

Nos. A08-1252 and A08-1700

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State of Minnesota  
In Supreme Court

PREMIER BANK, a Minnesota corporation,

*Appellant,*

vs.

BECKER DEVELOPMENT, LLC, a Minnesota limited liability company,  
 BOONE FAMILY INVESTMENTS, LLC, a Minnesota limited liability company,  
 STEVEN L. BOONE, an adult resident of Minnesota, ANNETTE C. BOONE, an  
 adult resident of Minnesota, NANCY C. BUEHLER, an adult resident of  
 Minnesota, ROBERT G. BUEHLER, an adult resident of Minnesota,  
 MICHAEL S. UZELAC, an adult resident of Minnesota, PAMELA J. NOLL, an  
 adult resident of Minnesota, DEANNA M. LASSER, an adult resident of Minnesota,  
 ANN-MARIE RASMUS, an adult resident of Minnesota, DANIEL P. BOONE, an  
 adult resident of Minnesota, BAUERLY BROTHERS, INC., a Minnesota  
 corporation, KUECHLE UNDERGROUND, INC., a Minnesota corporation,  
 JOHN OLIVER & ASSOCIATES, INC., a Minnesota corporation,  
 AND JOHN DOES 1 THROUGH 5,

*Respondents,*

PAMELA J. NOLL,

*Respondent,*

vs.

GORDON JENSEN and JENSEN ANDERSON SONDRALL, P.A.,

*Respondents.*

**APPELLANT PREMIER BANK'S BRIEF AND ADDENDUM**

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## STATEMENT OF LEGAL ISSUES

- I. Under Minnesota law, one who files a blanket mechanic's lien pursuant to Minn. Stat. § 514.09 may not foreclose the full amount of its lien against less than all the lots subject to the lien, but must apportion its lien. The district court ruled the lien claimant could foreclose the entire amount of its mechanic's lien against only those lots where its lien enjoyed priority. Did the district court err in its application of law?**

The district court ruled that the lien claimant could foreclose the full amount of its mechanic's lien against only those lots where its lien enjoyed priority over the bank's mortgage and that Minn. Stat. § 514.09 did not require lien claimant to apportion its lien.

In a published opinion, the court of appeals affirmed the district court and held that despite the absence of express statutory authority, equitable principles allow a lien claimant to foreclose the full amount of its mechanic's lien against less than all the lots subject to its lien and does not require the lien claimant to apportion its lien.

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)

## STATEMENT OF CASE

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

In the first action, District Court File No. 71-CV-07-1374, Premier sought to foreclose 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 a residential development in Sherburne County commonly known as the "River Bend Development" (also sometimes referred herein as the Project). The River Bend Development is located on forty acres in Becker, Minnesota, and consists of fifty-two improved lots and seven outlots. Premier alleged that Becker Development had defaulted on the loan documents and sought to recover the amounts due and owing under the promissory note and that the mortgage secured.

In the second action, District Court File No. 71-CV-07-960, Premier sought to foreclose on three separate construction mortgages that secured three construction loans it had given 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.

In both actions, Premier named respondent Kuechle Underground, Inc. (Kuechle), as a defendant based on the mechanic's lien statement Kuechle had recorded with the Sherburne County Recorder's Office on February 14, 2007. The lien was in the amount of \$266,622.96, and was filed against all 59 lots comprising the River Bend

Development. Kuechle had contracted with 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 and asserted claims for breach of contract, account stated, and quantum meriut against Becker Development.

The district court consolidated the two cases, and Premier and Kuechle moved for summary judgment on their respective claims. 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. In 71-CV-07-960, Premier acknowledged that it had released the three lots on which the model homes were situated from its first mortgage and did not record its three construction mortgages on those lots until after the first date of work attributable to Kuechle. It argued, in part, that Kuechle could not foreclose the full amount of its mechanic's lien against less than all the lots subject to the lien, but instead, was required to apportion its lien on a per lot basis because Kuechle's work benefited all the lots in the Project equally. Premier argued that it was inequitable and unjust to allow Kuechle to encumber the three lots with the full amount of the lien 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.

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 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 its 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 permitted Kuechle to foreclose the full amount of its lien in the amount of \$266,622.96 against the three lots, plus the additional eight lots, even though Kuechle admitted that its work benefited all 59 lots within the River Bend Development equally.

In a published opinion, the court of appeals affirmed in part, reversed in part, and remanded the matter for an order consistent with its opinion. *Premier Bank v. Becker Dev., LLC*, 767 N.W.2d 691, 694 (Minn. App. 2009). The court reversed the district court's grant of summary judgment to the individual guarantors and refusal to grant Premier a decree of foreclosure on its three construction mortgages. *Id.* at 698, 702. The court of appeals, however, affirmed the district court's ruling that Minn. Stat. § 514.09 did not require Kuechle to apportion its mechanic's lien on a per lot basis and Kuechle could foreclose the

full amount of its lien against only those lots where its lien enjoyed priority over Premier's construction mortgages. *Id.* at 702.

