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No. 14-113037-A

IN THE SUPREME COURT FOR THE STATE OF KANSAS

WAGNER INTERIOR SUPPLY OF WICHITA, INC.,
Plaintiff-Appellant,

v.

DYNAMIC DRYWALL, INC., ET AL.
Defendants,
(PUETZ CORPORATION AND UNITED FIRE & CASUALTY CO.)
Appellees.

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

Appeal from the District Court of Sedgwick County, Kansas
The Honorable Mark Vining, District Court Judge
District Court Case No. 14 CV 0475

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NATURE OF CASE

This appeal concerns the interpretation of K.S.A. 60-1110 on a statutory bond claim 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"), 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 of Sedgwick County entered its Journal Entry which granted Puetz's Motion for Summary Judgment and denied Wagner's Motion for Summary Judgment. On October 2, 2015 the Kansas Court of Appeals reversed the District Court and entered judgment in favor of Wagner on its claim. On June 21, 2016 this Court granted Puetz's and United's Petition for Review.

STATEMENT OF ISSUES ON APPEAL

I. The Court of Appeals' Opinion should be affirmed and the District Court's Judgment should be reversed because Bob Eldridge Constr. Co. v. Pioneer Materials, Inc., 235 Kan. 599, 684 P.2d 355 (1984) is valid, controlling precedent for the interpretation of K.S.A. 60-1110, as amended in 2005, in that the filing of a bond discharged Wagner's lien and eliminated the need for strict compliance with perfection requirements.

A. Puetz and United Incorrectly Attempt to Add Word "Perfected" to K.S.A. 60-1110.

B. Puetz and United Misinterpret "Disputed" in Isolation Without Giving Meaning to the Entire Language of K.S.A. 60-1110.

C. Puetz and United Overlook the Importance of the Doctrines of Stare Decisis and Separation of Powers.

D. K.S.A. 60-1110 Does Not Create Two Classes of Bonds That Have Different Results Under Eldridge.

E. The Bond Filed by Puetz and United is a Contract That Permits Recovery Without a Perfected Lien.

STATEMENT OF FACTS

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, 2013. (R. V. 24).

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).

STANDARD OF REVIEW

There are two standards of review applicable to this case. First is the standard for de novo review of grants of summary judgment. Adams v. Board of Sedgwick County Comm'rs, 289 Kan. 577, 584, 214 P.3d 1173 (2009); 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 272 Kan. 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.)

The second standard relates to statutory interpretation. Statutory interpretation is a question of law subject to unlimited review. Brennan v. Kansas Ins. Guar. Ass'n, 293 Kan. 446, 450, 264 P.3d 102, 107 (2011).

ARGUMENTS AND AUTHORITIES

II. The Court of Appeals' Opinion should be affirmed and the District Court's Judgment should be reversed because Eldridge is valid, controlling precedent for the interpretation of K.S.A. 60-1110, as amended in 2005, in that the filing of a bond discharged Wagner's lien and eliminated the need for strict compliance with perfection requirements.

Wagner requests that this Court declare and reaffirm that the law of Kansas as contained in K.S.A. 60-1110, as amended in 2005, is: (1) when an owner or contractor files a statutory bond for payment of claims the strict statutory lien requirements, including perfection, need not be complied with and are eliminated and waived; and (2) upon the filing of a bond any filed lien is discharged and the case shifts from a showing

that each statutory element for a lien is fulfilled to a showing that the claimant has a right to a bond. This interpretation has been, and should continue to be, the law in Kansas because it is a reasonable reading of the plain language of 60-1110 as a whole without taking words in isolation or out of context.

The Court of Appeals was right when it followed Bob Eldridge Constr. Co. v. Pioneer Materials, Inc., 235 Kan. 599, 684 P.2d 355 (1984) in its interpretation of K.S.A. 60-1110, as amended in 2005, and found that Puetz's filed bond discharged Wagner's lien and thereby mooted any claims regarding the lien's imperfection. The statute interpreted by the Court of Appeals is:

> **60-1110 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.

