STATE OF MINNESOTA

IN COURT OF APPEALS

A08-1883

Imperial Developers, Inc.,
Plaintiff,

vs.

Calhoun Development, LLC, Respondent; Regal Custom Homes, Inc., Guaranteed Mortgage of Minnesota, and Jeremy J. Roseth, Defendants; Lind Homes, Inc., Respondent; JMA Builders, Inc., Defendant; Prime Security Bank (Shakopee), Defendant; Minnesota State Curb & Gutter, a division of AVR, Inc., Respondent; Thompson Plbg Corp., Respondent; Great Northern I, Inc., Respondent;
Southview Design & Construction, Inc., Appellant; Bank First, Respondent; First Commercial Bank (Bloomington), Defendant; and The Woodshop of Avon, Inc., Respondent;

and

Scherer Bros. Lumber Co., Appellant;

vs.

Matthew Lind and Kristen K. Lind, Third Party Defendants; and Simonson Lumber of Ham Lake, Inc., Third Party Plaintiff;

vs.

Contractors Capital Corporation, R&J Insulation, Inc., Automated Building Components, Inc.; J. Roux Interior Design, Inc., Merit Drywall, Inc., and Tricolor Heron, LLC; Third Party Defendants, and DJ's Companies, Inc., Intervenor and Fourth Party Plaintiff,

vs.

ORO Holdings, Gemini Equity Group, LLC, and Alliance Bank, Fourth-Party Defendants.

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENT.....i

TABLE OF AUTHORITIES.....iii

Legal Issues.....1

Statement of the Case.....2

STATEMENT OF FACTS.....3

Procedural History.....7

STANDARD OF REVIEW.....10

ARGUMENT.....12

I. NEITHER THE BANK FIRST MORTGAGE NOR THE CALHOUN MORTGAGE WERE "OF RECORD" AT THE TIME SOUTHVIEW'S MECHANIC'S LIEN ATTACHED, THUS RENDERING THE SOUTHVIEW AND SCHERER MECHANIC'S LIENS PRIOR AND SUPERIOR TO THE MORTGAGES.....13

A. The Critical Difference Between the Torrens and Abstract Property Systems is the Ability to Rely on the Existing Certificate of Title When Operating under the Torrens System.....18

B. Unlike with Abstract Property, to be "Of Record" Under the Torrens Act, an Interest Must Not Only be Filed with the Registrar of Titles, It Must Appear as a Memorial on the Property's Certificate of Title.....20

1. For Purposes of the Mechanic's Lien Statute (Minn. Stat. § 514.05) and the Torrens Act, the Mortgages Became "of Record" on September 20, 2006.....21

2. The Electronic Filing Rules of 2008 Highlight the Difference Between When Instruments Conveying Interests in Property Become "Of Record" in the Torrens System and the Abstract System.....23

3. The Failure to Memorialize the Mortgages on the Certificate of Title Represents Incomplete or Failed Registration, as Opposed to a "Gap" Between the Time of Filing and the Memorialization on the Certificate of Title.....24

4. Certificate of Title No. 1144974 is Irrefutable Evidence that the Registration of the Mortgages Was Not Completed and that the Mortgages Were Not "Of Record" at the Time the Mechanic's Liens Attached.....29

II. GIVEN THE UNDISPUTED FACTS OF THE CASE, THE DISTRICT COURT ERRED WHEN IT CONCLUDED, WITHOUT ANY FACTUAL BASIS, THAT SOUTHVIEW HAD ACTUAL NOTICE OF THE BANK FIRST AND CALHOUN MORTGAGES.....30

A. History of the Actual Notice Exception to the Torrens Act.....32

B. The District Court Erred by Concluding that Southview had Actual Notice of the Mortgages, Despite the Undisputed Facts to the Contrary.....40

C. Bank First and Calhoun May be Eligible for Recovery from the General Assurance Fund Under Minn. Stat. § 508.76.....45

CONCLUSION.....47

CERTIFICATE OF BRIEF LENGTH.....See Attached

APPENDIX.....Under Separate Cover

ADDENDUM.....Under Separate Cover

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).

TABLE OF AUTHORITIES

MINNESOTA STATUTES

Minn. Stat. § 480A.08 37

Minn. Stat. Ch. 507 18

Minn. Stat. §507.0941 – 507.0948 23

Minn. Stat. §507.0943 ..... 23, 24

Minn. Stat. Ch. 508 ..... 3, 14, 18

Minn. Stat. Ch. 508A 18

Minn. Stat. §508.25 ..... 19, 39, 40

Minn. Stat. § 508.36 ..... 4, 19, 29

Minn. Stat. § 508.48 ..... 15, 17

Minn. Stat. § 508.49 ..... 1, 16

Minn. Stat. §508.54 ..... 1, 15, 16

Minn. Stat. §508.55 ..... 1, 16, 21

Minn. Stat. §508.64 17

Minn. Stat. § 508.76 ..... 45, 46

Minn. Stat. § 514.05 ..... 1, 2, 12, 20, 21, 30, 31, 32

1901 Minn. Laws 348-378 14

2008 Minn. Laws, c. 238, art. 2, §§ 1-10 23

FEDERAL DECISIONS

United States v Ryan,
124 F. Supp. 1 (D.Minn. 1954).....1. 15, 17. 18

In re Zachman Homes, 47 B.R. 496 (Bankr. D. Minn. 1984).....32

MINNESOTA DECISIONS

Bondy v. Allen,
635 N.W.2d 244 (Minn. Ct. App. 2001).....10

Carlson v. Allstate Ins. Co.,
749 N.W.2d 41 (Minn. 2008).....41

Comstock & Davis, Inc. v. G.D.S. & Assocs.,
481 N.W.2d 82 (Minn. Ct. App. 1992).....1. 31

C.S. McCrossan, Inc. v. Builders Finance Company,
232 N.W.2d 15 (Minn. 1975).....34, 35, 36. 37. 38

Engler v. Wehmas,
633 N.W.2d 868 (Minn. Ct. App. 2001).....10

Frost-Benco Elec. Ass'n v. Minn. Pub. Utilities Comm'n,
358 N.W.2d 639 (Minn. 1984).....10

Glass v. Freeburg,
52 N.W. 90 (Minn. 1892).....32

Hersh Properties, LLC v McDonald's Corp.,
588 N.W.2d 728 (Minn. 1999).....15

Hubred v. Control Data Corp.,
442 N.W.2d 308 (Minn. 1989).....10

In re Alchemedes/Brookwood, Ltd. Partnership,
546 N.W.2d 41 (Minn. Ct. App. 1996).....1, 31, 41, 44

In re Collier,
726 N.W.2d 799 (Minn. 2007).....14. 15, 18, 19. 31, 39. 40. 44

In re Juran,
178 Minn. 55, 226 N.W. 201 (Minn. 1929).....
.....1, 15, 18, 30, 31, 32. 33, 38, 39. 40, 43, 44

In re the Petition of Walther,
2005 WL 3470490 (Minn. Ct. App. Dec. 20, 2005) (unpublished).....
.....1, 37. 38, 39. 40. 41, 42. 43

In re Petition of Willmus,
568 N.W.2d 722 (Minn. Ct. App. 1997).....43

Isles Wellness, Inc. v. Progressive N. Ins. Co.,
703 N.W.2d 513 (Minn. 2005).....10

Jadwin v. Kasal,
318 N.W.2d 844 (Minn. 1982).....30. 31

Kane v. State,
237 Minn. 261, 55 N.W.2d 333 (1952).....33, 34, 43

Lefto v. Hoggsbreath Enterprises, Inc.,
581 N.W.2d 855 (Minn. 1989).....11

Mill City Heating& Air Cond. V. Nelson,
351 N.W.2d 361 (Minn. 1984).....43

Morton Bldgs., Inc. v. Comm'r of Revenue,
488 N.W.2d 254 (Minn. 1992).....11

Prior Lake Am. v. Mader,
642 N.W.2d 729 (Minn. 2002).....10

State by Cooper v. French, 460 N.W.2d 2 (Minn. 1990).....10

Weston v. McWilliams & Assoc., Inc., 716 N.W.2d 634 (Minn. 2006).....11

OTHER AUTHORITIES

Black's Law Dictionary (7th ed.1999).....31

LEGAL ISSUES

I. Do the Southview and Scherer Mechanic's Liens take priority over the Mortgages of Bank First and Calhoun, where the Mortgages were not memorialized on the certificate of title to the Property, and thus not registered or "of record" at the time the Mechanic's Liens attached?

The trial court concluded that because Bank First filed its Mortgage with the registrar of titles on June 28, 2005, the Mortgage was "registered" and "of record" as of June 28, 2005, making it prior to the Mechanic's Liens of Southview and Scherer. The trial court appears to have further concluded that because the Calhoun Mortgage was similarly filed, the Calhoun Mortgage was prior to the Mechanic's Liens of Southview and Scherer.

Apposite Authority: Minn. Stat. § 514.05, subd. 1; Minn. Stat. § 508.49; Minn. Stat. § 508.54; Minn. Stat. § 508.55; *United States v. Ryan,* 124 F. Supp. 1 (D. Minn. 1954); *In re Juran,* 178 Minn. 55, 226 N.W. 201 (1929).

II. Does Southview's Mechanic's Lien (and Scherer's coordinate Lien) take priority over the Mortgages of Bank First and Calhoun, where Southview had no actual notice of the Mortgages?

Despite the absence of supporting facts in the record, and based solely upon Certificate of Title No. 1144974, the trial court concluded that Southview and Scherer had "actual knowledge" that Certificate of Title No. 1144974 was inaccurate merely because it listed Calhoun as the owner of the Property. As a result, the trial court summarily concluded that Southview and Scherer should have known that the certificate was inaccurate. The trial court further concluded that because Certificate of Title No. 1144974 listed Calhoun as the owner of the Property, Southview and Scherer had a duty to inquire as to whether there were mortgages or other interests on the Property not appearing as memorials on the certificate of title.

Apposite Authority: Minn. Stat. § 514.05, subd. 1; In re Juran, 178 Minn. 55, 226 N.W. 201 (1929); *Comstock & Davis, Inc. v. G.D.S. & Assocs.,* 481 N.W.2d 82 (Minn. Ct. App. 1992); *In re Alchemedes/Brookwood, Ltd. Partnership,* 546 N.W.2d 41 (Minn. Ct. App. 1996); *In re the Petition of Walther,* 2005 WL 3470490 (Minn. Ct. App. Dec. 20, 2005) (unpublished).