In affirming the district court, the court of appeals stated that the issue of how a lien claimant forecloses a blanket mechanic's lien was one of first impression in Minnesota and there was no precedential case law on point. *Id.* at 699-700. The court observed that while there was nothing in the mechanic's lien statute that allowed a lien claimant to foreclose a lien against less than all the property subject to the lien, there was nothing in the statute that prevented a lien claimant from doing so. *Id.* at 700. The court concluded the mechanic's lien statute is ambiguous because its various provisions can be read to allow foreclosure of an entire lien against less than all property subject to the lien, or in such a manner that requires apportionment of the lien. *Id.* at 699. To resolve the issue, the court of appeals stated it would apply equitable principles and "examine and weigh the equities involved under the specific circumstances of the case." *Id.* at 700.

In examining the equities, the court of appeals acknowledged that allowing Kuechle to foreclose the full amount of the lien against less than all the lots subject to the lien would resurrect Kuechle's lien rights on the majority of the development that Kuechle did not otherwise enjoy. *Id.* at 701. This factor weighed in Premier's favor. *Id.* But the court believed that two additional factors weighed in Kuechle's favor. *Id.* First, the court reasoned that allowing Kuechle to foreclose the entire lien amount against less than all the lots would further the purpose of the lien laws because it would allow Kuechle to receive full payment for the labor and materials it furnished to the Project and prevent Premier from reaping a windfall. *Id.* Second, the court noted that Premier could have, but did not require

Kuechle to agree to remain a junior lienholder on the released lots. *Id.* The court concluded that allowing Kuechle to foreclose the full amount of its lien against less than all the lots subject to the lien balanced the equities and advanced the purpose of the lien laws because it placed the parties in the same position they would have been in had the project been developed without any problems. *Id.*

The court of appeals dismissed Premier's concern that such a rule had the potential of creating a scenario where a lien claimant could arbitrarily pick and choose which lots to foreclose against, believing that adequate safeguards exist to prevent such a situation. *Id.* In a situation where the value of the property exceeds the lien amount of the senior leinholder, the court of appeals concluded that the district court was free to examine the equities of the particular case and that a redemption under Minn. Stat. § 580.24 could be used to acquire the property and protect junior lien holders. *Id.* According to the court, the district court could employ its equitable powers and determine whether redemption is warranted and whether a junior lienholder failed to protect its rights by failing to file a notice to redeem and subsequently redeeming the property. *Id.* The court of the appeals then construed this court's decision in *Carr-Cullen v. Cooper*, 144 Minn. 380, 385-86, 175 N.W. 696, 699 (1920), to hold that apportionment is required when a bona fide purchaser acquires the property after the lienholder has established lien rights. *Id.*

By Order dated and filed on September 16, 2009, this court granted Premier's petition for further review on the issue of apportionment under Minn. Stat. § 514.09 (2008).

## STATEMENT OF FACTS

In general, Premier agrees with the court of appeals recitation of the facts. 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 three phases. (*Id.* at T. 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 T. 36-37)

On September 8, 2005, Premier entered into a loan agreement with Becker Development and agreed to lend Becker Development \$3.2 million for the purchase of the land and the overall site work necessary to develop the 40 acres on which the River Bend Development is situated. *Premier Bank*, 767 N.W.2d at 694. Becker Development executed a promissory note in favor of Premier in the amount of \$3.2 million. *Id.* It also jointly executed a mortgage with defendant Boone Family Investments, LLC, ("Boone Family Investments") in favor of Premier in the amount of \$3.2 million. *Id.* Premier recorded the mortgage with the Sherburne County Recorder on September 9, 2005. *Id.*

On February 13, 2006, Premier entered into three loan agreements with Boone Builders, the builder for the Project, for the construction of three model homes on Lots 5, 6, and 10 of Block 3, River Bend. *Id.* The principal amounts of these loans were: \$233,000; \$243,000; and \$252,000. (*See* App. 24) Boone Builders secured these loans by providing separate mortgages in Premier's favor for each lot. *Premier Bank*, 767

N.W.2d at 694. Premier recorded one mortgage on February 28, 2006, and the other two on April 21, 2006. *Id.*

On April 20, 2006, 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 Project. *Id.* This agreement memorialized an earlier oral agreement by which Becker Development agreed to pay Kuechle \$931,037.15 for the initial site work. *Id.* (See also App. - 46) Pursuant to this earlier oral agreement, Kuechle began the first visible work on the Project on October 3, 2005. *Id.*

On October 10, 2006, Premier and Becker Development, along with Boone Family Investments, entered into a loan modification agreement that extended the maturity date of the promissory note to September 8, 2007. *Id.* Under this agreement, Premier also released its development mortgage on Lots 5, 6, and 10 of Block 3, River Bend *Id.*

During the course of the Project, additional work was necessary and the parties agreed to adjust the total contract price to \$1,083,730.58. (A-91) Becker Development, however, only paid Kuechle \$817,107.62, which left an unpaid balance due under the contract of \$266,622.96. (*Id.*) On February 14, 2007, Kuechle served and filed a mechanic's lien statement for the unpaid amount against all 59 lots within the River Bend Development. (A-139)

Ultimately, Becker Development defaulted on its \$3.2 million development loan. *Premier Bank*, 767 N.W.2d at 695. Similarly, Boone Builders defaulted on its three construction loans. *Id.* Premier then commenced two separate mortgage foreclosure actions. *Id.* In the first action, Premier sought to foreclose the \$3.2 million development

mortgage. *Id.* It alleged that Becker Development was in default under the mortgage and other loan documents by failing to make the payments required under those instruments.

