

FILED

No. 113037

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**IN THE COURT OF APPEALS  
OF THE STATE OF KANSAS**

HEATHER L. SMITH  
CLERK OF APPELLATE COURT

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**WAGNER INTERIOR SUPPLY OF WICHITA, INC.**

*Plaintiff/Appellant*

v.

**DYNAMIC DRYWALL, INC., et al.**

*Defendants/Appellees*

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**BRIEF OF APPELLANT WAGNER INTERIOR SUPPLY OF WICHITA,  
INC.**

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Appeal from the District Court of Sedgwick County  
The Honorable Mark Vining  
District Court Case No. 14CV0475

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Oral Argument: 30 Minutes

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B. THE 2005 AMENDMENTS TO K.S.A. 60-1110 DID NOT EXPRESSLY OR IMPLIEDLY CHANGE THE LAW AS EXPRESSED IN THE HOLDING OF BOB ELDRIDGE CONSTRUCTION CO. V. PIONEER

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## **BRIEF STATEMENT OF NATURE OF CASE**

This appeal concerns a claim on a statutory bond by a material supplier, Appellant Wagner Interior Supply of Wichita, Inc. (“Wagner”), against a general contractor, Appellee Puetz Corporation (“Puetz”), and its surety, Appellee United Fire & Casualty Company (“United Fire”), for unpaid materials and supplies totaling \$108,162.97 used and consumed at a hotel project located at 2340 N. Greenwich Road, Wichita, Kansas (the “Project”). On November 13, 2014 the District Court entered its Journal Entry which granted Puetz’s Motion for Summary Judgment and denied Wagner’s Motion for Summary Judgment. On December 11, 2014 Wagner timely filed its Notice of Appeal.

## **BRIEF STATEMENT OF ISSUES TO BE DECIDED ON APPEAL**

- I. The District Court erroneously granted Puetz’s Motion for Summary Judgment on the statutory bond because:
  - A. The holding of Bob Eldridge Construction Co. v. Pioneer Materials, Inc., 235 Kan. 599, 684 P.2d 355 (1984), correctly states the law in that the filing of a statutory Release of Lien Bond eliminates and waives the strict statutory requirements for perfecting a material suppliers’ lien under K.S.A. 60-1103; and
  - B. The 2005 amendments to K.S.A. 60-1110 did not expressly or impliedly negate the holding of Bob Eldridge Construction Co. v. Pioneer Materials, Inc., *id.*, in that even after the 2005 amendments to 60-1110 the filing of a Release of Lien Bond should eliminate and

waive the strict statutory requirements for perfecting a material suppliers' lien under 60-1103.

- II. The District Court erred in denying summary judgment in favor of Wagner on its claim for payment on the statutory bond because Wagner established as a matter of law that there was no material issue of fact on its claim in that materials were supplied by Wagner and said materials were used in the improvement of the real property which was the subject of the filed lien.

### **FACTUAL STATEMENT OF THE CASE**

#### A. Undisputed Material Facts

The following facts were found by the District Court to be uncontroverted:

1. This matter arises from the construction of the Holiday Inn Express & Suites hotel (the "Hotel") located at 2340 N. Greenwich Road, Wichita, Kansas 67226. (R. III, 6).

2. The Hotel has been owned and operated by the Wichita Hospitality Group, LLC (the "Owner") at all relevant times. (Id.)

3. Pursuant to an Agreement dated September 20, 2012, Wichita Hospitality Group, LLC hired Puetz to be the general contractor to design and build the Hotel. (Id.)

4. Puetz subcontracted a portion of the work on the Hotel, including drywall work, to Dynamic pursuant to separate Subcontracts for Building Construction dated January 18, 2013 and May 3, 2013, respectively (collectively referred to as the "Subcontracts"). (Id.)

5. Wichita Hospitality Group, LLC was not a party to the Subcontracts between Puetz and Dynamic. (Id.)

6. Puetz made payments to Dynamic totaling \$271,270.78 for materials and services provided under the Subcontracts. (Id.)

7. Wagner furnished drywall materials to Dynamic, which Dynamic used in performing under its Subcontracts for the construction of the Hotel. The materials were last furnished on September 10, 2013. (R. III, 6-7).

8. Wagner claims that there is an outstanding balance of \$108,162.97 owed by Dynamic for the drywall materials. (R. III, 7).

9. On November 26, 2013 Wagner filed a lien statement in the Sedgwick County, Kansas District Court claiming a mechanic's lien on the Hotel in the amount of \$108,162.97 for drywall materials it supplied to Dynamic. (Id.)

10. Wagner did not file a notice of extension of time to file its lien statement. (Id.)

11. The Owner was in the process of refinancing the Hotel property at the time the lien statement was filed. (Id.)

12. In order to quiet title to the Hotel property to allow it to be refinanced and to free up the property from future litigation arising from the validity of Wagner's claimed lien, Puetz Corporation filed a Release of Lien Bond on January 13, 2014 pursuant to K.S.A. § 60-1110. (Id.)

13. The Release of Lien Bond was approved by the District Court. (Id.)

14. United Fire is the surety on the Release of Lien Bond. (Id.)

15. Puetz subcontracted a portion of the work on the Hotel to Dynamic, including drywall work and completion of the acoustical ceilings. (R. V, 4).

16. Wagner furnished drywall materials to Dynamic, which Dynamic used in performing under its subcontracts for the construction of the Hotel. (Id.)

17. The drywall materials were used by Dynamic in the improvements of the Hotel. (R. V, 5).

18. Wagner delivered the drywall materials to the Hotel construction site. (Id.)

19. Dynamic did not pay Wagner for the drywall materials. (Id.)

20. On November 26, 2013, Wagner filed a lien statement in the Sedgwick County, Kansas District Court claiming a mechanic's lien on the Hotel in the amount of \$108,162.97 for the drywall materials used in the improvement of the Hotel. (Id.)

21. On October 10, 2013, Wagner Interior Supply made written demand for payment from Puetz for the outstanding \$108,162.97 owed by Dynamic Drywall, but payment has not been made. (Id.)

22. Puetz and Wagner communicated about the fact that Dynamic had failed to pay Wagner in early December, 2005. (Id.)

B. The District Court's Ruling on Summary Judgment

On October 23, 2014 the District Court held a hearing and granted summary judgment in favor of Puetz and United Fire on Wagner's claim for

payment on the Release of Lien Bond. (R. VII, 23, 25). The Journal Entry was entered and filed on November 13, 2014. (R. VII, 23).

### **ARGUMENTS RELIED UPON**

The District Court misinterpreted Kansas mechanic's lien law when it granted summary judgment because the language added to K.S.A. 60-1110 in 2005 did not change the fact that a statutory lien bond is a substitute for a lien. By finding in favor of the general contractor Puetz and its surety United Fire, the District Court required strict compliance with perfection requirements when a statutory Release of Lien Bond has been filed contrary to established Kansas Supreme Court precedent in of Bob Eldridge Construction Co. v. Pioneer Materials, Inc., 235 Kan. 599, 684 P.2d 355 (1984). This finding by the District Court was a misstatement of the law which can only be corrected by reversal and remand.

Further, upon remand Wagner requests that this Court instruct the District Court to enter summary judgment in favor of Wagner for the reason that the uncontroverted facts show Wagner provided materials used in the improvement of the Hotel which were the subject of the lien. The only action left for the District Court to take on remand is to provide the parties the opportunity to present any remaining facts as to prejudgment interest, attorney's fees and costs.