(K.S.A. 60-1110; L2005, Ch. 95 Sec. 4; emphasis reflects additional language added in 2005 amendment to original statute). As further explained herein Puetz and United (1) incorrectly ask this Court to add words and meaning to 60-1110 that are not readily found in the statute; (2) misinterpret "disputed" in isolation without giving meaning to the entire language of 60-1110; (3) fail to recognize the importance of the doctrines of stare decisis and separation of powers in calling for the abandonment of Eldridge's holdings on the very issue present in this case; (4) advance an internally inconsistent theory that the 2005 amendment to 60-1110 created two separate and distinct classes of bonds; and (5) fail to acknowledge the wording used in the actual bond they filed in this case. For these reasons Wagner requests that this Court affirm the opinion of the Court of Appeals in this case. By doing so this Court should also reverse and remand the judgment of the District Court and render judgment in favor of Wagner in the amount of the claim of $108,162.97 plus interest at the rate of 18% per annum from October 10, 2013 to the present, plus attorney's fees, costs and expenses with instructions to the District Court to enter judgment in accordance therewith.

A. Puetz and United Incorrectly Attempt to Add Word "Perfected" to K.S.A. 60-1110.

Puetz and United want to add the word "perfected" in front of the word "lien" in 60-1110 as revealed by how they frame the issue around the word "disputed" used in 60-1110. ("The question in this case is whether "disputed" means for any reason or only for certain reasons." Supplemental Brief p. 1.) They go on to say that "disputed" should be

interpreted to include "all existing disputes" including "perfection disputes." (Id.) By making this argument Puetz and United are advancing an interpretation of 60-1110 that would interpret "lien" to mean "perfected lien." This Court should reject this interpretation because it reads language into 60-1110 not readily found there. This Court's task is to "merely interpret [] the language as it appears; [we are] not free to speculate and cannot read into the statute language not readily found there." State v. Holt, 298 Kan. 469, 474, 313 P.3d 826 (2013); State v. Paul, 285 Kan. 658, 661, 175 P.3d 840 (2008) (court should not read statute to "add language that is not found in it.")

In essence Puetz and United try to rewrite the second half of the first sentence of 60-1110 to read "... or to any person claiming a perfected lien which is disputed by the owner or contractor . . ." Wagner submits the plain language of 60-1110 defeats Puetz's and United's argument because in 2005 the legislature kept, and adopted, the bulk of the pre 2005 version of 60-1110. They chose to keep the words "lien/liens" throughout the statute. They chose not to limit the "liens" impacted by a 60-1110 bond to only statutorily "perfected liens." Since this prior, unlimited use of the word "lien" is the same in the 2005 amendment, this Court should construe the language as a continuation of the prior law on this point and not a new enactment. (Curless v. Board of County Comm'rs of Johnson County, 197 Kan. 580, 586-87, 419 P.2d 876, 881 (1966). "The provisions of any statute so far as they are the same as those of any prior statute, shall be construed as a continuation of such provisions, and, not as a new enactment.") The statute clearly does not require a lien to be perfected to recover on the bond. Eldridge settled the issue in 1984 in holding "when a bond is filed the statutory lien requirements

need not be complied with and are waived." 235 Kan. at 599, Syl. 4. Therefore, Puetz's and United's effort to add language to 60-1110 must fail.

B. Puetz and United Misinterpret "Disputed" in Isolation Without Giving Meaning to Entire Language of K.S.A. 60-1110.

Throughout their Supplemental Brief Puetz and United assert that the addition of the word "disputed" in 2005 must be interpreted to mean that Eldridge is no longer relevant or controlling on the issue of whether a lien must be statutorily perfected in order to recover on a bond. But their argument misses the point because they violate another cardinal rule of statutory construction that all provisions of the statute must be read as a whole rather than in isolation so as to make all the provisions consistent and harmonious. ("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 then consistent and harmonious. 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)). The phrase containing the word "disputed" cannot, and should not, be read in isolation from the rest of the first sentence and without giving consideration to the remaining language, and title, of 60-1110.

The statute when read in context does not support Puetz and United in that the meaning of "disputed" is clear and unambiguous when compared to language used in the prior version of 60-1110 which was continued and readopted in the 2005 amendment. As noted by the Court of Appeals the term "disputed" was contained in language added in 2005 after the existing phrase:

> "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, conditioned for the payment of all claims which might be the basis of liens in a sum not less than the contract price . . ."

It is after this phrase the legislature in 2005 added the language:

> ". . . 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."

