

CASE NO. A06-1999

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**State of Minnesota**  
**In Court of Appeals**

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STERLING STATE BANK,

*Appellant,*

vs.

ANN MARIE SIMONS f/k/a ANN MARIE SHILTZ,

*Respondent.*

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**APPELLANT'S BRIEF AND APPENDIX**

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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) (with amendments effective July 1, 2007).

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## ISSUES ON APPEAL

- I. **DID THE TRIAL COURT ERR IN DETERMINING THAT THE DIVORCE DECREE CREATED A MARITAL LIEN DESPITE THE REQUIREMENT FOR BRYAN SHILTZ TO EXECUTE AND DELIVER A MORTGAGE AGAINST THE SUBJECT PROPERTY TO SECURE OBLIGATIONS UNDER THE DIVORCE DECREE?**
  
- II. **DID THE TRIAL COURT ERR IN RULING THAT NO MATERIAL FACTS WERE IN DISPUTE AS TO SIMON'S OBLIGATION TO SUBORDINATE HER ALLEGED MARITAL LIEN TO THE MORTGAGE INTEREST OF STERLING STATE BANK?**

## STATEMENT OF THE CASE

On January 11, 2002, the Wright County Court issued Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree terminating the marriage of Respondent, Ann Marie Simons, (“**Simons**”) and Bryan Shiltz (“**Shiltz**”). [App. at 36-73.] The Divorce Decree provided that Shiltz was to pay Simons a property settlement in the amount of \$380,226.00, payable in monthly installments, and awarded Shiltz title to the property located a 5014 Parrish Avenue N.E., St. Michael, Minnesota 55376 (“**Property**”). [Id. at 65.] The Divorce Decree also provided that Shiltz was to obtain a second mortgage on the Property in favor of Simons to secure the property settlement. [Id. at 66.] Simons did not obtain or docket a judgment with the court, but instead recorded the Divorce Decree with the Wright County Recorder on April 16, 2002. [Id. at 168.] Simons did not obtain a second mortgage from Shiltz to create or perfect a lien against the Property. [App. at 109; 154-65.]

On March 22, 2002, Shiltz obtained a home equity loan from the Bank which allowed him to pay \$176,327.95 to Simons, representing all of the loan proceeds from the

home equity loan. On May 8, 2002, Shiltz refinanced the Wells Fargo first mortgage and the home equity loan by executing a first mortgage in favor of Sterling State Bank, (“**Bank**”) in the amount of \$361,600.00 against the Property. [Id. at 169.] The Bank perfected the mortgage by recording it with the Wright County Recorder on May 29, 2002 as Document No. 792784. [Id.]

On or about December 14, 2005, Simons served the Bank with a Summons and Complaint. Among other things, Simons requested that the court adjudge and decree that her interests in the Property are superior to the Bank’s. [Id. at 7-8.] Simons also requested the court allow her to foreclose her lien. [Id.] On or about March 10, 2006, Simons filed a motion for summary judgment. [Id. at 22-23.] On April 14, 2006, the district court for Wright County filed an Order Granting Simons’ motion for summary judgment. [Id. at 186-92.] The court reserved its right to determine attorney’s fees and the total amount of Shiltz’s obligation at a future time. [Id. at 189.]

On June 12, 2006, the Bank filed a Notice of Appeal to the Court of Appeals as well as its Statement of the Case and a Cost Bond in the amount of \$500.00. On June 26, 2006, the Bank filed a Notice of Dismissal of Appeal because the district court, in its April 14, 2006 order, reserved the issue of attorney’s fees and the total amount of Shiltz’s obligation under the Divorce Decree.

On July 18, 2006, Simons filed a Motion to Amend the Order Granting Summary Judgment, asking the Court to rule on the amount of Shiltz’s obligation under the Divorce Decree. [Id. at 193-94.] On August 21, 2006, the district court for Wright County filed an order fixing the amount of Shiltz’s obligation and allowing Simons to recover future

attorney's fees and costs incurred in securing payment from Shiltz, which was a final judgment. [Id. at 215-18.]

