IN THE MISSOURI SUPREME COURT

Case No. SC94038

BRENTWOOD GLASS COMPANY, INC.,

Plaintiff-Appellant,

v.

PAL'S GLASS SERVICE, *et al.*,

Defendants-Respondents.

Appeal from the Circuit Court of St. Louis County
Case No. 08SL-CC00587-01
The Honorable Richard Bresnahan Presiding

SUBSTITUTE BRIEF OF DEFENDANTS-RESPONDENTS CLAYCO, INC., CORNERSTONE VI, LLC, UMB BANK, N.A., VICTOR ZARILLI, NATIONAL CITY BANK OF THE MIDWEST, PAUL M. MACON, AND ST. LOUIS COUNTY, MISSOURI

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Abbreviations:

"L.F." Legal File

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SUPPLEMENTAL STATEMENT OF FACTS

A.) Introduction and summary:

On July 24, 2012, the Circuit Court entered summary judgment in favor of Respondents on each of the claims asserted against them in Plaintiff/Appellant Brentwood Glass Co., Inc.'s ("BWG") Petition. (L.F. 1223-1224.) This appeal arises from the grant of summary judgment in favor of Respondents.

On March 1, 2010, BWG filed its Fourth Amended Petition in this matter, which was originally filed in 2008 ("Petition"), and asserted nine counts against Defendants Pal's Glass Service, Inc. ("Pal's"), Clayco Construction Company, Inc. (n/k/a Clayco, Inc.) ("Clayco"), Cornerstone VI, LLC ("Cornerstone"), the County of St. Louis, State of Missouri ("County"), UMB Bank, N.A., National City Bank of the Midwest, Paul M. Macon, and Victor Zarilli (collectively "Respondents"). (L.F. 20-290.)

BWG's Petition included an action to enforce a mechanic's lien against each Respondent (Count VIII), and an action for failure to post a payment bond under § 107.170 RSMo. (Count IX), which was only asserted against the County. (L.F. 21-22.)

B.) The Property ownership and leasehold interest:

At all relevant times, the County was the owner of a parcel of real property located in St. Louis County ("Property), commonly known as Six CityPlace Drive, Creve Coeur, Missouri. (*See* Movants' *Statement of Uncontroverted Material Facts in Support of their Motion for Summary Judgment* ("SUMF"), ¶ 2; L.F. 347, 359-364.) Specifically, the County became the owner of the Property on September 9, 2005, by Special Warranty

Deed ("Deed") executed by the prior owner (and grantor), Cornerstone. (*See* Movants' SUMF, ¶¶ 2-3; L.F. 347-348, 365-367.) The County remained the fee simple owner of the Property until July 15, 2011. (*See* Movants' SUMF, ¶ 4; L.F. 348, 365-366.)

In connection with the County acquiring fee simple title to the Property via the September 9, 2005 Deed, the County leased the Property back to Cornerstone via a certain Lease Agreement, dated August 1, 2005 ("Lease Agreement"). (L.F. 666-671, 729-775).

C.) The Project and related agreements:

On or about July 19, 2005, Clayco entered into an agreement ("Clayco/Koman Agreement") with The Koman Group, L.L.C. ("Koman"), whereby Clayco would design and construct an office building on the Property ("Project"). (*See* Movants' SUMF, ¶ 5; L.F. 348, 372-389.) BWG admitted that the agreement was between Clayco and Koman. (*See* BWG's Substitute Brief, Pg. 4.) Koman is and always has been a Missouri limited liability company, and is privately owned by its members. (*See* Movants' SUMF, ¶ 6; L.F. 348, 365-366, 368-371.) Furthermore, Koman is not an official board, commission, or agency of the State of Missouri, nor is Koman a county, city, town, township, school, road district, or other political subdivision of Missouri. (*See Id.*) Thus, Clayco did not enter into any agreements with a public entity to construct the Project; specifically, Clayco did not contract with the County with respect to the Project. (*See* Movants' SUMF, ¶ 9; L.F. 349, 372-375.) The Clayco/Koman Agreement makes no reference to the Project being for "public works."

In its Brief, BWG stated, "[t]here is nothing in the record to suggest that Cornerstone contracted with Koman to build the Project for it." (*See* BWG's Substitute Brief, Pg. 4.) However, the record shows that Koman was acting as the "developer" for the Project. (*See* Affidavit of Garrick Hamilton, ¶ 9; L.F. 1100.) Specifically, Mr. Hamilton, a representative of Koman, stated: "Koman, in independently entering into its agreement with Clayco, was not acting as an agent for Cornerstone with respect to the Project; rather, Koman was acting as the **developer** with respect to the Project" (emphasis added). (*Id.*)

Clayco also entered into a sub-contract with Pal's ("Clayco/Pal's Agreement"), whereby Pal's was to perform work including the "glass and glazing" scope of work. (*See* Movants' SUMF, ¶ 8; L.F. 349, 372-373, 390-418.)

On October 18, 2005, Pal's entered into a sub-sub-contract with BWG ("Pal's/ BWG Agreement"), whereby BWG was to perform work, including labor relating to the "glass and glazing" scope of work. (*See* Movants' SUMF, ¶ 10; L.F. 349, 372-375, 419, 87-132.) The Pal's/BWG Agreement incorporates by reference a document titled, "AGC Document No. 655, STANDARD FORM OF AGREEMENT BETWEEN CONTRACTOR AND SUBCONTRACTOR ("AGC No. 655"). (*See* Movants' SUMF, ¶ 12; L.F. 350, 112-132.) Pursuant to Article 7 of the AGC No. 655, any changes in the subcontract amount must be by written "change order" and signed before the work is done. (L.F. 122.) Specifically, Section 7.1 provides as follows:

> SUBCONTRACT CHANGE ORDERS When the Contractor orders in writing, the Subcontractor, without nullifying this agreement, shall

> make any and all changes in the Subcontract Work which are within the general scope of this Agreement. Any adjustment in the Subcontract Amount or Subcontract Time shall be authorized by a Subcontract Change Order. No adjustment shall be made for any changes performed by the Subcontractor that have not been ordered by the Contractor. A Subcontract Change Order is a written instrument prepared by the Contractor and signed by the Subcontractor stating their agreement upon the change in the Subcontract Work.

(*Id.*)

The original amount of the Pal's/BWG Agreement was $1,104,243.00. (L.F. 97.) By Change Order dated November 5, 2005, the contract amount was amended for a final contract amount of $1,131,122.00. (L.F. 133-134.)

D.) The parties' work on the Project:

The earliest date any work commenced on or materials were delivered to the Project was September 26, 2005. (*See* Movants' SUMF, ¶ 13; L.F. 350, 373, ¶ 9.) BWG admits it began work on the Project on or about January 19, 2006. (*See* Movants' SUMF, ¶ 14; L.F. 145-173, 350, 527; *see also* BWG's Petition, ¶¶ 9, 154; L.F. 25, 67.)

BWG admitted that the last date it paid an employee for work performed on the Project was January 31, 2007. (*See* Movants' SUMF, ¶ 16; L.F. 350, 478.) BWG also admitted that the last day a BWG employee actually worked on the Project was January 31, 2007. (*See* Movants' SUMF, ¶ 17; L.F. 350, 478.) BWG's records submitted to the

Glazier's Union show that the last day a BWG employee performed work with respect to the Project was January 31, 2007. (*See* Movants' SUMF, ¶ 18; L.F. 350, 478.) According to Clayco's records, the last day BWG performed any work or provided any materials with respect to the Project was January 18, 2007. (*See* Movants' SUMF, ¶ 19; L.F. 350, 373 (¶ 11), 422-435.) On the other hand, notwithstanding BWG's suggestion to the contrary (*see* BWG's Substitute Brief, Pg. 7), there are no records of any work performed by BWG in February of 2007. (*See* Albers Depo. Vol. I, Pg. 137, line 22 – Pg. 139, line 23; Pg. 143, line 19 – Pg. 144, line 25; L.F. 476-77.) Furthermore, there are no records submitted to the Glazier's Union for any work performed by BWG in February of 2007. (*See* Albers Depo., Vol. I, Pg. 146, line 12 – Pg. 148, line 6; L.F. 478.) BWG did not file its Mechanic's Lien until August 8, 2007, which was more than six months after the date of its last documented work on the Project.

E.) BWG's Lien Waivers:

In connection with its work, BWG testified (through its owner and Corporate Designee, Bettie Albers), that BWG executed several lien waivers between February of 2006 and January of 2007 in exchange for payments. (*See* Movants' SUMF, ¶¶ 28-29; L.F. 352, 494, 516-526; S.L.F. 13;[1] *see also* BWG's Substitute Brief, Pg. 6 – 7, 34 – 35.) Specifically, Ms. Albers admitted that she executed a lien waiver, dated January 12,

[1] The Legal File, prepared by BWG, omitted a key document – the lien waiver executed by BWG on January 12, 2007. Respondents included this document in their Supplemental Legal File.

2007, whereby, BWG waived any and all lien rights with respect to the Project through that date. (*See* Movants' SUMF, ¶¶ 30-31; L.F. 352, 494-495.)

BWG admitted in Paragraph 156 of its Fourth Amended Petition (L.F. 68-69) that it had been paid a total of $1,018,838.32 for its work and materials in connection with the Project, against a final contract amount of $1,131,122.00. (L.F. 97, 133-134.)

BWG's Mechanic's Lien reflects that it performed, at most, $32,865.00 worth of work after January 12, 2007. (L.F. 167-169.)

The final lien waiver signed by BWG (dated January 12, 2007), specifically provided that BWG agreed:

> [To w]aive 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.

(*See* Movants' SUMF, ¶ 32; L.F. 352-353; S.L.F. 13.)

In addition, the January 12, 2007 lien waiver expressly provided that BWG had fully paid all of its material suppliers and sub-contractors. (*See* Movants' SUMF, ¶ 34; L.F. 353, 495.) This representation was false. Five of BWG's material suppliers and sub-contractors made claims upon Clayco for outstanding payments related to the Project and on April 24, 2007, Clayco paid a total of $47,343.92 to said material suppliers and

sub-contractors of BWG. (*See* Movants' SUMF, ¶¶ 35-36; L.F. 353, 372-375, 436-451, 495; S.L.F. 14-18[2].)

Therefore, in addition to the payments Clayco had made to BWG through January 12, 2007 (totaling $1,018,838.32), Clayco paid a total of $1,066,182.24 for BWG's work and materials for the Project. (L.F. 68-70.)

F.) BWG's Mechanic's Lien:

On August 8, 2007, BWG filed its mechanic's lien against the Property ("Mechanic's Lien"). (*See* Movants' SUMF, ¶ 37; L.F. 145-173, 354.) Although BWG's final contract amount was only $1,131,122.00, and BWG fully admitted that it had been paid $1,018,838.32 (plus $47,343.92 Clayco paid to BWG's suppliers), BWG's Mechanic's Lien claimed that it was still owed $1,061,464.04. BWG's Mechanic's Lien asserts that Cornerstone was the owner of the Property at the time of filing. (*See* Movants' SUMF, ¶ 38; L.F. 170, 354.)

Prior to filing its Mechanic's Lien, BWG served its notice of intent to file its Mechanic's Lien on the following entities: (a) Pal's; (b) Clayco; (c) Cornerstone; (d) Koman; (e) National City; and (f) UMB ("BWG Notice"). (*See* Movants' SUMF, ¶ 39; L.F. 354, 469-470, 528-573.) However, the BWG Notice was **not** served upon the

[2] BWG's Legal File also omitted Page 3 of the Affidavit of Jared Hegeman, attached as Exhibit 3 to Respondents' Statement of Uncontroverted Material Facts. Therefore, Respondents included a complete copy of this Affidavit in their Supplemental Legal File.

County prior to BWG filing its Mechanic's Lien, or at any time thereafter. (*See* Movants' SUMF, ¶ 40; L.F. 354, 528-573.)

There is no evidence that the County ever received notice of BWG's intent to file its Mechanic's Lien; rather, there was uncontroverted evidence to the contrary. (*See* Movants' SUMF, ¶ 41; L.F. 354, 574-575.) In addition, BWG admits that its Notice was not sent to the County. (*See* Movants' SUMF, ¶ 43; L.F. 355, 470.)

With respect to the service of BWG's Notice, BWG *alleges* that it served notice of its intent upon the owner's agent, Koman. (*See* BWG's Petition, ¶ 147, 168; L.F. 66, 72-73.) However, there is no substantial evidence to support this allegation; rather there was substantial evidence to the contrary. (*See* Movants' SUMF, ¶ 45; L.F. 355, 365-366.) Koman never received notice of the filing of any lien, including that of BWG, on behalf of the County. (*See* Movants' SUMF, ¶ 47; L.F. 355, 365-366.)

Koman was not an agent of the County for any purpose, including accepting notice. (*See* Movants' SUMF, ¶ 48; L.F. 355, 574-575.) The County is not aware of any circumstance in which anyone representing the County granted Koman any authority to accept notice on behalf of the County. (*See* Movants' SUMF, ¶ 49; L.F. 355, 574-575.)

BWG's Mechanic's Lien claims that on February 13, 2007, someone allegedly performed 5 hours of work, and further, that between February 5 and 9, 2007, someone allegedly performed an additional 5 hours of work. (*See* Movants' SUMF, ¶ 54; L.F. 356, 527 (duplicate on 145-173.)) However, although generally BWG maintained records of its work performed with respect to the Project, BWG is not aware of any specific documents reflecting the February 5-9 or February 13 work. (*See* Movants'

SUMF, ¶ 55; L.F. 356, 476-477.) Further, no invoices for this alleged work were ever sent to Clayco or Pal's. (*Id.*)

Finally, although BWG's Mechanic's Lien includes certain amounts for "extra" work it allegedly performed in connection with the Project, BWG admits that these "extra" items of work and/or materials supplied were not included in any "change orders." (*See* Movants' SUMF, ¶ 58; L.F. 357, 472-473.) As previously discussed, Section 7.1 of the AGC No. 655, which was incorporated into the Pal's/BWG Agreement, specifically provides that any changes in the subcontract amount must be by written "change order" and signed before the work is done. (L.F. 122.) Rather, BWG's list of alleged "extra" work was not submitted to Clayco or Pal's until February of 2007, after Project completion. (*See* Movants' SUMF, ¶ 60; L.F. 357, 492-493.)

