

NO. A10-1607

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State of Minnesota  
**In Court of Appeals**

Brickwell Community Bank,

*Appellant,*

vs.

Hunter Construction, Inc., and  
Verde General Contractor, Incorporated,

*Respondents,*

Kevin Lam, Lee-Tzong Chen, Ming-Mei Chen, Karl L. Kruse,  
Starbound St. Paul Hotel, LLC, a Minnesota limited liability  
company, Wing-Heng, Inc., a Minnesota corporation,  
Brickwell Community Bank, a Minnesota corporation,  
Integrity Works Construction, Inc., a Wisconsin Corporation,  
City of Saint Paul, John Doe, Mary Roe, ABC Corporation  
and XYZ Partnership,

*Defendants,*

JZ Electric, Inc., a Minnesota Corporation,  
Hamline Construction, Inc., a Minnesota Corporation,  
Hunter Construction, Inc., a Minnesota Corporation,  
Verde General Contractor Incorporated, a Minnesota  
Corporation, Midwest Building Maintenance, L.L.C., a Minnesota  
limited liability company, Winrock Corporation, a Nevada  
Corporation, Sheik A.N. Azizudin, All Floors Plus, Inc.,  
a Minnesota Corporation,

*Additional Defendants.*

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**APPELLANT BRICKWELL COMMUNITY BANK'S REPLY BRIEF**

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**TABLE OF CONTENTS**

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... ii

ARGUMENT ..... 1

**I.**    PERSONAL SERVICE UNDER MINN. STAT. § 514.08, SUBD. 1(2)  
          REQUIRES FORMAL LEGAL DELIVERY OF THE MECHANIC’S LIEN  
          STATEMENT CONSISTENT WITH RULE 4.02 OF THE MINNESOTA  
          RULES OF CIVIL PROCEDURE..... 1

        A.    THE MECHANIC’S LIEN STATUTE DISTINGUISHES  
              BETWEEN PERSONAL SERVICE AND PERSONAL  
              DELIVERY. .... 1

        B.    MINNESOTA COURTS APPLY RULES AND DEFINITIONS  
              PERTAINING TO SERVICE OF PROCESS TO ISSUES  
              CONCERNING SERVICE OF A MECHANIC’S LIEN  
              STATEMENT UNDER MINN. STAT. § 514.08, SUBD. 1(2)..... 4

        C.    THIS COURT’S DECISION IN *NAT’L DISPATCHERS, INC. V.*  
              *HASTINGS MOTEL LLP* IS NOT BINDING ON THIS COURT ..... 7

        D.    THERE IS NO CONFLICT OR INCONSISTENCY BETWEEN  
              RULE 4.02 AND MINN. STAT. § 514.08, SUBD. 1(2) ..... 8

**II.**   PUBLIC POLICY FAVORS PERSONAL SERVICE BY A NONPARTY ..... 9

**III.**  RESPONDENTS FAILED TO COMPLY WITH THE REQUIREMENTS  
          OF RULE 4.02 OF THE RULES OF CIVIL PROCEDURE BECAUSE  
          THE MECHANIC’S LIEN STATEMENT WAS NOT PERSONALLY  
          SERVED BY A NONPARTY ..... 12

