

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.

**RESPONDENT KUECHLE UNDERGROUND, INC.'S
BRIEF AND APPENDIX**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF THE ISSUES

1. Under Minnesota law and the particular facts, circumstances, and equities of this case, may a mechanic's lien claimant, who performs indivisible infrastructure work on an entire subdivision, and who then perfects a blanket mechanic's lien on the entire subdivision pursuant to Minn. Stat. § 514.09, foreclose and recover the entire amount of the blanket mechanic's lien against less than all of the lots in the subdivision?

Yes.

The district court ruled in the affirmative.

The Minnesota Court of Appeals affirmed the district court.

The district court and Minnesota Court of Appeals properly applied Minnesota law and should be affirmed.

Most apposite authorities:

Minn. Stat. § 514.09

Minn. Stat. § 514.10

Minn. Stat. § 580.08

STATEMENT OF THE CASE

This appeal arises out of two consolidated mortgage foreclosure actions commenced by Appellant Premier Bank in Sherburne County District Court. The lawsuits relate to a residential subdivision known as "River Bend" – a 59-lot development located in Becker, Minnesota. Premier Bank financed Respondent Becker Development, LLC's initial acquisition and development of the River Bend development. Premier Bank secured its initial loan with a mortgage on the entire development.

Thereafter, Premier Bank released 12 lots from the development mortgage. Premier Bank then financed Respondent Boone Builders, Inc.'s construction of three model homes on three of the lots Premier Bank released from the development mortgage. Premier Bank recorded three new mortgages on the three lots to secure the construction loans to Boone Builders.

Previously, at the time Becker Development owned the entire River Bend property, Respondent Kuechle Underground, Inc. contracted with Becker Development to provide initial site, street, and sewer work for the whole development. Becker Development failed to pay \$266,622.96 to Kuechle Underground for its work. Kuechle Underground then recorded a mechanic's lien against the entire River Bend development.

Kuechle Underground's mechanic's lien is junior to Premier Bank's development mortgage, but the mechanic's lien has priority over all other interests in the 12 lots released from Premier Bank's development mortgage – including Premier Bank's here construction mortgages. Eleven homes have been built on the 12 lots, leaving one as open space. The three model homes built by Boone Builders are the subject of one of the

consolidated cases in the present appeal. The other eight homes are the subject of separate foreclosure proceedings. There is no dispute that Kuechle Underground's mechanic's lien has priority over Premier Bank's three construction mortgages.

Becker Development and Boone Builders subsequently defaulted on their development loan and three construction loans, respectively, with Premier Bank. Premier Bank commenced two foreclosure actions to foreclose its development mortgage and its three construction mortgages. Premier Bank also asserted claims against the borrowers (Becker Development and Boone Builders, respectively) and their personal guarantors.

The first action, *Premier Bank v. Becker Development, LLC* (Court File No. 71-CV-07-1374), concerns 47 lots that remain subject to Premier Bank's development mortgage. Premier Bank asserted mortgage foreclosure claims as well as several other claims against Becker Development and the individual guarantors for defaulting on the development loan.

The second action, *Premier Bank v. Boone Builders, Inc.* (Court File No. 71-CV-07-960), concerns three of the lots released from the initial development mortgage. Premier Bank sought to foreclose Premier Bank's three construction mortgages on the model homes constructed and owned by Boone Builders; Premier Bank also asserted several other claims against Boone Builders and the individual guarantors for defaulting on the loans.

Respondent Kuechle Underground, Inc. was named as a defendant in both actions because of its mechanic's lien. Kuechle Underground asserted counterclaims and cross claims for foreclosure of its mechanic's lien. Kuechle Underground also asserted several

payment claims against Becker Development and its principals for failing to pay Kuechle Underground for its work.

The district court consolidated the *Becker Development* and *Boone Builders* cases. Premier Bank and Kuechle Underground then brought cross-motions for summary judgment on their respective claims. Kuechle Underground argued its mechanic's lien had priority over Premier Bank's mortgages in both cases. Premier Bank disputed Kuechle Underground's mechanic's lien had priority over the development mortgage in *Becker Development*. Premier Bank conceded that Kuechle Underground's mechanic's lien had priority over the three construction mortgages in *Boone Builders* because Premier Bank released its development mortgage on 12 lots, including the three model homes.

In the district court, Kuechle Underground argued it was entitled to foreclose the full amount of its mechanic's lien against the three model homes. On the other hand, Premier Bank argued Kuechle Underground was required to apportion its mechanic's lien and, therefore, was entitled to recover only 1/59th of its mechanic's lien from any one lot in the River Bend subdivision, so in the Banks' view, Kuechle Underground could only recover 3/59 of its lien when foreclosing on the three model homes.

On May 30, 2008, the Sherburne County District Court (Hon. Alan F. Pendleton, presiding) issued a combined Statement of Undisputed Facts, Conclusions of Law, Order for Judgment and Partial Summary Judgment in both *Becker Development* and *Boone Builders*. The district court ruled Premier Bank's mortgage had priority over Kuechle Underground's mechanic's lien on the 47 lots in *Becker Development*. The district court

also ruled that Kuechle Underground's mechanic's lien had priority over Premier Bank's mortgages on the three model homes in *Boone Builders*. The district court agreed with Kuechle Underground and ruled that Kuechle Underground (1) was not required to apportion the mechanic's lien, and (2) was entitled to foreclose the full amount of its \$266,622.96 mechanic's lien against the three model homes in *Boone Builders*.

Premier Bank appealed the district court's ruling to the Court of Appeals. In a recorded opinion dated June 30, 2009, the Court of Appeals affirmed the district court. *Premier Bank v. Becker Development, LLC*, 767 N.W.2d 691 (Minn. Ct. App. 2009).

On September 16, 2009, this Court granted Premier Bank's petition for further review.

STATEMENT OF THE FACTS

This appeal arises out of two consolidated Sherburne County District Court cases: *Premier Bank v. Becker Development, LLC* (Court File No. 71-CV-07-1374) (“*Becker Development*”) and *Premier Bank v. Boone Builders, Inc.* (Court file No. 71-CV-07-960) (“*Boone Builders*”). The consolidated cases arise out of common facts and have a similar procedural posture.

I. RIVER BEND DEVELOPMENT BACKGROUND

River Bend is a 40-acre residential housing development located in Becker, Minnesota. (RA 9).¹ Presently, the development includes 52 standard lots and seven outlots for a total of 59 lots. (*Id.* at 13, 25, 28). Only 11 homes have been built; none are occupied. Three of the homes are detached single-family townhomes built by Boone Builders, Inc. (*Id.* at 23).

A. Premier Bank’s Development Mortgage

On September 8, 2005, Premier Bank loaned Becker Development, LLC (“*Becker Development*”) \$3.2 million to develop River Bend. (AA 171-189). On September 9, 2005, Premier Bank recorded a mortgage on the entire development to secure the \$3.2 million loan (“*Development Mortgage*”). (AA 171, 126-129). Premier Bank’s *Development Mortgage* originally encumbered the entire River Bend development but, as discussed below, several lots subsequently were released from the *Development Mortgage*. (AA 130-131).

¹ Citations to Respondent Kuechle Underground, Inc.’s Appendix shall be in the following format: “RA ___”. Citations to Appellant Premier Bank’s Appendix will be cited as “AA ___”. Citations to Appellant Premier Bank’s Addendum will be cited as “Add. ___”.

B. Kuechle Underground Installed Streets, Sidewalks, Storm Sewers, Sanitary Sewers, Watermain, a Retention Pond, and Other Related Improvements at River Bend

Becker Development, as owner, entered into an oral contract with Kuechle Underground, as contractor, to clear and grade the River Bend property, install sanitary sewers, storm sewers, roads, gutters, and sidewalks, install a storm retention pond, and perform general contracting services and related work as part of the development of River Bend. (RA 20, 62). Kuechle hired a subcontractor, Theilen Construction, Inc. (“Theilen”), to perform clearing, grubbing, and common excavation at River Bend. (*Id.* at 62, 57). Theilen began its work at River Bend on October 3, 2005. (*Id.*).

On April 20, 2006, Becker Development and Kuechle memorialized their prior oral agreement with a written, updated unit price contract for \$931,037.15. (RA 16, 62-66). This contract was later increased when Becker Development requested that Kuechle perform additional work. (*Id.* at 17, 62). After taking into account the extra work not included in Kuechle Underground’s original bid, the agreed upon adjusted total contract amount Becker Development agreed to pay Kuechle Underground for its work was \$1,083,730.58. (*Id.*).

Kuechle Underground and its subcontractors performed their work at River Bend from October 3, 2005, through October 18, 2006, contributing improvements to River Bend totaling \$1,083,730.58. (RA 62). The work was performed pursuant to the parties’ contract, and included installing streets and sidewalks to provide access to the entire development. (*Id.* at 23). The work also included installing of a sanitary sewer and storm sewer system serving the entire development, including a retention pond, so waste

and water from each home and each lot could be evacuated and no flooding of each lot would occur. The work also included installation of the watermain providing city water utilities to the entire development.

C. Premier Bank's Construction Mortgages

On October 10, 2006 – while Kuechle was still performing work at River Bend – Premier Bank released twelve lots in the River Bend development from Premier Bank's Development Mortgage. (AA 130-131, 261-266). These lots were released from the Development Mortgage pursuant to a loan modification agreement between Premier Bank and Becker Development. (*Id.*).