### **I. THE DISTRICT COURT ERRONEOUSLY GRANTED PUETZ'S MOTION FOR SUMMARY JUDGMENT ON THE STATUTORY BOND BECAUSE:**

**A. THE HOLDING OF BOB ELDRIDGE CONSTRUCTION CO. V. PIONEER MATERIALS, INC., 235 KAN. 599, 684 P.2D 355 (1984) CORRECTLY STATES THE LAW IN THAT THE FILING OF A STATUTORY RELEASE OF LIEN BOND ELIMINATES AND WAIVES THE STRICT STATUTORY REQUIREMENTS FOR PERFECTING A MATERIAL SUPPLIERS' LIEN UNDER K.S.A. 60-1103; AND**

**B. THE 2005 AMENDMENTS TO K.S.A. 60-1110 DID NOT EXPRESSLY OR IMPLIEDLY CHANGE THE LAW AS EXPRESSED IN THE HOLDING OF BOB ELDRIDGE CONSTRUCTION CO. V. PIONEER MATERIALS, INC., IN THAT EVEN AFTER THE 2005 AMENDMENTS TO 60-1110 THE FILING OF A STATUTORY RELEASE OF LIEN BOND SHOULD ELIMINATE AND WAIVE THE STRICT STATUTORY REQUIREMENTS FOR PERFECTING A MATERIAL SUPPLIERS' LIEN UNDER 60-1103**

**A. STANDARD OF REVIEW FOR POINT I**

The standards for summary judgment apply on this appellate issue.

Bracken v. Dixon Industries, Inc., 272 Kan. 1272, 1274-75, 38 P.3d 679, 681-82

(2002); Mutual Savings Association v. Res/Com Properties, LLC, 32 Kan.App.2d

48, 51, 79 P.3d 184, 188 (2004). Summary judgment is appropriate if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Bracken at 1275. The appellate court must resolve all facts and inferences in favor of the party against whom the ruling is sought. Id. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. Id. If reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied. Id.

### **B. ARGUMENT FOR POINT I**

Resolution of this case requires interpretation of K.S.A. 60-1110 on mechanic lien bonds and whether Bob Eldridge Construction Co. v. Pioneer Materials, Inc., 235 Kan. 599, 684 P.2d 355 (1984) is still the law on a bond claimant's burden of proof. K.S.A. 60-1110 states:

**Bond to secure payment of claims.** The contractor or owner may execute a bond to the state of Kansas for the use of all persons in whose favor liens might accrue by virtue of this act, conditioned for the payment of all claims which might be the basis of liens in a sum not less than the contract price, or to any person claiming a lien which is disputed by the owner or contractor, conditioned for the payment of such claim in the amount thereof. Any such bond shall have good and sufficient sureties, be approved by a judge of the district court and filed with the clerk of the district court. When bond is approved and

filed, no lien for the labor, equipment, material or supplies under contract, or claim described or referred to in the bond shall attach under this act, and if when such bond is filed liens have already been filed, such liens are discharged. Suit may be brought on such bond by any person interested but no such suit shall name as defendant any person who is neither a principal or surety on such bond, nor contractually liable for the payment of the claim.

The following canons apply in interpreting 60-1110:

“The fundamental rule of statutory construction, to which all other rules are subordinate, is that the intent of the legislature governs.”

“An appellate court may consider various aspects of a statute in attempting to determine the legislative intent. The court must first look at the intent as expressed in the language of the statute. When the language is plain and unambiguous, an appellate court is bound to implement the expressed intent. Ordinary words are to be given their ordinary meanings without adding something that is not readily found in the statute or eliminating that which is readily found therein.”

“An appellate court must consider all of the provisions of a statute *in pari materia* rather than in isolation, and these

provisions must be reconciled, if possible, to make them consistent and harmonious. As a general rule, statutes should be interpreted to avoid unreasonable results.”

State v. McElroy, 281 Kan. 256, 262, 139 P.3d 100, 105 (2006) (quoting State v. Manbeck, 277 Kan. 224, Syl. ¶ 2, 3, 4, 83 P.3d 190 (2004)). Only if statutory language is ambiguous do courts move from interpretation to construction and rely on any revealing legislative history or background considerations that speak to legislative purpose, as well as the effects of application of the canons of statutory construction. State v. Haberlein, 296 Kan 195, 206, 290 P.3d 640, 648 (2012).

If the statute being interpreted is an amendment or revision to an existing law, courts presume the legislature intended to change the law as it existed prior to the amendment and acted with full knowledge of the existing law. State v. Englund, 50 Kan.App.2d 123, 126, 329 P.3d 502, 505 (2014). However, when a statute is ambiguous, and is later amended, the legislative purpose in amending it may be to clarify ambiguities within the statute, not to change the law. Brennan v. Kansas Ins. Guar. Ass’n., 293 Kan. 446, 458, 264 P.3d 102, 112 (2011); Hays v. Ruther, 298 Kan. 402, 407, 313 P.3d 782, 787 (2013). And, in interpreting provisions of a statute that are the same as those of a prior statute, they should be construed as continuation of such provisions and not a new enactment. Curless v. Board of County Com’rs of Johnson County, 197 Kan. 580, 586-87, 419 P.2d 876, 881 (1966).

Prior to 2005 K.S.A. 60-1110 had been interpreted to plainly and unambiguously show that liens need not be perfected for the lienholder to be entitled to recover on the bond. Bob Eldridge Construction Co. v. Pioneer Materials, Inc., 235 Kan. at 603, 684 P.2d at 360; Murphree v. Trinity Universal Ins. Co., 176 Kan. 290, 294, 269 P.2d 1025 (1954). Instead, all that needed to be shown was that the claimant could have perfected the lien if the bond had not been filed. Id. This result was based on the fact that the statutory lien bond is a substitute for liens. Id. These rulings have not been criticized since 1984. Nevertheless, Puetz convinced the District Court it no longer needed to follow Supreme Court precedent because 60-1110 was amended in 2005. Under its interpretation of 60-1110, Puetz swayed the District Court to apply strict compliance requirements and hold Wagner's lien unperfected because on its face the lien statement did not list the name of the owner or subcontractor. (R. VI, 94-95).

The District Court got it wrong because the 2005 amendments to 60-1110, when read in the context of prior versions of 60-1110 and the circumstances of its passage, show the language of 60-1110 interpreted in Bob Eldridge on perfection did not change in the amended statute. Instead, the amendment was part of a legislative effort to clarify the law on priority of liens. The District Court should have followed Bob Eldridge and denied Puetz's Motion for Summary Judgment. For this reason the District Court erred.

1. History of 60-1110 Before 2005

The current version of K.S.A. 60-1110 became law in 2005. In order to aid this Court 60-1110 is restated in its entirety with the 2005 amended language in italics:

**Bond to secure payment of claims.** The contractor or owner may execute a bond to the state of Kansas for the use of all persons in whose favor liens might accrue by virtue of this act, conditioned for the payment of all claims which might be the basis of liens in a sum not less than the contract price, *or to any person claiming a lien which is disputed by the owner or contractor, conditioned for the payment of such claim in the amount thereof.* Any such bond shall have good and sufficient sureties, be approved by *a judge of the district court* and filed with the clerk of the district court. When bond is approved and filed, no lien *for the labor, equipment, material or supplies under contract, or claim described or referred to in the bond* shall attach under this act, and if when such bond is filed liens have already been filed, such liens are discharged. Suit may be brought on such bond by any person interested *but no such suit shall name as defendant any person who is neither a principal or surety on such bond, nor*

*contractually liable for the payment of the claim.* (Italics added)

The unitalicized portion of 60-1110 was the statutory language for many years and had been interpreted to show that a lien need not be perfected for the lien holder to recover on a bond. Bob Eldridge Construction Co. v. Pioneer Materials, 235 Kan. at 603, 684 P.2d at 360; Murphree v. Trinity Universal Ins. Co., 176 Kan. 290, 294, 269 P.2d 1025 (1954). Rather, to recover it must merely be shown that the lien could have been perfected if the bond had not been filed. Bob Eldridge, 235 Kan. at 603, 684 P.2d at 360.

