

NO. A08-1252, A08-1700

State of Minnesota
In Court of Appeals

PREMIER BANK, a Minnesota corporation,
Plaintiff-Appellant,

vs.

BECKER DEVELOPMENT, LLC, BOONE FAMILY INVESTMENTS, LLC, STEVEN L. BOONE, ANNETTE C. BOONE, NANCY C. BUEHLER, ROBERT G. BUEHLER, MICHAEL S. UZELAC, PAMELA J. NOLL, DEANNA M. LASSER, ANN-MARIE RASMUS, AN ADULT RESIDENT OF MINNESOTA, DANIEL P. BOONE, AN ADULT RESIDENT OF MINNESOTA, BAUERLY BROTHERS, INC., KUECHLE UNDERGROUND, INC., JOHN OLIVER & ASSOCIATES, INC., AND JOHN DOES 1 THROUGH 5,
Defendants-Respondents,

and

PAMELA J. NOLL,
Third-Party Plaintiff,

vs.

GORDON JENSEN and JENSEN ANDERSON SONDRALL, P.A.,
Third-Party Defendants.

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68 A.L.R. 1300 § 2 (1976) 281

STATEMENT OF LEGAL ISSUES

- I. Under Minnesota law, a mechanic's lien claimant who files a blanket lien pursuant to Minn. Stat. § 514.09 must apportion its full lien claim against all of the lots subject to its lien and may not foreclose the full lien against less than all the lots subject to its lien. Here, the district court ruled Kuechle was entitled to foreclose its blanket mechanic's lien in full against 11 lots of a 59-lot development. Did the district court err in its application of the law?**

The district court ruled that Minn. Stat. § 514.09 did not require Kuechle to apportion its full blanket mechanic's lien on a per lot basis and Kuechle could foreclose the full amount of its lien against the 11 lots of the 59-lot River Bend development on which its lien had priority even though the labor and material Kuechle furnished benefited all lots equally.

Apposite Cases:

Carr-Cullen Co. v. Cooper, 144 Minn. 380, 175 N.W. 696 (1920)

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

- II. Under Minnesota law, a junior lien is permitted to foreclose its lien against the subject property subject to any senior interest in the property. The district court refused to grant Premier a decree of foreclosure on the three lots on which its mortgages were junior to Kuechle's mechanic's lien. Did the district court err in refusing to grant Premier a decree of foreclosure?**

The district court that Premier was entitled to summary judgment and decree of foreclosure, but refused to issue the decree of foreclosure.

Apposite Authority:

Minn. Stat. § 514.05 (2008)

Minn. Stat. § 580.12

Gerdin v. Princeton State Bank, 384 N.W.2d 868 (Minn. 1986)

- III. Minnesota law provides for the reformation of a legal instrument where the parties had a valid agreement expressing their real intent, the written instrument fails to express that intent; and the failure was the result of mutual mistake. Here, contrary the Loan Agreement that the Individual Guarantors signed, the guaranties securing the loan erroneously list the "Debtor" as Boone Family Investment rather than Becker Development. Did the district court err in refusing to reform the guaranties?**

The district court ruled that the guaranties were executed in favor of Boone Family Investments and not Becker Development.

Apposite Cases:

Johnson v. Giese, 231 Minn. 258, 261, 42 N.W.2d 712 (1950)

Nichols v. Shelard Nat'l Bank, 294 N.W.2d 730 (Minn.1980)

Berg v. Carlstrom, 347 N.W.2d 809 (Minn.1984)

Norwest Bank Minnesota, v. Ode, 615 N.W.2d 91 (Minn. App. 2000)

IV. Did the district court err in denying Premier's summary judgment motion and dismissing the Individual Guarantors?

The district court dismissed Premier's claims against the Individual Debtors because it concluded that the guaranties were executed in favor of Boone Family Investments and not Becker Development.

Apposite Cases:

Borg Warner Acceptance Corp. v. Shakopee Sports Center, Inc., 431 N.W.2d 539 (Minn.1988)

Watkins Products, Inc. v. Butterfield, 274 Minn. 378, 144 N.W.2d 56 (1966)

STATEMENT OF CASE

This appeal arises out of two mortgage foreclosure actions that appellant Premier Bank (Premier) commenced in Sherburne County District Court.

In the first action, which is District Court File No. 71-CV-07-1374, Premier sought to foreclose on a \$3.2 million mortgage that secured a loan it had provided to defendant Becker Development, LLC (Becker Development), for the purchase and overall site work for the River Bend development project. The River Bend development is a residential housing development located on forty acres in Becker, Minnesota, that consists of fifty-two improved lots and seven outlots. Premier alleged that Becker Development had defaulted on the promissory note and the mortgage securing the loan, and sought to recover the amounts due and owing under the promissory note and various loan documents. It also brought suit against defendant Boone Family Investments, LLC (Boone Family Investments) and several members of the Boone family individually, who were owners of Boone Family Investments, seeking to enforce the guaranties they executed as part of the loan transaction.

In the second action, which is District Court File No. 71-CV-07-960, Premier sought to foreclose on three separate construction mortgages that secured three construction loans it had advanced to defendant Boone Builders, Inc. (Boone Builders), for the construction of three model homes within the River Bend development. Premier alleged that Boone Builders defaulted on the promissory notes and mortgages that secured the three construction loans. Premier also brought suit against defendants Steven

L. Boone and Annette C. Boone, seeking to enforce the personal guaranties they executed on behalf of Boone Builders.

In both actions, Premier named respondent Kuechle Underground, Inc. (Kuechle), as a defendant based on the mechanic's lien statement that Kuechle had recorded with the Sherburne County Recorder's Office on February 14, 2007. The lien was a blanket lien in the amount of \$266,622.96, and was filed against all 59 lots comprising the River Bend development. Kuechle had contracted with defendant Becker Development to serve as the general contractor for the initial site, street, and sewer work for the River Bend development. In both actions, Kuechle asserted crossclaims and counterclaims seeking to foreclose its mechanic's lien claim. It also asserted claims for breach of contract, account stated, and quantum meruit against Becker Development.

The district court consolidated the two cases, and eventually both Premier and Kuechle moved for summary judgment on their respective claims. In its motions for summary judgment, Kuechle argued that its mechanic's lien was prior and superior to Premier's first mortgage and three construction mortgages. Premier opposed Kuechle's motion in 71-CV-07-1374, noting that it had recorded its first mortgage for the land acquisition and overall site work with the Sherburne County Recorder on September 9, 2005, nearly three weeks before October 3, 2005, the first date of work listed in Kuechle's mechanic's lien statement. Premier did not dispute Kuechle's priority claim in 71-CV-07-960 with respect to the three lots on which the model homes were constructed. Premier had released these lots from its first mortgage and acknowledged that it had recorded its three construction mortgages after the first date of work attributable to

Kuechle. It argued, however, that Kuechle could not foreclose its mechanic's lien against less than all the lots subject to the lien and was required to apportion its blanket mechanic's lien claim on a per lot basis because Kuechle's work benefited all the lots of the River Bend development equally. Premier argued that it was inequitable and unjust to allow Kuechle to encumber the three lots with the full amount of Kuechle's blanket mechanic's lien claim when those lots did not receive the full value of the work and improvements.

In 71-CV-07-1374, the district court agreed with Premier and denied Kuechle's summary judgment motion. The court ruled that Premier's first mortgage was prior and superior to Kuechle's mechanic's lien. The court granted Premier's motion for summary judgment with respect to its claims against Becker Development. On its own motion, the district court dismissed Premier's claims against the individual guarantors, ruling that the guaranties were executed in favor of Boone Family Investments and not Becker Development. The court also granted defendant Nancy C. and Robert G. Buehler's and Pamela J. Noll's motion to dismiss and strike without prejudice for lack of service based on its finding that they had not been personally served and the attorney who filed an answer on their behalf did not have authority to file the answer and accept service.¹

In 71-CV-07-960, the district court granted Premier's motion for summary judgment, but failed to grant Premier a decree of foreclosure allowing Premier to foreclose its three

¹ On August 1, 2008, the district court issued an Supplemental Statement of Undisputed Facts, Conclusions of Law, Order for Judgment and Judgment, dismissing the Buehlers and Noll on the same grounds as the other guarantor defendants as they stood in the same position for purposes of the guaranty issues raised in this appeal. On September 29, 2008, Premier filed its notice of appeal of that Supplemental Order, which it challenges on the same grounds as it challenges the rulings relating to the Individual Guarantors in this appeal.

construction mortgages. It did so because it had granted Kuechle's motion on the issue of priority. The court ruled that Kuechle was entitled to foreclose the full amount of its mechanic's lien against the three lots encumbered by Premier's construction mortgages and an additional eight lots that Premier had also released from the first mortgage. The district court concluded that Minn. Stat. §514.09 did not require Kuechle to apportion its mechanic's lien on a per lot basis. The court, therefore, permitted Kuechle to foreclose its full mechanic's lien in the amount of \$266,622.96 against the three lots, plus an additional eight lots, even though Kuechle's work benefited all 59 lots within the River Bend development equally.

