NOT DESIGNATED FOR PUBLICATION

No.113,037

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

WAGNER INTERIOR SUPPLY OF WICHITA, INC.,
Appellant,

v.

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

MEMORANDUM OPINION

Appeal from Sedgwick District Court; MARK A. VINING, judge. Opinion filed October 2, 2015. Reversed and remanded with directions.

Vincent F. O'Flaherty, of Law Offices of Vincent F. O'Flaherty, of Kansas City, Missouri, for appellant.

Ryan M. Peck, and *Nanette Turner* Kalcik, of Morris, Laing, Evans, Brock & Kennedy, Chartered, of Wichita, for appellee.

Before MCANANY, P.J., GARDNER, J., and WALKER, S.J.

Per Curiam: This case arising from cross-motions for summary judgment asks us to construe the effect of the 2005 amendments to K.S.A. 60-1110. We find that pursuant to the plain language of the statute, a release of lien bond discharges a mechanic's lien regardless of the lack of perfection of the lien. We therefore reverse.

The undisputed facts

The underlying facts are undisputed and uncomplicated. In September of 2012, Wichita Hospitality Group, LLC entered into an agreement with Puetz Corporation ("Puetz") for Puetz, as general contractor, to design and construct a Holiday Inn Express & Suites Hotel ("the Hotel") in Wichita, Kansas. Puetz subcontracted a portion of the work to Dynamic Drywall, Inc. ("Dynamic"), and paid Dynamic $271,270.78 for materials and services provided under the subcontracts. Wichita Hospitality Group was not a party to the subcontracts between Puetz and Dynamic.

Dynamic obtained drywall materials from Wagner Interior Supply of Wichita, Inc. ("Wagner") and used these materials in the construction of the Hotel. Wagner last delivered materials to the Hotel construction site on September 10, 2013. The reasonable value of the materials was $108,162.97.

Dynamic failed to pay Wagner for the drywall materials, and an outstanding balance of $108,162.97 was owed to Wagner. Wagner demanded payment from both Puetz and Dynamic, but payment was never made.

On November 26, 2013, Wagner timely filed a lien statement in the district court claiming a mechanic's lien on the Hotel in the amount of $108,162.97 for the drywall materials it supplied to Dynamic. But in the mechanic's lien, Wagner incorrectly identified "Dynamic Drywall, Inc.," instead of Puetz, as the general contractor for the Hotel, an error that could cause a mechanic's lien to fail. See *Alliance Steel, Inc. v. Piland*, 39 Kan. App. 2d 972, 976-78, 187 P.3d 111 (2008). Wagner's mechanic's lien also incorrectly named "Holiday Inn Express & Suites" as the owner, but the legal description attached to the lien correctly showed the owner to be "Wichita Hospitality Group, LLC." Wagner neither corrected any lien error nor filed a notice of extension of time. See K.S.A. 60-1103(e). Thus the 3-month period for timely filing a lien statement

as to the materials Wagner furnished to Dynamic ran on December 10, 2013. See K.S.A. 60-1103(a).

Approximately 1 month later, Puetz filed a Release of Lien Bond pursuant to K.S.A. 60-1110. The bond was filed in order to quiet title to the Hotel property so it could be refinanced and so the property would be free from future litigation about the validity of Wagner's claimed lien.

The bond named Puetz as principal, United as surety, and Wagner as the claimant in the amount of $108,162.97. It states in part:

> "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."

The bond concludes: "Accordingly, the Clerk . . . is hereby requested to release the above-described lien and substitute [in] lieu thereof this bond." Similarly, the district court's Judicial Approval of Bond concludes: "The mechanic's lien claimed by Wagner … is hereby discharged in accordance with K.S.A. 60-1110."

Thereafter, Wagner filed a petition to recover under the bond, naming Dynamic, Puetz, and United as defendants. Wagner subsequently dropped its claim against Dynamic because Dynamic had filed for bankruptcy protection.

