

IN THE
SUPREME COURT OF MISSOURI

No. SC94038

BRENTWOOD GLASS COMPANY, INC.,

Plaintiff-Appellant,

vs.

CLAYCO, INC., CORNERSTONE VI, LLC, UMB BANK,
VICTOR ZARILLI, NATIONAL CITY BANK,
PAUL M. MACON, ST. LOUIS COUNTY, MISSOURI

Defendants-Respondents,

Appeal from the Circuit Court of the County of St. Louis, Missouri

Division 18

The Honorable Richard C. Bresnahan

SUBSTITUTE BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT.

This is an appeal from a final judgment of the Circuit Court of St. Louis County, 21st Judicial Circuit, pursuant to Section 512.020 (5), R.S.Mo. (2000), on the claims of a contractor under the Missouri's public works bond and mechanic's lien statutes. On August 7, 2012, Appellant filed a notice of appeal of the July 24, 2012 judgment. Because there is neither any issue of the validity of any statute nor any other issue within the exclusive appellate jurisdiction of the Supreme Court of Missouri, this appeal was within the general appellate jurisdiction of the Court of Appeals. Mo. Const. art. V, § 3; Section 477.050, R.S.Mo. (2000). The Court of Appeals affirmed the judgment on October 15, 2013. In compliance with Rules 84.17(b) and 83.02, and with leave of court, on November 7, 2013, appellant filed both a motion for rehearing and an application for transfer. After the Court of Appeals denied the motion and application on February 13, 2014, pursuant to Rule 83.04, on February 28, 2014, appellant timely filed in this Court an application for transfer. This Court granted the application.

STATEMENT OF FACTS

I. Parties

Plaintiff-Appellant, Brentwood Glass Company, Inc. ("Brentwood Glass"), filed suit to collect payment for work performed under a subcontract with Pal's Glass Service, Inc. ("Pal's Glass"). Brentwood Glass' work included installation of windows, window frames, glass and related items in the construction of a ten-story office building ("Project") on land

commonly known as Six City Place Drive, Creve Coeur, Missouri (“Property”). L.F.¹ I/20-II/343; L.F. VIII/1134-A.L.F.² IX/1191.

Defendants-Respondents include Clayco, Inc. (“Clayco”), the general contractor for the Project and others who had or have various interests in the Property: Cornerstone VI, LLC (“Cornerstone”), the owner now and at the time that the general contract was signed and also the lessee, with the option and obligation to purchase, while the work was done (L.F. V/586-87 ¶¶ 3, 4, 5; A.L.F. VI/729, 755-57 §§ 11.1, 11.4); the County of St. Louis (“County”), the owner of the Property during most, if not all, of the construction (L.F. V/586-87 ¶¶ 3, 4, 5, V/590-92 ¶¶ 8, 10, 13, V/619 ¶¶ 73-75); Victor Zarilli, trustee under a deed of trust executed by the County to secure \$21 Million of County-issued industrial revenue bonds, held by UMB Bank, N.A., as trustee for the only bondholder, Cornerstone (A.L.F. VI/796 - VII/811); and, Paul M. Macon, the trustee of a deed of trust securing a note to National City Bank (*e.g.*, L.F. I/20).

II. Claims on Appeal

Brentwood Glass’ consent judgment against Pal’s Glass for breach of contract in the amount of \$593,261.47 and costs remains unsatisfied. A.L.F. IX/1215-1216; L.F. I/18-19.

To collect the sums due it, Brentwood Glass makes two other claims:

1. against the County, alleging that the County was the

¹Legal File. The Roman numeral refers to the volume and the Arabic number refers to the page within said volume.

²Amended Legal File

owner of the Property on which the Project was built, that the County was required by Section 107.170, R.S. Mo. (2000) (Appendix at p. (“A”) 8) to have its contractor obtain and post a statutory payment bond, that no such bond was posted, and that, therefore, the County is liable for all amounts due Brentwood Glass. L.F. I/77-85; L.F. VIII/1150-51; and,

2. For a mechanic’s lien. L.F. I/62-77; L.F. VIII/1134-50.

III. The Project

A. Industrial Revenue Bond Authorization

The Project had its genesis no later than March 8, 2005, when the County Council adopted a resolution which stated that the County intended to issue bonds, in an amount not to exceed \$43,000,000, to finance the County’s acquisition of the Property, the construction of the Project, and the equipping and furnishing of the Project’s office building. L.F. VII/815-57. The resolution provides that “Cornerstone [is] hereby authorized to proceed with the purchase, construction and equipping of the Project, including the entering of contracts and purchase orders in connection therewith” L.F. VII/819 §6.

The Council reviewed the plan in April (L.F. VII/858-917) and considered an ordinance to approve the plan in July (L.F. VII/918-47). The Council and the County Executive enacted the ordinance on August, 3, 2005. L.F. VII/948-56. The Ordinance finds

that the plan is “desirable for the improvement of the economic welfare and development of the County and within the public purposes of the [Missouri Constitution, Sections 100.010-200, R.S. Mo. (2000), and the County Charter].” L.F. VII/954.

B. Koman Contract with Clayco

While this process was unfolding, on July 19, 2005, The Koman Group, L.L.C. (“Koman”) entered into a contract with Clayco to build the Project for a sum not to exceed just over \$25.6 Million (“Koman/Clayco Contract”). L.F. II/348 ¶5; L.F. III/372 ¶3; L.F. III/376-89 (A12-14); L.F. III/378 §5.1.2 (A12); L.F. V/586-87 ¶5. Though the Koman/Clayco Contract identifies Koman as the “Owner,” (L.F. III/376-89 (A12)), Cornerstone, not Koman, then owned the Property (L.F. II/347-48 ¶¶’s 2,3,5; L.F. II/359-64; L.F. V/585-86 ¶¶’s 2,3,5; L.F. V/616-17 §64; L.F. VIII/1061-64; L.F. VIII/1081-82 §64).

William J. Koman, Jr. (“Mr. Koman”), who signed the Koman/Clayco Contract as the President of Koman (A14), was also the manager and sole owner, as trustee of his trust, of Cornerstone. L.F. VIII/1082-83 ¶66. He operated Cornerstone out of the same office suite at One City Place Drive as was used by Koman. *Id.*

There is nothing in the record to suggest that Cornerstone contracted with Koman to build the Project for it.

C. The Cornerstone/County Closing

On September 9, 2005, Cornerstone and the County closed an elaborate set of transactions: among other things, Cornerstone deeded the Property to the County, the County leased it back to Cornerstone (L.F. V/617-18 §67; A.L.F. VI/729-768 (A15-18); L.F. VIII/1083 §67), and the County issued \$21 Million in industrial revenue bonds to finance

part of the cost of construction of the Project. A.L.F. VI/672 - VIII/1059. Mr. Koman signed the deed on behalf of Cornerstone. L.F. II/347 §2; L.F. II/359-64; L.F. V/585-86 §2; A.L.F. VI/666-VIII/1073. Several of the agreements require that any notices to Cornerstone be sent to the attention of Mr. Koman and in care of “The Koman Group, L.L.C., One City Place Drive, Suite 540,” as well as to “The Koman Group, L.L.C., One City Place Drive, Suite 540” . A.L.F. VI/715-16 (trust indenture); A.L.F. VI/761-62 (lease); A.L.F. VI/780 (bond purchase agreement).

D. The Lease of the Property by the County to Cornerstone

The lease between the County and Cornerstone (the “Lease”) provides:

Section 4.2. Purchase, Construction and Improvement of the Project Improvements. The County and [Cornerstone] agree that [Cornerstone] *as the agent of the County* shall . . . purchase, construct and improve the Project Improvements as follows:

. . . .

(b) *On behalf of the County*, [Cornerstone] will purchase and construct the Project Improvements on the Project Site and otherwise improve the Project Site in accordance with the Plans and Specifications. . . .

A.L.F. VI/738 (A16); L.F. V/617 ¶67; L.F. VIII/1083 ¶67 (emphasis added).

E. Cornerstone Was Obligated to Buy Property Back

The Lease both grants Cornerstone an option, and imposes on it an obligation,

to repurchase the Property. A.L.F. VI/755-57, 783-94.