STATEMENT OF THE CASE

Appellants Southview Design & Construction, Inc. ("Southview") and Scherer Bros. Lumber Co. ("Scherer") seek a reversal of a summary judgment order issued by Hennepin County District Court Judge William Howard which granted the summary judgment motion of Bank First ("Bank First") and Calhoun Development LLC ("Calhoun") and denied the summary judgment motion of Appellants with respect to the priority of the parties' respective interests in Torrens property. In lieu of trial, the parties entered into a Stipulation of Facts establishing the validity and amount of the liens, and stipulating that the Southview and Scherer liens are coordinate and of equal standing. Accordingly, the only issue for appeal is the priority of the liens.

This case involves two mortgages which were filed with the registrar of titles, but which were not memorialized on the certificate of title to the property, and thus, did not appear "of record" with respect to the property when the mechanic's liens attached. As a result, when Southview's lien attached, it had no actual notice of the mortgages.

Minnesota Statute § 514.05, subd. 1 provides that a mechanic's lien shall attach and take effect from the time the first item of material or labor is furnished to the premises and shall take priority over any mortgage not then "of record" unless the lienholder had actual knowledge thereof. Because the mortgages were not memorialized on the certificate of title to the property, they were not registered or "of record" with respect to the property and Southview had no actual notice of those mortgages. Accordingly, Southview (and Scherer as a coordinate lien holder) were entitled to summary judgment declaring their liens prior and superior to the mortgages.

STATEMENT OF UNDISPUTED FACTS

This case involves real property located in Eden Prairie, Hennepin County, Minnesota, legally described as:

> Lots 1, 2, 3, 4, 5, 6, 7, and 8, Block 1, Edenvale Highlands, Hennepin County, Minnesota, according to the recorded plat thereof.

(Collectively referred to herein as the "Subdivision Parcels.") [Amended Stip. of Facts at ¶ 1 (attached as Addendum pp. 16-23); Findings of Fact, Conclusions of Law, Order for Judgment and Judgment as to Defendant and Third Party Plaintiff Scherer Bros. Lumber Co. and Defendant Southview Design & Construction, Inc., filed September 10, 2008 (hereafter referred to as "Judgment") at ¶ 1 (attached as Addendum pp. 24-30).]

The Subdivision Parcels comprise a subdivision commonly referred to as Edenvale Highlands. *Id.* All Subdivision Parcels are Torrens property, subject to the Torrens Registration Statutes set forth in Minnesota Statutes, Chapter 508. *Id.* at ¶ 2.

On December 30, 2004, the plat of Edenvale Highlands was registered with the Hennepin County Registrar of Titles, which divided the Subdivision Parcels into eight separate lots, each lot with a separate Certificate of Title as follows:

Lot 1, Block 1:	Certificate No. 1144971
Lot 2, Block 1:	Certificate No. 1144972
Lot 3, Block 1:	Certificate No. 1144973
Lot 4, Block 1:	Certificate No. 1144974
Lot 5, Block 1:	Certificate No. 1144975
Lot 6, Block 1:	Certificate No. 1144976
Lot 7, Block 1:	Certificate No. 1144977
Lot 8, Block 1:	Certificate No. 1144978

(Appendix Ex. 1 – 8, pp. 40-63)[1]

At the time of platting, the developer, Calhoun, was the fee owner of each lot. *Id.* This appeal involves only Lot 4 (hereafter referred to as "Lot 4" or the "Property").

On June 27, 2005, Calhoun conveyed to Lind Homes, Inc. ("Lind") Lots 3, 4, and 5 by a Warranty Deed dated June 27, 2005, and filed with the Office of the Hennepin County Registrar of Titles on June 28, 2005, as Document No. 4129639. (App. Ex. 9, pp. 64-65.)[2] As a result of the conveyance, a new Certificate of Title No. 1157096, was issued for Lot 5. (App. Ex. 10, pp. 66-68.) No new certificates of title were issued for Lots 3 or 4 at that time. (App. Ex. 9, 10, pp. 64-68.)

At the same time, Lind, as mortgagor, executed and delivered to Bank First, as mortgagee, a mortgage dated June 27, 2005, in the principal amount of $2,155,000.00 (App. Ex. 11, pp. 69-73.) Said mortgage was filed in the Office of the Hennepin County Registrar of Titles on June 28, 2005, as Document No. 4129640 ("Bank First Mortgage"). *Id.*

In addition, Lind, as mortgagor, executed and delivered to Calhoun, as mortgagee, a mortgage dated June 27, 2005, in the principal amount of $243,817.76. (App. Ex. 12, pp. 74-80.) Said mortgage was filed in the Office of the Hennepin County Registrar of Titles on June 28, 2005, as Document No. 4129641 ("Calhoun Mortgage"). *Id.*

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[1] Minn. Stat. §508.36 (2008) expressly provides that a certificate of title shall be received in evidence in all the courts of this state and be conclusive evidence of all matters and things contained in it.

[2] Pursuant to the Amend. Stip. of Facts, ¶ 4, Lind took title to the Property on June 27, 2005, and was thus the fee owner of the Property as of that date. (Addendum pp. 16-23.)

The Bank First Mortgage and the Calhoun Mortgage (collectively referred to herein as the "Mortgages") were memorialized on the new Certificate of Title No. 1157096 for Lot 5, but were not memorialized on the existing certificates of title for Lots 3 or 4 (Certificate Nos. 1144973 and 1144974). (App. Ex. 3, 4, 10, pp. 46-48, 49-51, 66-68.) Accordingly, the certificate of title for the Property (Lot 4) did not contain any memorial or mention of the Mortgages at that time. (App. Ex. 4, pp. 49-51.)

On or about May 11, 2006, Lind executed written agreements with Appellant Southview, whereby Lind requested that Southview provide, and Southview agreed to provide, skill, labor, materials, supplies and landscaping services to the Property. [Amend. Stip. of Facts at ¶ 17 (Addendum p. 19); Judgment at ¶ 18 (Addendum p. 27).]

Pursuant to the written agreements with Lind, from May 17, 2006 through June 9, 2006, Southview furnished skill, labor, materials, supplies, and landscaping services to the Property. (*Id.* at ¶ 19, 20; Judgment, ¶¶ 21, 22.) At the time that Southview furnished the skill, labor, materials, supplies, and services to the Property, the certificate of title for the Property (Certificate No. 1144974) did not include any memorial of the Mortgages. (App. Ex. 4, pp. 49-51; Iverson Aff. at Ex. A, App. pp. 15-16.)

On August 29, 2006, within 120 days after furnishing the last item of skill, labor, materials, supplies, and services to the Property, Southview served its verified Mechanic's Lien Statement by certified mail, return receipt requested, upon both Calhoun and Lind. [Amend. Stip. of Facts, ¶¶ 21, 22 (Addendum p. 19); Judgment, ¶¶ 23, 24 (Addendum p. 27).] That same day, August 29, 2006, Southview filed with the Office of the Hennepin County Registrar of Titles, as Document No. 4299632, its verified

Mechanic's Lien Statement. [Amend. Stip. of Facts. ¶ 23 (Addendum p. 19); Judgment. ¶ 25 (Addendum p. 28).] At the time that Southview served and registered its Mechanic's Lien Statement (August 29, 2006), the Mortgages were not memorialized upon the then-current certificate of title for the Property (Certificate of Title No. 1144974). (App. Ex. 4, pp. 49-51; Iverson Aff. at ¶3 and Ex. A, App. pp. 11-16.)

On September 20, 2006, nearly a month after Southview registered its Mechanic's Lien Statement against the Property, the Warranty Deed from Calhoun to Lind with respect to Lots 3, 4, and 5, which was previously filed in the Office of the Hennepin County Registrar of Titles as Document No. 4129639, was re-filed as Document No. 4307439 (a new document number). (App. Ex. 13, pp. 81-84.) At this time, a new Certificate of Title No. 1189682 was issued for Lots 3 and 4. (App. Ex. 14, pp. 85-87.)

Immediately thereafter, on September 20, 2006, a "New Certificate" document was filed as Document No. 4307440; the Certificates of Title for Lots 3 and 4 (Certificate No. 1189682) and Lot 5 (Certificate No. 1157096) were cancelled; and a new Certificate of Title No. 1189683 was issued for Lots 3, 4, and 5. (App. Ex. 10, 14, 15, 16, pp. 66-68, 85-87, 88-89, 90-92.) Certificate of Title No. 1189683 is the current Certificate of Title for Lots 3, 4, and 5. (App. Ex. 16, pp. 90-92.) The current Certificate of Title No. 1189683 for the Property the contains a memorial for both the Mortgages, however, these Mortgages did not appear "of record" as memorials on the certificate of title for the Property until September 20, 2006 -- well after Southview's Mechanic's Lien attached and was registered. (App. Ex. 4, 16, pp. 49-51, 90-92.)

Like Southview, Appellant Scherer furnished labor and materials to the construction and improvement of the Property. [Amend. Stip. of Facts, ¶¶ 6, 7 (Addendum p. 18); Judgment, ¶¶ 7, 8 (Addendum p. 26).] Commencing October 13, 2005 and continuing through June 29, 2006, Scherer furnished lumber, building materials, and labor for the construction and improvement of the Property. *Id.* On September 21, 2006, within 120 days after furnishing the last item of labor or material, Scherer served and filed with the Office of the Hennepin County Registrar of Titles, as Document No. 4307732, its verified Mechanic's Lien Statement in the amount of $250,657.34. [Amend. Stip. of Facts, ¶¶ 8, 9, 10 (Addendum p. 18); Judgment, ¶¶ 9, 10, 11 (Addendum p. 26).][3]

Procedural History

On or about October 4, 2006, Imperial Developers, Inc. ("Imperial") initiated a mechanic's lien foreclosure action. (*See* Plaintiff's Complaint, App. pp. 1-7) On or about October 15, 2007, Southview and Scherer filed a Motion for Partial Summary Judgment requesting a judgment declaring their Mechanic's Liens prior and superior to the subsequently registered Mortgages of Bank First and Calhoun with respect to the Property. [*See* Notice of Motion and Motion for Partial Summary Judgment by Southview and Scherer (App. pp. 8-10); Memorandum of Law in Support of Motion for Partial Summary Judgment by Southview and Scherer; Reply Brief in Support of Partial

[3] It was stipulated by the parties that the Mechanic's Liens of Southview and Scherer are valid, coordinate, and of equal standing. (*See* Judgment, p. 3.) As a coordinate lien, Scherer's Lien shares in the priority of the Southview Lien with respect priority over the Mortgages. No other mechanic's liens against the Property were stipulated or declared to be coordinate to Southview's Lien.

