

Nos. A08-1252 and A08-1700

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.

MINNESOTA LAND TITLE ASSOCIATION'S BRIEF, AS AMICUS CURIAE

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STATEMENT OF INTEREST

Minnesota Land Title Association (“MLTA”) submits this brief as amicus curiae requesting reversal of the decision of the Minnesota Court of Appeals.¹ MLTA’s interest in this action is public in nature. MLTA was established in 1908 as a professional organization interested in securing the integrity of land titles throughout Minnesota. Now with over 130 members statewide, MLTA is Minnesota’s largest land title association. MLTA’s members provide abstracts of title, real estate closing services, title insurance and related assistance to the real estate and lending industries on behalf of the public. In such capacity, MLTA has a public interest in ensuring that the laws governing real estate and land titles in Minnesota operate fairly for all and promote sound public policy. MLTA will offer insight as to the public benefits of adopting the long established and widely accepted rule nationwide that a blanket mechanic’s lien cannot be enforced in its full amount on less than all the parcels liened.

SUMMARY OF DISCUSSION

The fundamental purpose and intent of a mechanic’s lien is to provide recovery for the unpaid value of labor or materials furnished for the improvement of real property by allowing perfection and enforcement of a lien on the property that was improved. Mechanic’s liens are “creatures of statute” and thus lien claimants’ rights arise from and are limited by the statute. As in most if not all other states with analogous law,

¹ In accordance with Minn. R. Civ. App. P. 129.03, Minnesota Land Title Association hereby certifies that its counsel authored this brief and that no person or entity, other than Minnesota Land Title Association, has made a monetary contribution to the preparation or submission of this brief.

Minnesota's mechanic's lien statute requires a direct relationship between the property improvement and the extent of the lien. Specifically, only the improved property may be burdened by a mechanic's lien, and the amount of the lien is limited to the extent to which the improved property was benefited.

Nationwide, the long established and widely accepted rule is that a blanket mechanic's lien cannot be foreclosed on less than all the parcels liened without apportioning the amount of the lien among the parcels sought to be foreclosed. This rule is consistent with the basic principle that a mechanic's lien against a particular property can only provide recovery for the unpaid amount of an improvement actually furnished to that specific property, and thus affords clarity and predictability for owners, encumbrancers and lien claimants alike.

The Court of Appeals decision allows a blanket lien to be foreclosed in its full amount on less than all the parcels liened so long as the balancing of equities does not unfairly burden one owner or property over others. This is directly contrary to the widely accepted majority rule nationwide and is inconsistent with well established Minnesota law. Moreover, rather than providing needed clarity, certainty, and predictability, the decision of the Court of Appeals only raises uncertainties and doubts while inviting further litigation in every instance as the equities of the competing parties are contested. Further, the Court of Appeals ruling incentivizes lien claimants to abuse and manipulate the foreclosure process by picking and choosing among properties according to the available value to be realized upon foreclosure.

Enforcing a mechanic's lien disproportionately among the liened parcels is inherently inequitable. Thus the Court of Appeals has created an impossible test. Adopting the rule that a blanket lien cannot be enforced for its full amount on less than all the parcels liened unless reasonably apportioned among the affected parcels ensures that any given property can only be charged for its share of the unpaid improvement. This rule best serves the interests of all parties concerned in the enforcement and foreclosure of mechanic's liens.

DISCUSSION

I. The Fundamental Purpose and Intent of Minnesota's Mechanic's Lien Law.

A. The basic purpose of a mechanic's lien is to provide recovery for the unpaid value of a specific property improvement.

Mechanic's liens are governed by Minnesota Statutes chapter 514. They exist purely as creatures of statute and thus lien claimants are limited to the rights conferred by the statute. *M.E. Kraft Excavating and Grading Co. v. Barac Constr. Co.*, 279 Minn. 278, 283, 156 N.W.2d 748, 751 (1968). Under the statute, whoever provides labor or materials for the improvement of real property "shall have a lien upon the improvement, and upon the land on which it is situated." Minn. Stat. § 514.01 (2008). A guiding principle underlying the statute is that a person "whose property is enhanced 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." *Albert and Harlow, Inc. v. Great Northern Oil Co.*, 283 Minn. 246, 252-53, 167 N.W.2d 500, 505-6 (1969) (quoting *Emery v. Hertig*, 60 Minn. 54, 57, 61 N.W. 830, 831). A mechanic's lien provides a direct method of

recovery for one who contributes to an improvement of a specific parcel but does not receive payment. This is important because the availability of mechanic's liens encourages timely payment while allowing laborers and material suppliers to perform such improvements with assurance that a clear remedy exists if payment is not received.

