

**Appellate Case No. A06-1999**

**STATE OF MINNESOTA  
IN COURT OF APPEALS**

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Sterling State Bank,

Appellant,

v.

Ann Marie Simons,

Respondent.

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**RESPONDENT'S BRIEF**

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## ISSUES PRESENTED

**I. Did the District Court err when it followed Minnesota Supreme Court precedent and held that Ann Marie Simons had a valid lien of first priority in the Property pursuant to the Dissolution Decree?**

- The District Court properly found that the Dissolution Decree created a valid lien on the Property in favor of Ann Marie Simons, and that the lien was superior to Sterling State Bank's interest in the Property.
- Apposite Authority: Oldewurtel v. Redding, 421 N.W.2d 722 (Minn. 1988); Minnesota Statute § 507.34 (2006).

**II. Did the District Court err in ruling that there were no genuine issues of material fact where Sterling State Bank did not raise any material fact issues in its summary judgment submittals or at the summary judgment hearing?**

- The District Court properly found that there were no disputed issues of material fact.
- Apposite Authority: DLH, Inc. v. Russ, 566 N.W.2d 60 (Minn. 1997); Minnesota Rule of Civil Procedure 56.05.

## STATEMENT OF THE CASE

This case is dispute over the priority of the parties' interests in real property. The property is located at 5014 Parrish Avenue NE, City of St. Michael, County of Wright, State of Minnesota (the "Property"). Ann Marie Simons ("Simons") received a lien on the Property as a result of a marital dissolution decree ("Dissolution Decree") entered by the Wright County District Court on January 11, 2002. (App. 66, 216.) The Dissolution Decree terminated the marriage between Simons and Bryan Lee Shiltz ("Shiltz") and gave ownership of the Property to Shiltz subject to Simons's lien (App. 36–37, 65–66.)

Simons provided Appellant Sterling State Bank ("SSB") with actual notice of her lien on March 19, 2002, if not earlier. (App. 152.) Simons then recorded the Dissolution

Decree, which created and evidenced her lien, with the Wright County Recorder on April 16, 2002. (App. 79.) Despite receiving notice of Simons's lien, SSB entered into a mortgage with Shiltz on May 8, 2002. (App. 130–33.) SSB recorded that mortgage on May 29, 2002—one-and-a-half months after Simons recorded her lien. (App. 78.)

Simons filed this lawsuit to (1) confirm the validity of her lien and (2) declare her lien superior to all other interests in the property. (App. 3–8.) Minnesota law is clear that a lien may be created in favor of an ex-spouse on the other spouse's real property if the dissolution decree provided the ex-spouse with a security interest in the other spouse's real property. See Oldewurtel v. Redding, 421 N.W.2d 722, 725, 727 n.4 (Minn. 1988). Such a lien is valid and enforceable from the date the dissolution decree is entered. See id. Minnesota law is equally clear that such a lien is enforceable against any subsequently-recorded interests in the same property or against any parties that acquire interests in the property with knowledge of the lien. See Minn. Stat. § 507.34. Because Simons recorded her lien before SSB (and the other defendants) and because SSB knew of Simons's lien before entering into the mortgage with Shiltz, Simons moved for summary judgment. (See App. 24–31.) SSB was the only defendant to oppose Simons's motion. (See App. 88–106.)

The District Court granted Simons's motion for summary judgment on April 14, 2006. (App. 187–92.) The District Court found that Simons has a valid lien on the property. (App. 190.) It also found that SSB had actual knowledge of Simons's lien prior to executing and recording the mortgage with Shiltz. (Id.) As a result, the District Court held that Simons's lien was valid and superior to SSB's mortgage (and the other

defendants' interests) and granted Simons's motion for summary judgment. (App. 187–92.) This holding was correct and should be affirmed on appeal.