Premier now appeals, arguing the district court erred in ruling that Minnesota law permitted Kuechle to foreclose its mechanic's lien on less than all the lots subject to Kuechle's blanket mechanic's lien claim. Premier also argues that the district court erred when it refused to grant Premier a decree of foreclosure on its three construction mortgages, and refused to grant summary judgment in its favor against the individual guarantors for breach of their respective guaranties, and instead, dismissed Premier's claims against the individual guarantors.

STATEMENT OF FACTS

These consolidated cases arise out of the River Bend development project. The River Bend development is a residential housing development located on 40 acres in Becker, Minnesota. (Steven Boone Depo. at T. 19 – Affidavit of Jesse Orman (71-CV-07-960), Exh. A) The project originally envisioned the property being developed into approximately 150 lots in the three phases. (*Id.* at. p. 92) The site work for the first phase has been completed and the property currently consists of 52 improved lots and seven outlots. (*Id.* at T. 27, 92) The improved lots are comprised of 27 single-family lots, 24 multi-family or "quadplex" lots, and one open-space lot. (*Id.* at 36-37)

On September 8, 2005, appellant Premier loaned defendant Becker Development \$3.2 million to develop the 40 acres on which the River Bend development is situated. (A-171-172, 179) To secure the loan, Becker Development executed a promissory note in the amount of \$3.2 million. (A-172, 213) It also jointly executed a mortgage with Boone Family Investments in favor of Premier in the amount of \$3.2 million. (A- 174, 216) Premier recorded the mortgage with the Sherburne County Recorder on September 9, 2005. (A-216) As part of the loan transaction, Premier requested and received guaranties from Boone Family Investments, and various members of the Boone family who were owners of Boone Family Investments, in which they agreed to absolutely and unconditionally guaranty the full payment and performance of Becker Development's obligations under the promissory note, mortgage, and the other related loan documents. (A-175, 261-298) These individuals included: defendants Steven L. Boone, Annette C. Boone, Michale S. Uzelac, Deanna M. Lasser, Ann-Marie Rasmus, Nancy C. Buehler,

Robert G. Buehler, Pamela J. Noll, and Daniel P. Boone. (*Id.*) These individuals were also signatories of the Loan Agreement between Premier and Becker Development. (A-171-172, 179)

A little over a year later, on October 10, 2006, Premier and Becker Development, along with Boone Family Investments entered into a Loan Modification Agreement. (A-175-176, 304). Under this agreement, Premier released its development mortgage on three lots within the River Bend development. (*Id.*) These lots were: Lots 5, 6, and 10 of Block 3, River Bend (*Id.*) The loan modification agreement also extended the maturity date of the promissory note to September 8, 2007. (*Id.*)

Earlier, on February 13, 2006, Premier had provided three loans to Boone Builders, the builder for the project, for the construction of three model homes on the three lots released from Premier's first mortgage under the Loan Modification Agreement. (Affidavit of Thomas J. Kern (960) ¶ 4, Exh. A – C; A-175-176, 304) The principal amounts of these three loans were: \$233,000; \$243,000; and \$252,000. (Kern Aff. (960) ¶ 4, Exh. A – C) In addition to executing a promissory note in favor of Premier, Boone Builders secured the loans with three mortgages on the respective lots. (*Id.* at ¶ 5, 7, 9, 11, 14, 16, Exh. D, E, H, I, L, M) Premier recorded the mortgage securing the second construction loan with the Sherburne County Recorder on February 28, 2006. (*Id.* at ¶ 11, Exh. I) It recorded the mortgages securing the first and third construction loans with the Sherburne County Recorder on April 21, 2006. (*Id.* at ¶ 7, 16, Exh. E, M) In conjunction with these loans, Premier requested and received guaranties from defendants Steven Boone and Annette Boone in which they guaranteed the

obligations of Boone Builders under the promissory notes, mortgages, and other loan documents. (*Id.* at ¶ 8, 13, 18, Exh. F, G, J, K, N, O)

On April 20, 2006, respondent Kuechle entered into a written contract with Becker Development to serve as the general contractor for the initial site, street, and sewer work for the entire River Bend development project. (A-91) This agreement memorialized an earlier oral agreement by which Becker Development agreed to pay Kuechle \$931,037.15 for the initial site work. (*Id.*) Pursuant to this earlier oral agreement, Kuechle had subcontracted with Theilen Construction, Inc., to perform the clearing, grubbing, and common excavation for the project. (A-92) Theilen began its work on October 3, 2005. (A-93) As the project progressed, Becker Development requested that Kuechle perform additional work and the two agreed to an adjusted total contract price of \$1,083,730.58. (A-91) Becker Development, however, only paid Kuechle \$817,107.62, leaving an unpaid balance due under the contract of \$266,622.96. (*Id.*) On February 14, 2007, Kuechle served and filed a blanket mechanic's lien claim for the unpaid amount on all 59 lots comprising the River Bend development project. (A-139)

Between January and September 2007, Becker Development failed to make the monthly installments due under the promissory note it executed as part of the \$3.2 million development loan and failed to pay the real estate taxes and penalties due on the River Bend property for the first half of 2007. (A-172) It also failed to pay the promissory note when it matured in September 2007. (*Id.*) Under the promissory note, mortgage and other loan documents, Becker Development's failure to make these

required payments constituted conditions of default. (*Id.*) Despite Premier's demand to do so, Becker Development failed to cure these conditions of default. (*Id.*)

On July 25, 2007, Premier commenced an action against Becker Development in Sherburne County District Court to foreclose its \$3.2 million development mortgage. This is district court file number: 71-CV-07-1374. (*See* Summons and Complaint in 71-CV-07-1374) It also alleged that Becker Development was in default under the promissory note, mortgage, and other loan documents and sought to recover the amounts due and owing under those instruments. (*Id.*) Premier also brought suit against defendants Steven L. Boone, Annette C. Boone, Michale S. Uzelac, Deanna M. Lasser, Ann-Marie Rasmus, Nancy C. Buehler, Robert G. Buehler, Pamela J. Noll, Daniel P. Boone ("Individual Guarantors") and Boone Family Investments, seeking to hold them liable under the personal guaranties they had executed guaranteeing the performance and payment obligations of Becker Development under the various loan instruments. (*Id.*)

Premier also commenced a separate, but related action against Boone Builders and Steven and Annette Boone in Sherburne County District Court, seeking to foreclose on its mortgages securing the three construction loans it had advanced to Boone Builders for the construction of the three model homes. (*See* Summons and Complaint in 71-CV-07-960) This is district court file number: 71-CV-07-960. (*Id.*) It alleged, in part, that Boone Builders had defaulted on the three promissory notes and mortgages by failing to pay the promissory notes when they matured and the real estate taxes due on the three lots for the first half of 2006. (*Id.*) It also sought to enforce the guaranties that Steven

and Annette Boone had executed guaranteeing the performance and payment obligations of Boone Builders owed to Premier under the various loan instruments. (*Id.*)

In both actions, Kuechle asserted crossclaims and counterclaims seeking to foreclose on its mechanic's lien claim. (*See* Kuechle's Answer to Premier's Complaint and Kuechle's Counterclaim and Crossclaim (71-CV-07-1374), and Kuechle's Answer to Premier's Complaint and Counterclaim and Crossclaim (71-CV-07-960) It also asserted claims for breach of contract, account stated, and quantum meruit against Becker Development. (*Id.*)

After the district court consolidated Premier's two actions, Premier and Kuechle moved for summary judgment.

In 71-CV-07-1374, which concerned the \$3.2 million development loan, Premier based its motion on the undisputed evidence that Becker Development had failed to make monthly payments due under the promissory note between January and September 2007, and that the note remained unpaid after it matured in September 2007. (A-143) It was also undisputed that Becker Development had failed to pay the real estate taxes on the River Bend property for 2007. (*Id.*) Premier therefore argued that Becker Development was in default under the promissory note, mortgage, and other related loan documents. (*Id.*) It also argued that the Individual Guarantors and Boone Family Investments, had breached their respective guaranties when they refused to satisfy Becker Development's payment obligations under the various loan and mortgage instruments. (*Id.*) With respect to the various mechanic's lien claims, Premier argued that its mortgage had priority over Kuechle's mechanic's lien claim because it had recorded its mortgage on September 9,

2005, Kuechle did not record its mechanic's lien statement until February 14, 2007, and the first date of work listed in Kuechle's mechanic's lien statement was October 3, 2005.

(Id.)