Summary Judgment by Southview and Scherer; and "Supplemental Response" Letter Brief by Southview and Scherer in Support of Partial Summary Judgment dated November 21, 2007, on file and of record in this case.][4] On or about October 16, 2007, Bank First and Calhoun filed Motions for Summary Judgment requesting a judgment declaring their Mortgages prior and superior to the mechanic's liens of Thompson Plbg. Corp., Great Northern I, Inc., The Woodshop of Avon, Southview, and Scherer with respect to the Property. (*See* Bank First and Calhoun Motions for Summary Judgment, App. pp 17-18.) The Cross Summary Judgment Motions were heard on November 14, 2007.

On February 8, 2008, the court issued its Findings of Fact, Conclusions of Law, and Order for Summary Judgment granting the Summary Judgment Motions of Bank First and Calhoun, and denying the Summary Judgment Motions of Southview and Scherer. An Amended Findings of Fact, Conclusions of Law, and Order for Summary Judgment (hereafter referred to as the "Summary Judgment Order") was filed on February 14, 2008, which clarified the superiority of the Imperial lien. (Addendum pp. 1-15.)

Because priority was the only the issue contested and decided on summary judgment motion, the case proceeded to trial on the issues of validity and amount of the various liens and mortgages. In lieu of trial, Southview, Scherer, Bank First and Calhoun

[4] A separate Motion for Partial Summary Judgment was filed by Southview and Scherer in which Southview and Scherer argued that their Mechanic's Liens were coordinate to the mechanic's lien of Imperial Developers, Inc. That Motion for Partial Summary Judgment and the district court's decision denying that Motion is not the subject of this appeal.

entered into a Stipulation of Facts, dated June 13, 2008. An Amended Stipulation of Facts was executed and filed by Scherer, Southview, Bank First, and Calhoun on or about June 18, 2008. (Addendum pp. 16-23.) In the Stipulation of Facts and Amended Stipulation of Facts, Bank First and Calhoun stipulated to the validity and amount of the Scherer and Southview Mechanics Liens. [Stip. of Facts at ¶¶ 15, 16 28, 29; Amend. Stip. of Facts at ¶¶ 15, 16, 28, 29 (Addendum pp. 16-23).] The stipulated amount of Southview's Lien is $126,546.17 and the stipulated amount of Scherer's Lien is $354,688.78. *Id.*

Based upon the Amended Stipulation of Facts, the district court issued its Findings of Fact, Conclusions of Law, Order for Judgment, and Judgment as to Defendant and Third Party Plaintiff Scherer Bros. Lumber Co. and Defendant Southview Design & Construction, Inc. on September 10, 2008. (*See* Addendum pp. 24-30.) The Judgment specifically finds that Scherer and Southview are holders of valid Mechanic's Liens against the Property, and that said Liens are coordinate and of equal standing. [*See* Judgment at Conclusions of Law at ¶ 1, 2, 3 (Addendum p. 29).] With respect to the priority of the Southview and Scherer Mechanic's Liens, the Judgment incorporates the court's Amended Findings of Fact, Conclusions of Law, and Order for Summary Judgment dated February 14, 2008. *Id.* at ¶ 4. A Notice of Entry of Judgment was issued on September 16, 2008, rendering the district court's Judgment final and appealable. *Id.* at p. 31.

Scherer and Southview hereby appeal the district court's denial of their Motion for Partial Summary Judgment and the issuance of Summary Judgment in favor of Bank First

and Calhoun with respect to the issue of priority. The validity and amount of the Scherer and Southview Mechanic's Liens was stipulated to by the parties and is not at issue in this appeal.[5] Accordingly, the sole issue on appeal is the priority of the Southview and Scherer Mechanic's Liens in relation to the Mortgages of Bank First and Calhoun.

STANDARD OF REVIEW

Whether summary judgment was properly granted or denied is a question of law reviewed *de novo* by the appellate court. *Prior Lake Am. v. Mader*, 642 N.W.2d 729, 735 (Minn. 2002). In reviewing a summary judgment, the court must determine: (1) whether there are any genuine issues of material fact; and (2) whether the district court erred in its application of law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). In doing so, the court must view the evidence in the light most favorable to the party against whom summary judgment was granted (in this case, the Appellants). *Isles Wellness, Inc v. Progressive N. Ins. Co.*, 703 N.W.2d 513, 516 (Minn. 2005).

A reviewing court need not defer to the district court's application of law when the material facts are not in dispute. *Engler v. Wehmas*, 633 N.W.2d 868, 872 (Minn. Ct. App. 2001) (citing *Hubred v. Control Data Corp.*, 442 N.W.2d 308, 310 (Minn. 1989), *review granted* (Minn. Dec. 19, 2001), *appeal dism'd* (Minn. Apr. 5, 2002). In other words, an appellate court is not bound by, and need not give deference to, the district court's decision on a question of law. *Bondy v. Allen*, 635 N.W.2d 244, 249 (Minn. Ct. App. 2001) (citing *Frost-Benco Elec. Ass'n v. Minn. Pub. Utilities Comm'n*, 358 N.W.2d

[5] *See* Amend. Stip. of Facts at ¶¶ 15, 16, 28, & 29 (Addendum pp. 16-23); Transcript of Pretrial Hearing, May 6, 2008, pp. 17-18; Judgment at Conclusions of Law ¶¶ 1 and 2 (Addendum p. 29).

639, 642 (Minn. 1984)). The application of the law to undisputed facts is a question of law, and thus is freely reviewable. *Morton Bldgs., Inc. v. Comm'r of Revenue*, 488 N.W.2d 254, 257 (Minn. 1992). When a district court grants summary judgment based on the application of a statute to undisputed facts, the result is a legal conclusion that the appellate court reviews *de novo*. *Weston v. McWilliams & Assoc., Inc.*, 716 N.W.2d 634, 638 (Minn. 2006) (citing *Lefto v. Hoggsbreath Enterprises, Inc.*, 581 N.W.2d 855, 856 (Minn. 1989)).

In this case, none of the parties opposing the summary judgment motions at issue in this appeal asserted that there were any questions of fact to be determined by the district court. Rather, both Southview and Scherer and Bank First and Calhoun sought separate summary judgments based upon the undisputed facts of the case. Accordingly, the sole issues on appeal are questions of law to be determined *de novo* by this Court. Specifically, this Court must decide whether the district court erred in granting summary judgment in favor of the Bank First/Cahoun parties ("Respondents") with respect to the priority of their Mortgages and whether the district court erred in denying summary judgment on the issue of priority for the Southview/Scherer parties ("Appellants") with respect to their Mechanic's Liens. Because the application of law is one to be reviewed *de novo*, the same questions of law presented to the district court are before this Court on appeal. The district court's decision is entitled to no deference, as there were no issues of fact in dispute to be determined by the district court. An application of the law to the undisputed facts in this case mandates the reversal of the district court's order and the

granting of summary judgment in favor Southview and Scherer, declaring that their Mechanic's Liens are prior and superior to the Mortgages of Bank First and Calhoun.

ARGUMENT

Given the undisputed facts of this case, the priority of the Southview and Scherer Mechanic's Liens over the Mortgages of Bank First and Calhoun, is solely an issue of law, not of fact, mandating the reversal of the district court's order granting summary judgment in favor of Bank First and Calhoun.

Minnesota Statute § 514.05, subd. 1 provides:

> All liens, as against the owner of the land, shall attach and take effect from the time the first item of material or labor is furnished upon the premises for the beginning of the improvement, and shall be preferred to any mortgage or other encumbrance not then **of record**, unless the lienholder had **actual notice** thereof.

(Emphasis added).

All parties conceded at the time of summary judgment that the issue of priority is dictated by Minn. Stat. § 514.05, subd. 1. (*See* Appellants' Memorandum of Law in Support of Motion for Partial Summary Judgment; Transcript from Summary Judgment Motion, November 14, 2007, p. 35.[6]) Accordingly, the issues before the Court are simple and twofold: (1) whether the Bank First and Calhoun Mortgages were "of record" at the time Southview's Mechanic's Lien attached; and (2) whether Bank First and Calhoun had

[6] As stated by Brian Sund, attorney for Bank First, at the summary judgment motion hearing, "The whole case with respect to the Torrens property issue boils down really to the mortgage – the definition of, quote, "mortgage of record" under Minn. Stat. § 514.05 which is the mechanic's lien statute." (Transcript of Summary Judgment Motion Hearing, dated November 14, 2007, p. 35.)

established their burden of proving that Southview had actual notice of those Mortgages when its Lien attached. The indisputable answer to both questions is no.

The facts are clear and undisputed that the Bank First and Calhoun Mortgages were not "of record" on the Property at the time Southview's Mechanic's Lien attached, as neither Mortgage appeared on the certificate of title for the Property when Southview's Lien attached or was registered. The facts are similarly clear that Southview had no actual notice of the Bank First and Calhoun Mortgages at the time that its Mechanic's Lien attached and was registered. Indeed, Southview had no actual notice of the Mortgages until such Mortgages were made "of record" on the Property on September 20, 2006 – well after both the Southview and Scherer Liens attached. Accordingly, the district court erred when it denied Appellants' Motion for Partial Summary Judgment as to the priority of their Mechanic's Lien over the Bank First and Calhoun Mortgages. As a coordinate lien to Southview, Scherer's Lien shares in the priority of the Southview Lien, thus also taking priority over the Mortgages. As a result, the district court's order granting summary judgment in favor of Bank First and Calhoun and its denial of Southview and Scherer's Motion for Summary Judgment is erroneous and must be reversed.

I. NEITHER THE BANK FIRST MORTGAGE NOR THE CALHOUN MORTGAGE WERE "OF RECORD" AT THE TIME SOUTHVIEW'S MECHANIC'S LIEN ATTACHED, THUS RENDERING THE SOUTHVIEW AND SCHERER MECHANIC'S LIENS PRIOR AND SUPERIOR TO THE MORTGAGES.