The amendment expanded the rights of the owner and contractor. Before 2005, the bond had to be for the entire contract price which on a large commercial project could be quite substantial. After the 2005 amendment, the legislature gave owners and contractors the ability to secure a bond limited to the amount of the disputed lien instead of the entire contract price. There is nothing ambiguous about "disputed" and nothing suggests that the legislature meant to alter or overrule the prior statutory interpretation of 60-1110 by the Eldridge court.

Also, the remaining language of 60-1110 when read in context with where the phrase containing " disputed" appears shows that the Eldridge opinion still controls the issue of whether a lien must be perfected to recover on a bond. Eldridge held that a perfected lien was unnecessary for recovery because the bond discharged the lien. 235 Kan. at 603. In so holding, the Eldridge court interpreted the language ". . . and when such bond is so approved and filed no lien shall attach under this act, and if when such bond is filed liens have already been filed, such liens are discharged." K.S.A. 60-1110

(Ensley 1983). This discharge language remained unchanged in the 2005 amendment when the legislature added the language:

> 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. (emphasis shows language added in 2005)

Eldridge's holding means that when Puetz and United chose to file their bond

> "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. [citation omitted]. 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." 235 Kan. at 604.

Puetz and United do not give a reasonable interpretation of the word "discharged" when they suggest the word really means "discharges the lien from the property so that it may be litigated under the bond." (Supplemental brief, p. 15 – emphasis in original brief.) Eldridge and the Court of Appeals interpreted "discharge" to be an extinguishment of the lien not a transfer of the lien. (Eldridge, 235 Kan. at 599, Syl. 4, COA Memorandum Opinion at 11.) Now Puetz and United disagree and want an interpretation that transfers the lien when they claim the lien is only discharged "from the property so that it may be litigated under the bond." (Supplemental brief, p. 15 emphasis

in original.) They improperly speculate on legislative intent when they say that the strict compliance requirements for the lien are not discharged or eliminated thereby not giving any meaning to the word "discharged" as used in the statute. ("[We are] not free to speculate and cannot read into the statute language not readily found there." State v. Spencer Gifts, LLC, _____ Kan. _____, 374 P.3d 680, 686 (2016) (*citing to* State v. Holt, 298 Kan. 469, 474, 313 P.3d 826 (2013) and State v. Paul, 285 Kan. 658, 661, 175 P.3d 840 (2008)). In reading a perfection requirement that is not readily found in 60-1110, Puetz and United also incorrectly render other language in the statute calling for the discharge of filed liens upon the filing of the bond meaningless and mere surplusage. ("It is a cardinal rule of statutory construction that a provision should not be interpreted as to render some language mere surplusage." Rhodenbaugh v. Kansas Employment Sec. Bd. of Review, 52 Kan.App.2d 621, 626, 372 P.3d 1252, 1257 (2016) (*citing to* Northern Natural Gas Co. v. ONEOK Field Services Co., 296 Kan. 906, 918, 296 P.3d 1106 (2013)). This Court should not adopt this rewriting of the statute and Puetz's and United's argument should be rejected. Eldridge did interpret the "discharge" language and interpreted it to plainly mean that strict compliance with perfection requirements was no longer an issue once the bond was filed. Eldridge, 235 Kan. at 599, Syl. 4.

Puetz and United also avoid addressing the "discharge" language in 60-1110 when they suggest the Court of Appeals Opinion leads to an "unreasonable or absurd result" caused by "a secret trap springing up to produce the opposite outcome than the rest of the Article." (Supplemental brief, p. 7-8). Closer examination of this argument actually defeats the point trying to be made because from 1984 when Eldridge was decided to 2005 there was no "secret trap." The statute and its legal interpretation were

clear in holding that an unpaid subcontractor who filed a lien that did not meet the strict perfection requirements of 60-1102 or 60-1103 could recover the full amount of its claim if a bond had been filed under 60-1110. Likewise, no change in this law was made in the 2005 amendment and no new trap for the unwary was created. Therefore, from 2005 to the present, even with the amended language, the law on this point remained the same. It is not unreasonable or absurd for an unpaid subcontractor after 2005 to be permitted to recover because as Eldridge held "when a bond is filed the statutory lien requirements need not be complied with and are waived." Eldridge, 235 Kan. at 599, Syl. 4. As a result, it is incorrect for Puetz and United to suggest the Court of Appeal's decision is a watershed event that turns the law of bonds upside down in the area of mechanic lien releases and discharges. Indeed, the Court of Appeal's opinion correctly follows thirty-two years of established law and precedent and should be adopted by this Court.