In the companion case, 71-CV-07-960, which involved the three loans for the construction of the model homes on Lots 5, 6, and 10 of Block 3, River Bend, Premier argued that the evidence was undisputed that Boone Builders had defaulted under the promissory notes, mortgages, and other loan documents by failing to pay the promissory notes when they matured and the real estate taxes for the three lots. (A-50)

In support of its motions for summary judgment in both actions, Kuechle argued it was entitled to foreclose on its mechanic's lien claims against all the lots because its mechanic's lien was prior and superior to Premier's first mortgage and three construction mortgages. (A-84, 338) Premier opposed Kuechle's motion in 71-CV-07-1374, noting that it had recorded its first mortgage with the Sherburne County Recorder on September 9, 2005, more than three weeks before October 3, 2005, the first date of work listed in Kuechle's mechanic's lien statement. (A-348)

In 71-CV-07-960, which involved the three lots on which the model homes were situated, Premier did not dispute Kuechle's priority claim. (A-109) It argued, however, that Kuechle could not foreclose the full amount of its mechanic's lien against less than all 59 lots subject to the lien. *(Id.)* Because Kuechle's initial site work benefited all 59 lots of the River Bend development equally, Premier maintained that Kuechle was required to apportion its blanket mechanic's lien claim on a per lot basis. *(Id.)* Premier argued that it was inequitable and unjust to allow Kuechle to encumber the three lots with the full amount

of Kuechle's mechanic's lien claim when those lots did not receive the full value of the work and improvements. (*Id.*)

In 71-CV-07-1374, the district court agreed with Premier and denied Kuechle's summary judgment motion. (A-5) The court ruled that Premier's first mortgage was prior and superior to Kuechle's lien. (A-36) On its own motion, the court denied Kuechle the right to foreclose on all the lots. (*Id.*) The court also granted Premier's motion for summary judgment with respect to its claims against Becker Development, granting it a decree of foreclosure and finding Becker Development liable for the amounts due and owing on the \$3.2 million promissory note. (A-33-36) The district court, however, dismissed Premier's claims against the Individual Guarantors, noting that the guaranties were executed in favor of Boone Family Investments and not Becker Development. (A-37) With respect to defendants Nancy C. and Robert G. Buehler and Pamela J. Noll, the district court granted their motion to dismiss and strike without prejudice for lack of service and finding that any answer filed did not subject them to the court's jurisdiction. (A-40)

In 71-CV-07-960, the district court granted Premier's motion for summary judgment, but refused to grant a decree of foreclosure allowing Premier to foreclose its three construction mortgages. (A-29-38) The district court ruled that Kuechle was entitled to foreclose the full amount of its mechanic's lien against the three lots encumbered by Premier's construction mortgages, along with eight additional lots that had also been released from Premier's development mortgage. (A-30) The court concluded that Minn. Stat. §514.09 did not require Kuechle to apportion its mechanic's lien on a per lot basis. (A-44) The court, therefore, permitted Kuechle to foreclose its full mechanic's lien in the

amount of \$266,622.96 against the 11 lots even though Kuechle filed a blanket mechanic's lien against all 59 lots in the River Bend development and its work benefited all 59 lots equally. (A-44-45)

In its Statement of Undisputed Facts, the district court found that Boone Family Investments had signed the same guaranty as the Individual Guarantors. On June 30, 2008, Premier moved the district court for reconsideration on this issue because the guaranty that Boone Family Investments signed listed the "Debtor" as Becker Development, LLC. On July 18, 2008, the district court granted Premier's motion for reconsideration and entered judgment against Boone Family Investments under this guaranty.²

This appeal follows.

² Premier had not received a copy of this order and judgment when it filed this appeal on July 23, 2008.

ARGUMENT

I. Standard of Review

On appeal from summary judgment, this court asks two questions: (1) whether there are any genuine issues of material fact; and (2) whether the lower court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). "On appeal from summary judgment on undisputed facts, appellate review is limited to determining whether the district court erred in its application of the law." *Marshall v. Inn on Madeline Island*, 631 N.W.2d 113, 118 (Minn. App. 2001) (citation omitted). The construction of Minnesota's mechanic's lien statute is a question of law that this court reviews de novo. *Daive-Thomas Co., Inc. v. Voss*, 517 N.W.2d 341, 342 (Minn. App. 1994).

II. The District Court Erred In Ruling That Kuechle May Foreclose Its Mechanic's Lien Against Less Than All The Lots Subject To Its Lien.

The district court erred in ruling that Kuechle was entitled to foreclose the full amount of its mechanic's lien against less than all 59 lots within the River Bend development subject to its blanket mechanic's lien. There is no statutory or other Minnesota legal authority that specifically allows a mechanic's lien claimant to foreclose a blanket lien against less than all the parcels subject to the lien. The Minnesota Supreme Court long ago ruled that a mechanic's lien claimant who perfects a blanket lien against two or more adjoining lots must apportion its lien so that each lot is subject to a lien for the amount fairly chargeable to it. This position is consistent with the general rule and its corollary that the majority of courts around the country have adopted. The general rule

is that a mechanic's lien claimant may not enforce the full amount of its blanket lien against less than all the parcels subject to its lien because it would be unjust and inequitable to burden one or a few parcels with the full amount of the lien where all the parcels subject to the lien benefited from the work or materials; rather, it must apportion its lien claim on a per lot basis.

Because the district court erred in its application of law on this issue, Premier respectfully requests that this court reverse and remand to the district court with directions that Kuechle must apportion its mechanic's lien claim on a per lot basis and may not foreclose the full amount of its blanket lien against less than all the lots subject to its lien.

- A. There is no statutory basis under Minnesota's Mechanic's Lien Statute for the district court's decision allowing Kuechle to foreclose its lien claim against less than all the lots subject to its lien.**

It is well established that mechanic's liens are purely creatures of statute and exist only within the terms of the statute. *Dunham Assocs, Inc. v. Group Inv., Inc.*, 301 Minn. 108, 118, 223 N.W.2d 376, 383 (1974). The jurisdiction of courts in the area is strictly governed by statute. *Duinick Bros. & Gilchrist v. Brandondale Chaska Corp.*, 311 Minn. 291, 248 N.W.2d 743 (1976). Thus, a lien claimant may foreclose and recover on its lien claim only in the manner that the mechanic's lien statute proscribes.

Under Minnesota Mechanic's Lien Statute, "whoever . . . contributes to the improvement of real estate by performing labor, or furnishing skill, material or machinery for any of the purposes hereinafter stated . . . shall have lien upon the improvement and upon the land on which it is situated." Minn. Stat. § 514.01 (2008) (emphasis added).

If the lien claimant has contributed to improvements on two or more contiguous lots pursuant to one general contract, the mechanic's lien statute permits the lien claimant to file one blanket lien rather than separate lien statements for each lot. Minn. Stat. § 514.09 (2008). The statute provides that:

A lienholder who has contributed to the erection, alteration, removal, or repair of two or more buildings or other improvements situated upon or removed to one lot, or upon or to adjoining lots, under or pursuant to the purposes of one general contract with the owner, may file one statement for the entire claim, embracing the whole area so improved; or, if so electing, the lienholder may apportion the demand between the several improvements, and assert a lien for a proportionate part upon each, and upon the ground appurtenant to each, respectively.

Id. The purpose of this section is "to relieve a mechanic of the need to keep separate accounts when improving multiple contiguous lots." *Automated Building Components, Inc. v. New Horizon Homes, Inc.*, 514 N.W.2d 826, 830 (Minn. App. 1994), *review denied* (Minn. June 15, 1994) (citation omitted). In such a situation, "it might be impractical for the contractor to keep a separate account of the materials and labor for each [improvement], and file a separate lien for each. This statute was intended to relieve him from the necessity of doing so." *Johnson v. Salter*, 70 Minn. 146, 150, 72 N.W. 974, 975 (1897).

Here, the district court ruled that Kuechle was entitled to foreclose its mechanic's lien against the 11 lots within the River Bend development on which its lien had priority over Premier's construction mortgages. It refused to allow Kuechle to foreclose on the remaining lots within the development that were subject to Kuechle's mechanic's lien

because it found Premier's development mortgage was superior to Kuechle's mechanic's lien. The district court premised its decision on the mistaken belief that the junior status of Kuechle's mechanic's lien precluded Kuechle from foreclosing on these lots. The court also rejected Premier's argument that Kuechle was required to apportion its mechanic's lien among all 59 lots subject to Kuechle's lien, stating that "[i]f Defendant Kuechle is not permitted to foreclose its blanket lien as authorized by statute and recover against any properties therein which contain equity, Defendant will not be paid for its work." The court reasoned that under Minn. Stat. § 514.09, "apportionment is authorized only if Kuechle [had filed] separate liens [against individual lots]."

The district court erred in its interpretation of Minn. Stat. § 514.09. The plain language of Minn. Stat. § 514.09 does not limit apportionment to those situations in which a lien claimant files separate liens against individual lots. This section merely addresses the type of lien statement that a mechanic may choose to file. It is silent on the issue of how a lien claimant may foreclose a blanket lien filed against two or more parcels. Nothing within the language of Minn. Stat. § 514.09 expressly permits a lien claimant to file a blanket lien against several parcels of property, and then foreclose the full amount of the lien against one or a few parcels it selectively chooses from among all the parcels subject to and embraced by its lien. Because mechanic's liens are strictly creatures of statute, a lien claimant may foreclose and recover on its lien claim only in the manner that the mechanic's lien statute proscribes. Thus, absent express statutory authority permitting such a remedy, Kuechle was not entitled to foreclose the full amount of its blanket mechanic's lien against less than all 59 lots subject to its lien.