G.) The Motion for Summary Judgment:

On August 1, 2011, Respondents filed their Motion for Summary Judgment. (L.F. 344-346.) Respondents argued that they are entitled to summary judgment with respect to each of the claims asserted against them in the Petition as follows:

a. Respondents are entitled to summary judgment with respect to Count VIII of the Petition (action to enforce the Mechanic's Lien) for three reasons: (i) BWG failed to give proper notice to the owner of the Property, as required by law; (ii) BWG's Mechanic's Lien is invalid because it was filed out of time; and (iii) BWG's Mechanic's Lien does not contain a "just and true" account of the demand

due it because it seeks to recover for work waived as a result of a valid lien waiver executed in connection therewith, and for other reasons;

b. The County is entitled to summary judgment with respect to Count IX of the Petition (action for failure to post a bond), where the statute relied upon by BWG does not apply as a matter of law because the County did not have a contract with a "contractor" for improvement of the Property.

(L.F. 344-346.)

After full briefing and a hearing thereon on October 19, 2011, the Motion for Summary Judgment was submitted to the Circuit Court. (L.F. 13.)

On October 25, 2011, BWG dismissed, without prejudice, Counts III, IV, and V of the Petition against Clayco only. (L.F. 1119-1120.)

On November 21, 2011, the Circuit Court granted Respondents' Motion for Summary Judgment by *Order and Judgment* ("Judgment"). (L.F. 1121.) The Circuit Court found that there existed no genuine issue of material fact and that Respondents were entitled to judgment as a matter of law as to Count VIII of the Petition (action to enforce mechanic's lien), and the County was entitled to judgment as a matter of law as to Count IX of the Petition (action for failure to post a bond). (*Id.*)

On July 24, 2012, the Circuit Court entered its *Final Judgment*, whereby final judgment was entered in favor of Respondents and against BWG as to all claims and causes of action in BWG's Petition. (L.F. 1223-1224.) The July 24, 2012 Final Judgment also expressly declared that this Judgment disposed of all claims and causes of

action asserted in the matter, and that there was no just reason for delay in the entry of this Judgment. (*Id.*)

H.) Pal's Consent Judgment:

In its Statement of Facts, BWG notes that it has a judgment against Pal's in the amount of $593,261.47 and costs, which remains unsatisfied. (*See* BWG's Substitute Brief, Pg. 2.) However, the judgment was entered with the ***consent*** of Pal's and was **not** obtained after a trial on the merits. (L.F. 1215-1216.) Moreover, it is important to note that Pal's was out of business at the time it consented to the entry of judgment against it, and thus, Pal's had no reason to fight the matter in court.

I.) The Appellate Proceedings:

BWG appealed the Circuit Court's July 24, 2012 judgment in favor of Respondents to the Missouri Court of Appeals, Eastern District. (L.F. 1225 – 1232.) After full briefing and oral argument, the Court of Appeals issued its Order affirming the Circuit Court's judgment pursuant to Mo. R. Civ. P. 84.16(b). The Court of Appeals also issued a ten-page Memorandum supplementing its Rule 84.16(b) Order ("Memorandum"), fully explaining the court's well-reasoned rationale for its decision. BWG then filed its Motion for Rehearing and/or Application for Transfer with the Court of Appeals, which was denied on February 13, 2014. On February 28, 2014, BWG filed its Application for Transfer pursuant to Rule 83.04 with this Court, which was granted on April 29, 2014.

POINTS RELIED ON

I.

(In response to Appellant's Point Relied On II)

THE CIRCUIT COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS WITH RESPECT TO COUNT VIII OF THE PETITION BECAUSE THERE ARE NO GENUINE ISSUES OF MATERIAL FACT AND RESPONDENTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW IN THAT THE UNDISPUTED EVIDENCE IN THE RECORD ESTABLISHED THAT: (A) BWG'S MECHANIC'S LIEN DOES NOT CONTAIN A "JUST AND TRUE" ACCOUNT OF THE DEMAND DUE IT, INVALIDATING THE LIEN; (B) BWG'S MECHANIC'S LIEN IS INVALID BECAUSE IT WAS FILED OUT OF TIME; AND (C) BWG FAILED TO GIVE PROPER NOTICE, PURSUANT TO SECTION 429.100 RSMO., OF ITS INTENT TO FILE A MECHANIC'S LIEN ON THE OWNER OF THE PROPERTY, INVALIDATING THE LIEN.

Section 429.080 RSMo.

Section 429.100 RSMo.

City Wide Asphalt Co. v. Industrial Paving, Inc.,

838 S.W.2d 480 (Mo. App. W.D. 1992)

Westerhold v. Mullenix,

777 S.W.2d 257 (Mo. App. E.D. 1989)

II.

(In Response to Appellant's Point Relied On I)

THE CIRCUIT COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF THE COUNTY WITH RESPECT TO COUNT IX OF THE PETITION BECAUSE THERE ARE NO GENUINE ISSUES OF MATERIAL FACT AND THE COUNTY IS ENTITLED TO JUDGMENT AS A MATTER OF LAW IN THAT SECTION 107.170 RSMO. DOES NOT APPLY BECAUSE THE UNDISPUTED EVIDENCE IN THE RECORD ESTABLISHES THAT THE COUNTY DID NOT HAVE A CONTRACT WITH A "CONTRACTOR" FOR THE IMPROVEMENT OF THE PROPERTY AND THERE IS NO EVIDENCE THAT AN AGENT OF THE COUNTY DID SO.

Section 107.170 RSMo.

Wyler Watch Agency v. Hooker,

280 S.W.2d 849 (Mo. App. Spr. 1955)

Business Bank of St. Louis v. Old Republic Nat'l Title Ins. Co.,

322 S.W.3d 548 (Mo. App. E.D. 2010)

Sedalia Mercantile Bank & Trust v. Loges Farms, Inc.,

740 S.W.2d 188 (Mo. App. W.D. 1987)

STANDARD OF REVIEW

Upon review of a circuit court's grant of summary judgment, the Court of Appeals should affirm the judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Mo. R. Civ. P. 74.04. An appellate court reviews the trial court's decision *de novo*. *ITT Comm. Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993).

The propriety of summary judgment is purely an issue of law. *THF Chesterfield North Dev. v. THF/TMI*, 106 S.W.3d 13, 16 (Mo. App. E.D. 2003). The criteria on appeal are no different from those used by the trial court to determine the motion initially. *Id*. Facts set forth by affidavit or otherwise in support of a party's motion are taken as true unless contradicted by the non-moving party's response. *Id.* Once the moving party establishes that there is no genuine dispute as to the genuine facts and a right to judgment as a matter of law, the non-moving party must create a genuine dispute by supplementing the record with competent materials that establish "a plausible, but contradictory, version of at least one of the movant's essential facts." *Id.* When the facts are not disputed, they are admitted for purposes of analyzing a motion. *Id*.

A genuine issue is "a real, nonfrivolous dispute that exists where the record contains competent, material evidence that two plausible, but contradictory accounts of the essential facts in the case." *Tonkovich v. Crown Life. Ins. Co.*, 165 S.W.3d 210, 214 (Mo. App. E.D. 2005). Only those factual disputes that might affect the outcome of the case under the applicable law are material. *Id*. A genuine issue is also one that it is "real and not merely argumentative, imaginary, or frivolous." *Id*.

In the Standard of Review section of its Substitute Brief, BWG complains that the Circuit Court did not explain the reason for its order granting summary judgment in favor of Respondents. (*See* BWG's Substitute Brief, Pgs. 13 – 18). However, trial courts are free to explain or not explain the basis for their decisions. *See, e.g., G & J Holdings, LLC v. SM Properties, LP*, 391 S.W.3d 895, 900 (Mo. App. E.D. 2013). Notwithstanding this rule, BWG argues that this case presents an opportunity for this Court to reconsider the "scope of review" of Missouri appellate courts in such cases. However, BWG's argument should be disregarded and the decision in this case should be affirmed for two reasons: (1) BWG's argument violates Mo. R. Civ. P. 83.08(b), which prohibits the alteration of claims made to the Court of Appeals; and (2) the well-established standard of review applicable in this case (and others like it) should not be disturbed because: (a) BWG's entire argument is premised upon an incorrect description and understanding of the applicable standard of review in this case, which is *de novo*; and (b) the Court of Appeals followed the correct standard of review and performed an independent review of this case, as set forth below.

First, BWG's argument in this regard violates Rule 83.08(b), which expressly states that a party's substitute brief filed with this Court "shall not alter the basis of any claim that was raised in the court of appeals brief…." In this case, BWG's argument in its Substitute Brief regarding the standard of review violates Rule 83.08(b) because BWG's brief filed with the Court of Appeals did not include any such argument or authority in support. *See, e.g., J.A.R. v. D.G.R.*, 426 S.W.3d 624 (Mo. banc 2014). Thus, BWG's new argument should not be considered by this Court.

Second, BWG's entire argument is premised upon an incorrect description and understanding of the applicable standard of review in this case, which is *de novo,* and the Court of Appeals followed the correct standard of review and performed an independent review of this case. BWG argues that the so-called "no-explanation-needed" rule results in the appellate court acting as an advocate for the lower court's decision and the prevailing party. (*See Id*. at 17.) It also argues that it "fails to promote the careful consideration of the [summary judgment] motion by the trial court." (*See Id*. at 15.) BWG's arguments misrepresent the standard of review in an attempt to create a straw man to then knock down.

Under the applicable standard of review, the appellate court does not act as an advocate for the trial court's decision or the prevailing party. As set forth above, an appellate court reviews the trial court's decision *de novo*. *ITT,* 854 S.W.2d at 376. The propriety of summary judgment is purely an issue of law. *THF Chesterfield North Dev.*, 106 S.W.3d at 16. *De novo* review requires an appellate court to undertake a new and independent determination of the summary judgment motion based upon the same record presented to the trial court. As this Court held in *ITT*, "[t]he criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially." 854 S.W.2d at 376. Further, appellate courts must "accord the non-movant the benefit of all reasonable inferences from the record." *Id*. Since the propriety of summary judgment is "purely an issue of law," an appellate court "need not defer to the trial court's order granting summary judgment." *Id*. BWG is simply wrong to suggest that the appellate

court was to act as an advocate for the trial court's decision. Rather, it makes its own review of the record and an independent decision as to whether summary judgment was proper. Thus, BWG's primary argument for a change of the standard of review is based on a faulty premise and should be disregarded.

BWG's argument that the Court should require a detailed, written decision from the trial court is also misplaced. First, trial courts, often without the benefit of law clerks, should not be burdened with the obligation to provide a detailed written explanation of their decisions. Doing so would surely cause unnecessary delay to summary judgment procedures. Further, it would serve no purpose on appeal because the appellate review is *de novo*. Therefore, as set forth above, the appellate court does not consider the reasons given by the trial court for its decision but rather makes its own determination of the propriety of summary judgment. BWG, in an effort to revive its case, suggests an unnecessary and, ultimately, pointless requirement be placed on trial courts. The Court should reject its argument.

BWG also incorrectly suggests that the standard of review in cases involving a grant of summary judgment is currently the same as in "court-tried" cases[3]. (*See* BWG's

[3] In support, BWG suggests that parties against whom summary judgment is entered "have not had their day in court and the opportunity to carefully and thoughtfully present their entire cases." (*See Id.*) However, any suggestion that BWG has not had its own day in court or an opportunity to "carefully and thoughtfully" present its entire case is disingenuous and wrong, where BWG has elsewhere noted that the summary judgment

Substitute Brief, Pg. 16.) However, BWG is again incorrect. As this Court first stated in *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976), appellate review of court-tried cases pursuant to Rule 73.01 is as follows: "[T]he decree or judgment of the trial court will be sustained by the appellate court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." In contrast, as noted above, the standard of review in cases involving a trial court's grant of summary judgment is *de novo*, and the judgment should be affirmed if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Rule 74.04; *ITT*, 854 S.W.2d at 376.

The Court of Appeals in this case applied the correct standard of review, *de novo*, and thus, BWG cannot possibly argue that the Court of Appeals was somehow an advocate for either the Circuit Court or Respondents. As such, the Court of Appeals gave BWG the proper appellate review to which it was entitled under Missouri law, and correctly affirmed the Circuit Court's judgment, as fully explained in its Memorandum. Thus, the entry of summary judgment in favor of Respondents should likewise be affirmed by this Court.

In its Memorandum, the Court of Appeals devoted an entire section (and a full page) to the applicable standard of review, and began by noting as follows: "We review

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record in this case (which is contained in Volumes II – VI of the Legal File) comprise approximately 775 pages, and that does not even include the "voluminous" memoranda of law filed by the parties. (*See* BWG's Substitute Brief, Pg. 14 – 15, footnote 6.)

the entry of summary judgment **de novo**" (emphasis added). (*See* Memorandum, Pg. 4.) The Court of Appeals cited this Court's opinion in *ITT*, 854 S.W.2d at 376, and further noted that under *ITT*, "[t]he criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially." (*See* Memorandum, Pg. 5.) In addition, the Court of Appeals in this case implicitly recognized that it is not an advocate for the trial court or the parties, noting that appellate courts, "need not defer to the trial court's order granting summary judgment." (*See Id.*) Moreover, the Court of Appeals in this case specifically noted that it views the record "in the light most favorable to the party against whom summary judgment was entered." (*See Id.*)

Therefore, BWG cannot possibly suggest with a straight face that the Court of Appeals below was permitted (or forced) to be an advocate for Respondents. First, BWG's counsel filed the Record on Appeal with the Court of Appeals, which contained all the evidence BWG deemed necessary for its appeal, and included nine volumes and over 1,200 pages. Second, BWG's counsel filed its brief, and thus, BWG's counsel had a full opportunity to explain (as an *advocate* for BWG) the reasons why it believes summary judgment should not have been entered, which brief included over 34 pages and over 9,100 words. Respondents' counsel then filed its own brief, where Respondents' counsel fully explained (as an *advocate* for Respondents) the reasons why the Circuit Court correctly entered summary judgment for Respondents. Third, BWG's counsel filed its reply brief, where BWG's counsel had yet another opportunity to further explain its position. Finally, counsel for BWG and Respondents each had an opportunity to explain

their respective positions (as *advocates* for their respective clients) at oral argument. Thus, based upon the same extensive record presented to the Circuit Court, and based upon counsels' "voluminous" briefing advocating their respective clients' positions, the Court of Appeals undertook an independent review of Respondents' summary judgment motion, and ultimately reached the same result as the Circuit Court.

