

NO. A08-1883

State of Minnesota
 In Court of Appeals

Imperial Developers, Inc.,

Plaintiff,

vs.

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

Respondents,

Regal Custom Homes, Inc.; Guaranteed Mortgage of Minnesota;
 Jeremy J. Roseth; JMA Builders, Inc.; Prime Security Bank (Shakopee);
 and First Commercial Bank (Bloomington),

Defendants,

Southview Design & Construction, Inc.,

Appellant,

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, L.L.C. and Alliance Bank,

Fourth Party Defendants.

RESPONDENT BANKFIRST'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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LEGAL ISSUES PRESENTED

I. Was Respondent BankFirst's Mortgage Prior and Superior to Appellants Southview and Scherer Bros.' Mechanics' Liens Because It Was "Of Record" – Although Not Memorialized on a New Certificate of Title – Prior to the Attachment of Appellants' Coordinate Liens?

The district court ruled in the affirmative, granting BankFirst's motion for partial summary judgment on the issue of priority and denying Southview and Scherer Bros.' cross-motion for partial summary judgment.

Apposite Cases and Statutes:

C.S. McCrossan, Inc. v. Builders Finance Co., 304 Minn. 538, 232 N.W.2d 15 (1975).

Home Lumber Co. v. Kopfmann Homes, Inc., 535 N.W.2d 302 (Minn. 1995).

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Minnesota Statutes section 508.54.

Minnesota Statutes section 508.55.

Minnesota Statutes section 514.05.

II. Did Appellants Southview and Scherer Bros. Have Actual Notice that Certificate of Title No. 1144974 Was Inaccurate Because It Did Not List Lind Homes, Inc. as “Owner” of the Subject Property?

The district court ruled in the affirmative, finding that Appellants Southview and Scherer Bros. knew the party with whom they were contracting was not the record owner memorialized on the Certificate of Title.

Apposite Cases and Statute:

C.S. McCrossan, Inc. v. Builders Finance Co., 304 Minn. 538, 232 N.W.2d 15 (1975).

In re Collier, 726 N.W.2d 799, 809 (Minn. 2007).

Minnesota Statutes section 514.011, subdivision 2(a).

STATEMENT OF THE CASE

This mechanic's lien action involves improvements to eight Torrens lots in Eden Prairie, Minnesota, as part of a high-end residential development known as Edenvale Highlands. Respondent Calhoun Development, LLC ("Calhoun") – the developer – hired Imperial Developers, Inc. to perform the necessary site preparation work. Subsequently, Calhoun sold Lots 1-2 to Regal Custom Homes, Lots 3-5 to Lind Homes, Inc., and Lots 6-8 to JMA Builders, LLC. This appeal only involves Lot 4,¹ upon which Lind Homes, Inc. constructed a luxury home. Lot 3 and Lot 5 remain vacant.

Lind Homes, Inc. financed its purchase of Lots 3-5 by granting a mortgage in the amount of \$2,155,000.00 to Respondent BankFirst and a second mortgage in the amount of \$243,817.76 to Respondent Calhoun. Both mortgages were registered² by the Hennepin County Registrar of Titles on June 28, 2005. For unknown reasons, a new Certificate of Title for Lot 4 showing Lind Homes, Inc. as the owner and memorializing BankFirst's and Calhoun's respective mortgages was not issued until September 20, 2006. Appellants Scherer Bros. Lumber Co. ("Scherer Bros.") and Southview Design & Construction, Inc. ("Southview") performed their first improvements of Lot 4 on October 13, 2005, and on May 17, 2006, respectively. Thus, Scherer Bros. commenced its

¹ The property is legally described as Lot 4, Block 1, Edenvale Highlands, Hennepin County, Minnesota ("the Subject Property").

² At the time an instrument affecting title to Torrens property is filed in the office of the county registrar, the registrar registers that instrument by stamping it with a document number and a notation of the exact time of filing. Minn. Stat. § § 508.38 & 508.55; In re Owen Fin. Servs., Inc., 649 N.W.2d 854, 856-57 (Minn. App. 2002). Once registered, the mortgage is "of record." See Home Lumber Co. v. Kopfmann Homes, Inc., 535 N.W.2d 302, 304 (Minn. 1995).

improvements four months after BankFirst registered its mortgage, while Southview began furnishing improvements on Lot 4 nearly a year later.

Following Lind Homes, Inc.'s default on its mortgages, BankFirst foreclosed on its mortgage, with the sheriff's sale taking place on June 14, 2007. Contractors Southview and Scherer Bros. also asserted mechanic's lien claims for their unpaid improvements to Lot 4.

On November 14, 2007, Appellants Southview and Scherer Bros. and Respondents BankFirst and Calhoun brought cross-motions for summary judgment, seeking a ruling on the priority of their respective liens, before the Honorable William R. Howard, Judge of District Court for Hennepin County. In the Amended Findings of Fact, Conclusions of Law and Order for Summary Judgment, filed on February 14, 2008, Judge Howard granted Respondents' motion for summary judgment, ruling: (1) Respondents' respective mortgages are prior and superior to Appellants' mechanics' liens because the mortgages were "registered and of record" on June 28, 2005, well before Appellants' liens attached; and (2) Appellants had actual knowledge that Certificate of Title No. 1144974 (upon which they claim to have relied when deciding whether to perform improvements upon Lot 4) was inaccurate as it listed Calhoun – not Lind Homes, Inc. – as the record owner. In his Memorandum (incorporated by reference into the February 14, 2008 Amended Findings of Fact, Conclusions of Law and Order for Summary Judgment), Judge Howard further noted that under Appellants' proposed "view of Torrens law," their mechanics' liens would be *invalid* since no pre-lien notice was given to the owner of record

(Calhoun) listed on Certificate of Title No. 1144974 at the time Appellants contracted with Lind Homes, Inc.

In lieu of proceeding to trial on the validity of Appellants' respective lien amounts and their claimed associated attorney fees, Appellants and Respondents entered into an Amended Stipulation of Facts on June 18, 2008. Accordingly, on September 16, 2008, judgment was entered pursuant to Judge Howard's 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., that was filed on September 10, 2008.

Southview and Scherer Bros. filed their joint Notice of Appeal on October 28, 2008.

