

## **The Potential Implications of the Indiana Supreme Court's Decision Addressing the Recovery of Attorney's Fees in Mechanic's Lien Foreclosure Actions**

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Contractors, subcontractors and suppliers to Indiana construction projects frequently ask whether they are entitled to recover the attorney's fees they incur in preparing, filing and foreclosing mechanic's liens. The answer to this question is generally yes, subject to certain limitations. Under well-established precedent applying the Indiana mechanic's lien statute found at Indiana Code Section 32-28-3-1 *et seq.*, lien claimants are permitted to recover attorney's fees against a property owner as part of a foreclosure judgment unless the property owner has paid the full amount owed under its contract with the general contractor. Conversely, if no money is owed to the general contractor under the prime contract, attorney's fees are not recoverable as part of the lien claimant's foreclosure judgment against the property owner.

More recently, however, the Indiana Supreme Court in *Goodrich Quality Theaters, Inc. v. Fostcorp Heating & Cooling, Inc.*, 39 N.E.3d 660 (Ind. 2015), interpreted Indiana's mechanic's lien statute as establishing a right not just to recover attorney's fees against a property owner who has not paid the prime contract in full, but also against the party liable for the underlying debt secured by the mechanic's lien. As discussed below, this interpretation may significantly expand the instances in which attorney's fees may be recovered in mechanic's lien foreclosure actions.

The right to recover attorney's fees in a lawsuit to foreclose a mechanic's lien is set forth in Indiana Code Section 32-28-3-14, which provides as follows:

- (a) Except as provided in subsection (b), in an action to enforce a lien under this chapter, a plaintiff or lienholder who recovers a judgment in any sum is entitled to recover reasonable attorney's fees. The court shall enter the attorney's fees as a part of the judgment.
- (b) A plaintiff may not recover attorney's fees as part of the judgment against a property owner in an action in which the contract consideration for the labor, material, or machinery has been paid by the property owner or party for whom the improvement has been constructed.

The ability to recover attorney's fees is further supported by the language of Indiana Code Section 32-28-3-11. That section permits a person with an interest in the property subject to the lien to substitute a written undertaking for the property as the security for the mechanic's lien. Consistent with the right to recover attorney's fees under section 32-28-3-14, section 32-28-3-11 requires that the written undertaking "provide that the person filing it will pay any judgment that may be recovered in the action to foreclose the lien, including costs and attorney's fees allowed by the court, if the claim on which the judgment is founded is found by the court to have been a lien on the property at the time the action was filed."

*Goodrich Quality Theaters, Inc.* addressed the ability of subcontractors on a commercial construction project to recover their attorney's fees. In that case, the property owner hired a

general contractor to build an IMAX movie theater. The general contractor then hired several subcontractors to provide the labor and materials needed to construct the theater. The subcontractors were not paid in full by the general contractor and filed mechanic's liens against the IMAX property to secure their claims. Thereafter, the subcontractors filed suit to foreclose their liens and requested attorney's fees.

The general contractor filed an undertaking and posted a surety bond under section 32-28-3-11 to substitute the bond for the IMAX property as security for the liens. To comply with the requirements of section 32-28-3-11, the surety bond provided that the general contractor (as principal under the bond) and the surety would pay any judgment recovered in the action to foreclose the lien, "including costs and attorney's fees allowed by the court." The trial court approved the bond and ordered the IMAX property discharged of the subcontractors' mechanic's liens.

Subsequently, the property owner paid the general contractor in full. Following a bench trial, the trial court entered judgments in favor of the subcontractors and against the general contractor, which included substantial amounts for the subcontractors' attorney's fees. The general contractor appealed the award of attorney's fees based primarily on the argument that attorney's fees could not be recovered against it because it was not the owner of the IMAX property and the property owner had paid the general contractor full contract consideration, thereby precluding the recovery of fees under section 32-28-3-14(b). The subcontractors countered that the language of section 32-28-3-11 and section 32-28-3-14 allowed the trial court to award attorney's fees against the general contractor that were incurred in the foreclosure of the mechanic's liens and that it would be inequitable for the general contractor to avoid paying the fees merely because it posted the surety bond.

In *Goodrich Quality Theaters, Inc. v. Fostcorp Heating & Cooling, Inc.*, 16 N.E.3d 426 (Ind. Ct. App. 2014), the Court of Appeals agreed with the general contractor that the subcontractors could not recover their attorney's fees against it. The Court based its conclusion in part on a prior Indiana Supreme Court case which held that the purpose of the mechanic's lien statute is to make the property owner an involuntary guarantor of payment for the reasonable value of the lien claimants' improvements to the property. The Court of Appeals concluded that "the mechanic's lien statutes in Indiana Code chapter 32-28-3 only apply to the property owners, and as [the general contractor] is not a property owner, the mechanic's lien and subsequent attorney fees cannot be enforced against it."