The fact that Kuechle's mechanic's lien was junior to Premier's \$3.2 million development mortgage on all but 11 lots did not invalidate the lien nor did it preclude Kuechle from foreclosing on its lien claim against all the lots subject to its lien. Under Minnesota's mechanic's lien statute, a mechanic's lien claimant who perfects a lien is entitled to foreclose on the lien and recover any amount realized from the ensuing sheriff's sale, subject to any senior interests in the property. *See* Minn. Stat. § 514.10 (providing for foreclosure of mechanic's lien); Minn. Stat. § 514.15 (providing for sale of property for satisfaction of all liens, "subject to the rights of all persons which are paramount to such liens"). Issues relating to the priority of liens have no bearing or effect on a mechanic's lien claimant's right to foreclose on a properly perfected lien. The issue of priority simply determines the order in which mortgages and liens on the property are satisfied. Thus, even though Kuechle's mechanic's lien claim was junior to Premier's development mortgage, it is permitted under the mechanic's lien statute to foreclose its lien against all 59 lots within the River Bend development that its lien embraced and subject to any senior interests in the lots.

B. The district court's decision is contrary to Minnesota case law.

Not only is the express statutory basis for the district court's decision lacking, it is contrary to Minnesota case law. The Minnesota Supreme Court long ago held that a mechanic's lien claimant who perfects a blanket lien against two or more adjoining lots must apportion its lien so that each lot is subject to a lien for the amount fairly chargeable to it. *Carr-Cullen Co. v. Cooper*, 144 Minn. 380, 175 N.W. 696 (1920).

In *Carr-Cullen*, a lumber supplier furnished building materials that the property owner used in the construction of six homes on eight adjoining lots. *Id.* at 381, 175 N.W. at 697. The owner, who was also the contractor and builder, failed to pay for any of the materials. *Id.* at 381-382, 175 N.W. at 697. The lumber supplier then filed one blanket mechanic's lien against all eight lots for the unpaid materials, and, as part of the mechanic's lien actions that others brought against the lots, commenced an action to foreclose on its mechanic's lien. *Id.* at 381, 175 N.W. at 697. The district court denied the lumber supplier's lien claim. *Id.*

In reversing the district court, the Minnesota Supreme Court noted that, under the version of Minn. Stat. § 514.09 in effect at the time, the lumber supplier was entitled to assert one blanket lien against the eight lots because it had furnished the building materials pursuant to one general contract with the owner. *Id.* at 382, 175 N.W. at 697. The court ruled that the district court should have given judgment to the lumber supplier for a lien on all eight lots for the full lien amount. *Id.* at 385-86, 175 N.W. at 699. But in granting the lien, the court specifically held that the lumber supplier was required to apportion its full lien among the lots on which the houses were situated, stating:

Such amount should be apportioned among the several owners of the property so that its lien against each of the six parcels into which the eight lots were divided will be limited to the sum which the court found to be the value of the materials furnished by appellant [lumber supplier] which entered into the construction of the house thereon.

Id. at 385-86, 175 N.W. at 699.

The decision in *Carr-Cullen* establishes the rule that a mechanic's lien claimant who files a blanket lien under Minn. Stat. § 514.09 must apportion its full lien claim against all of the lots subject to its lien. This is to ensure that each lot is subjected to a lien for the amount of the improvement that is fairly chargeable to it. Underlying this rule is the equitable principle that one or a few parcels should not bear the burden of satisfying the full amount of a blanket lien where other parcels were also subject to the lien and benefited in equal measure from the work or labor giving rise to the lien.

Indeed, the Minnesota Supreme Court requires that there must be a direct relationship between the value contributed to the property by the lien claimant and the extent of the lien granted. *Albert & Harlow, Inc. v. Great Northern Oil Co.*, 283 Minn. 246, 253, 167 N.W.2d 500, 506 (1969). The case in *Great Northern* arose out of the construction of a 171-mile long oil pipeline between Minnesota and Wisconsin. *Id.* at 247, 167 N.W.2d at 502. Seventeen miles of the pipeline were located in Minnesota, with the rest situated in Wisconsin. *Id.* During the course of the project, the general contractor obtained its required petroleum products from the lien claimant. *Id.* The total value of these materials was \$35,000. *Id.* at 248, 167 N.W.2d at 502. Of this amount, \$8,000 was used for the construction of the pipeline in Minnesota, while the rest was used for the stretch of pipeline constructed in Wisconsin. *Id.* at 248, 167 N.W.2d at 502-03. The lien claimant filed a mechanic's lien in Minnesota for the full value of the materials it supplied to the entire project. *Id.*

The supreme court held that the lien claimant was entitled to foreclose its lien claim for the amount of materials it supplied for the Minnesota segment of the pipeline

only, and it could not recover the full amount of its lien. *Id.* at 255, 167 N.W.2d at 507. Given the lack of specific statutory provisions dealing with the situation, the court resorted to general considerations of the purpose and object of the mechanic's lien statute. *Id.* at 252, 167 N.W.2d at 505. The court noted that the basic legislative intent underlying Minnesota's lien law is that one "whose property is enhanced in value by the labor and toil of others should be made to respond in some way by payment and full satisfaction for what he has secured." *Id.* at 253, 167 N.W.2d at 506. The court observed that "[t]his purpose of the law implies that there is a *direct relationship* between the value contributed to the property by the lien claimant and the extent of the lien granted." *Id.* (emphasis added).

The court was mindful that the burden a statutory lien places on real estate is a considerable one. *Id.* If the claim remains unpaid, the lien claimant may enforce the lien by foreclosure. *Id.* This, in turn, requires the owner to pay the claim or make a deposit with the court in an amount that stands as security in place of the lien. *Id.* The court also observed that, at best, the foreclosure proceedings embarrass the property owner, and at worst, "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." *Id.* The court therefore ruled that the lien claimant was required to apportion its lien claim among the parcels that directly received value from the labor and materials supplied. *Id.* In doing so, the court stated that

The extreme situation where the amount of the lien claim exceeds the value of the property improved is not likely to occur if the items of labor and materials on account of which

a lien can be asserted are limited to those which serve to improve the specific property with respect to which the lien can be asserted. So limited, it can be assumed generally that the value added to the property by the labor or materials contributed would be at least equal to the amount of the lien claim. A direct relationship between the value added and the amount claimed would probably exist. But this would not be the case if property in Minnesota is subjected to liens for labor and materials contributed to the improvement of immovables located elsewhere.

Id.

Thus, consistent with the equitable and remedial purpose of the mechanic's lien statute, the decision in *Great Northern* requires that there must be a direct relationship between the value of the labor and materials that the lien claimant contributes to the improvement of the property and the extent of the lien granted. This rule protects property from being subject to a lien that is grossly disproportionate or has no relation to the value of the material and labor actually furnished for improvements on the property.

In this case, it is undisputed that Kuechle's work benefited all 59 lots within the River Bend development equally. Indeed, in its memorandum in support of summary judgment in 71-CV-07-960, Kuechle emphatically asserted that "[its] work improved all of the River Bend development's residential lots and outlots." (emphasis in original). Because there is no evidence that one or a few of the lots benefited in greater proportion to any of the other lots, it stands that each lot within the River Bend development received an equal share, or 1/59th, of the benefit of Kuechle's work. Thus, the amount of Kuechle's mechanic's lien fairly chargeable to each of the 59 lots within the River Bend development is \$4,519.03, or 1/59 of \$266,622.96.

But rather than apportioning Kuechle's mechanic's lien among the 59 lots equally, the district court ruled that 11 lots within the River Bend development must bear the sole burden of satisfying Kuechle's \$266,622.96 mechanic's lien. The district court's decision, if allowed to stand, will force these 11 lots to each carry the burden of a lien in the amount of \$24,238.45. This far exceeds the value that Kuechle contributed to these 11 lots and bears no direct relationship to Kuechle's contribution in material or labor to those lots. This is contrary to the supreme court's decision in *Great Northern* and is wholly inequitable.

Neither Kuechle nor the district court have offered a rational or compelling reason that the 11 selected lots should bear the burden of satisfying the entire lien when Kuechle's work benefited all 59 lots equally. In support of its decision, the district court relied on the United States Bankruptcy Court's decision in *In re Zachman Homes*, 47 B.R. 496, 518 (Bankr. D. Minn. 1984). Not only is this decision not binding precedent, but it is directly contrary to the Minnesota Supreme Court's decisions in *Carr-Cullen* and *Great Northern*. Equally misplaced is the district court's reliance on the decision in *Johnson v. Salter*. The court in that case held that where a lien claimant furnishes labor and material to two or more lots under one general contract, the mechanic's lien statute permitted the lien claimant to file one lien statement instead of apportioning its lien and filing separate liens against each individual lot. The case merely reaffirmed the statutory language of the version of Minn. Stat. § 514.09 in effect at the time. The decision in *Johnson*, therefore, is inapposite to the issue of whether Kuechle may foreclose its mechanic's lien in full against less than all the lots subject to its lien.

Here, the district court's decision lacks explicit statutory authority and is directly contrary to the Minnesota Supreme Court's decisions in *Carr-Cullen* and *Great Northern*. It is also inconsistent with the equitable principles underlying the mechanic's lien statute because it burdens lots with a lien that bears no relation to the value of labor and materials actually furnished to the lots. Because the district court erred in its application of current Minnesota law, Premier respectfully requests that this court reverse the decision of the district court and remand the matter with directions that the district court apportion Kuechle's lien claim on a per lot basis because Kuechle's contribution benefited all the River Bend lots equally.