Mechanic's liens serve a vital and important function but the enforcement of a mechanic's lien cannot prejudice other properties or parties. Though the mechanic's lien statute is intended to protect laborers and material suppliers and is generally construed in their favor, the statute also safeguards and balances the rights and interests of others. *See Dolder v. Griffin*, 323 N.W.2d 773, 780 (Minn. 1982) (explaining that the mechanic's lien statute is strictly construed against lien claimants in determining whether a lien attaches but liberally construed in favor of lien claimants after a lien attaches). The statute contains numerous protections and safeguards for other parties. For example, the statute requires specific notices be provided to property owners, contains a lien priority framework intended to protect prior mortgagees, and contains protection against attempts to overstate the amount claimed due. Minn. Stat. §§ 514.011, .05, .74 (2008); *Home Lumber Co. v. Kopfmann Homes, Inc.*, 535 N.W.2d 302, 304 (Minn. 1995). Thus, although the statute affords laborers and material suppliers a favored status and is generally construed in their favor, such status is not so absolute as to abrogate the interests and rights of others when a property improvement goes unpaid.

- B. Mechanic's liens are only intended to provide recovery for the unpaid value of an improvement actually furnished to a specific parcel.**

In the enforcement of a mechanic's lien, the statute requires a direct relationship between the property improvement and the extent of the lien. *See Great Northern*, 283 Minn. at 253, 167 N.W.2d at 506 (explaining that the "purpose of the [mechanic's lien] 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"). Specifically, a mechanic's lien can only provide recovery for the actual unpaid value of an improvement to a particular property, and the lien can only encumber the actual property improved. Minn. Stat. §§ 514.03, .08, .09 (2008). This nexus is of central importance in safeguarding and balancing the interests and rights of mechanic's lien claimants, property owners, mortgagees, and other encumbrancers alike. Allowing a mechanic's lien to be enforced only against the actual improved property ensures that only this parcel can be burdened with a lien for the unpaid improvement.

Minnesota courts have shown consistent concern with ensuring that only the specific parcel improved will be burdened by a mechanic's lien for the unpaid improvement. The statute allows a lien claimant to elect to file a blanket lien for labor or materials provided to adjoining parcels. Minn. Stat. § 514.09 (2008). However, this right does not abrogate the basic rule that a mechanic's lien can only provide recovery for the unpaid value of an improvement actually furnished to a specific parcel. In an early case concerning an attempt to enforce a single blanket mechanic's lien for materials supplied under one contract to three noncontiguous parcels, the Minnesota Supreme Court refused to allow enforcement of the lien because the lien was not properly apportioned and might unfairly burden some of the parcels with charges for labor and materials not actually

furnished to the parcel. *S.H. Bowman Lumber Co. v. Piersol*, 147 Minn. 300, 303, 180 N.W. 106, 107 (1920). As the Court explained, “It seems quite clear that one tract of the land cannot be charged with the value of material furnished in the improvement of other separate and distinct tracts. Each must stand alone, and be chargeable only to the extent the material was furnished in its improvement.” *Id.* at 303, 180 N.W. at 107.

In *Carr-Cullen Co. v. Cooper*, 144 Minn. 380, 175 N.W. 696 (1920), the Minnesota Supreme Court held that a blanket lien must be apportioned so that each parcel is only burdened for the actual amount fairly chargeable to it. The *Carr-Cullen* case involved eight adjoining lots upon which six houses were constructed. *Id.* at 381, 175 N.W. at 697. A lumber supplier who provided materials for construction of the houses filed a single blanket lien encumbering all eight lots. *Id.* at 381, 175 N.W. at 697. The Court held that the lumber supplier was entitled to a lien for the entire amount due, but specifically held that the lien must be apportioned so that no parcel would be unfairly subjected to a lien for labor and materials not actually provided to it. *Id.* at 385-86, 175 N.W. at 609. The Court specifically explained that:

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 609. Thus again the Minnesota Supreme Court refused to stray from the basic rule that a specific parcel can only be burdened with a mechanic’s lien for an unpaid improvement actually furnished to that parcel. This guiding rule has

consistently instructed the decisions of Minnesota courts since enactment of the mechanic's lien statute. These rulings are the law of the land and bind the Court of Appeals which erred in its attempt to abandon this long standing principle.