STATEMENT OF FACTS

On June 27, 2005, Respondent Calhoun, the developer of Edenvale Highlands in Eden Prairie, Minnesota, conveyed Lots 3, 4, and 5 to builder Lind Homes, Inc. by Warranty Deed, registered on June 28, 2005, by the Hennepin County Registrar of Titles as Document No. 4129639. (A.65.)³ Also on June 27, 2005, Lind Homes, Inc. granted a mortgage on Lots 3, 4, and 5 in favor of BankFirst in the amount of \$2,155,000.00. On June 28, 2005, at 11:00 a.m., BankFirst's mortgage was registered as Document No. 4129640 by the Hennepin County Registrar of Titles. (A.70-73.)

Upon registration of the Warranty Deed for Lots 3-5, the registrar did not issue new Certificates of Title for all three lots, showing Lind Homes, Inc. as the new owner of record. Instead, the registrar only issued a new Certificate of Title for Lot 5 (Certificate No. 1157096), upon which BankFirst's mortgage was memorialized. (A.67-68.) Due to an obvious clerical error, no new Certificates of Title were issued for Lot 3 or for Lot 4. (RA.7.) Thus, neither the existing Certificate of Title for Lot 3 (Certificate No. 1144973) nor the existing Certificate of Title for Lot 4 (Certificate No. 1144974) referenced the deed from Calhoun to Lind Homes, Inc. or BankFirst's mortgage. (A.47-48, 50-51.)⁴ In

³ All citations to "A. ___" refer to Appellants' Appendix. All citations to "RA. ___" refer to Respondent BankFirst's Appendix.

⁴ On pp. 5-6 of their Statement of Facts, Appellants note that BankFirst's mortgage was not memorialized (*i.e.*, noted) on *the existing* Certificate of Title for Lot 4. This statement reveals a total failure on the part of Appellants to understand that BankFirst's mortgage *could not be* memorialized on *the existing* Certificate of Title because that Certificate showed Calhoun as the record owner. Minnesota Statutes section 508.52 provides that when registered land is conveyed to a new owner, as soon as the deed is memorialized, the existing certificate of title must be cancelled and a new certificate – showing the new registered owner – must be issued.

fact, Certificates of Title Nos. 1144973 and 1144974 list *Calhoun – not Lind Homes, Inc.* – as the Owner of Lot 3 and Lot 4.

After purchasing Lot 4, Lind Homes, Inc. served as general contractor and hired Scherer Bros. to provide lumber and other materials needed to construct a luxury home on Lot 4. Scherer Bros. furnished its first contribution on October 13, 2005, performed its final contribution on June 29, 2006, and filed its mechanic's lien with the Registrar of Titles as Document No. 4307732 in the amount of \$250,657.34 on September 21, 2006. (Add.18, 26.)⁵ Scherer Bros. did not deliver a pre-lien notice. (Add.26.)

In addition, Lind Homes, Inc. contracted with Southview for the provision and installation of landscaping materials on Lot 4. Southview furnished materials and services from May 17, 2006 through June 9, 2006, delivering *on Lind Homes, Inc.* a pre-lien notice on May 11, 2006. (Add.19-20, 27-28; RA.28-33.) Southview filed its mechanic's lien with the Registrar of Titles as Document No. 4299632 in the amount of \$74,415.53 on August 29, 2006. (Add.19-20, 27-28.)

For unknown reasons, on September 20, 2006, the Hennepin County Registrar of Titles registered the Warranty Deed for Lots 3-5 from Calhoun to Lind Homes, Inc. as Document No. 4307439. (A.82-84.) This is the same Warranty Deed that had been previously registered as Document Number 4129639 on June 28, 2005. (A.65.) In addition, on September 20, 2006, the Registrar issued a new Certificate of Title (Certificate No. 1189682) for Lot 3 and Lot 4 jointly, which listed Lind Homes, Inc. as

⁵ “Add. ___” refers to Appellants’ Addendum, submitted in addition to Appellants’ Brief and Appendix. Although the documents contained in Appellants’ Addendum should have been placed in Appellants’ Appendix rather than in an Addendum (see Minn. R. Civ. App. P. 128.04 & 130.01), Respondent BankFirst will reference the documents contained

the record owner and memorialized BankFirst's mortgage as having been *registered on June 28, 2005 at 11:00 a.m.* (A.86-87.) Also on September 20, 2006, the Registrar subsequently cancelled this new joint Certificate of Title for Lots 3 and 4 (Certificate No. 1189682) as well as the separate Certificate of Title for Lot 5 (Certificate No. 1157096). (A.86-87, 67-68.) The Registrar then issued a new Certificate of Title (Certificate No. 1189683), merging Lots 3, 4 and 5 all onto the same certificate, correctly listing Lind Homes, Inc. as the Owner. (A.91-92.) In their recitation of the facts, Appellants fail to note that Certificate No. 1189683 memorializes BankFirst's mortgage as having been *registered at 11:00 a.m. on June 28, 2005.* (A.91-92.)

Lind Homes, Inc. defaulted on its mortgages as well as on its payments to subcontractors Southview and Scherer Bros. On November 14, 2007, BankFirst, Calhoun, Southview, and Scherer Bros. asserted cross-motions for partial summary judgment, seeking a legal ruling on the priority of their respective interests in Lot 4. On February 14, 2008, the district court issued its Amended Findings of Fact, Conclusions of Law and Order for Summary Judgment, declaring the priority of BankFirst's mortgage over Southview and Scherer Bros.' coordinate liens. (Add.1-15.) No trial was held as the Parties stipulated to the amount of Southview and Scherer Bros.' subordinate liens and to the amount of attorney fees the contractors incurred in prosecuting their mechanics' liens. (Add.16-23.) This appeal followed.

in Appellants' submissions in the same fashion as Appellants have.

ARGUMENT

I. Standard of Review.

On appeal from summary judgment, the court reviews *de novo* “whether there are any genuine issue of material fact and whether the district court erred in its application of the law.” Star Centers, Inc. v. Faegre & Benson, L.L.P., 644 N.W.2d 72, 76-77 (Minn. 2002). Because the Parties submitted stipulated facts to the district court, the sole issues to review on appeal involve the proper interpretation of the apposite Minnesota statutes. Statutory interpretation presents a question of law subject to *de novo* review. Ryan v. ITT Life Ins. Corp., 450 N.W.2d 126, 128 (Minn. 1990).

