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CASE NUMBER: 113037

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.

SUPPLEMENTAL BRIEF OF APPELLEES PUETZ CORPORATION AND UNITED FIRE & CASUALTY CO.

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 THE CASE

This matter presents a question of statutory interpretation. For the first time, this Court is called on to review the effect and meaning of certain 2005 amendments to K.S.A. § 60-1110.

The loser in this case will suffer an unfair loss, as is usual in mechanic's lien cases. After a supplier on a hotel project in Wichita was not fully paid by a now-bankrupt subcontractor, it filed a lien statement that is fatally defective under Kansas law. The contractor, who had already paid the subcontractor, then filed a lien-release bond to free up the property for the owner while the dispute was litigated. The Legislature's 2005 amendments to K.S.A. § 60-1110 added a provision for a contractor or owner to file a bond narrowly tailored to a specific "lien which is disputed by the owner or contractor." The question in this case is whether "disputed" means for any reason or only for certain reasons.

Based on the answer to that question, filing such a lien-release bond will either keep the status quo and preserve all existing disputes while freeing up the real property, or will instead operate as a substantive waiver of all timing and perfection disputes and preserve only disputes about delivery of materials and work performed. The Court of Appeals held the latter, but that view is not supported by the plain language of the statute, nor by public policy.

Therefore, the decision of the Court of Appeals should be reversed and remanded with instructions to reinstate the judgment of the trial court in favor of Puetz Corporation ("Puetz") and United Fire and Casualty Co. ("United").

STATEMENT OF THE ISSUES ON APPEAL

A. Materials supplier Wagner filed a timely but defective lien statement. After the time passed to file a valid lien statement, general contractor Puetz filed a lien-release bond under K.S.A. § 60-1110 so that the owner could refinance its construction loan on the property. Did the filing of the lien-release bond waive Puetz's defenses to Wagner's defective lien statement?

B. In 1984, this Court in *Bob Eldridge Constr. Co. v. Pioneer Materials, Inc.*, 235 Kan. 599, 684 P.2d 355 (1984) found that a bond claim did not need to be perfected like a mechanic's lien under the then-version of K.S.A. § 60-1110. In 2005, the Kansas legislature amended K.S.A. § 60-1110 to add the "disputed lien" portion of the statute. Was *Eldridge* abrogated by the 2005 amendments such that the language of the statute controls?

C. The statutory mechanic's lien has strict requirements in an attempt to balance the competing interests of the contractor in payment for services and the owner in free alienation of property. The Court of Appeals' interpretation of K.S.A. § 60-1110 is that the filing of the bond waives all perfection of lien defenses even on liens already filed and when the time for new liens has expired. Is the Court of Appeals' decision consistent with the public policy of Kansas in balancing protections of subcontractors and property owners?

STATEMENT OF FACTS

The relevant facts are undisputed and correctly recited in the Court of Appeals decision. The necessary facts can be summarized as follows: Certain real property in Wichita is owned by Wichita Hospitality Group, LLC ("Property Owner"), which in 2012

hired Puetz to design and build a Holiday Inn Express & Suites Hotel (the "Hotel") on the property. [*See* Rec. V. 3, pp. 21-31 (Agreed Joint Pretrial Conference Order) at Sec. 4, Stips. c. through e.; *see also* Rec. V. 3, pp. 32-46 (Standard Form Agreement Between Owner and Design-Builder).] Puetz subcontracted a portion of the work on the Hotel, including drywall work, to Dynamic Drywall, Inc. ("Dynamic") pursuant to separate Subcontracts for Building Construction, dated January 18, 2013 and May 3, 2013, respectively (collectively referred to as the "Subcontracts"). [*See* Rec. V. 3, pp. 21-31 (Agreed Joint Pretrial Conference Order) at Sec. 4, Stip. f.; *see also* Rec. V. 3, pp. 47-66 (Subcontract for Building Construction, dated January 18, 2013), and Rec. V. 3, pp. 67-86 (Subcontract for Building Construction, dated May 3, 2013).] The Property Owner was, of course, not a party to the Subcontracts between Puetz and Dynamic. [*See* Rec. V. 3, pp. 21-31 (Agreed Joint Pretrial Conference Order) at Sec. 4, Stip. h.; *see also, generally* Rec. V. 3, pp. 47-86.]