C. Puetz and United Overlook the Importance of the Doctrines of Stare Decisis and Separation of Powers.

Puetz and United overlook the important doctrines of stare decisis and separation of powers as they call for abandonment of thirty two years of clear statutory interpretation handed down in Eldridge on the standard of proof necessary for an unpaid subcontractor and material supplier to recover on a bond. Eldridge has been, and should still be, the law applicable to these facts where an owner or contractor posts a bond but wants to raise perfection defenses in the proceedings on the bond. Under the doctrine of stare decisis

> [O]nce 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. A court of last resort will follow that rule of law unless clearly convinced it was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent.

Simmons v. Porter, 298 Kan. 299, 304, 312 P.3d 345, 350 (2013); (*quoting from* Miller v. Johnson, 295 Kan. 636, 653, 289 P.3d 1098 (2012) with citation to Rhoten v. Dickson, 290 Kan. 92, 112, 223 P.3d 786 (2010).

Also in this case involving property and contract rights this Court should be mindful that "[c]onsiderations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved." Crist v. Hunan Palace, Inc., 277 Kan. 706, 715, 89 P.3d 573, 580 (2004) (*citing* Payne v. Tennessee, 501 U.S. 808, 828, 111 S. Ct. 2597, 115 L. Ed.2d 720 (1991). Eldridge's holdings are as valid today as they have been for thirty two years. (The doctrine of stare decisis is particularly compelling in cases where, as here, the legislature is free to alter a statute in response to court precedent with which it disagrees but declines to do so. State v. Quested, 302 Kan. 262, 278, 352 P.3d 553, 563 (2015)). This Court should not read 60-1110 as Puetz and United do because subcontractors and material suppliers, and their counsel, for many years have relied on the precedent of Eldridge when an owner or general contractor has filed a payment bond on the property. The filing of the bond eliminated strict statutory compliance on perfection so that any dispute was limited to what materials were delivered, when they were delivered and whether they were actually used at the subject property. The 2005 amendment did not change the reliance placed on

the Eldridge precedent related to what needed to be proven to succeed on a payment bond claim. Nothing in the 2005 amendment suggests that conditions have changed since Eldridge was decided in 1984 such that the legislature intended to abolish its precedent.

Puetz and United should not be able to avoid the doctrine of stare decisis and the precedent of Eldridge by arguing public policy because where legal authority resolves a case, public policy should not be used to reach a decision. (" . . . we will not reach a decision in a case based on public policy when we have legal authority that guides us to appropriate resolution." Fidelity Bank v. King, 281 Kan. 1278, 1282, 136 P.3d 465, 468 (2006)). Therefore, Puetz and United cannot justify their public policy position by citing to different states with different lien statutes. This Court is under no requirement to address non-binding authority from out-of-state jurisdictions. Critchfield Physical Therapy v. Taranto Group, Inc., 293 Kan. 285, 311, 263 P.3d 767, 786 (2011). There is established Kansas precedent on the issue presented and there is no need to look outside Kansas to interpret a Kansas statute.

Following the precedent established in Eldridge furthers the democratic foundation of separation of powers between the legislative and judicial branches. Puetz and United argue with a broad brush that because language was added to 60-1110 by the legislature it automatically means that Eldridge's interpretation must be abandoned and disregarded. Kansas law does not call for such a result. Under the separation of powers doctrine the executive and judicial branches are prohibited from assuming the role of the legislature. State ex rel. Morrison v. Sebelius, 285 Kan. 875, 898, 179 P.3d 366, 383 (2008) "Broadly speaking, where the legislature looks to the future and changes existing conditions by making a new rule to be applied thereafter, by contrast 'the judiciary

