

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.*

**APPELLANT PREMIER BANK'S REPLY BRIEF**

Katherine M. Melander (#0180464)  
 Stephen F. Buterin (#0248642)  
 COLEMAN, HULL & van VLIET, PLLP  
 8500 Normandale Lake Boulevard  
 Suite 2100  
 Minneapolis, MN 55437  
 (952) 841-0001

Scott S. Payzant (#0255907)  
 Thomas C. Atmore (#0191954)  
 LEONARD, O'BRIEN, SPENCER,  
 GALE & SAYRE, LTD.  
 100 South Fifth Street, Suite 2500  
 Minneapolis, MN 55402-1234  
 (612) 332-2740

*Attorneys for Appellant*  
*(Additional Counsel Listed on following page)*

Aaron A. Dean (#0243954)  
Jesse R. Orman (#0310244)  
FABYANSKE, WESTRA, HART  
& THOMSON, P.A.  
800 LaSalle Avenue, Suite 1900  
Minneapolis, MN 55402  
(612) 359-7600

*Attorneys for Respondent  
Kuechle Underground, Inc.*

Lawrence P. Marofsky (#0067714)  
LAW OFFICE OF  
LAWRENCE P. MAROFSKY  
7022 Brooklyn Boulevard  
Minneapolis, MN 55429  
(763) 566-4570

*Attorney for Respondents Steven L. Boone,  
Annette C. Boone, Boone Family Investments, LLC  
& Becker Development, LLC, Michael S. Uzelac,  
Deanna M. Lasser, Anne-Marie Rasmus  
and Daniel P. Boone*

Patrick B. Hennessy (#0124412)  
Timothy A. Sullivan (#0107165)  
BEST & FLANAGAN LLP  
225 South Sixth Street, Suite 4000  
Minneapolis, MN 55402  
(612) 339-7121

*Attorneys for Respondents Nancy C. Buehler  
and Robert G. Buehler*

Tammy L. Pust (#151646)  
PARKER ROSEN LLC  
300 First Avenue North, Suite 200  
Minneapolis, MN 55401  
(612) 767-3000

*Attorney for Respondent and  
Third-Party Plaintiff*

Robert J. Feigh (#0028629)  
GRAY, PLANT, MOOTY, MOOTY  
& BENNETT, P.A.  
1010 West St. Germain  
Suite 600  
St. Cloud, MN 56301  
(320) 252-4414

*Attorney for Respondent Knife River  
Corporation f/ k/ a Bauerly Brothers, Inc.*

David S. Holman (#0193628)  
THE LAW OFFICE OF  
DAVID S. HOLMAN  
201 West Travelers Trail, Suite 225  
Burnsville, MN 55337  
(952) 895-1224

*Attorney for Respondent John Oliver  
& Associates, Inc.*

Bradley N. Beisel (#6191)  
David J. Krco (#0389382)  
BEISEL & DUNLEVY, P.A.  
282 U.S. Trust Building  
730 Second Avenue South  
Minneapolis, MN 55402  
(612) 436-2222

*Attorneys for Amicus Curiae*

## TABLE OF CONTENTS

TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	iii
ARGUMENT .....	1
I. Minnesota's Mechanic's Lien Statute Does Not Allow A Mechanic's Lien Claimant To Foreclose The Full Amount Of A Blanket Mechanic's Lien Against Less Than All The Lots Subject To Its Lien. ....	1
A. The principles of statutory interpretation are merely an aid and may not be used to rewrite the mechanic's' lien statute to provide a remedy not found in the mechanic's lien statute. ....	1
B. Minnesota Statutes Chapter 581 does not apply nor govern the foreclosure of liens filed pursuant to Minn. Stat. § 514.09 .....	3
C. Premier does not have "unclean hands." .....	5
D. The Minnesota Legislature has not recognized that a lienholder may foreclose a mechanic's lien against less than all the lots subject to the lien. ....	7
II. Minnesota Case Law Supports And Requires Kuechle To Apportion Its Blanket Lien On A Per Lot Basis. ....	8
A. <i>Carr-Cullen Co. v. Cooper.</i> ....	8
B. <i>Albert &amp; Harlow, Inc. v. Great Northern Oil Co.</i> .....	11
C. <i>Reilly v. Williams.</i> .....	12
III. The Cases From Foreign Jurisdictions Offer Guidance And Persuasive Authority On The Specific Issue Of Whether A Mechanic's Lien Claimant Who Files A Blanket Lien Must Apportion Its Lien When It Seeks To Foreclose The Lien Against Less Than All The Property Subject To The Lien. ....	13
IV. Public Policy Supports Apportionment. ....	20

