

A08-418

NO. A08-569

State of Minnesota
In Court of Appeals

S.M. HENTGES & SONS, INC.,

Defendant,

vs.

RICHARD MENSING AND MARTHA A. MENSING, Husband and
 Wife; a/k/a RICHARD D. MENSING; MARTHA A. MENSING
 Revocable Living Trust, MARTHA A. MENSING AND
 RICHARD D. MENSING, Trustees,

Respondents,

and

LAND GEEKS, LLC, a Minnesota Limited Liability Company;
 MICHAEL VINCENT,

Defendants,

SHORT ELLIOTT HENDRICKSON, INC.,
 a Minnesota corporation,

Appellant,

THE CITY OF CANNON FALLS; AND
 THE COUNTY OF GOODHUE,

Defendants.

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. THE DISTRICT COURT ERRED IN REFUSING TO APPLY MINN. STAT. § 514.011, SUBD. 4b IN THIS CASE.

The district court erred in refusing to apply the prelien notice exception set forth in Minn. Stat. § 514.011, subd. 4b.

Here, despite finding "that the project was wholly residential in nature" and called for the development and construction of at least 22 residential lots, the district court refused to apply the exception set forth in Subdivision 4b, and instead, concluded that appellant Short Elliott Hendrickson, Inc. (SEH) was required to provide prelien notice under Minn. Stat. § 514.011, Subdivision 2(a). (App. 2-5, 11-12) In its decision, the district court never stated why the prelien notice exception contained in Subdivision 4b did not apply in this case. The Mensings do not dispute the district court's findings that the subdivision at issue in this case was wholly residential in nature and consisted of more than 20 residential lots. Based on these findings, the plain language of Subdivision 4b applied to SEH's mechanic's lien claim and did not require SEH to provide prelien notice as a condition to establishing a valid and enforceable mechanics' lien. The district court committed reversible error in failing to explain why, given the facts as it found, the statutory exception set forth in Subdivision 4b did not apply on its face.

II. THE DISTRICT COURT ERRED IN APPLYING *CHRISTLE V. MARBERG* BECAUSE IT DID NOT ADDRESS MINN. STAT. § 514.011, SUBD. 4b IN ANY WAY.

The district committed reversible error in refusing to apply the statutory exception set forth in Subdivision 4b after applying that both the district court and the Mensings concede did not address the exception set forth in Subdivision 4b.

In refusing to apply the prelien notice exception contained in Subdivision 4b, the district court declined to apply this court's decision in *E & H Earth Movers, Inc. v. Waland Cos.*, 1998 WL 157351 (Minn. App. Apr. 7, 1998). It instead relied on this court's decision in *Christle v. Marberg*, 421 N.W.2d 748 (Minn. App. 1988), despite acknowledging that "the issues addressed by the [*Christle*] court's decision were not the same as in this case." (App. 11-12, 18)

Both the district court and the Mensings concede that the prelien notice exception set forth in Subdivision 4b was not at issue nor raised in *Christle*. It was therefore improper for the district court to rely on that case as justification for not applying the plain language of Subdivision 4b to the present case. Because the application and interpretation of Subdivision 4b was never at issue in *Christle*, the case is inapposite to the issue of whether SEH was required to provide the Mensings with prelien notice in this case.

The only Minnesota appellate court decision addressing Minn. Stat. § 514.011, Subdivision 4b is this court's decision in *E & H*. As they did below, the Mensings argue this court should ignore *E & H* because it is unpublished and therefore not of precedential value. They also contend that "*E & H* was wrongly decided, and is in direct conflict with published decisions of the Supreme Court and the Court of Appeals" (Respondents' Brief at 2) The Mensings, however, fail to specifically cite those published decisions of the supreme court and this court that are "in direct conflict" with *E & H*. (*See id.*) The Mensings' inability to cite these decisions is not surprising because none exist. Although *E & H* is unpublished, and therefore not binding on this court, it is the only appellate decision in Minnesota that addresses the prelien notice exception set forth in Subdivision 4b. It therefore has persuasive value, and unlike *Christle*, affords relevant guidance and instruction

on how this court has previously addressed the interpretation and application of Subdivision 4b.