*Id.*

In the second action, Premier sought to foreclose its three mortgages securing the three construction loans it had advanced to Boone Builders for the construction of the three model homes. *Id.* It alleged, in part, that Boone Builders had defaulted on the three mortgages and accompanying loan documents by failing to pay the promissory notes when they matured. *Id.*

Premier named Kuechle and other lien claimants as defendants in both actions. *Id.* In each action, Kuechle asserted crossclaims and counterclaims seeking to foreclose its mechanic's lien. (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.*)

The district court consolidated the two actions. *Id.* Premier and Kuechle moved for summary judgment. *Id.* In 71-CV-07-1374, the district court agreed with Premier and denied Kuechle's summary judgment motion. (Add. 34) The court ruled that Premier's first mortgage was prior and superior to Kuechle's lien. (Add. 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. (Add. 33)

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 after concluding they did not have priority over Kuechle's mechanic's lien. (Add. 37-39) The district court ruled that Kuechle was entitled to foreclose the full amount of its mechanic's lien against the three lots that Premier's construction mortgages encumbered, along with eight additional lots that had also been released from Premier's development mortgage. (Add. 37) The court concluded that Minn. Stat. §514.09 did not require Kuechle to apportion its mechanic's lien on a per lot basis. (Add. 43) The court, therefore, permitted Kuechle to foreclose its mechanic's lien in the amount of \$266,622.96 against the 11 lots even though Kuechle filed one lien against all 59 lots and its work benefited all 59 lots equally. (Add. 37)

This appeal follows.

## SUMMARY OF ARGUMENT

The court of appeals erred when it applied equitable principles to affirm the district court's decision that allowed Kuechle to foreclose the full amount of its mechanic's lien against only those three lots where the lien enjoyed priority. This court has long held that the mechanic's lien statute creates the right to the lien and affords the exclusive manner in which to enforce the lien. A lien claimant, therefore, may foreclose and recover on its lien only in the manner that the mechanic's lien statute provides. Although Minn. Stat. § 514.09 allows one who furnishes labor or materials to an improvement of real property to file one lien against two or more contiguous parcels, it does not permit a lien claimant to foreclose the full amount of the lien against less than all the lots subject to the lien. Absent such express statutory authority, Kuechle was not entitled to foreclose the full amount of its mechanic's lien against only the three lots where its lien enjoyed priority. The court of appeals was not free to supply what the legislature purposely omitted or inadvertently overlooked and impermissibly applied equitable principles to provide Kuechle with a remedy not found in the statute. In doing so, the court of appeals exceeded its authority as an error-correcting court.

The court of appeals also erred in concluding that there is no precedential authority addressing the manner by which a lien claimant must foreclose a blanket mechanic's lien. Nearly 90 years ago, this court addressed the issue of apportionment under Minn. Stat. § 514.09 in *Carr-Cullen Co. v. Cooper*, 144 Minn. 380, 175 N.W. 696 (1920). In the only case to address this issue, this court held that one who perfects a

mechanic's lien against two or more adjoining lots must apportion its lien so that each lot is subject to a lien that is fairly chargeable to it. *Id.* at 385-86, 175 N.W. at 699.

The court of appeals, however, misconstrued the *Carr-Cullen* decision and established the new rule that apportionment is required only in those situations when a bona fide purchaser acquires the property after the lienholder has established lien rights. This interpretation and rule make no sense under Minnesota law and demonstrate a fundamental misunderstanding of Minnesota mechanic's lien law. Once a lienholder establishes the right to a lien, it eliminates the possibility of one acquiring the property as a bona fide purchaser (or mortgagee). The mechanic's lien statute and long established case law provide that the beginning of the actual and visible improvement on the ground serves as notice to the world that the property is subject to a possible mechanic's lien claim. Minnesota law deems one who takes an interest in the property after the beginning of an actual and visible improvement on the ground to have knowledge of the improvement and that the property may be subject to a mechanic's lien claim. It therefore makes no sense for the court of appeals to construe this court's decision in *Carr-Cullen* as establishing a rule that apportionment is required only where a bona fide purchaser acquires the property after a lienholder has established lien rights. This situation can never occur under Minnesota law because there can never be a bona fide purchaser of property after the date of the first actual and visible improvement to the property. The court of appeals reading of *Carr-Cullen* is further flawed because this court did not distinguish between bona fide purchasers and those who acquire their interest after a lienholder has established lights rights when it required apportionment in that case.

But, even assuming that the court of appeals correctly construed the decision in *Carr-Cullen*, this case falls squarely within the new rule that the court of appeals has established. There is no question that Premier acquired its interest in the three lots after Kuechle had established lien rights in those lots. Thus, under the court of appeals' own reading of *Carr-Cullen*, Kuechle was required to apportion its mechanic's lien.