F. Construction Begins

Clayco provided an affidavit, supported by a project report, which states that work commenced on the Project on Monday, September 26, 2005. L.F. II/350; L.F. III/373; A.L.F. IV/420 (A22-23). Brentwood Glass denied this fact on the basis that the project report (A22-23) refers to ongoing work (“Rain over the week end ... playing hell with the productivity of the project. ... Clayco labors [sic] pumping water from the deep columns and grouting.”) L.F. V/591-92.

G. Subcontracts

In early October, 2005, Clayco subcontracted the glass and glazing work to Pal’s Glass. L.F. II/349 ¶8; L.F. III/390 - A.L.F. IV/417; L.F. V/590 ¶8. In mid-October, 2005, Pal’s Glass subcontracted a portion of its work to Brentwood Glass. L.F. I/87-132 (A19-21); L.F. II/349 ¶10; L.F. V/590-91 ¶10.

IV. No Payment Bond Provided for Project

The Lease provides that Cornerstone “will comply with the provisions of Section 107.170 of the Revised Statutes of Missouri, as amended, to the extent applicable to the construction of the Project.” A.L.F. VI/738 ¶ 4.2 (d) (A16). Neither Clayco nor Koman furnished a bond to the County to assure that all of the Projects’ subcontractors and suppliers would be paid. L.F. I/84-85 ¶¶’s 193-94; L.F. II/309-10 ¶¶’s 193-94.

V. Partial Waivers of Lien

Between February, 2006, and January, 2007, in exchange for progress payments, Brentwood Glass signed a series of documents, on Clayco’s form, entitled “Partial Waiver

of Lien.” L.F. II/352-53 ¶¶’s 28-33; A.L.F. IV/516-526 (A24); L.F. V/597-600 ¶¶’s 28-33. Each Partial Waiver of Lien is dated, recites the amount of the partial payment for which it was exchanged, and states that Brentwood Glass:

waive[s] and release[s] any and all liens and claim or right to lien on [the Property] under the Statutes of the State of Missouri relating to Mechanic’s and Materialmen’s Liens, on account of labor or materials, or both, furnished by the undersigned

A.L.F. IV/516-26 (A24). The Partial Waivers of Lien do not mention payment bond claims.

A.L.F. IV/516-26 (A24).

VI. Brentwood Glass’ Last Day of Work

A. Clayco’s Evidence

Clayco’s records indicate that Brentwood Glass last worked on the Project on January 18, 2007. L.F. III/373 ¶11. Brentwood Glass’ filings with the glaziers’ union list union employees’ last work on January 31, 2007. L.F. II/350 ¶18. The last day of work for which Brentwood Glass paid any employee was January 31, 2007. L.F. II/350 ¶16. Brentwood Glass admitted that January 31, 2007, was the last day that any of its employees worked on the Project. L.F. II/350 ¶17.

B. Brentwood Glass’ Evidence

Bettie Albers, Brentwood Glass’s vice-president, installed many bathroom mirrors on the Project and did caulking beginning on February 5th and ending on February 9th, 2007. L.F. V/619 ¶73; A.L.F. VI/626-27 ¶¶’s 2-4, 7; A.L.F. IV/476 at 139, l. 5 - 140, l. 6; L.F. I/169. On February 13, 2007, Mrs. Albers also worked five hours installing vertical

covers and exterior mullions on the storefront. L.F. V/619 ¶7; A.L.F. VI/627 ¶8; A.L.F. IV/476 at 137, 1.22 – 138, 1.6; L.F. I/169. Everything she did was within the scope of work Pal’s Glass had assigned to Brentwood Glass. L.F. I/91 ¶1; L.F. I/93 ¶¶’s 13, 24; L.F. I/95 ¶36.

VII. Clayco’s Payments to Brentwood Glass’ Suppliers

In late April, 2007, Clayco paid a total of \$47,343.92 to several of Brentwood Glass’ suppliers. L.F. II/356-57 ¶56; L.F. V/613 ¶56. Clayco never advised Brentwood Glass that Clayco had made these payments. L.F. V/622 ¶78. Brentwood Glass did not learn of these payments until after it filed its mechanic’s lien. A.L.F. VI/631 ¶ 19.

VIII. Notice to Owner

On July 27, 2007, Brentwood Glass served Cornerstone and Koman with its notice of intent to file a mechanic’s lien. *E.g.*, L.F. II/354 ¶39; L.F. V/528-32, 548-53, 604 ¶39; L.F. VIII/1074-80.

IX. The Lien

On August 8, 2007, Brentwood Glass filed its mechanic’s lien (“Lien”) with the Circuit Clerk of the County. L.F. II/354 ¶37; L.F. I/145–II/286; L.F. V/603-04 ¶37. The Lien lists the labor and materials which Brentwood Glass furnished, beginning in January 2006 and ending on February 20, 2007. L.F. I/145 - II/286. For each weekly period, the Lien states the number of hours of work that Brentwood Glass’ performed and the hourly charge for its labor. L.F. I/145-69. The Lien uses labor rates of \$70/hour for regular time. *Id.* The Pal’s Glass/Brentwood Glass Contract provides that the hourly rate for journeymen glaziers is \$62. L.F. I/97. The Lien gives credit for payments that Brentwood Glass received

from Pal's Glass and from Clayco, but it does not give credit for the payments which Clayco made directly to Brentwood Glass' suppliers. L.F. I/170; L.F. II/357 ¶57; L.F. V/613-14 ¶57.

X. Transfer of Property Back to Cornerstone

On July 8, 2011, the County transferred the Property back to Cornerstone. L.F. VIII/1099 ¶4.

XI. Procedural Facts

A. Brentwood Glass' Claims

There are two claims which are the subject of this appeal. A.L.F. IX/1229. Brentwood Glass seeks a money judgment against the County for its unpaid work. L.F. I/62-86; L.F. VIII/1150-51. Brentwood Glass alleges that the County failed to have its contractor obtain a bond to assure the payment of all subcontractors and suppliers. *Id.* In the alternative, Brentwood Glass seeks a mechanic's lien. L.F. I/62-77; L.F. VIII/1134-50.

B. Motion for Summary Judgment

All Defendants besides Pal's Glass and its owner joined in filing a motion for summary judgment with respect to Brentwood Glass's bond and mechanic's lien claims. L.F. II/344-46. The motion contends that the bond claim fails, as a matter of law, because there is no evidence that the County had "a contract for improvement of the subject property." L.F. II/345 ¶3.b. It also asserts that the mechanic's lien claim fails, as a matter of law, because Brentwood Glass failed to give notice to the property owner of its intention to file the Lien, the Lien was untimely filed, and the Lien is not a just and true statement of

the amount due, because it includes charges for work described in valid lien waivers.³ L.F. II/345 ¶3.a.

Without giving any explanation whatsoever, the trial court entered summary judgment in favor of all defendants on both claims. L.F. I/20-II/343; L.F. VIII/1121 (A1); L.F. VIII/1132-33 (A2-A3); A.L.F. IX/1213-1214 (A4-A5); A.L.F. IX/1223-1224 (A6-A7). The court amended this judgment several times, adding parties that had been omitted, finally disposing of the bond and mechanic's lien claims on July 24, 2012.⁴ L.F. VIII/1132-33 (A2-A3); A.L.F. IX/1213-14 (A4-A5); A.L.F. IX/1223-24 (A6-A7).

C. Perfection of Appeal

On July 26, 2012, Brentwood Glass filed its notice of appeal. A.L.F. IX/1225-32. The appeal was premature, but timely. *E.g., Buchanan v. Rentenbach Construction, Inc.*, 922 S.W.2d 467, 469 (Mo.App. E.D. 1996) (*citing* Rule 81.05(b)).

The record on appeal consists of a legal file but no transcript.

³In argument, Defendants raised two other issues: they contended that the Lien is not a just and true account, because it fails to give credit for payments Clayco made to Brentwood Glass' suppliers and because it charges \$70 per hour for labor rather than the contract rate of \$62.

⁴The only remaining claim, Clayco's counterclaim, was dismissed on November 8, 2012. A.L.F. IX/1233.

POINTS RELIED ON

I.

The trial court erred in granting the County's motion for summary judgment on the bond claim, because there is a genuine issue of material fact as to whether the County had a contract for the construction of the Project on its Property, in that there is evidence in the record that the County itself or through its agent did so.