### **STATEMENT OF FACTS**

#### **I. THE DISTRICT COURT'S DISSOLUTION DECREE GAVE SIMONS A LIEN OVER THE PROPERTY.**

Simons petitioned the Wright County District Court to dissolve her marriage to Shiltz. On January 11, 2002, the District Court entered its Findings of Fact, Conclusions of Law, Order for Judgment, and Judgment and Decree (the “Dissolution Decree”) dissolving the marriage between Simons and Shiltz. (App. 36.) Pursuant to Conclusion of Law 20 of the Dissolution Decree, Shiltz was ordered to pay Simons a cash property settlement in the amount of \$380,226. (App. 65.) This amount was payable in monthly installments of \$7,314.26, with an interest rate of 6% on the unpaid balance. (*Id.*) In return, Simons was required to convey her ownership in the Property to Shiltz.<sup>1</sup> (App. 59, 65-66.)

As security for the property settlement, Simons received a lien on the Property. (App. 66, 216.) Specifically, Conclusion of Law 20 stated that the “property awarded to

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<sup>1</sup> Conclusion of Law 20 refers to this property as the “Homestead.” The term “Homestead” is defined in Conclusion of Law 12(a) as 5014 Parrish Avenue NE, City of Rogers, County of Hennepin, State of Minnesota. (App. 59.) The property is located at 5014 Parrish Avenue, but is in the City of St. Michael and in Wright County. Both parties agree as to this fact. (*See* App. 89.)

Respondent [Shiltz]<sup>2</sup> shall constitute security for Respondent’s property settlement obligation.” (App. 66.) This language created a lien in Simons’s favor on the Property. To further evidence this lien, Shiltz was supposed to execute a second mortgage against the Property in favor of Simons. (Id.) The Dissolution Decree, however, does not condition the creation of Simons’s lien on the execution of a second mortgage by Shiltz. (Id.) Simons’s lien was not to be subordinated to any subsequent refinancing of the Property unless Simons received proceeds from the refinancing in satisfaction of Shiltz’s property settlement obligation. (Id.) If Shiltz defaulted on his property settlement obligation, Simons had the right to foreclose her lien on the Property. (Id.)

Under the Dissolution Decree, Shiltz’s obligation to pay Simons was also secured by (1) Shiltz’s 25% ownership of certain Riverwood commercial property and (2) Shiltz’s business assets and stock ownership in Top Gun, Inc. (App. 66–67.) Shiltz, however,

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<sup>2</sup> Specifically, Conclusion of Law 20 states:

Respondent shall execute a second mortgage in favor of Petitioner against his homestead, which has equity of approximately \$216,000. Said mortgage is not to be subordinated to any subsequent refinancing of the home. However, to the extent Respondent is refinancing the homestead for the purpose of paying to Petitioner loan proceeds to be applied towards satisfaction of Respondent’s obligation herein to Petitioner, then Petitioner shall subordinate her second mortgage to permit Respondent’s refinancing in an amount to pay off the first mortgage and such additional amount payable to Petitioner as provided herein.

(App. 66.) Throughout its Brief, SSB defines “Respondent” as Simons when discussing the Dissolution Decree. (See, e.g., Appellant’s Br. 3, 9, 11, 17.) While Simons is the Respondent in this Appeal, she was the Petitioner in her marital dissolution action. Nonetheless, because it mistakenly references Simons as the Respondent, SSB’s brief suggests that Simons had a duty to obtain a mortgage from Shiltz. As demonstrated by the foregoing language, such a suggestion is erroneous.

surreptitiously sold the Riverwood commercial property and his interest in Top Gun, Inc., without informing Simons. (App. 183, n.5.) As a result, Simons was left with only a lien on the Property.

## **II. SIMONS NOTIFIED SSB OF HER LIEN ON THE PROPERTY.**

After the Dissolution Decree was entered, Simons contacted SSB for the purpose of notifying it that she had a lien on the Property. Specifically, on March 19, 2002, Simons's previous attorney, Wally Bauch, sent SSB a letter<sup>3</sup> stating the following:

As you are aware, the Judgment and Decree of Dissolution of the Shiltz marriage provides that Ms. Shiltz [Simons] retains a lien in the above-captioned property until such time as Mr. Shiltz has paid his property settlement obligation in full to Ms. Shiltz [Simons].

(App. 152.) By sending this letter, Simons provided SSB with *actual notice* of her lien on the Property. SSB has never denied that it had actual knowledge of Simons's lien over the Property. (App. 217, n.2.) To the contrary, they admitted that they "had constructive knowledge, and probably had actual knowledge of the divorce case." (App. 103.)