The facts of Bob Eldridge are as follows. Bob Eldridge Construction Company (“Eldridge”) was the general contractor for the construction of two high-rise apartment complexes who subcontracted drywall work to R&S Construction Company (“R&S”). R&S subcontracted with Pioneer Materials (“Pioneer”) to supply all drywall for the project. Pioneer supplied the materials but was not paid. Pioneer filed mechanic’s lien statements in the counties where the projects were located. Shortly after the lien statements were filed by Pioneer, Eldridge, as principal, and Fireman’s Fund Insurance Company as surety, executed and filed bonds pursuant to K.S.A. 60-1110 to discharge Pioneer’s liens.

In related litigation Pioneer sought recovery on the bonds for the unpaid materials that were the subject of the discharged liens. Trial was held and judgment entered in favor of Pioneer against Eldridge and Fireman’s Fund. On appeal Eldridge argued that Pioneer had not perfected its liens by complying with

all of the statutory requirements, including proof of a reasonably itemized statement, an authorized verification, and proof that the material was used or consumed for the improvement of real property. Bob Eldridge, 235 Kan. at 603, 684 P.2d at 359. The Supreme Court disagreed and affirmed the trial court holding that once a Release of Lien Bond is filed, the claimant does not have to prove the lien must be perfected. Rather, all that must be shown is that the claimant “could” have perfected the lien. Bob Eldridge, 235 Kan. at 603-604, 684 P.2d at 360.

The same issue raised by Puetz, to what extent a bond claimant must show it could have perfected its lien, was previously decided in Bob Eldridge:

The issue before the court is to what extent the appellee must show it could have perfected its liens. We hold the rule as stated in Murphree that “when the bond is filed a claimant is not required to file a lien statement in order to preserve his rights – he may then look to the bond for recovery . . .” 176 Kan. at 294, 269 P.2d 1025. This means when the bond is filed the statutory requirements of the lien, such as the filing of a lien statement, need not be complied with and are waived. The only requirement to recover the bond money is to prove the material or labor was supplied by the claimant and was used in the improvement of the real property which was the subject of the lien. The case then shifts from a

showing that each statutory lien element was fulfilled to a showing that the claimant has a right to the bond. See 57 C.J.S. Mechanic's Liens §233, p. 806. The posting of a bond also eliminates the need for the strict construction rule we adhere to in mechanic's lien cases since the lien is thereby eliminated.

Bob Eldridge, 235 Kan. at 604, 684 P.2d at 360.

Wagner submits the facts of this case are nearly identical to those in Bob Eldridge and as a result the motion for summary judgment in favor of Puetz should be reversed. Reversal is appropriate even when the additional language added in 2005 to 60-1110 is considered. The current version of 60-1110 contains most of the wording from its pre 2005 version. It is logical to conclude that by keeping this language the legislature expressed an intent to maintain, and not change, the law as it was previously interpreted with the words used. The legislature added clarifying language instead of different language which further shows the intent was not to change the law as interpreted in Bob Eldridge.

Wagner submits that Bob Eldridge's interpretation is easily harmonized with the language added to 60-1110 in 2005 by considering the circumstances under which such amendments were made. Even though legislative history is not to be relied on in construing an unambiguous statute, the background history is relevant here to show the legislature was addressing a priority, not perfection, issue when it undertook amending the mechanic's lien statutes in 2005.

## 2. Circumstances of 2005 Amendments

In 2005 the Kansas legislature was asked to address two holdings made in the case of Mutual Savings Association v. Res/Com Properties, 32 Kan.App.2d 48, 79 P.3d 184 (2003) that members of the public felt muddied the water on priority of liens. Minutes, Senate Judiciary Committee, August 3, 2005. First, in Mutual Savings it was held that mechanic's lien priority for all subsequent lienholders under K.S.A. 60-1101 could be established by a contractor or subcontractor who has been paid in full and no longer had a claim on the property. Id. Second, Mutual Savings held that work that was not visible could establish the priority date for all other subsequent lienholders. Id., see also Mutual Savings, 32 Kan.App.2d at 56, 79 P.3d at 191. The legislature responded to these rulings by amending 60-1101 for the stated purpose of clarifying Kansas law on priority of materialman's liens rendered uncertain by the Mutual Savings opinion. Minutes, Senate Judiciary Committee, August 3, 2005. While the legislative discussion focused on the language of 60-1101, the final version of the bill included language added to not only 60-1101, but also other statutes including 60-1110. S.B. 112, 2005 Leg., Reg. Sess. (Kan. 2005).

The 2005 amendment to 60-1110 added five clarifying phrases while readopting the majority of the existing language. First, at the end of the first sentence this phrase was added: "or to any person claiming a lien which is disputed by the owner or contractor, conditioned for the payment of such claim in the amount thereof." It was in this additional language that Puetz seized on the

word “disputed” to suggest to the District Court that the meaning of 60-1110 had been altered such that Bob Eldridge’s holding on waiver of strict perfection requirements was no longer controlling. (R. VI, 94-95).

Puetz and the District Court are incorrect because when the word “disputed” is read in context with the first part of the first sentence: “The contractor or owner may execute a bond to the state of Kansas for use of all persons in whose favor liens might accrue by virtue of this act. . .” it is obvious the legislature intended to clarify the class of persons impacted by the bond. Before the 2005 amendment the bond was intended to impact the class described as “all persons in whose favor liens might accrue by virtue of this act.” The 2005 amendment included this class of persons but also included “any person claiming a lien which is disputed by the owner or contractor.” Use of the word “or” that was added to the phrase “or to any person . . .” shows the legislative intent of granting an alternative right for a contractor or owner to post a bond as to one, but not all, potential lien claimants on a project. A contractor or owner would want to post this type of bond in situations where multiple lien claimants might exist, some of which were disputed, (i.e. whether materials were supplied, etc.) and some of which were not disputed. An owner or contractor might want to “bond” around a single lien claimant with an early priority filing date so as to bar later lien claimants from using the earlier priority date for their later filed liens. For this reason the added language clarifies an owner’s and contractor’s right to control

priority of liens and not an intent to change the established law on perfection of liens.

Such intent is further shown by the additional language added in the first sentence that the bond would be “conditioned for the payment of such claim in the amount thereof.” This language must be read with the alternative option in the earlier part of the sentence where the bond was to be “in a sum not less than the contract price.” It makes sense that the legislature intended to give a contractor or owner who was disputing a specific lien from a specific contractor the statutory right to post a bond in the amount of the disputed lien instead of the full contract price. Before the 2005 amendment the bond would need to be in the amount of the full contract price instead of just the disputed lien amount. On a large commercial construction project the difference in bond amounts could be hundreds of thousands, and potentially, millions of dollars. This language was added to deal with priority not perfection of liens.

The absence of the word “perfected” before the word “lien” also shows the legislature did not intend to change existing law holding that bonds are substitutes for liens and as a result the filing of a bond waives strict compliance with the requirements for perfection. Had the legislature wanted to change the law as expressed in Bob Eldridge, it could have included “perfected” before or after, the word “lien” in 60-1110. The words “lien” and “liens” appear six times in 60-1110. At no place did the legislature add any descriptive or limiting language to “lien.” If additional or limiting language to “lien” had been used then it would

show a clear intent the legislature required strict compliance with perfection requirements and the holding of Bob Eldridge would no longer be the law. Failing to do so leads to the conclusion the legislature did not intend to change the law on perfection.

The second area of added language in 60-1110 appears at the beginning of the second sentence with the words “Any such bond shall have . . . .” This language does not change the law. It merely clarifies that whether the bond is “in a sum not less than the contract price” or “in the amount thereof” of a disputed claim, the bond must have a good and sufficient surety. This requirement was the same before 2005.

The third area of added language is in the middle of the second sentence where the legislature added “a judge of the district court.” This language clarified who at the district court must approve the bond. Nothing in this additional language impacts Wagner’s claim because Puetz’s bond was approved by the District Court.