The facts are undisputed that at the time the Southview Mechanic's Lien attached (May 17, 2006) neither the Bank First nor Calhoun Mortgages appeared as memorials on

the certificate of title for the Property (Certificate No. 1144974). Accordingly, the Mortgages were not "of record" at the time Southview's Mechanic's Lien attached and, therefore, cannot claim priority under the law. As a coordinate lien to the Southview Lien, Scherer's Mechanic's Lien shares in the priority of Southview's Lien.

As discussed in detail below, to be "of record" under the Torrens Act, an interest must be both filed with the registrar of titles and memorialized on the certificate of title, giving notice to all who inquire about or claim an interest in the Property. After all, it is the memorialization of the interest that provides notice to the world. If filing a document alone was sufficient to establish an interest in Torrens property, as Respondents contend, then the Torrens Act would be rendered meaningless, and there would be no need (and, indeed, no effect to) certificates of title.

In 1901, the Minnesota Legislature adopted the Torrens system of property registration. Act of Apr. 11, 1901, ch. 237, §§ 1-98, 1901 Minn. Laws 348, 348-378, *codified at* R.L. § 3370-403 (1905). The Torrens Act is codified in Minnesota Statutes, Chapter 508.

Under the Torrens system, a party seeking to register an ownership interest in property applies for a court adjudication of ownership and obtains a court decree converting the abstract property into Torrens property. *In re Collier*, 726 N.W.2d 799, 804 (Minn. 2007). After the ownership and other interests in the property are adjudicated, the registrar of titles creates a certificate of title which documents and sets forth all interests in and encumbrances on the property. *Id.* Once the certificate of title is issued, all conveyances, liens, instruments, encumbrances, and other matters that affect

the title to the property must be filed and registered with the registrar of titles in order to affect the title to the property. *Id.* (citing Minn. Stat. § 508.48).

"The purpose of the Torrens system was to create a title registration procedure intended to simplify conveyancing" by eliminating the need to perform extensive title examinations "by the issuance of a single certificate of title, free from 'any and all rights or claims not registered with the registrar of titles.'" *Hersh Properties, LLC v McDonald's Corp.*, 588 N.W.2d 728, 733 (Minn. 1999) (citing *In re Juran*, 178 Minn. 55, 58, 226 N.W. 201, 202 (Minn. 1929)). Under the Torrens system, extensive title searches into public records are alleviated because a purchaser of Torrens property, and all those claiming interest in the property, may, subject to very limited exceptions,[7] determine the status of the title by merely inspecting the certificate of title. *Hersh*, 588 N.W.2d at 733. In this way, the Torrens Act "abrogates the doctrine of constructive notice except as to matters noted on the certificate of title." *Juran*, 178 Minn. at 60, 226 N.W. at 202 (emphasis added).

It is long established in Minnesota law that unregistered instruments do not affect Torrens titles or create any interest in land, since the Torrens Act intends that all titles registered thereunder shall be free from all unregistered rights or claims except those specifically memorialized on the certificate of title. *Id.* at 58, 202; *United States v. Ryan*, 124 F. Supp. 1, 9 (D. Minn. 1954). With respect to the registration of mortgages, the Torrens Act, Minn. Stat. § 508.54, expressly provides:

[7] None of the seven exceptions are applicable in this case.

> The owner of registered land may mortgage the same by deed or other instrument sufficient in law for that purpose and such mortgage or other instrument may be assigned, extended, discharged, or released, either in whole or in part, or otherwise dealt with by the mortgagee by any form of deed or instrument sufficient in law for that purpose. Such deed, mortgage or other instrument, and all instruments assigning, extending, discharging, releasing, or otherwise dealing with the same, shall be registered and take effect upon the title only from the time of registration.
>
> (Emphasis added).

Under the Torrens Act, the registration of a mortgage requires two separate but equally important acts: (1) the presentation (or filing) of the instrument with the registrar of titles; and (2) the entering of a memorial upon the certificate of title of the instrument so registered. These two requirements are expressly set forth in Minn. Stat. § 508.49 and § 508.55, as follows:

> **§508.49. Interest less than fee; notice by memorial**
>
> All interests in registered land, less than an estate in fee simple, shall be registered by filing with the registrar the instrument which creates, transfers, or claims the interest, and by brief memorandum or memorial of it made and signed by the registrar upon the certificate of title.
>
> (Emphasis added).
>
> **§508.55. Registration of mortgage; memorial entered on certificate of title**
>
> The registration of a mortgage made by the registered owner, the registered owner's attorney-in-fact, or by a party having an interest registered on the certificate of title, other than the registered owner or the registered owner's attorney-in-fact, shall be made in the following manner: The mortgage deed or other instrument to be registered shall be presented to the registrar, and the registrar shall enter upon the certificate of title a memorial of the instrument registered, the exact time of filing, and its file number. The registrar shall also note upon the registered instrument the time of filing and a reference to the volume and page where it is registered.
>
> (Emphasis added).

As these provisions expressly provide, the "registration" of a mortgage interest requires both the filing of the mortgage instrument and the entry of a memorial of that mortgage on the certificate of title. In other words, the isolated act of filing an instrument with the registrar of titles is insufficient in itself to register a mortgage interest in property. Rather, it is the filing of the instrument, along with the entry of a memorial of the mortgage on the certificate of title, which actually registers the interest.

These "dual requirements" for registration were the subject of the 1954 case of *United States v. Ryan*, 124 F. Supp. 1 (D. Minn. 1954). In *Ryan*, the United States attempted to enforce a tax lien which had been filed in the office of the registrar of titles under the debtor's name, but which was not memorialized on the Torrens certificate of title to the property which the United States intended to lien. The court denied the United State's claim of lien and held that unless a lien or claim is noted as a memorial on the certificate of title of the property to be liened, it is not a lien against the registered interest of the owner. *Id.* at 12.

The court expressly held that to be valid, interests in registered land must not only be filed with the registrar of titles, but "to be effective, they must also be noted as memorials on the certificate of title covering the specific parcel of registered land intended to be affected by such filing." *Id.* at 6 (citing Minn. Stat. § 508.48 and § 508.64) (emphasis added). Otherwise, the court noted, "the filing of the instrument does not create a lien on the property." *Id.*

The court reasoned that if the filing of the instrument alone was sufficient to create the lien, without a memorial of the instrument on the certificate, the entire Torrens system would be rendered "meaningless." As the court explained:

> The purpose of the Torrens law is to establish an indefeasible title free from any and all rights or claims not registered with the registrar of titles, ...to the end that anyone may deal with such property with the assurance that the only rights or claims of which he need take notice are those registered [and appearing on the certificate of title].

Id at 9 (quoting *Juran*, 178 Minn. at 58, 226 N.W. at 202).

Thus, for a mortgage to be registered and "of record" under the Torrens system, such mortgage interest must be both filed with the office of the registrar of titles <u>and</u> memorialized on the certificate of title of the affected property. To hold otherwise would be to abolish the entire purpose of the Torrens Act.

A. The Critical Difference Between the Torrens and Abstract Property Systems is the Ability to Rely on the Existing Certificate of Title When Operating Under the Torrens System.

To fully appreciate the requirement of the two-step registration process under the Torrens Act, it is critical to understand the differences between the abstract property system (governed generally by the Recording Act, Minn. Stat. Chapter 507) and the Torrens property system (governed by the Torrens Act, Minn. Stat. Chapters 508 and 508A). Under an abstract property system, transactions that affect real property are filed or "recorded" with the county recorder's office where the property is located. *Collier*, 726 N.W.2d at 803-804. These recorded documents become public records and are a source for prospective purchasers or others with interests to ascertain the status of the title. *Id.* at 804. The recorded documents are summarized in an abstract of title, but such

abstract is not conclusive of all interests that may affect title to the property. *Id.* Accordingly, a person interested in the property must carefully investigate the property's history and condition to determine the marketability of its title. *Id.*

The Torrens Act simplifies this process and provides a straightforward method for determining interests in property. *Id.* Under the Torrens Act, once a property is converted to Torrens property, a certificate of title is issued which contains every conveyance, lien, instrument, or proceeding that affects the title to the property.[8] *Id.* Unlike an abstract of title, the certificate of title, by virtue of the Torrens Act, is conclusive evidence of all effective interests in the property. *Id.* (emphasis added). Those interests which do not appear "of record" as memorials on the certificate of title do not have effect. *Id.* In this way, the certificate of title provides assurance and certainty of the interests that exist which affect the property. *Id.* As such, one is able to rely upon the certificate of title as conclusive evidence of the interests which affect the title to the property. *Id. See also,* Minn. Stat. § 508.36.

Thus, unlike under the abstract system where filing a document is sufficient, in and of itself, to give constructive notice and be "of record" to the world under the Torrens system, a document must both be filed and appear as a memorial on the certificate of title to be "of record." This is a key distinction between the two systems of property registration – a key distinction which Respondents would like this Court to ignore.

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[8] Notwithstanding the seven specific exceptions set forth in Minn. Stat. § 508.25, none of which are applicable to this case.

B. Unlike with Abstract Property, to be "Of Record" Under the Torrens Act, an Interest Must Not Only be Filed with the Registrar of Titles, It Must Appear as a Memorial on the Property's Certificate of Title.

The single most important difference between abstract property and Torrens property is the issuance of a certificate of title and the ability to rely on the memorials contained thereon as conclusive evidence of all interests in the registered property. Indeed, the crux of this entire case is the difference between the two, very different, property systems.

Here, Respondents contend that the single act of filing their Mortgages with the registrar of titles was sufficient to register the Mortgages and make them appear "of record" under Minn. Stat. § 514.05, subd. 1, despite the important fact that the second prong of the Torrens registration process (memorialization on the certificate of title) was deficient. If Respondents' contention were correct – that the simple act of filing an instrument was sufficient to make the interest become "of record" in the Torrens system then there would be no difference between the Torrens and abstract property registration systems. Consequently, no party dealing with Torrens property could ever fully rely on the certificate of title. Rather, all persons dealing with Torrens property would need to undertake additional investigation into the property records to ensure that no documents were filed but failed to appear as memorials on the certificate of title. This is exactly what the Torrens system was enacted to prevent.

1. For Purposes of the Mechanic's Lien Statute (Minn. Stat. § 514.05) and the Torrens Act, the Mortgages Became "Of Record" on September 20, 2006.