## **III. SIMONS RECORDED HER LIEN BEFORE SSB RECORDED ITS INTERESTS IN THE PROPERTY.**

On March 21, 2002, Simons conveyed her ownership interest in the Property to Shiltz via quitclaim deed. (App. 34, 74.) In doing so, she specifically reserved her rights under the Dissolution Decree, including her lien on the Property. (App. 74.) Shiltz subsequently defaulted on his payment obligations under the Dissolution Decree and

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<sup>3</sup> This letter made clear that Simons only agreed to subordinate to the First Mortgage.

never executed a second mortgage on the property in favor of Simons. (App. 217.) On March 22, 2002, Shiltz granted SSB a mortgage in the Property to secure a loan in the amount of \$176,327.95 (the “First Mortgage”).<sup>4</sup> (App. 112.) Simons received \$175,400 from the First Mortgage. (App. 111.)

On April 16, 2002, Simons recorded the Dissolution Decree with the Wright County Recorder. (App. 79.) Subsequently, on May 8, 2002, unbeknownst to Simons, Shiltz granted SSB another mortgage to secure a loan in the amount of \$361,000 (the “Second Mortgage”). (App. 130–33.) The proceeds of the Second Mortgage were used to pay off the First Mortgage as well as a pre-existing mortgage on the Property. (App. 217.) None of the funds from the Second Mortgage, however, were used to satisfy Shiltz’s payment obligation to Simons. (App. 217.) Accordingly, Simons had no duty to subordinate her lien to the Second Mortgage. SSB recorded the Second Mortgage with the Wright County Recorder on May 29, 2002. (App. 78.) SSB also insured the Second Mortgage with title insurance from Universal Title. (Appellant’s Br. 6.) Universal Title, however, apparently failed to read the Dissolution Decree recorded with the Wright County Recorder and failed to make the Dissolution Decree an exception to its title policy. (See id.)

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<sup>4</sup> The “First Mortgage” was subsequently satisfied, and is not the mortgage pursuant to which SSB claims an interest in the Property. Moreover, while referred to as the “First Mortgage” in this Brief, SSB’s March 22, 2002, mortgage was subordinate to a previous mortgage that Simons and Shiltz granted when they purchased the Property.

**IV. SIMONS SUED TO DECLARE HER LIEN VALID AND SUPERIOR TO ANY OTHER INTERESTS IN THE PROPERTY; THE DISTRICT COURT AGREED AND HELD THAT SIMONS'S LIEN WAS SUPERIOR TO ALL OTHER INTERESTS IN THE PROPERTY.**

On December 14, 2005, Simons sued SSB and all other parties with an interest in the Property for a judgment declaring her lien superior to all other interests. (App. 3–8.) On March 10, 2006, Simons brought a motion for summary judgment. (App. 22–23.) The only party to oppose Simons's motion was SSB. (App. 86–106.) On April 14, 2006, the District Court granted Simons summary judgment declaring her lien valid and superior to all other interests in the property. (App. 186–92.) SSB admitted at the summary judgment hearing that the Dissolution Decree gave Simons a lien and did not dispute that it had actual knowledge of that lien. Accordingly, the District Court found that Simons's lien was valid and superior to SSB's Second Mortgage under Minnesota Statutes § 507.34. (See *id.*) In rendering its decision, the District Court found the Minnesota Supreme Court's decision in Oldewurtel v. Redding, 421 N.W.2d 722, 726 (Minn. 1988), particularly persuasive. (See *id.*)

Despite granting Simons's summary judgment, and permitting her to sell the Property at Sheriff's sale, the District Court's April 14, 2006 Order did not specify a monetary figure for the amount due on the lien, nor did it award a specific amount of attorneys' fees. (App. 186–92.) Because such a figure was necessary to sell the Property at Sheriff's sale, and because none of the defendants ever contested the amount Simons claimed Shiltz owed, Simons brought a motion to amend the Order to include a monetary figure. (App. 195–200.) On August 4, 2006, the District Court granted Simons's motion

and stated that the amount Shiltz owes Simons as of March 7, 2006, was \$247,256.35, with interest, costs, and fees continuing to accrue thereafter.<sup>5</sup> (App. 215–18.) On October 31, 2006, the Property was sold at Sheriff’s sale conducted pursuant to the District Court’s Order. Simons was the successful bidder at that sale.