C. Chisago County District Court Decision

At least one other Minnesota district court has addressed this precise issue and ruled that a lien claimant may not enforce its full lien against less than all the lots subject to its lien because it would be inequitable to do so. The Chisago County District Court recently confronted the same legal issue in two consolidated cases that involved facts nearly identical to the present case: *Premier Bank v. Raspberry Hill Development Corp, et al*, District Court File No. 13-CV-07-58, and *S.R. Weidema, Inc. v. Raspberry Hill Development Corp. et al.*, District Court File No. 13-CV-06-876. (Affidavit of Katherine M. Melander (960), Exh. A)

In that consolidated action, Premier, which is also involved in this appeal, sought to foreclose its mortgage against 69 of the 78 residential lots that comprised the Raspberry Hill development, which was located on 40 acres in Chicago County, Minnesota. (*Id.*) The mortgage secured a \$2,950,000 loan that Premier had provided a

development loan to the Raspberry Hill Development Corporation (Raspberry Hill) for the development of the property. (*Id.*) Before defaulting on its loan, Raspberry Hill had conveyed nine lots to individual buyers and Premier had released these nine lots from its mortgage. (*Id.*)

Raspberry Hill had contracted with S.R. Weidema for the construction of the site work, roads, sewer, water, and other related work as part of the 78-lot Raspberry Hill development. (*Id.*) S.R. Weidema then filed a blanket mechanic's lien against all the lots, including those lots that Raspberry Hill had sold to individual owners, claiming Raspberry Hill failed to pay \$217,198.67 of the \$1,532,670.54 contract price. (*Id.*) It then sought to foreclose on its mechanic's lien. (*Id.*)

In a cogent and well reasoned opinion, the Chisago County District Court rejected S.R. Weidema's argument that it could foreclose its mechanic's lien against less than all the lots subject to its lien because Minn. Stat. § 514.09 authorized apportionment only if it had file separate liens against all 78 lots. The court ruled that "[t]here is nothing in the language of Minn. Stat. § 514.09 that would permit S.R. Weidema to charge one lot, or less than all of the 78 lots, with the entire amount of its lien, when it elected to record one blanket lien." (*Id.*) In reaching this result, the court held that "it would be inequitable for S.R. Weidema to provide \$1,532.670.54 in improvements to the entire development that benefits 78 lots equally and then hold less than all of the properties liable for its lien." (*Id.*)

In reaching its decision, the district court examined decisions from other jurisdictions addressing the issue and noted the general rule is that the lien claimant

cannot enforce a blanket lien in full against less than all of the parcels subject to the lien. (*Id.*) The court observed that the Nebraska Supreme Court had, in *Badger Lumber Co., v. Holmes*, 44 Neb. 244, 62 N.W. 446 (1895), established that although a contractor may assert a blanket mechanic's lien against more than two lots, the contractor could not charge all of the lien to only part of the lots. (*Id.*) The Nebraska Supreme Court reasoned that a contractor must apportion its lien on a per lot basis so no part would bear any greater amount of the expense than the value of the material actually used in the construction of the home situated on the lot to be charged. (*Id.*) The district court also adopted the decision of the Supreme Court of Arkansas in *Sebastian Bldg. & Loan Ass'n v. Minten*, 27 S.W.2d 1011 (1930), which held that while a mechanic's lien claimant may file a single lien against two or more contiguous lots for materials and labor provided under one contract to those lots, the lien must be apportioned between the several lots where the rights of others are affected. (*Id.*)

The district court also concluded that S.R. Weidema was required to apportion its mechanic's lien because Minn. Stat. § 514.01 provides that whoever contributes to an improvement of real estate by performing labor or furnishing material "*shall have a lien upon the improvement and upon the land which it is situated.*" (*Id.*) (emphasis in original). The court noted that only six lots of the 78 lots comprising the Raspberry Hill development were not subject to Premier's foreclosure action. (*Id.*) The court concluded that "to have only those six remaining lots cover the unpaid balance due to S. R. Weidema in the amount of \$217,198.67, while all 78 lots reaped an equal benefit is

wholly inequitable." (*Id.*) The court determined that each lot was responsible for 1/78 of S.R. Weidema's lien because each lot enjoyed 1/78 of the improvements. (*Id.*)

The Chisago County District Court's decision, while not binding authority, is persuasive and consistent with the provisions of Minnesota's mechanic's lien statute and the supreme court's decisions in *Carr-Cullen* and *Great Northern*. It also is the better reasoned approach to the issue of how a lien claimant may foreclose on a blanket lien, striking a balance between the interests of the lien claimant and others who may also have an interest in the properties subject to the blanket lien.

D. The majority of courts that have addressed this issue have ruled that the lien claimant may not enforce its lien against less than all the parcels subject to the lien.

The district court's decision in this case is also contrary to the majority of courts that have addressed this issue. The general rule is that a blanket mechanic's lien against two or more parcels cannot be enforced in full against less than all of the parcels subject to the lien. J.R. Kemper, Annotation, *Enforceability of single mechanic's lien upon several parcels against less than the entire property liened*. 68 A.L.R. 1300 § 2 (1976)³.

³ The cases and jurisdictions that have explicitly or implicitly adopted the general rule that a lien claimant may not enforce a blanket mechanic's lien against less than all the lots subject to its lien are as follows: *CS & W Contractors, Inc. v. Southwest Savings & Loan Assoc.*, 883 P.2d 404 (Ariz. 1994); *Sebastian Building & Loan Ass'n et al. v. Minten et al.*, 27 S.W.2d 1011 (Ark. 1930); *Cook v. Capellino*, 281 P. 412 (Cal.App. 1929); *Compass Bank v. Brickman Group, Ltd.*, 107 P.3d 955 (Colo. 2005); *New England Savings Bank v. Meadow Lakes Realty Co.*, 688 A.2d 345 (Conn. 1997); *Richards Brick Co. v. Trott*, 23 App. D.C. 284, 1904 WL 19065 (App. D.C. 1904); *Rathburn v. Landess*, 129 So. 738 (Fla. 1930); *Friedlaender v. McCann*, 91 Ill. App. 415, 1900 WL 3325 (Ill. App. 1899); *William Metzger and Edward P. Baker v. Andrew McCann et al.*, 92 Ill. App. 109, 1900 WL 3385 (Ill. App. 1899); *M.R. Smith Lumber Co. v. Russell Et. Al.*, 144 P. 819 (Kan. 1914); *Maryland Brick Co. v. Dunkerly*, 36 A. 761 (Md. 1897); *Foster v.*

The reason underlying the rule is that it is inequitable to burden some lesser portion of the liened premises with charges for labor and material that were not actually furnished to that particular parcel. *Id.* The corollary to the rule is that, where the total labor and material costs for which the blanket lien is asserted can be reasonably allocated to individual parcels, the amount of the lien can be apportioned among the individual parcels and the lien enforced against the individual parcels to the extent of the apportioned value of the lien. *Id.* It does not appear that any court has allowed a lien claimant to enforce a blanket mechanic's lien in full against just one or a few lots subject to its lien.

The Arizona Supreme Court applied this general rule and its corollary to a case with facts nearly identical to the present case in *CS & W Contractors, Inc. v. Southwest Savings & Loan Assoc.*, 883 P.2d 404 (Ariz. 1994). In that case, a developer had

Cox, 123 Mass. 45, 1877 WL 10211 (Mass. 1877); *Dodds v. Cavett*, 97 So. 813 (Miss. 1923); *Manchester Iron Works v. E.L. Wagner Const. Co.* 107 S.W.2d 89 (Mo. 1937); *Hostetter v. Inland Dev. Corp.*, 561 P.2d 1323 (Mont. 1977); *Badger Lumber Co. v. Homes Et. al.*, 76 N.W. 174 Neb. 1898); *Brunzell v. Lawyers Title Ins. Corp.*, 705 P.2d 642 (Nev. 1985); *Blackman-Shapiro Co. v. Salzberg*, 8 Misc. 2d 972, 168 N.Y.S.2d 590 (N.Y. 1957); *Lichtenstein v. Grossman Contr. Corp.*, 162 N.E.2d 292 (N.Y. 1928); *W.H. Dail Plumbing, Inc. v. Roger Baker & Assoc., Inc.*, 308 S.E.2d 452 (N.C. 1983); *State Loan Co. v. White Earth Coal Mining, Brick & Tile Co.*, 157 N.W. 834 (N.D. 1916); *Eccles Lumber Co. v. Martin*, 87 P. 713 (Utah 1906); *PIC Const. CO., Inc. v. First Union Nat'l Bank*, 241 S.E.2d 804 (Va. 1978); *Weaver v. Harland Corp.*, 10 S.E.2d 547, 548 (Va. 1940); *Little Bros. Mill Co. v. Baker*, 106 P. 910 (Wash. 1910); *Associated Sand & Gravel Co., Inc. v. Di Pietro*, 509 P.2d 1020 (Wash. App. 1973); *Stevens Constr. Corp. v. Draper Hall, Inc.*, 242 N.W.2d 893 (Wis. 1976).