And contrary the Mensings' assertion, the decision in *Christle* is not "clear precedent." (Respondent's Brief at p. 4) The decision in that case is not precedential because it does not address nor mention the prelien notice exception set forth in Subdivision 4b. *See Christle*, 421 N.W.2d at 748-51. A case that shares similar facts is not precedential if it involves different legal theories, principles, or governing statutory provisions. The decision in *Christle* addressed the prelien notice exception set forth in Minn. Stat. § 514.011, subd. 4c, an all together different prelien notice exception from the one contained in Subdivision 4b. It therefore has little, if any, relevance to the legal issues involved in this case.

Because the decision in *Christle* did not involve the application or interpretation of the prelien notice exception set forth in Subdivision 4b, the district court erred in relying on it to justify its refusal to apply Subdivision 4b to the undisputed facts of this case.

III. MINN. STAT. § 514.011, SUBD. 4b'S HEADING DOES NOT PRECLUDE APPLICATION OF SUBD. 4b TO A WHOLLY RESIDENTIAL DEVELOPMENT OF MORE THAN 20 RESIDENTIAL LOTS.

The Mensings claim, and the district court agreed, that Subdivision 4b's heading, which is entitled "Subd. 4b. **Exceptions; multiple dwelling**," precludes Subdivision 4b's application in this case because the heading "does not say 'multiple lots.'" (Respondents' Brief at 2) The Mensings' argument fails because statutory headings are not a part of the text of a statute.

Under the canons of construction, "[t]he headnotes printed in boldface type before sections and subdivisions in editions of Minnesota Statutes are mere catchwords to indicate the contents of the section or subdivision and **are not part of the statute.**" Minn. Stat. §

645.49 (2008) (emphasis added); see *In re PERA Police and Fire Plan Line of Duty Disability Benefits of Brittain*, 724 N.W.2d 512, 514 n.2 (Minn. 2006) (stating headnotes are not part of statute and do not determine its meaning) (citing Minn. Stat. § 645.49)). Statutory headings are relevant to legislative interest only where they were present in the bill during the initial legislative process. *Minnesota Exp. Inc. v. Travelers Ins., Co.*, 333 N.W.2d 871, 873 (Minn. 1983)

Here, Subdivision 4b's heading was not added until 1981, so it has little persuasive value with respect to the meaning of "more than four family units." See 1981 Minn. Laws ch. 213, § 1; 1978 Minn. Laws Ch. 703, § 2; and 1973 Minn. Laws ch. 247, § 2 (See App. 120-127) Further, the Mensings' argument can cut the other way: the Legislature could have expressly specified "multiple unit dwelling" in the heading if its intent was to "clearly connote a multi-unit building, such as a townhome or condominium" for "more than four family units" in Subdivision 4b. (Respondents' Brief at 3) It did not.

Under the canons of construction, "words and phrases are construed according to rules of grammar and according to their common and approved usage" Minn. Stat. § 645.08(1). Subdivision 4b applies to an "improvement to real property consisting of or providing more than four family units" Minn. Stat. § 514.011, Subd. 4b. This language connotes an improvement to real property made up of "units" with each "unit" containing a "family." "Family" in *The American Heritage College Dictionary* is defined as "all the members of a household under one roof" and "unit" is defined as "an individual, a group, a structure, or other entity regarded as an elementary constituent of a whole." *The American Heritage College Dictionary* 493, 1476 (3d ed. 1993). Likewise, *Webster's New Universal Unabridged Dictionary* defines "family" as "the collective body of persons who live in one

house" and defines "unit" as "a single person or group of individuals, especially as distinguished from others or as a part of a whole." *Webster's New Universal Unabridged Dictionary* 661, 1999 (2d ed. 1983); see *Sylvester Brothers Development Co. v. Great Central Ins. Co.*, 480 N.W.2d 368, 375 (Minn. App. 1992) (stating dictionaries are helpful insofar as they set forth the ordinary, usual meaning of words).

Accordingly, the common meaning of "family unit" in Subdivision 4b is a structure containing all the members of a household in one house or under one roof that is an elementary constituent of, or a part of, the whole improvement to real property. The district court found that the improvement in this case, the Woodridge Bluffs development, included more than twenty residential lots and was a "wholly residential development project." Applying the text of Subdivision 4b to these facts, the prelien notice statute did not apply to SEH in this case.