II. Allowing a Blanket Mechanic's Lien to be Foreclosed for Its Full Amount on Less Than All the Parcels Liened Is Inherently Unjust and Creates Serious Practical Problems.

Foreclosure of a blanket lien for its full amount on less than all the parcels liened unjustly burdens the targeted property with charges for labor and materials provided to other parcels. The circumstances giving rise to blanket mechanic's liens are common and frequently involve development and construction of subdivisions. Typically, where undeveloped and unplatted land is purchased for eventual development into platted lots, the purchase is financed through a development mortgage encumbering the entire property. These mortgages are generally recorded prior to the actual and visible commencement of construction work so as to have priority over subsequent mechanic's liens under Minn. Stat. § 514.05. The developer hires contractors to complete the development with the intent to ultimately sell individual lots to end purchasers for further construction. The contractors have no reasonable expectation of having priority positions on any of the property they are improving.

If some of the platted lots are released from the development mortgage and sold to end purchasers financed by new mortgages, these new interests will not have the same priority over mechanic's liens as did the development mortgage. If the project fails before all the lots are sold, the development lender will foreclose its senior mortgage against the unsold lots, and any of the unpaid contractors will need to redeem their

interests as junior creditors in the mortgage foreclosure process or lose their mechanic's lien rights against the unsold lots. However, if the unpaid contractors have filed blanket mechanic's liens against the whole subdivision they would, under the Court of Appeals decision, have the right to claim their entire unpaid balance against any or all of lots in the subdivision. As a direct consequence, families who have purchased homes, as well as their lenders, could be forced to pay for all of the subdivision improvements, not just the portion of the amount that is actually attributable to their individual lot.

This outcome is clearly fraught with inequity and is directly contrary to the basic purpose of a mechanic's lien to provide recovery only for the unpaid value of an improvement furnished to a specific property. It allows for a potential shifting of the burden of paying for real property improvements based on completely fortuitous circumstances to the severe detriment of innocent owners and lenders. At a minimum, the new owners and lenders will be thrust into litigation as they are forced to establish their respective equitable positions in order to avoid being forced to pay for improvements to parcels in which they have no interest. This result is fundamentally unfair for the new owners and mortgagees. Further, it could unfairly prejudice the rights of subsequent mechanic's lien claimants who have contributed only to the later and separate improvements of house or building construction on the sold lots pursuant to separate contracts. These lien claimants will not have access to the full value created by their improvements to these lots if earlier lien claimants are allowed to enforce their blanket liens disproportionately.

To be sure, if the lien claimant was not paid and has perfected its mechanic's lien, he should be allowed to recover the apportioned value of his improvement attributable to each lot. In the typical case where equal value was provided to each lot, the apportioned value will no doubt be determined by simply dividing the lien amount among the number of improved lots to determine the proper amount attribute to each lot. If the lien claimant feels that a different manner of apportionment is called for it can assert this in its foreclosure action. For instance, if the improved lots are greatly dissimilar in size or nature, a square foot or front footage method of apportionment may be more appropriate and fair. What should not be allowed, however, is for targeted lots to bear the entire, or any inequitable portion, of the unpaid amounts furnished to the whole subdivision. Allowing the lien claimant to do this would violate and undermine the fundamental rule that a mechanic's lien can only provide recovery for an unpaid improvement actually furnished to a specific parcel.

III. The Long Established and Widely Accepted Rule Nationwide is That a Blanket Mechanic's Lien Cannot be Foreclosed for Its Full Amount on Less Than All the Parcels Liened.