CONCLUSION ..... 24

## TABLE OF AUTHORITIES

### MINNESOTA CASES

<i>Abel v. City of Minneapolis</i> , 68 Minn. 89, 70 N.W. 851 (1897) .....	2
<i>Albert &amp; Harlow, Inc. v. Great Northern Oil Co.</i> , 283 Minn. 246, 167 N.W.2d 500 (1969) .....	8, 9, 11, 14
<i>Anderson v. Breezy Point Estates, Inc.</i> , 283 Minn. 490,, 168 N.W.2d 693 (1969) .....	2
<i>Automated Building Components, Inc. v. New Horizon Homes, Inc.</i> , 514 N.W.2d 826 (Minn. App. 1994), <i>review denied</i> (Minn. June 15, 1994) .....	14
<i>Baker v. Ploetz</i> , 616 N.W.2d 263 (Minn. 2000) .....	4
<i>Carlson-Grefe Constr., Inc. v. Rosemount Condominium Group P'ship.</i> , 474 N.W.2d 405 (Minn. App. 1991), <i>review denied</i> (Minn. Oct. 31, 1991) .....	2
<i>Carr-Cullen Co. v. Cooper</i> , 144 Minn. 380, 175 N.W. 696 (1920) .....	8, 9, 10, 11, 23, 24
<i>Griffin v. Chadbourne</i> , 32 Minn. 126, 19 N.W. 647 (1884) .....	2
<i>Langford Tool &amp; Drill Co. v. Phoenix Biocomposites, LLC</i> , 668 N.W.2d 438 (Minn. App. 2003) .....	14
<i>LaValle v. Bayless</i> , 257 N.W.2d 283 (Minn. 1977) .....	8
<i>M. E. Kraft Excav. &amp; Grading Co., Inc. v. Barac Constr. Co.</i> , 279 Minn. 278, 156 N.W.2d 748 (1968) .....	2
<i>Muirhead v. Johnson</i> , 232 Minn. 408, 46 N.W.2d 502, 505 (1951) .....	4
<i>Performance Funding, L.L.C. v. Ariz. Pipe Trade Trust Funds</i> , 203 Ariz. 21, 49 P.2d 293 (Ariz. App. 2003) .....	15

<i>Reilly v. Williams</i> , 47 Minn. 590, 50 N.W. 826 (1891) .....	12, 13
<i>S. H. Bowman Lumber Co. v. Piersol</i> , 147 Minn. 300, 180 N.W. 106 (1920) .....	14
<i>Suburban Exteriors, Inc. v. Emerald Homes</i> , 508 N.W.2d 811 (Minn. App. 1993) .....	1
<i>Superior Constr. Servs., Inc. v. Belton</i> , 749 N.W.2d 388 (Minn. App. 2008) .....	1
<i>Twin City Pipe Trades Serv. Ass'n Inc. v. Peak Mech., Inc.</i> , 689 N.W.2d 549 (Minn. App. 2004) .....	14, 15

**OTHER JURISDICTIONS**

<i>Badger Lumber Co. v. Homes</i> , 6 N.W. 174 (Neb. 1898) .....	16, 17, 18
<i>CS &amp; W Contractors, Inc. v. Southwest Savings &amp; Loan Ass'n</i> 883 P.2d 404 (Ariz. 1994) .....	14, 15, 16, 20, 21, 22
<i>Hostetter v. Inland Dev. Corp.</i> , 561 P.2d 1323 (Mont. 1977) .....	15, 16, 17

**MINNESOTA STATUTES AND LAWS**

Minn. Stat. § 514.03 (2008) .....	7, 8
Minn. Stat. § 514.05 (2008) .....	1
Minn. Stat. § 514.08 (2008) .....	23
Minn. Stat. § 514.09 (2008) .....	1, 2, 3, 4, 5, 7, 9, 10, 22, 23, 24
Minn. Stat. § 514.10 (2008) .....	3, 4, 9
Minn. Stat. § 515B (2008) .....	19, 20
Minn. Stat. § 515B.3-118 (2008) .....	18

Minn. Stat. § 580.08 (2008) .....	3, 4, 9, 10
Minn. Stat. § 581.02 (2008) .....	4, 9
Minn. Stat. § 645.45 (2008) .....	4, 5
1973 Minn. Laws ch. 247 § 3 .....	8
1976 Minn. Laws ch. 32 § 1 .....	8
Revised Laws Minnesota 1905 § 4464 .....	9

**SECONDARY AUTHORITY**

<i>Black's Law Dictionary</i> 28 (7th ed. 1999) .....	4
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## ARGUMENT

### **I. Minnesota's Mechanic's Lien Statute Does Not Allow A Mechanic's Lien Claimant To Foreclose The Full Amount Of A Blanket Mechanic's Lien Against Less Than All The Lots Subject To Its Lien.**

In its response, Kuechle attempts to manipulate the mechanic's lien and mortgage foreclosure statutes to rewrite the mechanic's lien statute so that it will achieve a priority for its mechanic's lien to which it is not entitled under the express provisions of the mechanic's lien statute. Even applying a liberal construction of the mechanic's lien statute, this court is not free to rewrite the statute to add or supply language that the legislature omitted or failed to include. While language of Minn. Stat. § 514.09 allows a lien claimant to file a single mechanic's lien against multiple lots, it does not permit the lien claimant to then selectively choose which lots to foreclose the full amount of its lien based on its priority over other interests in the property.

#### **A. The principles of statutory interpretation are merely an aid and may not be used to rewrite the mechanic's' lien statute to provide a remedy not found in the mechanic's lien statute.**

Minnesota courts recognize that the dual purpose of the mechanic's lien statute is to "balance the policy of protecting mortgagees . . . against the policy of safeguarding the rights of persons who furnish labor and material to the improvement." *Superior Constr. Servs., Inc. v. Belton*, 749 N.W.2d 388, 391 (Minn. App. 2008) (citing *Suburban Exteriors, Inc. v. Emerald Homes*, 508 N.W.2d 811, 813 (Minn. App. 1993)); see also Minn. Stat. § 514.05, subd. 1 (2008) (providing statutory priority scheme between lien claimant, purchaser, mortgagee and other encumbrancer of real property). This dual purpose is best served when the rights of mortgagees and lien claimants are fixed with

definiteness and certainty. See *Carlson-Grege Constr., Inc. v. Rosemount Condominium Group P'ship.*, 474 N.W.2d 405, 408-09 (Minn. App. 1991), review denied (Minn. Oct. 31, 1991).