Puetz made all payments to Dynamic, totaling $271,270.78, for materials and services provided under the Subcontracts. [*See* Rec. V. 3, pp. 21-31 (Agreed Joint Pretrial Conference Order) at Sec. 4, Stip. i.; *see also* Rec. V. 3, pp. 87-97 (copies of checks from Puetz to Dynamic for work performed on the Hotel project).]

Dynamic ordered from Wagner some of the drywall materials it used in performing under its Subcontracts for the construction of the Hotel. The materials were last furnished by Wagner on September 10, 2013, and Dynamic still owed Wagner $108,162.97 on the project when Dynamic went bankrupt. [*See* Rec. V. 3, pp. 21-31 (Agreed Joint Pretrial Conference Order) at Sec. 4, Stips. j. and m.; *see also* Rec. V. 3, pp. 98-100 and Rec. V. 4, pp. 1-89 (Lien Statement filed by Wagner on November 26, 2013).]

Within three months of last furnishing materials on the project, Wagner filed a lien statement in the District Court of Sedgwick County, Kansas, claiming a mechanic's lien on the Hotel in the amount of $108,162.97 for drywall materials it supplied to Dynamic. [*See* Rec. V. 3, pp. 21-31 (Agreed Joint Pretrial Conference Order) at Sec. 4, Stip. p., and Rec. V. 3, pp. 98-100 and Rec. V. 4, pp. 1-89.] But Wagner's lien statement identified "Holiday Inn Express & Suites"—not Wichita Hospitality Group, LLC—as the owner of the property, and identified "Wagner Interior Supply of Wichita, Inc."—not Puetz—as the general contractor. [*See* Rec. V. 3, pp. 98-100 and Rec. V. 4, pp. 1-89 (Lien Statement filed by Wagner on November 26, 2013).]

At the time Wagner filed its defective lien statement, the Property Owner was in the process of refinancing the property. [*See* Rec. V. 4, pp. 90-92 (Declaration of Jon Schmitz).] In order to quiet title to the property to allow it to be refinanced and to free up the property from lengthy litigation regarding the validity of Wagner's claimed lien, Puetz filed a Release of Lien Bond pursuant to K.S.A. §60-1110. [*See* Rec. V. 3, pp. 21-31 (Agreed Joint Pretrial Conference Order) at Sec. 4, Stip. r.; *see also* Rec. V. 4 pp. 93-97 and Rec. V. 3, pp 90-92 (Release of Lien Bond).] The Release of Lien Bond was filed on January 13, 2014, and was approved by the District Court. [*See* Rec V. 4, pp. 93-97.]

STANDARD OF REVIEW

This Court's review of the trial court's order on summary judgment is de novo. *Adams v. Board of Sedgwick County Comm'rs,* 289 Kan. 577, 584, 214 P.3d 1173 (2009). Therefore, the "standards for reviewing on appeal an order granting summary judgment are the same standards the district court must apply in the first instance in considering a summary judgment motion." *Gold Mine Investments, Inc. v. Mount Vernon Fire Ins. Co.*,

48 Kan. App. 2d 818, 823, 300 P.3d 1113, 1116-17 (2013). Kansas law governing summary judgment is well established. When the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. *See, e.g., Nelson v. Nelson*, 288 Kan. 570, 578, 205 P.3d 715 (2009).

There are no genuine issues as to any material facts in this case. Rather, the issue is which party is entitled to judgment as a matter of law based on the meaning of K.S.A. § 60-1110. A statute's interpretation is a question of law that is subject to unlimited review. *See, e.g., Brennan v. Kansas Ins. Guar. Ass'n*, 293 Kan. 446, 450, 264 P.3d 102, 107 (2011).

ARGUMENTS AND AUTHORITIES

I. Wagner's lien statement was defective and invalid. Therefore, no mechanic's lien attached to the property, and Puetz was entitled to discharge of the claimed lien. The filing of a statutorily-authorized lien-release bond for the convenience and protection of all parties should not flip that result.