## ARGUMENT

### **I. STANDARD OF REVIEW.**

In reviewing a grant of summary judgment, the Court of Appeals asks two questions: (1) whether the district court erred in its application of the law and (2) whether there are any genuine issues of material fact. Hubred v. Control Data Corp., 442 N.W.2d 308, 310 (Minn. 1989). Here, the answer to both of these questions is no.

### **II. THE TRIAL COURT PROPERLY FOUND THAT SIMONS HOLDS A VALID AND ENFORCEABLE LIEN THAT IS SUPERIOR TO SSB’S SECOND MORTGAGE ON THE PROPERTY.**

#### **A. Pursuant to Minnesota Law, Simons Has a Valid Lien on the Property.**

In a marital dissolution action, a lien may be created in favor of an ex-spouse on the other spouse’s real property in two ways: (1) the dissolution decree may provide one spouse with an interest in the other spouse’s real property as security for payment obligations under the divorce decree or (2) a spouse may docket a money judgment awarded under the divorce decree pursuant to Minnesota Statutes § 548.091. Oldewurtel v. Redding, 421 N.W.2d 722, 725, 727 n.4 (Minn. 1988). The Minnesota Supreme Court’s decision in Oldewurtel, which involved facts similar to those at issue here, demonstrates the first method for creating a lien.

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<sup>5</sup> SSB does not appeal this ruling.

In Oldewurtel, the Minnesota Supreme Court was called upon to sort out the priority of Oldewurtel's alleged lien vis-à-vis Windom State Bank's mortgage on Redding's real property. The relevant facts were as follows. On December 5, 1984, the trial court issued a dissolution decree requiring Redding (the ex-husband) to pay Oldewurtel (the ex-wife) \$257,705. Id. at 725. The trial court, however, failed to include any provision in the dissolution decree securing the amount due Oldewurtel with an interest in Redding's real property. Redding appealed the dissolution decree. In March 1985, while that appeal was pending, Redding granted a \$140,000 mortgage to Windom State Bank on his real property. Id. The bank recorded the mortgage on April 2, 1985. In July 1985, the Court of Appeals remanded the case to the trial court. On May 28, 1986, the trial court filed an order for judgment requiring Redding to pay Oldewurtel \$100,000 of his payment obligation within 120 days and the remainder over a ten-year period. Id. Unlike its December 1984 decree, the trial court secured this judgment "by all of [Redding's] stock and real estate." Id.

Based on these facts, the Minnesota Supreme Court held that the dissolution decree dated December 5, 1984, did not create a lien in Oldewurtel's favor because it did not secure Oldewurtel's right to payment with an interest in Redding's real property. Id. at 727. Instead, the dissolution decree only provided for an unsecured monetary award that Oldewurtel needed to docket as a judgment in order to create a lien. Id. The Supreme Court, however, stated that a lien would have been created in Oldewurtel's favor if the dissolution decree had secured Oldewurtel's right to payment with an interest in Redding's real property. Id. The Supreme Court also stated that such a lien would

have arisen on the date of the dissolution decree and, thus, would have been superior to Windom State Bank's mortgage: "[T]he December 5, 1984 Order contains no provision for securing Oldewurtel's award. *Had such a provision been made*, as it was in the May 28, 1986 Order, *Oldewurtel's lien would have arisen against these appellants on that date.*" *Id.* at 727, n.4 (emphasis added).<sup>6</sup>

As Oldewurtel demonstrates, Simons has a valid lien. Simons's Dissolution Decree secures her right to payment from Shiltz with an interest in Shiltz's real property. Specifically, Conclusion of Law 20 of the Dissolution Decree states as follows:

As security for payment of the promissory note and property settlement payable to Petitioner [Simons] by Respondent [Shiltz], the following *property awarded to Respondent* [Shiltz] shall *constitute security for Respondent's property settlement payment obligation*.