This Appeal was filed by the Bank on or about October 26, 2006. A Notice of Case Filing was issued on October 23, 2006.

### **STATEMENT OF THE FACTS**

The Divorce Decree, filed with the Wright County District Court on January 11, 2002, provides, in relevant part:

20. **Cash Property Settlement Payable to Petitioner.** As and for an equalization of the property division between the parties and consideration for Petitioner's waiver of spousal maintenance, Respondent [Shiltz] shall pay to Petitioner [Simons] a cash property settlement in the amount of \$380,226.00, with interest at a rate of 6% on the unpaid balance, payable in monthly installments of \$7,314.26, commencing July 1, 2001, and continuing thereafter....

As security for payment of the promissory note and property settlement payable to Petitioner by Simons, the following property awarded to the Simons shall constitute security for Simons' property settlement payment obligation. Simons shall execute a second mortgage in favor of Petitioner against his homestead, which has equity of approximately \$216,000.00. Said mortgage is not to be subordinated to any subsequent refinancing of the home. However, to the extent Simons is refinancing the homestead for the purpose of paying to Petitioner loan proceeds to be applied towards satisfaction of Simons' obligation herein to Petitioner, then Petitioner shall subordinate her second mortgage to permit Simons' refinancing in an amount to pay off the first mortgage and such additional amount payable to Petitioner as provided herein.<sup>1</sup>

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<sup>1</sup> In error, the trial court ruled that paragraph 20 of the Divorce Decree "created" some type of lien against the Property. [App. at 216-218.] Further, the trial court mistakenly found that the Bank admitted that the Divorce Decree "created" a lien. [Id. at 216, fn. 1] Any statements interpreting the Divorce Decree made at oral arguments are not binding upon this Court, since an interpretation of the Divorce Decree is a question of law. If any such statements were made at oral arguments, they are contrary with the Bank's position in its trial court brief, where it

[Id. at 65-66 (emphasis added).]

From March 22, 2002 through May 8, 2002 (about 45 days), Sterling State Bank closed certain loan transactions with Shiltz, the purpose of which was two-fold: (1) pay \$175,400.00 to Simons toward satisfying Shiltz's obligations pursuant to the above paragraph of the Divorce Decree, and (2) close on an affordable refinancing of both a first mortgage with Wells Fargo Bank and the substantial amounts paid to Simons under the Divorce Decree. [Id. at 107-08; 125.]

On March 22, 2002, Shiltz obtained a home equity loan<sup>2</sup> from the Bank for \$176,327.95, and executed a mortgage in favor of Sterling State Bank. [Id. at 108; 124-26.] This mortgage was recorded against the Property on April 16, 2002. [Id. at 168.] On or about March 27, 2002, Simons received \$175,400.00 from the home equity loan, which was all of the proceeds from that loan. [Id. at 108; 124-26.] Shiltz received none of the proceeds from the home equity loan. [Id.]

On May 8, 2002, Shiltz refinanced the Property, and executed a mortgage in favor of the Bank in the amount of \$361,600.00. [Id. at 108.] These proceeds were used to refinance the prior first mortgage in favor of Wells Fargo Bank, and the home equity loan used to fulfill Shiltz's obligations to Simons. [Id. at 109.] The refinancing documents were executed on May 8, 2002 and recorded with the Wright County Recorder on May

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clearly described Simons' rights as a "potential lien." [Id. at 88-106.] The Bank's trial court brief further argued that "Plaintiff's attempt to argue for creating a lien by recording something other than a mortgage must fail as a matter of law. [Id. at 98.]

<sup>2</sup> The trial court erroneously believed that the home equity loan was a refinancing, even though it's clear and undisputed that the home equity loan did not payoff the existing first mortgage with Wells Fargo, and instead provided Simons with cash of \$176,327.95. [App. at 91-92; 108.] It appears that the trial court mistakenly believed that two separate refinancings occurred in 2002, which likely contributed to its erroneous grant of summary judgment. [Id. at 218.]