CONCLUSION ..... 15

## TABLE OF AUTHORITIES

### MINNESOTA CASES

<i>Am. Family Ins. Group v. Schroedl</i> , 616 N.W.2d 273 (Minn. 2000) .....	4
<i>Annandale Advocate v. City of Annandale</i> , 435 N.W.2d 24 (Minn. 1989) .....	2
<i>County of Washington v. AFSCME</i> , 262 N.W.2d 163 (Minn. 1978) .....	2
<i>Eischen Cabinet Co. v. Hildebrandt</i> , 683 N.W.2d. 813 (Minn. 2004) .....	6, 7
<i>General Drivers, Local No. 6 v. Aitkin County Bd.</i> , 320 N.W.2d 695 (Minn. 1982) .....	3
<i>Handle With Care, Inc. v. Dept. of Human Serv.</i> , 406 N.W.2d 518 (Minn. 1987) .....	2
<i>Int’l Union of Elec. &amp; Mach. Workers of America v. Portec, Inc.</i> , 303 Minn. 341, 228 N.W.2d 239 (1975) .....	3
<i>Lewis</i> , 413 N.W.2d at 155 (Minn. App. 1987) .....	10
<i>Pella Prod., Inc. v. Arvig Tele. Co.</i> , 488 N.W.2d 316 (Minn. App. 1992), <i>review denied</i> (Minn. Sept. 30 1992) .....	5, 7
<i>State v. Schauer</i> , 501 N.W.2d 673 (Minn. App. 1993) .....	3
<i>Vlahos v. R&amp;I Constr. Of Bloomington, Inc.</i> , 676 N.W.2d 672 (Minn. 2004) .....	8
<i>Year 2001 Budget Appeal of Landgren</i> , 633 N.W.2d at 878 (Minn. App. 2001) .....	10

### OTHER DISTRICTS

<i>American Soda Fountain Co. v. Hogue</i> , 17 N.D. 375, 116 N.W. 339, 17 L.R.A.....	14
------------------------------------------------------------------------------------------	----

<i>Caldwell v. Coppola</i> , 219 Cal. App. 3d 859 (4th Dist. 1990) .....	10
<i>Froling v. Farrar</i> , 44 N.W.2d 763 (N.D. 1950) .....	13, 14
<i>Morrissey v. Murphy</i> , 137 F. Supp 377 (E.D. Wis. 1956) .....	10
<i>State ex rel. West Virginia Truck Stop, Inc. v. W.H. Belcher</i> , 192 S.E.2d 229 (W. Va. 1972) .....	13
<i>Van Sickle v. McArthur</i> , 110 N.W.2d 281 (N.D. 1961) .....	10

**U.S. DISTRICT COURT**

<i>Cedric Kushner Promotions, Ltd. v. King</i> , 533 U.S. 158 (2001) .....	12
-------------------------------------------------------------------------------	----

**STATUTES AND LAWS**

Minn. Stat. § 514.011 (2008) .....	1, 3, 5
MINN. STAT. § 514.08 (2008) .....	1, 3, 4, 5, 6, 7, 8, 9, 11, 12
Minn. Stat. § 645.17 (2008) .....	4

**RULES**

MINN. R. CIV. P. 4.02 .....	1, 4, 7, 8, 9, 10, 11, 12
-----------------------------	---------------------------

## ARGUMENT

### I. PERSONAL SERVICE UNDER MINN. STAT. § 514.08, SUBD. 1(2) REQUIRES FORMAL LEGAL DELIVERY OF THE MECHANIC'S LIEN STATEMENT CONSISTENT WITH RULE 4.02 OF THE MINNESOTA RULES OF CIVIL PROCEDURE.

In their response, respondents Hunter Construction, Inc. and Verde General Contractor Incorporated (jointly referred to as “respondents,” unless otherwise noted) argue that the legislature did not intend that personal service of a mechanic’s lien statement under Minn. Stat. § 514.08, subd. 1(2) be accomplished in the same manner as personal service of a summons or other process. To support this argument, respondents draw on the fact that, unlike some other statutes, the mechanic’s lien statute does not explicitly state that a lien claimant must serve its mechanic’s lien statement in the same manner as a summons.

#### A. The mechanic’s lien statute distinguishes between personal service and personal delivery.

This argument, however, ignores the fact that within the mechanic’s lien statute itself, the legislature distinguishes between simple personal delivery of a document and when documents must be personally served. *Compare* Minn. Stat. § 514.08 (requiring contractor to have copy of mechanic’s lien statement “served personally”) and § 514.011 (requiring service of lien statement and summons as prerequisite to commencing action to foreclose lien) *with* Minn. Stat. § 514.011

(providing any required prelien notice must be “delivered personally”).<sup>1</sup> Respondents dismiss this distinction as the “inane lexical observations” of appellant Brickwell Community Bank. But contrary to respondents’ characterization, this distinction reflects the legislature’s intent and conscious decision with respect to the personal service requirement of Minn. Stat. § 514.08, subd. 1(2) to require the formal legal delivery of a mechanic’s lien statement by a lien.