Although Kuechle may be entitled to a liberal construction of the mechanic's lien statute, this principle of statutory interpretation is merely an aid for the court in interpreting the provisions of the mechanic's lien statute. It is not a device that operates to grant or confer rights and remedies to Kuechle that are beyond those provided by the mechanic's lien statute. This court has long held that "mechanic's liens are purely creatures of statute and the rights of the parties are governed by the language of the statutes." *Anderson v. Breezy Point Estates, Inc.*, 283 Minn. 490, 493, 168 N.W.2d 693, 693 (1969) (citing *M. E. Kraft Excavating & Grading Co. v. Barac Constr. Co.*, 279 Minn. 278, 283, 156 N.W.2d 748, 751 (1968)). And Kuechle does not dispute that 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).

The parties agree that the language of Minn. Stat. § 514.09 allows a lien claimant who contributes improvements to two or more adjoining lots under one general contract with the owner to file a single lien statement for the entire claim against the whole area improved, or to file separate lien statements for each lot on an individual basis. Under the

first option, the lien attaches to the "whole area so improved" for the entire amount of the claimed lien. Minn. Stat. § 514.09. As the amicus brief correctly notes, if a lien claimant elects to file a single lien for the entire improvement against all the parcels improved under its contract with the owner, then the lien must encompass all of the improved parcels and be foreclosed as a single lien against all the parcels. This is because the lien claimant is seeking to recover the unpaid value of the improvements it furnished to all the lots. Because the lien attaches to "the whole area so improved" the lienholder must foreclose the lien in its entirety and against all the lots improved.

**B. Minnesota Statutes Chapter 580 does not apply nor govern the foreclosure of liens filed pursuant to Minn. Stat. § 514.09.**

Kuechle argues that Minn. Stat. § 580.08, a section within the mortgage foreclosure by advertisement statute, governs the foreclosure of mechanic's liens filed under Minn. Stat. § 514.09. Specifically, Kuechle argues that this section requires a lien claimant to foreclose the full amount of its blanket mechanic's lien one lot at a time until the lien is satisfied and forbids the apportionment of liens under Minn. Stat. § 514.09. Not only does Minn. Stat. § 580.08 not apply to liens filed pursuant to Minn. Stat. § 514.09, such a statement demonstrates a fundamental misunderstanding of how mechanic's liens are foreclosed in this state.

The plain language of Minn. Stat. § 514.10, which is entitled "Foreclosure of liens", provides, in part, that:

[s]uch liens may be enforced by *action in the district court* of the county in which the improved premises or some part thereof are situated . . . which *action* shall be begun and conducted in the same manner as *actions* for the foreclosure

of mortgages upon real estate, except as herein otherwise provided . . . .

Minn. Stat. § 514.10 (emphasis added).

Minnesota law defines an "action" as "any proceeding in any court of this state." Minn. Stat. § 645.45(2) (2008); *see also Baker v. Ploetz*, 616 N.W.2d 263, 269 (Minn. 2000) (noting action is defined as "[a] civil or criminal judicial proceeding") (citing *Black's Law Dictionary* 28 (7th ed. 1999)); *Muirhead v. Johnson*, 232 Minn. 408, 46 N.W.2d 502, 505 (1951) (recognizing statutory definition of action under Minn. Stat. § 645.45 and noting courts generally state "action is the prosecution in a court of justice of some demand or assertion of right by one person against another") (citation omitted). This statutory provision simply provides that to foreclose a mechanic's lien, the lienholder must commence an action, i.e. judicial proceeding, in district court. Therefore, Minn. Stat. §514.10 does not contemplate the application of the mortgage foreclosure by advertisement statutes found in Minn. Stat. § 580.01, et seq.

In support of its argument that Minn. Stat. § 580.08 applies to the foreclosure of liens under Minn. Stat. § 514.09, Kuechle cites Minn. Stat. § 581.02. However, Kuechle's reliance on Minn. Stat. § 581.02 is grossly misplaced. This section provides that, "[t]he provisions of sections 580.08, 580.09, 580.12, 580.22, 580.25, and 580.27, *so far as they relate to the form of the certificate of sale*, shall apply to and govern the foreclosure of mortgages by action." Minn. Stat. § 581.02 (emphasis added). This section has nothing to do with the foreclosure of mechanic's liens filed pursuant to Minn. Stat. § 514.09, and it does not govern the manner in which those liens are foreclosed. It

limits the incorporation and application of the cited provisions to Minnesota Statutes Chapter 580 to the "*form of the certificate of sale*" only.

**C. Premier does not have "unclean hands."**

Kuechle argues that Premier is to blame for the situation that now exists because Premier failed to obtain a subordination agreement from Kuechle as a condition of releasing the development mortgage and ensuring that its construction mortgages would have priority over its mechanic's lien. It asserts that Premier failed to protect its interests in the Lots 5, 6 and 10.

This argument does little, if anything, to promote the resolution of the central issue in this case. Had Premier required Kuechle to execute a subordination agreement, this case would not have been litigated because Premier's development and construction mortgages would have enjoyed priority over Kuechle's mechanic's lien. In reality, Kuechle benefited from Premier not requiring it to subordinate its lien rights in Lots 5, 6, and 10. If Premier had obtained a subordination agreement, Kuechle would foreclose its mechanic's lien subject to Premier's construction mortgages. The fact that Premier did not obtain a subordination agreement simply is a reflection that Premier agreed to assume the risk that it might be responsible for paying for the cost of Kuechle's improvements to these three lots if Becker Development failed to pay for them under its contract with

Kuechle. Premier stands ready, willing and able to pay Kuechle for the reasonable value of the improvements Kuechle made to Lots 5, 6 and 10.<sup>1</sup>

Kuechle also contends that Premier was the reason it filed a mechanic's lien because Premier refused to pay Becker Development's last construction draw. It maintains that Premier is trying to pay only a fraction of the cost for a completed project, only, while keeping the \$266,622.96 that it alleges "was agreed to be paid to Kuechle." This argument takes great liberty with the facts and distorts the record.

