

NO. A10-1607

State of Minnesota
In Supreme Court

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.

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

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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ARGUMENT

I. THE PLAIN MEANING OF “SERVED PERSONALLY” UNDER MINN. STAT. § 514.08, SUBD. 1(2) CONTEMPLATES AND REQUIRES THE FORMAL LEGAL DELIVERY OF THE MECHANIC’S LIEN STATEMENT CONSISTENT WITH RULE 4 OF THE MINNESOTA RULES OF CIVIL PROCEDURE.

In their response, respondents Hunter Construction, Inc. and Verde General Contractor Incorporated argue that the language of Minn. Stat. § 514.08, subd. 1(2) is not ambiguous and the canons of statutory construction require this court to apply the plain meaning of “personal service.”¹ They assert that the plain meaning of “personal service” is accomplished simply by handing a copy of the mechanic’s lien statement to the intended recipient and does not disqualify any class of individuals from accomplishing personal service. But contrary to respondents’ argument, the plain meaning of “personal service” under Minn. Stat. § 514.08, subd. 1(2) contemplates and requires the formal legal delivery of the mechanic’s lien statement that is consistent with Rule 4 of the Minnesota Rules of Civil Procedure.

A. The plain and ordinary meaning of “served personally” under Minn. Stat. § 514.08, subd. 1(2) contemplates the formal legal delivery of the mechanic’s lien on the property owner or other designated person.

The goal of all statutory construction is to ascertain and give effect to the legislature’s intent. *Mavco, Inc. v. Eggink*, 739 N.W.2d 148, 153 (2007) (citing Minn. Stat. § 645.16). In construing the language of a statute, this court gives words and phrases their plain and ordinary meaning. *Premier Bank v. Becker Dev., LLC*, 785

¹ Unless otherwise noted, Hunter Construction and Verde General Contractor shall be referred to collectively as “respondents.”

N.W.2d 753, 759 (2010) (citing Minn. Stat. § 514.08). In discerning the plain and ordinary meaning of a statutory word or phrase, this court considers the common dictionary definition of the word or phrase. *State v. Brown*, 792 N.W.2d 815, 822 (Minn. 2011).

Here, there is no dispute that the mechanic's lien statute, Minnesota Statutes Chapter 514, does not explicitly define the terms "service" or "served personally." To give meaning to these terms, respondents rely on the definition of "personal service" found in *Black's Law Dictionary*. According to *Black's*, "personal service" is defined as the "[a]ctual delivery of process to the person to whom it is directed." *Black's Law Dictionary* 1369 (6th ed. 1990). Based on this definition, respondents argue that Hunter's hand delivery of the mechanic's lien statements complied with the common meaning of Minn. Stat. § 514.08, subd. 1(2).

Respondents' argument is unavailing because it fails to consider the critical word "service," which is incorporated and used in the term "personal service." "Service" is a well defined legal term of art that has a specific meaning. *See Wal-Mart Stores, Inc. v. City of Central Point*, 144 P.3d 914 (Or. 2006) (noting word "service is a term of art with a specific, legal meaning"). *Black's Law Dictionary* defines "service" as: "1. The formal delivery of a writ, summons, or other legal process * * * [or] 2. The *formal delivery* of some other *legal notice*, such as a pleading." *Black's Law Dictionary* 1372 (7th ed. 1999) (Emphasis added). It defines "formal" as "[p]ertaining to or following established procedural rules, customs, and practices." *Id.* at 662. Thus, as one court has recognized, under this definition "service is the delivery of some sort of legal notice in some formal

manner,” and “[i]mplicit in that definition is the assumption of legal requirements as to how the delivery is to take place.” *City of Central Point*, 144 P.3d. at 916 (summarizing definition of “service” contained in *Black’s Law Dictionary* 1399 (8th ed. 2004)). (Emphasis in original.)

Similar definitions of “service” also can be found in nonlegal dictionaries. *The Oxford Dictionary and Thesaurus* defines “serve” as follows: “deliver (a writ, etc.) to the person concerned in a **legally formal manner**.” *The Oxford Dictionary and Thesaurus* 1382 (Am. ed. 1999) (emphasis added). It defines “legal” as “of or based on law * * * appointed or required by law.” *Id.* at 855. “Formal” is defined as “used or done or held in accordance rules, convention, and ceremony.” *Id.* at 575. *The Oxford Dictionaries Online* likewise defines “service” as, “Law the **formal delivery** of a document such as a writ or summons.” *Oxford Dictionaries Online*, <http://oxforddictionaries.com/definitions/service?region=us>. (Emphasis added.) It defines the word “formal” as: “done in accordance with rules of convention or etiquette; suitable for or constituting an official or important situation or occasion * * * officially sanctioned or recognized.” *Id.* at <http://oxforddictionaries.com/definitions/formal?region=us>.

The common thread running through these definitions is a recognition and understanding that, rather than informal delivery that is not subject to any rules or procedures, “service” or “serve” contemplates the formal legal delivery of a document to the person to whom it is directed in accordance with established rules, practices, and customs. The addition of the descriptor “personal” to describe the type of “service” does

not change this definition. It simply distinguishes the form of “service” from the other recognized methods of “service” – “service by mail” and “service by publication.”