The mechanic’s lien statute does not explicitly define the phrase “served personally.” Where statutory wording is not explicit, courts may consider the statute’s contemporaneous legislative history, which includes “events leading up to [the legislation], the history of its passage, and any modifications made during its course.” *Handle With Care, Inc. v. Dept. of Human Serv.*, 406 N.W.2d 518, 522 (Minn. 1987) (citation omitted). In doing so, courts “often refer to legislative changes in a bill to interpret the statute into which it was finally enacted.” *County of Washington v. AFSCME*, 262 N.W.2d 163, 167-168 (Minn. 1978); *see also Annandale Advocate v. City of Annandale*, 435 N.W.2d 24, 30 (Minn. 1989); *General Drivers, Local No. 6 v. Aitkin County Bd.*, 320 N.W.2d 695, 699-701

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<sup>1</sup> Contrary to respondents’ assertion, the service of the mechanic’s lien statement under Minn. Stat. § 514.08 is jurisdictional and a prerequisite to commencing a mechanic’s lien action in district court. Minn. Stat. Section 514.011. A lien claimant may not commence an action in district court to foreclose its mechanic’s lien unless it has properly served its lien statement within the 120 days of its last contribution. *Id.* If it fails to serve the lien within the 120 days, the lien ceases to exist and the district court is divested of jurisdiction over the mechanic’s lien claim. *Pella*, 488 N.W.2d at 317-319

(Minn. 1982); *State v. Schauer*, 501 N.W.2d 673, 676 (Minn. App. 1993). Courts also presume that in changing the language of a statute, the legislature intended to effect a change in the meaning of the statute. *See Int'l Union of Elec. & Mach. Workers of America v. Portec, Inc.*, 303 Minn. 341, 228 N.W.2d 239 (1975) (holding legislature intended change in meaning where it changed statutory language from “or” to “and”).

In their response, respondents fail to explain the legislature’s decision to change the wording of Chapter 247, Senate File No. 6, which added the requirement of prelien notice now codified in Minn. Stat. § 514.011, and amended Minn. Stat. § 514.08 to add subdivision 1, subpart 2. In the original draft, the legislature required that both the prelien notice required under Minn. Stat. § 514.011 and the mechanic’s lien statement required by Minn. Stat. § 514.08, subd. 1(2) be “served personally.” (App. 147) The final bill that the legislature enacted removed the requirement that prelien notice be “served personally,” and instead, required only that it be “delivered personally.” (App. 139) The legislature left intact the requirement that the mechanic’s lien statement requirement under Minn. Stat. § 514.08, subd. 1(2) be “served personally.”

This change was obviously important to the legislature and this court cannot presume the change was simply a mistake or oversight on the part of the legislature. *See County of Washington*, 262 N.W.2d at 167 (recognizing respect due legislature as coequal and independent branch of government does not permit court to “brand the legislative deletion of a word from a bill as a ‘mistake’ and to

reinstate the word without further ado”) (citation omitted). The contemporaneous legislative history of the mechanic’s lien statute at the time Minn. Stat. § 514.08, subd. 1(2) was enacted reflects the legislature’s intent to distinguish between the simple delivery of a document by a lien claimant and those instances when formal legal delivery, i.e. formal personal service, is required.

The district court’s interpretation renders the legislature’s distinction within the mechanic’s lien statute between the phrases “served personally” and “delivered personally” meaningless and superfluous. This is an interpretation that is not permitted and should be reversed by this court. *See Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000) (holding statute should be interpreted, whenever possible, to give effect to all its provisions and “no word, phrase, or sentence should be deemed superfluous, void, or insignificant”); *see also* Minn. Stat. § 645.17 (2008) (providing courts may presume legislature intended “entire statute to be effective and certain”).