investigates, declares and enforces liabilities as they stand on present or past facts, under laws supposed already to exist. (Id.) (emphasis in original text, citation omitted). In ascertaining the meaning of a plain and unambiguous statute, the separation of powers doctrine instructs that "[a]n appellate court should not speculate about the Legislative intent behind the clear language, and it should refrain from reading something into the statute that is not readily found in its words . . ." Bussman v. Safeco Ins. Co. of America, 298 Kan. 700, 725, 317 P.3d 70, 87 (2014) (*citing to* Double M. Constr. v. Kansas Corporation Comm'n, 288 Kan. 268, 271-72, 202 P.3d 7 (2009)). And, "[w]here the court believes that the legislature has omitted a vital provision in a statute that precludes the intended result, if that omitted provision cannot be found under any reasonable interpretation of the language actually used, then the remedy lies solely with the legislature." Bussman, 298 Kan. at 725, 317 P.3d at 87 (*citing to* Ft. Hays St. Univ. v. University Ch., Am. Ass'n of Univ. Profs., 290 Kan. 446, 464-65, 228 P.3d 403 (2010). This Court cannot delete provisions or supply omissions in a statute. State v. Prine, 297 Kan. 460, 475, 303 P.3d 662, 672 (2013). Adding language to a statute impermissibly usurps the legislative function. Slusher v. Wonderful House Chinese Restaurant, Inc., 42 Kan. App.2d 831, 835, 217 P.3d 11, 14 (2009).

In 2005 the legislature readopted and continued in place the bulk of the language in 60-1110, including the language discharging liens upon the filing of a bond. By doing so it did not criticize or expressly or impliedly abrogate the holdings of Eldridge. The legislature did not add a perfection requirement to the liens that were discharged by the bond. In 2005 Eldridge had been the law for twenty one years and clearly established what was necessary to prove to recover on a bond. There was a certainty, and reliance,

by the construction industry on what happens to liens when bonds are approved and filed. The legislature chose not to change precedent or the key provisions of 60-1110. If they had wanted to, the legislature could have done so. If contractors and sureties thought the holdings of Eldridge unfair they could have lobbied their representatives to adopt new legislation requiring proof of perfection of a lien to recover on a bond. They did not do so. Under the separation of powers doctrine this Court should not do the job of the legislature to rewrite the statute. Eldridge should still be the law and Wagner asks this Court to declare so.

D. K.S.A. 60-1110 Does Not Create Two Classes of Bonds That Have Different Results Under Eldridge.

Puetz's and United's interpretation of 60-1110 is internally inconsistent because it calls for "a different result" depending on the type of bond used. They want to say that the first sentence of 60-1110 creates two separate classes of bonds broken down as follows:

1. ". . . 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
2. A bond " 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."

(See Appellee's Supplemental brief, p. 9.) Puetz and United label the first type of bond a "general obligation bond" or "performance bond" that is "very analogous to a public works bond provided for by K.S.A. §60-1111." (Id.) On the other hand they claim the second type of bond is "a far different bond, and requires a different result." (Id.) They repeatedly try to label this second type of bond as a "narrow lien-release bond." (Supplemental brief, p. 10, 16).

The attempt to parse 60-1110 depending on the label, or class, of bond is not reasonable or what the statute says. K.S.A. 60-1110 permits only one kind of bond as shown by its title: "Bond to secure payment of claims." The claims secured by a 60-1110 bond are claims by subcontractors and material suppliers who are within the class of persons entitled to file liens under 60-1102 and 1103. The first sentence of 60-1110 only refers to the single noun "bond" where it states "The contractor or owner may execute a bond . . . to any person claiming a lien which is disputed by the owner or contractor, conditioned for payment of such claim in the amount thereof." The statute does not call for separate "bonds."

At pages 16-18 of their Supplemental brief Puetz and United misdirect the interpretation of 60-1110 by claiming the first type of bond outlined in the statute is a "general obligation bond or a performance bond" because 60-1110 relates to a "payment bond" not a general obligation bond or a performance bond. The title of 60-1110 is "Bond to secure payment of claims." The statute uses the term "payment" multiple times and never uses the words "performance" or "general obligation." There is a distinct difference between payment bonds and performance bonds or general obligation bonds. Payment bonds are for the benefit and protection of subcontractors and materialmen.