IV. APPLICATION OF MINN. STAT. § 514.011, SUBD. 4B DEPENDS ONLY ON AN IMPROVEMENT'S SIZE AND CHARACTER.

Subdivision 4b's application depends only on the size and character of an improvement. See Minn. Stat. § 514.011, subd. 4b. The Mensings misread SEH's brief in claiming that "SEH incorrectly rel[ies] on the owner's 'sophistication' to excuse noncompliance with the prelien notice provision" and that "SEH takes contradictory positions on the role that the owner's 'sophistication' plays in the analysis" of application of the prelien notice statute. (Respondents' Brief at 3, 5) In fact, SEH has consistently stated that relative sophistication plays no role in a court's determination and that the "more than four family unit" threshold represents the Legislature's judgment as to which owners are entitled to notice:

Subdivision 4b neither requires nor invites Minnesota courts to distinguish landowners from developers—or to measure their relative sophistication—in determining whether its exception applies. . . . The applicability of this exception depends only on the size and nature [or character] of the improvement, not the sophistication of the landowner or contractor. The "more than four family units" threshold . . . represents the Legislature's line of demarcation between those who are entitled to the statute's protection and those who are not. **It is the Legislature's determination** of whether an owner of a wholly residential improvement is insufficiently sophisticated so as to require the protection of pre-lien notice.

(Appellants' Brief at 10, 11, 12) (emphasis added)

V. THE LEGISLATIVE HISTORY OF MINN. STAT. § 514.011 AIDS ITS CONSTRUCTION.

Subdivision 4b's legislative history supports the contention that prelien notice is not required for large wholly residential improvements consisting of more than twenty residential lots. The Mensings attempt to disregard the legislative history by citing an old case and questioning interpretive notes and instructions on a copy of the bill dated February 22, 1973 and located in the files of the Minnesota Senate Judiciary Committee at the Minnesota State Archives.

Minn. Stat. § 645.16 provides, in part:

When the words of a law are not explicit, the intention of the legislature may be ascertained by considering, among other matters:

- (1) the occasion and necessity for the law;
- (2) the circumstances under which it was enacted;
- (3) the mischief to be remedied;
- (4) the object to be attained;
- (5) the former law, if any, including other laws upon the same or similar subjects;
- (6) the consequences of a particular interpretation;
- (7) **the contemporaneous legislative history**; and
- (8) legislative and administrative interpretations of the statute.

Minn. Stat. § 645.16 (2008) (emphasis added).

This court has allowed that "[t]he intention of the legislature can be ascertained by considering, among other things, the *contemporaneous* legislative history of statutes. Contemporaneous legislative history may include events leading up to the introduction of the act, the history of the act's passage, and any modifications made during the course of the bill's passage." *Haage v. Steies*, 555 N.W.2d 7, 9 (Minn. App. 1996) (citing Minn. Stat. § 645.16 and *Laue v. Production Credit Ass'n*, 390 N.W.2d 823, 828 (Minn. App. 1986) (citations omitted) (emphasis in original). Contemporaneous legislative history materials considered by this court are also not limited to the journals of the Minnesota Senate and House of Representatives. *See, e.g., McMains v. Commissioner of Public Safety*, 409 N.W.2d 911, 914 (Minn. App. 1987) (considering committee reports, committee meeting minutes, journal entries, and tape recordings of legislative testimony and discussion).

The prelien notice statute was introduced as Senate File 6 in the 1973 Legislature. (App. 69, 72-78) On February 22, 1973, the Senate Judiciary Committee included interpretive notes and instructions in the margins of a copy of Senate File 6 during its presentation and consideration by the Committee. (App. 72-78). These notes were likely made by Committee Secretary Mary Mogush, because the bill includes an instruction regarding underlining the effective date language at the end ("**please underline on final**") and the handwriting does not match the signature of Committee Chairman Jack Davies. (*See* App. 70, 78) (emphasis added). Page 4 of the bill contains the following notation next to the "more than four family units" exception:

"lien law is not chgd on large jobs"

(App. 75) (emphasis added). This notation provides a key to unlocking the 1973 Legislature's understanding that enactment of a pre-lien notice statute would "not

ch[an]g[e]" mechanic's "lien law" for "large jobs." Therefore, this court's application of Subdivision 4b to a wholly residential subdivision of more than twenty residential lots would be in keeping with the text and original intent of the prelien notice statute.

VI. MINN. STAT. § 514.011, SUBD. 2(a) DOES NOT APPLY TO PERSONS PERFORMING ENGINEERING OR LAND SURVEYING SERVICES WITH RESPECT TO REAL ESTATE.