There is little to distinguish the present case, either factually or legally, from this court's decision in *Carr-Cullen*. In each case, the lienholders had filed one mechanic's lien against several parcels of property and the parties challenging the lien claim had acquired their interests in the property after actual and visible work had begun on the liened parcels. Similar to the property owners in *Carr-Cullen*, who acquired their interest in their respective parcels after actual and visible work had begun on those parcels, Premier acquired its mortgage interests in the three lots on which the model homes were built after Kuechle commenced its overall site work for the Project. The decision in *Carr-Cullen* is dispositive of the issue in this case and required Kuechle to apportion its mechanic's lien on a per lot basis.

The decision of the court of appeals also stands alone in the country. The 23 state appellate courts to address the issue have uniformly held that a lien claimant may not foreclose the full amount of its mechanic's lien against less than all the lots subject to the lien. With little difficulty, these courts have all recognized in some form or another that it is manifestly inequitable to allow a lienholder to "extract the value of improvements made to several lots from fewer than all those lots." *CS & W Contractors, Inc. v. Southwest Savings & Loan Assoc.*, 883 P.2d 404, 406 (Ariz. 1994). They are also

cognizant that to permit such a practice could allow a lien claimant to resurrect an extinguished lien, obtain a priority to which it is not entitled, or shift its lien in such a manner to unduly burden some parcels, while relieving others, thus imperiling the interests of others in the parcels. The majority rule that has evolved establishes that a lien claimant who files a mechanic's lien against two or more parcels cannot foreclose the full amount of the lien against less than all the lots subject to the lien. The corollary to the rule allows a lienholder to foreclose and apportion its lien on a per lot basis. The reason that courts around the country have rejected the rule that the court of appeals adopted in this case, is because it leads to inequitable, inconsistent and harsh results.

Indeed, the decision of the court of appeals invites abuse and manipulation by lien claimants. Under the court of appeals' decision, a lien claimant is free to file a blanket lien and then arbitrarily pick and choose which lots to foreclose the full amount of its lien based on priority. The result is that certain lots will be unfairly burdened with satisfying the full amount of the lien, while other lots that also benefit from lien claimant's work will be relieved of such an obligation. This is contrary to Minnesota law, which requires that there must be a direct relationship between the value of the labor and materials contributed to the parcel and the extent of the lien granted.

The safeguards against such abuse and manipulation that the court of appeals identified do not exist and will do nothing to prevent this situation from arising. The court of appeals mistakenly believed that where the value of the property exceeds the value of the lien amount, the district court is free to use its equitable powers to determine whether redemption under Minn. Stat. § 580.24 is warranted and whether a junior

lienholder failed to protect its rights by filing a notice to redeem and redeeming the property. The right of redemption under Minn. Stat. § 580.24 is a statutory right that all junior lienholders enjoy and it is not dependent on equitable considerations. Moreover, redemption does nothing to prevent or protect against a lienholder from picking and choosing which lots to foreclose the full amount of its lien. The court of appeals' decision allows a lienholder to shift the full amount of its lien to one or a few lots and the junior creditor on those lots may redeem the property only if it pays the full amount of the claim. The statutory right of redemption under Minn. Stat. § 580.24 is, therefore, a nonexistent safeguard against abuse and manipulation by a lienholder in deciding which lots to foreclose the full amount of its claim.

The decision of the court of appeals will also place the ability of subsequent lien holders to recover on their liens in jeopardy. While the lien laws recognize generally that the lien rights of contractors and material suppliers in the same project as coordinate, this is not the case where the improvements to a project are furnished pursuant to separate contracts and are deemed to be separate improvements. It is conceivable (and likely) that situations will arise where a lien claimant so burdens a parcel with the full amount of a mechanic's lien that it imperils the ability of a subsequent lienholder to recover on a lien for labor and material furnished to the same parcel. This situation arises when, as in this case, site work for a development is deemed to be a separate and distinct improvement from that of the construction of the individual residential units.

More problematic is that the decision of the court of appeals has interjected great uncertainty into the commercial and residential construction industries. To require courts

to consider the equities of apportionment on a case-by-case basis will result in increased and prolonged litigation throughout the state. No longer will owners, contractors, and lenders be able to ascertain their potential liability on a per lot basis for the payment of improvements furnished to their respective lots. Based on the court of appeals' decision, cases involving the foreclosure of a blanket mechanic's lien now require district courts to determine whether one or a few lots can be burdened with the cost of improvements benefiting other lots, and if so, by how much. To abandon the rule of apportionment that contractors, owners, and lenders have historically followed will not only increase the cost of litigation, it will serve as an impediment to the resolution of these cases by the parties themselves.

The decision of the court of appeals lacks statutory support, is directly contrary to this court's decision in *Carr-Cullen*, and is inconsistent with the principles of sound public policy. Premier therefore respectfully requests that this court reverse the court of appeals and hold that Kuechle was not entitled to foreclose the full amount of its mechanic's lien against less than all the lots subject to the lien.