II. The District Court Properly Concluded that Respondent BankFirst’s Mortgage Was Prior and Superior to Appellants’ Mechanics’ Liens Because It Was “Of Record” Before Appellants’ Coordinate Liens Attached.

The district court correctly ruled that BankFirst’s mortgage was superior to Appellants’ liens because it was “of record” at the time Appellants’ lien attached. The law in Minnesota is clear that within the context of a Torrens property, “of record” constitutes a document that has been registered. Registered means that the mortgage document is filed and thus time stamped and assigned a document number. It is at that exact point that it becomes of record. The law in Minnesota does not require memorialization, however, to be registered or of record.

Appellants have correctly noted that Minnesota Statutes section 514.05, subdivision 1, governs the relative priorities of competing lien interests on the part of mechanics and mortgagees:

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.

Minn. Stat. § 514.05, subd. 1 (emphasis added). Because BankFirst's mortgage was "of record" before Appellants' mechanics' liens attached, the district court's ruling that BankFirst's mortgage has priority over Appellants' liens must be affirmed.

In this appeal, Appellants are challenging the district court's holding that BankFirst's mortgage became "of record" upon its registration on June 28, 2005. (Add.5) Appellants, however, have significantly misconstrued Minnesota law by failing to acknowledge precedential cases and statutes that specifically address when a mortgagee interest in Torrens property is "of record" and takes priority over a competing mechanic's lien interest. Unable to point to any apposite authority, Appellants simply opine, "[T]o 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." (Appellants' Brief, p. 14.) However, the Torrens Act provides no such authority for Appellants' meritless theory that a mortgage is only "of record" when memorialized on the Certificate of Title.

A. **The Torrens Act Is Intended To Protect Good Faith Purchasers of Torrens Property Against Encumbrances Not Appearing on the Certificate of Title.**

Appellants' reliance on the Torrens Act (Minnesota Statutes Chapter 508) is misplaced and demonstrates a misunderstanding of its true purpose. Minnesota Statutes section 508.25 provides:

Every person *receiving a certificate of title* pursuant to a decree of registration and every subsequent purchaser of registered land who

receives a certificate of title in good faith and for a valuable consideration shall hold it free from all encumbrances and adverse claims, excepting only the estates, mortgages, liens, charges, and interests as may be noted in the last certificate of title. . . .

(Emphasis added.) According to the Minnesota Supreme Court, “[T]he 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” In re Juran, 178 Minn. 55, 58, 226 N.W. 201, 202 (1929); accord United States v. Ryan, 124 F. Supp. 1, 5 (D. Minn. 1954) (“the holder of a certificate of title to registered land ‘shall hold the same free from all encumbrance and adverse claims,’ excepting only those noted on the last certificate of title”); Hersh Props., LLC v. McDonald’s Corp., 588 N.W.2d 728, 734 (Minn. 1999) (“The conclusive nature of certificates of title allows real property *owners* to rely on the certificate of title while disregarding most interests not evidenced on the current certificate of title.”) (emphasis added). Clearly, the purpose of section 508.25 is to protect the property interests of a purchaser for value (the owner of registered land), *not the priority of a mechanic’s lien claimant*.

Appellants rely heavily on the following decisions as “authority” for their assertion that BankFirst’s mortgage does not have priority over their liens because – although registered well before Appellants began furnishing improvements – the mortgage was not *memorialized* on a certificate of title until after Appellants began work: In re Juran, In re Collier, Kane v. State, In re Willmus, and In re Walther. However, these cases are simply inapposite to the instant circumstances as they involve whether *the holder of the certificate of title (i.e., the owner)* is entitled to protection under section 508.25 as a *good faith purchaser of the subject property* against an encumbrance not noted on the

certificate of title. Thus, the issue in those cases is whether when taking title to the property, the *owner* had actual notice of any encumbrances not appearing on the certificate of title. Significantly, these cases neither explain *when* a mortgage interest takes effect nor address *priority between competing lien interests* in registered land.

Appellants have disturbingly omitted from their brief the following Minnesota cases that do show when a mortgage becomes “of record” and how competing lien interests in Torrens property are resolved: In re Ocwen Fin. Servs. Inc., 649 N.W.2d 854 (Minn. App. 2002) and Home Lumber Co. v. Kopfmann Homes, Inc., 535 N.W.2d 302 (Minn. 1995). These cases are in point and dispositive to the issues as discussed below.

B. A Mortgage Against Torrens Property Is “Of Record” When It Is Registered By Document Number.

Appellants would have this Court believe that Minnesota Statutes section 508.49 provides that registration of a mortgagee interest in Torrens property consists of two steps: (1) the filing of the mortgage with the registrar; and (2) the subsequent memorialization of the mortgage on the certificate of title. However, the portion of the Torrens Act specifically governing the registration of *mortgages* is contained in Minnesota Statutes sections 508.54-.55. Because sections 508.54-.55 *specifically* pertain to the registration of mortgage interests, they take precedence over the more general section 508.49 upon which Appellants rely. See Minn. Stat. § 645.26, subd. 1 (specific statute governs over more general statute).

In pertinent part, section 508.54 provides that a mortgage interest “shall be registered and take effect upon the title only from the time of registration.” Minn. Stat. §

508.54. Section 508.55 further clarifies the use of the term “registration” as it pertains specifically to a mortgage interest:

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.) Together Minnesota Statutes sections 508.54 and 55 govern the registration process of a mortgage in Torrens. Under the plain language of section 508.55, the legislature has delineated the following procedure: the mortgage is filed with the registrar, who simultaneously registers the document by stamping it with a document number and the precise time of filing. Subsequently, the registrar enters a memorial *of the instrument registered* by making notations of the document number and exact time of filing on the certificate of title. Indeed, Minnesota Statutes 386.31⁶ provides that the document number “shall be prima facie evidence of priority of registration.” By their plain language, these statutes establish that time-stamping and the assignment of a document number – not subsequent “memorialization” on a certificate of title – constitute registration. See e.g., Hersh, 588 N.W.2d at 735 (where unambiguous, plain language of statute controls). In other words, contrary to Appellants’ assertion (see Appellants’ Brief, p. 21), the relevant statutes do not delineate filing and “memorialization” as a two-step process required for registration of a mortgage.