The fourth addition is contained in the third sentence where the words “for the labor, equipment, material or supplies under contract, or claim described or referred to in the bond.” The language follows the first sentence of 60-1101 granting lien rights to “any person furnishing labor, equipment, material or supplies . . . under a contract . . . .” This language in 60-1110 does not change the law but merely clarifies that no “lien” or “claim” shall attach under the act when a bond has been approved or filed.

The fifth and final addition is contained at the end of the last sentence of 60-1110 with the phrase “. . . but no such suit shall name as defendant any person who is neither a principal nor surety on such bond, nor contractually liable for the payment of the claim.” The plain meaning of this language makes it clear that in suits on bonds there can only be two groups of persons who can be named as defendants: (1) principals and sureties on the bond; and (2) persons contractually liable for payment of a claim. Here the two defendants, Puetz and United Fire, are the principal and surety. The added language does not address perfection requirements for the lien.

These five parts of 60-1110 that contain language added in 2005 can be harmonized with caselaw interpretation of the statute before 2005. The interpretation that liens need not be perfected to be entitled to recover on the bond still applies to 60-1110. The lien, whether perfected or not, is eliminated when the bond is filed. The legislature did not intend to change this result with the language added in 2005.

Since the law on waiver of lien perfection was not changed by the legislature in 2005, the District Court was required to follow Bob Eldridge and deny Puetz’s Motion for Summary Judgment. See Anderson Office Supply v. Advanced Medical Assoc., 47 Kan.App.2d 140, 161, 273 P.3d 786, 800 (2012) (holding lower courts are duty bound to follow supreme court precedent in absence of some indication that the court is departing from its previous position) and Simmons v. Porter, 298 Kan. 299, 304, 312 P.3d 345, 350 (2013) (holding

once a point of law has been established by a court, it will generally be followed by the same court and all courts of lower rank in subsequent cases when the same legal issue is raised).

3. Reading a Perfection Requirement into 60-1110 is Unreasonable

As a general rule statutes should be interpreted to avoid unreasonable results. State v. McElroy, 281 Kan. at 262, 139 P.3d at 105. By requiring Wagner to prove its lien was perfected even though a bond had been approved and filed, the District Court imposed an unreasonable result contrary to the plain meaning of 60-1110. The statute merely requires that Wagner's lien could have been perfected. Bob Eldridge Construction Co., 235 Kan. at 603, 684 P.2d at 360. Instead, the District Court established a higher level of proof to recover on the bond than required by the statute. The level of proof required by the District Court contained these elements: (1) a perfected lien filed by Wagner, (2) materials supplied by Wagner, and (3) Wagner's materials were used in the construction of the Hotel. Requiring perfection of the lien was unreasonable when compared with the purpose of 60-1110 which is to discharge a lien when a bond is approved and filed.

Puetz convinced the District Court that Wagner's lien was "fatally defective" because it failed to properly identify the owner of the Project in accordance with 60-1102(a)(1) and it failed to identify the contractor in accordance with 60-1103(a)(1). (R. VI, 96). This argument misapplied the established law in Bob Eldridge that a bond claimant does not have to "validate its

lien” with requisite statutory proof. In Bob Eldridge the contractor and surety argued the same thing as Puetz in this case, that the bond claimant failed in its proof because the liens had not been perfected by complying with all of the statutory requirements for a lien. Bob Eldridge, 235 Kan. at 603, 684 P.2d at 359. The Supreme Court decided the issue by holding 60-1110 did not require proof of the mechanic’s lien statutory requirements. This interpretation is also the same under the current language of 60-1110 because use of the word “disputed” does not express an intent of requiring lien perfection.

The unreasonableness of the District Court’s interpretation of 60-1110 is not lessened by Puetz’s contention that even under Bob Eldridge Wagner could not show it “could have perfected its lien” because by the time Puetz’s lien was filed the ability to perfect its lien had already expired. (R. VI, 96). Wagner last furnished materials on September 10, 2013 (R. III, 26). Wagner timely filed its lien on November 26, 2013. (R. V, 38). The Release of Lien Bond was filed by Puetz on January 13, 2014. (Id.) Puetz could have challenged the validity of the lien before posting its bond but it chose not to. Puetz had Wagner’s lien and never challenged it. Prior to suit being filed, Puetz elected to post a bond which shifted Wagner’s burden from showing that each statutory lien element was fulfilled to showing that Wagner had a right to the bond. Bob Eldridge, 235 Kan. at 603, 684 P.2d at 359, see also 57 C.J.S. Mechanic’s Liens § 233 p. 806.

There is no clear conflict between the current version of 60-1110 and the holding of Bob Eldridge because Puetz always had the right in the suit on the bond

to dispute that the materials were supplied by Wagner and/or that the materials were used in the improvement of the Hotel. Bob Eldridge, 235 Kan. at 604, 684 P.2d at 360. 60-1110 is not rendered meaningless by a waiver of the strict requirements for perfection.

There are no facts showing that Puetz disputed Wagner's lien at the time of the filing of the Release of Lien Bond. The first Wagner was aware that Puetz claimed that the mechanic's lien was unperfected and not enforceable was when the Agreed Joint Pretrial Conference Order was submitted in August, 2014. (R. III, 24). The lien was filed on November 26, 2013. (R. III, 26). Puetz received notice of the lien and rather than raise any statutory defenses it chose to file the Release of Lien Bond on January 13, 2014. (R. III, 27). Wagner filed this suit on February 13, 2014. (R. I, 9). In its answer filed on March 27, 2013 Puetz did not raise any statutory defenses or other defense. (R. I, 22).

### **C. CONCLUSION FOR POINT I**

In conclusion, Wagner requests this Court reverse the District Court's grant of summary judgment in favor of Puetz and United Fire. The District Court incorrectly found that the 2005 amendment to 60-1110 now requires unpaid material suppliers to strictly comply with mechanic's lien perfection rules when a statutory Release of Lien Bond has been approved and filed. There is no such requirement in the plain language of 60-1110 and it was error to so find.

**II. THE DISTRICT COURT ERRONEOUSLY DENIED WAGNER'S MOTION FOR SUMMARY JUDGMENT ON THE STATUTORY BOND BECAUSE WAGNER ESTABLISHED AS A MATTER OF LAW THAT THERE WAS NO MATERIAL ISSUE OF FACT ON ITS CLAIM IN THAT MATERIALS WERE SUPPLIED BY WAGNER AND SAID MATERIALS WERE USED IN THE IMPROVEMENT OF THE REAL PROPERTY WHICH WAS THE SUBJECT OF THE FILED LIEN.**

**A. STANDARD OF REVIEW FOR POINT II**

The standards for summary judgment apply on this appellate issue. Wagner adopts and incorporates its statement on the standard of review for Point on Appeal I herein by reference.

**B. ARGUMENT FOR POINT II**

In Point I Wagner presented this Court with the reasons why Bob Eldridge Construction Co is still good law. Under the holding of Bob Eldridge Construction Co., Wagner is entitled to recover on the bond if it is proven that it provided material or labor used in the improvement of the real property which was the subject of the lien. Bob Eldridge, 235 Kan. at 604, 685 P.2d at 360. The uncontroverted facts show Wagner satisfied the requirements for recovery. Uncontroverted Fact 16 established “Wagner furnished drywall materials to Dynamic, which Dynamic used in performing under its subcontracts for the

construction of the Hotel. (R. VI, 91). Uncontroverted Fact 17 proved “The drywall materials were used by Dynamic in the improvements of the Hotel.” (Id.) Uncontroverted Fact 20 was “On November 26, 2013 Wagner filed a lien statement in the Sedgwick County, Kansas District Court claiming a mechanic’s lien on the Hotel in the amount of \$108,162.97 for the drywall materials used in the improvement of the Hotel.” (R. VI, 92). The uncontroverted facts entitled Wagner to judgment as a matter of law against Puetz and United Fire.