## 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, this court's review is limited to determining whether the district court erred in its application of the law. *Associated Builders & Contractors, et al. v. Ventura*, 610 N.W.2d 293, 298 (Minn. 2000) (citation omitted). The construction of Minnesota's mechanic's lien statute is a question of law that this court reviews de novo. *Mavco, Inc. v. Eggink*, 739 N.W.2d 148, 152 (Minn. 2007).

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

The court of appeals 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 mechanic's lien. There is no statutory or other Minnesota legal authority that allows a lienholder to foreclose a mechanic's lien against less than all the parcels subject to the lien. This court long ago ruled that a lienholder who is awarded a mechanic's lien against two or more adjoining lots must foreclose by apportioning 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 lienholder may not enforce

the full amount of its mechanic's 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; the corollary provides that if it is to recover, the lienholder must apportion the full amount of its lien on a per lot basis.

**A. The court of appeals erred in its interpretation of Minnesota's Mechanic's Lien Statute.**

Both the district court and court of appeals erred in their interpretation and application of Minn. Stat. § 514.09. There is nothing within the language of Minn. Stat. § 514.09 that permits a lien claimant to assert a mechanic's lien against two or more lots and then selectively foreclose the full amount of the lien against less than all the lots subject to the lien. If a lien claimant elects to file one mechanic's lien against several lots pursuant to Minn. Stat. § 514.09, then it is required to foreclose the lien against all the lots subject to the lien. It may not, as the district court and court of appeals ruled, selectively foreclose the full amount of its lien against one or a few lots embraced by the lien.

Minnesota mechanic's lien statute provides that "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 a lien upon the improvement and upon the land on which it is situated." Minn. Stat. § 514.01 (2008) (emphasis added). The right to a mechanic's lien, as security for labor or materials furnished to an improvement to real property, was unknown at common law or equity. *Jewett v Iowa Land Co.*, 64 Minn. 531, 535, 67 N.W. 639, 640 (1896). It is purely a creature of statute. *Id.* As a creature of statute,

mechanic's liens 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). Where a statute creates the right to a lien and provides a method for enforcement, the statutory remedy is exclusive no matter how inconvenient or defective it may be. *Griffin v. Chadbourne*, 32 Minn. 126, 129, 19 N.W. 647, 648 (1884); *see also Abel v. City of Minneapolis*, 68 Minn. 89, 94, 70 N.W. 851, 853 (1897) (holding where statute creates right and liability not existing at common law and provides specific mode by which such right shall be asserted and liability ascertained then such mode alone must be pursued). Thus, a lienholder may assert and foreclose its lien claim only in the manner that the mechanic's lien statute proscribes.

Where a lien claimant has contributed to improvements on two or more adjoining lots pursuant to one general contract with the owner, the mechanic's lien statute permits the lien claimant to choose between filing a single lien statement for the entire claim that embraces the whole area improved or it may file separate lien statements for each lot on a pro rata basis. Minn. Stat. § 514.09. 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.* (emphasis added.)

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 court of appeals determined that the mechanic's lien statute was ambiguous because it was silent "as to whether a lienholder can assert its claim against less than all the properties for which labor and materials were provided under a blanket lien." *Premier Bank*, 767 N.W.2d at 699. After examining various provisions of the mechanic's lien statute, the court concluded that while there was nothing within the statute that allowed a blanket lien to be foreclosed against less than all the property subject to the lien, there was nothing within the statute to prevent a blanket lien from being foreclosed in this manner. *Id.* at 700. The court resorted to equitable principles to resolve the issue. This was in error.

Contrary to the court of appeals' decision, the language of Minn. Stat. § 514.09 precludes a lienholder from asserting, and later foreclosing, a mechanic's lien against less than all the properties for which it provided the labor and materials. The plain language of Minn. Stat. § 514.09 provides that if a lienholder elects not to file separate lien statements against each parcel for the value of labor or materials it furnished to each

parcel, then its only option is to "file one statement for the entire claim, embracing the whole area so improved." *See id* Under this option, the lien attaches to the whole lot or tract for the entire value of such labor or material furnished to the lot or tract. *See Glass v. St. Paul Carriage & Sleigh Co.*, 43 Minn. 228-30, 45 N.W. 150, 150 (1890) (holding where material is furnished under entire contract for erection of several houses owned by same person and situated on same lot or tract of land, lien attaches on the whole, as an entirety, and for gross value of material furnished). The language of Minn. Stat. § 514.09, therefore, prohibits a lienholder from asserting its entire claim against less than all the lots for which it provided labor or materials because the lien attaches to "the *whole* area so improved." Because the lien attaches to whole area improved for the entire value of the labor or materials furnished to the improvement, it necessarily follows that the lienholder must foreclose the full amount of its lien against all the lots subject to the lien and may not foreclose against one or a few of those lots.