29, 2002 as Document No. 792784 (“Mortgage”). [Id. at 108-09; 127-51.] Again, Shiltz did not receive any cash from the Mortgage. [Id. at 109.] In fact, Shiltz was required to pay an additional amount of \$45,062.38 at the time he executed the Mortgage. [Id.]

Shiltz was the only signatory on these loans from Sterling State Bank because Simons deeded her interest in the Property to Shiltz in accordance with the Divorce Decree. [Id. at 109; 154.] The Deed contained standard divorce language “reserving the lien(s), if any, in favor of” Simons in the Divorce Decree. The mortgage that was to be executed and delivered to Simons from Shiltz, according to paragraph 20 of the Divorce Decree, is indisputably absent from the public record for the Property. [App. at 109; 154-65.] Simons never obtained a second mortgage to the property to create or perfect a mortgage lien against the Property. [Id.]

At the time the Bank secured the Mortgage, no judgments appeared of record in Shiltz’s name. [App. at 159.] A later Owners and Encumbrances Report finds only one judgment entered and docketed against Shiltz on March 11, 2004 in the amount of \$11,964.98. [App. at 170.] This judgment arose out of his divorce case with Simons and resulted from Simons following the notice and affidavit requirements of section 548.091 of the Minnesota Statutes. The judgment search did not find the entry and docketing of any judgment against Shiltz at the time the Divorce Decree was filed on January 12, 2002 or when the Divorce Decree and Deed were recorded with the County Recorder on April 16, 2002. [Id.]

An accurate copy of the entire Register of Actions, including all Events & Orders of the Court for the family court matter of *In Re the Marriage of: Ann Marie Shiltz*,

*Petitioner and Bryan Lee Shiltz, Simons, Case No. 86-F4-00-3065*, shows the March 11, 2004 judgment as well as a more recent judgment, dated November 16, 2005 against Shiltz for \$22,229.21. [Id. at 167; 173-77.] The Register contains no reference to the docketing of any money judgment at the time the original Divorce Decree was entered on January 12, 2002, or at any time other than the two referenced smaller money judgments docketed in 2004 and 2005. [Id.]

The Bank approved and closed on Shiltz's refinancing, including the Mortgage, on the express condition it was receiving a first mortgage lien against the Property that would not be junior to any interests of other creditors of Shiltz. [Id. at 110.] The relevant title work does not show the title examiner at Universal Title finding or disclosing the existence of a lien or mortgage against the Property in favor of Simons. [Id.] In fact, the Application by Shiltz at the time of his refinancing discloses only the two (2) mortgages actually of record as liens against the Property. [Id.] No reference in the Application discloses any lien or mortgage interest in the Property in favor of Simons. [Id.]

Shiltz subsequently defaulted on his obligations under the Mortgage. [Id. at 90.] As a result, the Bank foreclosed the Mortgage and was the successful bidder at the foreclosure sale on October 27, 2005, with its bid amount of \$372,773.63. [Id.] The six (6) month redemption period expired on April 27, 2006. [Id.]

## ARGUMENT

### **I. STANDARD OF REVIEW FROM TRIAL COURT'S ORDER FOR SUMMARY JUDGMENT.**

A reviewing court, on an appeal pursuant to a motion for summary judgment, must determine whether any issues of material fact exist and whether the lower court erred in applying the law to the facts of the case. *Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). Rule 56.03 of the Minnesota Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." A fact is material only when its resolution affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The facts are to be viewed in the light most favorable to the non-moving party, *Anderson*, 477 U.S. at 250, but the non-moving party may not rest upon mere denials or allegations in the pleadings, but must set forth specific facts sufficient to raise a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). The evidence presented in support of or in opposition to a motion must be competent evidence admissible at any subsequent trial. *Miller v. Solem*, 728 F.2d 1020, 1026 (8th Cir. 1984).