Three of these twelve lots were owned by Boone Builders.² Premier Bank financed Boone Builders' construction of one single-family detached townhome model home on each of the three lots: Lot 5, Block 3; Lot 6, Block 3; and Lot 10, Block 3 ("Released Model Homes"). (AA 24).

Premier Bank made the three loans to Boone Builders on February 13, 2006, to construct the three Released Model Homes. (AA 24). Premier Bank secured its loans to Boone Builders by recording mortgages on February 28, 2006 and April 21, 2006 ("Construction Mortgages"). (AA 24-25). The mortgage on Lot 6, Block 3 was recorded on February 28, 2006. (A 25-26). The mortgages on Lot 5, Block 3 and Lot 10, Block 3 were both recorded on April 21, 2006. (AA 25-27.). All three Construction Mortgages

² The other lots were owned by Dan Happe Construction, Inc. Premier Bank did not finance construction of homes on those lots and although foreclosure proceedings are underway on those lots, those cases were not consolidated with the *Becker Development* and *Boone Builders* cases, and those lots are not part of this case.

were recorded between five and seven months after Kuechle began its work. (As discussed below, Premier Bank does not dispute that the Construction Mortgages are junior to Kuechle's mechanic's lien.)

D. Kuechle Underground Recorded Its Mechanic's Lien Because Becker Development Failed to Pay Kuechle Underground for its Work

Although Kuechle Underground and its subcontractors performed their work without dispute or delay, Becker Development only paid Kuechle \$817,107.62 of the \$1,083,730.58 contract price. (RA. 63). The balance of \$266,622.96 was never paid. (*Id.*).

Becker Development never disputed that it owed Kuechle the principal amount of \$266,622.96, plus interest, for work performed on behalf of Becker Development at River Bend. (RA 41-49 at Interrog. Nos. 15, 16 and 17; Response to Admission Nos. 4, 11 and 12). Becker Development would have paid Kuechle Underground, except for Premier Bank's interference. (RA 28).

Premier Bank retained control over when and how the River Bend development was funded and when construction draws were paid. (*Id.*). Without explanation, Premier Bank refused to provide the necessary funds for Becker Development to pay Kuechle Underground the final \$266,622.96 on its contract even though Premier Bank and Becker Development received the benefit of Kuechle Underground's completed work. (*Id.*).

To preserve its mechanic's lien rights, Kuechle Underground filed and served its mechanic's lien statement within 120 days of its last contribution of labor and materials to the River Bend development. (AA 94); *see also* Minn. Stat. § 514.08 (2006). Kuechle

Underground's last work was performed on October 18, 2006, and it filed and served its \$266,622.96 mechanic's lien statement on February 14, 2007, within the 120 days required by statute. (*Id.*) Kuechle Underground's mechanic's lien statement was a "blanket" mechanic's lien statement under Minn. Stat. § 514.09, and encumbered the entire River Bend development. (*Id.*)

II. PROCEDURAL HISTORY

Becker Development subsequently defaulted on the development loan from Premier Bank that was secured by the Development Mortgage. (AA 132). Boone Builders also defaulted on the three construction loans from Premier Bank; those loans were secured by the Construction Mortgages on the Released Model Homes. (AA 29).

Premier Bank commenced the *Becker Development* and *Boone Builders* lawsuits to foreclose on the Development Mortgage and Construction Mortgages, respectively. Kuechle Underground was named as a defendant in both actions because of its mechanic's lien. Kuechle Underground asserted counterclaims and cross claims to foreclose its mechanic's lien. (*See* Answer (Court File No. 71-CV-07-1374); Answer (Court File No. 71-CV-07-960)). Kuechle Underground also asserted several payment claims against Becker Development and its principals for failing to pay Kuechle Underground for its work. (*Id.*)

The district court consolidated the *Becker Development* and *Boone Builders* cases. Premier Bank and Kuechle Underground then cross-moved for summary judgment on their respective claims. (AA 5, 31, 36, 39, 64, 82, 295, 305, 310). Kuechle Underground

argued its mechanic's lien had priority over Premier Bank's mortgages in both cases. (*Id.*).

Premier Bank disputed Kuechle Underground's mechanic's lien had priority in *Becker Development*, but conceded the mechanic's lien had priority in *Boone Builders* because Premier Bank released its Development Mortgage against 12 lots, including the Released Model Homes. (*Id.*). Kuechle Underground also argued it was entitled to foreclose the full amounts of its \$266,622.96 mechanic's lien against the Released Model Homes. (*Id.*). On the other hand, Premier Bank argued Kuechle Underground was required to apportion its mechanic's lien and, therefore, was entitled to recover only 1/59 of its mechanic's lien (\$4,519.03) from each lot in the subdivision. (*Id.*).

On May 30, 2008, the Sherburne County District Court (Hon. Alan F. Pendleton, presiding) issued a combined Statement of Undisputed Facts, Conclusions of Law, Order for Judgment and Partial Summary Judgment. (Add. 16).

The district court granted Kuechle Underground's motion for summary judgment on its breach of contract and account stated claims against Becker Development for \$266,622.96. (*Id.* at 48). The district court also ruled that Kuechle Underground's mechanic's lien was valid and perfected.³ (*Id.* at 48-49).

With respect to *Becker Development*, the district court ruled Premier Bank's Development Mortgage had priority over Kuechle Underground's mechanic's lien on all of the lots except those released by Premier Bank. (*Id.* at 38). With respect to *Boone*

³ The district court also made rulings on other claims and ancillary procedural motions that are not at issue on appeal.

Builders, the district court ruled that Kuechle Underground's mechanic's lien had priority over Premier Bank's Construction Mortgages on the Released Model Homes, and all other lots released by Premier Bank. (*Id.* at 41). The district court agreed with Kuechle Underground that no apportionment of the mechanic's lien was required so Kuechle Underground could foreclose and recover the full amount of its \$266,622.96 mechanic's lien against the three Released Model Homes in *Boone Builders*. (*Id.* at 42, 54-56).

On June 20, 2008, Kuechle Underground subsequently moved the district court to correct various clerical errors in the May 30, 2008, Order, including discrepancies in the amount of the judgment and the legal description of the lots for which Kuechle Underground has priority. (*See* June 20, 2008 Notice of Motion and Motion to Correct Clerical Errors Pursuant to Rule 60.01 and Supporting Memorandum). The motion was not opposed.

On July 23, 2008, before the district court ruled upon the motion to correct clerical errors, Premier Bank filed its notice of appeal. Premier Bank appealed from the district court's decision ruling that Kuechle Underground was entitled to foreclose the full amount of its mechanic's lien against the Released Model Homes. (AA 1). The court of appeals affirmed the district court in a published opinion. *Premier Bank v. Becker Development, LLC*, 767 N.W.2d 691 (Minn. Ct. App. 2009). Thereafter, this Court granted Premier Bank's petition for further review.

LEGAL ARGUMENT

I. STANDARD OF REVIEW

Premier Bank accurately identified the standard of review applied by this Court on an appeal from summary judgment. But this Court also may affirm the district court and Court of Appeals on other grounds than those addressed or considered by the lower courts. *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722, 728 (Minn. 1990) (appellate court will not reverse correct decision simply because it is based on incorrect reason). Accordingly, in the event that this Court is troubled by any of the district court's or Court of Appeals' analyses, a remand is unnecessary because this Court may affirm a correct decision on any grounds. *Id.*

II. THE COURT OF APPEALS SHOULD BE AFFIRMED BECAUSE THE MECHANIC'S LIEN STATUTE MUST BE CONSTRUED TO ALLOW KUECHLE UNDERGROUND TO FORECLOSE THE FULL AMOUNT OF ITS BLANKET MECHANIC'S LIEN AGAINST LESS THAN ALL OF THE LOTS ENCUMBERED BY THE LIEN

The fundamental legal issue before the Court is whether the mechanic's lien statute, the various statutes it incorporates by reference, and the significant body of case law interpreting those statutes, allow Kuechle Underground to foreclose its blanket mechanic's lien against the three Released Model Homes on the specific facts, circumstances, and equities of this case. The analysis therefore begins with statutory interpretation.

A. Statutory Interpretation – General Principles

The goal of statutory interpretation is to “ascertain and effectuate” the legislature's intent. Minn. Stat. § 645.16 (2006). When interpreting a statute, Minnesota courts “first

look to see whether the statute's language, on its face, is clear or ambiguous. A statute is only ambiguous when the language therein is subject to more than one reasonable interpretation.” *Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000) (quotations omitted). The Court of Appeals properly determined that the mechanic’s lien statute is ambiguous in that it does not specify the foreclosure procedure applicable in this situation.

Because the statute is ambiguous, Minnesota courts apply a number of statutory and common law canons of statutory interpretation. Among the key canons of interpretation applicable in this case is the admonition that a statute should be interpreted, whenever possible, “to give effect to all of its provisions” and that “no word, phrase, or sentence should be deemed superfluous, void, or insignificant.” *Amaral v. St. Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999).

Mechanic's liens were unknown at common law and are purely creatures of statute. *Jewett v. Iowa Land Co.*, 64 Minn. 531, 535, 67 N.W. 639, 640 (1896). This Court has a long history of interpreting the mechanic's lien statute and, over the years, several unique principles have developed when interpreting and applying it. The first principle is that because mechanic's liens only exist within the terms of the statute, Minnesota courts strictly construe whether the mechanic’s lien claimant satisfied the statutory criteria for creating and perfecting the mechanic’s lien. *Dolder v. Griffin*, 323 N.W.2d 773, 779-80 (Minn. 1982).