Missouri Department of Transportation ex rel. On Point Contractors,

LLC v. Aura Contract, LLC, 391 S.W.3d 11 (Mo. App. E.D. 2012)

Collins & Hermann, Inc. v. TM2 Construction Co., 263 S.W3d 793

(Mo App. E.D. 2008)

Section 107.170, R.S.Mo. (2000)

II.

The trial court erred in granting defendants' motion for summary judgment on the mechanic's lien claim, because there are these three genuine issues of material fact:

- a. **Whether Brentwood Glass, a subcontractor, gave notice to the owner of its intention to file a lien, in that there is evidence that Brentwood Glass gave notice to the owner or its agent;**
- b. **Whether the lien was timely filed, in that there is evidence that Brentwood Glass's last day of work was within six months of the filing of the lien; and,**
- c. **Whether the lien is a just and true account of the amount**

due, in that there is evidence that the Lien had sufficient information to allow the owner to determine whether the work was done, whether it was lienable, and that the charges were proper, and that any omissions or mistakes in the Lien were without an intention to defraud.

Home Building Corp. v. Ventura Corp., 568 S.W.2d 769 (Mo. 1978)

Klonoski v. Cardiovascular Consultants of Cape Girardeau, Inc.,
171 S.W.3d 70 (Mo.App. E.D. 2005)

Missouri Land Development Specialities, LLC v. Concord Excavating Co.,
269 S.W.3d 489 (Mo.App. E.D. 2008)

Tharp v. Keeter/Schaefer Investments, L.P., 943 S.W.2d 811
(Mo.App. S.D. 1997)

Section 429.080, R.S.Mo. (2000)

Section 429.100, R.S.Mo. (2000)

ARGUMENT

Standard of Review

In that both Point I and II question the trial court's grant of summary judgment, the standard of review as to both points is the same.

Reviewing the trial court's entry of summary judgment *de novo*, this Court must review the record in the light most favorable to Brentwood Glass. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376-82 (Mo. banc 1993) (citing Rule 74.04, Mo.R.Civ.P., *inter alia*). This means that the Court must reverse if there is any evidence in the record that presents a genuine issue of material fact. *Id.* at 382. It is not the truth of the asserted facts upon which this Court must focus; rather, it is whether those facts are disputed. *Id.* If the judgment depends on an inference "and the evidence reasonably supports any inference other than (or in addition to) the movant's inferences, a genuine dispute exists" and the judgment must be reversed. *Id.* at 382.

In granting summary judgment, the trial court failed to explain why it did so. (A1). So, this case presents an opportunity for this Court to consider whether and how such an opaque ruling affects the scope of review.

In its Memorandum, the Court of Appeals wrote this:

If the trial court fails to specify the grounds upon which it granted summary judgment, we will affirm the grant of summary judgment if it is proper under any theory supported by the record and presented on appeal.

(quoting *G & J Holdings, LLC v. SM Properties, LP*, 391 S.W.3d 895, 900 (Mo. App. E.D.

2013) (quotation omitted)). Neither *G & J Holdings* nor any in the line of cases from which it descends⁵ give a rationale for this rule.

This no-explanation-needed rule demands examination in light of the historical suspicion of summary judgment and the way it is employed in current practice.

Summary judgment was long thought “an extreme and drastic remedy . . . [that] borders on the denial of due process in that it denies the opposing party his day in court.” *ITT Commercial Finance*, 854 S.W.2d at 377 (citing and quoting *Cooper v. Finke*, 376 S.W.2d 225, 229 (Mo. 1964) and *Olson v. Auto Owners Insurance Co.*, 700 S.W.2d 882, 884. (Mo.App. E.D. 1985)).

But, the experience of the last twenty-one years, since this Court reinvigorated summary judgment practice with its decision in *ITT Commercial Finance*, has been one in which some litigants and courts have woefully over-indulged in this procedure. Now, so many garden-variety cases of every type do not proceed to trial without voluminous motions for summary judgment being filed. Often the burden, in time and expense, to both the litigants and the courts, of such a motion, approaches that which would be required to simply try the case and to prosecute any appeal from an after-trial judgment.⁶ Its common use in

⁵Tracing this line of cases, case by case, back from *G & J Holdings*, we find that the earliest case enunciating this rule, *Southwestern Bell Yellow Pages, Inc. v. Robbins*, 865 S.W.2d 361, 369 (Mo. App. E.D. 1993), relies on cases that compare the grant of summary judgment to the entry of judgment after trial in a court-tried case.

⁶This case, though more complex than many, illustrates the burden of such

factually-complicated cases in which summary judgment is rarely warranted gives undue advantage to the litigants with deep pockets and institutional staying power.

Reflection on this no-explanation-needed rule makes evident that it neither serves the interests of justice nor inspires the confidence of citizens in the integrity of the judicial process.

It does not serve the interests of justice for several reasons.

It fails to promote the careful consideration of the motion by the trial court. Requiring even a brief analysis of the pertinent facts and law would encourage the conscientious deliberation that we deserve from our judicial officers. Such a requirement need not be unduly burdensome, even in those Circuits without a staff of able law clerks. As is commonly done in bench trials where there has been a request for findings of fact and conclusions of law, the court's burden could be minimized by the court's adoption, in whole or in part, of a proposed judgment prepared by the attorney for the prevailing party.

But, then, we must ask, would such a written trial court opinion make any difference on appeal? Under current practice, the appellate courts are completely unconstrained by any trial court rationale: "Because our review is de novo, the trial court's order may be affirmed

_____ motions. The motion and supporting and opposing materials, not including the voluminous memoranda of law which are not part of the legal file, are contained in volumes II-VIII of the Legal File and comprise about 775 pages. Consideration of the motion consumed almost a year in the trial court, and, so far, a year and a half on appeal.

E.g., L.F. Table of Contents (Third Revised).

in this Court on an entirely different basis than that posited at trial.” *ITT Commercial Finance*, 854 S.W.2d at 387-88. *Accord*, *Turner v. School District of Clayton*, 318 S.W.3d 660, 664 (Mo. banc 2010); *Roberts v. BJC Health System*, 391 S.W.3d 433, 437 (Mo. banc 2013) (“A summary judgment, like any trial court judgment, can be affirmed on appeal by any appropriate theory supported by the record.”). *Accord*, e.g., *Bishop v. Glazier*, 723 F.3d 957, 961 (8th Cir. 2013) (“We may uphold a grant of summary judgment for any reason supported by the record, even if different from the reasons given by the district court.”); *Jamshidnejad v. Central Curry School District*, 108 P.3d 671, 675 (Or. App. 2005) (“We can affirm nonetheless if we can determine from the record that the court was ‘right for the wrong reason.’” (citations omitted). *Cf. Home Depot U.S.A. Co. v. Taylor*, 676 So.2d 479, 480 (Fla. App. 1996) (on appeal after trial, appellate court will affirm if “judge made the right decision, albeit for the wrong reason . . .,” referring to this as the “‘tipsy coachman’ rule,” after the Oliver Goldsmith poem about the coachman, presumably with the aid of his experienced horses, who, despite his drinking, arrived home safely). So, it seems, unless this indulgent approach is changed, the answer is no.

Given that the parties have not had their day in court and the opportunity to carefully and thoughtfully present their entire cases, the standard of review should not be the same as is used in reviewing a court-tried case. A better practice would be to restrict the review to the reasons given by the trial court. Such a rule would foster conscientious analysis and deliberation by the trial court. It would lessen the burden on the parties and the appellate court, as all could focus on the reasons given rather than having again to scour the entire record and explore every conceivable legal theory.

The no-explanation-needed rule fails to inspire the confidence of the public in the integrity of the court, because, in the absence of some written analysis of the facts and the law, it is most difficult for counsel for the losing litigant to dissuade her client from harboring the suspicion that the judge ruled against the client for some improper reason. *Cf.* Robert E. Keeton, *Judging* 139 (West Publ. Co. 1990) (“Write briefly in most matters. . . . Do say enough that the parties and their lawyers can understand why you decided as you did.”). *Cf., e.g., Virginia City v. Olsen*, 52 P.3d 383, 385 (Mont. 2002) (*quoting* Rule 52(a), Mont. R. Civ. P. which requires that any order granting a motion for summary judgment “shall specify the grounds therefor with sufficient particularity as to apprise the parties and the appellate court of the rationale underlying the ruling”)

Particularly because the case never went to trial, this no-explanation-needed rule puts an appellate court in the unseemly position of appearing to be an advocate for the prevailing party below, searching the record for any reason to justify the trial judge’s ruling. What seems a roving commission to prove the trial judge was correct undermines the public confidence in the objectivity and impartiality of the courts.