The problems of foreclosing a blanket lien on less than all the property liened are not new and have been repeatedly addressed by appellate courts throughout the country. Mechanic's lien statutes have been in effect for more than 100 years since being first widely enacted during the late nineteenth century and early twentieth century. Since then, and as courts nationwide have confronted attempts to enforce blanket liens for the full amount on less than all the parcels liened, a well established and widely accepted rule has emerged:

[I]t has frequently been held or recognized that a single blanket mechanic's lien upon or against several lots or properties for a total sum due to the claimant for labor or materials furnished thereto by him may not ordinarily, and in the absence at least of some showing of proper apportionment, be enforced against less than all of such tracts or parcels.

J.R. Kemper, Annotation, *Enforceability of Single Mechanic's Lien Upon Several Parcels Against Less Than the Entire Property Liened*, 68 A.L.R.3d 1300 § 2 (1976). The basis and reasoning for the rule is that "it would be inequitable to burden some specific lesser portion of the entire liened premises with charges for labor and materials which were not actually furnished to that particular tract or parcel." *Id.* See also 53 Am. Jur. 2d *Mechanics' Liens* § 262 (2006) (stating that "[g]enerally, a blanket construction lien against an entire property consisting of several parcels cannot be enforced in toto against less than all of such parcels, since it would be inequitable to burden some lesser portion of liened premises with charges for labor and materials which were not actually furnished to such particular parcel"). The corollary to the rule is that where the total costs of an improvement can be reasonably apportioned among the improved parcels, then a blanket lien against all the parcels can only be enforced against an individual parcel to the extent of the proper apportioned amount. Kemper, 68 A.L.R.3d § 3.

At least 23 state appellate courts nationwide have expressly or impliedly adopted the rule that a blanket mechanic's lien cannot be foreclosed on less than all the parcels liened. See Appellant's Brief at pp 29-32 & n.2. Notably, the consistent guiding principle underlying these decisions is that a mechanic's lien is only intended to provide recovery for the unpaid value of an improvement actually furnished to a specific parcel.

The courts have consistently held that allowing fewer than all the liened parcels to be charged for the entire amount of a blanket lien is plainly inequitable and prejudicial to the rights and interests of others in the property.

For example, the Wisconsin Supreme Court stated that “[t]he general rule is that a blanket construction lien against an entire property consisting of several parcels cannot be enforced *in toto* against less than all of such parcels,” because it would be “inequitable to burden some lesser portion of the liened premises with charges for labor and materials which were not actually furnished to that particular parcel.” *Stevens Constr. Corp. v. Draper Hall, Inc.*, 242 N.W.2d 893, 899 (Wis. 1976). Similarly, the Washington Court of Appeals explained that “[t]he general rule is that a single mechanic’s lien against more than one lot or parcel of land cannot be enforced against less than the entire property liened, without first showing what part of the entire lien may properly be allocated to the lot or tract against which enforcement is sought.” *Associated Sand & Gravel Co. v. Di Pietro*, 509 P.2d 1020, 1022 (Wash. Ct. App. 1973) (quoting 10 G. Thompson, *Real Property* § 5212 (Grimes repl. Ed. 1957)). Likewise, the Arizona Supreme Court held 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.” *CS & W Contractors, Inc. v. Southwest Savings & Loan Assoc.*, 883 P.2d 404, 406 (Ariz. 1994).

IV. The Decision of the Court of Appeals is Contrary to the Fundamental Purpose and Intent of a Mechanic’s Lien.

A. The Court of Appeals decision violates the basic rule that a mechanic's lien can only provide recovery for an unpaid improvement actually furnished to a specific parcel.

Directly contrary to the long established and widely accepted majority rule, the court of appeals held that under Minn. Stat. § 514.09 a blanket lien can be foreclosed for its full amount on less than all the parcels liened so long as the balancing of equities does not unfairly burden one owner or property over others. *Premier Bank v. Becker Dev., LLC*, 767 N.W.2d 691, 702 (Minn. Ct. App. 2009). To be sure, Minn. Stat. § 514.09 permits a lien claimant who has furnished an improvement for adjoining parcels to either 1) file a blanket lien encumbering all the parcels for the entire amount due, or 2) file separate liens on each parcel for the apportioned amount due on each separate parcel. Mechanic's lien claimants are permitted to file a blanket lien so as to relieve them of the burden of keeping separate accounts for improvements involving multiple contiguous parcels. *Automated Bldg. Components v. New Horizon Homes, Inc.*, 514 N.W.2d 826, 830 (Minn. Ct. App. 1994) (citing *Johnson v. Salter*, 70 Minn. 146, 151, 72 N.W. 974, 975 (1897)).