The second principle takes up where the first principle leaves off and addresses how the Court interprets enforcement of the mechanic’s lien statute once a lien claimant

successfully perfects its lien. As this Court recently explained, the mechanic's lien statute “is remedial in nature and its essential purpose is to reimburse laborers and material providers who improve real estate and are not paid for their services.” *Eischen Cabinet Co. v. Hildebrandt*, 683 N.W.2d 813, 816 (Minn. 2004). Accordingly, Minnesota’s mechanic's lien statutes are to be “liberally construed to effectuate their purpose of protecting the rights of workmen and materialmen who furnish labor and material for the improvement of real estate.” *Dolder*, 323 N.W.2d at 779-80. In baseball, ties go to the runner. In mechanic’s lien law, ties go to the mechanic’s lien claimant.

Finally, this Court has also affirmed that equitable principles are applicable when courts are called upon to enforce mechanic’s liens. *Northland Pine Co. v. Melin Bros.*, 136 Minn. 236, 237, 161 N.W. 407, 408 (1917). Because the issue in this case directly concerns enforcement of Kuechle Underground’s lien, the district court and Court of Appeals properly applied equitable principles.

Premier Bank and the *amicus curiae*, Minnesota Land Title Association (“MLTA”), do not dispute that: (1) Kuechle Underground’s blanket mechanic’s lien is valid and perfected, and (2) that the fundamental “liberal interpretation” principle of statutory interpretation applies. (Premier Bank Br. at 25; MLTA Br. at 4). MLTA attempts to downplay the importance of the general liberal interpretation requirement, but goes too far and effectively reads this important principle out of the analysis. Premier Bank also incorrectly states that equitable principles should not have been applied. (Premier Br. at 4, 20).

Premier Bank and MLTA's arguments dilute the principle of liberal interpretation of mechanic's liens so much as to leave it nearly unrecognizable. Protecting the rights of mechanic's lien claimants who have not been paid for their work – like Kuechle Underground – is the paramount concern for the Court in this case. When the issue before the Court is viewed through that important lens, this Court must interpret the mechanic's lien statute to provide for foreclosure of the entire blanket lien against less than all of the lots.

B. Minn. Stat. § 514.09 Provides Mechanic's Lien Claimants With a Choice Between Apportioning a Lien and Filing a Blanket Lien

Proper interpretation of the mechanic's lien statute and lien foreclosure issues presented in this appeal requires an understanding of the purpose and function of several provisions of the mechanic's lien statute and, therefore, an understanding of the entire mechanic's lien process.

Ordinarily, a mechanic's lien claimant (e.g., a roofer) provides labor, skill, material, or machinery for an improvement to real property (e.g., a new roof for a house). The mechanic's lien statute clearly provides that if the mechanic's lien claimant is not paid for its work, then the claimant is entitled to a lien on the real property improved by its work – i.e., the house and the lot. Minn. Stat. § 514.01. The mechanic's lien claimant then has the option to enforce the lien by foreclosing the lien in the same way a mortgage is foreclosed. *See* Minn. Stat. § 514.10. In other words, if the mechanic's lien claimant is not paid, the mechanic's lien claimant is empowered to sell the house at a sheriff's sale

and use the proceeds to pay off the debt – just like a mortgagee when the mortgagor defaults.

Foreclosure of a mechanic's lien in routine mechanic's lien cases is straightforward. Going back to the roofer example, if the roofer provided \$10,000 in labor and materials for the new roof and was not paid for its work, then the roofer likely filed a \$10,000 mechanic's lien. The roofer would then foreclose its lien by selling the house at a sheriff's sale. The roofer would then recover \$10,000 from the sheriff's sale, plus statutory costs and attorney's fees.

But the Minnesota legislature recognized over time that more complex scenarios may arise in which mechanic's lien claimants seek to enforce their mechanic's lien rights. Most significantly, the legislature recognized that mechanic's lien claimants are often involved in larger construction projects involving improvements to more than one building or lot under the same general contract. The quintessential example is a contractor who performs work for an entire housing development under a single contract with the developer/owner.

The legislature recognized that in larger projects: (1) it would be burdensome to require contractors to keep separate accounts and records for each separate lot improved by that contractor's work, and (2) additional burdens and costs would occur if mechanic's lien claimants had to file separate liens against individual lots for the exact amount of improvements made to each lot. *Johnson v. Salter*, 70 Minn. 146, 151, 72 N.W. 974, 975 (1897).

The legislature, therefore, provided mechanic's lien claimants with a choice between two additional⁴ ways in which a mechanic's lien claimant could enforce its lien rights. The statute at issue, Minn. Stat. § 514.09, provides as follows:

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, [1] may file one statement for the entire claim, embracing the whole area so improved; or [2], 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.

Minn. Stat. § 514.09 (brackets and emphasis added).

The statute provides two distinct options for contractors. The contractor may chose to file a single blanket lien for the entire amount of all improvements over the entire project. Thus, if a contractor performed \$1,000,000 of work on a 100-lot development, and was not paid, then the contractor could choose to file a single blanket lien – for \$1,000,000 – over the whole development. Contractors who opt to file a blanket lien are not required to apportion their lien – in contrast to the contractors who opt to take the second option under the statute.

Contractors have the option of apportioning their lien. This is accomplished by filing separate liens for a “proportionate part” of the work on each lot. Thus, if a contractor had performed \$1,000,000 of work on a 100-lot development, and was not

⁴ Nothing in the statute prevents mechanic's lien claimants from following the standard mechanic's lien procedure in Minn. Stat. § 514.01 and keeping lot-specific records. Section 514.09 is supplemental to, but does not replace, the usual lien rights afforded to lien claimants.

paid, and did not want to file a blanket lien, the contractor could choose to file one lien per lot – i.e., 100 liens – in the amount of \$10,000 each (\$10,000 = 1/100 of \$1,000,000), assuming it made sense to assign a pro-rata portion of the entire amount owed to each lot in equal increments. Contractors who opt for the second option must, therefore, apportion their lien rights.

Filing one blanket lien or multiple apportioned liens is an option. The statute does not impose limitations on a contractor's ability to chose between a blanket lien or apportionment under Minn. Stat. § 514.09. Contrary to Premier Bank's argument, once a mechanic's lien claimant makes a choice regarding apportionment and perfects its mechanic's lien, the mechanic's lien statute does not further distinguish the three different liens: (1) an individual and lot-specific mechanic's lien under Minn. Stat. § 514.01, (2) a blanket mechanic's lien under Minn. Stat. § 514.09, (3) liens that have been apportioned under Minn. Stat. § 514.09.

C. The Mechanic's Lien Statute Incorporates Mortgage Foreclosure Statutes that Preclude Apportionment of Blanket Mechanic's Liens

The next critical step in the analysis is to determine whether the Minnesota mechanic's lien statute specifically addresses how mechanic's liens are to be foreclosed and, if so, whether any distinction exists between foreclosure of blanket liens versus apportioned liens, and any other pertinent statutory directives. The mechanic's lien statute does not specify any unique procedure to foreclose a mechanic's lien under these

circumstances.⁵ Nor does the statute distinguish between foreclosing blanket liens or apportioned liens. Instead, the mechanic's lien statute unambiguously incorporates by reference the statutory provisions governing foreclosure of mortgages. Minn. Stat. § 514.10. Specifically, the statute provides that mechanic's lien claimants are to enforce their liens in a foreclosure action "in the same manner as actions for the foreclosure of mortgages upon real estate." Minn. Stat. § 514.10.

Minnesota Statutes Chapters 580 and 581 govern mortgage foreclosures. Chapter 580 is the "main" section, dealing with the most-common foreclosure procedure: foreclosure by advertisement. *See* Minn. Stat. § 580.01, *et seq.* Chapter 581 provides certain additional procedures applicable when foreclosing a mortgage by action. *See* Minn. Stat. § 581.01, *et seq.*

Chapter 581 governs mortgage foreclosure by action and specifically incorporates several provisions from Chapter 580 governing foreclosure by advertisement. Minn. Stat. § 581.02. Among the provisions incorporated into both foreclosure methods is Minn. Stat. § 580.08, which provides the proper procedure to foreclose blanket mortgages.

A blanket mortgage encumbers multiple lots or parcels and is analogous to a blanket mechanic's lien that encumbers multiple lots. Minnesota Statutes § 580.08 specifically addresses foreclosure of blanket mortgages and provides, in full, as follows:

⁵ Minn. Stat. § 514.15 generally addresses the contents of a judgment of foreclosure, particularly as it relates to multiple mechanic's liens, but it does not address the appropriate foreclosure procedure for blanket mechanic's liens or apportionment issues.

If the mortgaged premises consist of separate and distinct farms or tracts, they shall be sold separately, and no more farms or tracts shall be sold than are necessary to satisfy the amount due on such mortgage at the date of notice of such sale, with interest, taxes paid, and costs of sale.

Minn. Stat. § 580.08. The statute directs that when a mortgage encumbers multiple lots, the lots are to be sold one at a time, and the proceeds are to be applied to the mortgage debt, so there is no waste and no more lots are sold than necessary to satisfy the full amount of the mortgage. Minn. Stat. § 580.08. Because the mortgage foreclosure statutes are specifically incorporated by reference into the mechanic's lien statute, § 580.08 applies to foreclosing Kuechle Underground's blanket mechanic's lien. Minn. Stat. § 514.10.