The remaining parties filed cross-motions for summary judgment focusing on the statutory interpretation of K.S.A. 60-1110. Wagner argued it was not required to show it had perfected its lien in order to recover on the bond but was required to show only that it had supplied materials to the job site, that the materials had been used in improvements,

and that it had not been paid for those materials. In contrast, Puetz and United claimed that Wagner's failure to timely perfect its mechanic's lien prevented it from collecting under the bond. The district court agreed, so granted summary judgment in favor of Puetz and United. Wagner timely appeals.

Summary of the parties' arguments

On appeal, as below, Wagner argues that it was not required to perfect the lien because Puetz filed a release of lien bond which substituted for and discharged the lien. Wagner relies on the strikingly similar case of *Bob Eldridge Const. Co. Inc. v. Pioneer Materials, Inc.*, 235 Kan. 599, 684 P.2d 355 (1984), which so held, and claims that subsequent amendments to the statute *Eldridge* relied on, K.S.A. 60-1110, have not changed the law.

Puetz and United argue the holding in *Eldridge* is no longer controlling because the 2005 amendments to K.S.A. 60-1110 required Wagner to perfect its lien. They contend that Wagner's lien statement was fatally defective, that Wagner's time in which to amend its lien statement had expired, and thus its unperfected lien never attached to the Hotel property.

Our standard of review

When the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. The district court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude

summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. On appeal, the same rules apply; summary judgment must be denied if reasonable minds could differ as to the conclusions drawn from the evidence. *Stanley Bank v. Parish*, 298 Kan. 755, 759, 317 P.3d 750 (2014).

Where there is no factual dispute, appellate review of an order regarding summary judgment is de novo. *Martin v. Naik*, 297 Kan. 241, 246, 300 P.3d 625 (2013). When the controlling facts are based on the parties' joint stipulation, an appellate court determines de novo whether the nonmoving party is entitled to a judgment as a matter of law. *In re Tax Appeal of LaFarge Midwest*, 293 Kan. 1039, 1043, 271 P.3d 732 (2012). We do so here.

The *Eldridge* case

The facts in *Eldridge* are very similar to the facts before this court. In *Eldridge*, Bob Eldridge Construction Company, Inc. was a general manager who subcontracted its drywall work to R & S Construction Company. Pioneer Materials, Inc. supplied the drywall materials to R & S. After R & S filed for bankruptcy, Pioneer supplied the materials directly to Eldridge. When Pioneer did not receive payment for its supplies, it filed lien statements against the projects. Eldridge, as principal, and Fireman's Fund, as surety, executed and filed bonds to discharge the liens. The district court found in favor of Pioneer so Pioneer recovered under the bonds. Eldridge appealed. 235 Kan. at 600-02.

The first issue on appeal was whether the district court erred by ruling Pioneer did not need to prove it had perfected its liens. Eldridge argued Pioneer had not perfected its liens because it had not complied with several of the strict statutory requirements. The district court found perfection of the lien was unnecessary because the bond discharged the lien. 235 Kan. at 603. The Kansas Supreme Court reviewed the language of K.S.A. 60-1110 in effect at the time, which stated:

> "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, with good and sufficient sureties, to be approved by, and filed with, the clerk of the district court, 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. Suit may be brought on said bond by any person interested." K.S.A. 60-1110 (Ensley 1983).

The Kansas Supreme Court held this language "clearly shows the lien need not be perfected in this case, rather, it must merely be shown that it could have been perfected if the bond had not been filed." 235 Kan. at 603. The trial court correctly held that the bonds discharged the lien and the appellee was bound only to prove the validity of its claim to the bonds.

The court then addressed whether Pioneer *could* have perfected its lien. 235 Kan. at 604. But its focus was *not* on whether Pioneer could timely have amended its lien to correct any deficiencies. Instead, it focused on the relationship between the parties and the delivery of materials that were used to improve the real property which was the subject of the lien.