**C. CONCLUSION FOR POINT II**

It was error for the District Court to deny Wagner’s summary judgment motion on the statutory bond claim because Wagner established by the uncontroverted facts that it provided materials used in the improvement of the Hotel which were the subject of the lien. Wagner requests that as part of this appeal this Court remand the case back to the District Court with instructions to enter judgment in favor of Wagner in the amount of \$108,162.97 and to provide the parties the opportunity to calculate appropriate prejudgment interest, attorney’s fees and other costs.

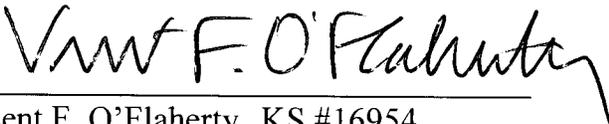
**RELIEF REQUESTED**

In order to correct the District Court’s errors, Wagner requests the following relief: First, this Court should reverse the District Court’s Journal Entry and Order Granting Summary Judgment in Favor of Defendants Puetz Corporation and United Fire and Casualty Company. Second, this Court should remand this matter to the District Court and instruct the District Court to enter summary

judgment in favor of Wagner and to provide the parties the opportunity to calculate appropriate prejudgment interest, attorney's fees and other costs. Finally, Wagner requests any other relief deemed necessary and proper by this Court.

Respectfully submitted,

LAW OFFICES OF VINCENT F.  
O'FLAHERTY, ATTORNEY, LLC

By 

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INTERIOR SUPPLY OF WICHITA, INC.

**CERTIFICATE OF MAILING**

I hereby certify that two copies of Appellant's Brief were served this  
24<sup>th</sup> day of February, 2015 via Regular Mail on:

Mr. Richard A. Kear  
Mr. Ryan M. Peck  
Morris, Laing, Evans, Brock & Kennedy, Chtd.  
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ATTORNEY FOR DEFENDANT/APPELLEE

  
\_\_\_\_\_  
Attorney for Appellant Wagner Interior  
Supply of Wichita, Inc.

# LEGISLATIVE HISTORY

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:30 A.M. on February 10, 2005, in Room 123-S of the Capitol.

All members were present except:  
Derek Schmidt- excused

Committee staff present:  
Mike Heim, Kansas Legislative Research Department  
Jill Wolters, Office of Revisor of Statutes  
Helen Pedigo, Office of Revisor of Statutes  
Nancy Lister, Committee Secretary

Conferees appearing before the committee:  
Edward P. Cross, Executive Vice President, Kansas Independent Oil and Gas Association  
Stanley Jackson, Senior Vice President, Insurance Planning, Inc.  
Kathy Olsen, Kansas Bankers Association  
Matthew Goddard, Vice President, Heartland Community Bankers Association  
William Larson, General Counsel to Associated General Contractors of Kansas  
Woody Moses, Managing Director of the Kansas Ready Mixed Concrete Association

Others attending:  
See attached list.

Chairman Vratil opened the meeting. There were no bill introductions.

Chairman Vratil opened the hearing on SB 97.

**SB 97--Bill by Financial Institutions and Insurance Construction contracts; indemnification agreements**

**Proponents:**

Ed Cross testified on behalf of the Kansas Independent Oil and Gas Association in support of the bill. The bill amends K.S.A. 2004 Supp. 16-121 to include oil and gas exploration and production activities in the definition of a construction contract. Mr. Cross stated that the bill augments last year's HB 2154 which addressed indemnification provisions for construction contracts along with other railroad issues. The bill would disallow any hold harmless or indemnification agreement that called for a contractor to protect the operator if a claim of negligence were made against the operator. Mr. Cross stated the Association's goal is to make the Master Service Agreement what it started out being, and to eliminate what is above and beyond what the basic agreement did. (Attachment 1)

Stanley Jackson, testified on behalf of Insurance Planning, Inc., and stated that the one asked to assume the risk has the insurance and if there is a loss, then the premium goes up. (Attachment 2)

Chairman Vratil stated that the bill is basically HB2154 that the Governor signed into law last year, with the oil and gas industry added to it. They are asking for the same treatment as the railroad industry received in the House bill. Additionally, the Small Truckers Association is asking for the same treatment. Chairman Vratil stated he intends to ask for an interim study on whether the public policy of Kansas should permit one party to indemnify another party for that other party's negligence.

Chairman Vratil closed the hearing on SB 97 and opened the hearing on SB 112.

**SB 112--Materialman's liens; priority of claims; property under construction**

**Proponents:**

Kathleen Taylor Olsen, representing the Kansas Bankers Association, stated she brought a guest, Dennis Hadley of the Dennison State Bank in Holton, in case there were questions. The bill amends several statutes relating to the priority of materialman's liens. K.S.A. 60-1101 establishes the basis for determining priority of claims against property under construction. The requested change in lines 30-32, page 1, states that materialmans' liens are measured from the date that the earliest unpaid lien holder begins work on a property,

## CONTINUATION SHEET

MINUTES OF THE Senate Judiciary Committee at 9:30 A.M. on February 10, 2005, in Room 123-S of the Capitol.

and not the date work began by a party who has been paid in full. The second change also establishes the priority date for all other lien holders. Ms. Olsen stated that a recent court case, *Mutual Savings Association vs. Res/Com Properties*, cast doubt on the reliability of K.S.A. 60-1101. The court decision indicated that the priority date for all subsequent lien holders under the law could be established by a contractor or subcontractor who has been paid in full and no longer has a claim on the property, and that work that is not visible can establish the priority date for all other subsequent lien holders under the law. (Attachment 3)

Ms. Olsen stated that the intention of the bill is to ensure that improvements to a property are visible. A contractor should not be able to stick a sign in the ground, perform no work, and yet, because of the sign, be considered as having established visible work on the premise.

Chairman Vratil questioned whether an alternative should be to allow anyone that provides labor, equipment or supplies to a job site to file a simple one-page notice of lien with the Register of Deeds. That would then be considered public notice to the world, including any lender, that the lender may have reason to be concerned about a potential lien on the property. Ms. Olsen said that is what happens in Nebraska, and might solve the problem.

Senator Bruce cited K.S.A.60-1103 (A) which reads " Any supplier, sub-contractor or any other person furnishing labor, equipment, materials or supplies, used or consumed at the sight of the property subject to lien, under agreement with the contractor, or sub-contractor or owner contractor may obtain a lien for the amount due in the same manner and to the same extent as the original contractor." He questioned if there still would be some conflict, because that is what the court relies on to place liens subsequent after the mortgage has been placed, and that was how sub-contractors leapfrog ahead in front of the mortgage as the first unsatisfied lien holder. Ms. Olson stated that it was her understanding that by amending K.S.A. 60-1101, which is the contractors sub-section, also affects K.S.A. 60-1103. Ms. Olsen stated she would have the attorneys review this.

Senator Bruce gave another scenario of a contractor that comes in, does work, perhaps the site runs out of money so they get a mortgage on the project. The lending institution comes in, sees the concrete is poured, and they go ahead and pay off the first contractor, then other contractors come in later. Senator Bruce was concerned that the understanding would be that the other subcontractors would go ahead of the first mortgage. Ms. Olsen stated that currently, and what happened in the *Mutual* case was, the lending institution paid off the contractor that came before the mortgage lender, the lender obtained a lien assignment, and the court said that everyone still gets to piggyback relief off of the original lien because the lender didn't get a lien waiver. In fact the lender needed to obtain lien waivers from everyone. Senator Bruce asked if this would only come into play if the first contractor was unsatisfied, or whether he was paid or not. Ms. Olsen stated that this is the problem. The norm is that before a mortgage is given, any work done prior to the mortgage being effective is paid for, so that there are no prior liens and the institution lending the money is the first lien holder.