There is no basis in fact for Kuechle's assertion that it was paid only a small fraction of its costs on the Project. It is undisputed that of the total contract price was \$1,083,730.58, and that Kuechle received payments from Premier totaling \$817,107.62. Kuechle has already been paid by Premier 75% of its contract entered into with Becker Development. And, if this court adopts the rule that Premier advocates, Kuechle will receive additional payments of approximately \$54,000.00 to \$65,000.00, together with statutory interest and attorneys' fees and costs as determined by the district court, which will amount to 82% of its contract price. To date, Premier has yet to recover on either its development or construction mortgages, and the value of its mortgages will ultimately exceed the value of the Project.

Likewise, Kuechle has failed to cite to any evidence that Premier agreed to pay the last construction draw and then reneged on that promise. The reason that Premier did not advance funds for the last construction draw was that Becker Development had defaulted.

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<sup>1</sup>Likewise, the construction lender which holds the mortgages on eight other lots, will need to pay Kuechle for the value of the improvements made to those lots.

Under the terms of the loan documents, Premier was entitled to cease making advances in the event of a default by Becker Development. Premier was not, as Kuechle unfairly insinuates, attempting to sit back and get a completed project for only a fraction of the cost. It was merely attempting to protect itself by ceasing to make advances once Becker Development defaulted.

There is little, if any, merit that Premier was acting in some nefarious or unjust manner. This litigation was the direct result of Becker Development and Boone Builders defaulting on their development and construction mortgages – not the actions of Premier.

**D. The Minnesota Legislature has not recognized that a lienholder may foreclose a mechanic's lien against less than all the lots subject to the lien.**

Kuechle contends that the Minnesota Legislature has explicitly recognized that the enforcement of a mechanic's lien against less than all of the lots subject to the lien is equitable. In support of this argument, Kuechle relies on Minn. Stat. § 514.03, subd. 3 (2008). But, there is nothing in this section, elsewhere in Chapter 514, or in case law that demonstrates suggests that the legislature authorized the kind of selective lien foreclosure Kuechle seeks here.

Section 514.03, subd. 3 limits the extent of a mechanic's lien “to all the interest and title of the owner . . . not exceeding 80 acres” or 40 acres for homesteaded agricultural land. Minn. Stat. § 514.03, subd. 3. It does not in any way address the procedure to be used when a lien claimant forecloses a single lien filed pursuant to Minn. Stat. § 514.09, nor does it provide any guidance on the issue. It merely caps the area subject to a mechanic's lien, reflecting the legislative intent to protect the owner of a large

tract of land (e.g. a farmer) from losing the entire tract in a mechanic's lien foreclosure action where there have been improvements made to only a portion of that tract.<sup>2</sup>

Kuechle also cites this court's decision in *LaValle v. Bayless*, 257 N.W.2d 283 (Minn. 1977). There, in a footnote, this court indicated that the district court properly reduced the mechanic's lien from 55 acres to 40 acres pursuant to Minn. Stat. § 514.03, subd. 3. *Id.* at 285 n. 2. There is no indication that the parties raised the issue of apportionment or that the district court allowed the lien claimant to foreclose the full amount of the original lien against the 40 acres. The decision in *LaValle*, therefore, provides little, if any, guidance in this case.

## **II. Minnesota Case Law Supports And Requires Kuechle To Apportion Its Blanket Lien On A Per Lot Basis.**

In its response, Kuechle attempts to distinguish this court's decisions in *Carr-Cullen Co. v. Cooper*, 144 Minn. 380, 175 N.W.2d 696 (1920), and *Albert & Harlow, Inc. v. Great Northern Oil Co.*, 283 Minn. 246, 167 N.W.2d 500 (1969). But, despite Kuechle's attempt to distinguish them, these decisions are controlling and dispositive of the issue before the court.

### **A. *Carr-Cullen Co. v. Cooper.***

According to Kuechle, this court's decision in *Carr-Cullen* does not apply because the case did not address the issue of whether a mechanic's lien claimant may foreclose the

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<sup>2</sup> Evidence of the original agrarian, pre-urban development policy underlying this acreage limitation—distinct from the longstanding policies underlying foreclosure of blanket liens—is the fact that the statute used to limit the property subject to a lien to 1 acre inside and 40 acres outside the city limits of an incorporated city or village. *See* 1973 Minn. Laws ch. 247 § 3; 1976 Minn. Laws ch. 32 § 1.

full amount of a mechanic's lien filed against multiple lots against less than all the property that the lien encumbers. It also maintains that not only did the case not involve a priority dispute, the decision did not address the interpretation of Minn. Stat. § 580.08.

The decision in *Carr-Cullen*, however, is controlling because it involved the interpretation and application of the language of Minn. Stat. § 514.09. More importantly, it is the only case in Minnesota to address the proper manner of foreclosing a lien filed pursuant to that section. After ruling that the lumber supplier was entitled to file a single lien against all eight lots for the full amount of unpaid labor and materials the lumber supplier furnished to the six houses built on those lots, this court ruled that the lienholder was required to foreclose the full amount of its lien against all eight lots and that the amount of the lien must be apportioned on a per lot basis. *Carr-Cullen*, 144 Minn. at 383-86, 175 N.W.2d at 697-99.