**B. Minnesota courts apply rules and definitions pertaining to service of process to issues concerning service of a mechanic’s lien statement under Minn. Stat. § 514.08, subd. 1(2).**

Respondents also argue that Rule 4.02 does not apply to the personal service requirements of Minn. Stat. § 514.08, subd. 1(2) because Rule 4.02 concerns the personal service of a summons or other legal process and a mechanic’s lien statement is not a summons nor other legal process. This argument fails to recognize that Minnesota courts have relied on definitions and

rules pertaining to the service of process in resolving issues concerning the service requirements under Minn. Stat. § 514.08, subd. 1(2).

This court addressed the definition of “personal service” under Minn. Stat. § 514.08, subd. 1(2) in its decision in *Pella Prod., Inc. v. Arvig Tele. Co.*, 488 N.W.2d 316 (Minn. App. 1992), *review denied* (Minn. Sept. 30 1992). In that case, a subcontractor who furnished windows for an existing building and had not been paid by the general contractor served the building owner with its mechanic’s lien statement by ordinary first class mail. *Id.* at 317. The district court dismissed the mechanic’s lien action after concluding that mailing of the mechanic’s lien statement by first class mail did not constitute certified mail or personal service as required by Minn. Stat. § 514.08, subd. 1(2). *Id.* In affirming the district court’s decision, this court defined personal service by quoting from the definition found in Black’s Law Dictionary, which provides: “[p]ersonal service generally has been defined as: actual delivery of *process* to person to whom it is directed or to someone authorized to receive it in his behalf.” *Id.* (citing and quoting Black’s Law Dictionary 1369 (6th ed.1990)) (emphasis added). Even though the building owner may have had actual notice of the lien statement through service by first class mail, this court concluded that it did not constitute personal service nor did it satisfy the requirement of service by certified mail, both of which are required by Minn. Stat. § 514.08, subd. 1(2). *Id.* at 318.

Similarly, in resolving the issue of when service of a mechanic’s lien statement by certified mail pursuant to Minn. Stat. § 514.08, subd. 1(2) is

effective, the Minnesota Supreme Court looked to the rules of civil procedure for guidance. *See Eischen Cabinet Co. v. Hildebrandt*, 683 N.W.2d. 813, 814 (Minn. 2004). In *Eischen*, the contractor served the property owners with a copy of its mechanic's lien statement by certified mail, which it mailed one day before the expiration of the 120-day time period under Minn. Stat. § 514.08, subd. 1(2). *Id.* at 815. The property owners, however, did not receive the certified letter with the mechanic's lien statement until two days after the 120-day time period had expired. *Id.* Both the district court and this court concluded that the service was untimely after ruling service by certified mail is effective upon receipt and not mailing. *Id.*

The supreme court reversed, holding that service by certified mail pursuant to Minn. Stat. § 514.08, subd. 1(2) is effective on mailing. *Id.* at 818. In reaching its decision, the court recognized that the language of Minn. Stat. § 514.08, subd. 1(2) is silent as to when service by certified mail is effective. *Id.* at 816. The court considered the language of other Minnesota statutes, but noted when service by certified mail is effective differs with each statutory provision. *Id.* And, unable to reconcile this court's conflicting decisions interpreting Minn. Stat. § 514.08, subd. 1(2), the court turned to its decision in a case that involved the question of when statutorily required notice cancelling township insurance served by certified mail was effective. *Id.* at 817-818. The court concluded that service by certified mail of the mechanic's lien statement is effective on mailing and observed that its interpretation of Minn. Stat. § 514.08, subd. 1(2) was consistent

with the rules of civil procedure even though it did not consider those rules binding on the court. *Id.* at 818.