(App. 66 (emphasis added).) The "property awarded to Respondent" was the Property. Thus, according to the Minnesota Supreme Court's reasoning, Conclusion of Law 20 creates a valid lien on the Property in favor of Simons. It does not matter whether Simons docketed the judgment she received. See Oldewurtel, 421 N.W.2d at 725–27 (finding that a judgment under a dissolution decree did not need to be docketed in order to create a lien). As will be demonstrated below, Minnesota Statutes § 507.34 mandates

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<sup>6</sup> Despite SSB's arguments, Dolly v. Nichols does not contradict Oldewurtel. See 386 N.W.2d 261, 262–63 (Minn. App. 1986). Dolly was decided before Oldewurtel and states that a money judgment in a divorce may be docketed to create a judgment lien. *Id.* at 263. Oldewurtel states that a valid and enforceable lien may arise upon entry of a dissolution decree, if the dissolution decree provides one spouse a security interest in the other spouse's real property. 421 N.W.2d at 727 n.4. As stated above, these are two non-exclusive mechanisms for creating a lien in favor of an ex-spouse on the other spouse's property.

that once created this lien became superior to and enforceable against anyone with actual or constructive knowledge of the lien (such as SSB) or any interests that were recorded after Simons recorded her lien (such as SSB's Second Mortgage).

**B. SSB Admitted that Simons Has a Valid Lien on the Property.**

SSB spends a large portion of its brief arguing that Simons does not have a lien on the Property and that the District Court erred in finding that Simons has a valid lien. (Appellant's Br. at 8–12, 15–17.) This argument is disingenuous. At the summary judgment hearing, SSB twice admitted that Simons had a lien on the Property. (Transcript 29:24–30:2; 45:12–13.) In fact, the last representation SSB made to the District Court was “*We admit they have a lien. It's not perfected.*” (Transcript 45:12–13 (emphasis added).) Thus, according to SSB, the only issue for the District Court, was whether Simons's lien was properly perfected—*not* whether Simons has a lien. For this reason and the reasons set forth above, SSB cannot argue that the District Court erred in finding that Simons has a lien.

**C. Minnesota Statutes § 507.34 Mandates that Simons's Lien is Superior to SSB's Second Mortgage on the Property.**

**1. Simons Recorded Her Lien Before SSB Recorded Its Second Mortgage on the Property.**

Minnesota Statutes § 507.34 determines the priority of liens and mortgages on real property according to the date they were filed with the county recorder. See Minn. Stat. § 507.34. An earlier recorded lien or mortgage is superior to a lien or mortgage that is recorded later. Id. An interest in real property that is not properly recorded “shall be void as against any subsequent purchaser in good faith and for a valuable

consideration . . . whose conveyance is first duly recorded.” Minn. Stat. § 507.34. A good-faith purchaser is one who gives valuable consideration for property without actual, implied, or constructive notice of other parties’ interests in the property. Claffin v. Commercial State Bank of Two Harbors, 487 N.W.2d 242, 247–48 (Minn. App. 1992).

Here, it is undisputed that Simons recorded her lien before SSB recorded its mortgage. (App. 78-79; see also Transcript 35:19–21 (“But I do agree with Mr. Vyvyan that with respect solely to what they call a priority issue, I don’t believe that there are any disputed material facts.”).) Simons’s lien was created pursuant to the Dissolution Decree on January 11, 2002. The Dissolution Decree was recorded with the Wright County Recorder on April 16, 2002. SSB’s Second Mortgage, however, was not entered into until May 8, 2002, and was not recorded until May 29, 2002. Thus, under § 507.34, Simons’s lien is superior to SSB’s Second Mortgage as a matter of law.

**2. Simons’s Lien is Superior to SSB’s Second Mortgage Because SSB Entered into that Mortgage with Actual Knowledge of Simons’s Lien.**

SSB argues that Simons did not “perfect” her lien by recording the Dissolution Decree with the Wright County Recorder and that, therefore, SSB’s Second Mortgage is superior to Simons’s lien. (Appellant’s Br. 9; Transcript 45:11–12 (“We admit they have a lien. It’s not perfected.”). SSB is mistaken. Minnesota Statutes § 507.34 provides that “[e]very conveyance of real estate shall be recorded,”<sup>7</sup> including dissolution decrees that

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<sup>7</sup> “Conveyance” is defined by Minnesota Statutes § 507.01 and includes “every instrument in writing whereby any interest in real estate is created, aliened, mortgaged, or assigned or by which the title thereto may be affected in law or in equity, except wills, leases for a term not exceeding three years, and powers of attorney.” Thus, the

create or convey liens. Accordingly, if a dissolution decree is recorded pursuant to § 507.34, the lien created by that dissolution decree is “perfected” and is valid against all interests recorded subsequently.