United City of Yorkville v. Ocean Atlantic Service Corp., 2013 WL 5433429, *4 September 30, 2013 (N.D. Illinois) (citing to Western Waterproofing Co. v. Springfield Hous. Auth., 669 F. Supp. 901, 905 (C.D. Ill. 1987); Restatement (Third) of Suretyship and Guarantee § 69(c) (1996). On the other hand, a performance bond runs to the benefit of the third party owner only and not to a contractor. Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co., 33 Kan. App.2d 504, 511, 104 P.3d 997, 1003 (2005). A general obligation bond is altogether different, it is a bond payable from and secured by a pledge of the issuer's taxing power. Bishop v. City of Winona, 267 Kan. 653, 658, 983 P.2d 861, 864 (1999) (citations and emphasis omitted). Therefore, it is incorrect to label the bond under 60-1110 as a performance bond or general obligation bond. It is a payment bond.

The difference between payment bonds and performance bonds is further shown by the fact it is common on large construction projects for two separate bonds to be issued, a performance bond and a payment bond. (*See* Westfield Ins. Co. v. Harvest Const. General Contracting, Inc. ____ Kan. App.2d _____, 288 P.3d 159 (2012)).

It is also incorrect for Puetz to suggest a public works payment bond under 60-1111 is analogous to a general obligation or performance bond. K.S.A. 60-1111 is a statutory payment bond, not a performance bond. (*See* J.W. Thompson Company v. Welles Products Corp., 243 Kan. 503, 504-505, 758 P.2d 738, 740 (1988). " . . . Pentra filed a statutory payment bond for the public works project with the Clerk of the Sedgwick County District Court in the sum equal to the contract.") It follows that performance bonds and general obligation bonds are not the types of bonds intended by

60-1110 or 60-1111 and Puetz's and United's suggestion to the contrary is incorrect and misdirected.

Also, there is no way 60-1110 can be read to create a separate class of bonds described by Puetz and United as a "general performance bond" because it is impossible for an owner to issue a performance bond that runs to its own benefit. K.S.A. 60-1110 starts off "The contractor or owner may execute a bond . . ." (emphasis added). If such a bond is a performance bond then it follows that the bond would be a bond issued by an owner for the benefit of the owner to insure performance of a project to the owner. It also follows such a bond would not benefit any contractor. Lee Builders, 33 Kan.App.2d at 511. K.S.A. 60-1110 does not authorize such performance bonds; it deals only with a "Bond to secure payment of claims." (emphasis added).

Nor is Puetz's and United's call to have Eldridge produce different results depending on how the owner or contractor and their surety choose to label their bond as applying to one contractor for a certain amount as opposed to all subcontractors for the total contract price reasonable. The statute says "When bond is approved and filed . . . such liens are discharged." The statute does not use the plural word "bonds" nor does it differentiate, as Puetz and United argue, between a "general obligation/performance bond" and a "lien release bond." Eldridge did not make such a distinction when it interpreted the prior version of the statute when it said the discharging of the lien eliminated the need of the claimant to prove to recover on the bond that it had a perfected lien. 235 Kan. at 599, Syl. 4.

The unreasonableness of Puetz's and United's position is fully revealed by the different manner in which they try to deal with Eldridge. At the Court of Appeals they

took the position Eldridge was no longer controlling simply because the statute was amended in 2005. (Appellee's brief, p. 9 "The holding of Eldridge is no longer controlling . . ." and p. 10 "Wagner's reliance on Eldridge is misplaced because the Legislature has since changed the law. The case was decided on an outdated version of K.S.A. 60-1110.") They again begin their Supplemental brief with the broad statement that Eldridge is "no longer controlling or relevant" after 2005. (Supplemental brief Point II, p. 8). Yet they take the inconsistent position later in their brief that maybe Eldridge is relevant to certain bonds, just not the bond Puetz and United filed in this case. Wagner submits it is wrong to pick and choose depending on the result wanted whether Eldridge is still good law or not. It is still the law and supports the Court of Appeal's decision.