A. Wagner's attempted mechanic's lien was defective and therefore did not properly attach to the property.

It is undisputed that Wagner incorrectly identified the contractor and the property owner in its lien statement—information that is required by K.S.A. § 60-1102(a) and -1103(a). Kansas courts have consistently held that such errors result in a fatally defective statement and no mechanic's lien attaches to the property. *See, e.g., Tradesmen International, Inc. v. Wal-Mart Real Estate Business Trust*, 35 Kan. App. 2d 146 (Kan. App. 2006); *Alliance Steel, Inc. v. Piland*, 39 Kan. App. 2d 972 (Kan. App. 2008); *National Restoration Co. v. Merit General Contractors, Inc.*, 41 Kan. App. 2d 1010 (Kan. App. 2009). This Court denied review in all three of those cases, each of which cited and relied

on this Court's prior decisions to not permit late amendments to invalid lien statements to fix similar fatal errors. *See Badger Lumber & Coal Co. v. Schmidt*, 122 Kan. 48, 251 P. 196 (1926); *see also, D.J. Fair Lumber Co. v. Karlin*, 199 Kan. 366, 430 P.2d 222 (1967).

B. Because Wagner's lien statement was fatally defective, Wagner would have lost an action to foreclose the lien or an action by the Property Owner to cancel the lien.

Based on Kansas law as laid out above, Puetz and the Property Owner would have been entitled to summary judgment on Wagner's claim. But that would have taken time, obviously. Under K.S.A. § 60-1105(a), Wagner could have waited a year to file a foreclosure action based on the lien statement. Possibly a year to litigate. Then, possible appeals. The present action, which was filed sooner than Wagner's hypothetical lien foreclosure suit, is already two and a half years old and is not over.

Or, the Property Owner could have filed suit to clear the lien. K.S.A. § 60-1108. Under Kansas law, again as laid out above, the Property Owner would have been entitled to summary judgment against Wagner. Puetz as the general contract may well have had to pay costs and fees for the Property Owner's action under K.S.A. § 60-1106. And that action would have taken an equally long time.

C. The Court of Appeals' incorrect interpretation of the lien-release bond statute produces the opposite result solely due to the form of the Action.

The lien-release bond the legislature provided for in K.S.A. § 60-1110 is meant to protect any valid lien without needlessly encumbering the real property for several years while the parties litigate and appeal the claimed lien. It is not a substantive waiver of rights and defenses. There is nothing in the plain language of the statute to even hint that the Legislature intended to limit its application to only certain types of lien disputes.

"A statute should not be read to add that which is not contained in the language of the statute or to read out what, as a matter of ordinary language, is included in the statute. [Citation omitted.]" *Frick v. City of Salina*, 289 Kan. 1, 8, 208 P.3d 739, 745 (2009) (quoting *Casco v. Armour Swift–Eckrich,* 283 Kan. 508, 521, 154 P.3d 494 (2007)). "Additionally, we must construe statutes to avoid unreasonable or absurd results, and we presume the legislature does not intend to enact useless or meaningless legislation." *Northern Natural Gas Co. v. ONEOK Field Servs. Co.*, 296 Kan. 906, 918, 296 P.3d 1106, 1115 *cert. denied sub nom. N. Natural Gas Co. v. ONEOK Field Servs. Co.,* 134 S. Ct. 162, 187 L. Ed. 2d 40 (2013).

If this Court reads K.S.A. § 60-1110 as Puetz suggests, a supplier like Wagner loses no rights—one could argue a supplier or subcontractor gains by having a pot of cash in the full amount of its claimed lien guaranteed by a surety, rather than simply having the real property sold at auction and hoping it satisfies its lien. After all, mechanic's liens arise in a variety of circumstances, some of which involve declining property values, unfished building projects, or large bank loans with priority. While subcontractors and suppliers are fully—likely even better—protected for their valid liens, property owners benefit by not having real property needlessly encumbered for years while claimed liens are litigated. Such a reading of K.S.A. § 60-1110 weaves it together with the rest of the mechanic's lien statutes in a balanced, seamless, sensible Article. One which protects lien claimants and property owner's alike.

Contrast that orderly tapestry with the reading given to K.S.A. § 60-1110 by the Court of Appeals. Under the Court of Appeals' decision, the filing of a lien-release bond is a substantive waiver of defenses to a mechanic's lien, a secret trap springing up to

produce the opposite outcome than the rest of the Article. The words "lien which is disputed" in the statute really means only "lien which is disputed as to whether the materials were furnished or what they cost, and excludes disputes about when the materials were furnished, the lien statement, and statutory defenses." Those are the sort of "unreasonable or absurd results" this Court "must construe statutes to avoid." *See* 296 Kan. at 918.