Under § 580.08, Kuechle Underground must be permitted to foreclose its blanket mechanic's lien against the Released Model Homes. Kuechle Underground cannot foreclose its blanket mechanic's lien in the strictly apportioned procedure advocated by Premier Bank and MLTA, because that would violate § 580.08 by necessarily maximizing the disruption and waste by requiring 59 foreclosure sales. Even if Kuechle Underground's lien had priority over all lots (which it does not), foreclosure under this process would not satisfy Kuechle Underground's lien until each and every lot was sold. (In the meantime, disruption would continue because none of the lots or homes could be sold until the entire debt was satisfied.) Section 580.08 directs exactly the opposite to occur.

More importantly, Kuechle Underground would not receive the full amount of its lien from a strictly apportioned sale process because all but 12 of the 59 lots remain

encumbered by Premier Bank's senior Development Mortgage. The only way to maximize Kuechle Underground's recovery, avoid waste, and comply with the statutory directive is for Kuechle Underground to foreclose the full amount of its lien against the three Released Model Homes.

Premier Bank and the MLTA do not directly address Section 580.08. Instead, they simply assert that Kuechle Underground's mechanic's lien must be foreclosed, one lot at a time, for a pro-rata fraction of the total amount of the blanket lien.

Minnesota Statutes Section 580.08 explicitly forbids apportionment in this manner. Kuechle Underground acknowledges that § 580.08 does not affirmatively provide how the non-apportioned foreclosure is to occur – it just precludes the opposite result.⁶ It necessarily follows, therefore, that the full amount of a blanket lien can and should be individually foreclosed against less than all lots subject to the lien. Any other interpretation reads § 580.08 out of the statute, which is contrary to the liberal interpretation Kuechle Underground is entitled to receive and is also a disfavored result under the applicable canons of statutory interpretation.

This Court should interpret the mechanic's lien statute and § 580.08 to allow the full amount of a blanket mortgage or lien to be foreclosed against individual lots, one at a

⁶ Mechanic's lien claimants who choose to apportion their liens under Minn. Stat. § 514.09 and file several liens are not precluded from foreclosing multiple liens at the same time because the mechanic's lien statute, Minn. Stat. § 514.10, provides that the mortgage foreclosures shall be followed "except as herein otherwise provided." Because the mechanic's lien statute (§ 514.09) explicitly allows apportionment when the mechanic's lien claimant elects apportionment, the mortgage foreclosure preclusion in Minn. Stat. § 580.08 to only allow foreclosure of one lot at a time does not apply when the mechanic's lien claimant forecloses a lien apportioned from its inception.

time, until the debt is satisfied. Kuechle Underground is entitled to have the three Released Model Homes sold one at a time until the proceeds are equal to the \$266,622.96 lien, plus interest, plus an award for Kuechle Underground's attorney's fees, costs, and disbursements.

D. The Mechanic's Lien Statute Permits Foreclosure of Lien Against a Parcel In Excess of the Amount of Work Attributable to the Parcel – No "Direct Relationship" Is Required

Premier Bank and MLTA argue that foreclosure of the full amount of Kuechle Underground's lien against the Released Model Homes is at odds with what they contend is a general principle of the mechanic's lien statute and case law. This general principle supposedly requires a "direct relationship" between the value of the improvement and the amount of the mechanic's lien per lot. (Premier Bank Br. at 26; MLTA Br. at 3-5).

If Premier Bank and the title insurance industry were correct, a mechanic's lien claimant would never be able to foreclose a mechanic's lien for more than the improvements on that particular parcel are worth. We know this is not the case because, under certain circumstances, Minn. Stat. § 514.03 allows foreclosure of the entire amount of a mechanic's lien against less than all of the property improved. See Minn. Stat. § 514.03, subd. 3.

Section 514.03, subdivision 3 requires that a mechanic's lien encumbering more than 80 acres (or 40 acres of homesteaded agricultural land) must be enforced and foreclosed only against the 80/40 acre limit – even if the improvements benefitted the entire 80-plus acres. *Id.* Thus, when a mechanic's lien claimant improves a large parcel of property, the statute demands that the lien be enforced only against the 80/40 acre

limit. *LaValle v. Bayless*, 257 N.W.2d 283, 285 n. 2 (Minn. 1977) (“[T]rial judge property reduced the claimed 55-acre lien to 40 acres in adherence to the maximum limit provided by [Minn. Stat. §] 514.03.”). The legislature has thus explicitly recognized that enforcing a mechanic’s lien against less than all of the property improved is equitable – contrary to the ostensible general principle that Premier Bank says exists.

The “direct relationship” argument advanced by Premier Bank and MLTA in this case is directly contrary to the liberal interpretation of the statute Kuechle Underground is entitled to receive. First, nothing in the mechanic’s lien statute precludes foreclosure as requested by Kuechle Underground. Second, other provisions including § 514.03 and § 580.08 contemplate non-apportioned foreclosure. Third, treating a non-apportioned blanket lien under § 514.09 the same way as an apportioned blanket lien would render part of § 514.09 superfluous – there would be no distinction between a non-apportioned blanket lien and an apportioned blanket lien. Both common law and statutory canons of statutory interpretation forbid interpretations that render part of the statute a nullity. *See Amaral*, 598 N.W.2d at 384; *see also* Minn. Stat. § 645.16. The only logical interpretation remaining, consistent with the law, is that non-apportioned foreclosure was contemplated by the legislature and implicitly approved by the mechanic’s lien statute.

III. EQUITABLE PRINCIPLES APPLICABLE IN ENFORCING MECHANIC’S LIENS OVERWHELMINGLY FAVOR KUECHLE UNDERGROUND

As discussed above, Minnesota courts consistently held that equitable principles apply when enforcing the mechanic’s lien statute. *See, e.g., Northland Pine Co.*, 136 Minn. at 237, 161 N.W. at 408. Both the district court and Court of Appeals properly

applied equitable principles to enforcing the lien and agreed that Kuechle Underground presented a strong equitable argument to foreclose the entire lien against the Released Model Homes.

Premier Bank and MLTA disagree with the district court and Court of Appeals and argue that it is “wholly inequitable” to allow Kuechle Underground to foreclose its mechanic’s lien against less than all of the lots burdened by the blanket mechanic’s lien. Premier Bank and MLTA even marshal a classic “parade of horrors” in support of their argument, implying that a decision in favor of Kuechle Underground in this case based on equity will change the entire construction industry. As discussed in Section VI, below, this fear-based policy analysis misses the mark. More importantly, equity is a case-specific analysis and the equities at issue in this case weigh heavily in favor of Kuechle Underground, particularly because Premier Bank stood by and watched Kuechle Underground finish its work and then did not pay the last draw.

The Court is called upon to adopt one of two contrasting rules. The Court can affirm and allow Kuechle Underground to recover the full amount of its \$266,622.96 mechanic's lien, plus costs and attorney’s fees, from the three lots released by Premier Bank. Alternatively, the Court can adopt the rule advocated by Premier Bank and the title insurance industry to allow Kuechle to recover 1/59 of its mechanic’s lien – \$4,519.03 – from each of the 12 lots that were released, for a maximum total principal

recovery of \$54,228.36, plus an award of attorney's fees and costs.⁷ That rule is unfair and inequitable for several reasons.

A. **Kuechle Underground's Work is Integral to the Entire River Bend Development and Cannot Equitably be Apportioned**

When analyzing the equities of the case before the Court, it is important to step back and view the case at its most basic and fundamental level. Kuechle Underground provided more than \$1 million of improvements for the River Bend development of which \$266,622.96 is unpaid. These basic infrastructure improvements, such as streets, sanitary sewer, storm sewer, a retention pond, and sidewalks, serve the entire development. The value of these improvements is greater than the sum of their parts because they are each part of a system that only works if it is 100% complete.

Each of the 59 lots in the River Bend subdivision benefited greatly from all of Kuechle Underground's work, although seven lots (i.e., the outlots) were never intended to be sold to homeowners. Because of the nature of the work, it cannot (with few exceptions) be separated from the balance of the project on a home-by-home or lot-by-lot basis. The best example is from the perspective of the Released Model Homes that are being foreclosed.

Kuechle Underground constructed the streets that provide access to each of these three homes and all other homes and lots in the River Bend development. The streets form a single interconnected system. Premier Bank would have the Court act based on

⁷ Premier Bank's mortgage has priority over Kuechle's mechanic's lien on all but 12 of the 59 lots, foreclosure of Premier Bank's mortgage will eliminate Kuechle Underground's mechanic's lien on 47 of the 59 lots.

the faulty assumption that each lot only benefits from this system to the extent of 1/59 of the value of the whole system, so Kuechle Underground should only be entitled to recover 1/59 of its lien from each lot. If this were true, would 1/59 of the street be worth as much if Kuechle Underground ripped out the streets in front of the other 58 lots?

There is little or no utility in 1/59 of a street or even 3/59. If the remaining 56/59 of the streets surrounding these three homes were ripped out, the eventual homeowners would have no access – zero access – to their homes by street. Access to the homes is completely dependent on Kuechle Underground's completed work. The streets' value is as a complete system providing access to the entire development. Kuechle Underground is entitled to be paid the entire \$266,622.96 for providing this access.