The courts in Delaware and Pennsylvania have ruled, respectively, the mechanic's lien statutes within those states do not permit a lien claimant to file a lien against two or more parcels. See *Di Mondì v. S&S Builders, Inc., et al.*, 124 A.2d 725 (Del. 1956) and *Goodyear v. Emele*, 21 Pa. D. 881, 1912 WL 3644 (Pa. D., Northampton County 1911).

contracted with CS & W Contractors for the construction of the streets, sewers, curbs, gutters and water lines as part of a 52-lot subdivision. *Id.* at 404. CS & W filed a lien on the entire property, claiming the developer had not paid it \$93,724.45 of the \$153,370.70 contract price. *Id.* at 404-05. The developer had obtained a loan from Southwest Bank for the initial work that was secured by a deed of trust. *Id.* at 404. During the construction, Southwest loaned the developer additional money that was secured by a second deed of trust that covered lots 39 through 42 only. *Id.* Southwest released these four lots from its first deed of trust, which, in turn, gave CS & W's mechanic's lien priority on the four lots. *Id.* at 405. Southwest's first deed of trust still enjoyed priority on the other 48 lots. *Id.*

Both the district court and court of appeals ruled that CS & W could assert its entire lien amount against the four lots on which its mechanic's lien had priority. *Id.* The Arizona Supreme Court reversed, holding that the district court incorrectly allowed CS & W to take the full amount of its 52-lot blanket lien from only four lots. *Id.* at 406. In reaching its decision, the court noted that "[b]asic infrastructure, such as roads, sewers, and water lines, benefit the entire subdivision and are only fortuitously located on any given lot. Each lot is equally benefited. Every future homeowner will use the same streets, water lines, sewers and fire hydrants." *Id.* at 406. The court acknowledged an earlier decision in which it held that equity requires a lien claimant to offer proof of specific benefit to specific lots in a subdivision when the value of that benefit is easy to

The issue of whether a lien claimant can enforce a blanket mechanic's lien against less than all the lots subject to the lien has not, and cannot, arise in those two states.

determine. *Id.* The court held, however, that "if all lots benefit equally from infrastructure[,] an equal apportionment is satisfactory, unless the claimant can prove disproportionate value was put into a lot over which it had priority." *Id.* The court ruled that "[a] lienor cannot extract the value of improvements made to several lots from fewer than all those lots. Apportionment is required when the superior lien runs to fewer than the total number of improved lots. A different result would allow [the lienor] to resurrect an extinguished lien and obtain a priority to which it is not entitled." *Id.* It concluded that CS & W was entitled to extract 4/52s of its entire lien from the four lots on which it had priority. *Id.*

Here, there is no sound reason the majority rule and its corollary does not, and should not, apply in this case. Like the contractor in *CS & W*, Kuechle provided labor and materials for the construction of the basic infrastructure for the River Bend development that included sewer, water, streets, curbs, and gutters. Kuechle concedes that its work benefited all 59 lots of the River Bend development, and it has made no showing that the labor or materials it furnished to the 11 lots on which its mechanic's lien has priority was in greater proportion to any other lots within the development. There is thus no difficulty in apportioning Kuechle's blanket lien among all 59 lots. Each lot benefited equally, and therefore, received 1/59 of the value of Kuechle's work furnished for the River Bend development.

In this case, it would be manifestly inequitable to allow Kuechle to "extract the value of improvements made to several lots from fewer than all those lots." *See CS & W*, 883 P.2d at 406. In this case, apportioning Kuechle's lien on a per lot basis would subject each lot to a

lien amount that reflects the value of the labor and materials actually furnished to each lot, protect others who may have interests in the 11 lots, and allow Kuechle to collect a portion of its outstanding debt. There is no sound reason why this court should not apply the general rule and its corollary, and the holding of the Arizona Supreme Court in *CS & W*, and hold that Kuechle may not foreclose its full blanket mechanic's lien against less than all the lots subject to its lien, but instead, must apportion its lien on a per lot basis.

E. Public policy supports apportionment.

Sound public policy supports the general rule and its corollary. As the Virginia Supreme Court reasoned, "[o]ne building can not be made to stand as the security for another. In truth, each building stands as a several debtor, and one can no more be made to discharge the debt of another building than one individual debtor can be made to pay a separate claim owing by somebody else to the same creditor." *Weaver v. Harland Corp.*, 10 S.E.2d 547, 548 (Va. 1940). In a later decision, the Virginia Supreme Court recognized the danger of allowing a lien claimant to enforce its entire blanket lien against less than all the parcels subject to its lien, stating that "if such procedure was permitted the lienors 'could so shift their liens as to unduly burden some of the lien subjects and relieve others, to the extent of imperiling the interests of other lien creditors which would not be consonant with the intent and spirit of the [mechanic's lien] statute and would be offensive to good conscience and equity." *PIC Constr. Co. v. First Union Nat'l Bank of North Carolina*, 241 S.E.2d 804, 808 (Va. 1978) (quotation and citation omitted). Thus, according to the Nevada Supreme Court, "apportionment [of a blanket lien] ensures that certain property . . . which is liable for the costs of its own improvement will not also be

liable for the improvement costs of other property." *Brunzell v. Lawyers Title Ins. Corp.*, 705 P2d 642, 644 (Nev. 1985).

The rule that the district court adopted is in the clear minority, and may be the only case in the country that has allowed a mechanic's lien claimant to foreclose a blanket lien against less than all the parcels subject to the lien. The reason that courts have routinely rejected such a rule is because it leads to inequitable and harsh results that run contrary to the principles of equity and sound policy.

The following example illustrates the inequitable and harsh results that may, and will likely, arise under the rule the district court adopted in this case: Developer hires contractor to perform initial site work for a 60-lot subdivision for \$1.5 million. This work includes the construction of streets, sewers, curbs, gutters and water lines, and benefits all 60 lots within the subdivision equally. Developer then sells 10 lots to a builder, who, in turn, sells those lots to private individuals. As part of this sale, bank releases the 10 lots from its mortgage embracing the entire subdivision. Contractor performs the site work, but the developer fails to pay for the work. Contractor then files a blanket mechanic's lien claim against all 60 lots of the subdivision, which enjoys priority over any subsequent mortgages on the 10 lots. If this court allows the district court's ruling to stand, it would be legally permissible for the contractor to bring a mechanic's lien foreclosure action for the full amount of its blanket mechanic's against only one lot. Thus, one lot could be burdened with, and responsible for, satisfying a \$1.5 million mechanic's lien, even though the contractor's work benefited the other 59 lots

equally. This result is unjust, inequitable, and contrary to common sense and the equitable principles underlying the mechanic's lien statute.

The rule adopted by the district court may also adversely affect other mechanic's lien claimants who furnish labor and materials for improvements situated on property subject to a blanket mechanic's lien. It is distinctly possible that the mechanic's lien claims of contractors and suppliers who provided labor and materials used in the later construction of homes on the lots subject to a blanket lien would be wiped out. By allowing the first contractor to enforce the full amount against less than all the lots subject to the lien may so encumber the selected lots, it may render it impossible for a later contractor who performed labor or furnished materials in the construction of the homes built on those lots from being able to collect on any mechanic's lien claim it may file.

There is no sound public policy that would commend this court to adopt the minority rule that the district court applied in this case. To the contrary, public policy counsels this court to apply the majority rule and its corollary. Premier therefore respectfully requests this court reverse the district court and remand with instructions that the district court apportion Kuechle's blanket mechanic's lien on a per lot basis.

F. Minnesota's Common Ownership Interest Act requires Kuechle to apportion its lien claim.

The River Bend development is a Common Interest Community formed and governed by Minn. Stat. §515B.1-101 – §515B.4-118. The CIC Declarations for the River Bend development were filed in the Sherburne County Recorder's Office on

(Affidavit of Katherine M. Melander (960), Exh. D) Therefore, the statutory framework established by the Minnesota Common Interest Ownership applies to this project.

Minn. Stat. §515B.3-117 provides impertinent part the following:

An individual unit owner may have the unit owner's unit released from a lien if the unit owner pays the lien holder the portion of the amount which the lien secures which that attributable to the unit. . . .

Minn. Stat. §515B.3-117 applies to the River Bend development, and although Premier is not currently the owner of Lots 5, 6, and 10, Block 3, River Bend, it will be when its foreclosure proceedings on the three construction mortgages are completed. Once Premier becomes the owner of these three lots, Premier will be afforded the protection of Minn. Stat. §515B.3-117, and can require Kuechle to apportion its lien.

Kuechle's argument that the *Zachman* decision does not require them to prorate their lien without a contractual agreement to do so is unavailing because it directly contrary to Minnesota law. (*Id.*, Ex. C). The River Bend Declarations together with the Minnesota Common Interest Ownership Act are provisions that run with the land and unit owners are afforded the protection found in Minn. Stat. §515B. 3-117. Therefore, Minn. Stat. §515B.3-117 requires Kuechle to apportion the amounts claimed in its mechanic's lien on per lot basis.

