIFICATION OF THE PROPOSED *AMICI*.

AGC and MAPA's interests in this matter are public. AGC is a non-profit trade organization composed of general contractors, subcontractors, and other businesses who perform, supply, or have interests in highways and roads, or industrial and commercial building construction in Minnesota. MAPA is a non-profit trade organization that primarily represents companies involved in constructing roads.

AGC and MAPA represent the interests of their members on industry-related issues at the local, state, and federal government levels; and work to promote thoughtful and considered policies and practices that benefit all stakeholders in the construction industry. This work includes creating form construction contracts, educating and commenting on contract issues, lobbying on contract and bidding matters, and appearing as amicus on other contract issues. They also support and promote industry practices through technical assistance, training, advocacy, and consultation to stakeholders ranging from residential driveways to roadways and airports.

AGC and MAPA are trusted resources to the construction industry and perform no construction work. Their interests in this matter solely relate to how the laws affect the construction industry and not to any private interest.

II. PUBLIC INTEREST.

Construction contracting does not follow an ideal, linear timeline. Contracts have been finalized after work began, and contracts often require changes because of issues that are unknown to the parties at the time of contracting. The construction industry worldwide

uses change orders to resolve issues not foreseen at bid time. It can be easily said that change orders are more the rule than the exception.

Construction is also expensive. Hospitals and roadways cost millions and the margins on construction work are slight. Industry studies place profitability margins (net income (loss) before taxes) for highway-heavy construction work at five percent (5%). *2023 Financial Benchmark*, CONSTR. FIN. MGMT. ASS'N, at line 168 (2023) (available in Excel format for download at <http://www.cfma.org/benchmark> (May 15, 2024)). A rise in cost of goods, changes in weather, and other factors can wipe out a company. Critical to a contractor's viability is foreseeing a project's risks accurately and managing the work to those risks.

This vulnerability to change and narrow margins couple to intensify the need for industry rules among owners/developers, prime contractors, and subcontractors. The mechanism to govern this volatility is the change order.

In this case, the contractor, Central Specialties, Inc. ("CSI"), bids work based upon the specifications and conditions provided by Minnesota Department of Transportation ("MnDOT") and industry practices. *Cent. Specialties, Inc. v. Minnesota Dep't of Transportation*, ---N.W.3d---, No. A23-0664, 2024 WL 1356588, at *1 (Minn. Ct. App. 2024). Evidence of these practices was submitted to a jury of Minnesota citizens who found unanimously that the industry practice to determine haul routes was for MnDOT to evaluate the routes based upon engineering and construction factors (*i.e.*, factors relevant to building, maintaining, and/or improving the road), MnDOT veered from this industry practice by using an "ulterior" or unrelated reason (*i.e.*, yielding to political pressures from

an official of Mahnomen County, which constituted a breach of MnDOT's duty of good faith and fair dealing), and MnDOT's breach caused CSI damage. *Id.* at *7.

The industry practices show the parties' intentions entering into the contract. *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 364 (Minn. 2009) (the primary goal in contract interpretation "is to ascertain and enforce the intent of the parties."). Absent evidence that a party intended (and conveyed this intention to the other party at the time of contracting) a meaning foreign to local customs or not apparent to the other party, the jury is entitled, and should, look to the local parlance, customs, and practices. *Walker v. Barron*, 6 Minn. 508, 512 (1861) ("Proof of particular customs is generally allowed to aid Courts and juries in arriving at the intention of parties when they perform acts or make contracts that are susceptible of more than one meaning."). Here, the jury was able to interpret and enforce Minnesota's understanding of "ulterior," and find both industry practices and parties' intentions.

The Court of Appeals disregarded this precedent, overturned the jury's findings, and ruled that neither industry practice nor the Minnesota jury define the word "ulterior," but that a foreign group of editors of a dictionary convened in a distant land is the preferred source of Minnesota parlance. *See Jacobs v. Rosemount Dodge-Winnebago South*, 310 N.W.2d 71, 76 (Minn. 1981) (appellate court defers to jury's findings of fact). In short, the dictionary no longer is the reflection of diction usage, but its face.

Specifically, the Court of Appeals adopted a dictionary definition of "ulterior" to include an element of being "hidden." *Cent. Specialties, Inc.*, ---N.W.3d---, No. A23-0664, 2024 WL 1356588, at *6 (*citing, Ulterior Motive, AMERICAN HERITAGE DICTIONARY OF*

THE ENGLISH LANGUAGE (Abridged 5th ed. 2018)). This definition is unsupported by evidence at trial, is selective (alternate dictionary definitions of “ulterior” do not include “hidden” as an element), and is mistaken in time (the Court of Appeals applied “hidden” at the time of MnDOT’s decision and not the time of offer or assent). *See, Ulterior*, WEBSTER’S THIRD NEW INT’L DICTIONARY (Unabridged 1986) (defining “ulterior” as “1b: more distant: remoter <without ... any purpose, immediate or ~ -- G.B. Shaw>”);¹ *see also Cent. Specialties, Inc.*, No. A23-0664, 2024 WL 1356588, at *7. Based on its inclusion of the concept of “hidden,” the Court of Appeals ruled that MnDOT could consider political factors that were outside of, remote, foreign, or not in line with industry standards so long as MnDOT was transparent, *i.e.* not hiding its reasons, at the time it made its decision.

The Court of Appeal’s ruling broadens a party’s discretion to force a change upon the other party for its convenience or a change in condition as long as its reason for the change is transparent.

III. IT IS DESIRABLE FOR APPLICANTS TO APPEAR AS *AMICUS CURIAE*.

AGC and MAPA respectfully maintain that their *amici curiae* brief is desirable because this case undoes Minnesota construction industry’s time-tested practices and makes Minnesota discordant with worldwide practices. The Court of Appeals ignored the

¹ The second, less common, definition of “ulterior” is “2: going beyond what is avowed, manifest, or proper: not apparent.” *Id.* The version of ulterior that includes apparency or hiddenness is in the context of “manifest” or known, and not in the context of obfuscated as the Court of Appeals held. (The 1a definition of ulterior is “occurring at a subsequent time,” which is less germane although instructive how English words can be imprecise and, therefore, more subject to local understandings, which is the theoretical function of the jury.)

jury's historic function to weigh evidence of industry practice and meanings, and usurped local understandings for a foreign definition of "ulterior." This result upsets core rules of construction contracting, dislodges the industry's mechanism to govern volatility, and subjects contractors to unfettered discretion of owners/developers. Any political convenience, discovered condition, or other change could result in expanding the contractor's scope of work and risk without compensation or honesty to the bid.²

IV. CONCLUSION.

For these reasons, Applicants respectfully seek leave to participate in this case as *amici curiae* to help the Court understand the impact this case will have on members of the construction industry and general principles of contract law and to file a joint brief.

Respectfully submitted,

BASSFORD REMELE
A Professional Association

Dated: May 15, 2024

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² In this case, the change in haul routes cost CSI approximately 20% above the project bid. *Cent. Specialties, Inc.*, ---N.W.3d---, No. A23-0664, 2024 WL 1356588, at *3 (suggesting CSI might lose 15% on the project rather than earn the average profit of 5% that is *supra.*).

and

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CERTIFICATION OF DOCUMENT LENGTH

The undersigned hereby certifies that this Application to Participate as Amici Curiae and Request for Leave to File a Joint Brief complies with the length limitations in Minn. R. Civ. App. P. 129.01(c). The Application is 1,362 words, inclusive of any footnotes and exclusive of the caption, acknowledgment, and signature block.

BASSFORD REMELE
A Professional Association

Dated: May 15, 2024

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