Despite Appellants’ theory that a mortgage is not “of record” until it is

⁶ Chapter 386 applies generally to the operations and procedures of county recorder offices throughout the State of Minnesota.

memorialized on the certificate of title, Minnesota Statutes sections 508.55 and 386.31 explicitly provide that registration occurs when the instrument filed with the registrar is denoted with a document number and time-stamp. In other words, a mortgage becomes “of record” at the exact instant the document number is stamped.

Furthermore, caselaw supports this definition of registration. Ocwen, supra, -- a case directly on point that Appellants have deliberately failed to address -- involves a dispute between two parties with competing mortgage interests, both filed with the registrar on the same day and time-stamped as having been submitted at 11:00 a.m. 649 N.W.2d at 855-56. The mortgages were assigned sequential document numbers (3228150 and 3228151, respectively), which reflects that they could not “have actually been stamped at the same time – even if the time differential was only seconds.” Id. at 857 (mortgagee with lower document number prevailed).

In Ocwen, the Minnesota Court of Appeals held that the “registration document numbers are *conclusive evidence* of the order in which the mortgages were filed and demonstrate that Ocwen’s mortgage [3228150] was *registered* first.” 649 N.W.2d at 857. (emphasis added) (explicitly noting that Minnesota is a “race-notice state”). Thus, the mortgage interest was effectively *registered* within the meaning of section 508.55 when the registrar stamped the mortgage with a document number and time-stamp -- not upon the registrar’s subsequent notation at some undefined time in the future of a memorial thereof on a certificate of title. In fact, the Ocwen court made its priority determination without reference to the certificate of title, other than to note that priority needed to be resolved because one of the mortgagees had commenced a proceeding subsequent action

pursuant to Minnesota Statutes section 508.58 to compel the issuance of a new certificate of title. Ocwen, 649 N.W.2d at 856. This reliance on document numbers is necessary because Minnesota Statutes do not require registrars to memorialize a registered document on the certificate of title within a specific timeframe or even to note on the certificate of title the time/date that a particular document was memorialized. In short, the only mechanism for determining priorities between competing mortgagee interests is by comparing the document numbers assigned at registration.

Under Ocwen, the mortgage that is registered first is clearly “of record” first. 649 N.W.2d at 857. Were this not the case and a mortgage only became of record upon “memorialization,” the Legislature’s requirement of stamping the date, time and document number on registered documents would be superfluous. See Minn. Stat. § 508.38 (2005) (“[i]nstruments affecting the title to land, filed with the registrar, shall be numbered by the registrar consecutively. . . together with the date, hour, and minute when the instrument is filed, the document number thereof, and a reference to the proper certificate of title”);⁷ American Family Ins. Group v. Schroedl, 616 N.W.2d 273, 277 (Minn. 2002) (statutes should not be construed in such a manner as to be rendered superfluous). Moreover, given that certificates of title do not indicate the date of a document’s memorialization – but rather only the *registration* date of a document memorialized on the certificate of title (see A.53-54) – Appellants’ contention that a document is not registered and “of record” until it is memorialized is entirely devoid of

⁷ The registrar’s error in the instant case would appear to be that the clerk only referenced the Certificate of Title for Lot 5 (not for Lots 3 & 4), when registering BankFirst’s mortgage.

logic. The supreme court itself, in the C.S. McCrossan, Inc. v. Builders Finance Co., recognized that a mortgage is of record upon registration, not upon memorialization:

To hold that the clerical error of *failing to memorialize a registered and filed mortgage* has the same effect as *never having registered or filed at all* would create an unwarranted burden upon the holder of a mortgage against registered land to continually inspect the state of his interest.

304 Minn. 538, 543, 232 N.W.2d 15, 18-19 (1975) (emphasis added) (recognizing distinction between registration and memorialization). Although McCrossan is factually distinguishable from the instant case as the mechanic's lien claimant there had actual notice of a prior mortgage, the Minnesota Supreme Court's remarks quoted above demonstrate that, as stated in section 508.55, a mortgage is in fact *registered* before it is memorialized. Were this not the case, a mortgagee would bear the ridiculous burden of continuously checking with the registrar's office to ascertain whether its registered document had finally been memorialized on the certificate of title.

On p. 19 of their brief, Appellants take extreme "liberties" with the Minnesota Supreme Court's language in In re Collier, 726 N.W.2d 799 (Minn. 2007), completely misconstruing the holding of that decision and ignoring Minnesota statutory law. Appellants cite this decision as supporting the proposition that "[t]hose interests which do not appear 'of record' as memorials on the certificate of title do not have effect." (Appellants' Brief, p. 18)(erroneously citing Collier, 726 N.W.2d at 804.) In fact, the Collier court stated that for a lien to take effect upon Torrens property, it "must be filed and registered with the registrar of title in the county where the property is located. . . ." Collier, 726 N.W.2d at 804; see also Minn. Stat § 508.54 (a mortgage interest shall "take effect upon the title only from the time of registration"). In Collier, the court makes no

mention of “as memorials”; thus, Appellants’ statement constitutes a disturbing misreading of that case. Moreover, the actual holding of Collier is that the purchaser of the subject property was not entitled to protection under Minnesota Statute Section 508.25 because he was not a good faith purchaser given his actual knowledge of a prior mortgage. Id. at 809. Clearly, Appellants have inexcusably misrepresented the supreme court’s holding in Collier and have taken a position in contravention of Minnesota law.

Similarly, Appellants’ reliance on United States v. Ryan for their theory that a mortgage is only registered and “of record” upon memorialization is misplaced, and, more importantly, misleading. On p. 18 of their brief, Appellants purport to “quote” from the Ryan decision as follows:

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*].

(Appellants’ Brief, p. 18) (emphasis added) (*inaccurately* quoting United States v. Ryan, 124 F. Supp. 1, 9 (D. Minn. 1954)). However, the actual passage, which Appellants have misquoted, contains *no* such qualification “and appearing on the certificate of title.” In fact, the actual passage reads as follows:

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. The law was framed to accomplish that purpose; and it establishes rules in respect to registered land which differ widely from those which apply in the case of unregistered land. It provides that the holder of a certificate of title to registered land “shall hold the same free from all encumbrances, and adverse claims, excepting only’ those noted on the last certificate of title and certain other specified rights or claims not important here. . .