The Indiana Supreme Court granted transfer and framed the issue before it as "whether, under Indiana's mechanic's lien statute, the subcontractors are entitled to collect attorney's fees incurred in foreclosing on their liens from [the general contractor], which posted a surety bond and filed an undertaking obligating it to pay attorney's fees upon recovery of a judgment against it." In examining the mechanic's lien statute, it concluded that the plain language of the applicable sections entitled the subcontractors to recover attorney's fees against the general contractor. It further held that it was immaterial that the property owner had paid the general

contractor in full because the general contractor was not entitled to the benefit of the exclusion under section 32-28-3-14(b) because it was not the property owner.

In reaching this conclusion, the Supreme Court rejected the argument that attorney's fees could not be recovered against the general contractor because it did not own the property. It held that, even if the general contractor had not posted a bond under section 32-28-3-11, "the subcontractors would have been entitled to recover attorney's fees from the general contractor under § 32-28-3-14 because subsection 14(a) expressly provides that a lienholder is entitled to fees upon the recovery of a judgment—not a judgment against a property owner." It further held that, "[g]iven subsection 14(b)'s express prohibition against recovering attorney's fees from a property owner who has paid the contract consideration, and the lack of any similar exclusion in subsection 14(a), it is clear that the General Assembly intended for subsection 14(b) to apply solely to property owners who have so paid and subsection 14(a) to apply generally in all other circumstances."

The fact that the Supreme Court in *Goodrich Quality Theaters* affirmed the award of attorney's fees against the general contractor is not surprising because the general contractor had posted a surety bond under section 32-28-3-11 and, under the express language of the bond and the statute authorizing it, was thereby obligated to pay any judgment awarded to the lien claimants, including attorney's fees. What is surprising about the *Goodrich Quality Theaters* decision is the Supreme Court's finding that the subcontractors would have been entitled to recover attorney's fees against the general contractor even if the general contractor had not posted a bond under section 32-28-3-11. It is this holding that potentially represents an extension of the right to recover fees in mechanic's lien foreclosure cases.

If we were to assume hypothetically that the general contractor in *Goodrich Quality Theaters* had not posted the bond, the subcontractors' mechanic's lien foreclosure judgments would be against the IMAX property, and not the general contractor's surety bond. So long as the general contractor had no ownership interest in the IMAX property, it would not be directly impacted by the judgments foreclosing the subcontractors' liens. Additionally, the foreclosure judgments would not include an award of attorney's fees because the owner of the IMAX property paid the general contractor in full. Thus, no attorney's fees would be awarded under the subcontractors' mechanic's lien claims because those claims are not against the general contractor and the subcontractors are precluded from recovering fees from the property owner under section 32-28-3-14(b).

Under the Supreme Court's holding in *Goodrich Quality Theaters*, the subcontractors would arguably still be entitled to attorney's fees under section 32-28-3-14(a) against the general contractor, however, because the subcontractors were successful in obtaining judgments on their breach of contract claims. This argument is supported by the Supreme Court's finding that the subcontractors would have been entitled to recover attorney's fees against the general contractor even if it had not posted the bond because "a lienholder is entitled to fees upon the recovery of a judgment—not a judgment against a property owner." As discussed in the hypothetical above, in

the situation where the general contractor did not post a bond, the award of attorney's fees could not be part of the foreclosure judgment against the owner of the IMAX property. Instead, the award of attorney's fees would have to be part of the subcontractors' judgments against the general contractor on their underlying claims to recover the debt.

This would seem to be a curious result because it would create a statutory right to recover attorney's fees under the mechanic's lien statute for breach of contract claims arising under common law. The subcontractors' mechanic's liens were by their very nature claims against real estate (i.e., *in rem* claims), while their breach of contract claims were personal claims against the general contractor (i.e., *in personam* claims) that do not arise under Indiana Code Section 32-28-3-1 *et seq.*

The holding in *Goodrich Quality Theaters* therefore raises several questions such as the following: Why is the subcontractors' right to recover attorney's fees as part of a judgment against the general contractor for breach of contract dependent on that judgment being entered "in an action to enforce a lien" as required by section 32-28-3-14(a)? In other words, why does the existence of a claim against the property owner to foreclose the mechanic's lien trigger the subcontractors' right to recover attorney's fees against the general contractor on a breach of contract claim that exists independent of the foreclosure claim? Would the subcontractors still be entitled to attorney's fees against the general contractor on their breach of contract claims if they were unsuccessful on their mechanic's lien foreclosure claims against the property owner? What attorney's fees are recoverable against the general contractor? Fees incurred in connection with the breach of contract claim, the mechanic's lien foreclosure claim or both? If the property owner had not paid full contract consideration under the prime contract, would the subcontractors be entitled to collect attorney's fees against the property owner on their foreclosure claims and against the general contractor on their breach of contract claims?

Although *Goodrich Quality Theaters* raises many unanswered questions, it arguably expands the right to recover attorney's fees in mechanic's lien foreclosure actions by subjecting the party found contractually liable to the lien claimant to the payment of the lien claimant's attorney's fees under section 32-28-3-14(a). It will be interesting to observe whether there is any legislative response to the *Goodrich Quality Theaters* decision in the coming months and years and how its holdings may be used to the advantage of mechanic's lien claimants in foreclosure actions.