In addition, because mechanic's liens did not exist at common law and are purely creatures of statute, a lienholder may only assert and recover on its lien in the manner that the mechanic's lien statute provides. There is nothing within the language of Minn. Stat. § 514.09, or elsewhere in the mechanic's lien statute, that permits a lien claimant to file a lien against several parcels of property and then selectively foreclose the full amount on only one or a few of the parcels. Absent express statutory authority permitting such a remedy, Kuechle was not entitled to foreclose the full amount of its mechanic's lien against less than all the lots subject to its lien. The court of appeals was not free to supply what the legislature purposefully or inadvertently omitted from the statute, and

impermissibly applied equitable principles to provide Kuechle with a remedy not found in the statute. See *State ex rel. Verbon v. St. Louis County*, 216 Minn. 140, 145, 12 N.W.2d 193, 196 (1943) (holding courts may not add language not present in statute nor supply what legislature purposely omits or inadvertently overlooks). "If there is to be a change in the statute, it must come from the legislature." *Martinco v. Hastings*, 265 Minn. 490, 497, 122 N.W.2d 631, 638 (1963) (citation omitted).

**B. This court's decision in *Carr-Cullen* is controlling.**

The court of appeals mistakenly believed that there was no precedential case law to guide it. But nearly 90 years ago, this court addressed the precise statutory language now found in Minn. Stat. § 514.09 and held that a lienholder who is awarded judgment on its lien against two or more adjoining lots must foreclose by apportioning the 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). This case is directly on point, remains good law, and is dispositive of the apportionment issue in this case.

In *Carr-Cullen*, a lumber supplier (Northland Pine) 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 filed one mechanic's lien against all eight lots for the amount of the unpaid materials pursuant

to the predecessor of Minn. Stat. § 514.09. *Id.* at 381, 175 N.W. at 697.<sup>1</sup> As part of the mechanic's lien actions that others had commenced, the lumber supplier answered and sought to foreclose its mechanic's lien in those actions. *Id.* The district court denied the lumber supplier's lien claim based on the challenges to the lien by the owners of lots and assignees of the mortgages on the lots, all of whom acquired their interests in their respective lots after the homes had been completed or actual and visible construction had started. *Id.*

This court reversed the district court, holding that the statute in effect at the time, which is identical to the present-day version of Minn. Stat. § 514.09, granted the lumber supplier the right to assert one lien against all eight lots for the full amount of its claim because it had furnished the building materials pursuant to one general contract with the owner. *Id.* at 382, 175 N.W. at 697. This court specifically ruled:

Appellant [lumber supplier] should have been given *judgment* for a lien upon the *whole* of the real property described in its lien statement for the *full amount of its claim*. 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 (emphasis added).

Thus, under this court's decision in *Carr-Cullen*, a lienholder who files a lien for the entire amount of its claim against two or more lots pursuant to Minn. Stat. § 514.09 must

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<sup>1</sup> The language of 7027, G.S. 1913, is identical to the language found in the current version of Minn. Stat. § 514.09. A copy of this statute is contained in the Statutory

foreclose by apportioning its full lien claim amongst all of the lots subject to its lien. This rule ensures that the amount of the lien for which each lot is responsible is limited to the reasonable value of the labor or materials furnished to the improvement and fairly chargeable to it.

The court of appeals, however, misconstrued the holding in *Carr-Cullen*. It misread the case as holding apportionment is required only in those situations when a bona fide purchaser acquires the property after the lienholder has established lien rights. This conclusion makes no sense under Minnesota law and demonstrates a fundamental misunderstanding of Minnesota mechanic's lien law. Once a lienholder establishes the right to a lien, it eliminates the possibility of one acquiring the property as a bona fide purchaser (or mortgagee). The beginning of the actual and visible improvement on the ground serves as notice to the world that the property is subject to a possible mechanic's lien claim. *See Glass v. Freeberg*, 50 Minn. 386, 390, 52 N.W.2d 900, 901 (1892). And, Minnesota law deems one who takes an interest in the property after the beginning of an actual and visible improvement on the ground to have knowledge of the improvement and that the property may be subject to a mechanic's lien claim. *Id.* The court of appeals' reading of *Carr-Cullen* as establishing a rule that apportionment is required only where a bona fide purchaser acquires the property after a lienholder has established lien rights makes no sense under well established Minnesota law. This situation can never occur under Minnesota law because there can never be a bona fide purchaser of property after the date of the first actual and visible improvement to the property. *See M. E. Kraft*

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Addendum.

*Excav. & Grading Co., Inc. v. Barac Constr. Co.*, 279 Minn. 278, 284, 156 N.W.2d 748, 752 (1968) (holding "whether one has the status of a bona fide mortgagee without notice depends upon whether or not there was an actual and visible beginning of the improvement on the ground").

But, even assuming that the court of appeals correctly construed the decision in *Carr-Cullen*, it failed to properly apply its own rule. It is undisputed that Premier acquired its interest in the three lots after Kuechle had established lien rights in those lots. Thus, applying the court of appeals' own reading of *Carr-Cullen*, Kuechle was required to apportion its mechanic's lien.

Here, there is little to distinguish this case, either factually or legally, from the decision in *Carr-Cullen*. In each case, the lienholder filed one mechanic's lien statement for the full amount their respective claims against all of the lots for which they furnished labor or materials. And, the parties challenging the lien claims in each case acquired their interests in the property after the lienholders had established their lien rights. In *Carr-Cullen*, the property owners and assignees of the mortgages all acquired their interests in their respective lots after actual and visible work had begun on the six homes situated on the eight lots at issue. Similarly, in this case, Premier acquired its mortgage interests in Lots 5, 6, and 10 after Kuechle had commenced the actual and visible site work within the River Bend Development. Thus, neither the property owners and mortgage assignees nor Premier Bank were bona fide purchasers or mortgagees because they were deemed to have notice of the lienholders' potential lien rights given the fact that the actual and visible work on the improvements had commenced on the ground.