Ryan, 124 F. Supp. at 9. Clearly, Appellants have *again* taken inappropriate liberties by including the language “[*and appearing on the certificate of title*]” in the block quote from Ryan. Appellants have disingenuously inserted their own argument into the text of the decision from which they are quoting. Appellants’ inserted text is not only misleading and inexcusable, it is patently erroneous. Again, the full citation from Ryan indicates that the memorialization of the registered interest on the certificate of title is a protection for the “holder of [the] certificate of title.”

Contrary to Appellants’ contention on pp. 17-18 of their brief, Ryan does not stand for the proposition that a mortgage interest in Torrens property only becomes effective upon memorialization or that “registration” entails both filing with the registrar *and* memorialization on the certificate of title. In fact, Ryan neither defines “registration,” nor makes any mention whatsoever of how to resolve competing lien interests. In any event, Ryan is, likewise, inapplicable to the situation here as that case involved the invalidation of a tax lien because of its filing in the wrong office, solely under the debtor’s name, without any property description. 124 F. Supp. at 6-7.

Despite Appellants’ assertions to the contrary, BankFirst’s filing of its mortgage with the county registrar did not result in an “ineffective” or “failed” registration. (Appellants’ Brief, pp. 26-28.) Rather, through apparent clerical error, BankFirst’s *registered* mortgage was not memorialized. Indeed, the record clearly shows that when the registrar’s failure to memorialize the registered mortgage was discovered on September 20, 2006, a new Certificate of Title was generated for Lot 3 and Lot 4, showing BankFirst’s mortgage as having the following “Date of Registration, Month,

Day Year Time”: June 28, 2005 a.m. (Document Number 4129640). (App. 86-87.) Significantly, the document number and time-stamp noted on the new Certificate of Title are *identical* to those noted on BankFirst’s mortgage upon its registration on June 28, 2005. (App. 70.) The same document number (4129640) and time-stamp (June 28, 2005 11:00 a.m.) assigned at registration also appear on the final merged Certificate of Title for Lots 3-5. (A. 91-92.)

Taken to its logical extension, Appellants’ position that BankFirst’s mortgage was not “of record” on June 28, 2005 would mean that had Lind Homes, Inc. defaulted on its mortgage in the fall of 2005, BankFirst could not have foreclosed on its mortgage. (As noted above, a mortgagee interest in Torrens property only becomes effective upon registration.) Surely that is not the case. On June 28, 2005, BankFirst filed its mortgage with the registrar, who simultaneously registered it with a document number and time-stamp. At that moment, BankFirst’s mortgage interest became effective and “of record” – not a year later upon its subsequent memorialization.⁸

Thus, Appellants’ contention that BankFirst’s filing of its mortgage with the registrar on June 28, 2005 resulted in a failed registration lacks any substantive merit. Clearly, only the memorialization of the *registered mortgage* was not performed due to a clerical error in the county registrar’s office.

⁸ A holding that a mortgagee has no security or rights to foreclosure pursuant to a properly registered mortgage unless and until it physically appears on the certificate of title would severely jeopardize the lender’s willingness to provide loans and place too much reliance on any given registrar office’s efficiency in *memorializing* registered interests on the certificate of title.

C. For Torrens and Abstract Property Alike, Priorities Between Mortgagee and Mechanics' Lien Interests are Governed by the Interplay between the Minnesota Recording Act and the Mechanic's Lien Statute.

As Ocwen illustrates, priority between competing mortgagee interests in Torrens property is governed by the Minnesota Recording Act. Ocwen, 649 N.W.2d at 857 (Minnesota is a race-notice state); Minn. Stat. § 507.34. Indeed, the Minnesota Court of Appeals has repeatedly noted the applicability of the Recording Act to both Abstract and Torrens property, expressly stating that section 507.34 “establishes mortgage priority from the date of recording with the county recorder *or the registrar of titles.*” Ripley v. Piehl, 700 N.W.2d 540, 544 (Minn. App. 2005) (emphasis added); see also David-Thomas Cos., Inc. v. Voss, 517 N.W.2d 341, 342 (Minn. App. 1994) (except where the Torrens Act specifies otherwise, recording statute applies “to Torrens property the same as it applies to non-Torrens property”) (citing Armstrong v. Lally, 209 Minn. 373, 375-76, 296 N.W. 405, 405-06 (1941)).

However, where the priority dispute is between competing mortgagee and mechanic's lien interests, the Minnesota Supreme Court has indicated that both sections 507.34 and 514.05 must be applied. Home Lumber, 535 N.W.2d at 304. While the priority date for mortgages is established by “the date of recording with the . . . registrar of titles,” section 514.05, subdivision 1, provides that a mechanic's lien has priority over any mortgage that is not “of record” when the lien attaches (unless the lienholder had actual notice of the mortgage). Home Lumber, 535 N.W.2d at 304. Simply stated, a mortgage is clearly “of record” on its registration date and has priority over any mechanic's lien that has not yet attached on that date.

The Home Lumber court noted that this statutory scheme “is intended to protect the prior mortgagee.” Id.; see also Reuben E. Johnson Co. v. Phelps, 279 Minn. 107, 112, 156 N.W.2d 247, 251 (1968) (“It must be assumed that the legislature chose the precise language of [Minn. Stat. § 514.05] with care, intending to protect a mortgagee who advances its money for the improvement of the premises as against lien claimants who file their claims after the mortgage is recorded.”); Suburban Exteriors, Inc. v. Emerald Homes, Inc., 508 N.W.2d 811, 813 (Minn. App. 1993) (section 514.05 balances interests of protecting “mortgagees who inspect property and discover no actual and visible improvements” against interests of contractors furnishing improvements).