**II. THE TRIAL COURT ERRED IN DETERMINING THAT THE DIVORCE DECREE “CREATED” A MARITAL LIEN DESPITE THE REQUIREMENT FOR BRYAN SHILTZ TO EXECUTE AND DELIVER A MORTGAGE IN FAVOR OF ANN MARIE SIMONS AGAINST THE SUBJECT PROPERTY TO SECURE OBLIGATIONS UNDER THE DIVORCE DECREE.**

Despite the fact that the Divorce Decree provided that Shiltz was to execute a second mortgage in Simons’ favor in order to protect Simons interests under the Divorce Decree, no such mortgage was obtained or recorded by Simons. Further, Simons did not take the necessary steps to obtain a judgment lien based on paragraph 20 of the Divorce Decree. The Divorce Decree, by itself, did not create a lien against the Property. Instead, the Divorce Decree provided for the execution and delivery of a second mortgage document to create a mortgage lien in favor of Simons. At best, the Divorce Decree gave Simons an expectancy of getting a mortgage lien against the Property. For these reasons, the trial court erred in determining that the Divorce Decree “created” some kind of marital lien that is prior to the Bank’s Mortgage. This Court should overturn the trial court’s decision and direct the trial court to issue an order determining that Simons does not have a lien against the Property, perfected or unperfected, and that its recent foreclosure sale is a nullity.

**A. The Absence Of A Second Mortgage In The Public Record Leaves Simons Holding Merely A Potential Mortgage Lien That Has Not Yet Come into Existence or Attached To The Property.**

Simons correctly cites Minnesota’s race-notice statute, section 507.34, as being applicable to a priority dispute, if a priority dispute were to exist in this action. However, Simons’ application of the race-notice statute in this case is mistaken, because she does

not yet have a mortgage lien against the Property. Further, the two small judgment liens she obtained in 2004 and 2005 are indisputably junior to the Bank's Mortgage under section 507.34. The mere recording of the Deed and the Divorce Decree did not create or perfect a mortgage lien or attach any judgment lien against the Property. *See Dolly v. Nichols*, 386 N.W.2d 261 (Minn. Ct. App. 1986). The Divorce Decree expressly required Simons to obtain a second mortgage from Shiltz to obtain a security interest in the Property:

...Simons shall pay to Petitioner a cash property settlement in the amount of \$380,226.00...As security for payment of the promissory note and property settlement payable to Petitioner by Simons, the following property awarded to the Simons shall constitute security for Simons' property settlement payment obligation. Simons shall execute a second mortgage in favor of Petitioner against his homestead, which has equity of approximately \$216,000.00.

[App. at 65-66.] Because the Divorce Decree contains an express and unambiguous term for the method of creating her "security" rights against the Property, Simons' failure to obtain the mortgage leaves her without a lien against the Property. She, of course, has an expectancy of getting a mortgage lien against the Property, based on the Divorce Decree, which is merely a private contract between two parties. If Simons had enforced her contract rights under the Divorce Decree, she could have obtained a court order requiring Shiltz to execute and deliver a second mortgage to her, or alternatively, she could have obtained a court order that expressly provided for its recording to constitute a second mortgage against the Property. She didn't follow through on either option.

Simons misapplies a Court of Appeals decision in *Dolly v. Nichols*, 386 N.W.2d 261 (Minn. Ct. App. 1986) in support of her theory that she created or perfected a lien

against the Property when she recorded the Deed and Divorce Decree on April 16, 2002. It is admittedly true that in *Dolly*, a quit claim deed and divorce decree were both recorded against the subject property by Dorothy Nichols to support her argument that she maintained a lien against the property in that case. Additionally, Nichols made the same arguments as Simons makes in the present case, i.e., that the recording of the documents in the county recorder's office "constitute a valid lien on the property." *Id.* at 263. Superficially, at least, the facts in the *Dolly* decision appear identical to the present case.