The same analysis applies to the watermains, storm sewers, sanitary sewers, and other improvements installed by Kuechle Underground. These systems serve each lot, but the true "value" of the watermains, storm sewers, and sanitary sewers is not – and cannot be – apportioned on a per-lot basis. There is only value if a complete, functioning system exists. The entire system is needed to benefit each lot.

This is easily demonstrated by considering the effect if these systems were disconnected at the boundaries of the lots at issue. Storm water would not be evacuated from the lots, homeowners would have to install individual septic systems (if the local governmental regulations allowed it), and each home would have to have its own well. The "new" development without each of these systems would begin to take on the characteristics of a rural residential area. And the value of the lots would plummet

because the River Bend development could no longer be marketed as if it were a true residential subdivision.

Similarly, the retention pond installed by Kuechle Underground benefits each and every lot. The integrated storm sewer evacuates water from the entire development and then empties into a retention pond so that each lot would not be flooded during heavy storms.

Requiring Kuechle Underground to apportion the value of this work to individual lots is impossible and demonstrates why mechanic's lien claimants like Kuechle Underground are permitted by Minn. Stat. § 514.09 to record a blanket mechanic's lien across an entire subdivision for such work. Requiring apportionment of that blanket lien certainly defeats the purpose of the statute. More importantly, when applied to Kuechle Underground in this case, apportionment would work a great inequity. Premier Bank will ultimately own the majority of the River Bend development and each lot will receive the benefit of a completed street, sanitary sewer, storm sewer, and watermain system. Kuechle Underground, on the other hand, will only receive payment for a fraction of the value of its work.

B. No Third-Party Will be Prejudiced

It is also significant in analyzing the equities that no "innocent homeowner" will be adversely affected by allowing foreclosure of the entire amount of the blanket mechanic's lien against the three model homes. This is not a situation, for example, in which a family purchased one model home and is now responsible for paying the entire \$266,622.96 mechanic's lien. None of the homes are occupied by bona fide purchasers;

the homes were built as models but never sold. Instead, the homes are currently owned by the original builder – Boone Builders – which defaulted on its mortgage payments. So both Premier Bank and the title insurance industry’s arguments about potential consequences to homeowners simply are not relevant to the matter before this Court.

If Boone Builders was inconvenienced in any way by Kuechle Underground’s proposed non-apportioned foreclosure, Boone Builders would have objected at some point in the proceedings. But Boone Builders never objected to Kuechle Underground’s request to foreclose the full amount of its mechanic’s lien against the three model homes.

C. Premier Bank Has Unclean Hands

Premier Bank argues that it would be inequitable to allow Kuechle Underground to foreclose its blanket lien against the Released Model Homes. But Premier Bank cannot obtain the benefit of any equitable argument because of the doctrine of unclean hands. The longstanding maxim applies: “he who seeks equity must do equity and that he who comes into equity must come with clean hands.” *Johnson v. Freberg*, 178 Minn. 594, 597, 228 N.W. 159, 160 (1929). Premier Bank has unclean hands for several reasons.

1. Premier Bank Failed to Obtain Subordination Agreements

Premier Bank is to blame this situation. As the senior lender that financed the initial development, Premier Bank was familiar with the development, including Kuechle Underground’s work. Premier Bank was aware that if Kuechle Underground was not paid in full for its work, it could lien the entire River Bend Project. As long as the Development Mortgage was in place, Premier Bank was senior in priority to Kuechle

Underground's junior lien. But as soon as the Development Mortgage was released, and a new construction mortgage recorded, Kuechle Underground's lien took over the senior position and Premier Bank's new construction mortgages became junior.

It would have been a simple matter for Premier Bank to require a subordination agreement from Kuechle Underground as a condition to releasing the Development Mortgage, so that its subsequent construction mortgages would have priority over Kuechle Underground's lien. Kuechle Underground could then decide whether to continue to work. Premier Bank also could have made subordination a condition on its construction loan to Boone Builders. For reasons that are not clear from the record, Premier Bank chose not to exercise either option. Accordingly, Premier Bank failed to protect its interest in the Released Model Homes.

2. Premier Bank Caused Becker Development Not to Pay Kuechle Underground

Premier Bank is the reason mechanic's liens were filed on the River Bend development. Near the end of the project, when Kuechle Underground requested its final payment, Becker Development signed off and approved the final pay application for Kuechle's work. (RA 28). Becker Development then submitted the request to Premier Bank to disburse funds. (*Id.*). Premier Bank refused to pay Kuechle without explanation. (*Id.*).

Additionally, Premier Bank never provided any notice to Kuechle Underground that Becker Development defaulted on the Development Mortgage. Instead, Premier Bank was content to sit back, say nothing, watch as Kuechle Underground completed

100% of the \$1,083,730.58 contract, have all of the infrastructure improvements, and then not fund the last \$266,622.96 construction draw. In circumstances such as this one, the Minnesota Court of Appeals disallowed a lender from recovering the benefit of both a 100% completed project and not disbursing all construction loan proceeds. *Twin City Const. Co. of Fargo, N.D. v. ITT Indus. Credit Co.*, 358 N.W.2d 716, 719 (Minn. Ct. App. 1984).

Premier Bank has a project that is 100% complete, but has retained development loan proceeds. The Bank is unfairly trying to get a completed project, only pay a fraction of the cost, and keep \$266,622.96 that was agreed to be paid to Kuechle Underground. Premier Bank's arguments turn equity on its head.

3. Title Insurance Cannot Be Disregarded

Premier Bank is entitled to foreclose its three construction mortgages on the three Released Model Homes and, therefore, may ultimately become the owner of the three models homes. Due to the fact that Kuechle Underground's mechanic's lien has priority over Premier Bank's three construction mortgages, the mechanic's lien will survive Premier Bank's foreclosure. Premier Bank's title insurer will then be responsible for paying off Kuechle Underground's lien.

The fact that Premier Bank has title insurance for these properties is undisputed and evident, among other ways, by the fact that Premier Bank has two sets of attorneys involved in this case. The first firm, Leonard, O'Brien, Spencer, Gale & Sayre, Ltd., is pursuing the foreclosure and payment claims against individual guarantors. The second firm, Coleman, Hull & Van Vliet, PLLP, was hired and paid by the title insurer to

advance the arguments regarding apportionment of Kuechle Underground's mechanic's lien and to try to minimize payment to Kuechle Underground. (RA 54).

Premier Bank's title insurer was paid handsome premiums for the title insurance policy issued on each of the three Released Model Homes. The title insurance policy was specifically purchased for circumstances such as this one – when mechanic's lien claimants have priority over Premier Bank's construction mortgages. The title insurer, not Premier Bank, will ultimately pay what is declared to be owed to Kuechle Underground.

Premier Bank and the MLTA argue that consideration of title insurance is improper. MLTA even goes so far as to analogize this situation to a personal injury lawsuit where disclosure of the existence of insurance has the potential to prejudice the jury against the defendant because the jury will know that someone else will end up paying any resulting judgment. That analysis simply does not apply in the context of a mechanic's lien foreclosure lawsuit.

First, there is no right to a jury trial in a mechanic's lien foreclosure action. *Engler Bros. Const. Co. v. L'Allier*, 280 Minn. 208, 211, 159 N.W.2d 183, 185 (1968). Judges are must less (if at all) susceptible to being prejudiced by knowledge that insurance exists. Second, "liability" is not an issue. Kuechle Underground's lien has priority. Third, substantially all residential transactions require homeowners to purchase title insurance. Oftentimes, there are two policies of title insurance: (1) a lender's policy and (2) a homeowner's policy. Title insurance is almost always required as a condition of the mortgagee funding the mortgage. Thus, the title insurer, not the homeowner,

actually pays what is owed. Of course, the title insurer was paid a premium for taking on this obligations, so there is no unfairness or inequity in this result.

The Seventh Circuit Court of Appeals has also concluded, contrary to the argument of the title insurance industry *amicus curiae*, that the existence of a policy of title insurance is relevant when weighing the equities in a mortgage foreclosure priority case. *First Federal Sav. Bank of Wabash v. U.S.*, 118 F.3d 532, 534 (7th Cir. 1997).

IV. NO MINNESOTA APPELLATE DECISION ADDRESSES THE CONTROLLING STATUTORY PROVISIONS OR UNIQUE EQUITIES PRESENTED BY KUECHLE UNDERGROUND'S BLANKET MECHANIC'S LIEN

Premier Bank cites two Minnesota decisions it contends control the issues before this Court: *Carr-Cullen Company 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). Neither case is on point and, more importantly, Premier Bank failed to discuss *Reilly v. Williams*, the single case that does specifically address apportionment. 47 Minn. 590, 50 N.W.2d 826 (1891).

A. Carr-Cullen Does Not Address a Mechanic's Lien Claimant's Request to Foreclose the Full Amount of its Lien Against Less than all of the Property Encumbered by the Lien and, therefore, is Distinguishable

Premier Bank repeatedly cites the Minnesota Supreme Court case *Carr-Cullen* to support its argument that the apportionment issue has already been decided. 144 Minn. 380, 175 N.W. 696. This case is distinguishable on a number of grounds, all of which stem from the fact that *Carr-Cullen* did not address the issue presently before this Court –

i.e., whether a mechanic's lien claimant may foreclose the full amount of a blanket mechanic's lien against less than all of the property encumbered by the blanket lien.