The problem that plagues respondents’ definition of “personal service” is that it fails to include and incorporate the definition of “service.” It is incomplete. The better and more appropriate definition of “personal service” includes the definition of “service.” Thus, when these two definitions are taken and read together, “personal service” is the actual formal legal delivery of a writ, summons, process, or notice to the party to whom it is directed in accordance with established procedures, rules, customs, and practices.

In Minnesota, the formal and established procedures, rules, customs, and practices relating to “service” are contained in Rule 4 of the Minnesota Rules of Civil Procedure. It therefore is logical and appropriate under the definition of “personal service” to look to those rules to determine how “personal service” may be made, including who may accomplish “personal service.” Rule 4.02 specifically addresses who may accomplish personal service. The rule provides simply that, “[u]nless otherwise ordered by the court, the sheriff or any other person not less than 18 years of age and not a party to the action, may make service of a summons or other process.” Minn. R. Civ. P. 4.02.

The plain meaning of “served personally” as used in Minn. Stat. § 514.08, subd. 1(2) implicitly, if not explicitly, incorporates the requirements of Minn. R. Civ. P. 4.02, and does not allow a lien claimant to personally serve the property owner or other designated person with a copy of the mechanic’s lien statement

B. The legislature’s use of the term “served personally” in other sections of the mechanic’s lien statute reflects its intent to distinguish between formal legal delivery and informal delivery.

Respondents further argue that unlike other statutes, the language of Minn. Stat. § 514.08 does not contain language requiring the mechanic’s lien statement be served “in the same manner as the service of a summons in civil actions.” They therefore reason that the absence of such language precludes this court from looking to or applying Rule 4.02 to determine who may accomplish personal service of a mechanic’s lien statement under Minn. Stat. § 514.08, subd. 1(2).

This argument is misplaced because the canons of statutory construction require this court to look to the other provisions of the mechanic’s lien statute in determining its meaning as used in Minn. Stat. § 514.08, subd. 1(2). As this court recently stated, the rules of statutory construction require this court “to read a particular provision in context with other provisions of the same statute in order to determine the meaning of the particular provision.” *ILHC of Eagan, LLC v. County of Dakota* 693 N.W.2d 412, 419 (Minn. 2005).

In examining the mechanic’s lien statute in its entirety, it is clear the legislature intended to, and did, distinguish between those documents that must be formally delivered by means of “personal service” with those that may be delivered informally. The mechanic’s lien statute requires two documents to be “served personally.” The first is the mechanic’s lien statement pursuant to Minn. Stat. § 514.08, subd. 1(2). The second is the summons commencing the lien foreclosure action as required by Minn. Stat. § 514.11. In contrast, the mechanic’s lien statute permits the prelien notice required under

Minn. Stat. § 514.011, subds. 1 and 2 to simply be “delivered personally” or by “personal delivery.”

With respect to service of the summons commencing the mechanic’s lien foreclosure action, the legislature used the term “served personally” in its traditional sense; that is, requiring the actual formal legal delivery of the summons in accordance with the rules of civil procedure. It did not impose this requirement on the delivery of prelien notice. By distinguishing between the formal and informal delivery of documents, it follows that the legislature intended that different requirements apply to each type of delivery. Presumably, the legislature was aware and understood that the term “service” or “served” were legal terms of art with specific meanings. By using these well understood legal terms of art, it is evident that the legislature implicitly, if not explicitly, intended to require the formal delivery of the mechanic’s lien statement under Minn. Stat. § 514.08, subd. 1(2), and the summons commencing the lien foreclosure action pursuant to Minn. Stat. § 514.11, in accordance with the rules of civil procedure to the extent those rules were not inconsistent with or contrary to the mechanic’s lien statute.

By requiring the lien statement to be “served personally” or “by certified mail,” the legislature intended and required something more than informal delivery of the lien statement. The court of appeals’ decision improperly renders the legislature’s distinctions meaningless and superfluous, and treats informal delivery and personal service the same.

The interpretation of the district court and court of appeals renders the legislature’s distinction within the mechanic’s lien statute between the phrases “served personally”

and “delivered personally” meaningless and insignificant. 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”). While all “service” is delivery, not all delivery is “service”.

C. This court is free to consider the legislative history to determine the plain meaning of “served personally.”

As respondents acknowledge, 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 (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.”

The contemporaneous legislative history of the mechanic’s lien statute at the time Minn. Stat. § 514.08, subd. 1(2) was enacted makes clear 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. It cannot be presumed this 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).

D. There is no conflict or inconsistency between rule 4.02 and minn. Stat. § 514.08, subd. 1(2).

As they did below, respondents argue 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. They also note several other differences between Rule 4.02 and Minn. Stat. § 514.08, subd. 1(2), that they claim create a conflict that bars this court from applying or even considering Rule 4.02 in determining the meaning of "served personally" in 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 administered, including who may affect 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 compliments and supplements Minn. Stat. § 514.08, subd. 1(2), in part, by identifying who may administer personal service.

E. The service of the mechanic's lien statement is to protect the property owner by providing him notice of the lien and an opportunity to protect himself.