The importance of a court explaining its rulings is widely understood. The Missouri Bar survey of lawyers concerning whether trial judges ought to be retained under the Non-Partisan Court Plan includes these questions:

Gives reasons for rulings[?]

. . . .

Rulings on dispositive motions state reasons . . . [?]

Missouri Bar Association, 2012 Trial Court Evaluation - Lawyer Survey, Judge Richard C.

Bresnahan, 21st Judicial Circuit at 1 (A25). Procedural fairness, including a clear explanation of judicial decisions is a major element of what the public wants and deserves:

Surveys and research have demonstrated that among the various sources of public dissatisfaction, perceptions of the relative fairness of court dispute processes are what ultimately determine the level of public trust in the court system. . . . [S]atisfaction with the outcomes of decisions is important, of course, but the key to understanding what people think of the courts is their assessment of the equity and efficiency of the procedures that courts use to make decisions. . . . [A]s judges, we sometimes forget the power of an explanation

. . . .

Taking the time not just to rule, but to explain, is a badge of respect and a conferral of dignity.

Hon. Susan K. Gauvey, *Delivering Justice, The Medium Is the Message Too*, 40 *Litigation*, No. 2, Winter 2014, at 52-53 (internal quotations and citations omitted).

For these reasons, this Court should require an explanation for any grant of summary judgment and should limit the review on appeal to consideration of the correctness of the reasons given for the summary judgment.

I.

The trial court erred in granting the County’s motion for summary judgment on the bond claim, because there is a genuine issue of material fact as to whether the County had a contract for the construction of the Project on its Property, in that there is evidence in the record that the County itself or through its agent did so.

A. The Little Miller Act

The mechanic’s lien and public works bond statutes are designed to give some form of security to every contractor and supplier, either a mechanic’s lien on a private job or a bond claim on a public one. *Collins & Hermann, Inc. v. TM2 Construction Co.*, 263 S.W.3d 793, 796-99 (Mo.App. E.D. 2008). Because an unpaid contractor cannot obtain a mechanic’s lien on property owned by the government, held for the benefit of the public, and reasonably necessary for its use, the bond statute requires one contracting with the government to post a bond, so as to provide its subcontractors and suppliers with the same kind of assurance of payment that a mechanic’s lien would have afforded. *City of Kansas City ex rel. Lafarge North America, Inc. v. Ace Pipe Cleaning, Inc.*, 349 S.W.3d 399, 403-04 (Mo.App. W.D. 2011) (citing *Collins & Hermann*, 263 S.W.3d at 798).

Section 107.170, R.S.Mo. (2000)⁷ (A8-A9) (“Little Miller Act”) requires that one who

⁷Variouly referred to as the “Little Miller Act,” as it is similar to the federal statute known as the Miller Act, *e.g.*, *Lafarge*, 349 S.W.3d at 403, and as the “Public Works Bond Statute” or the “Public Works Bond Act,” *e.g.*, *Collins & Hermann*, 263 S.W.3d at 794-96.

enters into a contract with a public entity for public works estimated to cost more than \$25,000 post a bond to assure that all subcontractors and suppliers are paid. The purpose of the Little Miller Act is to ensure that all subcontractors and suppliers on public works projects are paid. *Missouri Department of Transportation ex rel. On Point Contractors, LLC v. Aura Contract, LLC*, 391 S.W.3d 11, 15 (Mo. App. E.D. 2012). One of the reasons to afford this assurance of payment is to “promote public works projects” by encouraging contractors and suppliers to offer their services and products. *Lafarge*, 349 S.W.3d at 404 (citing *Collins & Hermann*, 263 S.W.3d at 797).

If no bond is posted, the public entity is itself liable to the subcontractors and suppliers. *Collins & Hermann*, 263 S.W.3d at 794-99.

B. No One Posted a Bond

The Lease provides that Cornerstone “will comply with the provisions of Section 107.170 of the Revised Statutes of Missouri, as amended, to the extent applicable to the construction of the Project.” A.L.F. VI/738 ¶ 4.2 (d). The County has never disputed that no one posted a payment bond in compliance with Section 107.170 – its sole defense was that the Little Miller Act does not apply to this Project because the County did not contract for the work. L.F. II/345 ¶3.b.

C. The County Contracted With Cornerstone To Build The Project

That it was the County, as principal, who constructed the Project is evident from the terms of its lease to Cornerstone: “The County has acquired the Project Site . . . and agrees to acquire, purchase and construct or cause to be acquired, purchased and constructed thereon the Project Improvements.” A.L.F. VI/736 §2.1. (b). It adds that the construction

of the Project would “further the public purposes of the Act [authorizing the issuance of industrial revenue bonds].” A.L.F. VI/736 §2.1. (c).

The lease provides that “[*o*]n behalf of the County, [Cornerstone] will purchase and construct the Project . . . in accordance with the Plans and Specifications.” (emphasis added). A.L.F. VI/738 §4.2 (A16) (emphasis added). So, the lease itself is a “contract for public works.”

One might characterize this kind of arrangement, between a governmental entity and a private developer, as an elaborate financing device for a private project, albeit a major one with expected economic advantages to the governmental entity. But, whether such a project is subject to the Little Miller Act or one in which subcontractors and suppliers have the right to protect themselves by obtaining mechanics’ liens is an issue of first impression. Given the popularity of the use of industrial revenue bonds in financing all manner of what would otherwise be private construction, so that governments, developers, contractors, and suppliers know how to protect themselves, it is vitally important that this Court remove doubt from this technically complex area of law by answering this question.

D. Cornerstone As Agent

Even if we assume, *arguendo*, that the lease itself is not a contract for public works, the record contains uncontradicted evidence that the County made Cornerstone its agent with authority to enter into contracts on the County’s behalf to construct the Project on the County’s Property.

The Lease says that Cornerstone is the County’s “**agent** . . . [for the purpose of] purchas[ing] and construct[ing] the Project Improvements on the Project Site. . . [and that]

[o]n behalf of the County, [Cornerstone] will purchase and construct the Project . . . in accordance with the Plans and Specifications.” A.L.F. VI/738 §4.2 (A16) (emphasis added). The County retained veto power over any alterations in the plans and specifications that “would materially alter the intended purpose of the Project.” *Id.* The County agreed to pay for the construction from the \$21 Million it had raised from the sale of the industrial revenue bonds and allowed Cornerstone to draw against the bond fund as work progressed. A.L.F. VI/738-39 §§ 4.3, 4.4; A.L.F. VI/767; A.L.F. VI/674. The land and building were and remained the property of the County, subject only to Cornerstone’s rights under the lease and to other encumbrances. A.L.F. VI/740 § 4,7.

These facts make Cornerstone the County’s agent. It had the power to alter the legal relations between the County and whomever it chose to build and equip the building by obliging the County to pay for the work out of the bond fund; it was a fiduciary as to the land and funds with which the County entrusted it; and, it was subject to the County’s control in making significant changes to the plans and specification. *State ex rel. Ford Motor Co. v. Bacon*, 63 S.W.3d 641, 642 (Mo. banc 2002).

E. Koman’s Role

There is no dispute that Cornerstone was not a named party to the Koman/Clayco Contract. L.F. III/376 (A12-A14). However, Cornerstone was the owner of the Property prior to transferring the Property to the County (L.F. II/360) and Cornerstone agreed to act as the County’s agent in contracting for construction of the Project (A.L.F. VI/738 §4.2 (A16)).