Though the statute permits lien claimants to file a blanket lien, there is no basis for allowing foreclosure for the full amount of the lien on less than all the parcels liened. The legislature provided lien claimants two choices in pursuing a mechanic's lien for an improvement to adjoining parcels: file a single blanket lien encumbering all the parcels, or file separate apportioned liens on each individual parcel. Minn. Stat. § 514.09. Implicit in this delineation is that under both options the amount and extent of the lien is determined and limited by the specific property improved and liened. If the lien claimant

wants to only file a single lien for the entire improvement to all the parcels, then such lien must encompass all the parcels and be enforced and foreclosed as a single lien against all the parcels. This is because the lien claimant is seeking recovery for the unpaid value of his improvement furnished to all the parcels. If however the lien claimant wants to pursue separate liens against each of the improved parcels, then the statute specifically requires such liens be limited to the apportioned amount of the improvement provided to each parcel. Each of these options ensures that any mechanic's lien will only provide recovery for the unpaid value of the improvement actually furnished to each parcel.

If the legislature intended for mechanic's lien claimants to have the ability to foreclose a blanket lien for the full amount against less than all the parcels liened, then such right would have been expressly granted. The legislature, however, did not grant such right because doing so would violate the basic rule that a mechanic's lien can only provide recovery for an unpaid improvement actually furnished to a specific parcel.

It was apparently significant to the Court of Appeals that Premier Bank might eventually become the owner of virtually all the lots in the subdivision following foreclosure of its underlying mortgage and its mortgages on the released parcels. *Premier Bank*, 767 N.W.2d at 701-03. Such facts, however, are irrelevant to the central analysis and are a distraction that led to flawed reasoning and a confused result which contradicts the basic purpose and intent of a mechanic's lien. The balancing test fashioned by the Court of Appeals permitted a windfall for the lien claimant at the expense of the rights and interests of others in the targeted lots. Importantly, it should be borne in mind that initially Kuechle's mechanic's lien was entirely junior to the

underlying mortgage and would have been lost through the foreclosure of that mortgage absent a redemption by Kuechle. It was only because of the unforeseen and fortuitous events whereby a few lots were released from the underlying mortgage prior to the project's failure that allowed Kuechle to have a priority position on any of the lots.

The Court of Appeals decision in effect gives Kuechle an unexpected windfall at the expense of the reasonable expectations of the owners and mortgagees of the sold lots who could not have foreseen exposure for more than their fair share of the costs of the subdivision improvements. What should have been for Kuechle a lien for junior debt on many of the lots based on the first visible improvement test was allowed to be transferred in whole to other lots on which the mechanic's lien would have senior lien position. The Court of Appeals effectively approved the manipulative tactic in which a lien claimant picks, chooses, and targets the specific parcels on which to foreclose the entire amount of its blanket lien regardless of the actual apportioned amount provided to the targeted parcels. The Court of Appeals' apparent desire to allow Kuechle to recover the full amount of its blanket lien because it appeared Premier Bank might ultimately own virtually all the lots led the Court of Appeals to disregard established law in Minnesota and veer alarmingly from the well reasoned majority rule. The public is now left with an unworkable scheme that invites litigation, encourages manipulative practices, and leaves all parties with uncertainty as to their rights and exposure to liability.

If a lien claimant is allowed to foreclose the full amount of a blanket lien on less than all the parcels liened, then the owner or lender could be forced to pay substantially more than the actual value of the improvement furnished to the targeted parcel in order to

satisfy the lien or redeem from its foreclosure. This would lead to concerns of inalienability and have a chilling effect on commerce as no prospective buyer or lender would be willing to take the risk that a single lot may be found to be encumbered by a mechanic's lien in an amount that bears no relationship to the value of the land. Under this cloud of uncertainty, property would be taken from a productive and valuable use and instead be entangled and frozen in mechanic's lien litigation for lack of a clear rule requiring apportionment. *See Great Northern*, 283 Minn. at 253, 167 N.W.2d at 506 (explaining that "where the amount of the [mechanic's] lien exceeds the value of the property, foreclosure may result in the 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. In such a case, the result is a net economic loss to the state"). When, however, there is a clear rule requiring apportionment, owners, lenders, and prospective buyers have assurance that their parcel can only be liable for the portion of an improvement actually attributable to their parcel. This predictability encourages early resolution of mechanic's liens so as to allow property to continue functioning in its most productive capacity rather than be subject to the uncertainty of litigation.