For these reasons, BWG's standard of review argument should be rejected and the applicable standard of review established by this Court should be left undisturbed, where the standard is perfectly sound and fair. In addition, since the Court of Appeals applied the correct standard of review in this case, *de novo* (*see* Memorandum, Pgs. 4 – 5), and further, because the Court of Appeals conducted an independent review of this case based upon the exact same record presented to the Circuit Court, BWG has failed to establish any basis for reversal. Thus, the Circuit Court's decision should be affirmed.

ARGUMENT:

I. (in Response to Appellant's Point Relied On II)

THE CIRCUIT COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS WITH RESPECT TO COUNT VIII OF THE PETITION BECAUSE THERE ARE NO GENUINE ISSUES OF MATERIAL FACT AND RESPONDENTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW IN THAT THE UNDISPUTED EVIDENCE IN THE RECORD ESTABLISHED THAT: (A) BWG'S MECHANIC'S LIEN DOES NOT CONTAIN A "JUST AND TRUE" ACCCOUNT OF THE DEMAND DUE IT, INVALIDATING THE LIEN; (B) BWG'S MECHANIC'S LIEN IS INVALID BECAUSE IT WAS FILED OUT OF TIME; AND (C) BWG FAILED TO GIVE PROPER NOTICE, PURSUANT TO SECTION 429.100 RSMO., OF ITS INTENT TO FILE A MECHANIC'S LIEN ON THE OWNER OF THE PROPERTY, INVALIDATING THE LIEN.

The Circuit Court correctly granted Summary Judgment in favor of Respondents with respect to Count VIII of the Petition because there are no genuine issues of material fact and Respondents are entitled to judgment as a matter of law for each of the three independent reasons set forth in (A) through (C) above.

As further explained below, each of the foregoing three reasons provides an *independent* basis for invalidating BWG's Mechanic's Lien under applicable law, and thus, summary judgment in favor of Respondents was appropriate on any single basis. *See, e.g.*,

Preston v. Preston, 823 S.W.2d 48, 49 (Mo. App. E.D. 1991) (holding that summary judgment must be affirmed, "if, as a matter of law, it is sustainable on any theory.").

In connection with the argument for its first Point Relied On, BWG suggests that Missouri courts construing the provisions of the mechanic's lien statutes should remember that they are "remedial" in nature, and thus, they should be given a "liberal" construction. (*See* BWG's Substitute Brief, Pgs. 26 – 27). BWG undoubtedly offers this authority because it fully recognizes that its own Mechanic's Lien was woefully deficient and failed to comply with several express requirements of applicable Missouri law, as will be discussed at length below. However, Missouri courts have long recognized that the mechanic's lien statutes provide an "extraordinary remedy" to those who seek to enforce it. *See, e.g., Mississippi Woodworking v. Maher*, 273 S.W.2d 753, 755 (Mo. App. St.L. 1954). Therefore, these courts hold that a lien claimant must "substantially comply" with its requirements in order to avail itself of the benefits thereof. *Id*. (citing *Springfield Planing Mill, Lumber & Const. Co. v. Krebs*, 193 S.W. 621 (Mo. App. Spr. 1917)).

Other Missouri courts have more recently held that Missouri's general policy of "liberal construction" does not relieve a purported lien claimant, such as BWG, "from the necessity of substantially complying with the requirements of the mechanic's lien statutes." *Fulkerson v. W.A.M. Investments*, 85 S.W.3d 745, 748 (Mo. App. S.D. 2002). In addition, Missouri courts hold that a purported lien claimant has the ***burden*** of showing that it has complied with the statutory requisites of the mechanic's lien statutes. *Id.*; *see also Ambassador Floor Co. v. Bruner Builders, LLC*, 323 S.W.3d 38, 41 (Mo. App. E.D. 2010) (recognizing that because Missouri's mechanic's liens exist only under

statute, "the party seeking the lien must comply with all statutory requirements and bears the burden of proving such compliance.").

In this case, BWG cannot avail itself of this "extraordinary remedy" because it not only failed to meet its burden of establishing that it "substantially" complied with certain statutory requirements, but failed to comply with these requirements altogether. These deficiencies include: (1) that BWG's Mechanic's Lien does not contain a "just and true" account of the demand due it, as required by § 429.080 RSMo.; (2) that BWG's Mechanic's Lien is invalid because it was filed out of time under § 429.080 RSMo.; and (3) that BWG failed to give proper notice of its intent to file a mechanic's lien to the owner of the Property at the time the work commenced, as required by § 429.100 RSMo.

The Circuit Court and the Court of Appeals, Eastern District, fully recognized these deficiencies, and thus, respectively granted and affirmed summary judgment in favor of Respondents.

A. (In Response to Appellant's Argument, Section II(E))

The Circuit Court correctly granted summary judgment in favor of Respondents with respect to Count VIII of the Petition because BWG's Mechanic's Lien does not contain a "just and true" account of the demand due it for each of the three *independent* reasons set forth in Sections A(1), A(2), and A(3) below.

1. BWG's Mechanic's Lien was not "just and true" because: (a) BWG sought to recover claims waived as a result of a valid lien waiver; and (b) BWG sought to recover for alleged "extra" work not included in its contract.

BWG's Mechanic's Lien was not "just and true," and warranted being vitiated, because BWG's lien statement contained two fatal errors. First, BWG's Mechanic's Lien was not "just and true" because it sought to recover claims waived as a result of a valid lien waiver undisputedly executed by BWG on January 12, 2007. (*See* Movants' SUMF, ¶¶ 28-34; L.F. 352-353.) By executing this unambiguous waiver, BWG waived its lien rights for all work up to and including the date of the waiver. The waiver is significant because BWG admitted it had been paid $1,018,838.32 for its work through January 12, 2007. (L.F. 68-69.) In contrast, BWG claims that it performed, at most, $32,865.00 worth of work after January 12, 2007. (L.F. 167-169.) Given that BWG's total contract was for only $1,131,122.00 (L.F. 97, 133-134), BWG's lien statement, which sought an *additional* $1,061,464.08, was not "just and true." Section 428.080 RSMo.

Second, BWG admits that its lien statement included amounts for "extra" work that it allegedly performed, but which was not included in any change orders (L.F. 357, 472-473), as required by its contract. (L.F. 122.) Thus, the lien statement included items that were not authorized by its contract. Moreover, the "extras" were untimely under its contract, where BWG first submitted them after project completion and without prior documentation, and thus, they were nothing more than an unjustified attempt to inflate BWG's lien statement. (L.F. 357, 492-493.) Given BWG's inclusion of these items, the lien was not "just and true," and also warranted vitiating BWG's entire Mechanic's Lien.

BWG's inclusion in its lien statement of amounts waived as a result of the January 12, 2007 lien waiver, as well as for alleged "extra" work not included in its contract,

rendered BWG's Mechanic's Lien invalid under § 429.080, and the Circuit Court correctly entered summary judgment in favor of Respondents on this basis alone.

a. A lien claimant must file a "just and true" account of its demand, which is the "foundation" to enforcing a mechanic's lien; knowingly filing an excessive claim voids the entire lien.

Section 429.080 RSMo., titled "Lien filed with circuit clerk, when," governs the lien statement that must be filed by every contractor seeking to impose a mechanic's lien pursuant to Chapter 429 RSMo., and provides in pertinent part as follows:

> It shall be the duty of every …. person seeking to obtain the benefit of the provisions of sections 429.010 to 429.330 within six months after the indebtedness shall have accrued…, to file with the clerk of the circuit court of the proper county a ***just and true account of the demand due him or them after all just credits have been given***, … which shall, in all cases, be verified by the oath of himself or some credible person for him.

(Emphasis added).

Missouri courts interpreting and applying § 429.080 RSMo. hold that filing a "just and true" account is the "foundation of the right to maintain suit for enforcement of a mechanic's lien and a condition precedent to the lien." *City-Wide Asphalt Co. v. Industrial Paving, Inc.*, 838 S.W.2d 480, 482 (Mo. App. W.D. 1992). On the other hand, the filing of an "unjust and untrue account, when knowingly made, 'forms no basis for a lien, and no foundation for a cause of action to enforce it, but vitiates the entire right of

lien.'" *Id.* (emphasis added). A mechanic's lien claimant has the burden to establish that an excessive claim was due to an honest mistake and not to design. *Id.*

It is a "fundamental doctrine" that when nonlienable items are included in a lien statement, "deliberately, knowingly, and intentionally, then the account so filed may not be regarded as 'just and true' within the meaning of the statute, and can form no basis for the adjudication and establishment of a lien for any part of the account." *Putnam v. Heathman*, 367 S.W.2d 823, 828-29 (Mo. App. K.C. 1963) (holding that the lien claimant's inclusion of a certain $1,900 nonlienable "cash item" in the lien statement vitiated the entire lien).

Putnam addressed the lien claimant's argument that it had a right to test the "lienability" of the item in court (i.e., whether the claimed item could form the basis for a mechanic's lien under Missouri law). In squarely rejecting this argument, *Putnam* stated:

> We cannot excuse the intentional inclusion of the $1900.00 in the lien statement on the ground that plaintiff had the right to test the lienability of the item in court. There is ***no reasonably debatable question*** present in this case, either of fact or law, as to whether or not plaintiff was entitled to the $1900.00 credit claimed.
>
> The mechanic's lien law confers special rights upon the class of persons who perform labor and furnish materials. It demands in return a fair and reasonable compliance with its terms. The integrity of that will not be preserved unless courts protect its abuse and deliberate violation.

Id. at 830 (emphasis added). Thus, *Putnam* held that it is not acceptable for a lien claimant to include claims for items that the claimant deems arguable.

Under the foregoing authority, an unsubstantiated claim for amounts due does **not** create a fact question that would preclude summary judgment against the lien claimant.

b. The undisputed evidence established that BWG's lien statement was not "just and true," justifying vitiating the entire lien on this basis alone.

(i) BWG waived its lien rights for all work before January 12, 2007.

In this case, BWG undisputedly executed a series of lien waivers beginning on February 15, 2006, and concluding with the waiver dated January 12, 2007. (*See* Movants' SUMF, ¶¶ 28-31; L.F. 352.) The January 12, 2007 waiver, which was signed by BWG's Owner, provided that in exchange for a payment of $15,000.00, BWG waived any and all lien rights it had with respect to work performed and/or materials provided prior to that date. (*See* Albers Depo. Vol. II, Pg. 197, line 25 – Pg. 198, line 12; L.F. 495.) As noted, BWG admitted that it had been paid $1,018,838.32 for its work through January 12, 2007. (L.F. 68-69.) The January 12, 2007 waiver stated:

> NOW THEREFORE, We the undersigned for and in consideration of the sum of Fifteen thousand and 00/100 ($15,000.00) 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 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.

(Italicized/bold emphasis added). (*See* January 12, 2007 lien waiver; S.L.F. 13.)

The January 12, 2007, lien waiver is significant because Missouri courts have long recognized that a lien claimant may, by agreement, waive certain lien rights pertaining to a mechanic's lien claim. *See, e.g., Center Creek Mining Co. v. Coyne*, 147 S.W. 148, 152-53 (Mo. App. Spr. 1912). More recently, the Missouri Court of Appeals in *Landvatter Ready Mix, Inc. v. Buckey*, 963 S.W.2d 298, 301 (Mo. App. E.D. 1997), affirmed that, "it has long been the rule that a mechanic's lien claim may be waived…." *Id.* *Landvatter* held that a lien claimant, who had previously executed a lien waiver very similar to the instant one, waived all of its lien rights up to and including the date of the lien waiver, where the waiver stated:

> We the undersigned for and in consideration of the sum of Eleven Hundred Ninety Four and 10/100, and other good and valuable consideration, the receipt of which is hereby acknowledged, we do hereby waive and release any and all lien, and claim or right to lien on said above described building and premises under the Statutes of Missouri relating to Mechanic's Liens, on account of labor and materials, or both, furnished by the undersigned to or on account of said R. Green & Sons for said building and premises.

Id. at 303-04.

In this case, the January 12, 2007 waiver executed by BWG is virtually identical to that found to be a valid waiver of lien rights in *Landvatter*. Accordingly, there is no reasonably debatable question that BWG waived all of its lien rights for all work performed and materials supplied up to and including January 12, 2007.