II. *Eldridge* was decided under a prior statute without the "lien which is disputed" language added by the Legislature in 2005, and is no longer controlling or relevant. And, the revised statute was misread by the Court of Appeals.

A. This Court's Eldridge *decision is not applicable to new lien-release bonds for disputed liens brought about by the Legislature's 2005 Amendments to K.S.A. § 60-1110.*

The Court of Appeals correctly noted that the underlying facts of this case are very similar to those in *Bob Eldridge Constr. Co. v. Pioneer Materials, Inc.*, 235 Kan. 599, 684 P.2d 355 (1984), where this Court allowed a drywall supplier to recover on a bond without a statutorily-compliant lien statement. The difference between the cases is the language of the statute in effect at the time.

The relevant statute in its entirety is as follows, with the 2005 amendments indicated:

> **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 (emphasis added to 2005 amendments); L. 2005, ch. 95, sec. 4.

When this Court decided *Eldridge*, the legislature had not provided for the situation of a disputed lien. Thus, the only bond was "a bond to the state of Kansas for the use of all persons in whose favor liens might accrue by virtue of this act...." There, this Court treated that as a general obligation or performance bond and did not require a perfected lien. Such a bond is very analogous to a public works bond provided for by K.S.A. § 60-1111.

After the 2005 amendments, however, a contractor or owner also has the option to file "a bond ... to any person claiming a lien which is disputed by the owner or contractor...." K.S.A. § 60-1110. That is a far different bond, and requires a different result.

"A change in phraseology ... in amending or revising a statute raises a presumption that a change of meaning was intended by the legislature." *Linson v. Johnson*, 1 Kan. App. 2d 155, 160, 563 P.2d 485, 490 (1977) *aff'd,* 223 Kan. 442, 575 P.2d 504 (1978) (citing *Shawnee Township Fire District v. Morgan*, 221 Kan. 271, 559 P.2d 1141 (1977)). The court "must presume that the legislature ... intended thereby to effect a change in the law and that it was fully aware of the impact of the change which was made." *Linson*, 1 Kan. App. 2d at 160; *see also, State ex rel. v. Richardson,* 174 Kan. 382, 256 P.2d 135 (1953); *State v. Beard*, 197 Kan. 275, 416 P.2d 783 (1966).

"'It will be presumed that the legislature, in adopting the amendment, intended to make some change in the existing law, and therefore the courts will endeavor to give some effect to the amendment. A change of phraseology from that of the original act will raise

the presumption that a change of meaning was also intended; this presumption is fairly strong in the case of an isolated, independent amendment, but is of little force in the case of amendments adopted in a general revision or codification of the laws, as in such case the change of phraseology may be due to a rearrangement of the statutes or to a desire to improve the style.' (36 Cyc. 1165.)" *Confinement Specialists, Inc. v. Schlatter*, 6 Kan. App. 2d 1, 5-6, 626 P.2d 223, 226-27 (1981) (quoting *Hauserman v. Clay County*, 89 Kan. 555, 558, 132 P. 212 (1913))." The changes made in the amended version of K.S.A. § 60-1110 were more than simply stylistic. Provisions were added. A whole new type of bond was created. Phraseology was altered and it raises the presumption that a change of meaning was also intended. *Id.*

In the instant case, the Court of Appeals based its decision to treat such a lien-release bond as a waiver of defenses—some defenses, that is—on four arguments. First, the Court of Appeals speculated that the purpose of the amended language was only for contractors or owners to address priority situations. Second, the Court of Appeals examined the legislative history of the 2005 amendments. Third, the Court of Appeals construed the word "discharge" in the statute to address waiver of some classes of disputes. And fourth, the Court of Appeals drew an analogy to performance bonds. As explained below, Puetz and United submit that each of those arguments is contrary to the unambiguous language of the statute, public policy, and prior decisions of this Court.

B. The 2005 addition to K.S.A. § 60-1110 of bonds for "liens which are disputed" was not to alter the priority date of liens.