Simons, however, fails to point out that the recording of the deed and decree in *Dolly* was entirely irrelevant to the decision in that case. *Id.* at 263-64. According to the Court of Appeals in *Dolly*, only the "docketing" of the monetary judgment by Nichols created a statutory judgment lien, not a mortgage or some other type of lien. *Id.* Despite the fact that the decision in *Dolly* does not provide information about the steps taken to docket the judgment, or the date the judgment was docketed, it is absolutely clear that the earlier docketing of the money judgment was the key event that created the statutory judgment lien, and that the recording of the divorce decree and quit claim deed played no role in the Court's priority ruling. *Id.*

As will be discussed below, Simons has no judgment lien against the Property that is prior or superior to the Bank's Mortgage. Thus, the *Dolly* decision does not strengthen Simons' argument that she has a lien against the Property. Any right that Simons may

claim against the Property must either be a mortgage or a statutory judgment lien.<sup>3</sup> It is undisputed that she failed to record a second mortgage, and further, failed to docket a money judgment other than the two junior judgment liens from 2004 (two years after the Bank's Mortgage) and 2005. Simons' attempt to argue for creating a lien by recording something other than a mortgage must fail as a matter of law.

Another distinction between *Dolly* and the present case, relates to the mandatory nature of executing a mortgage to secure the divorce obligation. A title examiner in the present case could reasonably disregard the Divorce Decree after finding a failure of Simons to record the mandatory mortgage required to trigger the perfection of Simons' "security" rights in the Property. The decree in *Dolly* did not mandate the execution of a mortgage to serve as security for the obligation. In the present case, the dissolution decree states "Simons **shall** execute a second mortgage in favor of Petitioner against his homestead" and expressly requires this mortgage to serve as security for Simons' rights to receive payments from Shiltz. The stronger Divorce Decree language that mandated the execution of a mortgage gives a creditor a stronger basis for relying upon an absence of the mortgage so that a title examiner can ignore the Divorce Decree in the absence of the required mortgage.

Simons previously referenced the Minnesota Supreme Court decision in *Oldewurtel v. Redding*, 421 N.W.2d 722 (Minn. 1988), but her passing reference to the *Oldewurtel* court "reasoning that a marital dissolution decree creates a lien" is misleading

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<sup>3</sup> Nothing in the record shows that Simons followed the process of getting a Summary Real Estate Disposition Judgment issued by a district court pursuant to Minn. Stat. § 518.191. It is further undisputed that nothing in the Divorce Decree provides for its recording with the county recorder to have any legal consequences or effect.

because a statutory judgment lien was the mechanism of lien creation in that case. [App. at 28.] Simons ignores the *Oldewurtel* court's actual holding that the bank's mortgage in that case was found to have priority over a lien created in an earlier divorce decree, because the marital lien remained an "undocketed and unperfected judgment that did not give an interest in the property" until it was later docketed by Oldewurtel in that case. *Oldewurtel*, 421 N.W.2d at 727. The *Oldewurtel* case is in fact dispositive of the present case in favor of the Bank, and is discussed in more detail below.

**B. Simons Does Not Have A Judgment Lien Under Minnesota Law.**

Any suggestion by Simons that the recording of her Divorce Decree constituted a judgment lien (as opposed to a mortgage or some other type of lien) is inconsistent with the terms and operation of the Divorce Decree and ignores the statutory procedures for obtaining money judgments and judgment liens under Minnesota law. First, the Divorce Decree did not provide that a judgment lien was to be the security for Shiltz's payment obligations under paragraph 20. [App. at 65-66.] The Divorce Decree provided for a second mortgage as security. [Id.] Second, Chapter 548 of the Minnesota statutes governs the entry and docketing of money judgments, and the attachment of judgment liens, both in family and non-family civil matters. Section 548.091 is the general provision that makes a judgment lien a specific lien against real estate from the time of the entry and docketing of the money judgment.