> "The issue before the court is to what extent [Pioneer] must show it could have perfected its liens. We hold the rule is as stated in [*Murphree v. Trinity Universal Ins. Co.*, 176 Kan. 290, 294, 269 P.2d 1025 (1954),] that 'when the bond is filed a claimant is not required to file a lien statement in order to preserve his rights—he may then look to the bond for recovery . . . .' [Citation omitted.] This means when the bond is filed the statutory requirements of the lien, such as the filing of a lien statement, need not be complied with and are waived. The only requirement to recover the bond money is to prove the material or labor was supplied by the claimant and was used in the improvement of the real property which was the subject of the lien. The case then shifts from a showing that each statutory lien element was fulfilled to a showing that the claimant has a right to the bond. See 57 C.J.S., Mechanics' Liens § 233, p. 806. The

> posting of a bond also eliminates the need for the strict construction rule we adhere to in mechanics' lien cases since the lien is thereby eliminated." 235 Kan. at 604.

The Supreme Court found substantial evidence showing that a delivery of materials had occurred. 235 Kan. at 605. It also found that the lien statement's misidentification of Pioneer as a subcontractor "was not misleading and did not allow Pioneer to recover when it ordinarily would not have been allowed to." 235 Kan. at 605. Further, even though no written contract was produced between Pioneer and the contractor, the court ruled that none was necessary, relying on the general rule that "a claim for materials furnished to a subcontractor is within the coverage of a bond given by a general contractor to secure payment for labor and materials employed or used in the performance of the general contract." 235 Kan. at 605, citing *Leidigh & Havens Lumber Co. v. Bollinger*, 193 Kan. 600, 603, 396 P.2d 320 (1964). Accordingly, Pioneer was entitled to recover on its claim under the bond without having perfected its lien. 235 Kan. at 606.

The 2005 amendments to K.S.A. 60-1110

Puetz and United contend the 2005 statutory amendments to K.S.A. 60-1110 render *Eldridge's* holding no longer valid.

Interpretation of a statute is a question of law over which appellate courts have unlimited review. *Jeanes v. Bank of America, N.A.*, 296 Kan. 870, Syl. ¶ 2, 295 P.3d 1045 (2013). The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained. When a statute is plain and unambiguous an appellate court should not speculate about the legislative intent behind that clear language, and it should refrain from reading something into the statute that is not readily found in its words. *Cady v. Schroll*, 298 Kan. 731, 738-39, 317 P.3d 90 (2014).

The legislature amended K.S.A. 60-1110 in 2005 by adding the words we italicize below:

> "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 (Furse 2005); L. 2005, ch. 95, sec 4.

Puetz and United rely primarily on the amended language which provides: "or to any person claiming a lien which is disputed by the owner or contractor." They claim this reference to a disputed lien means the legislature intended to preserve all types of lien disputes that could have been brought before a bond is filed and transfer such disputes to the bond proceedings. They contend the purpose of the revised law is to allow a party to post a bond to effectively transfer the disputed lien to the bond thus freeing up the property for conveyance and that waiving the strict statutory requirements for perfecting a lien would defeat the primary purpose of freeing up the property for conveyance.

We disagree. The amended language must be read in context. Its preceding phrase states: "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." K.S.A. 60-1110. Before the 2005 amendments, the bond was stated to impact only a collective group—"all persons in whose favor liens might accrue by virtue of this act." And the bond had to be

"conditioned for the payment of all claims which might be the basis of liens in a sum not less than the contract price." That amount could be very large—much larger than the amount of a disputed lien.

The amendments expanded the protection available to the contractor or owner by including individual claimants within the persons impacted by the bond. They grant the contractor or owner an alternative right to post a bond as to one, or fewer than all, actual lien claimants on a project—to "any person claiming a lien which is disputed by the owner or contractor." Such a bond need not be conditioned for the payment of sums in the full contract price but can be conditioned for the payment of the amount of the disputed lien.

Thus an owner or contractor could post a bond to protect itself where multiple lien claimants might exist, only some of which are disputed. And 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. See K.S.A. 60-1101 (providing that "[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.") (Emphasis added.).

Puetz and United contend the 2005 amendments were a legislative response to *Eldridge*. But *Eldridge* was decided 21 years earlier and the parties fail to show any causal connection between the two. In contrast, Wagner shows legislative history expressly stating that the 2005 amendments were made in direct response to the 2004 case of *Mutual Savings Association v. Res/Com Properties*, 32 Kan. App. 2d 48, 79 P.3d 184 (2003). See Brief of Appellant, Legislative Authority Appendix.