Respondents' argument that Rule 4.02 does not apply to the personal service requirement found in Minn. Stat. § 514.08, subd 1(2) because the rule refers to "summons" or "other legal process" rings hollow in light of the decisions in both *Pella* and *Eischen*. In both cases, the courts considered and applied rules and definitions that pertained to the service of a summons or process when resolving issues concerning the effectiveness of service of a mechanic's lien statement under Minn. Stat. § 514.08, subd. 1(2). Indeed, in *Pella*, when this court defined "personal service" under Minn. Stat. § 514.08, subd. 1(2), it relied on a definition that pertained explicitly to "*process*." The decisions in *Pella* and *Eischen* do not limit this court from considering and applying Rule 4.02 in deciding the issue of who can administer personal service of the mechanic's lien statement required under Minn. Stat. § 514.08, subd. 1(2).

**C. This court's decision in *Nat'l Dispatchers, Inc. v. Hastings Motel LLP* is not binding on this court.**

In support of their argument that Rule 4.02 does not govern service of the mechanic's lien statement under Minn. Stat. § 514.08, subd. 1(2), respondents rely on this court's unpublished decision in *Nat'l Dispatchers, Inc. v. Hastings Motel LLP*, 2003 WL 21652262 (Minn. App. July 15, 2003). Because it is an unpublished decision, the decision is not precedential and does not bind this court. *See* Minn. Stat. 480A.08, subd. 3(e) (2008). As the Minnesota Supreme Court has

stated, unpublished decisions should not be cited as binding authority because “[t]he danger of miscitation is great because unpublished decisions rarely contain a full recitation of facts.” *Vlahos v. R&I Constr. Of Bloomington, Inc.*, 676 N.W.2d 672, 676 n.3 (Minn. 2004).

Respondents’ reliance on *Nat’l Dispatchers* illustrates the dangers of relying on unpublished decisions of this court. The decision is devoid of any facts indicating the manner in which personal service of the mechanic’s lien statement was personally served, including by whom it was served; nor is there any substantive discussion or analysis of the arguments that the parties presented on the issue. It is therefore impossible to ascertain whether the case is either factually or legally distinguishable. Any value the decision may provide, if any, is severely limited by the summary disposition of the issue. This court must decide this case based on the record and arguments of the parties presently before it and should not give deference to, nor is it bound by, the decision in *Nat’l Dispatchers*.

**D. THERE IS NO CONFLICT OR INCONSISTENCY BETWEEN RULE 4.02 AND MINN. STAT. § 514.08, SUBD. 1(2).**

Respondents argue that the district court correctly concluded that the Minnesota Rules of Civil Procedure do not govern the procedures in Minn. Stat. § 514.08, subd. 1(2) because they are inconsistent and in conflict with the statute. Like the district court, respondents contend that Rule 4.02 conflicts with Minn. Stat. § 514.08, subd. 1(2) because the rule pertains to service of a summons or other process and the statute pertains to service of a mechanic’s lien statement,

which they contend does not constitute a summons or other process. To the contrary, there is no conflict or inconsistency between Rule 4.02 and Minn. Stat. § 514.08, subd. 1(2).

While Rule 4.02 and Minn. Stat. § 514.08, subd. 1(2) differ in what must be served, there is no conflict or inconsistency as to the manner by which service must be accomplished. The language of Minn. Stat. § 514.08, subd. 1(2) is silent as to the manner by which personal service of the mechanic's lien statement must be administered, including who may effect personal service. It therefore cannot, and does not, conflict with the requirements of who may administer personal service under Rule 4.02, nor is it inconsistent with those requirements. Rather than creating any conflict or inconsistency, Rule 4.02 complements and supplements Minn. Stat. § 514.08, subd. 1(2), in part, by identifying who may administer personal service. The application of Rule 4.02 to the personal service requirement of Minn. Stat. § 514.08, subd. 1(2) furthers the purpose of the notice requirement, which, according to this court, is to ensure the actual receipt of the lien statement by the one required to receive it.