Nonetheless, even assuming Simons failed to properly “perfect” her lien, that lien is still superior to SSB’s Second Mortgage. Section 507.34 provides that an unrecorded or “unperfected” lien is valid and superior to any interests acquired by parties not in good faith—i.e., acquired by parties having actual or constructive knowledge of adverse, unrecorded interests.

SSB acquired the Second Mortgage with actual knowledge—or, at a minimum, constructive knowledge—of Simons’s lien. On March 19, 2002, before SSB entered into the Second Mortgage, Simons sent SSB a letter providing it with actual notice of Simons’s Lien:

As you are aware, the Judgment and Decree of Dissolution of the Shiltz marriage provides that Ms. Shiltz [Simons] retains a lien in the above-captioned property until such time as Mr. Shiltz has paid his property settlement obligation in full to Ms. Shiltz [Simons].

(App. 152.) Moreover, SSB has never disputed that it had actual knowledge of Simons’s lien before entering into the Second Mortgage. (App. 217, n.2.) Regardless, SSB admitted that it had constructive knowledge of the lien in its summary judgment submittals. (App. 103 (“[T]he Bank had constructive knowledge, and probably had actual knowledge of the divorce case.”).) Accordingly, because SSB had actual knowledge or constructive knowledge of Simons’ lien, SSB did not acquire the Second

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Dissolution Decree creating a lien in Simons’s favor is clearly a conveyance that should be recorded under § 507.34.

Mortgage in good faith. Thus, as the district court held, SSB's Second Mortgage is junior to Simons's lien regardless of whether Simons's lien was properly perfected. (See App. 190–92.)

**III. SHILTZ'S DUTY TO EXECUTE A SECOND MORTGAGE IN SIMONS'S FAVOR WAS NOT A CONDITION PRECEDENT TO THE CREATION OF SIMONS'S LIEN.**

Conclusion of Law 20 states “[a]s security for payment of the promissory note and property settlement payable to Petitioner [Simons] by Respondent [Shiltz], the following property awarded to Respondent shall constitute security for Respondent's property settlement obligation. Respondent shall execute a second mortgage in favor of Petitioner against his homestead.” (App. 66.) Notwithstanding the clarity of this language, SSB claims that Conclusion of Law 20 “expressly require[s] Plaintiff to obtain a mortgage from Shiltz to perfect her security interest in the property.” (Appellant's Br. 9.) SSB misreads Conclusion of Law 20.

Conclusion of Law 20 does not condition—either expressly or implicitly—the creation of Simons's security interest on Shiltz's execution of a second mortgage in her favor. (See App. 66.) To the contrary, Conclusion of Law 20 states (1) that the property awarded to Shiltz shall serve as security for his payment obligation and (2) that Shiltz shall execute a second mortgage on the property to evidence Simons's security interest. (Id.) Simons, however, could record either the Dissolution Decree or the mortgage (had Shiltz executed one) to provide notice of her lien to third parties. SSB ignores this fact and the plain language of Conclusion of Law 20 in arguing that Shiltz's duty to record a second mortgage is a condition precedent to the creation of Simons's lien.

Moreover, contrary to SSB’s contention, Conclusion of Law 20 does not place the onus of obtaining a second mortgage on Simons. Conclusion of Law 20 states that “*Respondent* shall execute a second mortgage in favor of Petitioner against his homestead.” (App. 66 (emphasis added).) The respondent being referred to is Shiltz. Accordingly, SSB’s argument that Conclusion of Law 20 “expressly require[s] Plaintiff to obtain a mortgage from Shiltz” is simply wrong.

Finally, SSB makes the argument that Simons had a contractual right under the Divorce Decree to require that the court order Shiltz to execute a second mortgage. (Appellant’s Br. 9.) This argument is irrelevant to a priority determination under Minnesota Statutes § 507.34. All that matters is that SSB had actual or constructive knowledge of the dissolution decree prior to executing and recording the Second Mortgage—which SSB admits. Moreover, the argument was not made to the District Court and, therefore, need not be considered here.<sup>8</sup> (Compare Appellant’s Br. 9 with App. 96.)