Because there is nothing to factually or legally distinguish this case from the decision in *Carr-Cullen*, the court of appeals erred when it concluded the case did not apply. The decision is dispositive of the issue here and required Kuechle to apportion its blanket mechanic's lien.

**C. Minnesota law requires a direct relationship between the value of the improvement and the extent of the lien granted.**

Underlying the rule in *Carr-Cullen* is the principle that one or a few parcels should not bear the burden of satisfying the full amount of a 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. This court has long required the existence of 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 lien claim 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.*

This 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 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).

This 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 principles and remedial purpose of the mechanic's lien statute, the decision in *Great Northern* requires 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 toward the value of the material and labor actually furnished for improvements on the property. Indeed, the mechanic's lien expressly provides that in all cases not involving a contract for an agreed price with the owner, a lien "shall be for the reasonable value of the work done, and of the skill, material, and machinery furnished." Minn. Stat. § 514.03, subd. 1(b) (2008).

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.

But rather than apportioning Kuechle's mechanic's lien among the 59 lots equally, the lower courts ruled that the three lots encumbered by Premier's construction mortgage and the eight lots that were conveyed to another builder/developer and released from Premier's development mortgage must bear the sole burden of satisfying Kuechle's \$266,622.96 mechanic's lien. This is contrary to this court's decisions in *Carr-Cullen* and *Great Northern*.

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

The decision of the court of appeals stands alone in the country. The courts that have addressed this issue have uniformly held that a mechanic's lien asserted 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)<sup>2</sup>. The

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<sup>2</sup> 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. (1904); *Rathburn v. Landess*, 129 So. 738 (Fla. 1930); *Friedlaender v. McCann*, 91 Ill. App. 415, (1899); *William Metzger and Edward P. Baker v. Andrew McCann et al.*, 92 Ill. App. 109, (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. Cox*, 123 Mass. 45, (1877); *Dodds v. Cavett*, 97 So. 813 (Miss. 1923);

rationale underlying the rule is that it is inequitable to burden some lesser portion of the lien premises with charges for labor and material that were not actually furnished to that particular parcel. *Id.* The corollary to the general rule is that, where the total labor and material costs 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 the general rule and its corollary to a case that is nearly identical in every respect to the present case. In *CS & W Contractors, Inc. v. Southwest Savings & Loan Assoc.*, 883 P.2d 404 (Ariz. 1994), a developer had contracted with CS & W Contractors for the construction of the streets, sewers, curbs, gutters and

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*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, (1911). The issue of whether a lien claimant can enforce a blanket mechanic's lien against less than all the lots subject to the lien, therefore, cannot arise in those two states.

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 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 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.

**E. Public policy supports apportionment.**

Sound public policy favors this court's adoption of the general rule and its corollary. As the Virginia Supreme Court has 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). The Virginia Supreme Court later 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 decision of the court of appeals is the only case in the country that has allowed a lienholder to foreclose a 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.

Indeed, the decision of the court of appeals invites abuse and manipulation by lien claimants. Under the court of appeals' decision, a lien claimant is free to file a blanket lien and then arbitrarily pick and choose against which lots to foreclose the full amount of its lien. The result is that certain lots will be unfairly burdened with satisfying the full amount of the lien, while other lots that also benefit from lien claimant's work will be relieved of such an obligation. This is contrary to Minnesota law, which requires that there must be a direct relationship between the value of the labor and materials contributed to the parcel and the extent of the lien granted.

The decision of the court of appeals, if left to stand, will also adversely affect other lienholders who furnish labor and materials for improvements situated on property subject to a blanket mechanic's lien. It is distinctly possible and likely 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 such a lien would be eliminated. In allowing the first contractor to enforce the full amount against less than all the lots subject to the lien, it may so encumber the selected lots that renders 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.

The safeguards against such abuse and manipulation that the court of appeals identified do not exist and will do nothing to prevent this situation from arising. The

court of appeals mistakenly believed that where the value of the property exceeds the value of the lien amount, the district court is free to use its equitable powers to determine whether redemption under Minn. Stat. § 580.24 is warranted and whether a junior lienholder failed to protect its rights by filing a notice to redeem and redeeming the property. The right of redemption under Minn. Stat. § 580.24 is a statutory right that all junior lienholders enjoy and it is not dependent on equitable considerations. Moreover, redemption does nothing to prevent or protect against a lienholder from picking and choosing against which lots to foreclose the full amount of its lien. The court of appeals' decision allows a lienholder to shift the full amount of its lien to one or a few lots and the junior creditor on those lots may redeem the property only if it pays the full amount of the claim. The statutory right of redemption under Minn. Stat. § 580.24 is, therefore, a nonexistent safeguard against abuse and manipulation by a lienholder in deciding which lots to foreclose the full amount of its claim.