In discussing the meaning of "any person claiming a lien which is disputed by the owner or contractor," the Court of Appeals correctly notes that the 2005 "amendments expanded the protection available to the contractor or owner by including individual

claimants within the persons impacted by the bond." *See* Court of Appeals' decision at 9. But then the Court of Appeals rejected Puetz's reading and provided the two situations it found applicable. First, "an owner or contractor could post a bond to protect itself where multiple lien claimants might exist, only some of which are disputed." *Id.* How would that "expand the protection available to the contractor or owner"? The contractor or owner would need to pay the undisputed liens either way, but under the Court of Appeals' reading of the statute could not post a bond regarding the disputed liens without waiving most of its defenses to the liens. Why would the legislature change the law to permit a lien-release bond that secretly waived the most common defenses? Who would use it?

Second, "an owner or contractor could use a bond to help control the priority of liens by bonding around and thus discharging a single lien claimant who had an early priority date, thus preventing later lien claimants from applying that earlier priority date to their later-filed liens." *Id.* An owner or contractor already has the ability to play that game by paying off—in full or by negotiated discount—that same early-priority claimant. Why would an owner or contractor take the more expensive path to bond around—and ultimately pay the surety when judgment entered—an early-priority claimant rather than paying it off to reduce the priority of later claimants? And in actual practice, it is more likely to be the lender on a construction loan paying off an early-priority claimant to put itself in first position. But the statute does not even give a lender the ability to bond around—only a contractor or owner. So that cannot be the meaning and purpose.

The Court of Appeals' strained reading of "a lien which is disputed by the owner or contractor," makes the 2005 amendments useless and unnecessary, and thus fails under the clear standards laid out by this Court for statutory interpretation. "A statute should not

be read to add that which is not contained in the language of the statute or to read out what, as a matter of ordinary language, is included in the statute." *Frick*, 289 Kan. at 8. "Additionally, we ... presume the legislature does not intend to enact useless or meaningless legislation." *Northern Natural*, 296 Kan. at 918.

C. The Court of Appeals' examination—and interpretation of—the legislative history of the 2005 Amendments was improper and incorrect.

The Court of Appeals examined the legislative history of the 2005 amendments despite calling the statutory language "plain and unambiguous." "The fundamental rule governing interpretation of statutes is that the legislature's intent governs if this court can ascertain that intent." *Unruh v. Purina Mills, LLC*, 289 Kan. 1185, 1193-94, 221 P.3d 1130, 1138-39 (2009). "'[T]he best and only safe rule for ascertaining the intention of the makers of any written law, is to abide by the language they have used.'" *Univ. of Kansas Hosp. Auth. v. Bd. of Comm'rs of Cnty. of Wabaunsee*, 299 Kan. 942, 957, 327 P.3d 430, 439 (2014) (quoting *Gannon v. State,* 298 Kan. 1107, 1143, 319 P.3d 1196 (2014) (quoting *Wright v. Noell,* 16 Kan. 601, 607, 1876 WL 1081 [1876])). Stated another way, "[t]he legislature is presumed to have expressed its intent through the language it enacted." *Frick*, 289 Kan. at 8. "For this reason, when the language of a statute is plain and unambiguous, courts 'need not resort to statutory construction.'" *Id.*

"Only when the language of a statute is unclear or ambiguous does the court move to the next analytical step, applying canons of construction or relying on legislative history to construe the statute in accord with the legislature's intent." *Id.* Therefore, "[w]hen a statute is plain and unambiguous, [the court does] not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it." *Northern Natural*, 296 Kan. at 918; *see also Univ. of Kansas Hosp. Auth. v. Bd. of Cnty. Comm'rs of*

Unified Gov't of Wyandotte Cnty./Kansas City, 301 Kan. 993, 1001-02, 348 P.3d 602, 607 (2015) ("But if a statute is plain and unambiguous, this court will not speculate about legislative intent or turn to canons of construction.").

When "determining legislative intent, the starting point is not legislative history; rather, we first look to the plain language of the statute, giving common words their ordinary meaning." *Id.* at 998-99 (citing *Graham v. Dokter Trucking Group,* 284 Kan. 547, 556–57, 161 P.3d 695 (2007) ("The Court of Appeals erred in overlooking the import of this plain language in the statute, instead attempting to divine legislative intent from a review of legislative history."); *see also Wabaunsee County,* 299 Kan. at 957, 327 P.3d 430 (stating the "best and only safe rule for ascertaining the intention of the makers of any written law, is to abide by the language they have used")).