The more reasonable reading of the 2005 amendments to 60-1110 is that rather than creating two types of bonds, the legislature intended to expand the protection available to a contractor or owner by including individual claimants within the persons impacted by the bond. These expanded rights include: (1) the right to post a bond as to one, or fewer than all, lien claimants; (2) the right to post a bond for less than the full project cost and limit it to a particular claimant; (3) the right to use the bond to protect themselves from a disputed lien claimant but not all lien claimants; and (4) the right to use the bond to control priority of liens. (See K.S.A. 60-1101 which provides "[w]hen two or more such contracts are entered into applicable to the same improvement, the liens of all claimants shall be similarly preferred to the date of the earliest unsatisfied lien of any of them. If an earlier unsatisfied lien is paid in full or otherwise discharged, the commencement date for all claimants shall be the date of the next earliest unsatisfied lien.") Also, it is appropriate to look at the legislative history behind the 2005

amendments to the mechanic's lien statutes because it helps explain why Puetz's and United's reading of the statute was not what the legislature intended. Where a statute's language or text is unclear or ambiguous, this Court may look to legislative history including background of the enactment, the circumstances attending its passage, the purpose to be accomplished, and the effect the statute may have under the various constructions suggested. State v. Prine, 297 Kan. 460, 475, 303 P.2d 662, 672 (2013) (*citing to* In re Tax Exemption Application of Lietz Constr. Co., 273 Kan. 890, 898, 47 P.3d 1275 (2002)). This history, as explained in Appellant's brief at pages 15-20, supports the Court of Appeals' recognition that the 2005 amendment was a direct response to the case of Mutual Savings Association v. Res/Com Properties, 32 Kan. App.2d 48, 79 P.3d 184 (2003) and not an effort to change the twenty one year precedent established by Eldridge.

E. The Bond Filed by Puetz and United is a Contract That Permits Recovery Without a Perfected Lien.

The "Release of Lien Bond" voluntarily filed by Puetz and United in Sedgwick County on January 13, 2014 is a contract that is also bound by rules of construction. The bond identified Wagner by name as the "Lien Claimant" and stated the "Amount of Claim" as "108,162.97." (L.F. Vol. I, p. 15). The bond did not limit itself to only paying on "perfected liens." Instead, it stated:

> NOW THEREFORE, the condition of this obligation is such that if the lien claimant shall be finally adjudged to be entitled to recover upon the claim upon which lien is based, the Principals or its Surety shall pay to such claimant, the amount

> of the judgment, together with any interest, costs or other sums which such claimant would be entitled to recover upon the foreclosure of the lien.

(Id.) This contractual language used in the bond is significant because the " claim upon which lien is based" is Wagner's claim to be paid for supplying $108,162.97 in materials and supplies to the subject project. While Puetz and United had the right under Eldridge and 60-1110 to dispute the amount charged and whether it was delivered to the property at issue, they did not do so and have stipulated and do not contest these facts in this appeal. ("The relevant facts are undisputed and correctly recited in the Court of Appeals decision." Supplemental brief p. 2; "The parties do not dispute the uncontroverted facts which show the validity of Wagner's claim under the bond." COA Memorandum Opinion at 12.) Under the language of their own bond Puetz and United are obligated to pay the "claim." The bond does not say they will pay "upon the claim upon which the perfected lien is based" and this Court should not allow Puetz and Wagner to add this requirement to the document they prepared and filed. It was Puetz and United who also stated in their bond:

> "ACCORDINGLY, the Clerk of the 18th Judicial District Court is hereby requested to release the above-described lien and substitute the lieu thereof this bond.

(Id.) The substituted bond allows recovery "upon the claim upon which lien is based" and Eldridge permits recovery.

CONCLUSION

Kansas law has been, and still should be, that when an owner or contractor files a statutory bond for payment of liens on a private project any filed liens are discharged such that the strict statutory lien requirements need not be complied with and are waived. Eldridge correctly interpreted 60-1110 and its interpretation thirty-two years ago also applies to the statute in its current form. Any attempt by Puetz and United to suggest otherwise is unreasonable and contrary to the statutory language read as a whole in context. Therefore, the Court of Appeals Memorandum Opinion correctly stated the law and should be adopted and followed by this Court as the law of Kansas on this subject.

RELIEF REQUESTED

Wagner requests the following relief: First, this Court should affirm the Memorandum Opinion of the Court of Appeals. Second, this Court should render judgment in favor of Wagner in the amount of $108,162.97 plus interest, costs and attorneys fees. Third, this Court should remand this matter to the District Court of Sedgwick County for proceedings to determine the amount of interest at the rate of 18% per annum and costs and attorneys fees. Finally, Wagner requests any other relief deemed necessary and proper by this Court.

Respectfully submitted,

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CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 18th day of August, 2016, a true and correct copy of the above and foregoing was served via E-Mail and the Kansas Judicial Branch eFlex System to the following:

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