In the present case, the Divorce Decree provided that the payments at issue in paragraph 20 of the Divorce Decree "shall be in the nature of family support." [App. at 65.] Thus, section 548.091 of Minnesota statutes, titled: "Support, Maintenance, or

County Reimbursement Judgments,” applies to the process for entering and docketing money judgments for defaults in the payments required under the Divorce Decree. Neither maintenance nor child support provisions in a divorce judgment and decree automatically rise to the level of a docketed money judgment or judgment lien under section 548.091. Simons was required to follow the judgment statute to docket any money judgment and thus obtain a judgment lien against the Property. Section 548.091 has detailed provisions and procedures that first required Simons to serve a notice of default upon Shiltz for failing to make required payments under the Divorce Decree, wait 20 days for a default, and then file a statutorily required affidavit before court administration could enter or docket a specific money judgment arising under the Divorce Decree. Minn. Stat. § 548.091 (2006). Only after Simons followed the statutory procedures would she be entitled to docket any judgment so as to create a judgment lien against the Property.

In fact, Simons followed the correct procedure in obtaining money judgments on two separate occasions. Both of these judgment liens arose out of the Divorce Decree and resulted from Shiltz’s failure to pay his obligations after entry and docketing of these judgments. [App. at 175-76.] The earlier of the two judgments was entered and docketed against Shiltz on March 12, 2004, in the amount of \$11,964.98. [Id. at 175.] Simons followed the statutory procedures of giving notice to Shiltz and filing the required affidavits before the entry and docketing of this judgment. [Id.] Because the Bank’s Mortgage was recorded two years earlier, this judgment lien is junior and inferior to the Bank’s Mortgage.

The second judgment lien arose on November 16, 2005, which was the date of its entry and docketing with the Wright County Court Administrator for the amount of \$22,229.21. [Id. at 176.] Again, Simons served the statutory notice of default and filed the required affidavits to have the money judgment entered and docketed with the Wright County Court Administrator. These docketed money judgments are the only judgment liens Simons has of record against the Property. [Id.] Simons did not redeem from the Bank's foreclosure sale as a junior creditor, and as a result, her two judgment liens no longer exist as liens against the Property.

Simons also failed to follow the statutory procedures for obtaining a money judgment or judgment lien against Shiltz with regard to the purported lien she now attempts to claim under the Divorce Decree. For this reason, Simons has no judgment lien to foreclosure against the Property, and her recent foreclosure sale was a nullity.

The *Dolly* case cited in Simons' Memorandum is factually distinguishable from the present case because the court in *Dolly* ruled merely on the priority of a judgment lien arising out of a docketed money judgment, a fact pattern that was dispositive in Dolly, but is entirely absent in the present case. The clear and unmistakable ruling of the Court in the *Dolly* case was to give Dorothy Nichols priority for her judgment lien from the time that her money judgment was docketed in 1972, and therefore became a judgment lien on real estate in the county.

Simons accurately points out that many of the factual features of the *Dolly* case appear identical to the present matter. For instance, Nichols recorded a quit claim deed and the divorce decree, along with making the same argument that her recording of the

deed and decree against the property in that case would “constitute a valid lien on the property.” *Dolly*, 386 N.W.2d at 263. Simons in this case similarly argues for the creation of some kind of lien rights because she recorded the Deed and Divorce Decree on April 16, 2002. The *Dolly* court even recited the decree language for Nichols to receive a mortgage, and the failure of Nichols to get the mortgage executed by her ex-spouse. *Id.* at 262.

The *Dolly* court’s decision was however absolutely clear that the recording of the deed and divorce decree had nothing to do with its ruling on the priority of Nichols docketed money judgment. *Id.* at 263. Instead, the *Dolly* court reasoned that “[a] judgment lien was thus created on all property owned by Mammenga at the time this judgment and decree was docketed.” *Id.* Because the Wright County Court Administrator’s records clearly demonstrate that Simons failed to have any money judgment docketed against Shiltz until March 11, 2004, which is long after the Bank’s Mortgage was recorded, *Dolly* provides no support for Simons’ priority arguments. Its implicit application of the race-notice statute favors a ruling in this case in favor of the Bank.