A converse effect of allowing foreclosure of an entire blanket lien on less than all the property liened is to allow properties that have received the benefit of an improvement to receive such benefit without ever being held to account for unpaid labor and materials. Again this is directly contrary to the fundamental purpose and intent of Minnesota's mechanic's lien law. No party that receives the benefit of a property improvement should be able to escape responsibility for the unpaid value of such

improvement actually furnished to their property. But this is exactly what the Court of Appeals decision would allow by permitting foreclosure of blanket liens on less than all the parcels liened without apportioning.

B. The balancing test proposed by the Court of Appeals does not provide the clarity and predictability needed for enforcement and foreclosure of mechanic's liens.

Because mechanic's liens frequently arise, all parties concerned in the enforcement and foreclosure of mechanic's liens need clarity and predictability in the governing law. The Court of Appeals held that a blanket mechanic's lien can be foreclosed for its full amount on less than all the property liened so long as the balancing of equities does not unfairly burden one owner or property over others. *Premier Bank*, 767 N.W.2d at 702. This suggested balancing test does not provide the clarity and predictability needed for mechanic's liens. Allowing individual parcels of land to be disproportionately burdened by a blanket mechanics lien is inherently inequitable, thus making the balancing test impossible to perform. Instead of providing clarity and fairness, the decision of the Court of Appeals merely provides parameters for inevitable and protracted litigation .

Clarity and predictability in the law governing mechanic's liens is needed by mechanic's lien claimants, property owners, lenders, title insurers, and other interested parties when mechanic's liens arise. All these parties need to know with certainty how their rights and interests may be affected by the enforcement and foreclosure of a blanket lien. Lien claimants need clarity and predictability so they can determine how best to pursue payment for their services knowing that any given parcel can only be charged for

the fairly apportioned amount of an unpaid improvement. Property owners, lenders, or other encumbrancers need to know that their particular parcel can only be charged for the unpaid value of an improvement actually furnished to their property. Further, they need to know with certainty that the blanket lien can be satisfied, or that there can be redemption from the lien foreclosure, as to their specific parcel for only the apportioned amount of the unpaid improvement. Title insurers need clarity and predictability to determine the amount of a blanket lien that can be charged to a specific parcel and how such lien will be enforced for purposes of insuring title and resolving title claims.

The clarity and predictability of the rule requires apportionment will foster early resolution of disputes without the need for legal action in most cases. When all concerned parties know with certainty that a parcel can only be charged for the apportioned amount of an unpaid improvement, the path toward early resolution of a mechanic's lien dispute is much easier. Instead of contesting attempts to target and burden parcels with amounts greater than the improvement actually provided, parties can simply proceed with resolving issues concerning proper apportionment of the blanket mechanics lien. This of course will not eliminate all mechanics lien litigation, but when there is certainty in the law governing enforcement and foreclosure of blanket mechanic's liens there will be far less litigation concerning the extent to which any given parcel can be burdened for an unpaid improvement.

The Court of Appeals decision only invites litigation as to whether there will be an imbalance in the equities if foreclosure of a blanket lien on than all the parcels liened is permitted. Every time a blanket lien is enforced and foreclosed in such manner, there are

always parties whose parcels will be burdened with the unpaid costs of an improvement provided to other parcels while other parcels are allowed to escape accountability all together. It is unlikely, if not impossible, that parties involved in a mechanic's lien dispute would ever voluntarily agree that a particular property or party is more burdened than another so as to prohibit foreclosure of blanket lien on less than all the parcels liened. This can only be determined with the immense time and expense of court action. All the while, the targeted parcels will remain entangled in litigation as the uncertainty of the properties' futures inhibits maximization of their productive and valuable uses.