Since the vast majority of BWG's Mechanic's Lien claims are for work performed and materials provided prior to January 12, 2007, these amounts were waived and could not be claimed in the lien statement – which erroneously claimed an amount due of $1,061,464.08. Specifically, the lien statement includes 47 separate weekly entries for work performed up to and including January 7, 2007, totaling $1,909,342.00. (*See* BWG's Mechanic's Lien, Pgs. 1-23; L.F. 145-167.) The lien statement also includes an entry for the week of January 8, 2007 – January 14, 2007 for $15,890.00. (*See Id.* at Pg. 23; L.F. 167.) On the other hand, there are only six weekly entries for work performed after January 14, 2007, totaling just $32,865.00. (*Id.* at Pgs. 23-25; L.F. 167-169.) Finally, all but one of BWG's entries for materials supplied are for the time period prior to January 12, 2007, totaling $83,244.65. (*Id.* at 25-26; L.F. 169-170.) The other entry (for 11/5/2006 – 1/30/2007) is for $3,244.65. (*See Id.*)

According to BWG's lien statement, the total amount of work performed and materials provided prior to January 12, 2007 was $1,993,301.75, which included alleged "extras" never submitted to Clayco or Pal's until after project completion. On the other hand, the total amount of work allegedly performed after January 12, 2007 is only $32,865.00. (L.F. 167-170.) As noted above, the lien statement also reflects $15,890.00 in work performed between January 8, 2007 and January 14, 2007, a portion of which

was performed before January 12, 2007. Likewise, the lien statement reflects $3,244.65 in materials provided between November 5, 2006 and January 30, 2007, a portion of which was provided before January 12, 2007. However, BWG's total contract with Pal's was for only $1,131,122.00. (L.F. 97; 133-134.) Therefore, BWG's lien statement, which sought an *additional* $1,061,464.08 for alleged work performed and materials provided, was not "just and true" under Missouri law, since all but $32,865.00 of the alleged work had been waived by virtue of the January 12, 2007 waiver. § 429.080 RSMo.; *City-Wide*, 838 S.W.2d at 482.

Thus, since the vast majority of the work was performed and materials were provided prior to January 12, 2007, BWG's lien statement cannot possibly be considered a "just and true" account of the amount due (if any), where BWG admitted in its Petition that it had been paid $1,018,838.32 through January 12, 2007 (L.F. 68-69), and yet, BWG still seeks a balance due of $1,061,464.08 on a final contract amount of $1,131,122.50. Thus, the Circuit Court correctly granted summary judgment in favor of Respondents on this basis alone.

(ii) BWG's lien statement also failed to be "just and true" because of the inclusion of unjustified, non-contractual "extras".

Although the inclusion of the waived items in the lien statement was alone sufficient to invalidate BWG's Mechanic's Lien, BWG also admitted that its lien statement included items for "extra" work it allegedly performed that were not included in any change orders. (L.F. 357, 472-473.) BWG recently affirmed this key admission, where it specifically

stated the following in its Substitute Brief filed with this Court: "[M]ost 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…." (*See* BWG's Substitute Brief, Pg. 42.) Thus, BWG included items in its lien statement that were not authorized by its contract with Pal's. Given that the final amount of BWG's contract was $1,131,122.00, and given that the total amount of labor and materials claimed in the lien statement was $2,045,302.24 (L.F. 170), BWG's lien statement included $914,180.24 in unauthorized "extras." Moreover, BWG first submitted these "extras" in February of 2007, after project completion. Thus, the "extras" were untimely and unauthorized, where BWG's contract required that any changes in the contract amount must be by written "change order" and signed before the work was done. (L.F. 122.) However, BWG's alleged "extras" were nothing more than an improper attempt to inflate its lien statement.

As noted above, a mechanic's lien claimant has the ***burden*** to establish that an excessive claim was due to an honest mistake. *City-Wide Asphalt*, 838 S.W.2d at 482. However, BWG cannot possibly claim that its inclusion of waived work and amounts beyond its contract amount in its lien statement was the result of mere inadvertence or an honest mistake, where BWG fully admitted executing each of its lien waivers, including the January 12, 2007 lien waiver and the requirements of its contract were clear. (*See* Albers Depo. Vol. II, Pg. 197, line 25 – Pg. 198, line 12; L.F. 495.) Accordingly, BWG's failure to provide a credit in its lien statement for all the work performed and materials supplied prior to January 12, 2007, fully knowing that it had executed the January 12, 2007 lien waiver, constitutes an intent to impose a mechanic's lien for work and materials

for which it had no right to seek payment. Likewise, BWG's intentional inclusion of $914,180.24 in unauthorized "extras" sought payments with no justification.

Given that the undisputed evidence established that BWG knowingly included items in its lien statement that were unwarranted and unjustified as a matter of law, BWG failed to provide a "just and true" account of the demand due it, and the Circuit Court correctly entered summary judgment in favor of Movants on this basis alone.

c. BWG's argument that the January 12, 2007 lien waiver is ambiguous fails as a matter of law for three reasons.

In its Brief, BWG argues that the lien waivers were ambiguous, and thus, parol evidence may be considered in understanding the parties' intentions. (*See* BWG's Substitute Brief, Pgs. 26-30.) Specifically, BWG argues that there is a conflict between the title of the document, which includes the word "Partial," and the text of the document, which expressly states that BWG waived "any and all liens." (*Id.* at Pg. 26.) However, BWG's ambiguity argument should be rejected for two reasons.

First, BWG's ambiguity argument is without merit and provides no basis for reversing the grant of summary judgment because BWG ignores clear Missouri law to the contrary. Specifically, BWG incorrectly suggests that a "reasonable, average" person would not be able to determine the intent of the parties in executing the lien waivers, including the January 12, 2007 lien waiver, because it could be construed any number of ways. However, BWG ignores black letter contract law which holds that the intent of the parties to a contract is to be understood from a plain reading of the contract itself, and not

from some "reasonable person" standard. *J.C. Penney Life Ins. Co. v. Transit Cas. Co.*, 299 S.W.3d 668, 673 (Mo. App. W.D. 2009) (holding that, "[w]hen the language of the contract is unambiguous, we ascertain the parties' intent from the contract language alone and not from extrinsic or parol evidence."). In this case, there is nothing ambiguous about the lien waivers' use of language that expressly waived "any and all liens."

With respect to the term "Partial" in the title of the lien waiver, BWG's argument posits a misleading terminology distinction between the terms "partial" and "full." However, in construction practice the relevant distinction is between the terms "partial" and "final." Construction practice recognizes two basic types of liens waivers: (1) "partial waivers," that are executed at various points throughout the construction process in order to secure partial progress payments; and (2) "final waivers," that are executed at the conclusion of a project in order to secure final payment. *See* II Mo. Construction Law § 9.107, 9.108, and 9.109 (MoBar 2nd Ed. 2004). With respect to "partial waivers," there are two sub-categories: (a) "date waivers"; and (b) "amount waivers." *Id*. at § 9.87. Under a "date waiver," the contractor or subcontractor "agrees to waive all its lien rights for labor or materials that it provided up to a certain date." *Id.* In contrast, under an "amount waiver," a contractor or subcontractor "acknowledges that it receives payment of a specified amount and waives all rights to claim a lien for that amount." *Id.* In this case, each of the lien waivers executed by BWG were "date waivers" by their own terms. Thus, even if the January 12, 2007 lien waiver is deemed "partial" (as opposed to "final"), it was still a valid "date" waiver.

BWG also attempts to rely on *Tharp v. Keeter/Schaefer Investments, L.P.*, 943 S.W.2d 811 (Mo. App. S.D. 1997), which it incorrectly deems "instructive." BWG's reliance on *Tharp* is misplaced because the court was asked to analyze a lien waiver with language that is materially different than that found in the lien waivers at issue here. Specifically, the lien waiver in *Tharp* was mostly typed, but contained certain hand-written additions, and stated as follows (hand-written portions in *italics*):

> *Partial* WAIVER OF MECHANIC'S LIEN
>
> T&T INTERIORS, in consideration of *$25,000.00*, paid on this date, the receipt of which is hereby acknowledged, hereby waives any rights that it might have under Chapter 429 of the Revised Statutes of the State of Missouri for materials provided and/or work performed up to and including *Partial Retainage*, 1994 the property known as HOLIDAY INN CROWNE PLAZA, Branson, Missouri, and releases any claim that it might have against Keeter/Schaefer Properties, Inc., Keeter Schaefer Corp. and/or K&S Construction on account of any materials provided and/or work performed on said property up to and including the aforesaid date, *to the extent of the $25,000,00 payment received*.

Id. at 817-18. Therefore, given the language "to the extent of the $25,000 payment received," the waiver in *Tharp* was, at best, a hybrid "date" and "amount" waiver, where it contained language supporting both types of waivers. *Tharp* ultimately held that although the lien claimant waived most of its lien rights pursuant to the aforementioned

lien waiver, it did not waive its right to recover retainage of 10% of all prior progress payments for work performed before the date of the waiver in question. *Id.*

In this case, however, *Tharp* has no precedential value because the waiver in that case stated the following in a hand-written addition: "to the extent of the $25,000.00 payment received." *Id.* at 817-18. However, the lien waivers executed by BWG contained no such language, and thus, they should not be held to be "amount" waivers. Rather, as previously explained, the lien waivers executed by BWG were like the lien waiver at issue in *Landvatter*, which was a "date" waiver.

Second, BWG's ambiguity argument fails as a matter of law because BWG incorrectly suggests that because of the purported ambiguity with respect to the lien waivers, parol evidence may be considered in determining the intent of the parties, including certain language from the Pal's/BWG Agreement. (*See* BWG's Brief, Pg. 28-29.) As previously noted, however, there is no ambiguity in the lien waivers executed by BWG. Moreover, the parol evidence BWG attempts to rely on does not support the result it seeks. Specifically, BWG suggests that Clayco's construction of the lien waivers (i.e., as "date waivers") would violate Section 8.8 of the Pal's/BWG Agreement. However, this argument should be rejected because Clayco was not a party to this agreement, and thus, it was not bound thereby. *Landstar Investments II, Inc. v. Spears*, 257 S.W.3d 630, 632 (Mo. App. S.D. 2008).

d. BWG's attempt to re-write the lien waivers also fails as a matter of law.

Finally, the lien waivers executed by BWG should not be construed to only waive lien rights "to the extent of each payment," as incorrectly suggested by BWG. This is because, first, the language of the waivers clearly and unambiguously articulates the parties' intention to waive all of BWG's lien rights up to the date of their execution, as explained above. Thus, under Missouri law, it does not matter how a "reasonable" person might interpret them. *J.C. Penney*, 299 S.W.2d at 673. If BWG did not desire or intend to waive all lien rights through the date of each waiver, then it could have and should have insisted on and only executed "amount waivers," as discussed above. Thus, BWG's argument is not supported by any law or the facts, and provides no reason to reverse the grant of summary judgment in favor of Respondents.

The undisputed evidence in the record demonstrates that BWG sought to recover for claims waived as a result of a valid lien waiver, as well as alleged "extra" items that were not included in its contract with Pal's, and thus, BWG's Mechanic's Lien was not "just and true." Therefore, the Circuit Court correctly granted summary judgment in favor of Movants on this basis alone.

As further explained below, the Circuit Court also correctly granted summary judgment in favor of Respondents because BWG's Mechanic's Lien was not "just and true" for two other *independent* reasons.

2. BWG's Mechanic's lien was not "just and true" because it overcharged for its hourly rate.

Second, BWG's Mechanic's Lien was not "just and true" because it overcharged for its hourly labor rate in its lien statement.

a. The undisputed evidence in the record supports Respondents' right to judgment as a matter of law on this basis alone.

BWG admitted that the work claimed in its Mechanic's Lien reflected rates of $70/hour for normal time, and $106/hour for overtime. (*See* Albers Depo. Vol. II, Pg. 129, lines 2-11; L.F. 491.) However, BWG also admitted that the hourly rate agreed to in the Pal's/BWG Agreement for BWG's workers was not $70/hour; rather, the agreed-upon rate was $62/hour. (*See* Albers Depo. Vol. II, Pg. 129, line 15 – Pg. 130, line 1; L.F. 491.)

These facts are significant because a contractor is limited to recovering no more than the amount agreed to in an express contract governing its work, absent extreme circumstances (which do not apply in this case). *Oliver L. Taetz, Inc. v. Groff*, 253 S.W.2d 824 (Mo. 1953). Specifically, *Groff* held as follows:

> But where, as here, an express contract has been fully performed on plaintiff's part, ***and nothing remains to be done under it but the payment of money by defendant***, … The agreed price, if there is an agreed price, becomes prima facie evidence of the reasonable value of this service. ***But plaintiff may not recover more than the agreed price***.

Id. at 838 (emphasis added).

In this case, since BWG admittedly overcharged with respect to the hourly rate it billed its work relative to the labor rates agreed to in its express contract with Pal's, the lien statement did not contain a "just and true" account of the demand due it. Moreover, since BWG presented no substantial evidence that the overcharge was due to an honest mistake, as is its burden under Missouri law, *City-Wide*, 838 S.W.3d at 482, BWG cannot simply suggest the sole remedy of recalculating the amount due at the correct labor rate. Thus, since the undisputed evidence established that BWG's lien statement was not a "just and true" account of the demand due, BWG's Mechanic's Lien was properly vitiated pursuant to Missouri law, § 429.080 RSMo.; *Putnam*, 367 S.W.2d at 629, and the Circuit Court correctly granted summary judgment in favor of Movants on this basis alone.

b. <u>BWG's argument that it was not bound by the labor rates in its contract fails as a matter of law</u>.

In its Brief, BWG incorrectly suggests that its Mechanic's Lien should not be vitiated because even though it admittedly used labor rates higher than those permitted in its contract, it was not bound thereby because it did not have a contract with the owner of the property. (*See* BWG's Substitute Brief, Pg. 42.) Thus, according to BWG, it was entitled to a lien "for the reasonable value of the labor and materials that it furnished." (*See Id.*)

In support of this untenable proposition, BWG relies on *Commercial Openings, Inc. v. Mathews*, 819 S.W.2d 347, 350 (Mo. banc 1991), which states: "Since a mechanic's lien is essentially an action in quantum meruit, the subcontractor is entitled

only to the reasonable value of the material furnished, not the contract price." However, BWG's reliance upon *Commercial Openings* (and other related case law) is entirely misplaced, where the Missouri Supreme Court never held that a lien claimant was entitled to the *greater* of the reasonable value of its work/materials or the contract price. Rather, the holding in *Commercial Openings* can be summarized as follows: a lien claimant (such as BWG) is only entitled to recover, at most, the reasonable value of its work or materials, but regardless of the value thereof, the amount recovered shall not exceed the contract price. *Id*.

In this case, therefore, BWG was limited to recovering, at most, the labor rates agreed to in its contract with Pal's. The law in this regard is clear, and BWG had no basis to claim a higher rate because doing so was reasonably "debatable." *Putnam*, 367 S.W.2d 823 at 830. Therefore, BWG's attempt to include higher labor rates in its Mechanic's Lien constitutes an attempt to wrongfully obtain more than it bargained for, justifying vitiating its entire lien. *Id*. at 828-29.