There is no evidence of any agreement between Koman and Cornerstone with respect

to the Project, and no evidence of any role Koman played in the Project other than the fact that Koman is a party to the Koman/Clayco Contract. The reasonable inferences to be drawn from the record are that Koman was acting for Cornerstone in executing the Koman/Clayco Contract, because:

1. Koman had no official role to play in the County/Cornerstone transactions, as Cornerstone, not Koman, had leased the land from the County, A.L.F. VI/729, VI/673 - VIII/1059;
2. There is no evidence of any authorization allowing Koman to build the Project on Cornerstone's (or the County's) Property;
3. Cornerstone, not Koman, had the obligation to build the Project, Cornerstone did not satisfy this obligation unless Koman was building for it, Cornerstone had the right to draw against the \$21,000,000 bond fund, funds which Koman have used to must have used to pay Clayco over \$25 Million to construct a ten-story office building and five-level garage, (e.g., L.F. III/376-77; A.L.F. VI/677, 738 §4.2 (b), 739 §4.4, 767, 776, VII/821);
4. the Koman/Clayco Contract misidentifies Koman, rather than Cornerstone, as the owner of the

Property, (L.F. III/376-89 (A12-A14); L.F. II/347-48 ¶¶'s 2,3,5; L.F. II/359-64; L.F. V/585-86 ¶¶'s 2,3,5; L.F. V/616-17 §64, L.F. VIII/1061-64, L.F. VIII/1081-82 §64); and,

5. Mr. Koman, who signed the contract as the President of Koman (A14), was also the manager and sole owner, as trustee of his trust, of Cornerstone and operated both firms out of the same office, (L.F. VIII/1082-83 ¶66).

In the alternative, based upon these facts, one could reasonably infer that the use of the name Koman rather than Cornerstone in the Koman/Clayco Contract (A12) was simply a mistake, a misnomer. In *H.W. Underhill Constr. Co. v. Nilson*, 3 S.W.2d 399, 400 (Mo.App. K.C. 1928), the court held that there was a question of fact for the jury where there was evidence from which it could infer that the contract mistakenly used the name of a partnership, H.W. Underhill & Co., rather than a corporation that the partnership had formed and through which it now conducted its general contracting business, H.W. Underhill Construction Company.

Alternatively, one reasonably could infer that Cornerstone appointed Koman as its sub-agent to hire Clayco to do what Cornerstone had promised the County that Cornerstone would do. Though the record includes no contract or other agreement between Cornerstone and Koman, unless Koman was doing so as Cornerstone's sub-agent, it makes no sense at all to believe that Koman would undertake to hire Clayco, at a cost of tens of millions of

dollars, to build the Project on land in which it had no interest. Cornerstone, not Koman, was obliged to build the Project. A.L.F. VI/738 § 4.2 (A16). Cornerstone, not Koman, had the right to draw against the County's \$21,000,000 bond fund. A.L.F. VI/739 § 4.4. Cornerstone, not Koman, had leased the Property. A.L.F. VI/729. Cornerstone, not Koman, had the right and obligation to purchase the Property. A.L.F. VI/755-57.

F. Conclusion

Viewed in the light most favorable to Brentwood Glass, this evidence, together with all reasonable inferences that favor Brentwood Glass, establishes that the County did, indeed, have a contract with Cornerstone, or through Cornerstone and/or Koman, with Clayco to build the Project. For these reasons, the trial court erred in granting summary judgment in favor of the County on the bond claim.

II.

The trial court erred in granting defendants' motion for summary judgment on the mechanic's lien claim, because there are these three genuine issues of material fact:

- a. Whether Brentwood Glass, a subcontractor, gave notice to the owner of its intention to file a lien, in that there is evidence that Brentwood Glass gave notice to the owner or its agent;**
- b. Whether the lien was timely filed, in that there is evidence that Brentwood Glass's last day of work was within six months of the filing of the lien; and,**
- c. Whether the lien is a just and true account of the amount**

due, in that there is evidence that the Lien had sufficient information to allow the owner to determine whether the work was done, whether it was lienable, and that the charges were proper, and that any omissions or mistakes in the Lien were without an intention to defraud.

A. Summary Judgment Motion and Ruling

In their motion, defendants argue that Brentwood Glass failed to give notice to the property owner of its intention to file the Lien, that the Lien was untimely filed, and that the Lien is not a just and true statement of the amount due, because it includes charges for work described in valid lien waivers. L.F. II/345 ¶3.a. In their memoranda and oral presentation, Defendants also claimed that the Lien was not a just and true account, because it used the wrong hourly labor rate and failed to give credit for payments made directly to Brentwood Glass's suppliers.

B. Liberal Construction of Mechanic's Lien Statutes

In construing the provisions of the applicable mechanic's lien statutes, we must remember this:

Statutes creating mechanic's liens are remedial in nature and should be given a liberal construction so as to effectuate their object and purpose and protect the claims of the mechanics and materialmen. We are to construe the statute[s] as favorably to the [mechanic and] materialman as [their] terms permit.

Midwest Floor Co. v. Miceli Development Co., 304 S.W.3d 243, 247-48 (Mo. App. E.D. 2010) (quoting *Glenstone Block Co. v. Pebworth*, 264 S.W.3d 703, 710-11 (Mo. App. S.D. 2008)).

C. Notice to Owner

1. Who Is “Owner” and When Is This Determined?

As a subcontractor, in order to obtain a mechanic’s lien, Brentwood Glass was obliged to give ten days’ notice “to the owner, owners or agent, or either of them” of its intention to file a lien. Section 429.100, R.S.Mo. (2000) (A11). Two questions must be answered. At what time do we determine ownership? And, was the County, was Cornerstone, or were both “owners” after Cornerstone deeded the Property to the County, leased it back, and contracted to re-purchase it?

2. “Owner” Is Title Holder At Time of Contracting

Here, the owner at the time of contracting was Cornerstone. (L.F. III/376-89 (A12-14); L.F. VIII/1061-64; L.F. II/359-64.) Cornerstone deeded the Property to the County after the time of contracting and before most, if not all, of the work commenced – although this deed was not recorded until after work commenced.⁸ (*Id.*; A.L.F. IV/420 (A22-23); L.F. V/591-92.) So, this case presents another issue of first impression, as no court has squarely faced a situation in which the property was transferred between the time of

⁸After deeding the Property to the County, Cornerstone leased it back and retained both the option and the obligation to re-purchase it. A.L.F. VI/755-57, 783-94. Years after the completion of the work, Cornerstone regained ownership. L.F. VIII/1099 ¶4.

contracting and the time that work commenced.

In determining whether a contractor was an “original contractor,” because he had contracted with the “owner” of the property, and, so, required to give notice to the owner under Section 429.012, R.S.Mo. (2000), this Court held that the “owner” is whoever held record title and was exercising dominion over the property at the time the general contract was signed. *Home Building Corp. v. Ventura Corp.*, 568 S.W.2d 769, 771 (Mo. 1978). Under Section 429.012, the purpose of determining whether a contractor is an “original contractor” is to determine what kind of notice it must provide in order to enforce its lien rights. *E.g., Dave Kolb Grading, Inc. v. Lieberman Corp.*, 837 S.W.2d 924, 935-936 (Mo.App. E.D. 1992). *Compare* Section 429.012 (notices required by original contractors) *with* Section 429.100 (notices required of subcontractors and others).

It makes sense to use the same test for “owner” for Section 429.100 as *Home Building Corp.*, 568 S.W.2d at 771, used for Section 429.012: who was owner when the general contract was signed? The purpose of giving the ten-day notice under Section 429.100 is to allow the owner to withhold payment from his contractor and avoid double payment. *River City Drywall, Inc. v. Raleigh Properties, Inc.*, 341 S.W.3d 716, 723 (Mo.App. E.D. 2011). Given this purpose, the “owner” to which this notice must be given is whoever held title when the general contract was signed. *But cf. Bullmaster v. Krueger*, 151 S.W.3d 380, 385-86 (Mo.App. W.D. 2004) (though owner at the time general contract was signed and work commenced was one and the same, the court expressed the rule as this: notice must given to person who was owner when the work commenced). Logically, the owner who has the right to withhold payment from his contractor would be the same owner who hired the

contractor to perform the work!

There is no dispute that the owner of the Property at the time the general contract, the Koman/Clayco Contract, (A12-A14), was signed was Cornerstone – and Brentwood Glass gave notice to Cornerstone. L.F. VIII/1061-64; L.F. II/359-64; L.F. III/376-89; L.F. V/547-53.

3. Cornerstone Was “Owner” of Leasehold

Throughout the construction, Cornerstone held a leasehold interest in the Property. A.L.F. VI/755-57, 783-94. So, as the “owner” of the leasehold, a property interest that can be subjected to a mechanic’s lien, Cornerstone was a proper party to receive Brentwood Glass’ notice and such notice entitles Brentwood Glass to obtain a lien against the leasehold interest,⁹ Section 429.070, R.S. Mo. (2000), *Miners Lumber Co. v. Miller*, 117 S.W.2d 711, 714 (Mo.App. St. L. 1938) (“owners of a leasehold in the property”).