Not only did the Court of Appeals err in looking to legislative history, but it incorrectly read the absence of any history regarding the changes to K.S.A. § 60-1110 as evidence against the plain language of the statute. The only written legislative history regarding the Act pertained to the changes being made to other mechanic's lien statutes. That does not mean the changes to K.S.A. § 60-1110 can be ignored or rendered meaningless.

The Court of Appeals read two things into the lack of any legislative history regarding the 2005 amendments, but both are without merit and contrary to the decisions of this Court. First, the Court of Appeals stated that if the legislature was responding to *Eldridge*, it would have acted sooner than 21 years. But the fact that the legislature was slow to act—and there are many reasons a legislature might be slow to act—does not invalidate its action in a clear and unambiguous statute. In addition, the holding of *Eldridge*

still applies for general performance bonds. And this Court recently found that a new legislative act abrogated a 21-year-old decision of this Court. *Univ. of Kansas Hosp. Auth. v. Bd. of Cnty. Comm'rs of Unified Gov't of Wyandotte Cnty./Kansas City*, 301 Kan. 993, 1000-01, 348 P.3d 602, 606-07 (2015). The 2005 amendments in this case should not be ignored just because they came 21 years after *Eldridge*.

Second, the Court of Appeals noted that the legislative history of the 2005 Act did state one case that was being overruled (regarding a different statute) but did not do the same for *Eldridge*. The legislature is not required to outline every case with precedential value that will no longer be controlling when enacting amendments to statutes. In fact, the legislative history cannot possibly recite every case that will be impacted by an amendment. Requiring that to make a statutory change would be absurd and would bring an already crippled legislative system to a screeching halt. In addition, this Court rejected that same argument in *Univ. of Kansas Hosp. Auth.*, 301 Kan. at 1000-01 ("*Frick* did not hold the legislature must clearly and specifically express its intent to overrule precedent.... *Frick* should not be read to require the legislature to offer some talismanic words to the effect of 'we hereby overturn....'"). Similarly, the Court of Appeals said that if the 2005 amendments were intended to create a different result than *Eldridge* in some cases, the legislature would have required perfection of liens and would have made that more explicit. The better argument is that if the legislature had intended "disputed" to mean only certain types of disputes and not others, it would have said that.

The mere fact that the amendments allow for a separate class of bonds—bonds when a lien is disputed—is enough to require a different result than prior precedent. Nothing more is required. The legislature expressed its intent clearly through the plain

language of the statute. Via its 2005 amendment, the legislature added a provision for posting a bond when a lien is disputed. This Court should not permit the change to be gutted by reading the most common disputes out of the statute.

D. The use of "discharge" versus "transfer" in the statute does not support the Court of Appeals' reading a waiver of defenses into the statute.

The Court of Appeals next misunderstood the removal of a lien from the property as a waiver of disputes. K.S.A. § 60-1110 states that if liens have already been filed on the property when either type of bond is filed, "such liens are discharged." The Court of Appeals stated that "discharge" does not mean "transfer" of the lien. But nothing in the statute indicates "discharge" means "waiver of some of the disputes" or "waiver of defenses."

"We give 'discharge' its ordinary meaning as '[a]ny method by which a legal duty is extinguished: esp., the payment of a debt or satisfaction of some other obligation.' Black's Law Dictionary 530 (9th ed. 2009)." COA Memorandum Opinion at 11. If that is true, why is it that the Court of Appeals held that the claim was not affected at all but numerous defenses and disputes were? Giving "discharge" its ordinary meaning in the context of this statute would be to find that the lien no longer encumbers the property—the very purpose of the bond. In other words, posting a narrow lien-release bond with regard to a disputed lien merely discharges the lien *from the property* so that it may be litigated under the bond. The real property is freed up, and the substantive rights of the parties are unchanged, with all claims and disputes preserved. To find otherwise drastically rewrites the statute.