The court of appeals' decision has interjected great uncertainty into the commercial and residential construction industries. To require courts to consider the equities on a case-by-case basis to determine whether a lienholder must apportion its blanket mechanic's lien will result in increased and prolonged litigation across the state and truly serves as an impediment to settlement. In each instance, the district court will need to determine if less than all the lots can be burdened with the cost of improvements that benefit other lots, and if so, but how much. In comparison, the rule of apportionment provides the certainty necessary to allow owners and lenders the ability to ascertain their potential liability for payment of improvements made to their respective lots with

minimal court involvement. Historically, attorneys representing contractors and those representing owners and lenders have been able to resolve these types of cases based on the per-lot-apportionment rule this court established in *Carr-Cullen*.

In its decision, the court of appeals stated that Premier could have required Kuechle to subordinate its mechanic's lien to Premier's three construction mortgages. This statement, however, assumes that Premier seeks to avoid paying Kuechle for the value of Kuechle's work attributable to those lots. The reality is that by not requiring Kuechle to subordinate its lien rights in those three lots, Premier simply agreed to assume the risk that if Becker Development did not pay Kuechle it might be responsible for paying for the cost of Kuechle's improvements to those three lots. Premier stands ready, willing and able to pay Kuechle for the reasonable value of the improvements that Kuechle made to Lots 5, 6 and 10 of Block 3, River Bend. It is, however, unfair and inequitable for Premier to pay for improvements to other lots that it released its development mortgage and those eight lots that have been sold to another builder/developer and in which it has no interest.

In stating that it seemed only fair to allow Kuechle to recover the entire remaining balance of its contract on three lots encumbered by Premier's construction mortgages, the court of appeals mistakenly believed that if it reversed the district court Premier would end up owning the entire subdivision and be able to retain the benefits of Kuechle's improvements. This ignores the fact that eight lots within the River Bend Development have been sold to another builder/developer and were released from Premier's development mortgage. Premier has no interest whatsoever in these eight lots. Thus,

Premier will not receive the benefit of Kuechle's work on these eight lots through the foreclosure process. The court of appeals' decision, however, will now require Premier to pay for improvements made to these lots. Not only is the court of appeals' decision unfair and inequitable in this case, it will allow such unfair and inequitable results in every instance because it is inherently unfair and inequitable to have one pay for improvements to the lots of others and for which it receives no benefit do not benefit their own lots.

As it stands, absent any kind of subordination of a potential lien claim, owners and lenders that take an interest in real property subsequent to the actual visible improvement to the property, may be responsible for the cost of improvements made to the property owned by others. This is an untenable situation because it creates profound uncertainty and unfairness, leaving owners and lenders potentially liable for improvements not made to their property.

This court should adopt the general rule and its corollary and adhere to the holding of the Arizona Supreme Court in *CS & W.*, all of which are consistent with this court's decision in *Carr-Cullen*, to hold that Kuechle must foreclose by apportioning the full amount of its mechanic's lien on a per lot basis.

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

It is undisputed that the River Bend Development is a Common Interest Community formed and governed by Minn. Stat. §515B.1-101 to §515B.4-118. The Minnesota Common Interest Ownership Act (MCIOA) therefore applies to this project.

The MCIOA provides, in relevant part, that:

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 (2008).

Because the River Bend Development is a common interest community, once Premier forecloses its three construction mortgages, and assuming no redemption occurs, Premier would be entitled under Minn. Stat. § 515B.3-117 to pay Kuechle that portion of the lien attributable to the lots that Premier owns. *Id.* Minn. Stat. § 515B.3-117 sets forth the same rule of apportionment for common interest communities that this court articulated in *Carr-Cullen* for non-common interest community property – owners and lenders alike are responsible the pro-rata share of the value of the improvements made to their properties. If the court of appeals' decision is allowed to stand, there will be two very distinct and separate rules of law that will apply: apportionment under Minn. Stat. § 515B.3-117 will be required in all cases for common interest communities, while courts will be required to determine whether apportionment is available for noncommon-interest-community property on a case-by-case basis.

To avoid such a situation, this court should reaffirm its decision in *Carr-Cullen*, and apply the same rule of law, albeit based on different legal grounds, for both common interest community and non-common interest community property in this state.

### CONCLUSION

The decision of the court of appeals stand alone in the country. It is contrary to the provisions of Minnesota's mechanic's lien statute and this court's decision in *Carr-Cullen*. The decision in *Carr-Cullen* confirms that Minn. Stat. § 514.09 allows a

lienholder to file one mechanic's lien for the full value of its entire claim against two or more lots and articulates how the lienholder must foreclose such a lien – the lienholder must apportion its lien on a per lot basis. This rule is consistent with sound public policy and the decisions of the 23 state appellate courts that have considered this issue.

Premier therefore respectfully requests that this court reverse the decision of the court of appeals on this issue and remand the matter to the district court directing that Kuechle must foreclose its mechanic's lien on a per lot basis.

Respectfully submitted,

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**Certification of Brief Length**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds.1 and 3, for a brief produced with a proportional 13 point font. The length of this brief is **10,834** words. This brief was prepared using Microsoft Word 2002.

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