Simons mistakenly relies upon the Minnesota Supreme Court decision in *Oldewurtel v. Redding*, 421 N.W.2d 722 (Minn. 1988) (even after the date that the divorce decree was entered and a quit claim deed given to an ex-spouse, a later recorded mortgage was found to have priority over any lien awarded in the earlier divorce decree; only an actually docketed judgment became a lien at much later date); *rev’g, Redding v. Oldewurtel*, 411 N.W.2d 231 (Minn. Ct. App. 1987) (court of appeals recognized that

lien created in divorce decree did not attach to real estate until after recording of bank's mortgage, but equitably subordinated the later created judgment lien over the earlier recorded mortgage on a finding bad faith by the Bank). The court in the *Oldewurtel* case held that a bank's recorded mortgage from 1985 took priority over an ex-spouse's judgment lien from 1986, even though the divorce decree was filed in 1984. *Id.* at 728. The *Oldewurtel* court reasoned that at the time the bank's mortgage was recorded in 1985, the wife held only an unsecured money judgment that remained undocketed as part of the earlier divorce decree, dated December 5, 1984. The Supreme Court even referred to Oldewurtel's lien rights awarded in the divorce decree as merely a "potential" interest in the property." *Oldewurtel*, 421 N.W.2d at 725.

The importance of the *Oldewurtel* case in fact is that the mere notice of a "potential" lien, even if part of an order that has already been entered, and even reduced to a money judgment (but not docketed), is insufficient to create a lien that attaches to property. *Id.* In fact, the *Oldewurtel* court found (or at least assumed) that the bank had actual knowledge of the divorce action, and even had actual knowledge of the undocketed, money judgment. *Id.* at 726. The Supreme Court stated that "we will assume that all parties had full knowledge in order to show that such knowledge does not change the result." *Id.* This fact pattern is identical to the present case, because the Bank in this case had constructive knowledge, and probably had actual knowledge of the divorce case. However, because Simons did not docket either of her two small judgments until long after the Bank's Mortgage was recorded, no judgment lien or mortgage lien exists in Simons' favor that has priority ahead of the Bank. The Bank's knowledge of a

potential mortgage lien against the Property would not have legal consequences for the Bank until such time as the Bank had actual knowledge of a fully executed and delivered second mortgage by Shiltz. The undisputed facts show that no such mortgage document ever existed.

**III. THE TRIAL COURT ERRED IN RULING THAT NO MATERIAL FACTS WERE IN DISPUTE AS TO SIMONS' OBLIGATION TO SUBORDINATE HER ALLEGED MARITAL LIEN TO THE MORTGAGE INTEREST OF THE BANK.**

Paragraph 20 of the Judgment and Decree also provides for Simons to subordinate any interest she may have to the interest of a mortgage taken out for the purpose of refinancing by Shiltz. [Id. at 65-66.] Paragraph 20 specifically provides:

...Said mortgage is not to be subordinated to any subsequent refinancing of the home. However, to the extent Simons is refinancing the homestead for the purpose of paying to Petitioner loan proceeds to be applied towards satisfaction of Simons' obligation herein to Petitioner, then Petitioner shall subordinate her second mortgage to permit Simons' refinancing in an amount to pay off the first mortgage and such additional amount payable to Petitioner as provided herein.

[Id. at 66 (emphasis added).] The clear and unmistakable intention of the above provision was for Simons' mortgage to be junior to the Wells Fargo Bank mortgage, which was the existing first mortgage at the time. [Id.] In addition, Simons' mortgage lien was to be junior to a loan obtained by Shiltz to pay money to Simons toward his obligations under the Divorce Decree. [Id.] The intent of the parties was that Simons would have a junior mortgage behind the interests currently represented by the Bank's Mortgage. [Id.]