Matthew Goddard, testifying on behalf of the Heartland Community Bankers Association, stated the *Mutual* case upset the long-term understanding of the law as it relates to priority of materialman's liens. Additionally, the *Mutual* Case clouded the issue of what is "lienable" work, and identified seven standards of what constitutes lienable work. (Attachment 4)

### Opponents:

William Larson, representing the Associated General Contractors of Kansas (AGC), testified that the AGC opposes the bill. The AGC takes the position that the amendments proposed to the lien laws are not necessary, that there are existing ways for financial institutions to protect themselves when financing a project. (Attachment 5)

Woody Moses stated that he represents three different organizations and asked the Committee to review the written testimony submitted on behalf of the Kansas Ready Mixed Concrete Association, Kansas Aggregate Producers Association, and the Kansas Cement Council. (Attachments 6-8)

Clinton Patty testified on behalf of the Kansas Aggregate Producers Association and the Kansas Ready Mixed Concrete Association. Mr. Patty stated that the Associations are opposed to the bill because it seeks to

CONTINUATION SHEET

MINUTES OF THE Senate Judiciary Committee at 9:30 A.M. on February 10, 2005, in Room 123-S of the Capitol.

substantially change the state's lien laws, depriving subcontractors of substantial protections guaranteed mostly to small businesses. The bill would be overturning what the Kansas Supreme Court established in the *HAZ-Mat* case. Section 2, under K.S.A. 60-1103, causes problems by changing the verbiage. If a project goes bad and there is not enough money to pay everyone, the sub-contractors should be higher up in the lien sequence, as they are not in a position financially to absorb the loss if their liens are not paid. (Attachment 9)

Chairman Vratil asked whether Mr. Patty and the Associations would react favorably to a proposal which would require a contractor or sub-contractor to file a one-page notice of lien with the Register of Deeds, indicating the description of the project, the date labor and materials were first supplied, and an estimate of the value of the goods and services. Mr. Patty stated that they are not without sympathy for the Bankers and other lien holders in the state and believe something could be worked out without unraveling thirty years of lien laws. Chairman Vratil suggested that the interested parties present get together and try to work out something that will be acceptable to all parties, and perhaps explore the method that Nebraska is using.

Testimony in opposition to the bill was provided in writing from Gus Rau Meyer, President, Rau Construction Company. (Attachment 10)

Chairman Vratil adjourned the meeting at 10:30 A.M. The next meeting is scheduled for February 14, 2005.



February 10, 2005

To: Senate Committee on Judiciary

From: Kathleen Taylor Olsen, Kansas Bankers Association

Re: SB 112: Materialman's Lien Statute

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to appear before you today to in support of SB 112, a bill that amends several statutes relating to the priority of Kansas materialman's liens. These amendments are the result of a collaborative effort among the Kansas Land Title Association, the Heartland Community Bankers Association and the Kansas Bankers Association. This bill draft represents this group's attempt to address a recent Kansas Court of Appeals decision, *Mutual Savings Assoc. v. Res/Com Prop.*, 32 Kan. App. 2d 48, 79 P.3d 184 (2004).

K.S.A. 60-1101, establishes the basis for determining priority of claims against property under construction. We believe that this statute provides that all unpaid materialmans' liens relating to the same improvement have equal rank with one another, and that all have priority over any other lien that is recorded subsequent to the commencement of visible work on the property.

There are two very important keys to this law: 1) that the priority for materialmans' liens over other liens is measured from the date that the earliest unpaid lienholder began work on the property, and not the date work began by some party who has been paid in full; and 2) that the work establishing the priority date for all other lienholders must be something that is visible at the property site.

The Court in the *Mutual Savings* case cast doubt on the reliability of the law as we know it to be. The Court decision indicates that the priority date for all subsequent lienholders under this law can be established by a contractor or subcontractor who has been paid in full and no longer has a claim on the property; and that work that is not visible can establish the priority date for all other subsequent lienholders under this law.

We believe that these amendments are necessary to re-establish the long-understood rule that allowed a mortgagee to ensure the priority of the recorded mortgage against unknown lienholders under this law by: 1) providing that those who have been paid in full and who no longer have a claim on the property cannot establish the priority date for subsequent lienholders; and 2) requiring that the work done on the property which establishes the priority date for all subsequent lienholders be visible, thereby giving notice to the world that there may be lien claims on the property.

Thank you and we would respectfully request that the Committee act favorably on SB 112.

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email kbaoffice@ink.org

Senate Judiciary  
2-10-05  
Attachment 3

HEARTLAND  
COMMUNITY  
BANKERS  
ASSOCIATION

Matthew S. Goddard, Vice President

700 S. Kansas Ave., Suite 512  
Topeka, Kansas 66603

Office (785) 232-8215 • Fax (785) 232-9320  
mgoddard@hcbankers.com

To: Senate Judiciary Committee

From: Matthew Goddard  
Heartland Community Bankers Association

Date: February 10, 2005

Re: Senate Bill 112

The Heartland Community Bankers Association appreciates the opportunity to appear before the Senate Committee on Judiciary to express our support for Senate Bill 112.

The Heartland Community Bankers Association represents savings associations in Kansas, Arkansas, Colorado, Nebraska and Oklahoma. Our Kansas membership makes more than \$250 million in construction loans annually for residential and commercial properties.

A ruling by the Court of Appeals in *Mutual Savings Association v. Res/Com Properties*, 32 Kan. App. 2d 48, 79 P.3d 184 (2004), has caused concern among Kansas lenders and has the potential to jeopardize future construction lending. The ruling upset our long-term understanding of Kansas law as it relates to the priority of materialman's liens. We believe Senate Bill 112 is a fair attempt to protect the interests of lenders, contractors and subcontractors. By providing for the interests of these three groups, we are also serving the interests of the owners of the property being constructed.

Currently, K.S.A. 60-1101 provides the basis for determining the priority of materialman's liens. The first lien can be filed when labor, equipment, material or supplies are used or consumed for the improvement of real property. The lien enjoys priority over all other liens which are subsequent to the start of the furnishing of labor, equipment, material and supplies at the property that is the subject of the lien. When two or more liens are filed on the same improvement, all of the liens are similarly preferred to the date of the earliest unsatisfied lien. A 1990 appellate court ruling upheld the long-time standard that any improvements to the property must be visible. This was so everyone would know lienable work had been performed.

In the *Mutual* case, the court found that even when Mutual Savings, which had second priority with its mortgage, paid the contractor with first lien priority and took assignment of its priority lien, the liens of contractors who subsequently performed lienable work still had priority over Mutual because of the "piggy-back" effect of materialman's liens. The court essentially said that the "earliest unsatisfied lien" remains so even after it is paid off. It was the expectation of our industry that Mutual would have first priority after paying the original lienholder and taking assignment of its lien.

HCBA is also concerned because the *Mutual* ruling seems to permit liens for work which is not visible and allows those liens to set the priority date for subsequent lienholders. Prior to *Mutual*, and affirmed in a 1977 opinion, work performed at a site constituted notice of the existence of the lien. Post-*Mutual*, we now live in an era of uncertainty as that standard seems to no longer be valid. Lenders are concerned that they may no longer know when lienable work has commenced.

SERVING FINANCIAL INSTITUTIONS IN COLORADO, KANSAS, NEBRASKA, AND OKLAHOMA Senate Judiciary

2-10-05  
Attachment 4

Senate Bill 112 requires that lienable work must be visible at the site of the property subject to the lien. The bill also provides that if an earlier unsatisfied lien is paid in full, the preference date for everyone with a claim becomes the date of the next earliest unsatisfied lien.

The ruling in *Mutual v. Res/Com* does not impact the vast majority of construction projects where the lender who is financing the construction files its lien prior to the commencement of work on the property. However, in instances where work begins or supplies are furnished before the lender files its lien, the uncertain presence of materialman's liens risks the project's financing. Although the Court of Appeals stated that lenders may protect the priority of their mortgage by obtaining lien waivers, any risk associated with that process may prompt the lender to abandon the project altogether. HCBA believes that by allowing the status quo to remain in place, lenders will be more likely to withdraw financing than risk losing out on the priority of its claim.

We respectfully request that the Senate Committee on Judiciary recommend SB 112 favorable for passage.

Thank you.