The act of registration of an interest in Torrens property and the moment in which an interest becomes "of record" with respect to the mechanic's lien statute (Minn. Stat. § 514.05, subd. 1) are two related, but nonetheless, distinct legal concepts. Whether an interest is "of record" under Section 514.05, subd. 1 is determined by the particular type of property affected. In this case, the Property is Torrens property. Accordingly, the Torrens Act determines what is considered "of record."

As set forth above, under the Torrens Act, an interest in land less than fee simple (including a mortgage) is registered by: (1) the filing of the instrument which creates the interest with the registrar of titles; and (2) the entry of a memorial of the interest by the registrar on the certificate of title. Minnesota Statute § 508.55 could not be more clear:

> The registration of a mortgage...shall be made in the following manner: The mortgage deed or other instrument to be registered shall be presented to the registrar, and the registrar shall enter upon the certificate of title a memorial of the instrument registered....
>
> (Emphasis added).

Under the Torrens Act, once an interest is filed and appearing as a memorial on the certificate of title, it is properly registered and is considered "of record" as actual notice to all who deal with the property. It is not until the completion of both the filing and the memorialization that the registration process is complete. Thus, until the interest is memorialized on the certificate of title, it is not "of record" to the world. This is the basic tenet behind the Torrens Act and is why the Torrens Act abrogates constructive notice, as will be discussed below.

In contrast, under the abstract property system, the act of filing an instrument with the recorder's office alone is sufficient to make the interest appear "of record." Under abstract law, the act of filing a document imposes constructive notice to all that the interest exists. That is why one dealing with abstract property must complete a thorough title examination of all documents filed against the property to determine what is "of record." There is no certificate of title to rely upon in abstract property. Consequently, once an instrument is filed, it is considered, "of record."

To determine what is and is not "of record" for Torrens property is quite simple. The Court need only review the certificate of title for the Property effective at the time the Liens attached to determine what was "of record" on the Property at that moment in time. (*See* Iverson Aff. Ex. A. App. pp. 11-16.) Here, neither Mortgage appeared as memorials on the certificate of title to the Property when Southview's Mechanic's Lien attached on May 17, 2006. *Id.* At the time the Mechanic's Lien attached, the only certificate of title for the Property was Certificate of Title No. 1144974, which contained no reference to, or memorials of, the Mortgages. *Id.* (*See also* App. Ex. 4, pp. 49-51.) Indeed, it was not until the deed was re-filed and a new Certificate of Title No. 1189683 was issued – over a year later (on September 20, 2006) – that the Mortgages were memorialized on a certificate of title and, thus, became effectively registered. (App. Ex. 16, pp. 90-92.) Consequently, the Mortgages did not become "of record" under the Torrens Act until September 20, 2006. *Id.*

2. *The Electronic Filing Rules of 2008 Highlight the Difference Between When Instruments Conveying Interests in Property Become "Of Record" in the Torrens System and the Abstract System.*

In 2008, the Minnesota Legislature enacted Minn. Stat. § 507.0941 to § 507.0948, the Minnesota Real Property Electronic Recording Act. 2008 Minn. Laws c. 238, art. 2 §§ 1-10. This Act applies to the filing, recording, and registration of instruments for both abstract and Torrens property. With the advent of electronic filing in 2008, the Legislature officially clarified when an instrument conveying an interest in property becomes effective or "of record" when filed electronically. The provisions describing the difference in effective dates between filings in abstract property and Torrens property underscores, for purposes of this case, when an instrument becomes "registered" and "of record" under the Torrens Act, and essentially codifies the common law rules set forth above.

According to Minn. Stat. § 507.0943(c), which applies to Torrens property:

> Notwithstanding the time of its delivery, an electronic document is registered as to a parcel of registered land for purposes of chapters 508 and 508A when the electronic document is memorialized or otherwise noted on the certificate of title for the parcel.

(Emphasis added).

In contrast, Minn. Stat. § 507.0943(d), which applies to abstract property, provides:

> Notwithstanding the time of its delivery, an electronic document is recorded for purposes of this chapter [507] at the earlier of (i) the time the electronic document is accepted for recording or (ii) the next close of the recorder's office hours following the time of delivery.

Under § 507.0943(d), a document filed electronically with the recorder's office for abstract property is deemed "recorded" when it is filed and accepted by the office (or by the next close of the office following the delivery). In stark contrast, under § 507.0943(d), a document filed electronically with the registrar of titles for Torrens property is deemed "registered" only when it is memorialized on the certificate of title – not when it is accepted for filing by the registrar's office.

Thus, consistent with paper filings, a document filed in abstract property is "recorded" and becomes "of record" upon filing and acceptance. Whereas, a document filed in Torrens property is "registered" only upon memorialization on the certificate of title, not upon mere filing or delivery. The clear definitions set forth in the Electronic Recording Act underscore and codify the common law rules of when an instrument conveying an interest in property becomes effective or "of record" in the two different property systems. While the statutes are not similarly explicit for paper filings, the principle set forth in common law interpreting the Torrens Act is essentially codified in § 507.0943(e) and remains clear: that a document is registered and "of record" only when both filed and memorialized on the certificate of title.

3. *The Failure to Memorialize the Mortgages on the Certificate of Title Represents Incomplete or Failed Registration, as Opposed to a "Gap" Between the Time of Filing and the Memorialization on the Certificate of Title.*

Respondents contend that this case represents a "gap" situation. According to Respondents' argument, a "gap" situation occurs when there is backlog in the registrar's

office that results in a short delay in the time that it takes the registrar to memorialize filed documents on the certificate of title. Upon careful review of the sequence of document filings and registrations that occurred with respect to the Property, it is clear that this is not a "gap" situation at all, but rather, a situation in which the registration of the Deed (Doc. No. 4129639) and Mortgages on June 28, 2005 failed. It was not until the Deed (Doc. No. 4129639) was re-filed as a whole new document (Doc. No. 4307439) on September 20, 2006, that the memorialization (and thus) registration of the Mortgages was completed – over a year after the original filings of the Mortgages. (App. Ex. 13, 16, pp. 81-84, 90-92.) Accordingly, to equate the failed registration process that occurred here to a "gap" situation would be like equating apples to oranges – they are two entirely different things.

To fully explain why this was not a mere "gap" situation, it is critical that this Court understand the filing and registration processes that occurred here. Certificate of Title No. 1144974 was the one and only controlling certificate of title for the Property until September 20, 2006 (i.e., Certificate of Title No. 1144974 was the only certificate of title in existence for the Property when the Southview and Scherer Liens attached). (App. Ex. 4, pp. 49-51.) On September 20, 2006, the Warranty Deed, which was originally filed on June 28, 2005 as Document No. 4129639, was re-filed as Document No. 4307439 (a new and completely different document number). (App. Ex. 9, 13, pp. 64-65, 81-84.) The issuance of the new document number to the Deed evidences the failed registration of the Deed and Mortgages on June 28, 2005. Upon the re-filing of the Deed on September 20, 2006, as a new Document No. 4307439, a new Certificate of Title No.

1189682 was issued for Lots 3 and 4 and the Certificate of Title No. 114974 was cancelled. (App. Ex. 4, 13, 14, pp. 49-51, 81-84, 85-87.) Immediately thereafter, a "New Certificate" document was filed as Document No. 4307440. (App. Ex. 15, pp. 88-89.) This "New Certificate" document prompted the cancellation of Certificate of Title No. 1189682 and the issuance of the new and current Certificate of Title No. 1189683. (App. Ex. 14, 15, pp. 85-87, 88-89) Accordingly, the current Certificate of Title No. 1189683 was only issued after a string of filings to correct the incomplete registration that was attempted, but failed, on June 28, 2005.[9] This string of filings, and the re-filing of the Deed as a new document number, evidences the fact that this is not at all a "gap" situation, but instead, a failure of the registration process.

If this were a "gap" situation [i.e., a simple gap of time between: (1) the filing of the Deed and Mortgage; and (2) the issuance of a new certificate and memorialization of the Mortgages], the Deed would not have been re-filed as a new document with a new document number and a new registration date.[10] Rather, a new certificate would have been issued (even if delayed) upon the original filing of the Deed (Doc. No. 4129639) on June 28, 2005, and all documents filed after the Deed (Doc. No. 4129639) and Mortgages would have appeared on that new certificate of title, not on Certificate of Title No. 1144974.

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[9] Notably, the Warranty Deed that was memorialized on the Certificate of Title No. 1144974 on September 20, 2006, is Warranty Deed No. 4307439 – the Deed filed on September 20, 2006, not the Deed filed on June 28, 2005. (App. Ex. 4, 13, pp. 49-51, 81-84.) This further confirms the ineffective registration of Deed No. 4129639 and the Mortgages, which were all filed together on June 28, 2005.

[10] Certificate of Title No. 1144974 lists the registration date of the Deed (Doc. No. 4307439) as September 20, 2006. (App. Ex. 4, pp. 49-51.)

In this case, however, Certificate of Title No. 1144974 continued to exist after the original filing of the Deed (Doc. No. 4129639) and contains multiple memorials of interests that were filed after Respondents' failed attempt to register the Deed and Mortgages on June 28, 2005 [e.g., the mechanic's lien statements of Minnesota State Curb & Gutter (filed Feb. 3, 2006), Imperial (filed Feb. 9, 2006), Thompson PLBG (filed July 27, 2006), Southview (filed Aug. 29, 2006), and Great Northern I. (filed Sept. 8, 2006)]. (App. Ex. 4, pp. 49-51.) If this were a simple "lag time" situation, all of the documents filed after the Deed (Doc. No. 4129639) and Mortgages on June 28, 2005, would have only appeared on a new certificate of title after the Mortgages and would not have appeared on Certificate of Title No. 1144974. Here, however, Certificate of Title No. 1144974 contains memorials of the lien interests filed after the Mortgages and Deed (Doc. No. 4129639), but does not contain any memorials of the Mortgages. *Id.* This is precisely because the registration of the Deed (Doc. No. 4129639) and Mortgages on June 28, 2005 failed.

In addition, if this were a lag-time situation, the documents filed after the Mortgages would not have appeared on the new Certificate of Title No. 1189683 above (or ahead of) the Mortgages. (App. Ex. 16, pp. 90-92) As the Court will note, on the new Certificate of Title No. 1189683, the Mortgages appear out of sequence behind a number of interests that were clearly filed after the filing of the Mortgages. *Id*

The fact that Certificate of Title No. 1144974 continued to exist after the filing of the Deed (Doc. No. 4129639) on June 28, 2005, and never contained any memorial of the Mortgages, is precisely what differentiates this situation from what Respondents describe

as a "gap" situation. Here, no memorial of the Mortgages ever appeared on the applicable Certificate of Title No. 1144974 because the Respondents or the registrar of titles failed to complete the registration of the Mortgages until September 20, 2006, when the Deed was re-filed as a new document and a new Certificate of Title No. 1189683 was issued. Accordingly, this is not an issue of "lag time," this is an issue of defective and/or incomplete registration.