The known equity in the Property at the time was stated in the Divorce Decree as only \$216,000.00, which means that because Simons received cash for \$175,400.00 of that equity, only about \$40,000.00 in equity remained to secure her right to payment of more than \$200,000.00 under the Divorce Decree. [Id. at 108.] At that time, Simons was grossly undersecured by her (unperfected) mortgage rights.

Simons' current efforts to ignore the Divorce Decree provisions give her a substantial windfall that elevates her from having very little security in the Property (assuming Shiltz had given her the mortgage he promised to give) to being fully secured at the Bank's great expense. This unintended result is not only inequitable, but entirely ignores the economic realities and commercial expectations of the very same Bank that issued a check to Simons in the amount of \$175,400.00 in the first place. Because there is insufficient equity to satisfy both the Bank and Simons from the Property, the windfall to Simons will likely equal the harm suffered by the Bank. It would be inequitable for the Bank to get caught in this ongoing family court matter.

The Bank's loan file contains a letter dated March 19, 2002 from Simons' divorce attorney that acknowledges that Simons will subordinate her interest in the Property to Shiltz's loan with the Bank. The letter inexplicably suggests that a judgment lien will be created upon the recording the quit claim deed. [App. at 104-05.] It also suggests that Simons will only subordinate to the amount she receives from Shiltz in loan proceeds, which directly contradicts paragraph 20 of the Divorce Decree requiring that she "shall subordinate her second mortgage to permit Simons' refinancing in an amount to pay off the first mortgage and such additional amount payable to Petitioner ..." [Id. at 66.]

Thus, not only did the Divorce Decree itself require Simons to subordinate to Shiltz's refinancing, but Simons' divorce attorney at the time also acknowledged her obligations to subordinate. Simons cannot be entitled to unfairly benefit from her own failure to perform her obligations under the Divorce Decree.

Despite the clear intentions of the parties to the Divorce Decree as to the result of refinancing the Property, the lengthy and numerous provisions in paragraph 20 of the Divorce Decree appear to be somewhat ambiguous, which may also create material fact dispute as to some of the obligations under the Divorce Decree. For instance, a few references are made to a promissory note, but no such promissory note has been uncovered to date. [Id.] Paragraph 20 does not explicitly grant Simons a "lien" or "judgment lien" against the Property, but instead makes vague references to his "homestead" being "security" for the nonexistent "promissory note." [Id.] Extrinsic evidence will most likely establish which real property is the homestead of Shiltz, the basic terms of the promissory note, and whether or not the parties intended to reduce a written promissory note to writing. Many unspoken assumptions may be important to understanding precisely the meaning of paragraph 20 of the Divorce Decree. No doubt, additional assumptions and other extrinsic evidence will explain exactly what was meant by the lien and subordination provisions as well. To the extent that any such ambiguities or intentions of the parties to the Divorce Decree are found to impact the present priority issue, summary judgment is not proper until the completion of discovery surrounding the Divorce Decree. However, based upon the absence of any recorded mortgage or prior

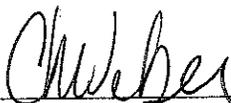
docketed judgment in favor of Simons, the subordination provision of the Divorce Decree will likely be irrelevant to the disposition of this case.

**CONCLUSION**

Based upon the above arguments, it is clear that the trial court erred in granting Simons' summary judgment motion. First, although Simons recorded the Divorce Decree with the county, this was insufficient to create or perfect any lien she was granted under the Divorce Decree. Second, the trial court erred in determining that there was no issue of material fact regarding Simons' obligation to subordinate her mortgage to the Bank's. For these reasons, Sterling State Bank respectfully requests the Court reverse the trial court's grant of summary judgment and remand this case to be determined on its merits.

WILFORD & GESKE, P.A.

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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) (with amendments effective July 1, 2007).