Likewise, BWG's argument that summary judgment was inappropriate because the reasonable value of its services is a "question of fact" must fail. (*See* BWG's Substitute Brief, Pgs. 42 – 43.) In this case, as discussed above, there is no dispute that the hourly rate for the work claimed in its Mechanic's Lien exceeded the hourly rate agreed to in the Pal's/BWG Agreement, which is not permitted. *Groff*, 253 S.W.2d at 838. In support, BWG solely relies on *Leggett v. Mutual Commerce Casualty Co.*, 250 S.W.2d 995 (Mo. 1952). *Leggett* simply held that in an ordinary contract case the reasonable value of services is a question of fact. However, *Leggett* did not involve a

mechanic's lien claimant seeking payment for "extra" work allegedly performed pursuant to a construction subcontract agreement without a change order. Rather, *Leggett* involved an attorney seeking the reasonable value of services provided to an insurance company. Thus, BWG's reliance on *Leggett* is unvailing.

Since BWG's Mechanic's Lien was not "just and true," the Circuit Court correctly granted summary judgment in favor of Respondents on this basis alone.

3. BWG's Mechanic's Lien was not "just and true" because BWG failed to give proper credits that were undisputedly due.

BWG's Mechanic's Lien was not "just and true" because BWG failed to credit $47,343.92 in payments that Clayco undisputedly made to five of BWG's material suppliers and subcontractors. Thus, BWG's omission constitutes a violation of § 429.080 RSMo., and justifies vitiating BWG's entire Mechanic's Lien. *Putnam*, 367 S.W.2d at 828-29. In addition, BWG's failure to provide the credit is significant because the January 12, 2007 lien waiver signed by BWG stated: "We also hereby acknowledge that all of our material suppliers and subcontractors have been paid in full by us and cannot claim or right [sic] to lien upon the above stated project."[4] However, as further explained herein, this representation was patently false and subjected the Property to mechanic's liens by BWG's unpaid suppliers.

[4] BWG's Substitute Brief purports to cite the language of the various lien waivers it executed. (*See* BWG's Substitute Brief, Pgs. 35 – 36.) However, BWG's reference to the lien waivers conveniently omitted the key sentence cited above.

a. The undisputed evidence in the record supports Movants' right to judgment as a matter of law on this basis alone.

It is undisputed that certain of BWG's material suppliers and contractors had not been paid, and thus, made claims upon Clayco for certain outstanding items related to the Property and the Project; furthermore, it is undisputed that on or about April 24, 2007, Clayco directly paid five of BWG's material suppliers and subcontractors for work performed and/or materials supplied totaling $47,343.92. (*See* Movants' SUMF, ¶¶ 35-36; L.F. 372-375; S.L.F 14-18.) BWG does not dispute that the payments were made by Clayco, and BWG acknowledged that it appeared the payments had been made. (*See* Albers Depo. Vol. I, Pg. 57, line 22 – Pg. 58, line 15; L.F. 467.) Finally, although BWG acknowledged that the payments made by Clayco to BWG's suppliers (on April 24, 2007) were made *before* BWG filed its Mechanic's Lien (on August 8, 2007), BWG further acknowledged that these payments were **not** credited against BWG's lien statement for materials supplied. (*See* Albers Depo. Vol. I, Pg. 58, lines 16-19; L.F. 467.) BWG also expressly admits in its Brief that it did not give credit for the $47,343.92 in payments made by Clayco. (*See* BWG's Brief, Pg. 34.)

Moreover, the January 12, 2007 waiver included an express representation that BWG's suppliers had been paid. (S.L.F. 13.) However, this representation was false, where BWG had not paid five of its material suppliers a total of $47,342.92, which Clayco was forced to pay in order to remove the threat of additional liens being placed on the Property. Thus, this fact was yet another basis for the Circuit Court to vitiate BWG's Mechanic's Lien.

Therefore, since BWG's lien statement was not "just and true," it could not form the basis for BWG's Mechanic's Lien under § 429.080 RSMo. *City-Wide*, 838 S.W.2d at 482; *Putnam*, 367 S.W.3d at 828-29. As such, the Circuit Court's grant of summary judgment in favor of Respondents was entirely proper on this basis alone.

b. BWG's argument that its failure to give proper credits was "innocent" fails as a matter of law.

Notwithstanding the critical admission that BWG's Mechanic's Lien did not give credit for the $47,343.92 in payments made by Clayco, BWG argues that its lien was nonetheless "just and true" because Clayco allegedly never told BWG that these payments had been made. (*See* BWG's Substitute Brief, Pg. 44 – 45.) Accordingly, BWG characterizes its failure to provide the credit as "completely innocent." (*See Id.*) However, the issue is not whether Clayco affirmatively informed BWG that the suppliers had been paid by Clayco; rather, the issue is whether BWG knew that it had not paid its own suppliers, that it had waived its lien rights thereto, and that it had represented that its suppliers had been paid.

As discussed above, Missouri courts hold that a mechanic's lien claimant, such as BWG, has the ***burden*** to establish that an excessive claim was due to an honest mistake and not to design. *City-Wide*, 838 S.W.2d at 482. However, the record is devoid of any evidence that BWG even attempted to satisfy this burden.

The following three key facts are undisputed: (1) BWG failed to pay five of its suppliers but represented to Clayco that it had; (2) Clayco paid a total of $47,342.92 to

BWG's suppliers for materials supplied to the Project; and (3) BWG failed to provide a credit therefor in its Mechanic's Lien, even though BWG knew it had not paid those suppliers. Therefore, BWG's attempt to justify its failure to properly credit based upon an "innocent" mistake fails as a matter of law. *City-Wide*, 838 S.W.2d at 482.

Therefore, since BWG failed to present any evidence contradicting Movants' right to judgment as a matter of law, the Circuit Court correctly granted summary judgment in their favor on this basis alone.

B. (In response to Appellant's Argument, Section II(D))

The Circuit Court correctly granted summary judgment in favor of Respondents with respect to Count VIII of the Petition because BWG's Mechanic's Lien was invalid in that it was filed out of time.

The Circuit Court correctly granted summary judgment in favor of Respondents because BWG's Mechanic's Lien was invalid in that it was filed out of time. As explained herein, the only substantial evidence regarding when BWG's work ended on the Project was January 31, 2007. Any other "work" allegedly performed by BWG was manufactured after-the-fact in an unsuccessful effort to salvage BWG's untimely lien. Given that BWG's Mechanic's Lien was filed on August 8, 2007, it was more than six months after the last work, and untimely as a matter of law.

1. Section 429.080 requires that a mechanic's lien be filed within six months after the claimant's completion of its work.

Section 429.080 RSMo., entitled "Lien filed with circuit clerk, when," imposes another critical requirement on any person seeking to impose a mechanic's lien on real property in Missouri pursuant to Chapter 429 RSMo. Specifically, § 429.080 provides that the lien statement must be filed no later than six months after the "indebtedness shall have accrued."

Missouri courts applying § 429.080 RSMo. hold that the phrase "indebtedness shall have accrued" means when the indebtedness becomes complete, or when the last labor is performed or the last material is furnished under an agreement." *Shamrock Bldg. Supply, Inc. v. St. Louis Inv. Properties, Inc.*, 842 S.W.2d 556, 558 (Mo. App. E.D. 1992); *J.R. Meade Co. v. Forward Constr. Co.*, 526 S.W.2d 21, 28 (Mo. App. St.L. 1975).

With respect to the application of § 429.080, Missouri courts also hold that a lien claimant must establish that lienable work was actually performed on the date claimed as the accrual of the indebtedness. Specifically, the Missouri Court of Appeals in *Westerhold v. Mullenix Corp.*, 777 S.W.2d 257, 265 (Mo. App. E.D. 1989), held as follows: "To state the obvious, a mechanic's lien cannot be imposed if the nature of the work done does not entitle the claimant to a lien." *Id.* (citing *Utley v. Wear*, 333 S.W.2d 787, 789 (Mo. App. Spr. 1960)). In *Westerhold*, the Court of Appeals affirmed the trial court's denial of a mechanic's lien on the grounds that the lien was not timely filed, where the lien claimant merely offered evidence that two of its employees were on the job site (each for four hours) on the date claimed as the accrual of the indebtedness. *Id.*

2. The evidence in the record established that BWG last performed lienable work on January 31, 2007.

BWG admitted that the last day it paid an employee to perform work with respect to the Project was January 31, 2007. (*See* Albers Depo., Vol. I, Pg. 145, lines 1-6, 7-15; L.F. 478.) BWG's records submitted to the Glazier's Union show that the last day a BWG employee performed work with respect to the Project was January 31, 2007. (*See* Albers Depo., Vol. I., Pg. 146, line 12 – Pg. 148, line 6; L.F. 478.) Finally, according to Clayco's records, the last day BWG performed any work or provided any materials was January 18, 2007. (*See* Defendants' SUMF, ¶ 19; L.F. 350; 373 (¶ 11).)

BWG's lien statement also claims that on February 13, 2007, someone allegedly performed 5 hours of work, and further, between February 5 and 9, 2007, someone allegedly performed an additional 5 hours of work. (*See* BWG's Mechanic's Lien, Pg. 25; L.F. 169.) However, despite the fact that BWG maintained records of its work performed with respect to the Project, BWG is not aware of any documents reflecting the alleged February 5 – 13 work, including any invoices sent to Clayco or Pal's with respect thereto. (*See* Albers Depo. Vol. I, Pg. 137, line 22 – Pg. 139, line 23; Pg. 143, line 19 – Pg. 144, line 25; L.F. 476-477.) Therefore, the record contains no substantial evidence documenting this work. Rather, this undocumented "work" is nothing more than an after-the-fact attempt to extend BWG's filing deadline. Thus, the "work" allegedly performed between February 5 - 13, 2007 is not lienable, and did not extend the deadline for BWG to file its Mechanic's Lien. *Westerhold*, 777 S.W.2d at 265.

Given that BWG's last documented work was January 31, 2007, BWG's deadline to file its Mechanic's Lien was July 31, 2007. Section 429.080 RSMo. However, BWG's Mechanic's Lien was not filed until August 8, 2007. (L.F. 145-286.) BWG's Mechanic's Lien was untimely as a matter of law. *Westerhold*, 777 S.W.2d at 265. Thus, the Circuit Court correctly granted summary judgment in favor of Respondents on this basis alone.

3. BWG failed to present any substantial evidence that it performed any lienable work on or after February 8, 2007.

BWG briefly attempts to explain how its Mechanic's Lien was nonetheless timely. (*See* BWG's Substitute Brief, Pgs. 30 – 31.) Specifically, BWG relies on deposition testimony of Ms. Albers that provides a vague description of "work" she allegedly performed between February 5 – 9, 2007, and on February 13, 2007. (*See Id.*) However, even if true, the aforementioned "work" failed to extend the deadline for BWG to file its Mechanic's Lien because BWG's evidence in this regard is so vague as to fail to be substantial evidence in support of its Mechanic's Lien, and thus, does not avoid summary judgment. *Westerhold*, 777 S.W.2d at 265 (holding that a lien was not timely filed, where the lien claimant merely offered evidence that two employees were on the job site on the date claimed as the accrual of the indebtedness). As noted, BWG is not aware of any documents reflecting the alleged work, even though BWG stated that it otherwise maintained records of its work performed on the Project. In addition, BWG admitted that it did not send any invoices to Clayco or Pal's regarding this "work." Rather, BWG

admitted that the last day it paid an employee for work performed on the Project was January 31, 2007. Given these undisputed facts, BWG cannot suggest that this undocumented and unbilled "work" was lienable under the standard articulated above, and thus, this "work" did not extend the deadline for BWG to file its Mechanic's Lien.

Since BWG's Mechanic's Lien was untimely as a matter of law, the Circuit Court correctly granted summary judgment in favor of Respondents with respect to Count VIII of the Petition on this basis alone.

C. (In response to Appellant's Argument, Section II(C))

The Circuit Court correctly granted summary judgment in favor of Respondents with respect to Count VIII of the Petition because BWG's Mechanic's Lien is invalid as a matter of law in that BWG failed to serve notice of its intent to file a mechanic's lien on the owner of the Property at the time the work commenced, the County, as required by Section 429.100 RSMo.

The Circuit Court correctly granted summary judgment in favor of Respondents with respect to Count VIII of the Petition because BWG's Mechanic's Lien is invalid as a matter of law in that BWG failed to serve notice of its intent to file a mechanic's lien on the owner of the Property at the time the work commenced, the County, as required by Section 429.100 RSMo. In addition, there is no substantial evidence in the summary judgment record to support BWG's argument that Cornerstone was the County's agent.

1. Since § 429.100 RSMo. provides important policy protections for property owners, "strict compliance" with its requirements is required.

Section 429.100 RSMo., entitled "Notification by subcontractors and others," imposes specific notice requirements on any person or contractor, except an "original contractor," seeking to impose a mechanic's lien on real property in Missouri pursuant to Chapter 429 RSMo. Specifically, § 429.100 provides, in pertinent part, as follows:

> Every person except the original contractor, who may wish to avail himself of the benefits of the provisions of sections 429.010 to 429.340, shall give ten days' notice before filing the lien, as herein required, to the owner, owners or agent, or either of them, that he holds a claim against such building or improvement, setting forth the amount and from whom the same is due.