4-2

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TESTIMONY OF WILLIAM A. LARSON,  
GENERAL COUNSEL TO THE ASSOCIATED  
GENERAL CONTRACTORS OF KANSAS  
TO THE SENATE JUDICIARY COMMITTEE ON  
SENATE BILL 112

The Associated General Contractors of Kansas, is an Association consisting of the majority of commercial general contractors (other than in Wyandotte and Johnson County) in the construction building industry. The Association, however, does not just represent general contractors. It also has in Kansas a large number of subcontractor members as well as associate members including material suppliers who have lien rights under our current mechanics liens laws. The Associated General Contractors of Kansas (AGC) opposes Senate Bill No. 112.

Senate Bill No. 112 is a reaction to the Kansas Court of Appeals case of *Mutual Savings Association v. Res /Com Properties, LLC, et al.*, 32 Kan.App.2d 448, 79 P.3d 184 (2003). In this case, Mutual Savings Association was attempting to foreclose on its mortgage against the owner of a project that defaulted on payments to Mutual Savings as well as to its contractor and subcontractors. Succinctly put the Court of Appeals held that the Mutual Savings Association did not have a first and prior lien to the mechanic's lien claimants and further held that it was not absolutely necessary that work on the site be visible prior to a mechanic's lien attaching. While it would probably not be productive to go into a detailed explanation of the *Mutual Savings Association* case, it suffices to say that the situation that occurred in the *Mutual Savings* case, was very unusual.

The AGC of Kansas has historically opposed changes to the mechanic's lien laws unless there was a very good reason for them. The reason is that the mechanic's lien laws are currently understood as a result of industry practice and numerous court interpretations of the law. Any time a change is made in the lien laws, it often results in multiple court decisions before the changes or the effects of those changes can be accurately evaluated by those involved in commercial construction industry in Kansas.

The AGC would agree with the Kansas Bankers Association and other financial institutions who support this law to the extent that where a project is financed, the financing entity would normally have a first and prior lien. In most cases, this is not an issue because the project does not go forward until the financing is in place. The problem in the *Mutual Savings* case was that because of a change in ownership work had been done on the project prior to the mortgage being filed. We believe that under existing laws, there was a very clear

Senate Judiciary  
2-10-05  
Attachment 5

means of protecting Mutual Savings' interest. Mutual Savings could have and should have obtained lien waivers from all of those who had performed any work on the project prior to filing the mortgage. It is our understanding that it is common practice for financial institutions to determine exactly what work, if any, has been done on a project prior to filing a mortgage and obtaining lien waivers or lien subordination agreements pertaining to those entities. In this case, Mutual Savings simply failed to do that for whatever reason. We do not believe it is appropriate to change the lien laws to try and alleviate a situation that normally would not and should not occur. The effect of the change advocated for K.S.A. 60-1101 would be to allow any party to change the preference date of all lien claimants after all of the encumbrances have been filed and during foreclosure procedures. This would involve what we believe would be a fairly drastic change in the lien laws which historically have stated that all mechanic's lien claimants are similarly preferred to the date of the earliest unsatisfied lien when the liens are filed. We do not believe that the law should be changed in reaction to a single case which involves a very unusual circumstance.

In addition, we also agree with the analysis of the Court of Appeals in the *Mutual Savings Association* case which held that in certain circumstances, lienable work may attach even though there is no visible change in the property. As noted in the Mutual Savings cases, companies can expend significant amounts of money in doing work on a project, some of which may include alterations to the site which are not readily visible. Certainly, we adamantly disagree with the language proposed in the change to K.S.A. 60-1101 which states "The placement of a sign or survey stakes at the site shall not constitute the 'visible furnishing' of labor, equipment, material and supplies.

In short, the AGC takes the position that the amendments proposed to the lien laws in Senate Bill No. 112 are simply not necessary. There are existing ways for financial institutions to protect themselves when financing a project.

Kansas Ready Mixed  
Concrete Association

TESTIMONY

Edward R. Moses  
Managing Director

Date: February 10, 2005  
Before: The Senate Committee on Judiciary  
By: Woody Moses, Managing Director  
Kansas Ready Mixed Concrete Association  
Regarding: Senate Bill #112 - An act concerning Materialman's Liens

Good Morning Mr. Chairman and Members of the Committee:

My name is Woody Moses, Managing Director of the Kansas Ready Mixed Concrete Association. The Kansas Ready Mixed Concrete Association (KRMCA) is an industry wide trade association comprised of over 175 members located or conducting operations in all 165 legislative districts in this state, providing basic building materials to all Kansans. I appreciate the opportunity to appear before you today in reluctant opposition to SB 112.

Reluctant because while we support the concept that every lender should have a reasonable expectation of security as a prerequisite to funding a construction or any other project for that matter; SB 112 is not the answer. Specifically we have problems with the term "visible" (page 1, line 25) and further definitions of what items are visible or not (page 1, line 33). In the context of our industry, preliminary work is not always visible such as concrete test cores, which are sometimes buried in the ground or underground base rock depending upon the phase of a project. Frankly it appears to us that SB112 would upset a large number of long standing procedures associated with an act that has met the test of time in providing order in the construction marketplace.

At this point in time I would like to introduce our legal counsel Clint Patty, of Frieden, Haynes & Forbes to discuss his analysis of this bill made at our request.

While we cannot support SB 112 in its current form we stand ready to work with all parties to achieve an equitable compromise. Thank you for your attention to our testimony.

Senate Judiciary  
2-10-05  
Attachment 6

**KAPA**

Kansas Aggregate  
Producers' Association

TESTIMONY

Edward R. Moses  
Managing Director

Date: February 10, 2005  
Before: The Senate Committee on Judiciary  
By: Woody Moses, Managing Director  
Kansas Aggregate Producers Association  
Regarding: Senate Bill #112 – An act concerning Materialman's Liens

Good Morning Mr. Chairman and Members of the Committee:

My name is Woody Moses, Managing Director of the Kansas Aggregate Producers Association. The Kansas Aggregate Producers Association (KAPA) is an industry wide trade association comprised of over 170 members located or conducting operations in all 165 legislative districts in this state, providing basic building materials to all Kansans. I appreciate the opportunity to appear before you today in reluctant opposition to SB 112.

Reluctant because while we support the concept that every lender should have a reasonable expectation of security as a prerequisite to funding a construction or any other project for that matter; SB 112 is not the answer. Specifically we have problems with the term "visible" (page 1, line 25) and further definitions of what items are visible or not (page 1, line 33). In the context of our industry, preliminary work is not always visible such as concrete test cores, which are sometimes buried in the ground or underground base rock depending upon the phase of a project. Frankly it appears to us that SB112 would upset a large number of long standing procedures associated with an act that has met the test of time in providing order in the construction marketplace.

At this point in time I would like to introduce our legal counsel Clint Patty, of Frieden, Haynes & Forbes to discuss his analysis of this bill made at our request.

While we cannot support SB 112 in its current form we stand ready to work with all parties to achieve an equitable compromise. Thank you for your attention to our testimony.

Senate Judiciary  
2-10-05  
Attachment 7

## KANSAS CEMENT COUNCIL

800 SW Jackson - 1408  
Topeka, Kansas 66612  
785-235-1188

### TESTIMONY

Date: February 10, 2005  
Before: The Senate Committee on Judiciary  
By: Woody Moses, Kansas Cement Council  
Regarding: Senate Bill #112 - An act concerning Materialman's Liens

Good Morning Mr. Chairman and Members of the Committee:

My name is Woody Moses, representing the Kansas Cement Council. The Kansas Cement Council is composed of the four cement mills operating in Southeast Kansas. I appreciate the opportunity to appear before you today in reluctant opposition to SB 112.