Thus, as explained in Home Lumber, the *priority* between BankFirst’s mortgage and Appellants’ mechanics’ liens is determined by comparing *the time-stamp (and corresponding document numbers) on the registered mortgage with the date of the first visible improvement*. Here, BankFirst registered its mortgage on June 28, 2005. Certificate of Title No. 1189683 confirms this by identifying the “*Date of Registration Month Day, Year Time*” of BankFirst’s mortgage as “June 28, 2005 at 11:00 a.m.” (A. 91-92) (emphasis added). BankFirst’s mortgage was, therefore, “of record” on June 28, 2005. However, Appellants’ first visible improvement did not take place until several months later on October 13, 2005. Accordingly, the district court did not err in ruling as a matter of law that BankFirst’s mortgage is prior and superior to Appellants’ mechanics’ liens.

D. In Focusing on Whether the Delay in Memorialization of BankFirst's Mortgage Resulted from the "Recording Gap," Appellants Fail to Recognize that the Known Gap between Registration of a Mortgage and Its Subsequent Memorialization on the Certificate of Title Is Precisely Why "Registration" Does Not Include Memorialization.

Appellants spend many pages "proving" that the delay in memorializing BankFirst's mortgage on the Certificate of Title for Lot 4 did not result from the "gap" between registration of a mortgage and the subsequent memorialization of that mortgage on the certificate of title. (Appellants' Brief, pp. 24-29.) Appellants have misconstrued BankFirst's argument at summary judgment. (RA.43.) Clearly, in this case, the fact that BankFirst's mortgage (registered on June 28, 2005) was not memorialized until September 20, 2006, goes beyond a typical gap period between registration of a mortgage and its subsequent memorialization.

What Appellants fail to grasp, however, is that while the typical "gap" between registration and memorialization does not explain the late memorialization of BankFirst's mortgage in this case, it does explain the reason why the document number and time-stamp on a registered mortgage dictate priority. Indeed, it is common knowledge that the "gap" between the registration of a mortgage and its subsequent memorialization is unavoidable and varies from county to county based on uncontrollable factors including the workload and efficiency of any given registrar's office. Accordingly, the legislature requires that documents filed with the registrar's office be registered with a time-stamp and document number so that Minnesota courts have a conclusive basis for making priority determinations. See Minn. Stat. § 508.38; Ocwen, 649 N.W.2d at 857. Were this interpretation incorrect, section 508.38 – which requires the stamping of a document

number as well as the exact filing time – would be superfluous. See Minn. Stat. § 645.17; Schroedl, 616 N.W.2d at 277 (“[a] statute should be interpreted, whenever possible, to give effect to all of its provisions; no word, phrase, or sentence should be deemed superfluous, void, or insignificant”).

Furthermore, if priority were determined solely upon memorialization, as Appellants suggest, an untenable legal vacuum would be created. In short, it would be impossible to predict priority because the priority of multi-million dollar mortgages would be subject to such uncontrollable variables as the relative efficiency and workload of a given registrar’s office. In the words of Aristotle, “Nature abhors a vacuum; so does the law.” Waynick v. Chicago’s Last Dep’t Store, 269 F.2d 322, 324-25 (7th Cir. 1959). Indeed, Appellants’ proposed memorialization requirement is not only unsupported by Minnesota law but would unduly burden lenders and have a chilling effect on future development projects. For this exact reason, the Minnesota legislature has provided a framework for determining the priority of competing interests in Torrens property based on the time of *registration* as evidenced by the registered document’s time-stamp and document number – not on the date of memorialization, which is not tracked and is completely dependent on the efficiency of a given registrar’s office.

Clearly, the priority of the encumbrances at issue here is governed by section 507.34 (a mortgage’s date of registration serves as its priority date) and by section 514.05 (mechanics’ liens have priority over mortgages “not then of record”). The Minnesota Court of Appeals has noted that section 514.05’s purpose of balancing the policy of protecting mortgagees with the policy of protecting the rights of contractors who furnish

improvements is best served when competing lien interests are fixed “with definiteness and certainty.” Carlson-Greffe Constr., Inc. v. Rosemount Condo. Group P’ship, 474 N.W.2d 405, 408 (Minn. App. 1991), review denied (Minn. Oct. 31, 1991), cited in Superior Constr. Servs., Inc. v. Belton, 749 N.W.2d 388, 391 (Minn. App. 2008). Thus, the date a mortgage is “of record” cannot be left to such uncertain *or indefinite* variables as the efficiency of a given registrar’s office in memorializing registered documents.

Accordingly, a mortgage registered under section 508.55 is “of record” at the date, hour, and minute it is time-stamped and assigned a document number. Certificates of title do not provide a date, hour, and minute of memorialization. Hence, the memorialization of a mortgagee interest on a certificate of title clearly does not and cannot provide a basis for determining the relative priorities of mortgagee and mechanic’s lien interests.

E. Appellants’ Reliance on the 2008 Enactment of the Minnesota Real Property Electronic Recording Act is Without Merit.

In an apparent attempt to find support for their untenable position, Appellants argue that the enactment of the Minnesota Real Property Electronic Recording Act (Minnesota Statutes sections 507.0941-.0948) somehow codifies existing “common law interpreting the Torrens Act.” (See Appellants’ Brief, pp. 23-24.) *In the first instance, Appellants have failed to recognize that there is already a statutory scheme in place for resolving the relative priority of interests in Torrens property as between a mortgagee and a mechanic’s lien holder.* As set forth above, Minnesota Statutes section 507.34 and 514.05 establish the procedure for resolving those competing priority interests. Moreover, decisions such as Ocwen – which Appellants have chosen simply not to

address in their Brief – demonstrate that a mortgage is “of record” when it registered with a document number and time-stamp.

It is well-established under Minnesota law that mechanics’ lien cases are determined by the law in effect at the time the work was finished, not when the mechanic’s lien is filed. Thompson Plumbing Co., Inc. v. McGlynn Cos., 486 N.W.2d 781, 784 (Minn. App. 1992). Here, Appellants seek to rely on Minnesota Statutes section 507.0943. That statute became effective on July 1, 2008; however, Appellants’ last day of work was on June 29, 2006 (Add.18). Laws 2008, c. 238, art. 2, § 3, eff. July 1, 2008.