III. The District Court Erred In Denying Premier's Decree Of Foreclosure On Its Three Construction Mortgages In Its Order for Judgment.

The district court erred in failing to grant Premier a decree of foreclosure on its three construction mortgages in its Order for Judgment in 71-CV-07-960. Although the district court granted Premier's motion for summary judgment allowing Premier to foreclose its

three construction mortgages, it denied Premier a decree of foreclosure in its Order for Judgment. The court denied Premier's decree of foreclosure on its three construction mortgages on the mistaken belief that its determination that the priority of Kuechle's mechanic's lien over Premier's three construction mortgages precluded Premier from foreclosing on the three mortgages. But under Minnesota law, the fact that Kuechle's mechanic's lien had priority over these three mortgages does not preclude Premier from foreclosing its mortgages.

A mechanic's lien enjoys priority from the date of the first visible improvement to the property. *See* Minn. Stat. § 514.05. It is well-settled under Minnesota law that a mechanic's lien attaches "from the time the first item of material or labor is furnished upon the premises for the beginning of the improvement" and enjoys priority over "any mortgage . . . not then of record." *See* Minn. Stat. § 514.05, subd. 1. Indeed, even an unrecorded mechanic's lien may be prior to a mortgage if the mortgage is recorded after the date visible improvements begin.

Accordingly, a foreclosure sale by a junior lienholder does not impact the rights of a prior lienholder. As the Minnesota Supreme Court has held, the purpose of a foreclosure sale is "terminate all interests *junior* to the mortgage being foreclosed and to provide the sale purchaser with a title identical to that of the mortgagor as of the time that the mortgage being foreclosed was executed." *Gerdin v. Princeton State Bank*, 384 N.W.2d 868, 871 (Minn. 1986) (quoting G. Osborn, G. Nelson & D. Whitman, *Real Estate Finance Law* § 7.19 (1979) (emphasis supplied)). Consistent with this principle, Minnesota Statute Section 580.12 unequivocally states that the sheriff's certificate of sale

"operate[s] as a conveyance to the purchaser or purchaser's assignee of all the right, title, and interest of the mortgagor in and to the premises named therein *at the date of such mortgage*" Minn. Stat. § 580.12 (emphasis supplied). Accordingly, a sheriff's sale pursuant to a decree allowing Premier to foreclose its three construction mortgages will not affect the priority of Kuechle's lien. The purchaser at such sale will simply take subject to Kuechle's lien rights.

Because there is no legal or factual basis for the district court's refusal to issue Premier a decree of foreclosure, Premier respectfully requests that this court remand this matter to the district court with instructions to enter a decree of foreclosure in Premier's favor against the three lots.

IV. The District Court Erred In Dismissing Premier's Claims Against The Individual Guarantors And Denying Its Motion For Summary Judgment Against The Individual Guarantors.

The district court erred in dismissing Premier's claims against the Individual Guarantors for breach of the guaranties and denying Premier's motion for summary judgment on these claims.

A guaranty "is an independent contract between a guarantor and a creditor and is collateral to the contractual obligation between the creditor and a debtor." *Loving & Associates, Inc. v. Carothers*, 619 N.W.2d 782, 786 (Minn. App. 2000), *review denied*, (Minn. Feb. 13, 2001). A guaranty is "an undertaking or promise to pay on the part of one person that is collateral to a primary obligation and that binds the guarantor to performance in the case of the default of the one primarily bound." *Baker v. Citizens State Bank*, 349 N.W.2d 552, 557 (Minn. 1984).

To be enforceable, "[a] guaranty agreement, like any other contract, must be supported by a valid consideration." *O'Neil v. Dux*, 257 Minn. 383, 101 N.W.2d 588, 594 (1960). Unlike other types of contracts, however, in the case of a guaranty agreement, "there need be nothing moving from the promisee to the promisor." *Id.* Rather, it has long been the law in Minnesota that where a creditor acts to its detriment by extending credit or altering the terms of existing credit in reliance on a guaranty, such detriment "is sufficient consideration to support" the guaranty. *Tri-County State Bank of Ortonville v. Golf Properties, Inc.*, 395 N.W.2d 409, 412 (Minn. App. 1986) (citing *Southdale Center, Inc. v. Lewis*, 260 Minn. 430, 110 N.W.2d 857 (1961)).

Minnesota law favors and encourages the enforcement of personal guaranties given in connection with commercial transactions of the sort at issue in this case. As the Minnesota Supreme Court has held:

A personal guaranty is a significant business transaction. A person signing as guarantor is agreeing to pay, if need be, the debt of another, never an agreeable task for the person signing but a prudent business precaution for the financing party. In these circumstances the law requires guarantors to abide by what they have agreed to.

Borg Warner Acceptance Corp. v. Shakopee Sports Center, Inc., 431 N.W.2d 539, 541 (Minn.1988). According to the supreme court, when two competent parties who are able to read and write sign a guaranty and a lender extends credit based on the guaranty, "there is nothing left for the Court to do but to find a judgment against such guarantors. . . . People who sign documents which are plainly written must expect to be held liable thereon. Otherwise written documents would be entirely worthless and chaos would prevail in our business relations." *Watkins Products, Inc. v. Butterfield*, 274 Minn. 378,

144 N.W.2d 56 (1966) *Borg Warner Acceptance Corp. v. Shakopee Sports Center, Inc.*, 431 N.W.2d 539, 541 (Minn.1988); *see also Watkins Products, Inc. v. Butterfield*, 274 Minn. 378, 144 N.W.2d 56 (1966)

Here, it is undisputed that the Individual Guarantors in 71-CV-07-1374 agreed to guaranty the \$3.2 million loan that Premier made to Becker Development and that Premier acted to its detriment by extending that loan based on those Guaranties. It also undisputed that the Individual Guarantors breached their respective Guaranties – Becker failed to make the installment payments due and owing under the parties' loan documents, and despite demand, the Individual Guarantors have failed to make such payment to Premier. (A-177). The Individual Guarantors are trying to evade their obligations based on a clear scrivener's error that erroneously defined the "Debtor" as Boone Family Investments, instead of Becker Development

A. The district court erred when it refused to reform the Guaranties to reflect the intent of the parties.

A court may reform an instrument if all the following elements are proven: (1) the parties had a valid agreement expressing their real intentions; (2) the written instrument failed to express their intent; and (3) the failure was due to the parties' mutual mistake. *Johnson v. Giese*, 231 Minn. 258, 261, 42 N.W.2d 712, 715 (1950). A mutual mistake occurs when "both parties agree as to the content of the document but that somehow through a scrivener's error the document does not reflect that agreement." *Nichols v. Shelard Nat'l Bank*, 294 N.W.2d 730, 734 (Minn.1980). An agreement may be reformed when the parties made a mutual mistake, there was a unilateral mistake by one party

accompanied by fraud or inequitable conduct, or the parties failed to comply with a legal requirement for execution, such as including the proper grantor. *Berg v. Carlstrom*, 347 N.W.2d 809, 812 (Minn.1984). The evidence supporting reformation must be consistent, clear, and convincing. *Norwest Bank Minnesota, v. Ode*, 615 N.W.2d 91 (Minn. App. 2000).

In this case, the undisputed evidence clearly and convincingly demonstrates that the district court should have reformed the Guaranties to reflect that Becker was the "Debtor", not Boone Family Investments. The loan agreement (Loan Agreement) that the Individual Guarantors and Premier signed on September 8, 2005, sets forth the terms under which Premier is making the loan and states that the loan is being made to Becker Development and must be guaranteed by the Individual Guarantors. The Loan Agreement expressly defines Becker Development as the "Borrower," refers to the "Loan Note" (Note) in the original principal amount of \$3,200,000.00 and lists the Guaranties from the Individual Guarantors as required security and "Loan Documentation." Paragraph 11 of the Loan Agreement obligates the Individual Guarantors to:

. . . indemnify Lender [Premier] and save it harmless against all loss, liability, expense, or damages, including but not limited to attorneys fees, which may arise by reason of a breach by Borrower [Becker] or any Guarantor of any warranties, representations or covenants contained in this Loan Agreement or the assertion of any lien against the Loan Property.

(A-189)

The parties' Loan Agreement clearly states the parties' intent that the Individual Guarantors agreed to guaranty Becker's indebtedness to Premier under the Note in the original principal amount of \$3,200,000.00. Thus, the undisputed facts establish the first

element of reformation – the parties had a valid agreement expressing their real intentions.

On September 8, 2005, the same day the Loan Agreement and Note were signed, the Personal Guarantors each executed a “Guaranty.” Each Guaranty states:

B. The Debtor and the Lender have agreed that the Lender will make an advance (“Loan”) to the Debtor in the principal amount of Three Million Two Hundred Thousand and 00/100 Dollars (\$3,200,000.00) which Loan is evidenced by a Loan Note of even date herewith from the Debtor to the Lender (hereinafter referred to as the “Note”) to be disbursed pursuant to the Loan Agreement of even date.

C. To secure payment of the Note, the Debtor has executed and delivered to the Lender a Mortgage and Assignment of Rents and Security Agreement and Fixture Financing Statement of even date herewith (hereinafter referred to as the “Mortgage”) covering the Premises.