The Mensings incorrectly state that SEH "did not raise th[e] issue" of Minn. Stat. § 514.011's application "before the Trial Court." (Respondents' Brief at 7) SEH has raised this issue at every stage of this litigation: in its pleadings, at trial, in its post-trial motions, and now in this appeal. (*See* App. 11, 26-34, 44-49, 110) This issue is at the crux of this case. It therefore is incorrect to say SEH has not raised this issue.

For nearly two decades, this court has recognized a statutory distinction between two classes of mechanic's lien claimants: "The [Mechanic's Lien] statute is designed to protect two groups: (1) persons who perform engineering or land surveying services, and (2) persons who perform labor or furnish skills, material or machines for any of the *purposes listed in the statute.*" *London Constr. Co. v. Roseville Townhomes, Inc.*, 473 N.W.2d 917, 919 (Minn. App. 1991) (emphasis in original). The Minnesota Supreme Court has also recognized that engineers and surveyors are a different class under the mechanic's lien statute:

Since 1974, the legislature has treated engineers and surveyors differently from others who have a right to a mechanics' lien. . . . Engineers and surveyors perform their services and qualify for a lien. Others must contribute to the improvement of real estate to qualify for a lien.

Kirkwold Constr. Co. v. M.G.A. Constr., Inc., 513 N.W.2d 241, 244-45 (Minn. 1994).

Because SEH provided engineering services only, it was not required to provide prelien notice. The prelien notice statute provides that:

Every person who contributes to the improvement of real property so as to be entitled to a lien pursuant to section 514.01 . . . must, as a necessary prerequisite to the validity of any claim or lien, cause to be given to the owner or the owner's authorized agent . . . a written notice

Minn. Stat. § 514.011, Subd. 2(a) (emphases added).

The Mensings attempt to ignore this express statutory distinction by distinguishing *Kirkwold*, by referencing unrelated statutory provisions, and by sounding the false alarm of unconstitutionality. The discussion of legislative history in *Kirkwold* was not limited to Minn. Stat. § 514.05. *See Kirkwold Constr. Co.*, 513 N.W.2d at 244-45. In fact, the court there discussed and analyzed the language found in Subd. 2(a) which contains the distinction between engineering/land surveying services and contributions to the improvement of real property. *See id.* The decision in *Kirkwold* is therefore directly on point.

The Mensings next try to second-guess the legislature by reviewing sections of the mechanic's lien statute that are not at issue in this appeal. (*See Respondents' Brief at 8*) Whether other sections of mechanics' lien statute apply equally to engineers is not before this court. The issue here is whether Subdivision 2(a) requires service of prelien notice by those who provide engineering services only. By its express language, it does not. The legislature is entitled to decide which provisions of the mechanic's lien statute apply to engineering services and those that do not.

Finally, the Mensings sound the false alarm of unconstitutionality in attacking the legislature's decision nearly thirty-five years ago to distinguish between mechanics' lien claimants performing engineering and land surveying services and those contributing to the improvement of real property. (*See Respondents' Brief at 8*) Minnesota courts have long recognized that "the legislature has the power to classify subjects for legislation, and the

courts will not interfere with such classification unless it is so manifestly arbitrary as to evince a legislative purpose of evading the constitution." *Visina v. Freeman*, 252 Minn. 177, 197, 89 N.W.2d 635, 651 (1958) (citations omitted). Courts, therefore, "are not at liberty to speculate upon the consideration[s] which motivate the legislature, or to declare void legislative classifications where there is some reason therefor, even though the judiciary may not hold such reasons in the same high regard as did the legislature." *General Mills v. Division of Employment & Sec.*, 224, Minn. 206, 311, 28 N.W.2d 847, 850 (1947). The legislature may well have concluded that improvements requiring engineering services are of a size and character that their owners do not require prelien notice.

The legislature expressly excluded engineering services from the prelien notice statute. The district court erred in ruling that SEH was required to provide prelien notice under Minn. Stat. § 514.011, subd. 2a.

CONCLUSION

SEH respectfully requests that this court reverse the district court's decision invalidating its mechanic's lien, and hold that, as a matter of law, it was not required to provide prelien notice as a prerequisite to establishing a valid and enforceable mechanic's lien.

Respectfully submitted,

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Dated: 5/15/08

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