Missouri courts applying Chapter 429 RSMo. hold that actions to establish and enforce a mechanic's lien are "purely" statutory in nature, and therefore, the averments must be pled and the evidence must prove the statutory elements before any recovery is permitted. *Bullmaster v. Krueger*, 151 S.W.3d 380, 385 (Mo. App. W.D. 2004). Specifically, Missouri courts hold that proper notice (i.e., pursuant to § 429.100 RSMo.) is, "a ***condition precedent*** to the creation, existence or validity of a mechanic's lien." *Id.* (emphasis added). Moreover, Missouri courts hold that "strict compliance" with the notice provisions of Chapter 429 RSMo. is required. *Id.* (citing *Guazy Excavating & Grading v. Kersten Homes, Inc.*, 934 S.W.2d 303, 305 (Mo. banc 1996)). Missouri courts recognize that the notice statutes (such as §§ 429.100 and 429.110 RSMo.) were enacted by the legislature, "to provide owners with notice of a subcontractor's claim for

labor, services or materials in order to protect the owner from double payments." *Fulkerson v. W.A.M. Investments*, 85 S.W.3d 745, 748-49 (Mo. App. S.D. 2002).

Under § 429.100 RSMo., notice must be given by a subcontractor to the person or entity that owned the property "at the time the work was done or the materials were furnished." *Bullmaster*, 151 S.W.3d at 385 (citing *BCI Corp. v. Charlebois Constr. Co.*, 673 S.W.2d 774, 776 (Mo. banc 1984)); *see also Vazquez v. Village Center, Inc.*, 362 S.W.2d 588, 596 (Mo. 1962). In the context of Chapter 429's notice requirements, the "owner" is defined as, "the person who has legal title to the real estate ***on the date the work commenced***." *Dave Kolb Grading, Inc. v. Lieberman Corp.*, 837 S.W.2d 924, 936 (Mo. App. E.D. 1992) (emphasis added).

2. The undisputed evidence established that BWG failed to serve notice on the owner of the Property at the time BWG's work commenced – the County.

In this case, there is no dispute that the County had legal title to the Property when the work commenced, where the record establishes that the County acquired legal title to the Property via Special Warranty Deed, dated September 9, 2005, from Cornerstone. (*See* Movants' SUMF, ¶ 2-4; L.F. 347-348.) In addition, there is no dispute that the earliest possible date work commenced on or materials were supplied to the Project was September 25, 2005, when Clayco first began its construction activities. (*See* Movants' SUMF, ¶ 13; L.F. 350, 373 (¶ 9).) Moreover, BWG admitted that the earliest date it commenced its work or supplied materials to the Project was January 19, 2006. (*See*

Movants' SUMF, ¶ 14; L.F. 350, 25 (¶ 9), 170.) According to Clayco's records, the first date that BWG performed any work on or supplied materials with respect to the Project was January 26, 2006. (*See* Movants' SUMF, ¶ 15; L.F. 350, 373 (¶ 10).) Either date is during the time that the County owned the Property.

In addition, there is no dispute that the County had legal title to the Property during all of BWG's construction activities, including the date it actually filed its Mechanic's Lien. (*See* Movants' SUMF, ¶¶ 2-4; L.F. 347-348.) BWG's Mechanic's Lien was filed on August 8, 2007. (*See* BWG's Petition, ¶ 170; L.F. 73; Albers Depo. Vol. II, Pg. 46, line 19 – Pg. 49, line 6; L.F. 486-487.) It is undisputed that the County owned the Property up to July 15, 2011. (*See* Movants' SUMF, ¶ 4; L.F. 348, 365 (¶ 4).) Furthermore, it is undisputed that the Special Warranty Deed conveying the Property to the County was recorded on November 22, 2005. (*See* Movants' SUMF, ¶ 2; L.F. 347, 359-364.) Therefore, BWG had constructive, if not actual, notice of the County's ownership of the Property from the date it first started the Project up to the date it filed its Mechanic's Lien. *Brown v. Evans*, 182 S.W.2d 580 (Mo. 1944) (holding that a recorded instrument imparts constructive knowledge to all).

Accordingly, given that the County had legal title to the Property when the work commenced, as well as at all relevant times thereafter, BWG was required to serve notice of intent to file its Mechanic's Lien upon the County. *Bullmaster*, 151 S.W.3d at 385; *Dave Kolb Grading*, 837 S.W.2d at 936.

However, the undisputed evidence in the record establishes that BWG did **not** serve notice of intent to file its Mechanic's Lien upon the County. (*See* Albers Depo.

Vol. I, Pg. 72, line 11 – Pg. 74, line 11; L.F. 469-470.) BWG admits that its notice did **not** contain a specific notice sent to the County. (*See* Albers Depo. Vol I, Pg. 75, line 12 – Pg. 76, line 17; L.F. 470.)

In addition, no County official ever received notice of BWG's intent to file its Mechanic's Lien. (*See* Grant's Affidavit, ¶ 3, attached as Ex. 12 to Movant's SUMF; L.F. 575.) BWG also admitted that it was not aware of whether it served its intent to file its Mechanic's Lien upon the County. (*See* Albers Depo. Vol. I, Pg. 74, lines 14-16; L.F. 470.) Finally, BWG admits that it had no communications with the County regarding whether it ever received any notice of BWG's intent to file its Mechanic's Lien. (*See* Albers Depo. Vol. I, Pg. 74, lines 18-22; L.F. 470.)

Therefore, BWG's Mechanic's Lien is invalid as a matter of law, where the undisputed evidence establishes that BWG failed to comply with § 429.100, which Missouri courts hold is a condition precedent to a claimant's right to maintain an action to enforce a mechanic's lien. *Bullmaster*, 151 S.W.3d at 385.

3. BWG's argument that it satisfied § 429.100 by serving notice on Cornerstone fails as a matter of law.

In its Substitute Brief, and in recognition of its undisputed failure to serve notice on the County, as required by § 429.100, BWG argues that it nonetheless satisfied the notice requirements of § 429.100 by serving notice on Cornerstone as an agent for the County. (*See* BWG's Substitute Brief, Pg. 30.) However, BWG's argument fails because it neglects to provide any meaningful argument in support of its notice by agent theory.

Missouri law is clear that an agency relationship will not be presumed. *See, e.g., Wyler Watch Agency v. Hooker*, 280 S.W.2d 849, 856 (Mo. App. Spr. 1955). When an agency is at issue, the burden of proof rests with the party alleging an agency relationship. *Id*. There are three specific requisites to establishing an agency relationship: (1) the agent holds the power to alter legal relations between the principal and third parties; (2) the agent is a fiduciary with respect to matters within the scope of the agency; and (3) the principal has the right to control the conduct of the agent with respect to matters entrusted to the agent. *Business Bank of St. Louis v. Old Republic Nat'l Title Ins. Co.*, 322 S.W.3d 548, 552 (Mo. App. E.D. 2010).

In its Substitute Brief, BWG simply suggests that Missouri courts should adopt a watered-down version of Missouri agency law in determining whether a person or entity is an agent of another for the purposes of complying with the strict statutory requirements of § 429.100 RSMo. (*See* BWG's Substitute Brief, Pg. 30). Specifically, without citation to any authority (binding or persuasive), BWG suggests that § 429.100 does not "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." (*See Id*.)

BWG's strained construction of § 429.100 should not be adopted because the statute clearly and unambiguously requires that the notice required thereunder be provided to the owner or owner's "agent." However, the statute says nothing about the owner's agent *for the limited purpose of receiving the notice required thereunder*, as BWG's strained construction of the statute would insert into the statute. If this had been the Legislature's intent, it easily could have written this meaning into the statute. Thus,

BWG's construction of § 429.100 would violate established Missouri law on statutory construction, which holds that, "a court may not change or add to a statute by supplying omitted words or phrases under the pretense of statutory construction, especially where the statute is not ambiguous." *Kelly v. Marvin's Midtown Chiropractic, LLC*, 351 S.W.3d 833, 837 (Mo. App. W.D. 2011).

Rather, in determining legislative intent, Missouri courts must give an undefined term used in a statute its "plain and ordinary meaning." *Hoffman v. Van Pack Corp.*, 16 S.W.3d 684, 688 (Mo. App. E.D. 2000). Under traditional rules of statutory construction, a word's dictionary definition supplies its "plain and ordinary meaning." *Id*. The term "agent" is commonly defined as follows: "A person authorized by another to act for him, one intrusted with another's business. * * * One who represents and acts for another under the contract or relation of agency." Black's Law Dictionary (5th Ed.). Furthermore, Missouri courts presume that the Legislature "acted with knowledge of any prior judicial construction of the term." *Hoffman*, 16 S.W.3d at 688. Thus, this Court should presume that the Legislature enacted § 429.100 RSMo. with full knowledge of well-established Missouri case law on agency, which was discussed at length above. *See, e.g., Wyler Watch Agency*, 280 S.W.2d 849, 855-56; *Business Bank of St. Louis*, 322 S.W.3d at 552. Thus, BWG's argument in this regard should be disregarded.

In this case, BWG has presented no argument or evidence to meet its high burden of establishing an agency relationship under the foregoing Missouri law.

4. BWG's construction of § 429.100 is contrary to established precedent.

BWG also suggests that it "makes sense" to apply the same test used for determining an "owner" under § 429.100 as that used for determining an "owner" under § 429.012. (*See* BWG's Substitute Brief, Pg. 28.) However, BWG's argument is directly contrary to well-established Missouri law.

Section 429.012 provides that every "original contractor" must give a specified notice to the "owner" of the property, which notice is a condition precedent to the creation, existence, or validity of any mechanic's lien in favor of such original contractor. In determining the proper "owner" to which the notice must be given, Missouri courts hold that the "owner" is whoever held record title to and was exercising dominion over the property ***at the time the general contract was signed***. *Homebuilding Corp. v. Ventura Corp.*, 568 S.W.2d 769, 771 (Mo. 1978).

In contrast, as discussed above, § 429.100 provides that every lien claimant (who is **not** an "original contractor") must give ten-days' notice of its intent to file the lien to the owner (or the owner's agent), as specified in the statute. In determining the proper "owner" to which the notice must be given, Missouri courts apply a *different* test, expressly holding that the notice must be provided to the owner of the subject property "at the time the work was done or materials furnished." *Bullmaster*, 151 S.W.3d at 385. In this case, it is undisputed that BWG was **not** an "original contractor," and thus, BWG was required to serve notice in accordance with § 429.100 and applicable case law.

The rule announced in *Bullmaster* makes sense because a subcontract agreement is typically executed at some point ***after*** the general contract is signed. Thus,

subcontractors only become involved with the construction project (and commence their work thereon) some time ***after*** the general contract was signed. Since subcontractors do not become involved and commence their work until after the general contract was signed, it is certainly possible, that there could be one owner at the time the general contract was signed and a different owner at the time subcontractors became involved and commenced their work. Since the recognized purpose of § 429.100 RSMo. is to give the current owner whose property may be subject to the mechanic's lien of a subcontractor with whom it did not directly contract an opportunity to withhold payment to the general contractor and avoid double payment (*see, e.g., River City Drywall, Inc. v. Raleigh Properties, Inc.*, 341 S.W.3d 716, 723 (Mo. App. E.D. 2011)), the owner who is most logically entitled to notice (and the owner to whom the subcontractor must give its notice) is the owner at the time the work commenced. This is because the owner at the time work commences is more likely to also be the owner at the time any purported lien claimant asserts its mechanic's lien (rather than the owner at the time the general contract was signed), given this owner's closer proximity to the time of lien enforcement. Thus, the rule in *Bullmaster* should not be disturbed.

BWG's argument that its lien is saved because it provided notice to the owner of the Property *at the time the original contract was signed* (i.e., Cornerstone) is not only unsupported by Missouri case law, but is directly contrary to express authority on this specific issue. As such, BWG's lien should be declared invalid for failure to serve notice, as required under § 429.100 RSMo., on the owner of the Property *at the time the work*

commenced, which was undisputedly the County. The Circuit Court correctly granted summary judgment with respect to Count VIII of the Petition on this basis alone.

5. There are no issues of first impression relating to § 429.100 RSMo.

BWG also incorrectly suggests that this case presents an issue of first impression regarding the application of the specific facts of this case to § 429.100 RSMo. (*See* BWG's Substitute Brief, Pg. 27.) However, BWG is incorrect because, as explained at length above, established Missouri law squarely addresses the undisputed facts in this case. Specifically, this case is governed by *Bullmaster*, 151 S.W.3d at 385, which expressly holds that the notice required under § 429.100 must be provided to the owner "at the time the work was done or materials were furnished." There is no dispute that the County was the owner of the Property at this time, and that BWG failed to provide notice to the County. Thus, this case presents no issue of first impression, and the Circuit Court correctly granted summary judgment in favor of Respondents. Thus, no further review by this Court is required.

6. Cornerstone's purported "leasehold" interest in and "equitable" ownership of the Property are immaterial to BWG's statutory notice requirements under § 429.100 RSMo.

Finally, BWG incorrectly suggests that because Cornerstone purportedly held a leasehold interest in the Property, and also was purportedly an "equitable" owner of the Property, this obviated its need to serve notice on the County, as required under § 429.100 RSMo. (*See* BWG's Substitute Brief, Pg. 29.)

As an initial matter, these arguments should be disregarded because they were not raised in BWG's Brief to the Court of Appeals, and thus, they alter the basis of BWG's claims that were raised at the Court of Appeals, in violation of Rule 83.08(b). Moreover, since these arguments were not made to the Circuit Court in the summary judgment record, they may not be made for the first time on appeal. *Schwartz v. Custom Printing Co.*, 926 S.W.2d 490, 493 (Mo. App. E.D. 1996).