Mutual Savings created two problems for lenders: it held that mechanic's lien priority for all subsequent lienholders under K.S.A. 60-1101 could be established by a contractor or subcontractor who had been paid in full and no longer had a claim on the property; and it held that work that was not visible could nonetheless establish the priority date for all other subsequent lienholders. See *Mutual Savings*, 32 Kan. App. 2d at 56. Legislative changes to address those issues focused on K.S.A. 60-1101, but included the statute which formed the basis for *Eldridge's* holding.

Eldridge addressed perfection, not priority, of liens. Had the 2005 amendments been in response to *Eldridge*, they likely would have required "perfection" of liens. Courts generally presume that the legislature acts with full knowledge of existing law. *In re Adoption of H.C.H.*, 297 Kan. 819, 831, 304 P.3d 1271 (2013). Furthermore, when the legislature revises an existing law, the court presumes the legislature intended to change the law as it existed prior to the amendment. See *Brennan*, 293 Kan. at 458 ("[T]his presumption's strength, weakness, or validity, changes according to the circumstances."). However, when the legislature fails to modify a statute to avoid a standing judicial construction of the statute, we presume the legislature intended the statute to be interpreted as we have done. *Cady*, 298 Kan. at 737. Therefore, had the legislature intended to require perfection of liens after the filing of a bond, it would have done so in a more explicit manner. We find that the 2005 amendments did not change the Supreme Court's ruling in *Eldridge* regarding lien perfection.

This result credits the plain language found in both the original statute and the amended statute — language which Puetz and United overlook — which states: "and if when such bond is filed liens have already been filed, such liens are discharged." K.S.A. 60-1110 (Ensley 1983) and K.S.A. 60-1110 (Furse 2005). We construe statutes to avoid unreasonable results, presuming that the legislature does not intend to enact useless or meaningless legislation. *Board of Sumner County Comm'rs v. Bremby*, 286 Kan. 745, Syl. ¶ 4, 189 P.3d 494 (2008). Puetz and United offer no plausible interpretation of this

clause. We give "discharge" it 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). See *Eldridge*, 235 Kan. at 604 (finding the posting of a bond "eliminated" the lien). Discharge of liens, as used in K.S.A. 60-1110. does not mean transfer of liens.

Puetz and United's position additionally fails to account for the public policy underlying our caselaw which has long held that a subcontractor can recover under a bond, even if it has not filed a lien. See e.g., *Manufacturing. Co. v. Deposit Co.*, 100 Kan. 28, 163 P. 1076 (1917). It 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. We find, as *Eldridge* did, that "when the bond is filed the statutory requirements of the lien, such as the filing of a lien statement, need not be complied with and are waived." 235 Kan. at 604. Any defects in perfection of the lien are extinguished, not transferred intact to be litigated in the bond proceeding.

In accordance with the plain and unambiguous language of the relevant statute, we find that when Puetz chose to file a bond instead of to challenge Wagner's lien as unperfected, Wagner's lien was discharged, mooting any claims regarding the lien's imperfection.

Wagner now bears the burden to show the validity of its claim against the bond. *Eldridge*, 235 Kan. at 604. "The only requirement to recover the bond money is to prove the material or labor was supplied by the claimant and was used in the improvement of the real property which was the subject of the lien." *Eldridge*, 235 Kan. at 604. The focus of the case is no longer on Wagner showing that each statutory lien element was or even could be timely fulfilled, but on Wagner showing it has a right to the bond.

The parties do not dispute the uncontroverted facts which show the validity of Wagner's claim under the bond. Wagner supplied the drywall materials to Dynamic, a subcontractor, under an agreement to do so; those materials were used in the improvement of the Hotel; the value of the materials was $108,162.97; and Wagner never received payment for those materials. The district court thus erred by granting summary judgment in favor of Puetz and United.

We reverse and remand with directions to grant summary judgment in favor of Wagner Interior Supply of Wichita, Inc.