#### **IV. SIMONS IS NOT OBLIGATED TO SUBORDINATE HER LIEN TO SSB’S SECOND MORTGAGE.**

While unclear, SSB appears to argue that Simons is obligated to subordinate her lien to SSB’s Second Mortgage. (See Appellant’s Br. 17–20.) SSB’s argument is

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<sup>8</sup> SSB’s argument that Simons failed to get a “Summary Real Estate Disposition Judgment” (Compare Appellant’s Br. 11, n. 3 with App. 96–98.) was not raised to the District Court and should be disregarded.

In addition, SSB argues that the “title examiner can ignore the Divorce Decree in the absence of the required mortgage [from Shiltz to Simons].” (App. 96–98.) SSB, however, fails to cite any authority for this argument. Accordingly, it should be disregarded.

premised on its misreading of Conclusion of Law 20. SSB argues that “the intent of the parties was that Simons would have a junior mortgage behind the interests currently represented by the Bank’s Mortgage.” (*Id.* at 17.) The plain language of Conclusion of Law 20, however, reveals a critical flaw in SSB’s position—the proceeds of the loan secured by SSB’s Second Mortgage were not used to pay off Shiltz’s payment obligation to Simons.

Conclusion of Law 20 states, as a general rule, that Simons’s interest in Shiltz’s property is not to be subordinated to *any* subsequent refinancing of the home. (App. 66.) But there is one exception. Simons’s interest may be subordinated to Shiltz’s refinancing of the property “to the extent [Shiltz] is refinancing the homestead *for the purpose* of paying to [Simons] loan proceeds to be applied towards satisfaction of [Shiltz’s] obligation herein to [Simons].” (*Id.* (emphasis added).)

On March 22, 2002, Shiltz granted the First Mortgage to SSB, in the amount of \$176,327.95. Shiltz paid Simons \$175,400 from the First Mortgage in partial satisfaction of his payment obligation under the Dissolution Decree. Simons’s lien was subordinate to this First Mortgage because the proceeds were used to satisfy Shiltz’s payment obligation to Simons. Subsequently, on May 8, 2002, Shiltz granted the Second Mortgage to SSB, securing a loan in the amount of \$361,600. The proceeds from the Second Mortgage, however, were not used to satisfy Shiltz’s payment obligation to Simons. Rather, the loan proceeds were used to pay off the First Mortgage<sup>9</sup> from SSB to

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<sup>9</sup> The \$176,327.95 mortgage loan from SSB to Shiltz has been satisfied. (App. 217.)

Shiltz, as well as the pre-existing mortgage. Because the proceeds from the Second Mortgage were not used to pay Simons, Simons's lien is not subordinate to the Second Mortgage. SSB's argument to the contrary<sup>10</sup> contravenes the plain language of Conclusion of Law 20.<sup>11</sup>

**V. THE DISTRICT COURT PROPERLY FOUND THAT THERE WERE NO GENUINE ISSUES OF MATERIAL FACT.**

A party opposing the grant of summary judgment must “present specific *facts* showing that there is a genuine issue for trial.” Minn. R. Civ. P. 56.05 (emphasis added). Summary judgment will not be disturbed “when the non-moving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the non-moving party's case to permit reasonable persons to draw different conclusions.” DLH, Inc. v. Russ, 566 N.W.2d 60, 71 (Minn. 1997). Here, SSB fails to identify a specific fact dispute that is material to the issues in this case.

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<sup>10</sup> SSB contends that Conclusion of Law 20 “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.” (Appellants Br. 17 (emphasis added).) The language of Conclusion of Law 20, however, requires Simons to subordinate her interest “to the extent [Shiltz] is refinancing the homestead *for the purpose of paying to [Simons] loan proceeds to be applied towards satisfaction of Respondent's payment obligation herein to petitioner.*” (App. 66 (emphasis added).)

