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No. 113037

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IN THE COURT OF APPEALS  
OF THE STATE OF KANSAS

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WAGNER INTERIOR SUPPLY OF WICHITA, INC.

*Plaintiff/Appellant*

v.

DYNAMIC DRYWALL, INC., et al.

*Defendants/Appellees*

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REPLY 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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## REPLY TO APPELLEE’S ARGUMENTS AND AUTHORITIES

In an issue of first impression concerning the interpretation of K.S.A. 60-1110 following its 2005 amendment, this Court must decide whether the Kansas legislature intended to require a perfected lien for recovery on a statutory bond. Appellees Puetz Corporation (“Puetz”) and United Fire & Casualty Company (“United Fire”) argue that the answer is “yes” because the addition of the words “disputed by the owner or contractor” to 60-1110 exhibited a clear legislative intent to require valid, perfected and enforceable underlying liens. This argument is unconvincing in that the filing of a statutory bond eliminated and waived strict compliance with perfection requirements. Accordingly, Appellant Wagner Interior Supply of Wichita, Inc. (“Wagner”) respectfully requests that summary judgment in favor of Puetz and United Fire be reversed and this Court render judgment in favor of Wagner as a matter of law.

Appellees cite two reasons why Wagner’s bond claim must fail. First, they argue that allowing Wagner to recover conflicts with the plain meaning of 60-1110. Second, allowing recovery would be contrary to the purpose of 60-1110 which is to free up property from disputed liens to permit conveyance. Neither reason holds water upon examination of the legislative history behind the 2005 clarifications to 60-1110 and the practicalities of Appellees’ position on strict statutory construction and should be rejected.

1. The “Plain Meaning” of 60-1110 Supports Wagner’s Recovery on the Bond

The parties agree there is no doubt that before 2005 Kansas bond claimants were excused from complying with the strict statutory requirements of K.S.A. 60-1102 and 1103 for perfecting a mechanic’s lien. Bob Eldridge Construction Co. v. Pioneer Materials, Inc., 235 Kan. 599, 684 P.2d 355 (1984) settled this interpretation of 60-1110 and has never been expressly criticized, challenged or overruled by any court or the Kansas legislature. However, Appellees advance the position that this law and interpretation of 60-1110 changed in 2005 when the phrase “...or to any person claiming a lien which is disputed by the owner or contractor. . . .” was added to the first sentence. [emphasis added] Appellees surmise these words negate the interpretation stated in Bob Eldridge and ask this Court to find that now only those Kansas claimants with a perfected lien meeting all strict statutory requirements are entitled to make a claim on a bond under 60-1110.

This result is not a fair reading of the statute and is not what the Kansas legislature intended. Wagner asks this Court to hold that the plain meaning of 60-1110 does not require a perfected lien because the addition of “disputed by the owner or contractor” in 2005 did not express a clear legislative intent to change the law on perfection as stated in Bob Eldridge. The legislative history behind the 2005 amendments to the mechanic’s lien statutes evidences no intention to reverse the holdings of Bob Eldridge. Rather, the history reveals the

intent was to reverse the holdings of Mutual Savings Association v. Res/Com Properties, 32 Kan.App.2d 48, 79 P.3d 184 (2003) and clarify the law on lien priority. Nowhere in the history is Bob Eldridge referenced. Appellees do not, and cannot, dispute this evidence of legislative intent. It is therefore appropriate for this Court to apply the Bob Eldridge holdings to the current version of 60-1110.

Nor does Appellees' reliance on the holding of State v. McElroy, 281 Kan. 256, 263, 130 P.3d 100 (2006) that a statutory amendment creates a presumption that the law changed support the position in this case that the Kansas legislature intended to overrule Bob Eldridge's findings on bonds. The legislative history presented by Wagner, for which Appellees have no response, shows no such intent. Actually, the fact that the majority of wording and phrasing of the original version of 60-1110 remains in the 2005 amendment leads to the reasonable conclusion that the legislature intended to continue the law on such provisions and added the wording to clarify the law on priority of liens as the legislative history suggests.