The industry and legal professionals have agreed with the interpretation advanced by Puetz and United since the statute was amended. The Kansas Real Estate Practice &

Procedure, *Fifth Edition,* which is published by the Kansas Bar Association, states the following about K.S.A. § 60-1110:

> When a lien is claimed but disputed, either the contractor or the owner may file a bond with the clerk of the district court conditioned for the payment of the claim. K.S.A. § 60-1110. A bond must have sureties approved by a judge. *Id.* When an approved bond is filed, no lien may attach to the property or, if a lien has already been filed, the lien is discharged. *Id.* The dispute is then litigated through a suit on the bond. *Id.*

(Emphasis added). The 2005 amendments to K.S.A. § 60-1110 provide a new way for owners to have free use of their property while a dispute is litigated. Contrary to the opinion of the Court of Appeals, they do not install a substantive waiver or complete change of outcome.

E. A subcontractor recovering on a general obligation bond or general performance bond without a perfected lien is consistent with—not incompatible to—the more narrow lien-release bond provided by K.S.A. § 60-1110.

The final reason the Court of Appeals gave for its decision to gut the 2005 amendments to K.S.A. § 60-1110 is the "public policy" underlying caselaw permitting recovery without a lien on general obligation or performance bonds. Citing to the subcontractor's recovery permitted in *Algonite Stone Mfg. Co. v. Fidelity & Deposit Co. of Maryland*, 100 Kan. 28, 163 P. 1076 (1917), the Court of Appeals stated that "[i]t would be anomalous to hold that one can recover under the bond without having filed a lien, but one cannot recover under the bond if it has filed a lien which is unperfected." The Court of Appeals failed to distinguish between very different types of bonds.

The bond in *Algonite* is what is known as a general obligation bond or a performance bond. It is the first type of bond outlined in K.S.A. § 60-1110 (and thus existed in 1917, well before the 2005 amendments). It is filed before construction begins

and applies to the whole project. It is in place before the subcontractor or supplier provides any work on a project. It is the private project's version of a public works bond—the kind provided for in K.S.A. § 60-1111. Some owners require such a bond for certain types of projects. As outlined in the statute, once such a bond is filed, mechanic's liens cannot attach to the real property. So there is no need to file a lien statement in such a case, since the lien cannot attach to the property. That is why the focus in such a case, as this Court noted in *Eldridge*, is not on whether a claim is perfected as a lien but on whether it could have been perfected.

Another kind of bond—one added to the statute by the Legislature in 2005—is a narrow, specific bond to an individual claiming "a lien which is disputed." Such a lien does not exist at the beginning of the project, or before a subcontractor or supplier files a lien statement—or, as in the case, does not exist even at the time a supplier's lien-filing rights expire. As detailed in section I. above, Wagner had no valid claim against Puetz at the time its lien rights expired, since there was no performance bond and its lien statement was fatally defective. Nothing in the 2005 revised statute purports to introduce a bond which changes that result.

As one can see, there is a large difference between a general performance bond, and a narrow lien-release bond. A general performance bond, agreed to between the owner and general contractor before the project even begins and announced to all those who may work on the project in the future, is a voluntary waiver of the requirements of the mechanic's lien statues in order to prevent any liens from ever being filed. A narrow lien-release bond is not. It is not at all unfair to require a subcontractor or supplier to perfect a mechanic's lien where that is its only means of recovery against a party it has no privity

with. It is very unfair, however, to hold that a statute which permits a bond-around procedure for "a lien which is disputed" secretly operates as a waiver of those disputes.

If one wants to draw analogies between bonds, the better example is a supersedeas bond. Under K.S.A. § 60-2103, a losing party appealing a judgment may get a stay on execution of that judgment by filing an approved bond in an amount that will satisfy the judgment if the party loses the appeal. The filing of a supersedeas bond does not waive any substantive argument in the appeal, but simply preserves the status quo and thereby balances the interests of the parties. Likewise, the filing of a specific lien-release bond after a lien is claimed so that the disputed lien can be guaranteed and fully litigated without tying up the property for years does not waive any substantive argument regarding the disputed lien. There is no support for the Court of Appeals' decision in the statute, caselaw, or any analogous situation.

III. Public policy overwhelmingly supports Puetz and United.

When a mechanic's lien is asserted, there are two competing interests. The first interest is that of the supplier, subcontractor or contractor who claims the lien because it was not paid in full. The second interest is that of the owner of the property that is encumbered by the claimed lien. Public policy supports entities getting paid for their work—that is the very purpose of the mechanic's lien. Public policy also supports the free alienation of real property: that a property owner be free to sell the property, refinance a loan on it, and put the property to the best possible use.