The reason the court did not address the interpretation and application of Minn. Stat. § 580.08 is because it does not apply. The language that is currently found in Minn. Stat. § 580.08 was enacted in 1905, and in effect at the time this court decided *Carr-Cullen*. See Revised Laws Minnesota 1905 § 4464. Arguably, if the language of Minn. Stat. § 580.08 applied and governed the foreclosure of mechanic's liens filed pursuant to Minn. Stat. § 514.09 as Kuechle urges, this court would have applied that section in deciding *Carr-Cullen*.<sup>3</sup> It did not.

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<sup>3</sup> The language contained in the current version of Minn. Stat. § 514.10 is substantively the same as § 3513, Revised Laws Minnesota 1905. In addition, with the exception of the numbers for the statutory cross references, the language found in Minn. Stat. § 581.02 is identical to the language of § 4487, Revised Laws Minnesota 1905. Thus, all the

Absent from the briefs that Kuechle has submitted to this court and the courts below are citations to any cases in which a Minnesota court has applied Minn. Stat. § 580.08, or any provision of Minnesota Statutes Chapter 580, to the foreclosure of mechanic's liens under Minn. Stat. § 514.09. Even though the statutory framework on which Kuechle relies to support its arguments has existed for over 100 years, the dearth of case law is indicative of the fact that Minn. Stat. § 580.08 does not apply nor govern the foreclosure of mechanic's liens.

There is similarly no merit to Kuechle's argument that the decision in *Carr-Cullen* is distinguishable because it did not involve a priority dispute. The issue of priority does not govern the manner in which mechanic's liens are foreclosed. Every successful mechanic's lienholder, whether their lien is junior or senior, has the statutory right to foreclose the full amount of its mechanic's lien regardless of the priority of its lien. See Minn. Stat. §§ 514.14-.15. The manner of foreclosure is not dependent on the priority level of the mechanic's lien.

In *Carr-Cullen*, this court addressed the issue of how a mechanic's lien filed under Minn. Stat. § 514.09 is to be foreclosed and established the rule that a mechanic's lien claimant who files a such a lien, if successful, is entitled to a "judgment for a lien upon the whole of the real property described in its lien statement for the full amount of its claim," but that such amount should be apportioned on a per lot basis to reflect the cost of improvements fairly chargeable to each lot. *Carr-Cullen*, 144 Minn. at 386, 175 N.W.2d

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statutory provisions on which Kuechle bases its arguments were in existence at the time this court decided *Carr-Cullen*.

at 699. The decision in *Carr-Cullen* remains good law and is dispositive of the present case.

**B. *Albert & Harlow, Inc. v. Great Northern Oil Co.***

Next, Kuechle argues that the decision in *Great Northern* is distinguishable because of what it contends were the unique policy and geographic considerations at play in that case.

Although the facts in that case did present a somewhat unique situation, this court's comprehensive analysis of the purpose and object of the mechanic's lien statute and the significant impact that a mechanic's lien places on real property and those with an interest in the lien property was not dependent on the facts at issue in that case. *Albert & Harlow, Inc. v. Great Northern Oil Co.*, 283 Minn. 246, 248-55, 167 N.W.2d 500, 503-07 (1969). After considering the equitable and remedial purposes of Chapter 514 in great detail, this court held that the "purpose of the [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." *Id.* at 253, 167 N.W.2d at 506 (emphasis added).

This statement of law is derived from the court's reading of the various provisions of Chapter 514, not the facts of the case. The rule that this court articulated is simply a recognition that there must be a reasonable relationship between the extent of the lien granted and the value of the cost of improvements furnished to the lien property.

C. *Reilly v. Williams.*

In support of its argument that it may recover the full amount of mechanic's lien against only the lots where its lien enjoys priority, Kuechle relies on *Reilly v. Williams*, 47 Minn. 590, 50 N.W. 826 (1891). This reliance is misplaced.

In that case, Williams contracted with Jackson to furnish the labor and materials necessary for the construction of two houses on two separate lots for \$6,580 under one general contract with Williams, who owned the two lots at the time. *Id.* at 591, 50 N.W. at 826. The two houses had the same plan and were of equal value in terms of labor and materials. *Id.* at 591-92, 50 N.W. at 826. After construction on the two houses started, Williams executed two first mortgages, one on each lot, to a defendant insurance company. *Id.* at 592, 50 N.W. at 826. He then executed a second mortgage on each lot to Berryhill, the individual from whom he purchased the lots. *Id.* Later, while construction was still taking place, Williams conveyed the lots back to Berryhill without Jackson's knowledge. *Id.* When the first house was completed, Williams requested and Jackson agreed to release that lot from any and all liens. *Id.* They further agreed that Jackson would retain his lien on the second lot for the full balance remaining due under their contract. *Id.* Ultimately, Williams paid Jackson \$3,915 of the contract price, leaving an unpaid balance due of \$2,675.50. *Id.* Jackson then filed a lien for this unpaid amount against the second house and lot. *Id.* This court rejected Williams' argument that Jackson's lien was invalid because the release of the one lot operated as release of both liens. *Id.* at 593, 50 N.W. at 827.

The decision in *Reilly* does not establish precedent that a mechanic's lien claimant is entitled to foreclose a blanket mechanic's lien against less all the lots subject to the lien. Kuechle refuses to acknowledge that the lien claimant in *Reilly* did not file a blanket lien against multiple lots. The reported facts of the case show that Jackson filed a single lien against the second house and lot in an amount of Jackson's lien did not exceed the value of the labor and materials furnished for the second house and lot. *Id.* at 592, 50 N.W. at 826. The case did not involve a mechanic's lien claimant's attempt to foreclose the full amount of a blanket mechanic's lien against less than all the lots subject to the lien. The decision in *Reilly*, therefore, has no relevance to the present case.