In the end, it is quite simple. When the Deed (Document No. 4129639) and Mortgages were filed with the registrar on June 28, 2005, the registrar failed to issue a new certificate of title for the Property. This, in turn, resulted in the failed registration of the Mortgages because those Mortgages were not memorialized on the Property's certificate of title. (As set forth above, the Mortgages needed to be memorialized on the certificate of title to be registered with respect to the Property.) Thereafter, numerous mechanic's lien statements were filed and memorialized on the Property's only existing Certificate of Title No. 1144974, but the Mortgages were not. (App. Ex. 4, pp. 49-51.) This evidences the fact that the Mortgages were not merely suffering from delayed memorialization, they were the result of a failed registration process.

It was not until the Deed was re-filed as a new Document No. 4307439 on September 20, 2006, that: (1) the new Certificate of Title No. 1189683 was issued; (2) the Mortgages were memorialized on Certificate of Title No. 1189683; and (3) the registration of the Mortgages was finally accomplished. (App. Ex. 13, 16, pp. 81-84, 90-92.) Consequently, this situation represents a failure of the registration process, not a mere "gap" in the time for memorialization.

4. *Certificate of Title No. 1144974 is Irrefutable Evidence that the Registration of the Mortgages Was Not Completed and that the Mortgages Were Not "Of Record" at the Time the Mechanic's Liens Attached.*

While Respondents would like the Court to ignore the fact that the Torrens Act controls this case, over 100 years of statutory and case law dictate otherwise. Unlike with abstract property where the filing of a document is sufficient to create an interest, under Torrens law, the document creating that interest must go through a second step to be effective – it must appear as a memorial on the certificate of title. The second step of memorialization is what sets the Torrens system apart from the abstract system. Indeed, the whole premise of the Torrens Act is to allow a party to look to and rely upon one document – the certificate of title – to determine all interests affecting the property. Absent actual notice, those interests not appearing as memorials on the certificate, lose their effect and/or their priority.

Minnesota Statute § 508.36 (2008) expressly provides that a certificate of title shall be received in evidence in all the courts of this state and be conclusive evidence of all matters and things contained in it. Certificate of Title No. 1144974 was the sole and controlling certificate of title for the Property until September 20, 2006. Thus, this Court must look to Certificate of Title No. 1144974 to determine what was and was not "of record" at the time the Southview's Mechanic's Lien attached on May 17, 2006.

The facts in this case are clear and undisputed. At the time Southview's Mechanic's Lien attached, the Mortgages were not properly registered, memorialized, or appearing of record with respect to the Property, as they did not appear as memorials on the then-controlling certificate of title. Certificate of Title No. 1144974 serves as

irrefutable evidence of that fact. As a result, Appellants were entitled to summary judgment declaring that, at the time Southview's Mechanic's Lien attached, the Mortgages were not "of record" rendering Southview's Mechanic's Lien (and thus Scherer's coordinate Lien) prior and superior to the Mortgages of Bank First and Calhoun.

II. GIVEN THE UNDISPUTED FACTS OF THE CASE, THE DISTRICT COURT ERRED WHEN IT CONCLUDED, WITHOUT ANY FACTUAL BASIS, THAT SOUTHVIEW HAD ACTUAL NOTICE OF THE BANK FIRST AND CALHOUN MORTGAGES.

Because the Mortgages were not properly registered and appearing of record as memorials on the certificate of title for the Property at the time the Southview Mechanic's Lien attached, to obtain priority over Southview's lien, Bank First and Calhoun must affirmatively prove that Southview had actual notice of the Mortgages at the time Southview's lien attached. Minn. Stat. § 514.05, subd. 1; *Jadwin v. Kasal*, 318 N.W.2d 844, 849-850 (Minn. 1982); *Juran*, 178 Minn. at 60, 226 N.W. at 202 (holding that the burden of proving actual notice is upon the party asserting it.). Bank First and Calhoun have not and cannot provide any such evidence, as no such notice exists. Indeed, the only evidence that exists, and the only evidence that is before the Court, is that Southview had no actual knowledge or notice of the Mortgages at the time its Mechanic's Lien attached to the Property. Accordingly, Southview (and Scherer as a coordinate lien-holder) were entitled to judgment as a matter of law declaring that their Mechanic's Liens are prior and superior to the Mortgages.

As a general rule under Minn. Stat. § 514.05, a mechanic's lien, which attaches at the time the first item of material or labor is furnished upon the premises, has priority over all mortgages that are not "of record" at the time the lien attached. *Jadwin*, 318 N.W.2d at 849-850; Minn. Stat. § 514.05, subd. 1. An exception to this rule exists when the mechanic's lienor had actual notice of an executed but unrecorded mortgage at the time that the lien attached. *Id* (emphasis added). It is well established in Minnesota law that the burden of proving actual notice rests upon the party asserting it. *Juran*, 178 Minn. at 60, 226 N.W. at 202. Accordingly, in this case, the burden rests upon Bank First and Calhoun to prove Southview had actual notice of the Mortgages.

Actual notice is generally defined as "[n]otice given directly to, or received personally by, a party." *Black's Law Dictionary*, 1087 (7th ed. 1999). With respect to mortgage instruments, this Court has repeatedly held that actual notice "requires conveying knowledge of a signed, enforceable agreement." *Comstock & Davis, Inc. v G.D.S. & Assocs.*, 481 N.W.2d 82, 85 (Minn. Ct. App. 1992). Actual notice thus requires actual knowledge. *In re Alchemedes/Brookwood, Ltd. Partnership*, 546 N.W.2d 41, 42 (Minn. Ct. App. 1996) (emphasis added). Anything less than actual knowledge is not actual notice, but rather, constructive notice or no notice at all.

It is long established in Minnesota law that the Torrens Act abrogates the doctrine of constructive notice except for matters listed on the certificate of title. *See e.g.*, *Juran*, 178 Minn. at 60, 226 N.W. at 202; *Collier*, 726 N.W.2d at 806. Consequently, unless Bank First and Calhoun can affirmatively show that Southview had actual knowledge of

the Mortgages, the Mortgages are, by operation of Minnesota law, subordinate to Southview's Mechanic's Lien.[11]

A. History of the Actual Notice Exception to the Torrens Act

Since the enactment of the Torrens Act, Minnesota appellate courts have repeatedly addressed what constitutes "actual notice" in property cases. While the cases have varied in facts and circumstances, in no case has a court held that a lien claimant or purchaser without direct or personal knowledge of an unrecorded or unregistered interest, was subject to that unrecorded or unregistered interest.

The Minnesota Supreme Court first carved out the actual notice exception in *In re Juran*, 178 Minn. 55, 226 N.W. 201 (Minn. 1929). In *Juran*, the Court held that the Torrens Act abrogates the doctrine of constructive notice except to matters noted on the certificate of title. *Id.* at 60, 226 N.W. at 202. The Court further held that "it does not do away with the effect of actual notice, although it undoubtedly imposes the burden of proving such notice upon the one asserting it." *Id.* While the Court carved out a narrow exception for actual notice of an unregistered interest, it did so reluctantly, noting that:

> The purpose of the Torrens Law is to establish an indefeasible title free from any and all rights or claims not registered with the registrar of titles...to the end that anyone may deal with such property with the assurance that the only rights or claims of which he need take notice are those so registered....

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[11] By extension, the Mortgages are subordinate to Scherer's Mechanic's Lien which, as a coordinate lien, shares in the priority of Southview's Mechanic's Lien. *In re Zachman Homes*, 47 B.R. 496, 512 (Bankr. D. Minn. 1984), *Glass v. Freeburg*, 52 N.W. 90 (Minn. 1892), Minn. Stat. § 514.15. The parties have stipulated that the Southview and Scherer Liens are valid, coordinate, and of equal standing. [*See* Judgment, p. 3 (Addendum p. 29.)]

Id. at 58, 226 N.W. at 202.

The cases following *Juran* have upheld the actual notice exception while still preserving the general tenets of Torrens law: That those dealing with property may rely upon the certificate of title to contain all interests which effect the land, and that those interests which do not appear on the certificate of title, are without effect.

In 1952, the Minnesota Supreme Court addressed the application of the actual notice exception in *Kane v. State*, 55 N.W.2d 333 (Minn. 1952). In *Kane*, a property owner brought an action for judgment declaring certain lots to be free of restrictive covenants which were noted on the back of a plat but not memorialized on the certificates of title for the lots. *Id.* at 334. In that case, a plat was approved and lots were registered. *Id.* The court, in registering the lots, omitted all restrictions from the decree of registration, and such restrictions were also omitted from the certificates of title for the lots. *Id.* The Kanes purchased two lots without any actual knowledge of any use restrictions. *Id.* When the Kanes attempted to sell the lots, certain restrictions noted on the back of the plat were discovered. *Id.* The Kanes, and others similarly situated, brought an action to release their properties from the restrictions on the basis that they had no actual notice of the same. *Id.*

The Court held in favor of the Kanes, finding that because the restrictions were not memorialized on the certificates of title, the Kanes could not be subject to the encumbrance. *Id.* at 337. The Court noted that under Torrens law, a good faith purchaser is charged with notice of all estates, mortgages, liens, charges, and interests <u>noted as memorials on the certificate of title</u>. *Id.* (emphasis added). But, as the Court emphasized,

such notice requirement ends there. *Id.* It does not require a purchaser to go further to ascertain whether there may be other encumbrances which are not shown as memorials on the certificate of title. *Id.* The Court reasoned that to hold otherwise "would tend to create confusion which would jeopardize the stability and purpose of the Torrens law." *Id.*

A similar result is dictated in the case at hand. Here, the Mortgages were not memorialized on the certificate of title at the time Southview's Lien attached. As in *Kane*, Southview had no duty or obligation to go further to ascertain whether there may be other interests or mortgages which were not shown as memorials on the certificate. Accordingly, under *Kane*, Southview is only subject to those interests noted as memorials on the certificate of title at the time Southview's lien attached. Since the Mortgages did not so appear, Southview cannot be subject to the same.