Furthermore, Minnesota Statutes section 645.21 provides that no law shall be construed retroactively “unless clearly and manifestly so intended by the legislature.” Here, there is no evidence that the legislature intended section 507.0943 be applied retroactively.⁹ In fact, that would be *impossible* given that section 507.0941-.0948 essentially establishes a framework for developing a system for the electronic filing of all instruments affecting an interest in Torrens property. Appellants appear to be ignorant of the fact that the system is *not yet operational* in Hennepin County. See Minn. Stat. § 507.0945(a) & (f) (creating Electronic Real Estate Recording Commission to adopt standards to implement sections 507.0941-.0948 and to identify and report “the information technology expertise it requires”).

Apparently, the intent with electronic filing is to avoid any gap between registration and memorialization. Significantly, the system outlined in the Minnesota Real

⁹ Although retroactive application of a statute is permissible where the statute constitutes a clarification as opposed to a modification of *existing* law, Minnesota Statutes sections 507.0941-.0948 obviously do not fall into this exception since electronic registration of mortgages on Torrens property is a clear departure from the status quo. See Nardini v.

Property Electronic Recording Act has yet to be implemented. *Accordingly, it simply has no application to the resolution of this priority dispute that arose in 2006.*

III. Appellants Southview and Scherer Bros. Had Actual Notice that Certificate of Title No. 1144974 Was Inaccurate Because the Certificate Did Not List Lind Homes, Inc. As “Owner” of Record. Thus, Appellants Did Not Act in Good Faith in Claiming to Have Relied Upon the Certificate of Title When Determining Whether to Perform Improvements on Lot 4.

Throughout their brief, Appellants reiterate that the Torrens Act “abrogates the doctrine of constructive notice except for matters listed on the certificate of title.” (E.g., Appellants’ Brief, p. 31) (emphasis added).¹⁰ However, Appellants fail to understand that BankFirst is not arguing that Appellants had either constructive or actual notice of its mortgage. Rather, BankFirst maintains that Appellants had *actual notice* that Certificate of Title No. 1144974 was inaccurate.

The Certificate of Title upon which Appellants claim to have relied when deciding whether to perform improvements on Lot 4 clearly lists *Calhoun* as the owner of record.¹¹ (A.50-51; RA.7, 11, 21.) However, in its contract with owner Lind Homes, Inc. to furnish improvements to Lot 4, Appellant Southview included a statutory pre-lien notice. (RA.28-33.) Thus, Appellant Southview knew that Certificate of Title No. 1144974 improperly listed Calhoun as the current owner of Lot 4.

Nardini, 414 N.W.2d 184, 196 (Minn. 1987).

¹⁰ For this proposition, Appellants correctly cite the following decisions: In re Juran, 178 Minn. 55, 60, 226 N.W. 201, 202 (1929); In re Collier, 726 N.W.2d 799, 806 (2007).

¹¹ Nonetheless, Appellants have only produced the *cancelled version* of Certificate of Title No. 1144974, rather than the then-current version upon which they purportedly relied when deciding whether to perform improvements on Lot 4. (A.50-51.)

Although Appellants repeatedly point out that they did not have actual knowledge of BankFirst's prior mortgage because it was not memorialized on a certificate of title before they commenced work on the Subject Property, Appellants fail to acknowledge that they had actual knowledge *that Certificate of Title No. 1144974 was inaccurate* because it listed Calhoun as owner – not Lind Homes, Inc.

Therefore, the district court did not err in ruling as follows on summary judgment:

If [Appellants] argue that BankFirst did not have an interest in Lot 4 as of June 28, 2005 because the mortgage had not been memorialized, then it must follow that Lind Homes had no interest in Lot 4 because Certificate of Title No. 1144974 listed Calhoun, not Lind Homes, as the owner of Lot 4 and listed no deed to Lind Homes. This should have been enough to raise questions on behalf of [Appellants]. The party who they were contracting with was not the owner memorialized on the Certificate of Title. The owner listed on the Certificate of Title was a party they had no relationship with and no knowledge of. [Appellants] 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 lien and their ability to be paid for their work*. Southview, and Scherer Bros. as a coordinate interest, had actual knowledge that Certificate of Title No. 1144974, which they now claim to have relied on, was inaccurate. Southview and Scherer Bros. Reliance on Certificate of Title No. 1144974 was not in good faith.

(Add. 13) (emphasis added).

BankFirst, on the other hand, duly filed its mortgage for registration, receiving a document number and time-stamp. As noted in McCrossan, a mortgagee meets its burden when its mortgage has been registered; the mortgagee has no ongoing “burden” to continually inspect “the state of his interest” by checking on a daily basis to verify when it is memorialized on the certificate of title. McCrossan, 304 Minn. 538, 543, 232 N.W.2d 15, 18-19. That is, once its mortgage was duly registered with a time-stamp and document

number, BankFirst had met its obligations and perfected its mortgagee interest in Lot 4. Unlike Appellants, BankFirst had no notice that anything was awry.

In its Memorandum accompanying the Order for partial summary judgment, the district court correctly noted “the notions of justice and good faith” inherent in resolving Torrens claims. (Add. 13.) That is why “since Juran was decided in 1929, the law in Minnesota has prevented a prospective purchaser with actual notice of superior interest in Torrens property from becoming a good faith purchaser.” (Add. 13)(citing Collier, 726 N.W.2d at 799). Although the instant dispute does not involve a good faith purchaser entitled to protection under Minnesota Statutes section 508.25, the same notions of good faith are applicable. In fact, in its most recent analysis of the Torrens Act, the Minnesota Supreme Court confirmed the importance of equitable principles “when a result under the Torrens Act violates notions of justice and good faith.” Collier, 726 N.W.2d at 808 (citing Finnegan v. Gunn, 207 Minn. 480, 292 N.W. 22 (1940) (approving after-the-fact registration of widow’s unregistered mortgage interest under “ancient concepts of equity”))).

Here, the equities clearly favor BankFirst, which did everything required to perfect its mortgage interest by registering its mortgage and obtaining both a time-stamp and document number. Appellants, on the other hand, claim to have relied upon Certificate of Title No. 1144974 to determine the owner’s ability to pay them for their work when deciding whether to perform improvements on Lot 4. Yet, Certificate of Title No. 1144974 designates *Calhoun* – not Lind Homes, Inc. – as owner of Lot 4. Appellants knew that Lind Homes, Inc. – the party with which they contracted and upon which

Appellant Southview delivered a prelien notice – was the owner of the Subject Property. (RA.28-33.) Thus, Appellants had actual knowledge that Certificate of Title No. 1144974 was inaccurate and have not acted in good faith.