4. Cornerstone Was The Equitable Owner

Throughout the construction, Cornerstone held the contractual right to purchase the Property. A.L.F. VI/755-57, 783-94. It eventually exercised this right and, once again, became the outright owner. L.F. VIII/1099 ¶4. As Brentwood Glass alleged, (L.F. I/64 ¶ 143), Cornerstone was, at all times, either the record owner or the equitable owner of the Property. So, by giving notice to Cornerstone, the equitable owner, Brentwood Glass is entitled to a lien against its equitable interest. *E.g., Allied Pools, Inc. v. Sowash*, 735 S.W.2d 421, 424 (Mo.App. W.D. 1987). It was not obliged to give notice to the County. *Id.* at 425.

⁹An interest that has now ripened into ownership of the fee.

5. Notice to Owner's Agent

But, assuming, *arguendo*, that Brentwood Glass was obliged to give notice to whoever was the record owner at the time the work on the Project commenced, and that the work did not begin until after the County acquired the Property (L.F. II/350; L.F. III/373; A.L.F. IV/420; L.F. V/591-592; L.F. II/350 ¶13; L.F. V/591-92 ¶13), summary judgment still is not warranted. By giving notice to the County's agent, Cornerstone, Brentwood Glass satisfied the Section 429.100 (A11) notice requirement. A.L.F. VI/738 §4.2 (A16); L.F. II/354 ¶39; L.F. V/528-32, V/548-53, V/604 ¶39; L.F. VIII/1074-80.

Section 429.100 does not require the owner's agent to be an agent authorized to accept service nor does it seem to use the term "agent" in the technical sense of one who has the power to alter legal relations between his principal and third parties, etc., *Bacon*, 63 S.W.3d at 642. Given the purposes behind Section 429.100, a logical reading of the statute is that all that is needed to be the owner's "agent" is that there is such a relationship with the owner that it is reasonable to expect that any notice to the "agent" will reach the owner. In the lease, Cornerstone promised that it would "promptly notify the County of the imposition of [any mechanic's] lien. . . ." A.L.F. VI/745 § 8.5(a). This obligation created such an expectation that service upon Cornerstone was service on the County.

For all of these reasons, summary judgment cannot be sustained on the basis that Brentwood Glass failed to give notice to the owner.

D. Evidence of Timeliness of Lien

Brentwood Glass was obliged to file its lien "within six months after the indebtedness [to it] shall have accrued" Section 429.080, R.S.Mo. (2000) (A10). "The

date that the ‘indebtedness has accrued’ is the last day work was performed or material incorporated.” *Midwest Floor Co.*, 304 S.W.3d 243 at 247 (citations omitted).

Brentwood Glass filed its Lien on August 8, 2007. L.F. I/145. So, if Brentwood Glass worked on or after February 8, 2007, its Lien was timely filed. Bettie Albers, Brentwood Glass’ project coordinator, testified in her deposition and gave an affidavit that stated, *inter alia*:

7. With the help of a carpenter, I installed many bathroom mirrors on several days beginning on February 5th and ending on February 9th, 2007.
8. I installed vertical covers and exterior mullions on the storefront on February 13, 2007.
-
13. Vistawall shipped missing parts to Brentwood on February 7th and 9th and I installed these parts taking five hours to do so on February 13th. This was not corrective work but was work never able to be done earlier due to the missing or defective parts.

A.L.F. VI/627, 629, 630; A.L.F. IV/476 at 137, l. 22 - 138, l. 6 and at 139, l. 5 - 140, l. 6. *See also* L.F. V/619 ¶¶’s 73-75. This is evidence, in the record, that Brentwood Glass last worked on the Project on or after February 8th; so, its filing of the Lien on August 8th was timely. Thus, the trial court’s entry of summary judgment cannot be sustained on this basis.

E. Just and True Account

1. Defendants' Arguments

Defendants argue that the Lien was not a "just and true" account of the demand due Brentwood Glass for three reasons: the Lien seeks payment for work with respect to which Brentwood Glass had waived its rights to claim a lien; the Lien uses the wrong labor rate; and, the Lien fails to give credit for payments which Clayco had made to Brentwood Glass' suppliers.¹⁰

2. Standard for Determining

Whether Lien Is Just and True

A mechanic's lien must be "a just and true account" of the amount due. Section 429.080 (A10). What is a "just and true account" is not defined by statute. *Id.* But, case law makes clear that innocent mistakes in the lien statement that do not prevent interested parties from investigating the pertinent facts do not destroy a lien's validity.

In *Missouri Land Development Specialities, LLC v. Concord Excavating Co.*, 269 S.W.3d 489, 493 (Mo.App. E.D. 2008), the lien included charges for grading and excavating equipment that sat idle during a shutdown caused by the general contractor's nonpayment. It also sought an amount greater than claimant was able to prove up at trial. *Id.* at 497-98. The court rejected the argument that either problem vitiated the entire lien. *Id.* at 497-99.

In reaching its decision, the court pointed out that the purpose of the requirement that

¹⁰ L.F. II/345 ¶3.a. (only the waiver issue is mentioned in the motion; Defendants raised the other issues in their memoranda and oral presentation).

a lien be a “just and true account” is this: to provide the owner and other interested parties with sufficient information to allow them to determine whether the labor and/or materials described were actually used in the construction, whether they were lienable items, and whether the amounts charged are proper. *Id.* at 497 (citing *Commercial Openings, Inc. v. Mathews*, 819 S.W.2d 347, 349 (Mo. banc 1991)).

In considering the amount of the lien, the court noted that “[a]rithmetic errors, errors of computation, inadvertence, or mistake, in the preparation of the account, where there is no showing of the lienor’s bad faith, should not defeat the lien.” *Missouri Land*, 269 S.W.3d at 498 (citations omitted). Because there was no evidence that the lien claimant had acted in bad faith and because the lien, with its attached invoices and documentation, was sufficiently detailed to allow any interested party to investigate, the mistaken amount did not invalidate the lien. *Id.*

Faced with the argument that the idle equipment charges were not lienable and that their inclusion rendered the entire lien not “just and true,” the court observed that there was no evidence that “the complained-of ‘downtime’ charges are inseparable from the other lienable charges, nor that the lien claimant deliberately included the ‘downtime’ charges with the intent to defraud, knowing them to be nonlienable.” *Id.* at 499. Without such evidence, the court refused to strike down the lien. *Id.*

Applying the standards of review set forth in *Missouri Land*, at minimum, a question of fact exists as to whether the Lien is a “just and true account” of the amount due Brentwood Glass. While the defendants have pointed to what, they contend, are errors or inaccuracies in the Lien, they have never suggested, nor could they reasonably suggest, that they were

unable to determine whether the labor and material described in the Lien were actually used in the construction of the Project, that they were unable to determine whether these were lienable items, or that they were unable to determine whether the amounts charged were proper. Nor have the defendants suggested or provided any proof that Brentwood Glass deliberately included nonlienable or otherwise erroneous charges in the Lien, knowing that they were incorrect or nonlienable, with intent to defraud.

Without uncontroverted evidence of any of these facts, summary judgment cannot be upheld on the ground that the lien statement was not a “just and true account.” *Missouri Land*, 269 S.W.3d at 498-99.

3. Partial Lien Waivers

a. Defendants’ Argument

Defendants claim that the Lien is defective, because it includes charges for work with respect to which Brentwood Glass had waived its right to assert a lien.

L.F. II/345 ¶3.a.

b. Partial Lien Waivers Exchanged for Progress Payments

As the Project and Brentwood Glass’s work was underway, in exchange for progress payments, Brentwood Glass signed and delivered to Pal’s Glass or to Clayco a series of documents, each entitled “Partial Waiver of Lien,” – all on forms prepared by Clayco. L.F. II/352 ¶¶’s 28-30; A.L.F. IV/516-26 (A24); L.F. V/597-99 ¶¶’s 28-30; L.F. V/622-23 ¶81; A.L.F. VI/630-32 ¶¶’s 14, 22. The last of these was dated January 12, 2007. L.F. II/352 ¶¶’s 28-30; L.F. V/597-99 ¶¶’s 28-30. The amounts identified in each Partial

Waiver of Lien correspond exactly with the progress payments Brentwood Glass received in exchange for each respective Partial Waiver of Lien. *Id.*; A.L.F. VI/627-29 ¶ 10.

c. Clayco’s Partial Waiver of Lien Form

Each of the Partial Waivers of Lien is identical, except for the date and the amount of the progress payment. The form states:

**PARTIAL
WAIVER OF LIEN**

....