(A-261, 298)

Paragraph 1 of each Guaranty provides that ***“the Note, the Mortgage, and the Loan Agreement are hereby made a part of this Guaranty by reference thereto with the same force and effect as if fully set forth herein.”*** (*Id.*) (Emphasis added). The “unconditional and absolute” guaranty set forth in paragraph 3 of each Guaranty also expressly refers to and incorporates by reference the obligations set forth in the Note, Mortgage and Loan Agreement. Moreover, paragraph 8 of each Guaranty provides that “the Individual Guarantor agrees that this Guaranty is executed in order to induce the Lender to make and disburse the Loan.” (*Id.*) These documents therefore make it clear that the parties understood that Premier was loaning \$3.2 million to Becker Development and that the Individual Guarantors were required to guaranty repayment of that debt. Thus, the undisputed facts establish the second element of reformation – the written

Guaranties failed to express the parties' intent when they defined the "Debtor" as Boone Family Investments rather than Becker Development.

This failure was due to the parties' mutual mistake. The Guaranties expressly incorporate the Loan Agreement by reference, which specifies that Becker Development is the "Borrower". Similarly, the Guaranties specifically incorporate the \$3.2 million Note, which specifically identifies Becker as the Borrower. The Guaranties also expressly state that they are being given to induce Premier to make and disburse the loan referred to in the Loan Agreement. All of the loan documents were signed on the same date. These documents make it obvious that the parties intended that the Individual Guarantors were guaranteeing the Note that Becker Development executed in favor of Premier.

The record is also devoid of any evidence that the parties ever contemplated the Individual Guarantors guaranteeing some other indebtedness. There is no evidence that Premier made, or even considered, a separate \$3,200,000.00 loan to Boone Family Investments that the Individual Guarantors were asked to guaranty. There is no evidence that the proceeds from the loan were used for anything other than to develop the River Bend project consistent with the intent of the loan documentation. Thus, the undisputed facts clearly and convincingly establish the third and final element needed for reformation – the scrivener's error defining the debtor as Boone Family Investments was a mutual mistake.

Minnesota courts have routinely used reformation to fix scrivener's errors in legal documents where there has been a mutual mistake. *See Berg v. Carlstrom*, 347 N.W.2d

809 (Minn. 1984) (reforming deed to include proper parties' names in order to perfect grant of easement); *Theisen's Inc. v. Red Owl Stores, Inc.*, 243 N.W.2d 145 (Minn. 1976) (reforming lease to change year building was completed, impacting computation of lessee's liability for tax increases, based on parties' course of conduct and expert testimony); *Hartigan v. Norwich Union Indem. Co.*, 188 Minn. 48, 246 N.W. 477 (Minn. 1933) (reforming insurance policy to reflect proper name of owner of insured car based on mutual mistake); *Magnuson v. Diekmann*, 689 N.W.2d 272, 274 (Minn. App. 2004) (holding "[a] deed creating by mistake a tenancy in common, where a joint tenancy was intended, will be reformed").

In this case, the undisputed evidence overwhelmingly leads to one conclusion: the Guaranties erroneously identified Boone Family Investments as the "Debtor," rather than Becker Development. The district court, therefore, erred when it refused to correct the scrivener's error and reform the Guaranties to properly identify Becker Development as the "Debtor."

B. The Individual Guarantors are liable to Premier because they guaranteed obligations of Boone Family Investments to guaranty the obligations of Becker Development under the promissory note.

Boone Investment's guaranty of the obligations of Becker Development entitles Premier to summary judgment against the Individual Guarantors even if the Guaranties are not reformed. As written, the Guaranties guaranteed Boone Investment's obligations as the "Debtor". (A-261-295). Boone Family Investments breached its obligations under the Loan Agreement, mortgage and its guaranty. Thus, even if the Guaranties are read to guaranty the indebtedness of Boone Family Investments (as opposed to Becker),

the Individual Guarantors are liable to Premier because it is undisputed that Boone Investments breached its obligations under the mortgage, the Loan Agreement, and its guaranty.

Under the Guaranties, each Individual Guarantor agreed to guaranty all obligations of Boone Investments under the loan documents. As the district court found, it is undisputed that Boone Investments breached its obligations under the Loan Agreement and its Guaranty. The Individual Guarantors are therefore responsible, and liable, for Boone Family Investments' indebtedness.

C. The district court erred in dismissing the Individual Guarantors.

The district court erred in dismissing Premier's claims against the Individual Guarantors on summary judgment because genuine issues of material fact existed regarding the intent of the Individual Guarantors in guaranteeing the promissory note between Becker Development and Premier.

Premier commenced this action in October 2007, seeking, *inter alia*, judgment for the balance owed on the loan from Becker Development and the Guarantors, jointly and severally; foreclosure of the mortgage; and foreclosure of Premier's security interest in other collateral pledged to secure the loans. On March 27, 2008, Premier moved for summary judgment against Becker Development and the Guarantors.⁴ Premier did not take discovery prior to moving for summary judgment because the answers filed on

⁴ Premier also moved for summary judgment on its claims of priority over the interests of defendants Knife River Corporation-North Central, formerly known as Bauerly Brothers, Inc., and Kuechle, each of whom have filed mechanic's liens against the mortgaged property.

behalf of the defendants admitted the authenticity of the documents and the material facts supporting Premier's claims. The district court had also not issued a scheduling order, thus, there would have been time to complete discovery if the summary judgment motion did not dispose of all issues. The hearing on Premier's motions for summary judgment in both cases took place on April 25, 2008.

In opposition to Premier's summary judgment motion, on or about April 23, 2008, three days before the hearing, three of the Individual Guarantors brought motions to dismiss for lack of service of process, claiming Lawrence Marofsky, the attorney who had interposed an answer on their behalf, did not have authority to do so. When they filed their Opposition to Motion for Summary Judgment on April 21, 2008, four days before the hearing, the remaining Individual Guarantors argued, for the first time, that Premier was not entitled to summary judgment because the Guaranties they signed guaranteed the obligations of Boone Family Investments, not Becker Development.

On May 30, 2008, the district court issued its Order for Judgment and Partial Summary Judgment (the "Order"). As part of that Order, the court granted "the Motion to Dismiss of **DEFENDANTS STEVEN L. BOONE, ANNETTE C. BOONE, MICHAEL S. UZELAC, DEANNA M. LASSER, ANN-MARIE RASMUS AND DANIEL P. BOONE** requesting dismissal of the action of **PLAINTIFF PREMIER BANK** against said Defendants on their respective personal guaranties of obligations dated September 8, 2005." Defendants had not noticed and filed a motion to dismiss on these grounds. The district court considered the motion *sua sponte*. The district court reasoned that "[t]hese guaranties were executed as guaranties of the indebtedness of

Boone Family Investments, LLC and not the indebtedness of Becker Development, LLC."

Even if Premier was not entitled to summary judgment, the district court's dismissal of the Individual Guarantors was improper because there was a triable issue of material fact regarding the intent of the Individual Guarantors to guaranty the Note.

The Guaranties expressly incorporate the Loan Agreement by reference, which specifies that Becker Development is the "Borrower"; the \$3.2 million Note is incorporated into the Guaranties by reference and specifies Becker Development as the Borrower; the Guaranties expressly state that they are being given to induce Premier to make and disburse the loan referred to in the Loan Agreement; and all of the loan documents were signed on the same date. This evidence clearly demonstrates a triable issue of fact with regard to the Individual Guarantor's intent; especially, when the record is devoid of any evidence other than the Individual Guarantors' denials that they did not intend to guaranty the loan to Becker. A party opposing summary judgment may not rely upon its pleadings or general statements of fact. *Celotex Corp. v. Cattrett*, 477 U.S. 317 (1986). Rather, the non-movant must go beyond the pleadings and set forth specific facts which raise a genuine issue for trial. *Id.* at 322. The Individual Guarantors have failed to offer any evidence with regard to intent beyond mere assertion.

If this court determines that Premier is not entitled to reformation of the Guaranties as a matter of law, at a minimum, the evidence in the record creates a triable issue of fact as to whether the Individual Guarantors agreed, and hence, intended to guaranty the indebtedness of Becker Development under the Loan Agreement and Note.

Accordingly, if this court does not direct that summary judgment be entered in favor of Premier, the case should be remanded to the district court for further discovery and trial on the issue of the intent of the parties, mutual mistake, and reformation.

CONCLUSION

The district court erred when it ruled that Kuechle was not required to apportion its mechanic's lien on a per lot basis. It also erred when it refused to issue Premier a decree of foreclosure against the three lots on which the model homes were situated, and in dismissing the Individual Guarantors and denied Premier's motion for summary judgment against them. Premier therefore respectfully requests that, in a published opinion, this court reverse the decision of the district court and remand this case to the district court for further proceedings consistent with this court's opinion.

Respectfully submitted,

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Dated: 9/29/08

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Certification of Brief Length

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs.1 and 3, for a brief produced with a proportional 13 point font. The length of this brief is **12,702** words. This brief was prepared using Microsoft Word 2002.

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