Reluctant because while we support the concept that every lender should have a reasonable expectation of security as a prerequisite to funding a construction or any other project for that matter; SB 112 is not the answer. Specifically we have problems with the term "visible" (page 1, line 25) and further definitions of what items are visible or not (page 1, line 33). In the context of our industry, preliminary work is not always visible such as concrete test cores, which are sometimes buried in the ground or underground base rock depending upon the phase of a project. Frankly it appears to us that SB112 would upset a large number of long standing procedures associated with an act that has met the test of time in providing order in the construction marketplace.

At this point in time I would like to introduce our legal counsel Clint Patty, of Frieden, Haynes & Forbes to discuss his analysis of this bill made at our request.

While we cannot support SB 112 in its current form we stand ready to work with all parties to achieve an equitable compromise. Thank you for your attention to our testimony.

Senate Judiciary

2-10-05

Attachment 8

TESTIMONY

By

Clinton E. Patty

Before the

Senate Judiciary Committee

Regarding SB 112

February 10, 2005

Chairperson Vratil, members of the committee, my name is Clint Patty. I am an attorney with the law firm of Frieden, Haynes and Forbes in Topeka, Kansas, and am here representing my clients, the Kansas Aggregate Producers Association and the Kansas Ready Mixed Concrete Association. I have been asked to provide testimony in opposition to S.B. No. 112, which seeks to substantially change our state's lien laws, depriving subcontractors of substantial protections guaranteed to these mostly small businesses.

S.B. 112 represents a "knee-jerk" reaction by the banking industry to a 2003 decision by the Kansas Court of Appeals, Mutual Savings Association v. Res/Com Properties, LLC, et al., 32 Kan.App.2d 48, 79 P.3d 184 (Kan.App. 2003), rev. denied, 2004. The primary problem with this bill is that it does much more than overturn Mutual Savings, effectively reversing three decades of lien law development in the state of Kansas. These developments serve an important purpose of protecting the "little guy", largely small business subcontractors who need the security of the current law to protect their businesses. Passage of S.B. 112 in its current form will represent an unnecessary shift in the law, favoring big banking interests over small business. Significantly, regardless of whether or not Mutual Savings remains precedent in Kansas, the proposed changes are unnecessary to protect the interests of the banking industry. This testimony will provide a brief history of the development of lien-holder priority law in Kansas, why this development is good for small business and finally why S.B. 112 is both harmful and unnecessary.

Historically, Kansas mechanics lien statutes at K.S.A. 60-1101, et seq. have provided that once a lien has attached, it is superior to any subsequent purchaser for value. The "improvement to the property" itself constitutes notice to the world of the existence of the lien. Lenexa State Bank & Trust Co. v. Dixon, 221 Kan. 238, 241, 559 P.2d 776 (1977). Additionally, regardless of when a subcontractor commences work on real property, their lien rights "relate back" to the prime contractor's date of lien. Because the statute does not define "improvement of real property", the Kansas Supreme Court in Haz-Mat Response, Inc. v. Certified Waste Services Ltd., 259 Kan. 166, 170, 910 P.2d 839 (1996), devised seven (7) considerations for determining if an activity is considered to improve real property:

- (1) What is or is not an improvement of real property is based upon the circumstances of each case;
- (2) improvement of the property does not require the actual construction of a physical improvement on the real property;
- (3) the improvement of real property *need not necessarily be visible*, although in most instances it is;
- (4) the improvement of the real property must enhance the value of the real property, although it need not enhance the selling value of the property;
- (5) for labor, equipment, material, or supplies to be lienable items, they must be used or consumed and thus become part of the real property;
- (6) the nature of the activity performed is not necessarily a determining factor of whether there is an improvement of real property within the meaning of the statute; rather, the purpose of the activity is more directly concerned in the determination of whether there is an improvement of property which is thus lienable; and
- (7) the furnishing of labor, equipment, material, or supplies used or consumed for the improvement of real property *may become lienable if established to be part of an overall plan to enhance the value of the property, its beauty or utility, or to adapt it for a new or further purpose*, or if the furnishing of labor, equipment, material, or supplies is a necessary feature of a plan of construction of a physical improvement to the real property.

For subcontractors across the state, the ability to establish priority lien rights is essential. The above factors, especially those recognizing that rights can attach even if the work is not "visible" is vital to those in the concrete and rock industry. These small businesses often perform improvements on property that may not be visible, but are essential to the overall improvement of real property.

Proponents of S.B. 112 are obviously responding to Mutual Savings, which held that a general contractor's preliminary staking and surveying constituted an "improvement" under K.S.A. 60-1101. This meant that the general contractor, along with all subcontractors lien rights were superior to the bank's mortgage where the bank did not obtain lien waivers.

While it is certainly understandable that the banking industry would be concerned with the Court's ruling, they are not without a remedy under the law. As the Court in Mutual Savings noted, the bank could have simply demanded lien waivers from the contractors prior to securing financing. This renders the entire bill unnecessary and overly burdensome. Further, since the Mutual Savings decision is limited to "preliminary staking and surveying", all that is needed would be a clarification that K.S.A. 60-1101 does not apply to the placement of signs or survey stakes. However, S.B. 112 goes much further, dismantling three decades of protections for subcontractors across the state. First, S.B. 112 provides that materials or services provided by contractor or subcontractors must be "visible" to effect lien rights. This is provided without any definition on what constitutes a "visible" improvement on real property. For many subcontractors, especially in the concrete industry, this bill would mean they would lose lien rights for

work performed that is necessary and essential for improvements, but not necessarily visible.

Second, Section 2 of the bill totally dismantles the lien priority system that has existed for three decades. By providing that "the preference date for all claimants shall be the date of the next earliest unsatisfied lien", subcontractors lose their priority once other liens are paid. Subcontractors should be able to rely upon having the same priority date as the general contractor. While the proposed changes may not have anticipated these consequences, the bill should be rejected primarily because it is unnecessary to alleviate the concerns raised by the holding in Mutual Savings.

On behalf of the subcontractors I represent here today, I hope you will vote against this unnecessary, and ultimately harmful change in the rights of small business owners across the state.

Thank you for allowing me the opportunity to provide my clients' position on this important matter.



TESTIMONY BEFORE

JUDICIARY COMMITTEE

THE SENATE

ARGUMENTS AGAINST SB 112  
CONCERNING REVISED LANGUAGE FOR LIEN LAWS  
BY GUS RAU MEYER  
FEBRUARY 10, 2005

My name is Gus Meyer, President of Rau Construction Company in Overland Park. Rau was founded in 1870, and is a mid-size General Contractor working on commercial, retail, office and historic rehabilitation projects. I am not able to submit this testimony in person, but urge your consideration in opposition to Senate Bill 112. Construction Lien laws, like those used in Kansas for commercial construction, are one of the laws that are universally understood and work well if followed. They provide protection for the Owner of a project and clearly tell him/her how gain this protection. They also provide protection for Subcontractors and Suppliers from Owners or Contractors who do not pay their bills. This legislation would change a system that has been working for decades. A system that is fair to all parties involved.

The changes to the language requiring that require "visible" work to be performed on a project before a claim could be made is troubling. Quite often, substantial work is performed before there is any "visible" evidence of work on the jobsite. An example would be structural steel work where the shopdrawing and fabrication stage may be 75% of the total cost of that subcontractors work, and none of it would be "visible" on the project site before they started erection on the site. In fact, almost every trade will have work they do, that is lienable, before they set foot on a project site.

The language on "preferences" is also problematic. The current application of lien laws says that all subcontractors and suppliers have the same standing, regardless of when the "arrived" on the job. Giving someone who was on site early in the project preference in getting paid over someone who arrived later in the project is an onerous burden for those who had to wait to start their portion of the project until those before them had completed their work. I do not think this is the intended consequence that the legislature would want if this were passed.

Again, I urge you to seriously consider the details in Senate Bill 112, and oppose this proposed legislation. I apologize for not being able to submit this testimony in person. If you have any questions on what I have prepared, please feel free to contact me at my office (913-642-6000).

Senate Judiciary

2-10-05

Attachment 10