Date _____

....

NOW THEREFORE, We the undersigned for and in consideration of the sum of [amount of progress payment paid to Brentwood Glass] Dollars, paid simultaneously herewith, the receipt of which is hereby acknowledged, do hereby waive and release any and all liens and claim or right to lien on said above described building and premises or the improvements thereon under the Statutes of the State of MO relating to Mechanic’s and Materialmen’s Liens; on account of labor or materials, or both, furnished by the undersigned for said building and premises or improvements thereon. . . .

A.L.F. IV/516-26 (A24).¹¹

d. Clayco's Partial Waiver of Lien Form is Ambiguous

Defendants argue that these Partial Waivers of Lien waived all of Brentwood Glass' mechanic's lien rights for all work performed through January 12, 2007. L.F. II/345 ¶3.a. This argument must be rejected, because the Partial Waivers of Lien are ambiguous and a question of fact exists as to the parties' intent in executing and exchanging the Partial Waivers of Lien.

Centered at the top of the form, in all capital letters, larger font, and bold type, is the title: "**PARTIAL WAIVER OF LIEN.**" A.L.F. IV/516-26 (A24). The word "**PARTIAL**" is even on a separate line, at the top of the form, and is in the largest font on the page. *Id.* (A24) Yet, despite this title, the body of the form says that it waives "any and all liens." *Id.* (A24).

In order to find that the form constitutes a waiver of all lien rights through the date signed, the Court would have to ignore the word "**PARTIAL.**" This the Court cannot do, because the Court must consider the whole instrument when determining whether the instrument is ambiguous. *E.g., Klonoski v. Cardiovascular Consultants of Cape Girardeau, Inc.*, 171 S.W.3d 70, 72-73 (Mo.App. E.D. 2005).

The conflict between a "partial" lien waiver and a "full" lien waiver creates an ambiguity in the lien waiver form. "The test is whether the disputed language, in the context

¹¹Actual font sizes in the original are different. The letters in the title are substantially larger and in the body smaller. *See* A24.

of the entire agreement, is reasonably susceptible of more than one construction giving the words their ordinary meaning as understood by a reasonable, average person.” *Id.* at 73. A reasonable, average person, upon reading a form with a title of PARTIAL WAIVER OF LIEN, having a dollar amount in the form, and language of “waive ... any and all liens” would not know if Brentwood Glass was waiving its lien rights to the extent of the amount recited in the form, waiving all of its lien rights for work performed up to the date the form is signed, or waiving all of its lien rights for work performed at any time, including in the future. Because this language is reasonably susceptible to more than one construction, it is ambiguous. *E.g., Klonoski*, 171 S.W.3d at 72-73.

Any ambiguity in a lien waiver must be construed in favor of the lien. *Landvatter Ready Mix, Inc. v. Buckey*, 962 S.W.2d 298, 303 (Mo.App. E.D. 1998). And, ambiguities must be construed against the drafter of the lien waiver – which was not Brentwood Glass. *See e.g., Burns v. Smith*, 303 S.W.3d 505, 509 (Mo. banc 2010).

An instructive case is *Tharp v. Keeter/Schaefer Investments, L.P.*, 943 S.W.2d 811 (Mo.App. S.D. 1997). In *Tharp*, the contractor submitted monthly invoices as his work progressed. *Id.* at 817. In accordance with the contract, the owner paid the contractor only 90 percent of each invoice, holding back 10 percent as retainage. *Id.* Each time the owner paid the contractor, the contractor signed a partial lien waiver that waived contractor’s lien rights for all work performed thru the date of the lien waiver. *Id.* The contractor even signed similar partial lien waivers after all work had been completed on the project. The owner eventually paid the contractor a portion of the retainage, but it withheld over \$110,000.00. *Id.* at 817-19. Faced with the owner’s claim that the lien waivers precluded the contractor

from obtaining a lien for the unpaid retainage, the court held that the contractor had “waived his right to a mechanic’s lien for only the amounts shown on the waivers, not for the retainage shown on each invoice.” *Id.* at 820. The court considered parol evidence to resolve the ambiguity created by the conflicting provisions of the waiver forms. *Id.* at 819-21.

e. **Parol Evidence of the Parties’ Intention**

Because of the ambiguity in the Partial Waiver of Lien form, we must look to parol evidence to determine the intent of the parties. *Klonoski*, 171 S.W.3d at 73. The construction that Defendants urge, that Brentwood Glass intended to waive its lien rights for work for which it had not yet been paid, is contrary to any plausible interpretation of all evidence in the record.

This ambiguity is further highlighted by the provisions of the Pal’s Glass/Brentwood Glass Contract:

PARTIAL LIEN WAIVERS AND AFFIDAVITS As a prerequisite for payments, the Subcontractor [Brentwood] shall provide, in a form satisfactory to the Owner and Contractor, partial lien or claim waivers in the amount of the application for payment . . . [I]n no event shall Contractor require the Subcontractor to provide an unconditional waiver of lien or claim, either partial or final, prior to receiving payment or **in an amount in excess of what it has been paid.**”

L.F. I/125 ¶ 8.8 (A21) (emphasis added). The Partial Waivers of Lien (A24) that Brentwood Glass was required to sign in order to get paid – if interpreted in the manner argued by the

Defendants – would violate this provision of the subcontract, because they would be unconditional waivers of lien in an amount in excess of what was paid to Brentwood. Each Partial Waiver of Lien (A24) contains an amount, which matches the amount that was paid to Brentwood Glass in exchange for that Partial Waiver of Lien. A.L.F. VI/627-629 (A24).

On every date when it signed a Partial Waiver of Lien (A24) in exchange for a progress payment, even after crediting the amount of such payment, Brentwood Glass was still owed a substantial amount for work that it had already performed. A.L.F. VI/627-29 ¶ 10; A.L.F. VI/631-32 ¶ 22. These included substantial sums due for work performed since the closing date of the application for payment for which the payment was made, as well as the 10 percent retainage held back from each installment. *Id.*

The first Partial Waiver of Lien is an example of this. It is dated February 15, 2006. A.L.F. IV/516. It recites a payment of \$46,246.00. *Id.* This was only 90 percent of the value of the work which Brentwood Glass had completed by the end of the prior month. A.L.F. VI/632. So, Brentwood Glass had neither billed nor been paid the remaining 10 percent for its January work, the \$5,138.00 described as retainage. *Id.* Likewise, it had not yet billed nor been paid anything for its work in the first half of February. *Id.*

A more striking example is the September 29, 2006, Partial Waiver of Lien. A.L.F. IV/521. By the following day, Brentwood Glass had completed work of a value of \$970,765.00. A.L.F. VI/632. And yet, the payment recited in this Partial Waiver of Lien, together with all prior the payments it had the received, amounted to only \$613,476.31. *Id.* So, the day after it signed the Partial Waiver of Lien at the end of September, Brentwood Glass had \$357,288.69 still due for its work to date. *Id.*

Given the fact that Pal's Glass never once paid Brentwood Glass in full for all work that it had performed up to the date of any of the Partial Waivers of Lien, the only reasonable interpretation is that Brentwood Glass waived its rights only to the extent of the amount of each payment. Bettie Albers, who signed many on the waivers on behalf of Brentwood Glass (e.g., A24), stated that this was her intention. A.L.F. VI/630 ¶14. The record is bereft of any evidence of what were Pal's Glass' and/or Clayco's intentions in exchanging these Partial Waivers of Lien for the progress payments. L.F. II/352-53 ¶¶s 28-36.