**III. The Cases From Foreign Jurisdictions Offer Guidance And Persuasive Authority On The Specific Issue Of Whether A Mechanic's Lien Claimant Who Files A Blanket Lien Must Apportion Its Lien When It Seeks To Foreclose The Lien Against Less Than All The Property Subject To The Lien.**

In addition to urging this court to ignore its own decisions, Kuechle asks this court to disregard the majority rule and its corollary that 23 state courts have either explicitly or implicitly adopted establishing that a mechanic's lien who files a blanket lien against two or more parcels cannot enforce the full amount of the lien against less than all of the parcels subject to the lien and must apportion the amount of its lien on a per lot basis. The central premise of Kuechle's argument is that the mechanic's lien statutes differ significantly from state to state and the courts in those states may not share the same policy of liberally construing their lien statutes in favor of lien claimants.

This argument, however, ignores the fact that this court, along with the court of appeals, have often looked to and considered the decisions from other states when

considering issues arising under Minnesota's mechanic's lien statute. *See e.g., Great Northern*, 283 Minn. at 248-55, 167 N.W.2d at 503-07 (considering cases from other jurisdictions as further support for its decision under Minnesota's mechanic's lien statute); *S. H. Bowman Lumber Co. v. Piersol*, 147 Minn. 300, 180 N.W. 106 (1920) (considering cases from other states to determine general rule regarding ability of lien claimant to file and foreclose mechanic's lien against two or more noncontiguous parcels for work furnished to one lot); *Twin City Pipe Trades Serv. Ass'n, Inc. v. Peak Mech., Inc.*, 689 N.W.2d 549 (Minn. App. 2004) (considering and basing decision on cases from foreign jurisdictions in case involving standing to assert mechanic's lien claim under Minnesota's mechanic's lien statute); *Langford Tool & Drill Co. v. Phoenix Biocomposites, LLC*, 668 N.W.2d 438 (Minn. App. 2003) (considering decisions from Kansas and Oregon in case involving issue of abandonment under Minnesota's mechanic's lien statute); *Automated Building Components, Inc. v. New Horizon Homes, Inc.*, 514 N.W.2d 826 (Minn. App. 1994), *review denied* (Minn. June 15, 1994).

Given this long established precedent, it is appropriate for this court to consider cases from outside Minnesota to resolve disputes under Minnesota's mechanic's lien statute. This court, as a doctrinal court, is free to adopt the majority rule and its corollary and rule that a lienholder who files a single mechanic's lien against multiple lots must apportion its lien on a per lot basis so as to reflect the value of improvements furnished that are fairly chargeable to each lot.

The Arizona Supreme Court addressed a factual and legal situation nearly identical to the present case in *CS & W Contractors, Inc. v. Southwest Savings & Loan*

*Ass'n*, 883 P.2d 404 (Ariz. 1994). Kuechle contends this decision is inapplicable because nothing within the opinion indicates that Arizona has a similar policy of liberally construing its mechanic's lien statute in favor of lien claimants. The Minnesota Court of Appeals, however, recently recognized the opposite, noting that similar to Minnesota, the courts in Arizona liberally construe the provisions of its mechanic's lien state to favor the protection of lien claimants. *See Twin City Pipe Trades Ass'n*, 689 N.W.2d at 552 (citing *Performance Funding, L.L.C. v. Ariz. Pipe Trade Trust Funds*, 203 Ariz. 21, 49 P.2d 293, 298-99 (Ariz. Ct. App. 2003)).

In *CS & W*, the Arizona Supreme Court addressed the issue of whether it is equitable to allow a mechanic's lien claimant who files a blanket mechanic's against multiple lots, all of which benefitted equally from the work, to selectively foreclose the full amount of the lien against only those lots on which its lien has priority. The court ruled that it was not, reasoning that such a practice is inequitable because a lien claimant cannot extract the value of improvements made to several lots from fewer than all those lots that benefitted from the improvements. It also recognized the danger that such a rule would allow a lien claimant to resurrect an extinguished lien or obtain a priority to which it might not be entitled. *Id.* at 406.

Given the factual and legal similarities with this case, it is appropriate for this court to consider and adopt the reasoning and holding of the Arizona Supreme Court in *CS & W*.

Kuechle argues that its arguments find support in the decisions from the Montana Supreme Court and Nebraska Supreme Court in *Hostetter v. Inland Dev. Corp.*, 561 P.2d

1323 (Mont. 1977), and *Badger Lumber Co. v. Homes*, 76 N.W. 174 (Neb. 1898). These decisions, however, both recognized the general rule and its corollary, but the rule given the unique facts present in each case.

The decision in *Hostetter* involved a lien claimant who had constructed ceramic bathtub enclosures in each unit of a 64-unit condominium complex pursuant to a single contract with the developer. *Hostetter*, 561 P.2d at 1324. After the developer failed to pay for the work, the lien claimant filed a single mechanic's lien against the entire condominium complex for the entire amount of the unpaid balance. *Id.* at 1325.