In the case of a disputed mechanic's lien, both parties take a hit. The property owner cannot do whatever it wants with its property—possibly for several years—because of the lien. The lien claimant runs the risk that the freeze on the property will cause the

project to not be completed, the property to fall into repair, or ultimately the property sold at auction to pay the judgment—all things which cause the property to lose a lot of value and possibly not be enough to satisfy the lien.

But what if there were a way to fix those problems for both parties? What if the lien claimant could keep all its rights and gain a guaranteed source of cash if it prevailed, and the property owner could free up the property immediately but still contest the lien? A legislative solution where everyone wins is not possible, right? Well, that is exactly what the legislature did with its 2005 amendments to K.S.A. § 60-1110.

It is not surprising, then, that states other than Kansas have adopted some version of this option, and do not treat it as a substantive waiver of rights. *See, e.g., Lindt & Sprungli USA, Inc. v. PR Painting Corp.*, 292 A.D.2d 610, 740 N.Y.S.2d 369 (N.Y. 2d Dept. 2002) (upon the filing of a lien-release bond, the action becomes a test of the validity of the lien had it not been discharged); *Conmac Corp. v. Southern Diversified Development, Inc.*, 245 Ga. App. 895, 539 S.E.2d 532 (Ga. App. 2000) (holding that the claimant must establish rights both to the lien and the foreclosure thereof in order to recover on a lien-release bond); *Few v. Capitol Materials, Inc.*, 274 Ga. 784, 559 S.E.2d 429 (Ga. 2002) (holding that the principal and surety on the bond are entitled to raise any defense that would have been available as a defense to the lien foreclosure); *Fidelity & Deposit Co. of Maryland v. Accel, Inc.*, 354 So. 2d 424, 425 (Fla. 4th Dist. App. 1978) (finding a lien-release bond "does not obviate the necessity of the lien claimant proving all of the prerequisites necessary for him to enforce his lien. On the contrary, even though the real property is no longer encumbered by the lien the claimant must prove all of the conditions precedent to the perfection and enforcement of that lien."); *Royster Constr. Co. v. Urban*

West Communities, 40 Cal. App. 4th 1158, 1165-67 (Cal. App. 2d Dist. 1995) (rejecting a claim for attorney fees against the lien-release bond because it was not permitted in the mechanic's lien statutes, finding that the bond "does not change the relation or rights of the parties...."); *In re J.M. Diver Lumber Co.*, 243 Mich. 175 (Mich. 1928) ("The giving of the bond in no way changed the rights of the lien claimant.").

There would be no incentive for an owner or contractor to post a bond under K.S.A. § 60-1110 if doing so would essentially revive or cure disputed liens that were otherwise fatally defective. Nevertheless, that is the result rendered by the Court of Appeals. The posting of a bond should not result in a concession that the disputed lien is valid and enforceable. It also should not result in a waiver of the strict statutory requirements for perfecting a lien under K.S.A. §§ 60-1102 and 60-1103 because that would defeat the primary purpose of freeing up the property for conveyance. Under the interpretation given by the Court of Appeals, an owner or contractor would use a lien-release bond only in the case of an undisputed lien.

Under Puetz' reading of the statute, all parties are protected, disputes can be litigated, and real property is freed up. Under the Court of Appeals' reading of the statute, a lien-release bond can almost never be used because it operates as a waiver of the most common defenses to a mechanic's lien, and therefore real property will have to be left encumbered unnecessarily. Which reading better fits the public policy of Kansas? That is the reading this Court should adopt.

CONCLUSION

It is uncontroverted that Wagner failed to comply with the strict statutory requirements of K.S.A. §§ 60-1102 and 60-1103 for perfecting a lien. Reliance on *Eldridge*

is misplaced because the Legislature has revised the language of § 60-1110. The Legislature revised the statute to allow owners and contractors to post a bond to any person claiming a lien that is disputed. The lien here is disputed. Accordingly, the plain language of the revised statute requires a different result than *Eldridge*. The dispute here concerning the underlying defective lien falls within the plain language of revised K.S.A. § 60-1110. The Court of Appeals' decision should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 20th day of July, 2016, a true and correct copy of the above and foregoing **Supplemental Brief of Appellees Puetz Corporation and United Fire & Casualty Co.** was served via E-Mail and the Kansas Judicial Branch eFlex System to the following:

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