There were only two issues on appeal in *Carr-Cullen* and the manner of foreclosure was not among them. The primary issue was whether Northland Pine Company ("Northland"), one of the mechanic's lien claimants in that case, was entitled to assert a blanket lien pursuant to the predecessor statute to Minn. Stat. § 514.09. *Carr-Cullen*, 144 Minn. at 381, 175 N.W. at 696 ("The principal question mooted is whether [Northland] had a right to a lien on the property as a whole or whether its claim grew out of separate and distinct transactions with the owner and builder of the houses."). The secondary issue was whether the district court had jurisdiction to enforce the lien against the owners and mortgagees given the manner in which the owners and mortgagees were made parties to the action. *Id.* at 383, 175 N.W. at 697.

Northland furnished lumber and other building materials for the six homes in *Carr-Cullen* under one contract with the builder. *Id.* at 381, 175 N.W. at 696. The six homes were constructed on eight adjoining lots. *Id.* The builder did not pay Northland for its contributions and Northland exercised its right under the predecessor to Minn. Stat. § 514.09 by filing a single blanket mechanic's against all six homes.

Other contractors also were not paid and commenced their own lien foreclosure actions. Northland ultimately attempted to enforce its mechanic's lien by filing an answer in the other six mechanic's lien foreclosure actions. The cases were consolidated for trial. *Id.*

The district court dismissed Northland's mechanic's lien claim on the grounds that it did not contribute to the improvements under one general contract and, therefore, was not entitled to a blanket mechanic's lien.⁸ Northland appealed. This Court reversed, holding that Northland was entitled to a blanket mechanic's lien because it performed its work under one general contract. *Id.*

Although all six homes in *Carr-Cullen* were initially owned by a single builder, each of the homes was ultimately sold and/or conveyed to a third-party. The homes were also mortgaged to various lenders. All of the owners and mortgagees were named defendants in the consolidated mechanic's lien foreclosure action. Accordingly, the various defendants (owners and mortgagees) requested that the district court apportion Northland's blanket mechanic's lien to each individual home. *Id.* at 382, 175 N.W. at 697. The district court did so, relying on the trial testimony of the builder who had conveniently retained records identifying the amount of building materials Northland supplied to each home.

There is no indication in the Court's opinion whether Northland opposed the requested apportionment or that Northland requested that it be permitted to foreclose the entire amount of its blanket lien against fewer than all six of the homes. Furthermore, the record is devoid of any facts that would explain why Northland would want to foreclose the entire lien against less than all six homes because all of the mortgages were

⁸ One of the requirements for a mechanic's lien claimant to file a blanket mechanic's lien under Minn. Stat. § 514.09 and its predecessor is that the work must have been performed "under or pursuant to the purposes of one general contract with the owner."

subordinate to the mechanic's liens.⁹ Thus, there is no indication anywhere in the opinion that the issue whether the mechanic's lien claimant was required to apportion its lien was ever litigated.

Even assuming, *arguendo*, (1) Northland had requested a foreclosure similar to Kuechle Underground, and (2) the Court specifically rejected Northland's request, *Carr-Cullen* still does not control. As a threshold matter, *Carr-Cullen* does not address the statutory provisions and statutory interpretation arguments that are at the heart of this issue – particularly Minn. Stat. § 580.08. Furthermore, the facts in *Carr-Cullen* are distinguishable in several important respects.

There was no priority dispute in *Carr-Cullen*, and so apportionment of the mechanic's lien would not have resulted in a net loss to Northland. (This probably explains why Northland did not request the non-apportioned foreclosure at issue in this case.) In contrast, if Kuechle Underground is required to apportion its lien, it will not be able to recover the majority of its lien because Premier Bank has priority over 47 of the 59 lots and one of the 12 released lots is a useless outlot.

It also appears that Northland's mechanic's lien was easily apportioned by the district court in *Carr-Cullen* because Northland and the builder maintained records identifying what building materials were used for each home. Here, however, Kuechle Underground constructed a system of infrastructure improvements the value of which cannot fairly be apportioned on a lot-by-lot basis. Nor were any records kept that would

⁹ In fact, foreclosure of more than an apportioned amount may have worked to Northland's disadvantage if the amount of the claim approached or exceeded the value of the property.

allow apportionment. As discussed above, the value of Kuechle Underground's infrastructure improvements is that they are a complete system providing benefit to all 59 lots and are worth far more together than simply the sum of their parts. In contrast, any single piece of lumber Northland supplied in *Carr-Cullen* was incorporated into one and only one house.

B. Great Northern is Distinguishable

Premier Bank also cites the *Great Northern* decision for the proposition that there must be a "direct relationship between the value contributed to the property by the lien claimant and the extent of the lien granted." *Great Northern*, 283 Minn. at 253, 167 N.W.2d at 506; (Premier Bank Br. at 26). The *Great Northern* case addressed a truly unique situation: whether a mechanic's lien claimant who contributed to the construction of a 117-mile pipeline could recover the full amount of its lien against the 17 miles of pipeline in Minnesota, even though the majority of the improvements (i.e., the other 100 miles of pipeline) were located in Wisconsin.

The Court in *Great Northern* acknowledged that the mechanic's lien statute did not address the novel cross-border situation. The Court's primary concern was whether a Minnesota landowner could fairly be subjected to liability for improvements located in Wisconsin. The Court held that, in fairness, it would not subject a Minnesota landowner to liabilities for construction projects located (at least in part) in another state. How would a Minnesota court determine whether a lien was properly perfected under Wisconsin law on Wisconsin property and then have a Minnesota landowner pay 100% of a claim over which the Minnesota court had no jurisdiction?

Significant policy and geographic considerations were at the forefront of the Court's analysis in *Great Northern* – no statutory guidance existed at all regarding a lien for work partly performed in Minnesota. As discussed above, there is no lack of statutory guidance for adjudicating Kuechle Underground's lien.

The Minnesota mechanic's lien statute (Minn. Stat. § 514.09) specifically authorizes a blanket lien. Once a blanket lien is imposed, Minn. Stat. § 580.08 requires foreclosure against less than all lots encumbered by having sheriff's sales one lot at a time until the entire lien (plus attorney's fees and costs) is paid. *Great Northern* does not bar enforcing Kuechle Underground's lien because there is no dispute that Kuechle Underground has a valid blanket mechanic's lien for the full amount of its \$266,622.96 claim and does not seek to enforce a claim for which it has no lien rights.

C. Premier Bank Fails to Cite Reilly

Notably missing in Premier Bank and the MLTA's discussion of relevant Minnesota case law is a discussion of *Reilly v. Williams*, 47 Minn. 590, 50 N.W. 826 (1891). In *Reilly*, a contractor entered into a construction contract with the owner to provide all the materials and labor to construct two homes on two adjacent lots. The lots were, at that time, encumbered by mortgages. Approximately halfway through the project, and after having received payment for over half of the amount due, the contractor released one of the lots from the contractor's mechanic's lien rights. Subsequently, when the project was completed, and the owner refused to pay the amount due, the contractor asserted a mechanic's lien against the remaining lot for the claim's full amount – *i.e.*, for work that had benefitted both lots. The mortgagee objected, arguing that the contractor

should, at most, be able to recover only 50% of the claim amount and not burden the other lot. *Id.* at 591-92, 50 N.W. at 826-27.

This Court disagreed and permitted the mechanic's lien claimant to foreclose the full amount of its lien on the remaining parcel. In its analysis, the Court likened the situation to what happens when a mortgagee releases part of the property burdened by a mortgage, but then enforces the mortgage lien on the remaining property for the full amount of the debt. *Id.* at 594, 50 N.W. at 827.

Reilly stands for the basic proposition urged by Kuechle Underground in this case – a mechanic's lien claimant can foreclose the full amount of its blanket mechanic's lien against less than all property improved by the lien claimant's work. This principle is in direct contrast to the policy advocated by Premier Bank – i.e., the full amount of a mechanic's lien for work on multiple lots can never be foreclosed against less than all lots. *Reilly* rejects the thesis that apportionment is required.

V. **CASES FROM FOREIGN JURISDICTIONS ARE DISTINGUISHABLE, NON-CONTROLLING, AND SHOULD BE DISREGARDED**

Premier Bank and the MLTA both cite decisions from a number of other jurisdictions to support their argument that Kuechle Underground should be precluded from foreclosing its blanket lien and must, instead, apportion its lien across all 59 lots. These foreign decisions should be disregarded because they are not controlling – Minnesota courts have historically permitted a mechanic's lien claimant to foreclose the full amount of its lien for work on two lots against one lot. *See Reilly*, 47 Minn. at 591-92, 50 N.W.2d at 896-97.

Minnesota courts have repeatedly expressed Minnesota's unwavering commitment to a liberal interpretation of the mechanic's lien statute to benefit mechanic's lien claimants and that this liberal policy may not be undermined by foreign case law. *Weyerhaeuser Co. v. Twin City Millwork Co.*, 191 N.W.2d 401, 405-06 (Minn. 1971).

Foreign cases are particularly unhelpful because mechanic's lien statutes differ significantly from state to state. Certainly the Court is not presented with a situation analogous to a uniform law, such as the Uniform Commercial Code (UCC), where the legislatures in all states expressly provide the specific statute is to be uniformly construed with the decisions in other states. Mechanic's lien statutes are not uniform, so Premier Bank's reliance on cases from other states is misplaced.