In support of BWG's argument that it was not required to serve notice on the County because Cornerstone purportedly held a "leasehold" interest in the Property, BWG relies on *Miners Lumber Co. v. Miller*, 117 S.W.2d 711 (Mo. App. St.L. 1938). However, BWG's reliance on *Miners Lumber* is misplaced because the Court of Appeals in that case did not hold that the lien claimant's service of the notice required under § 429.100 on the holder of a leasehold interest obviated the lien claimant's duty to nonetheless serve notice on the owner of the Property at the time the work commenced. Rather, *Miners Lumber* simply held that a petition against the holder of a leasehold interest in property could potentially state a cause of action for a mechanic's lien pursuant to the prior version of § 429.070 RSMo., provided the other statutory requirements were satisfied. *Id*. at 714. Thus, this argument should be disregarded.[5]

[5] In addition, as the Court of Appeals pointed out in its Memorandum, the record does not reveal whether BWG sought a mechanic's lien under (1) § 429.010 RSMo., which applies to work performed under a contract with the real estate owner or its agent and grants a lien on the building and the underlying real estate; or (2) § 429.070 RSMo., which applies

In support of BWG's argument that it was not required to serve notice on the County because Cornerstone was purportedly an "equitable" owner of the Property, BWG relies on *Allied Pools, Inc. v. Sowash*, 735 S.W.2d 421 (Mo. App. W.D. 1987), overruled on other grounds by *Bob DeGeorge Assoc., Inc. v. Hawthorn Bank*, 377 S.W.3d 592 (Mo. 2012). However, BWG's reliance on *Allied Pools* is also misplaced because that case did not address the notice requirements under § 429.100 (which applies to subcontractors), but rather, addressed the notice provided by an original contractor pursuant to § 429.012 RSMo. Thus, *Allied Pools* is inapplicable. Moreover, even if this Court accepts that Cornerstone may have been the "equitable" owner of the Property, this fact would not cure BWG's admitted failure to also serve notice on the County, where

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to work performed on leased real estate under a contract with the lessee or its agent and grants a lien on the building and the leasehold interest. (*See* Memorandum, Pg. 9, n. 3.) However, as the Court of Appeals further held, it does not matter which section applies because both statutes condition the lien upon the claimant "complying with the provisions of sections 429.010 to 429.340." *Id*. Thus, under either section, BWG's failure to comply with § 429.100 was fatal. Moreover, BWG failed to introduce evidence regarding the economic feasibility and possibility of damage the subject premises might suffer upon removing the improvements in question, as required by Missouri courts when seeking a mechanic's lien pursuant to 429.070 RSMo. *See, e.g., Bates v. McKay*, 724 S.W.2d 565, 570 (Mo. App. W.D. 1986); and *Orear v. Dierks Lumber Co.*, 176 S.W. 467, 468 (Mo. App. K.C. 1915).

Missouri courts hold that where there is more than one owner of real property that is potentially subject to a mechanic's lien, the statutory notice must be provided to **all** such owners. *See, e.g., Robert Towner v. O.L. Remick*, 1885 WL 7792, *2-3 (Mo. App. K.C. Nov. 9, 1885). As discussed above, BWG admittedly failed to serve notice on the County, who was undisputedly the owner of the Property at the time the work commenced. Thus, *Allied Pools* does nothing to change the result in this case, and this argument should be disregarded.

For these reasons, the Circuit Court correctly granted summary judgment in favor of Respondents, which the Court of Appeals correctly affirmed.

II. (In response to Appellant's Point Relied on I)

THE CIRCUIT COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF THE COUNTY WITH RESPECT TO COUNT IX OF THE PETITION BECAUSE THERE ARE NO GENUINE ISSUES OF MATERIAL FACT AND THE COUNTY IS ENTITLED TO JUDGMENT AS A MATTER OF LAW IN THAT SECTION 107.170 RSMO. DOES NOT APPLY BECAUSE THE COUNTY DID NOT HAVE A CONTRACT WITH A "CONTRACTOR" FOR THE IMPROVEMENT OF THE PROPERTY; FURTHERMORE, THERE IS NO SUBSTANTIAL EVIDENCE THAT AN AGENT OF THE COUNTY DID SO.

The Circuit Court correctly granted summary judgment in favor of the County with respect to Count IX of the Petition because there are no genuine issues of material fact and the County is entitled to judgment as a matter of law in that § 107.170 RSMo. does not apply because the County did not have a contract with a "contractor" for the improvement of the Property; furthermore, there is no substantial evidence that an agent of the County did so.

A. By its own terms, § 107.170 RSMo. did not apply to the Project.

Count IX of BWG's Petition is entirely premised upon the County's alleged violation of § 107.170 RSMo., which only applies if specific statutory provisions are met. In this case, the express statutory requirements were not met, and the statute did not apply. Specifically, § 107.170.2 RSMo. provides as follows:

> 2. It is hereby made the duty of all public entities in this state, in making contracts for public works, the cost of which is estimated to exceed twenty-five thousand dollars, to be performed for the public entity, to require every contractor for such work to furnish to the public entity, a bond with good and sufficient sureties, in an amount fixed by the public entity, and such bond, among other consideration, shall be conditioned for the payment of any and all materials, incorporated, consumed or used in connection with the construction of such work, and all insurance premiums, both for compensation, and for all other kinds of insurance, said work, and for all labor performed in such work whether by subcontractor or otherwise.

In addition, § 107.170 defines three key terms used within the statute as follows:

> **(1) "Contractor"**, a person or business entity who provides construction services ***under contract to a public entity***. *** * ***
>
> **(2) "Public Entity"**, any official, board, commission or agency of this state or any county, city, town, township, school, road district or other political subdivision of this state;
>
> **(3) "Public Works"**, the erection, construction, alteration, repair or improvement of any building, road, street, public utility or other public facility owned by the public entity.

Section 107.170.1 RSMo. (emphasis added).

In this case, under the plain and unambiguous language of the statute, § 107.170 does not apply because it is undisputed that the County did not have a contract with a "Contractor" with respect to the Property and/or the Project. The purported "contractor," Clayco, only had a contract with the developer, Koman. (*See* Movants' SUMF, ¶¶ 5 & 9; L.F. 348, 349; and Hamilton Affidavit, ¶ 9; L.F. 1100.) Therefore, it is undisputed that the County did not make a contract for "public works" with a "contractor," which is an express condition precedent to any duty arising from § 107.170 RSMo.

In addition, there is no reading of § 107.170 whereby Clayco would be considered a "contractor" (as defined by § 107.170.1(1)) because Clayco did not provide construction services "under contract to a public entity," as required by the statute. Rather, as previously discussed, Clayco's contract was with Koman, which is not a "public entity."

The Court of Appeals adopted the County's argument in this regard, specifically noting as follows in its Memorandum:

> Here, the County is a "public entity" for purposes of section 107.170. ***However, section 107.170 does not apply because the county never made a contract for the Project to be performed for the County***. Clayco and Koman entered into a contract providing that Clayco would design and construct the Project. Clayco then contracted with Pal's, which contracted with Plaintiff. ***The County was not a party to these contracts. Therefore, the County had no duty to obtain a bond***.

(Emphasis added). (*See* Memorandum, Pg. 6.)

Moreover, the Clayco/Koman Contract cannot be considered a contract for "public works," as that term is defined in § 107.170.1(3), because the Project did not involve the erection or construction of a "public facility" which is owned by a "public entity." As noted above, § 107.170.1(3) defines the term "public works" as follows: "[T]he erection, construction, alteration, repair or improvement of any building, road, street, public utility or other **public facility** owned by the **public entity**" (emphasis added). First, the Project itself cannot possibly be considered a "public facility," where the parties never intended for the County to ultimately use or occupy the premises, in that Section 4.2(b) of the Lease Agreement provides, in pertinent part, as follows:

> The Company agrees that the aforesaid construction and improvement will, with such changes and additions as may be made hereunder, result in facilities suitable for use by the ***Company for its purposes***….

(Emphasis added.) (L.F. 738.) In addition, the St. Louis County Ordinance authorizing the industrial revenue bonds that funded the Project specifically referred to the facility as an "industrial development project" (rather than a "public works" project). (L.F. 953.)

Second, although the County indeed owned the Property from September 9, 2005 through July 15, 2011, BWG fully admitted that Cornerstone currently owns the Property, and the parties always understood and intended that Cornerstone would ultimately own the Property. As BWG pointed out in its Substitute Brief, the Lease Agreement "both grants Cornerstone an option, and imposes an obligation, to repurchase the Property." (*See* BWG's Substitute Brief, Pg. 6.) BWG further admitted that on July

8, 2011, the County transferred the Property back to Cornerstone. (*See* BWG's Substitute Brief, Pg. 9.) Thus, not only was the Project never intended to be a "public facility," it was never intended that the County would own the Property beyond the short period it did, which included the construction thereof, during which time Cornerstone leased the premises from the County. Given that the Property was undisputedly for the benefit of Cornerstone, a private company, it cannot be considered a project for "public works," and thus, § 107.170 did not apply. *See, e.g.*, *Mo. Dept. of Trans. ex rel. On Point Contractors, LLC v. Aura Contracting*, LLC, 391 S.W.3d 11, 15-16 (Mo. App. E.D. 2012) (holding that § 107.170 did not apply because the subject project was not a project for "public" works in that the project was for the benefit of a private company).

Finally, to the extent BWG argues that the County's temporary ownership of the Property invalidated its alternative payment remedy of a mechanic's lien, such an argument is unavailing and does not constitute grounds for rewriting the express statutory requirements for imposing liability against a public entity under § 107.170 RSMo., as BWG proposes. Under a similar set of circumstances, the Supreme Court of Pennsylvania in *American Seating Co. v. City of Philadelphia*, 256 A.2d 599, 605 (Pa. 1969), held that a lien claimant's inability to execute against the municipality that temporarily owned the subject premises did not completely invalidate the lien, but merely suspended the right to execute against the subject property until title passed from the municipality into private hands. Thus, if this Court follows the rationale in *American Seating*, no further review of § 107.170 RSMo. is required, where lien claimants such as

BWG would still have the remedy of a mechanic's lien available to them under the circumstances present in this case, and thus, would still be protected from nonpayment.

Since § 107.170 did not apply to the Project by its own unambiguous terms, no duty to require a payment bond was ever imposed upon the County or any other party. Thus, the Circuit Court correctly granted summary judgment in favor of the County with respect to Count IX of BWG's Petition.

B. BWG's entire claim under § 107.170 RSMo. fails as a matter of law.

BWG attempts to circumnavigate the express requirements of § 107.170 by suggesting that the County's *agent* entered into a contract with respect to the Project. (*See* BWG's Substitute Brief, Pgs. 21 – 22.) BWG essentially acknowledges that it cannot satisfy the clear and unambiguous elements of a claim under § 107.170, which require BWG to establish that the County had a contract for the improvement of the Property. Undeterred, BWG attempts to rewrite § 107.170, and asks this Court to do so, by arguing that it is entitled to recover upon proof that the County's agent (and/or sub-agent) had a contract for the improvement of the Property. However, BWG's claim under § 107.170 should be rejected as a matter of law for four reasons. First, BWG failed to provide any authority that recovery under § 107.170 is permitted under an agency theory. Second, BWG's pleadings regarding the purported agency relationship are wholly insufficient. Third, BWG failed to present any substantial evidence to meet its high burden of establishing the existence of any agency relationship under Missouri law.

Fourth, BWG's proposed blue-pencil version of § 107.170 would create bad policy by changing the law after the fact.

1. There is no legal support for BWG's strained construction of § 107.170.

As a threshold matter, BWG's claim against the County under § 107.170 fails as a matter of law because BWG failed to explain how a purported agency relationship between the County and Cornerstone would establish liability against the County. This is because the clear and unambiguous language of § 107.170 only provides for liability against a "public entity" (i.e., the County) that makes a contract with a "contractor" for "public works." However, the statute says nothing about liability against a public entity when its *agent* makes a contract for "public works."[6] Therefore, since there is no provision within § 107.170 permitting liability against a public entity when its agent makes a contract for "public works," BWG's claim in Count IX fails as a matter of law, and the Circuit Court correctly entered summary judgment in favor of the County.

[6] By way of contrast, § 429.100 RSMo., a statute BWG relies upon elsewhere in its Substitute Brief, expressly permits service of a contractor's notice of intent to file a mechanic's lien upon the owner or the owner's agent. Accordingly, § 429.100 illustrates how the Legislature could have easily expressed its intent to permit liability against a public entity if the entity or its agent enters into a contract for "public works."

2. BWG's pleadings are insufficient to support its agency theory of liability.

BWG's claim under § 107.170 also fails as a matter of law because BWG's pleadings are wholly insufficient with respect to the entire purported agency relationship. In its Substitute Brief, BWG argues that Cornerstone was the County's agent with respect to the Project. (*See* BWG's Substitute Brief, Pgs. 21 – 22.) However, this argument ignores the next step – a purported agency relationship between Cornerstone and Koman. This connection is necessary because, as previously explained, Clayco contracted with Koman (the developer) with respect to the Project, and not with Cornerstone. (*See* Movants' SUMF, ¶¶ 5 & 9; L.F. 348, 349.)

However, BWG's pleadings regarding the purported agency relationship are inconsistent with the argument advanced in its Substitute Brief, where BWG merely alleged: "The County, acting through its agent, Koman, engaged Clayco as its original and general contractor to erect a large office building (the 'Project') on the Property." (*See* BWG's Petition, ¶ 179; L.F. 79.) BWG's pleadings also provide no specific factual allegations regarding the details of the purported agency relationship between the County and Koman, as required by Missouri law (explained below). As a possible alternative, BWG's pleadings also fail to allege or explain, first, a connection between the County and Cornerstone, and second, a connection between Cornerstone and Koman.

Detailed factual allegations are necessary because Missouri courts require a high pleading and evidentiary burden in order to establish an agency relationship. Specifically, Missouri courts hold that the law ordinarily indulges **no** presumption that agency exists. *Wyler Watch Agency v. Hooker*, 280 S.W.2d 849, 856 (Mo. App. Spr.

1955). When an agency is at issue, the burden of proof rests with the party alleging an agency relationship. *Id.*

Missouri courts further hold that there are three requisites to establishing an agency relationship: (1) the agent holds the power to alter legal relations between the principal and third parties; (2) the agent is a fiduciary with respect to matters within the scope of the agency; and (3) the principal has the right to control the conduct of the agent with respect to matters entrusted to the agent. *Business Bank of St. Louis v. Old Republic Nat'l Title Ins. Co.*, 322 S.W.3d 548, 552 (Mo. App. E.D. 2010).