In 1975, the Court specifically addressed the issue of actual notice as it relates to a mechanic's lien claimant. In *C.S. McCrossan, Inc. v. Builders Finance Company*, a mortgage was properly registered and memorialized under the Torrens Act on a property that included 32 separate parcels. 232 N.W.2d 15, 17 (Minn. 1975). All parcels were included on a single certificate of title which memorialized the mortgage. *Id.* On the date that McCrossan, the lien claimant, began work on the property (i.e., the date that McCrossan's mechanic's lien attached), the mortgage was properly filed, memorialized, and registered on the existing, single certificate of title. *Id.* In addition, throughout the time that McCrossan performed work on the property, the mortgage was properly noted on the existing certificate of title. *Id.*

After the last item of work was completed by McCrossan, the single certificate of title for the entire property was "split" and 32 new certificates of title covering the lots in the tracts were issued by the registrar. *Id.* The registrar, however, failed to memorialize the mortgage on seven of the certificates. *Id.* After the issuance of the new certificates, McCrossan filed and registered its mechanic's lien. *Id.* At the time the McCrossan's lien was filed, no mortgage was memorialized on the certificates of title for the subject lots. *Id.* When McCrossan commenced its mechanic's lien foreclosure, the error was discovered and the mortgage was memorialized out of sequence on the subject certificates. *Id.*

McCrossan argued that because the mortgage was not memorialized on the certificate at the time its mechanic's lien statement was filed, its lien had priority over the mortgage. *Id.* The Court, however, found that McCrossan had actual knowledge of the mortgage at the time that its lien attached. Strictly limiting its decision to the particular facts of the case, the Court held that McCrossan had actual notice of the mortgage because: (1) at the time that McCrossan's lien attached (i.e., on the date of the first item of contribution), the mortgage was properly registered and memorialized on the then-existing, single certificate of title; (2) at all times during McCrossan's work, the mortgage was properly filed and memorialized on the then-existing, single certificate of title; (3) McCrossan did not rely upon the certificates of title that omitted the mortgage when it furnished the labor and materials; and (4) McCrossan received partial payments from the bank (mortgagee) during its work on the property, giving McCrossan actual knowledge of the mortgagee's interest prior to the date the omission occurred. *Id.* at 19.

In defining the contours of actual notice, the Court largely based its decision on the lien claimant's reliance on the certificate of title existing at the time that the mechanic's lien attached and existing during the time that McCrossan furnished labor and materials. *Id.* (emphasis added). Because McCrossan did not rely upon a certificate of title which omitted the mortgage; because McCrossan performed all work in reliance of a certificate of title that did properly memorialize the mortgage; and because McCrossan had actual knowledge of the mortgage interest when it accepted partial payments from the mortgagee, the Court held that McCrossan had actual notice of the mortgage and refused to give McCrossan's lien priority over the mortgage. *Id.* (emphasis added)

The facts in *McCrossan* are materially distinguishable from the case at hand. Unlike the mortgage in *McCrossan*, the Bank First and Calhoun Mortgages were not properly registered and memorialized on the Certificate of Title No. 1144974 which existed at the time when Southview's lien attached and was registered. Nor were the Mortgages properly registered or memorialized on the certificate of title while Southview performed its work. Accordingly, Southview only had notice of Certificate of Title No. 1144974, which did not contain a memorial of the Mortgages when its lien attached, when it performed its work, or when it filed/registered its mechanic's lien statement. In addition, Southview only had Certificate of Title No. 1144974 to rely upon when its Lien attached and was registered, as that was the only certificate of title in existence for the Property at all of those times. Moreover, unlike in *McCrossan*, Southview did not receive any payments from Bank First or Calhoun, and had no actual knowledge of the existence of the Mortgages or the mortgage interests. Accordingly, under the factors

used to establish "actual notice" in *McCrossan*, Southview had no actual notice of the Mortgages, and thus those Mortgages do not take priority.

In 2005, the Minnesota Court of Appeals further limited the application of *McCrossan* in *In re the Petition of Walther*, 2005 WL 3470490 (Minn. Ct. App. Dec. 20. 2005) (unpublished). (*See* App. Ex. 17, pp. 93-98.)[12] In *Walther*, a petitioner brought an action to remove a memorial of an easement from a certificate of title, which the registrar of title erroneously omitted from the petitioner's predecessor's certificate of title and later added to the petitioner's certificate of title.

The facts of Walther are as follows: Karen Hays sold part of a 400-acre parcel to the Clausens, reserving a drainage and ingress/egress easement over the property. *Id.* at *1. The easement was memorialized on the certificate of title to the property at that time. *Id.* The Clausens then sold the property to the Jagts. *Id.* However, the registrar of titles, due to "human error," failed to memorialize the easement on the Jagt's certificate. *Id.* The Jagts then sold the property to petitioner Walther, who had no actual knowledge of the easement. *Id.* After the sale to Walther, the registrar added the easement to Walther's certificate of title in an attempt to correct the error. *Id.* at *2. Walther then brought action to remove the memorial of the easement from the certificate, thereby voiding the easement. *Id.*

Hays opposed the petition, arguing that Walther had actual notice of the easement. Hays argued that "actual notice" is a common law concept not expressly defined in the

[12] This unpublished case may be considered as it is appended. Minn. Stat. § 480A.08, subd. 3 (2008)

Torrens Act, and that certain statements at the closing regarding the easement either showed that Walther had knowledge of the easement or should have prompted Walther to make further inquiry into the existence of an easement. *Id.* at *5. As a result, Hays argued, Walther had "implied notice" of the easement. *Id.* Hays urged the court to expand the scope of actual knowledge to include implied or constructive notice. *Id.*

This Court flatly rejected this argument. *Id.* at *6. Instead, this Court relied upon *Juran* and the notice principles underlying the Torrens Act in affirming the district court's order to remove the memorial of the easement from the certificate of title. Citing *Juran*, this Court stated that "cases involving Torrens property require actual notice and specifically reject the concept of constructive or implied notice....The concept of 'inquiry notice' does not apply to Torrens property." *Id.* at *6. Accordingly, because the easement was not memorialized on the certificate of title when the petitioner purchased the property, and because the petitioner did not have actual knowledge of the easement, the easement was not valid as to petitioner. *Id.*

Most significantly, this Court rejected Hays' attempt to use *McCrossan* as a basis for arguing that in cases where a clerical error results in the failure to memorialize an interest, such interest retains its priority. *Id.* Instead, this Court emphasized the "strictly limited application" of *McCrossan* and the factual distinctions which showed that Walther had no knowledge of the erroneously unregistered interest. *Id.* In the end, this Court noted that it was "sympathetic" to the easement holders, who, as a result of a clerical error, lost their right to a long-standing property interest, but reasoned that "this harsh result is dictated by the Torrens law." *Id.*

A similar analysis and finding is warranted in the case at hand. Here, Southview had no notice – actual or otherwise – of the Bank First and Calhoun Mortgages. There is absolutely no evidence that exists that shows that Southview had any notice or knowledge of the Mortgages. While the failure to memorialize the Mortgages on the Certificate of Title No. 1144974 may (or may not) have been an error, the error does not negate the priority of Southview's Lien. Rather, as this Court in *Walther* makes clear, the fact that the Mortgages were erroneously excluded from the certificate of title does not remedy the fact that they are now junior to Southview's Lien. Since Southview had no actual notice of the error or of the Mortgages, Southview is entitled to priority. As the Court reasoned in *Walther*, any result to the contrary would be antithetical to the very foundation of Torrens law.

Most recently, the Minnesota Supreme Court had the opportunity to abrogate altogether the actual notice exception as declared in *Juran* but specifically declined to do so. In *In re Collier*, the Court reaffirmed that a purchaser with actual knowledge of a prior, unregistered mortgage is not a good faith purchaser under Minn. Stat. § 508.25. 726 N.W.2d 799, 808 (Minn. 2007). In that case, Collier purchased property with actual and undisputed knowledge of an unregistered mortgage. *Id.* at 802. Collier argued that the actual notice exception first articulated in *Juran* was mere dicta and should be ignored as contradictory to the principles of the Torrens Act. *Id.* at 806.

The Court disagreed and held that the "actual notice" exception to the Torrens law, as first articulated in *Juran*, continues as precedent today. *Id.* at 808. However, because Collier admitted to actual knowledge of the unregistered mortgage, the Court did not

need to address what constitutes "actual notice" under *Juran*. *Id.* at 809 (emphasis added). Instead, the Court relied upon Minn. Stat. § 508.25 to hold that a purchaser of Torrens property who has actual notice of a prior, unregistered interest in property is not a good faith purchaser. *Id.* In this way, the decision in *Collier* rests upon the definition of "good faith purchaser," not a determination of what constitutes actual notice. *Id.*

Notably, the Court specifically declined to define the outer contours of actual notice and limited its findings to the specific facts of that case. *Id.* Accordingly, because actual notice was present in *Collier*, *Collier* is not instructive to the issues in the case at hand. Nonetheless, *Collier* serves as a reminder that the only savior to an unregistered interest under Torrens law is clear, actual, and undisputed notice, which is not present in the case at hand.

B. The District Court Erred by Concluding that Southview had Actual Notice of the Mortgages, Despite the Undisputed Facts to the Contrary.

As set for in detail above, for over 80 years, Minnesota appellate courts have repeatedly upheld the basic principle of the Torrens Act – that absent actual notice of the same, unregistered interests are ineffective against those interests first duly filed and memorialized on the certificate of title. *Id* at 805-806. Here, it is undisputed that the Bank First and Calhoun Mortgages were not memorialized on the Certificate of Title No. 1144974 when Southview's Mechanic's Lien arose, attached, and was registered. Based upon the contents of Certificate of Title No. 1144974, Southview furnished labor and materials to the Property and registered its Mechanic's Lien Statement without any actual notice of the Mortgages. (*See* Iverson Aff., App. pp. 11-16.) Torrens law provides that

Southview was justified in relying upon Certificate of Title No. 1144974 to contain all interests "of record" and that Southview takes priority over any interests that did not appear on the certificate of title at the time Southview's Lien attached. Because Southview had no actual notice of the unmemorialized Mortgages, it cannot be subject to them. Under the facts of this case, the basic tenets of Torrens law, and the decades of precedents set by the high court of this State, Southview was entitled to summary judgment declaring its Mechanic's Lien prior to the Mortgages of Bank First and Calhoun.