Given the ambiguity in the Partial Waiver of Lien form (A24), and in light of the evidence that Brentwood Glass intended only to waive its lien to the extent of the amount identified in the form, the parties' intent in executing these forms is a question of fact for the jury. See, e.g., *Eveland v. Eveland*, 156 S.W.3d 366, 369 (Mo.App. E.D. 2004). Summary judgment cannot be sustained on this basis.

f. Honest Mistakes Do Not Vitate Lien

Even if we were to accept, *arguendo*, defendants' premise that Brentwood Glass waived its right to assert a lien for work done on or before January 12, 2007, the Lien is not, *ipso facto*, invalid. Even if the Lien overstated the amount due, because it included charges for work done prior to the date of the last Partial Waiver of Lien, there is evidence in the record that it is still a just and true account.

Based on Mrs. Albers' intention and apparent understanding that the Partial Waivers of Lien only waived Brentwood Glass' right to claim a mechanic's lien to the extent of the payments it had received, her inclusion of work prior to the date of the last partial lien waiver cannot be described as anything other than her honest submission of charges for work with

respect to which she believed Brentwood Glass was entitled to assert a lien. A.L.F. VI/630 ¶14.

It is a simple matter to separate the charges for work performed prior to the date of the last Partial Waiver of Lien from the work performed after that date, because the Lien describes the work, in great detail, week by week. L.F. I/145-72. So, even if some of the work should not have been included in the Lien, it is still a “just and true account.” *Missouri Land*, 269 S.W.3d at 499 (*internal citations and quotations omitted*).

Because this is evidence that the inclusion of those items was the result of an “honest mistake or inadvertence, without intent to defraud and [that] the nonlienable item[s] can be separated from the lienable items,” summary judgment cannot be sustained on this basis. *Id.*

4. Wrong Labor Rate

a. Rate, Mistake, and No Harm, No Foul Rule

Defendants argue that because the Lien charged for labor at the rate of \$70 per hour, rather than the \$62 per hour rate specified in the Brentwood Glass/Pal’s Glass contract (L.F. I/97), it is not a “just and true account.” Analysis of this contention requires the consideration of at least three questions.

Should Brentwood Glass have used the contract rate? If so, was the use of the wrong rate an innocent mistake? And, if so, did the use of the wrong rate prevent the owner and other interested parties from conducting an investigation to determine whether the labor described in the lien statement was used in the construction of the Project?

**b. As a Subcontractor, Brentwood Glass
Is Entitled To Lien for the Reasonable
Value of its Work and Materials**

Because, as a subcontractor, Brentwood Glass did not have a contract with the owner of the Property, it is entitled to a lien for the reasonable value of the labor and material that it furnished. *Dave Kolb Grading, Inc. v. Lieberman Corp.*, 837 S.W.2d at 931.

Mrs. Albers believed that the rates which Brentwood Glass used in the lien statement were fair and reasonable. A.L.F. VI/631 ¶18. Should the owner have a different opinion as to the reasonable value of Brentwood Glass’s labor, it “is free to challenge the amount of the lien.” *Commercial Openings*, 819 S.W.2d at 350. Other than the rate stated in the Pal’s Glass/Brentwood Glass contract (L.F. I/97), the record contains no evidence that the rates used by Brentwood Glass in the Lien were not fair and reasonable.

The labor rate stated in the Subcontract is evidence of the reasonable value of the work; but it is not conclusive. We must remember that, in determining the reasonable value of the labor and material that Brentwood Glass furnished, *Dave Kolb Grading, Inc. v. Lieberman Corp.*, 837 S.W.2d at 931, it is the total amount that is important, not the accuracy of every item claimed. And, because most of Brentwood Glass’ claim is for extra work – *i.e.*, work done for Pal’s Glass and/or Clayco over and above the scope of work under the Subcontract – the contract rate does not control.

The reasonable value of services is a question of fact. *E.g.*, *Leggett v. Mutual Commerce Casualty Co.*, 250 S.W.2d 995, 999 (Mo. 1952). So, there is no basis for a finding,

as a matter of law, that the Lien is not a “just and true account,” because the labor was priced at the rate of \$70 per hour.

c. Honest Mistake Precludes Summary Judgment

Even if, *arguendo*, Brentwood Glass was mistaken in using a rate different than that specified in the contract, there is no indication this was anything other than an honest mistake as to what it was legally entitled to claim, without intent to defraud. A.L.F. VI/631 ¶18. And, it is a simple matter to modify the labor rate and remove the extra charges. As such, there is no basis for finding that the Lien fails to provide a “just and true” account. *Missouri Land*, 269 S.W.3d at 499.

d. Use of Non-Contract Rate Did

Not Impede Investigation

Defendants have offered no evidence that the use of, what they contend is, the wrong labor rate prevented them from “undertak[ing] an independent investigation to ascertain the reasonable value of the furnished [labor and] materials,” *Commercial Openings*, 819 S.W.2d at 350, to determine whether the labor and materials “were actually used in the construction of the building, [and] whether they were lienable items. . . .” *Midwest Floor Co.*, 304 S.W.3d at 247. There is nothing in the record to suggest that the Lien, which, with exhibits, comprises hundreds of pages, itemizing all labor and material furnished (L.F. I/145 - II/286), was insufficient to allow the owner and other interested parties to conduct such an independent investigation. *See, e.g., Missouri Land*, 269 S.W.3d at 497-98 (bank which contested lien never alleged that it was unable to undertake such an investigation). And, the use of the wrong labor rate is not fatal where the hours and

description of the work performed is given, because it is the quantity of the labor supplied that is necessary to allow the owner to determine whether the labor was used in the Project. *Cf. Commercial Openings*, 819 S.W.2d at 350 (failure to list the price of each item of material is immaterial so long as the itemization of the materials themselves is sufficient).

For all of these reasons, in spite of the Lien's use of a different labor rate than that stated in the contract, it is a "just and true account."

**5. Credit for Clayco's Payments to
Brentwood Glass' Suppliers**

There is no dispute that the Lien does not give credit for \$47,343.92 in payments which Clayco had made to Brentwood Glass's suppliers. L.F. II/356 ¶56. Whether this omission prevents the Lien from being a "just and true account" requires the same analysis as do defendants' other objections to the Lien. Was the Lien incorrect, was this an innocent mistake, and were the owners and others able to investigate its correctness despite this omission?

Clayco never told Brentwood Glass that it had paid Brentwood Glass' suppliers. L.F. V/622 ¶78. Brentwood Glass was unaware of these payments when it filed the Lien. A.L.F. IV/467, Dep. p. 58, ll. 16-21; A.L.F. VI/626 ¶3, VI/631 ¶19. This is evidence that the omission of this credit was completely innocent. Therefore, one cannot say, as a matter of law, that the Lien is not a "just and true" account. *E.g., Glasco Electric Co. v. Best Electric Co.*, 751 S.W.2d 104, 109-10 (Mo. App. E.D. 1988) (in the absence of evidence that supplier had or was chargeable with knowledge that the general contractor was the source of payments made by its customer, an electrical subcontractor on the job, the lien statement was a "just and

true account,” despite supplier’s failure to give these credits). *Accord, A.E. Birk & Son Plumbing and Heating, Inc. v. Malan Construction Co.*, 548 S.W.2d 611, 617 (Mo.App. St. L. 1977) (the unintentional omissions of credits does not vitiate the lien).

Finally, the omission of this credit would not have prevented the owner and other interested persons from investigating the Lien to determine whether the labor and materials described were used in the construction of the Project, whether they were lienable, and whether the amounts charged were proper. *Commercial Openings*, 819 S.W.2d at 349.

For these reasons, there is evidence in the record that, despite the omission of the credit for Clayco’s payments to Brentwood Glass’ suppliers, the Lien is “just and true.”

CONCLUSION

For the foregoing reasons, the trial court erred in granting Defendants’ motion for summary judgment as to the bond claim and as to the mechanic’s lien claim. The court’s judgment should be reversed and the case remanded for trial on the merits.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH
RULE 84.06(c)

The undersigned counsel of record hereby certifies that the foregoing brief includes the information required by Rule 55.03, was prepared in proportional typeface of 13 points, that the word processing system used to prepare the brief is WordPerfect X6 in Times New Roman, and that the brief contains 12,183 words as determined by the WordPerfect X6 word counting system.

/s/ Canice Timothy Rice, Jr.

CERTIFICATE OF SERVICE

I certify that a copy of Appellants' Substitute Brief and of the Appendix to Appellants' Substitute Brief were served by ECF Notice of Electronic Filing this 20th day of May, 2014, to:

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