In reaching its decision, the Montana Supreme Court acknowledged the general rule that a single mechanic's lien filed against an entire property consisting of several parcels cannot be enforced in toto against less than all of such parcels. *Id.* at 1327. It further recognized the reasoning underlying the general rule – it is 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. *Id.* The court, however, created a limited exception to the general rule and its corollary based on the developer's egregious conduct violating numerous provisions of Montana's condominium act. *Id.* The court observed that the condominium act required the developer to set aside the proceeds from the sale of every unit into escrow and satisfy every blanket lien or mortgage before the first conveyance. *Id.*

But because the developer so blatantly ignored the provisions of Montana's condominium act designed to protect lienholders, the court ruled that the developer was responsible for satisfying the entire amount of the blanket lien from the units it still

retained. *Id.* The court, however, held that "should any amount of the lien remain unsatisfied, [the lien claimant] may seek proportionate enforcement of such balance against the 18 units previously sold by [the developer] after the owners of these units are made a party to the action." *Id.*

The decision in *Hostetter* is of limited value because it was based on a developer's egregious violations of the provisions contained in Montana's condominium act that were designed to ensure that those furnishing improvements to condominiums received payment for those improvements. No such statutory violations are present in this case that would justify this court ignoring the general rule and its corollary. As tragic and personal it is to those involved, this case involves a real estate development project that failed due to the current market conditions. For this reason, this court should decline Kuechle's invitation to adopt the decision in *Hostetter*.

Similarly, in *Badger Lumber*, the Nebraska Supreme Court adopted and affirmed the general rule and its corollary. The case involved protracted litigation regarding numerous mechanic's and mortgage liens filed against six lots. In the first appeal, the Nebraska Supreme Court held that "the entire debt to plaintiff [Badger Lumber] might be charged to all the real estate, but the whole indebtedness could not be charged to a part of the lots." *Badger Lumber Co.*, 76 N.W. at 174. The court continued, stating that "the entire premises were liable for the cost of erecting the improvements, but such costs might be apportioned so that the parts of the lots charged should bear no greater amount of the expense than the value of the material actually used in the erecting the improvements made on such part." *Id.* Following trial on remand, the district court

determined that Badger Lumber had a first lien on all of the six lots against which it filed its mechanic's lien, except that its lien was in second position with respect to a small portion of three of the lots. *Id.*

In affirming the district court, the Nebraska Supreme Court ruled there "was a substantial compliance with [its] former decision." *Id.* The court observed that the district court had found Badger Lumber was entitled to a mechanic's lien on all the lots, "a first lien on certain parts, and a second or junior lien on the remainder, and that the portion of the premises on which [Badger Lumber] had a second lien had been sold under the prior mortgage lien . . . , which cut out and foreclosed [Badger Lumber's] right or interest therein." *Id.*

Contrary to Kuechle's contention, the decision in *Badger Lumber* affirms the general rule and its corollary.

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

Finally, Kuechle argues that the provisions of Minnesota Common Interest Ownership Act (MCIOA) do not apply in this case because Premier is not the record owner of the property. This argument, however, ignores the statement contained on Page 28 of Kuechle's brief that "Premier Bank will ultimately own the majority of the River Bend Development."

It is undisputed that the River Bend Development is a common interest community (CIC). It therefore is governed by the Minnesota Common Interest Ownership Act (MCIOA), Minn. Stat. §§ 515B.1-101 to § 515B.4-118 (2008). This statute requires that

liens filed against units within a CIC must be apportioned to reflect the amount of the lien "attributable to the unit." Minn. Stat. § 515B.3-117.

Specifically, the statute provides that with respect to mechanic's liens:

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 that is attributable to the unit.

*Id.* § 515B.3-117(a) (2008). The release includes a release of any rights in the common elements appurtenant to the unit. *Id.* On receipt of payment, the statute requires the lienholder to deliver the unit owner a recordable partial satisfaction and release of lien that releases the unit from the lien. *Id.*

The legal effect of Minn. Stat. § 515B.3-117 is that it requires a lienholder who files a mechanic's lien against a CIC to foreclose its lien by apportioning the lien so that each unit within the CIC is subject to a lien amount that is attributable to that particular unit only. The lienholder is, in effect, statutorily barred from charging and having one unit satisfy a lien or lien amounts that are properly attributable to other units within the CIC. The MCIOA operates to make each unit within a CIC responsible for only that portion of the mechanic's lien attributable to that unit – the unit is not and cannot be responsible for the costs of improvements made to other units within the CIC. It therefore follows that in foreclosing its mechanic's lien, Kuechle may not charge the lots within the River Bend Development with lien amounts that are attributable to the other lots – it must apportion its lien so that each lot is responsible for satisfying that portion of the lien that is attributable to that particular lot only.

The fact that the statutory requirements of the MCIOA may mirror the provisions of the mechanic's lien statute and this court's decisions that prohibit lienholders from enforcing the full amount of a mechanic's lien against less than all the lots subject to the lien does not render these provisions redundant or read Minn. Stat. § 515B.3-117 out of the statute. The rule that Premier urges this court to adopt simply provides a consistent and workable rule that applies to common interest community property and non-common interest community property alike.

#### **IV. Public Policy Supports Apportionment.**

Kuechle argues that equity and public policy support the district court's decision permitting Kuechle to collect the full amount of its blanket mechanic's lien against less than all the lots subject to its lien, even though all 59 lots benefitted equally from its work.

Kuechle first argues that the improvements that it made were for basic infrastructure that serves the entire development and cannot be apportioned on a per lot basis because basic infrastructure works only if it is 100% complete. It maintains that its work is indivisible, and therefore, cannot be apportioned. The Arizona Supreme Court addressed this very situation in *CS & W*, and had little trouble with the issue. As the court there noted, "[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." 883 P.2d at 406. The court continued: "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.*

Kuechle fails to explain why the three lots should bear the burden of satisfying its entire blanket mechanic's lien and the remaining lots relieved of that obligation even though, by Kuechle's own admission, those lots received the same benefit from its work. By seeking to foreclose the full amount of its lien against only those three lots over which its lien has priority, Kuechle is attempting to obtain a priority to which it is not otherwise entitled. Kuechle has not explained why the principles of equity justify such a manipulation of its lien and the lien statute.