<sup>11</sup> SSB fails to make clear that it Shiltz granted it two separate mortgages. Instead, SSB appears to suggest that Shiltz's first and second mortgages with SSB are actually part of one large refinancing, taking place over a approximately 50 days. This is plainly not the case. To be sure, the District Court held that there were two separate mortgages between SSB and Shiltz. (App. 216-17.)

First, SSB argues that there *may* be fact issues because the Dissolution Decree appears ambiguous. (Appellant’s Br. 19.) The Dissolution Decree, however, is an order issued by the District Court. Whether a court order is ambiguous is a question of law. Head v. Metro. Life Ins. Co., 449 N.W.2d 449 (Minn. App. 1989) (“It is undisputed a court has jurisdiction to interpret and clarify a judgment which is ambiguous or uncertain on its face . . . . Whether language is ambiguous is a question of law.”). Further, SSB presented this issue to the District Court, which found that the provisions of the Divorce Decree were not ambiguous and held that there were no genuine issues of material fact. That finding should not be disturbed. Mikoda v. Mikoda, 413 N.W.2d 238, (Minn. App. 1987) (“On appeal, the trial court’s construction of its own decree has great weight.”).

Second, SSB does not identify any specific factual disputes. Rather, it claims that “the lengthy and numerous provisions in paragraph 20 of the Divorce Decree *appear* to be *somewhat* ambiguous, which *may* also create material fact dispute [sic] as to some of the obligations under the Divorce Decree.” (Appellant’s Br. 19 (emphasis added).) Such an argument is insufficient to create a genuine issue of material fact. See Minn. R. Civ. P. 56.05. At best, SSB’s argument that the Dissolution Decree “may create [a] material fact dispute” (Appellant’s Br. 19) presents a “metaphysical doubt as to a factual issue.” DLH, 566 N.W.2d at 71. As the Minnesota Supreme Court held in DLH, metaphysical doubt is insufficient to create a fact issue for trial. See id.

Finally, the fact issues SSB alleges are not material to the issue in this case—whether Simons’s lien is superior to SSB’s Second Mortgage. Three facts are sufficient to resolve this issue: (1) the date on which Simons’s lien arose; (2) the date on which

SSB's Second Mortgage was recorded; and (3) whether SSB had actual or constructive knowledge of Simons's lien before it recorded the Second Mortgage. As SSB admits, none of these facts are in dispute. (Transcript 35:19–21 (“But I do agree with Mr. Vyvyan that with respect solely to what they call a priority issue, I don’t believe there are any disputed material facts.”).) The parties do not dispute that the Dissolution Decree gave Simons a lien when it was entered by the District Court on January 11, 2002. (App. 190 (“The parties agree that the January 11, 2002 Judgment and Decree created a lien on the homestead in favor of Plaintiff.”); Transcript 45:11 (“We [SSB] admit they [Simons] have a lien.”).) The parties do not dispute that SSB's Second Mortgage was entered into on May 8, 2002, and recorded on May 29, 2002. (See Appellant's Br. 4–5.) And the parties do not dispute that SSB had actual knowledge of Simons's lien before it entered into the Second Mortgage and before it recorded the Second Mortgage. (App. 217, n.2 (“At the April 10, 2006 hearing, Plaintiff's attorney stated ‘They clearly were aware of the decree, your Honor. I don’t think that there is any dispute about that.’ This statement was never refuted by Defendant Sterling State Bank. In addition, Defendants Sterling State Bank admits in its memorandum [opposing summary judgment] that it had ‘constructive knowledge, and probably had actual knowledge of the divorce case.’”.) As the District Court held, these facts are sufficient to establish that Simons's lien is superior to SSB's Second Mortgage pursuant to Minnesota Statute § 507.34. (App. 190.) Any other fact disputes are not material to this issue.

## CONCLUSION

For the foregoing reasons, Simons has a valid lien on the Property and that lien is superior to SSB's interests in the Property. Accordingly, the Court should affirm the District Court's grant of summary judgment against SSB and deny SSB's request for a remand to the District Court.

Dated: January 8, 2007



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**CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that Respondent's Brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 1 and subd. 3(a)(1), for a brief produced with a proportional font. The font used in this brief is Times New Roman 13-point. The length of this brief is 5,524 words, exclusive of cover page, Table of Contents and Table of Authorities. This brief was prepared using Microsoft Word 2003.

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