The district court's conclusions of law are reviewed *de novo* by this Court. *Carlson v Allstate Ins. Co.*, 749 N.W.2d 41, 45 (Minn. 2008); *Alchemedes*, 546 N.W.2d at 42 (Where underlying facts are not in dispute, the appellate court would give "no deference to the district court's legal conclusions.") As such, the district court's erroneous legal conclusion that Southview had "actual notice" of the Mortgages is entitled to no deference by this Court. Instead, this Court must review the undisputed facts and apply the law *de novo* to those facts.

While the district court's conclusions of law are entitled to no deference by this Court, it is instructive to review how the district court's conclusions were legally erroneous in order to see why Respondents' arguments in this case must fail. In Paragraph 5 of the district court's Conclusions of Law, the court erroneously concludes, <u>without citing any factual basis</u>, that "Southview and Scherer Bros. had actual knowledge Certificate of Title No. 1144974 was inaccurate." [Summary Judgment Order, p. 5 (Addendum p. 5).] "Southview and Scherer Bros. could not have reasonably and in good

faith, relied on something they knew was inaccurate." *Id.* In its Memorandum, the court reasoned that because Calhoun was listed as the owner of the Property on the Certificate of Title No. 1144974, it "should have been enough to raise questions on behalf of the subcontractors...The subcontractors had a duty to themselves to inquire as to why the party they were contracting with was not the owner listed on the Certificate of Title if they intended to be able to rely on the Certificate of Title as to the validity of their mechanic's liens and their ability to be paid for their work." *Id* at p. 13. From this flawed analysis, the court erroneously concluded that Southview and Scherer "had actual knowledge" that Certificate of Title No. 1144974 was "inaccurate." *Id.*

The district court's legal conclusion is a blatantly erroneous under the law. First, there was no evidence or facts whatsoever that Appellants knew Certificate of Title No. 1144974 was erroneous. Indeed, the uncontroverted facts are directly contrary – Southview specifically proved that it had no actual knowledge or notice of the Mortgages. (*See* Iverson Aff., ¶¶ 4, 7, App. pp. 11-16.) The fact that Calhoun was listed as the owner of the Property on Certificate of Title No. 1144974 does not, in any way, show (let alone prove) that Southview knew about the Mortgages or that the certificate should have included memorials of the Mortgages. To make such a leap was a clear error in the application of law by the district court.

Second, for the court to erroneously hold that Appellants had a "duty to inquire" demonstrates that the court misapplied the concept of actual notice under Torrens law. As this Court held in *Walther*, "cases involving Torrens property require actual notice and specifically reject the concept of constructive or implied notice....The concept of

'inquiry notice' does not apply to Torrens property." 2005 WL 3470490 at *6 (citing *Juran*, 178 Minn. at 60, 226 N.W. at 202). Accordingly, there is no "inquiry notice" applicable to Appellants under Torrens law.

Third, for the district court to make the illogical jump that "should have inquired" amounts to actual knowledge/actual notice is a fundamental misapplication of law. Under Torrens law, there is no "duty to inquire" if there are or may be other interests not appearing on the certificate of title. "The purpose of the Torrens system of land registration is to ensure that a person dealing with registered property 'need look no further than the certificate of title for any transactions that might affect the land.'" *In re Petition of Willmus*, 568 N.W.2d 722, 725 (Minn. Ct. App. 1997) (citing *Mill City Heating & Air Cond. v. Nelson*, 351 N.W.2d 361, 364-65 (Minn. 1984)). "The Torrens Act provides a registered land ownership system where a 'purchaser may accept [a certificate of title to registered land] as truly stating the title and may disregard any claim no so appearing.'" *Willmus*, 568 N.W.2d at 725 (citing *Kane*, 55 N.W.2d at 338). In other words, the whole foundation of Torrens law is that a person dealing with property is entitled to rely on the certificate of title to contain all applicable interests of record, and those not appearing on the certificate of title are without effect.

In a similarly flawed analysis, Respondents essentially argue that Southview "should have known" that there was some type of error in Certificate No. 1144974 because it listed Calhoun as the owner of the Property. Respondents further argue that Southview should have inquired to see if there were any mortgages not appearing of record on the certificate of title. But "should have known" and "should have inquired"

are not the standards applied under Torrens law. Torrens law specifically abrogates constructive or implied notice. *See e.g.*, *Juran*, 178 Minn. at 60, 226 N.W. at 202; *Collier*, 726 N.W.2d at 806.

Actual notice does not include "should have" "would have" or "could have" known or inquired. *Alchemedes*, 546 N.W.2d at 41. Actual notice is actual knowledge. Without actual knowledge there is no actual notice. Nowhere in this case can Respondents show that Southview had actual knowledge of the Mortgages; simply because Southview did not have actual notice of the Mortgages.

The law is clear that Southview only needed to look to Certificate of Title No. 1144974 and could rely upon the contents of that certificate to be true and correct. After all, Certificate of Title No. 1144974 was the only certificate of title applicable to the Property at the time Southview's Lien attached and was registered. Consequently, Southview had no duty to investigate if there were errors in the certificate or if there were possible mortgages on the Property that were not appearing of record on the certificate. Torrens law does not impose a duty upon interest holders to go beyond the certificate of title and investigate whether the certificate is erroneous or if memorials are missing. To hold, as the district court did, that Southview had a duty to inquire as to whether there were mortgages not appearing on the certificate of title, would be to completely abrogate nearly 100 years of Torrens law and essentially gut the Torrens Act of any differentiation from the Recording Act.

Quite simply, there are absolutely no facts supporting the proposition that Southview had any actual knowledge or notice of the Mortgages. Indeed, the

uncontroverted facts are to the contrary – that Southview had no actual knowledge of the Mortgages. (*See* Iverson Aff., ¶¶ 4, 7, App. pp. 11-16.) Accordingly, the district court's conclusion of law that Southview and Scherer had actual notice of the Mortgages was erroneous and must be reversed.

C. Bank First and Calhoun May be Eligible for Recovery from the General Assurance Fund Under Minn. Stat. § 508.76.

As the cases above illustrate, the Torrens Act, by its very nature, is intended to be strictly enforced and upheld. As a result, in rare occasions, an error may occur in a certificate of title that deprives a party of its interest or priority in property. In acknowledgement of the potentially harsh outcomes that may result from the strict application of the Torrens Act, the Act itself has established a general assurance fund from which parties aggrieved by an error made by the registrar of titles may seek recovery. Minn. Stat. § 508.76 (2008).

Depending upon the cause of the error which deprived their Mortgages of priority in this case, Bank First and Calhoun may be subject to recovery from the general assurance fund established in Minn. Stat. § 508.76. Bank First and Calhoun are the only parties in this lawsuit with standing to seek recovery from the fund, and are, therefore, the only parties who may be able initiate such action.

Minnesota Statute § 508.76, subd. 1 provides:

> Any person who, without negligence on that person's part, sustains any loss or damage by reason of any omission, mistake or misfeasance of the registrar or the registrar's deputy, or of any examiner or of any court administrator, or of a deputy of the court administrator or examiner, in the performance of their respective duties under this law, and any person who, without negligence on that person's part, is wrongfully deprived of any land

> or of any interest therein by the registration thereof, or by reason of the registration of any other person, as the owner of such land, or by reason of any mistake, omission, or misdescription in any certificate of title, or in any entry or memorial, or by any cancellation, in the register of titles, and who, by the provisions of this law, is precluded from bringing an action for the recovery of such land, or of any interest therein, or from enforcing any claim or lien upon the same, may institute an action in the district court to recover compensation out of the general fund for such loss or damage.

Accordingly, if the failure to memorialize their Mortgages on the Certificate of Title No. 1144974 was solely due to the error of the Hennepin County Registrar of Titles (a fact that is still unknown), Bank First and Calhoun may have standing to seek recovery from the fund. They are the only parties with standing to seek such recovery. Neither Southview nor Scherer has the ability to seek recourse from this fund. In this way, the strict application of the Torrens Act serves the ends of justice: Southview maintains the priority to which it is entitled as an innocent lien claimant without notice, and Bank First and Calhoun are able to seek recovery from the general fund for any damages they suffered as a result of the error in the registration of their Mortgages.

Bank First contends that it did everything Minnesota law required to establish its priority. In the end, however, Minnesota Torrens law required more – it required that the Mortgages be memorialized on the certificate of title, thus properly registering the interest and giving notice of that interest to all dealing with the Property, including innocent parties like Southview and Scherer. As between the mortgagees and the lien claimants, some parties will suffer loss. Under the clear and established rule of Torrens law, it is the mortgagees – not the lien claimants – that lose priority.

Fortunately for Bank First and Calhoun, the law giveth as the law taketh away. In recognition of the sometimes harsh effects of the Torrens Act, the Act itself provides a remedy to Bank First and Calhoun. Bank First and Calhoun will be able to seek recovery from the general assurance fund, whose purpose is precisely to provide recovery to those parties, like Bank First and Calhoun, who are aggrieved by errors made by the registrar of titles. To that end, the principles of equity and justice are served.

CONCLUSION

For the aforementioned reasons, Appellants Southview Design and Construction, Inc. and Scherer Bros. Lumber Co. respectfully request that this Court reverse the district court's Amended Findings of Fact, Conclusions of Law, and Order for Summary Judgment and enter judgment declaring that the Mechanic's Liens of Southview and Scherer are prior and superior to the Mortgages of Bank First and Calhoun Development, LLC with respect to Lot 4, Block 1, Edenvale Highlands, Hennepin County, Minnesota.

Respectfully submitted,

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Dated: January 23, 2009

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A-08-1883

STATE OF MINNESOTA

IN COURT OF APPEALS

Southview Design & Construction, Inc.,

and

Scherer Bros. Lumber Co.,
Appellants,

v.

APPELLANTS' CERTIFICATION OF BRIEF LENGTH

Bank First; Calhoun Development, LLC;
Imperial Developers, Inc.; Thompson PLBG Corp.;
Great Northern I, Inc.; The Woodshop of Avon, Inc.;
Lind Homes, Inc.; and Minnesota State Curb & Gutter,
a division of AVR, Inc.,
Respondents.

I hereby certify that this Appellate Brief conforms to the requirements of Minn. R. Civ App. P. 132.01, subd.1 and 3, for a brief produced with a proportional font. The length of this brief is 13,318 words. This Brief was prepared using Microsoft Word 2007.

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