Kuechle further contends that in considering the equities of this case, this court must consider the effect of title insurance. But, the existence of title insurance is, and should be, immaterial to this court's legal analysis. More broadly, though, Kuechle fails to address the effect of its proposed rule in those situations where title insurance is unavailable or inadequate to cover a mechanic's lien claim that exceeds the value of the property. Contrary to Kuechle's assertion, homeowners have the option to decline title insurance. It is not uncommon, especially in today's difficult market, for homeowners to decline title insurance for cost reasons. In addition, Kuechle's argument fails to consider the fact that title insurance provides coverage only up to the amount of the value of the property being insured. Thus, it is possible that title insurance is unavailable for improvements made to other lots not covered by the policy.

In this case, it would be manifestly inequitable to allow Kuechle to "extract the value of improvements made to several lots from fewer than all those lots." *See CS & W,*

883 P.2d at 406. Sound public policy favors apportioning Kuechle's lien on a per lot basis because it would subject each lot to a lien amount that reflects the value of the labor and materials actually furnished to each lot, protect others who may have interests in the 11 lots, and allow Kuechle to collect a portion of its outstanding debt.

What is most disconcerting about Kuechle's position is that because Kuechle elected to exercise its statutory right to file a blanket mechanic's lien on all the lots, it is entitled to recover more of its lien than what it would have otherwise been entitled to had Kuechle filed individual mechanic's liens on the 59 lots. By filing a blanket mechanic's lien, Kuechle is entitled to recover for improvements made to 47 other lots even though Kuechle's lien is junior and subordinate to Premier's development mortgage. Had Kuechle filed individual mechanic's liens against each of the 59 lots, Minn. Stat. § 514.09 would have prohibited Kuechle from shifting the amounts claimed on the 47 lots to the 3 lots encumbered by Premier's construction mortgages and the eight lots owned by Dan Happe Construction. Consequently, Kuechle is entitled to unfairly burden these 11 lots for improvements made on other lots within the Project just because it filed a blanket lien.

The legislature never intended a construction of Minn. Stat. § 514.09 creating inconsistent results depending on how the lien claimant chose to foreclose its mechanic's lien. Under the court of appeals' decision, lien claimants will file a single mechanic's lien on numerous lots under the guise that they do not maintain separate records (therefore entitling them to file a blanket lien) and then shift the entire amount claimed to those lots where the lien has priority over other interests and encumbrances. This

practice will greatly increase a lien claimant's ability to recover amounts claimed where it would not have been entitled to if it had filed separate liens. Therefore, allowing the court of appeals' decision to stand will create widely different results depending upon whether a blanket or separate liens are filed under Minn. Stat. §514.09.

Compare this result with upholding *Carr-Cullen*. Under Minn. Stat. § 514.09, a lien claimant can choose at the time of the filing of its lien, whether to file one lien on contiguous lots or separate liens on individual lots depending on how the lien claimant maintains its records. See Minn. Stat. § 514.08-09. The lien claimant then commences an action within one year of its alleged last item of contribution stated in its lien statement pursuant to Minn. Stat. § 514.12, Subd. 3. If a lien claimant filed one statement for the "entire claim, embracing the whole area so improved" under *Carr-Cullen* the lien claimant would be required during discovery or at trial to apportion the amount of its lien based on the value of the improvements made to individual lots. If the labor and materials provided improved the lots equally (a condominium or townhouse project where the lots are equal in size) then the amounts claimed can easily be divided by the number of lots improved. If, however, the value of the improvements for certain lots are greater due to size of the lot or the nature of the improvements, the lien claimant would be entitled to a greater amount of its lien for these lots tied to the reasonable value of the labor and materials provided on a per lot. Adopting such a rule allows a lien claimant to maximize the recovery of its lien based on the value of the labor and materials provided to each parcel. Upholding *Carr-Cullen*, will also reinforce a central maxim of mechanic's lien law that the amount and value of the lien sought to be foreclosed bears a

direct relationship to the value of the improvements provided. Once the amount of the lien for the individual lots is established, the lien claimant would be entitled to foreclose its mechanic's lien pursuant to Minn. Stat. §§ 514.14-15 and the relevant sections of Chapters 581 and 550 of the Minnesota Statutes.

### 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 the amount of its lien based on the value of the improvements provided to the individual lots. This rule is consistent with sound public policy, the decisions of the 23 state appellate courts that have considered this issue and would promote fair and consistent results for all those who are afforded protection under the mechanic's lien statute.

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 apportion the amount of its lien.

Respectfully submitted,

COLEMAN, HULL & VAN VLIET, PLLP

Dated: Dec. 1, 2009

By: 

Katherine M. Melander (#180464)

Stephen F. Buterin (#248642)

8500 Normandale Lake Boulevard

Suite 2110

Minneapolis, Minnesota 55437

952-841-0001

*Attorneys for Premier Bank*

### Certification of Brief Length

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs.1 and 3, for a brief produced with a proportional 13 point font. The length of this brief is 6768 words. This brief was prepared using Microsoft Word 2002.

COLEMAN, HULL & VAN VLIET, PLLP

Dated: Dec. 1, 2009

By: Katherine M. Melander

Katherine M. Melander (#180464)

Stephen F. Buterin (#248642)

8500 Normandale Lake Boulevard

Suite 2110

Minneapolis, Minnesota 55437

952-841-0001

*Attorneys for Premier Bank*