V. It is Improper for the Respondent to Inject, or for this Court to Consider, the Possible Recourse of Owners or Lenders to Title Insurance Coverage.

It is perhaps unsurprising that the Respondent, in its opposition to this amicus brief, questions the motivation of the MLTA in seeking to offer its views in this case. What is troubling however is the Respondent's persistent reference, in its opposition to this amicus brief and in its previous filings, to the potential availability to the litigants of insurance coverage as a factor in the legal analysis of this case. References to potential insurance coverage are clearly inappropriate and should not be considered. Most notably, Rule 411 of the Minnesota Rules of Evidence specifically provides that:

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

This rule follows the well established approach in Minnesota that evidence as to whether someone is or is not insured against liability is inadmissible on issues of negligence or wrongful conduct. *See Olson v. Prayfrock*, 254 Minn. 42, 44, 94 N.W.2d 540, 542 (1958).

The legal analysis in a mechanics lien case must not turn on the existence of title insurance coverage any more than the legal analysis in a personal injury case should turn on whether an alleged tortfeasor has liability insurance coverage. The presence or absence of a potential source of recovery for a litigant is not a proper consideration as it would lead to differing results in factually identical situations where parties did and did not buy title insurance. Further, the fact of title insurance coverage is rarely known at the mechanic's lien litigation stage. That a title insurer may have elected to provide a defense is not a determinant of coverage since an insurer's duty to defend an insured is broader than its duty to indemnify. *Metro. Prop. and Cas. Ins. Co. and Affiliates v. Miller*, 589 N.W.2d 297, 299 (Minn. 1999). Hence it is unlikely that it will be known, absent a declaratory judgment action to determine coverage, whether there will or will not ultimately be recourse to title insurance coverage in any particular case. Thus, conjecture in a mechanic's lien foreclosure action about who will or will not have recourse to title insurance coverage is likely to be incorrect in addition to being improper.

Real property law must be "insurance blind" for two reasons. First, priorities of liens and competing property rights must be decided on their merits based on the long standing law, which is not different from one case to the next depending on whether or

not there is title insurance coverage against the competing lien. Otherwise, those with and without coverage would have different substantive rights under otherwise identical circumstances. Second, MLTA has filed this brief in part because title insurers rely on the law as written in making insurance decisions. If the law changes so that title insurers pay claims that they did not expect to pay, they will need to either decline to insure, or reflect the additional risk in the form of increased premiums in future transactions. Thus the many will pay higher premiums so that the few can get more favored treatment than the law now gives them, and the substantive rights in property will shift without the prospect of insurance coverage in the future.

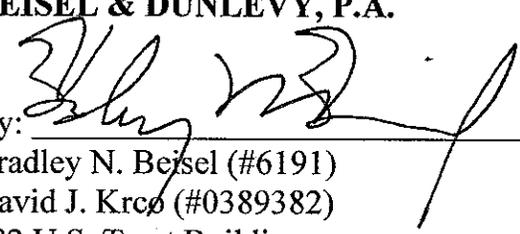
CONCLUSION

By failing to adopt the general rule regarding the enforcement of blanket mechanic's liens, the Court of Appeals has left litigants and potential litigants with uncertainty, doubt, and increased exposure to costly and protracted litigation. The balancing test enunciated by the Court of Appeals is impossible to perform because it is inherently unfair, and encourages manipulative practices by lien claimants as they seek ways to enforce a disproportionate amount of their liens on specifically targeted parcels. Minnesota should adopt the general rule that blanket mechanic's liens cannot be enforced on less than all of the property liened unless fairly apportioned among the liened parcels.

Respectfully submitted,

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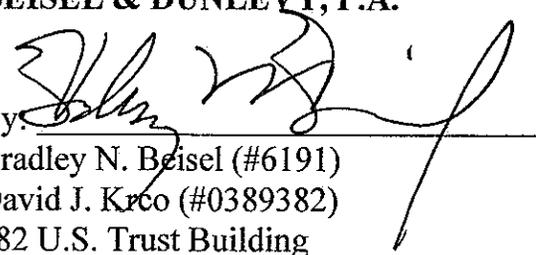
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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms with the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional 13 point Times New Roman font. The length of the brief is 5835 words. This brief was prepared using Microsoft Word 2007 software.

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