Respondents next argue that Rule 4.02 cannot apply because it would abridge lien claimants' substantive rights, and that considerations of "due process" are not relevant to

the service of lien statements. This argument is unappealing because it disregards the purpose of the service requirement contained in Minn. Stat. § 514.08, subd. 1(2), and the adverse effect the filing of a lien statement has on the owner of property.

The filing of a mechanic's lien statement places a cloud on title, affecting the property owners ability to transfer the property or obtain financing for construction or other projects on the subject property. *See Jacobson v. Lac Qui Parle County*, 119 Minn. 14, 137 N.W. 419 (1912) (recognizing filing of lien statement creates cloud on title of subject property). And, if the lien is not satisfied, the lien claimant may commence foreclosure proceedings in district court that will result in the property owner losing her property. *See Minn. Stat. § 514.11* (2010) (providing for foreclosure of mechanic's lien).

As this court has long recognized:

The burden of a statutory lien upon real estate or other immovables is a considerable one. If the claim is unpaid, the lien may be enforced by an action begun and concluded in the same manner as actions for the foreclosure of mortgages upon real estate. * * * In order to relieve the property from the burden of the lien, the owner must pay the claim or make a deposit in an amount fixed by the court to stand as security in place of the lien. At best, foreclosure proceedings embarrass the owner of property. At worst, where the amount of the lien exceeds the value of the property, foreclosure may result in transfer of title from one who maintains ownership for a special and valuable use to one who has no particular need for the property except as a device for collecting his debt.

Albert & Harlow, Inc. v. Great Northern Oil Co., 283 Minn. 246, 253, 167 N.W.2d 500, 506 (1969).

As this court has recognized, the purpose of requiring that the mechanic's lien statement on the property owner is to protect the owner by putting him on notice that the

contractor is not paying his bills, advise him of the extent of the lien, and enabling him to avoid paying it twice. *Minnesota Wood Specialties, Inc. v. Mattson*, 274 N.W.2d 116, 119 (Minn. 1978). The service of the lien statement under Minn. Stat. § 514.08, subd. 1(2) provides a property owner with notice of the lien and the opportunity to protect himself. *Albert & Harlow*, 283 Minn. at 250, 167 N.W.2d at 504.

The use of certified mail and personal service are recognized formal methods of legal delivery that “fill[] the function of insuring receipt by a person of suitable age or discretion at the person’s last known address and [are] thus reasonably calculated to provide notice to the affected person.” *Har-Ned Lumber Co. v. Amagineers, Inc.*, 436 N.W.2d 811, 815 (Minn. App. 1989) (addressing requirements and purpose of service by certified mail under Minn. Stat. § 514.08) (quotation and citation omitted). Thus, by requiring the mechanic’s lien statement under Minn. Stat. § 514.08, subd. 1(2) to be “served personally” or by certified mail, the legislature sought to ensure that the property owner receive notice of the mechanic’s lien and the opportunity to protect himself.

Contrary to respondents’ claim, applying Rule 4.02 and prohibiting a lien claimant from a serving the mechanic’s lien statement does not in any way abridge a lien claimants’ substantive rights. It does not affect the validity or amount of the lien, nor does it affect the right to the lien. Rule 4.02 is a procedural tool that is designed to eliminate bias, acrimony, and the chance that a party commit fraud with regard to the service issue by requiring service of the lien statement by an impartial person with no interest in the outcome of the mechanic’s lien proceedings.

II. PUBLIC POLICY FAVORS PERSONAL SERVICE BY A NONPARTY.

Finally, respondents argue that public policy supports a rule that allows a lien claimant to hand deliver a mechanic's lien statement to a property owner because the mechanic's lien statute is remedial in nature. They also claim that even if the requirement of nonparty service of a mechanic's lien statement is required, it will not protect property owners or lien claimants from fraud on the issue of service, or eliminate or significantly reduce the burdens on courts in resolving mechanic's lien issues.

Respondents' arguments do little to dispel or undermine the sound public policy considerations that favor an interpretation of Minn. Stat. § 514.08, subd. 1(2) that is consistent with Rule 4.02. Respondents do not seriously dispute the purpose of Minn. R. Civ. P. 4.02, which 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)). Simply because the application of Rule 4.02 may not eliminate all instances of fraud, abuse, or manipulation by property owners or lien claimants, or reduce the burdens on courts and parties forced to try the issue of service of the mechanic's lien statement, is insufficient reason to avoid its application. No law or rule will eliminate all disputes or burdens of litigating particular issues. But the protections provided to the lien claimants and property owners through objective service will almost certainly reduce, and in many instances, eliminate many of these issues in mechanic's lien cases. Public policy considerations therefore strongly favor a rule establishing that objective personal service by a nonparty is required under Minn. Stat. § 514.08, subd. 1(2).

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 are invalid and unenforceable.

Respectfully submitted,

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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, subds.1 and 3, for a brief produced with a proportional 13 point font. The length of this brief is 3,461 words. This brief was prepared using Microsoft Word 2007.

COLEMAN, HULL & VAN VLIET, PLLP

Dated: 10/31, 2011

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