Appellees mistakenly contend that "additional provisions in the revised version of [60-1110] alter the meaning of the statute" and that Wagner's interpretation renders such wording meaningless by their refusal to consider, or explain away, Wagner's interpretation of the words. At pages 15-18 of its Appellant's Brief Wagner gives meaning to, and does not ignore, the added language that is consistent with the legislative intent. "Disputed liens" was meant

to clarify the law on challenging priority of liens in the situation of multiple liens. The intent was not to add the additional requirement of strict compliance on perfection rules.

Further, Appellees' citation to the Kansas Real Estate Practice & Procedure, Fifth Edition, does not help them. The procedural manual does not say that 60-1110 expressly requires strict compliance with 60-1102 and 1103 to recover on a statutory bond. Nor does it say Bob Eldridge is no longer the law. The manual merely paraphrases the requirements of the statute in an explanatory way that does not support Appellees.

2. Permitting Wagner to Recover on the Bond Does Not Conflict  
With the Purpose of 60-1110

Appellees contend that one of the purposes of 60-1110 is to permit “the posting of a bond to discharge or release an alleged lien that is disputed for any reason.” (Appellees’ Brief, p. 11). They then go on to say that the bond frees up the property for conveyance and gives a source of payment to the claimant if it “is able to establish the validity and enforceability of its lien.” (Id.) Yet the following example shows why Appellees’ interpretation that 60-1110 requires strict compliance with perfection is an incorrect reading of the purpose behind 60-1110.

Assume, as is the case here, that the bond claimant last furnished materials on September 10, 2013. Under 60-1103 the last date on which a subcontractor claimant could file its lien statement would be December 10, 2013.

(Three months after the date materials were last furnished. K.S.A. 60-1103(a)(1)).

Further, assume the lien statement, like here, was timely filed on November 26, 2013. And further assume, as here, the lien statement failed to identify the contractor.<sup>1</sup> Finally, assume, as here, that no timely extension was filed.

However, unlike this case, assume that Appellee Puetz filed its release of lien bond on December 1, 2013 before the expiration of the full three month filing period. The question under this scenario is whether or not the claimant's "disputed lien" would still be barred for the reason that the filed bond did not name the contractor and as a result did not meet the strict compliance requirements of 60-1103. If the answer is "yes," then the bond is being misused to prevent claimants from amending liens to correct any errors.

If, on the other hand, the answer is "no," then a clever contractor will be rewarded to wait until December 11, 2013 to file its bond so as to rely upon the strict compliance defense. Such a difference is not the purpose of 60-1110 and highlights why the rule stated in Bob Eldridge still makes sense under the 2005 amendment. Puetz made the business decision to post a bond and have it approved by the District Court, which then eliminated and waived the requirement of strict statutory compliance with perfection.

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<sup>1</sup> The assumption does not assume the lien statement failed to properly identify the owner of the Hotel property because Wagner's lien statement did name the owner, Wichita Hospitality Group, LLC, in the Property Information Report that was attached to the lien statement. (R. Vol. II 107). When an attachment has clearly been incorporated by reference in a lien statement, the contents of any attachment deserve scrutiny as parts of the statement. Trane Co. v. Bakkalapulo, 234 Kan. 348, 352, 672 P.2d 586 (1983).

The Supreme Court in Bob Eldridge held that by posting a bond the statutory requirements for the lien need not be complied with and were waived. Cases cited by Appellees from other jurisdictions are not persuasive on this Kansas court in interpreting 60-1110.

### 3. Conclusion

In this case of first impression on whether the holding of Bob Eldridge applies to the current version of 60-1110, Wagner urges this Court to reverse the grant of summary judgment because the purposeful filing of the release of lien bond eliminated and waived Wagner's strict compliance with perfection requirements. The amendment to 60-1110 in 2005 was not an effort to change existing law, but rather to clarify the law as if it related to the disputed priority of liens.

### **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, attorneys' fees and other costs. Finally, Wagner requests any other relief deemed necessary and proper by this Court.

Respectfully submitted,

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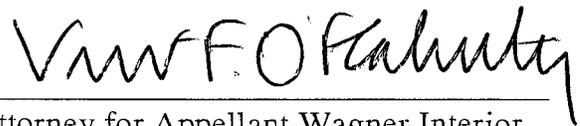
CERTIFICATE OF MAILING

I hereby certify that two copies of Appellant's Brief were served this

15<sup>th</sup> day of May, 2015 via Regular Mail on:

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