## **II. PUBLIC POLICY FAVORS PERSONAL SERVICE BY A NONPARTY.**

Public policy favors in interpretation of Minn. Stat. § 514.08, subd. 1(2) that is consistent with Rule 4.02. Such an interpretation will provide clarity, certainty, and protection to both lien claimants and property owners. Respondents have failed to present any public policy considerations that favor a contrary interpretation.

The purpose of Minn. R. Civ. P. 4.02 is “to eliminate bias, acrimony and possible oppression which is inherent in litigation.” *Year 2001 Budget Appeal of Landgren*, 633 N.W.2d at 878 (Minn. App. 2001) (citing *Lewis*, 413 N.W.2d at 155 (Minn. App. 1987)). The reason for the rule disqualifying parties to the suit from making service of process is to eliminate or reduce the chance of parties in an action who stand to gain or lose from the suit from creating an issue involving process that needlessly and substantially increases the burdens of the courts. *Morrissey v. Murphy*, 137 F. Supp 377, 379 (E.D. Wis. 1956). The intent of a statute or common law rule prohibiting personal service of process by parties is also to discourage fraudulent service by persons with an adversarial interest. *Caldwell v. Coppola*, 219 Cal. App. 3d 859, 864 (4th Dist. 1990). To permit service by a party would lead to great oppression, wrong, and irregularity. *Van Sickle v. McArthur*, 110 N.W.2d 281 (N.D. 1961). Indeed, as one court has recognized, it is difficult to conceive of a greater opportunity for mischief than to allow interested litigants to aver that they have made service in their own behalf. *Morrissey*, 137 F. Supp at 379.

Allowing lien claimants to deliver mechanic’s lien statements to owners will encourage and result in increased litigation and burdens on courts in resolving mechanic’s lien claims. Lien claimants naturally will have an incentive to claim service of the mechanic’s lien statements within the 120-day period, while property owners will have an incentive to claim otherwise. By requiring service

by certified mail or personal service consistent with Rule 4.02, the legislature sought to reduce, if not eliminate, such disputes.

Indeed, this case demonstrates why allowing mechanic's lien claimants to personally serve their own mechanic's lien statements is poor public policy. Initially, in its Complaint, Hunter Construction alleged that it served its mechanic's lien statements by certified mail. Later, however, Hunter testified that contrary to the allegations in the Complaint, he did not serve the mechanic's lien statement by certified mail, but instead, he simply handed a copy to the property owner. There was no other testimony or other independent evidence to support Hunter's claim, which the property owner denied. This conflict unnecessarily increased the number of issues for trial and needlessly extended the length of trial.

Public policy strongly favors personal service of a mechanic's lien statement under Minn. Stat. § 514.08, subd. 1(2) by an objective nonparty because it: (1) protects lien claimants and property owners equally by eliminating the opportunity for either party to commit fraud on the mechanic's lien service issue; (2) provides certainty and clarity as to who may administer personal service; and (3) reduces or eliminates the burdens on courts in resolving mechanic's lien claims.

The protections provided to the lien claimants and property owners through objective service and the reduction of burdens on the courts outweighs any burden it may place on a lien claimant. Public policy considerations strongly favor a rule

establishing that objective personal service by a nonparty is required under Minn. Stat. § 514.08, subd. 1(2).

**III. RESPONDENTS FAILED TO COMPLY WITH THE REQUIREMENTS OF RULE 4.02 OF THE RULES OF CIVIL PROCEDURE BECAUSE THE MECHANIC'S LIEN STATEMENT WAS NOT PERSONALLY SERVED BY A NONPARTY.**

Respondents argue that if personal service by a nonparty is required under Minn. Stat. § 514.08, they complied with this requirement because Hunter is a “natural person” distinct from the corporate entities.

In support of their position, respondents rely on the United States Supreme Court decision in *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158 (2001). This reliance is misplaced because the decision in that case did not concern who may administer service of process. The case involved legendary boxing promoter Don King, who had been sued by a rival promoter, who alleged that King had violated the federal civil RICO Act. The issue was whether King and his corporation constituted two distinct entities for the purpose of the RICO Act. The Supreme Court concluded that King and his corporation were separate entities for the purposes of the RICO act:

The corporation owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status.