Furthermore, as discussed above, the mechanic's lien statute was created by the Minnesota legislature and interpreted by numerous Minnesota courts with one goal in mind – protect contractors. (*See* Section II, A, above). This Court has held that this policy is so important that it trumps alternative interpretations of similar statutes from other jurisdictions. “Whatever may be the rule elsewhere, Minnesota is committed to a liberal interpretation of both statutes which govern contractors' bonds and laws dealing with mechanics liens.” *Weyerhaeuser*, 191 N.W.2d at 405-06 (rejecting arguments that Minnesota should follow less-liberal interpretation based on foreign jurisdictions' case law) (emphasis added).

Nothing has changed in the 38 years since the *Weyerhaeuser* decision was issued. Accordingly, cases from other jurisdictions cited by Premier Bank in its brief must be

disregarded as they do not advance the bedrock Minnesota public policy of protecting mechanic's lien claimants.

Many of the foreign cases relied upon by Premier Bank are also distinguishable on the merits. Some foreign cases cited by Premier Bank, and others that were not cited, even support Kuechle Underground.

Premier Bank relies most heavily on an Arizona case, *CS & W Contractors, Inc. v. Southwest Savings & Loan Association*, 883 P.2d 404 (Ariz. 1994). For all the reasons discussed above, this Arizona Court's holding cannot and should not be the rule in Minnesota, where it is the stated policy that the mechanic's lien statute is to be liberally construed in favor of the mechanic's lien claimants.

Nothing in the *CS & W* opinion indicates Arizona has a similarly liberal policy regarding mechanic's lien claimants. No consideration is given for the fact that the mechanic's lien claimant performed work that provided an improvement integral to the functioning of the entire development, yet will not be paid for all of its work. Similarly, there was no discussion of an Arizona bank trying to accomplish what Premier Bank and its title insurer are trying to accomplish by trying to obtain a 100% complete project, yet not disburse all construction loan proceeds. Because the primary goal of interpreting the mechanic's lien statute in Minnesota is to pay contractors, Premier Bank and its title insurer cannot rely on this case.

The decision in *CS & W* also fails to address the reality of the situation before this Court. Three Released Model Homes are still owned by the builder, an entity closely affiliated with the developer (RA 10-11) who defaulted on its payments to both Kuechle

Underground and Premier Bank. No bona fide purchaser is involved. Premier Bank is foreclosing on its mortgages and, ultimately, Premier Bank's title insurer will be responsible for paying Kuechle Underground's claim.

Premier Bank and MLTA also rely on two cases from Virginia, both of which are inapplicable. See *Weaver v. Harland Corp.*, 10 S.E.2d 547 (Va. 1940) and *PIC Constr. Co. v. First Union Nat'l Bank*, 241 S.E.2d 804 (Va. 1978). In both cases, the mechanic's lien claimant had a blanket mechanic's lien on an entire project, but then affirmatively released some of the lots from the lien. *Weaver*, 10 S.E.2d at 548; *PIC Constr.*, 241 S.E.2d at 805-06. In each case, the Virginia Supreme Court held that the mechanic's lien claimant could not enforce the entire blanket lien amount against the remaining parcels because of the prior releases. *Id.* Kuechle Underground did not similarly jeopardize its lien by releasing certain lots.

Premier Bank also stridently asserts that "[t]he decision of the court of appeals stands alone in the country" (Premier Bank Br. at 29), staking out the position that no other court has ever allowed foreclosure of a blanket lien against less than all lots encumbered by the lien. Premier Bank is wrong.

For example, Premier Bank's citation to a Nebraska case is puzzling because the Nebraska Supreme Court expressly authorized foreclosure of the full amount of a mechanic's lien claim against less than all property improved by that lien. *Badger Lumber Company v. Holmes*, 76 N.W. 174, 175 (1898).¹⁰

¹⁰ An earlier decision involving the same facts provides important background. See *Badger Lumber Company v. Holmes*, 44 Neb. 244, 62 N.W. 446 (1895).

The property at issue in *Badger Lumber* was subject to a mechanic's lien and several mortgages. Some of those mortgages had priority over the mechanic's lien, were foreclosed, and eliminated the mechanic's lien on part of the improved property. *Id.* Thus, like Kuechle Underground, the mechanic's lien claimant was not be able to recover the full amount of its lien unless the mechanic's lien claimant was permitted to foreclose the full amount of its lien against only part of the property improved. *Id.*

The Nebraska Supreme Court held that, under the circumstances, the mechanic's lien claimant should be entitled to a lien for the full amount of its claims on the property that remained subject to the liens. *Id.* The court reasoned that it would not be equitable to enforce a strictly apportioned mechanic's lien and, instead, the mechanic's lien claimant should be able to enforce its mechanic's lien against less than all property subject to the original blanket lien. Accordingly, the *Badger Lumber* court held as follows:

Plaintiff was entitled to a general lien on all the lots for the balance due it for materials, and it would be inequitable and unjust to hold that such general lien is defeated by the foreclosure of a prior lien on a portion of the premises. Plaintiff's lien is valid and binding on the remainder of the lots for the entire balance of the unpaid part of its claim.

76 N.W. at 175. *Badger Lumber* does not support Premier Bank and, instead, provides a roadmap for how this Court should resolve this appeal in favor of Kuechle Underground.

Premier Bank and the MLTA also fail to mention a case from the Montana Supreme Court permitting a mechanic's lien claimant to foreclose the full amount of a blanket lien against less than all property improved by the contractor. *Hostetter v. Inland*

Dev. Corp. of Montana, 561 P.2d 1323 (Mont. 1977). In *Hostetter*, a mechanic's lien claimant constructed ceramic bathtub enclosures in every unit in a large condominium development. *Id.* at 1324. Ultimately, the contractor filed a mechanic's lien on the entire condominium because the developer failed to pay.

The blanket mechanic's lien encumbered units retained by the developers and units sold by the developer. The developer failed to deposit escrow funds after the sales, as required by Montana statutes, to satisfy any mechanic's lien claims on the condominium. *Id.* at 1325. The developer violated several other provisions of the condominium statute designed to ensure contractors are fully compensated before individual units were sold. *Id.* at 1326. Ultimately, the mechanic's lien claimant attempted to enforce its blanket lien by foreclosing the lien's full amount against the units still owned by the developer. *Id.*

The Montana Supreme Court held that equitable principles are applicable when enforcing mechanic's liens, so the lien claimant was "allowed to satisfy the entire amount of its lien first from those units retained by [the developer]." *Id.* at 1328. The court acknowledged the "general rule" precluding enforcement of blanket mechanic's liens in this manner, but then specifically rejected application of the general rule because of the equities in that case. *Id.*

Foreign jurisdictions are not nearly as uniform or monolithic as Premier Bank suggests. The rule applied in *Hostetter* and *Badger Lumber* applies equally to Kuechle Underground.

VI. SOUND PUBLIC POLICY SUPPORTS ALLOWING KUECHLE UNDERGROUND TO RECOVER THE FULL AMOUNT OF ITS LIEN AGAINST LESS THAN ALL LOTS ENCUMBERED BY THE LIEN

“Public policy” figures heavily in the arguments advanced by Premier Bank and the *amicus curiae* representing the title insurance industry in this case. It is no surprise that the bank and title insurers argue dire consequences will follow if this Court affirms the district court and Court of Appeals. But this is not a case about changing “the system.” Neither the district court nor the Court of Appeals made new law or restructured an entire industry, and this Court’s decision will not do so either. Fundamentally, the question presented to this Court is fact-specific: whether Kuechle Underground may foreclose the full amount of its blanket lien against the Released Model Homes. Both the district court and Court of Appeals appropriately analyzed and weighed the competing equities and policy issues at hand. Premier Bank and the MLTA fail to present any policy argument that justify reversal.

A. General Fairness Does Not Preclude Non-Appportioned Foreclosure

The primary policy argument advanced by Premier Bank and the MLTA is it simply is not fair to impose a mechanic’s lien on one lot for work performed (at least in part) on another lot. This argument views the situation completely from the perspective of the lender and title insurer and ignores the interests of the mechanic’s lien claimant. Kuechle Underground performed \$266,622.96 of work for which it was never paid. No complaints were ever made regarding the quality or timeliness of Kuechle Underground’s work. Not surprisingly, none of the parties to this lawsuit have advanced any reason why Kuechle Underground should not be paid for its work.

Yet Premier Bank would have Kuechle Underground remain unpaid for the majority of its work for the ostensible “benefit” of parties who have not similarly contributed undisputed improvements to the property. And Premier Bank wants to foreclose its Construction Mortgages, have the benefit of the infrastructure improvements, and then obtain a windfall by not disbursing construction loan proceeds to pay Kuechle Underground’s last pay application. This is why mechanic’s liens exist and illustrates why those rights are to be liberally construed in favor of contractors. Otherwise, between developers, banks, and title insurance companies, all of whom are looking out for themselves, contractors do not get paid for their work.

B. Abuse and Manipulation is Unlikely

Premier Bank and the MLTA argue that a non-apportioned foreclosure rule would allow mechanic’s lien claimants, like Kuechle Underground, to “abuse and manipul[at]e” the foreclosure process. Notably, they fail to give specific examples of the kind of abuse and manipulation they fear. Presumably, their argument is that non-apportioned foreclosure would allow mechanic’s lien claimants to “game” the system and obtain an unfair advantage and perhaps prejudice other parties.

Those non-specific fears are overblown. First, as discussed above, this case is not a referendum on non-apportioned foreclosure of blanket mechanic’s liens in all circumstances. This case is about Kuechle Underground and Premier Bank and the unique equities involved in the River Bend development.