In order to show a principal-agent relationship between two corporate entities, "there must be such domination and control 'that the controlled corporation has, so to speak, no separate mind, will or existence of its own and is but a business conduit for its principal.'" *Sedalia Mercantile Bank & Trust v. Loges Farms, Inc.*, 740 S.W.2d 188, 202 (Mo. App. W.D. 1987). Even where there is an admitted affiliation between two entities, such as when one corporation is the sole shareholder of another (which the County expressly denies, and for which there is no evidence in this case), Missouri courts hold that the two entities are generally treated, "as two different persons." *Hefner v. Dausman*, 996 S.W.2d 660, 664 (Mo. App. S.D. 1999). More to the point, *Hefner* specifically held that even a parent corporation is not responsible for the acts of its subsidiary, "except where the wronged party pierces the corporate veil." *Id.* In this regard, *Hefner* further noted that, "[t]wo separate corporations may be treated as one only where there is such domination and control that the controlled corporation has no separate mind, will or existence of its own and is but an alter ego for its principal." *Id.*

Finally, *Hefner* added, "such domination and control must be established by evidence, and is **not** ***presumed***." *Id.* (emphasis added).

In this case, BWG's Fourth Amended Petition contains none of the specific and detailed allegations required in order to establish an agency relationship under Missouri law. Furthermore, there are no allegations (or evidence) supporting piercing the corporate veils of either Cornerstone or Koman. Rather, BWG's entire claim under § 107.170 relies on a single, conclusory allegation of an agency relationship between Cornerstone and Koman in § 4.2 of the Lease Agreement, which is wholly insufficient under Missouri law to establish an agency relationship. *Wyler Watch*, 280 S.W.2d at 849. Thus, BWG's claim fails as a matter of law.

3. BWG failed to present any substantial evidence in support of its agency theory of liability under § 107.170 RSMo.

In addition to BWG's pleading deficiencies, BWG failed to present any substantial evidence in support of the purported agency relationship between the County, Cornerstone, and Koman.

Specifically, the record is devoid of any substantial evidence actually supporting an agency relationship between Koman and the County. On the contrary, the undisputed evidence established that Koman was not an agent of the County for any purpose. For example, BWG specifically admitted that at no time prior to filing its Mechanic's Lien was it notified that any person (including a "Derrick [sic] Hamilton") was a representative or

agent of the County for any purpose, including accepting service. (*See* Albers Depo. Vol. I, Pg. 74, line 17 – Pg. 75, line 7; Pg. 76, line 23 – Pg. 77, line 9; L.F. 470-471.)

Next, there was substantial evidence that neither Garrick Hamilton (an attorney employed by Koman) nor Koman itself was ever an agent of the County for any purpose, including accepting service. (*See* Hamilton Affidavit, ¶¶ 5-6; L.F. 366.) In addition, neither Koman nor Mr. Hamilton ever held themselves out as legal representatives of the County to any entity, including BWG. (*See* Hamilton Affidavit, ¶ 7; L.F. 366.) BWG presented no contrary evidence in this regard.

There was also substantial evidence that the County was not aware of any instance in which anyone representing the County appointed Mr. Hamilton or Koman to act as an agent of the County. (*See* Grant Affidavit, ¶ 4; L.F. 575.) Moreover, the County is not aware of any representation to any entity, including BWG, from the County (and/or the individuals representing the County) that in any way suggests that Mr. Hamilton or Koman was a representative of the County, and further, the County never made any such representation, and did not witness any other individual representing the County ever making such a representation. (*See* Grant Affidavit, ¶ 6; L.F. 575.) BWG likewise presented no contrary evidence in this regard.

Therefore, BWG's conclusory allegation that Koman was an agent (or "sub-agent") of the County with respect to its contract with Clayco is completely unsupported and contrary to the only evidence in the record.

In its Substitute Brief, BWG attempts to rely on the Lease Agreement entered into by and between the County and Cornerstone in 2005 in support of its tenuous agency

argument. (*See* BWG's Substitute Brief, Pgs. 21 – 22.) However, nothing contained in the Lease Agreement constitutes substantial evidence that would defeat the County's right to judgment as a matter of law with respect to Count IX.

In particular, BWG attempts to rely on Section 4.2 of the Lease Agreement, which recites the existence of an agency relationship between the County and Cornerstone in purely conclusory fashion. However, the Lease Agreement contains no essential details regarding the nature and scope of the purported agency relationship. Furthermore, the Lease Agreement contains absolutely no details regarding the level or degree of control that the County had over Cornerstone's actions. Thus, this conclusory statement in the Lease Agreement fails to constitute substantial evidence of an agency relationship under applicable Missouri law. *Business Bank*, 322 S.W.3d at 552; *Sedalia Mercantile*, 740 S.W.2d at 202; *Hefner*, 996 S.W.2d at 664.

The Court of Appeals adopted the County's argument in this regard, noting that despite Section 4.2(b) of the Lease Agreement, the undisputed evidence shows, "that Plaintiff [BWG] cannot prove its assertion that the County made Cornerstone its agent with authority to enter into contracts." (*See* Memorandum, Pg. 7.) The Court of Appeals cited the relevant provision of Section 4.2(b), but noted that, "[t]his language is silent about Cornerstone holding the power to alter legal relations between the County and third parties." (*See Id.*) The Court of Appeals also held that "[t]he County did not grant Cornerstone the power to bind the County in contracts with third parties." *Id.* Finally, the Court of Appeals noted that the undisputed evidence in the record "shows that Plaintiff [BWG] cannot prove that Koman was acting for Cornerstone in signing the

contract with Clayco." *Id*. The Court of Appeals then summarized the sparse evidence cited by BWG, but concluded that in order to find an agency relationship between Cornerstone and Koman, it would have to resort to "conjecture." (*See Id*. at 7 – 8.)

Despite these glaring omissions, BWG now attempts to fabricate an agency relationship with other highly generalized and otherwise irrelevant provisions from the Lease Agreement cited in its Substitute Brief for the first time, which is not permitted. *Schwartz v. Custom Printing Co.*, 926 S.W.2d 490, 493 (Mo. App. E.D. 1996). Specifically, BWG notes that the County retained veto power over any alterations in the plans and specifications that "would materially alter the intended purpose of the Project." (*See Id*. at 22.) However, this very limited right does not rise to the level of the "power to alter the legal relations" between the County and any third parties or constitute the County's right to control Cornerstone's conduct, as required under Missouri law to establish agency. BWG also notes that "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." (*See Id*. at 21-22.) However, this very limited right likewise does not satisfy any of the specific requirements for establishing agency. Finally, BWG notes that "[t]he land and building were and remained the property of the County, subject only to Cornerstone's rights under the lease and other encumbrances." (*See Id*. at 22.) However, this also does not satisfy any of the specific requirements for establishing agency, where Cornerstone's own rights under the Lease Agreement were substantial, and included constructing the Property.

Thus, BWG has failed to meet its burden of establishing an agency relationship between the County and Cornerstone.

Next, regarding the purported agency relationship between Cornerstone and Koman, BWG's entire theory rests upon the faulty premise that, "one could reasonably ***infer*** that Cornerstone appointed Koman as its sub-agent to hire Clayco…." (emphasis added). (*See* BWG's Substitute Brief, Pg. 24.) In this regard, BWG expressly admits that, "[t]here is no dispute that Cornerstone was not named a party to the Koman/Clayco Contract." (*Id.* at Pg. 22.) Next, BWG incorrectly suggests that, "[t]here 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." (*See Id.* at Pgs. 22 – 23.) BWG is incorrect because the record indeed contains undisputed evidence regarding Koman's role with respect to the Project, where Koman was acting as the "developer" for the Project. (L.F. 1100 (¶ 9).) Specifically, Mr. Hamilton stated as follows: "Koman, in independently entering into its agreement with Clayco, was not acting as an agent for Cornerstone with respect to the Project; rather, Koman was acting as the ***developer*** with respect to the Project" (emphasis added). (*Id.*)

As discussed above, Missouri courts hold that the law ordinarily indulges **no** presumption that agency exists. *Wyler Watch*, 280 S.W.2d at 856. Moreover, the burden of proof rests with the party alleging the agency relationship. *Id.* Therefore, BWG is not entitled to any *inference* regarding a purported agency relationship in this case.

Finally, BWG alternatively argues that, "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" (emphasis added). (*See* BWG's Substitute Brief, Pg. 24.) However, BWG's argument should be rejected for two reasons. First, BWG's mistake/misnomer argument was not made to the Circuit Court in BWG's summary judgment pleadings, and thus, this argument is being made for the first time on appeal (*see* BWG's Memorandum of Law in Opposition to Movants' Motion for Summary Judgment, Pgs. 23-29; S.L.F. 41-47; *and* Supplemental Memorandum, Pg. 12; S.L.F. 64.), which is not permitted. *Schwartz*, 926 S.W.2d at 493. Second, as previously discussed, Missouri courts simply do not allow the inference of an agency relationship, which is the outcome sought from BWG in making this argument. *Wyler Watch*, 280 S.W.2d at 856. Furthermore, the case relied upon by BWG, *H.W. Underhill Constr. Co. v. Nilson*, 3 S.W.2d 399, 400 (Mo. App. K.C. 1928), is inapplicable here, where the Court of Appeals in *Nilson* did not simply ***infer*** that a mistake or misnomer had occurred in the name of a party to the disputed contract. Rather, the court found there was specific ***evidence*** that a mistake and/or misunderstanding had occurred with the name of a party to the disputed contract based upon the particular facts of the case. *Id.* In this case, however, BWG presented no evidence in support of its mistake/misnomer theory, as demonstrated by its request that this Court simply infer as much. Thus, BWG's mistake/misnomer argument should be rejected as a matter of law.

4. BWG's proposed blue-pencil version of § 107.170 would create bad policy.

Finally, BWG's proposed blue-pencil version of § 107.170 would create bad policy by changing established law after the fact. As discussed above, BWG is asking this Court

to rewrite § 107.170 to permit recovery upon proof that a public entity's agent made a contract for "public works," a construction that is contrary to the unambiguous language of the statute. It should be left to the Legislature to change the statute if it believes it is warranted. Missouri courts recognize that such decisions should be made by the Legislature, especially where the desired cause of action was not recognized at common law. *Klein v. Abramson*, 513 S.W.2d 714, 718 (Mo. App. K.C. 1974). Likewise, Missouri courts recognize that the Legislature is free to set the boundaries and procedures of any statutory cause of action, and courts may only interfere in cases where those procedures violate due process and other constitutional rights. *Sterneker v. Director of Revenue*, 3 S.W.3d 808, 810 (Mo. App. W.D. 1999).

Since § 107.170, by its own terms, did not apply to the Project, the Circuit Court correctly granted summary judgment in favor of the County on Count IX of the Petition.

C. This case presents no issue of first impression on the matter of whether the Project in this case, and others like it, are subject to the Little Miller Act or a mechanic's lien.

In its Substitute Brief, BWG incorrectly suggests that this case presents an issue of first impression on the matter of whether the Project in this case, and others like it, are subject to either the Little Miller Act or a mechanic's lien. (*See* BWG's Substitute Brief, Pg. 21.) However, BWG is incorrect because, as Respondents explained in their Suggestions in Opposition to BWG's Application for Transfer, the Circuit Court's decision regarding BWG's Bond claim, which was correctly affirmed by the Court of

Appeals, was based on existing statutory law. As Respondents have also explained at length herein, § 107.170 RSMo., on its face does not apply here. Specifically, a "public entity" (such as the County) may be held liable, if it all, only if it has a contract with a "contractor" for "public works." *See* § 107.170.1 RSMo. However, both the Circuit Court and the Court of Appeals correctly held that these requirements were not satisfied, and thus, the statute did not apply. As such, the County was not liable thereunder, and BWG's bond claim was correctly denied as a matter of law.

In this case, Respondents do **not** take the position that the Project was not ***subject to*** a mechanic's lien pursuant to Chapter 429 RSMo. Rather, as Respondents argued in their first Point Relied On (in response to BWG's second Point Relied On), BWG's Mechanic's Lien was simply deficient in several key respects, and thus, failed to impose a valid mechanic's lien against the Property in accordance with applicable Missouri law. Furthermore, evidence cited in BWG's own Substitute Brief illustrates that both Cornerstone and the County recognized that the Property was potentially ***subject to*** a mechanic's lien. Specifically, as BWG points out, the Lease provided that Cornerstone promised to "promptly notify the County of the imposition of [any mechanic's] lien…." (*See* BWG's Substitute Brief, Pg. 30.)

Thus, notwithstanding any suggestion to the contrary, BWG was **not** without an opportunity for payment protection in connection with the Project, where BWG had every opportunity to file a valid mechanic's lien in accordance with applicable Missouri law, but simply failed to do so for the various reasons set forth herein above. Thus, this case does **not** present an issue of first impression regarding the proper payment protection available

to BWG in this case. As such, BWG has stated no grounds for reversing the Circuit Court's grant of summary judgment in favor of the County, which the Court of Appeals correctly affirmed.

CONCLUSION

For each of the independent reasons stated herein above, the Circuit Court correctly granted summary judgment in favor of Respondents with respect to Counts VIII and IX of BWG's Fourth Amended Petition. Accordingly, Respondents respectfully request that this Court affirm, in its entirety, the Circuit Court's judgment in their favor.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 9th day of June, 2014, I electronically filed this ***Substitute Brief Of Defendants-Respondents Clayco, Inc., Cornerstone VI, LLC, UMB Bank, N.A., Victor Zarilli, National City Bank of the Midwest, Paul M. Macon, and St. Louis County, Missouri*** with the Clerk of the Court using the electronic filing system. Pursuant to Rule 103.08, service on registered users will be accomplished by the electronic filing system. I understand that at least one attorney of record for each party is a registered user.

/s/ R. Thomas Avery

RULE 84.06(c) CERTIFICATE

Pursuant to Supreme Court Rule 84.06(c), the undersigned hereby certifies that Defendants-Respondents' Substitute Brief contains 21,918 words, exclusive of the cover page, signature blocks, certificate of service, and Rule 84.06(c) certificate, according to the word-processing system's word count, and thus, complies with Supreme Court Rule 84.06(b). Finally, Defendants-Respondents' Substitute Brief includes the information required by Supreme Court Rule 55.03, and the undersigned attorney signed the original.

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