*Id.* at 163.

Importantly, the decision in *Cedric Kushner Promotions* does not involve the issue of service of process and who may administer personal service, nor does it hold that a principal of a corporation may serve on behalf of that corporation.

The case involves the interpretation of the federal civil RICO act and its requirements. It in no way involves issues concerning who may administer personal service. The case is therefore inapposite to the issue in this case.

Courts addressing the issue of whether an employee or owner of a company may administer personal service have concluded that they may not. The West Virginia Supreme Court has held that a full time employee of a plaintiff corporation serving a summons on a defendant is an activity precluded by the rule prohibiting a party from serving process. *State ex rel. West Virginia Truck Stop, Inc. v. W.H. Belcher*, 192 S.E.2d 229 (W. Va. 1972). And, the North Dakota Supreme Court has held that an individual who is not technically a party to an action is disqualified from serving a summons where the individual has a substantial interest in the outcome of the lawsuit. *Froling v. Farrar*, 44 N.W.2d 763 (N.D. 1950), plaintiff's husband served the summons on the defendant. Plaintiff and plaintiff's husband operated a collection business, plaintiff's husband had a financial interest in anything that plaintiff collected in the lawsuit, and the two would share the benefits that might result from the case. *Id.* at 765. The North Dakota Supreme Court had to determine whether the plaintiff's husband was a "party to the action" within rule preventing a party from serving a summons.

The court ruled that although the plaintiff's husband was technically not a party to the action, plaintiff's husband was a real party in interest. A real party in interest "is one who has a real, actual, material, or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal,

formal, or technical interest in, or connection with, the action.” *Id.* at 765. The determination of the question of who is the real party in interest in a suit is made with respect not merely to the name in which the action brought, but to the facts as they appear of record. *Id.* at 765. The court found that plaintiff’s husband was technically not a party to the action, but was a real party in interest because he had a substantial interest in the subject of the lawsuit and obtaining the relief sought. Accordingly, service was defective. *Id.* at 766.

Here, Hunter is a real party in interest. He was either the sole officer or one of two officers of Hunter Construction. (T. 203; T. 17) In fact, Hunter Construction’s lien includes over \$100,000 for charges on Hunter’s personal banking statement and his own personal labor. Hunter and the president of Verde are the only ones who stand to gain or lose from the mechanic’s liens. Hunter Construction and Verde have aligned interests, they both filed mechanic’s liens against the property, they sued the same parties, and they are both parties in the same mechanic’s lien litigation. As a result, Hunter cannot “personally serve” the mechanic’s lien statements on behalf of Hunter Construction or Verde. An entity such as a corporation can only act through its officers and agents. If Hunter can “personally serve” on behalf of Hunter Construction – an entity he owns– then when it comes to corporate entities, the rule excludes no one and simply does not apply to corporate entities.

In this case, Hunter is a real party in interest who has a vested interest in the outcome of the mechanic’s liens and related litigation. As a result, he may not

serve Hunter Construction's or any other lien claimant's mechanic's lien statement on the owner of the property.

### CONCLUSION

Appellant Brickwell Community Bank respectfully requests that this court reverse the decision of the district court and rule that respondents' failed to properly serve their respective mechanic's lien statements within time period and manner required by Minn. Stat. § 514.08, subd. 1(2). Because they failed to timely and properly serve their mechanic's lien statements, their liens ceased to exist and the district court no longer had jurisdiction over their mechanic's lien claims.

Respectfully submitted,

**COLEMAN, HULL & VAN VLIET, PLLP**

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## CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs.1 and 3, for a brief produced with a proportional 13 point font. The length of this brief is 3,783 words. This brief was prepared using Microsoft Word 2007.

### COLEMAN, HULL & VAN VLIET, PLLP

Dated: 1/3, 2010 By Stephen Buterin  
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