Second, mechanic’s lien claimants do not have any incentive to play games with the foreclosure process. It appears what Premier Bank and the title insurers fear the most

is foreclosure of a large blanket lien against just a few lots. But under normal circumstances, a mechanic's lien claimant wants to foreclose as small a lien as possible (relative to the value of the property) to maximize the chances of recovery – i.e., the property being sold to another bidder at the sheriff's sale.

Mechanic's lien claimants do not generally want to be in the business of real property investment, development, or management and so the end goal of the foreclosure process is not to own the property. Contractors just want to get paid. Foreclosing a large lien against a small number of lots may, in some cases, backfire against a mechanic's lien claimant. It is entirely possible for a mechanic's lien claimant with a senior lien to "overbid" at the foreclosure sale by bidding an amount that exceeds the property's market value.

The result of overbidding is no one bids more than the mechanic's lien claimant, so the mechanic's lien claimant ends up owning the property. Because the lien was used to "credit bid" at the sale, the lien is satisfied upon the mechanic's lien claimant's winning bid. The lien claimant then no longer has the ability to foreclose the rest of its lien against other lots and is stuck with property that may not be worth as much as the lien the contractor foreclosed. Sufficient disincentives exist in the process to ensure that mechanic's lien claimants will not "game" the system.

C. Impact on Junior Mechanic's Liens is Overstated

Premier Bank and the MLTA also argue that foreclosing the full amount of the mechanic's lien may prejudice the interests of junior mechanic's lien claimants. Again, this is a purely theoretical argument as it relates to River Bend because Kuechle

Underground is the only lien claimant that still has an interest in the Released Model Homes. No junior lien claimants ever raised an objection to Kuechle Underground's proposal because no junior lien claimants exist.

And although Kuechle Underground believes that the decision should be limited to the facts before the Court, a general rule allowing non-apportioned foreclosure of blanket mechanic's liens will not have the impact (allegedly) feared by Premier Bank and the title insurers because mechanic's lien claimants will be deemed "coordinate." Under well-settled law, mechanic's liens have equal (coordinate) priority when the improvements at issue were performed as part of a single continuous project, even if they were performed by multiple contractors. *See, generally, Witcher Const. Co. v. Estes II Ltd. Partnership*, 465 N.W.2d 404, 407 (Minn. Ct. App. 1991) (citing *Kahle v. McClary*, 255 Minn. 239, 96 N.W.2d 243 (1959)). Junior lien claimants will not be present in many cases because of the coordinate lien rule.

To the extent a contractor holds a truly junior mechanic's lien, sufficient protections exist to prevent unfair prejudice. Junior lien claimants have the right to redeem their lien. Minn. Stat. § 580.24. Premier Bank argues that junior lien claimants will not redeem from the full value of the blanket lien, but that is the risk junior mortgagees and lien claimants have under our system. Because equitable principles apply, the junior lien claimant is free to argue to the court that its lien should not be eliminated.

D. Uncertainty Concern is Overstated

Premier Bank and the MLTA also argue that apportioned foreclosure of blanket mechanic's liens is necessary to avoid "great uncertainty" that has descended upon the commercial and residential construction industries in the wake of the Court of Appeals' decision. None of this uncertainty is part of the record, of course, and the extent it exists is in the eye of the beholder.

Premier Bank and the MLTA say that the case-by-case analysis called for by the Court of Appeals will result in increased litigation and, for this reason, a simpler test should be adopted. But the correct rule is not always the easy one. If all legal disputes were capable of "certain resolution" based on application of simple rules to facts, there would be no need for an independent judiciary. A multitude of legal tests and analyses have been developed at common law (and by statute) over time that provide courts guidance on how to resolve truly difficult decisions. Not every question in life or the law has an easy, bright-line answer. Courts do not abrogate their duty and obligation to make the correct choice simply because it is harder.

E. Requiring Apportionment Will Result in Greater Uncertainty and Additional Prejudice to Contractors

Premier Bank and the MLTA argue that affirming the Court of Appeals will disrupt the status quo in which contractors and title insurers supposedly settle blanket mechanic's lien on a routine basis by paying the apportioned amount. The implication is that it will be too difficult to settle cases if mechanic's lien claimants are not forced to apportion their liens. Premier Bank underestimates the resourcefulness of contractors,

banks, title insurers, and their counsel in finding common ground to resolve lien claims in the future. Moreover, the status quo described by the bank and the title insurance industry does not exist. Kuechle Underground and its counsel are not familiar with the supposedly “routine” basis to settle liens described in MLTA’s brief.

Premier Bank and the MLTA also ignore the converse of their own argument. Contractors with mechanic’s lien rights – particularly subdivision utility and sitework contractors like Kuechle Underground – have historically released certain lots from their liens (either for free or for less than the lien amount) knowing that they could enforce the full lien later if necessary against remaining parcels, particularly if those remained owned by the developer.

If this Court adopts a general rule that blanket liens must be foreclosed on an apportioned basis, contractors will be much less likely to release their liens for any of the many reasons they traditionally have done so. These contractors will be less likely to work with developers and general contractors for the good of the project. Instead, these contractors will be forced to stand on their rights and insist on the per-lot share.

There are equitable concerns and arguments in support of all stakeholders’ positions in this case. In large part, those concerns balance themselves and come out even in the wash. But when the fundamental, guiding principle of mechanic’s lien law is applied and the statute and the equities are liberally construed in favor of mechanic’s lien claimants, only one result is warranted. Kuechle Underground must be permitted to foreclose the full amount of its lien against the three Released Model Homes.

VII. PREMIER BANK'S ARGUMENT REGARDING THE COMMON INTEREST COMMUNITY STATUTE IS NOT RELEVANT

Premier Bank argues that Kuechle should not be permitted to foreclose a blanket mechanic's lien because Premier Bank may *someday* be the record owner of the Released Model Homes, and may *someday* exercise its potential, future rights under the Minnesota Common Ownership Interest Act ("Act") (Minn. Stat. § 515B.3-117) to release the mechanic's lien on the Released Model Homes by paying a portion of the mechanic's lien that is attributable to the individual unit. (Premier App. Br. at 34).

Premier Bank's argument fails for multiple reasons. First, Premier Bank's argument requires several assumptions about future events that have not occurred, are not part of the record before this Court, and are not within Premier Bank's control at present. Premier Bank does not own the Released Model Homes. Boone Builders is presently the record owner. Boone Builders may opt to exercise its rights to redeem from the mortgage foreclosure and remain the owner of record.

Premier Bank may never become the record owner of the three model homes. Nothing in the record indicates that Boone Builders intends to exercise any rights Boone Builders (as the owner) may have under the Act. No one can assume that Premier Bank one day may be the record owner. This Court should not make a ruling based on unsupported predictions about future events that are not in the record.

Second, even if the Act permits property owners to "opt out" of a blanket mechanic's lien in the future, that potential election by a future homeowner does not invalidate the blanket mechanic's lien *ab initio*. Because the Act allows individual unit

owners to force a partial apportionment, it implies that non-apportioned foreclosure of a blanket lien is the default procedure.

If mechanic's lien claimants were required to apportion their liens under all circumstances – as Premier Bank argues – the Act's provision would be redundant. It is a cardinal rule of statutory interpretation to avoid interpretations that render statutory provisions a nullity or otherwise without effect. *See Amaral*, 598 N.W.2d at 384. If Premier Bank's argument is accepted that mechanic's lien claimants are required to apportion their blanket mechanic's lien, owners in common interest communities gain no benefit by being able to "force" the mechanic's lien claimant to release the lien by paying a pro-rated, apportioned amount of the lien. And Section 515B.3-117 would be read out of the statute.

Third, the Act recognizes the danger in allowing mortgagees such as Premier Bank, or other "secured parties," to exercise the rights granted to owners under the Act. Accordingly, the Act only provides "unit owners" with the power to release their units from a blanket lien. Minn. Stat. § 515B.3-117. Any "secured party," like Premier Bank, is specifically excluded from the definition of unit owner and may not exercise the rights of true unit owners under the Act. Minn. Stat. § 515B.1-103(36).

CONCLUSION

Kuechle Underground respectfully requests this Court to affirm the district court and Court of Appeals' determination that Kuechle Underground is permitted to foreclose the full amount of its mechanic's lien against the three Released Model Homes.

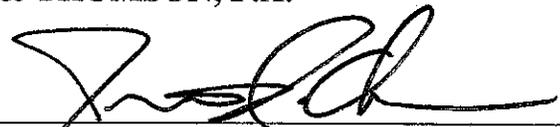
Although the district court and Court of Appeals followed slightly different reasoning, the result should be affirmed because the correct decision was made in both cases.

Minnesota's mechanic's lien statute, the applicable standards of interpretation, the equities, controlling case law, and Minnesota's long-standing policy requiring liberal interpretation of the mechanic's lien statute provide this Court with a clear path to approve non-apportioned foreclosure under the circumstances. This Court should disregard decisions from other jurisdictions that suggest a contrary result. The Court should also not be swayed by Premier Bank and the title insurance industry's one-sided policy arguments. The only result consistent with Minnesota public policy is to approve Kuechle Underground's ability to foreclose the full amount of its lien against the three Released Model Homes.

Dated: November 18, 2009

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CERTIFICATE 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 font. The length of this brief (exclusive of the Table of Contents and Table of Authorities) is 13,575 words and the font size is 13-point. This brief was prepared using Microsoft Word 2003.

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