Accordingly, under the equitable principles belying the Torrens Act, the district court did not err in ruling BankFirst's mortgage as prior and superior to Appellants' mechanics' liens as a matter of law.

A. Appellants' Failure to Serve Pre-Lien Notice on Calhoun – the Owner of Record on the Certificate of Title – Invalidates Their Coordinate Liens.

Mechanic's liens are purely creatures of statute and exist only within the terms of the governing statutes. Automated Bldg. Components, Inc. v. New Horizon Homes, Inc., 514 N.W.2d 826, 828 (Minn. App. 1994), review denied (Minn. June 15, 1994). Minnesota Statutes section 514.011, subdivision 2(a), requires mechanic's lien claimants, *who do not have a contract with the owner*, to give all owners a pre-lien notice:

Every person who contributes to the improvement of real property so as to be entitled to a lien pursuant to section 514.01, except a party under direct contract with the owner must, *as a necessary prerequisite to the validity of any claim or lien*, cause to be given to the owner or the owner's authorized agent, either by personal delivery or by certified mail, not later than 45 days after the lien claimant has first furnished labor, skill or materials for the improvement, a written notice in at least 10-point bold type, if printed, or in capital letters, if typewritten

(Emphasis added.) Under Appellants' proffered interpretation of the Torrens Act, Certificate of Title No. 1144974 (A.50-51) is *conclusive proof* that Calhoun still owned Lot 4 prior to the issuance of Certificate of Title No. 1189683 on September 20, 2006. However, it is undisputed that Appellants did not deliver a pre-lien notice upon Calhoun – the owner of record. (Add.17-19.)

In its Memorandum accompanying its Order for partial summary judgment, the district court cogently stated:

Under [Appellants'] strict view of the Torrens law, their mechanic's liens are invalid because pre-lien notice was not given to the registered owner on the Certificate of Title. Southview and Scherer Bros. cannot argue that BankFirst's mortgage is not properly registered because it was not memorialized on the Certificate of Title¹² and also argue that Lind Homes is the proper owner of Lot 4 for the purposes of pre-lien notice¹³ even though their purchase of the property is not memorialized on the Certificate of Title. The Certificate of Title cannot be valid for one purpose and invalid for another.

(Add. 14.)

Thus, were this Court to find Appellants' interpretation of Torrens law compelling and reverse the district court, Appellants' coordinate liens would be invalid as a matter of law for failing to provide the requisite pre-lien notice. See Merle's Constr. Co. v. Berg, 442 N.W.2d 300, 302 (Minn. 1989). ("The prelien notice is no mere technicality).¹⁴ That is, Appellants would not even have a junior lien interest. Given this harsh consequence, Appellants' decision to appeal the district court's ruling on priority – which at least provides them with a junior lien interest – is mysteriously illogical.

¹² See infra Footnote 4 (explaining that BankFirst's mortgage could not be memorialized on the *existing* Certificate of Title as it listed Calhoun as Owner of record).

¹³ BankFirst fully recognizes that under Minnesota Statutes section 514.011, subdivision 2(a), no pre-lien notice is required from a subcontractor who has contracted directly with the owner. However, if Calhoun is the owner of record, then a prelien notice would be required since Appellants' direct contract is with Lind Homes, Inc.

¹⁴ The 1989 amendment to Minnesota Statutes section 514.011, subdivision 2(b), providing that failure to strictly comply with prelien notice "may not result in loss of lien rights if there has been a good faith effort to comply" does not apply here. This is not a case where the notice was given in the wrong font size; rather, no pre-lien notice whatsoever was delivered on Calhoun. Merle's Constr. Co. v. Berg, 442 N.W.2d 300, 302 n.1 (Minn. 1989).

B. Appellants' Argument that Its Liens Are Superior to BankFirst's Mortgage Because of a Potential Remedy under Minn. Stat. § 508.76 Lacks Merit.

Appellants maintain that the district court's ruling on priority should be overturned because BankFirst has a potential remedy under Minnesota Statutes section 508.76 to recover under the general assurance fund for the registrar's error in failing to memorialize BankFirst's mortgage on Lot 4. *This argument is a red herring.* Appellants' reliance on section 508.76 is nothing more than an attempt to persuade this Court to ignore the delineated procedure established in Minnesota Statutes section 514.05 and in Home Lumber for determining priority between conflicting mortgagee and mechanic's lien interests in Torrens property. As demonstrated above, application of this procedure defeats Appellants' position.

Moreover, contrary to Appellants' assertion, either all parties or none of them have standing to seek redress under section 508.76. At first blush, both Appellants and BankFirst appear to have standing as they have both "sustain[ed] any loss or damage by reason of any omission, mistake or misfeasance of the registrar or the registrar's deputy." However, section 508.76 is only available to parties who are "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." Minn. Stat. § 508.76. Clearly, both Appellants and BankFirst have had the opportunity to litigate their interests in Lot 4. Hence, recovery under section 508.76 is unavailable to them. See Zahradka v. State, 515 N.W.2d 611, 614 (Minn. App. 1994) ("[section 508.76] does not guarantee relief, it only guarantees a chance to make a claim against the general fund *if a party was unable to litigate the claim*

in the first instance” because of dismissal due to a Rule 12 motion) (emphasis added), rev. denied (Minn. June 29, 1994).

Zahradka involved competing certificates of title that could be construed as including the same property. In that case, the district court ordered the respondent’s certificate of title to be revised to exclude the disputed property interest. The Minnesota Court of Appeals upheld the subsequent dismissal of the respondent’s attempt to recover under the general fund because the parties had, in fact, litigated the matter pursuant to Torrens registration laws. Id. at 612-14.

As in Zahradka, all parties in the present case have been “given a full and fair chance to litigate” their respective interests in the Torrens property at issue. See id. Accordingly, this Court should disregard Appellants’ arguments with respect to section 508.76.

CONCLUSION

Respondent BankFirst respectfully requests that this Court affirm the district court’s grant of partial summary judgment to BankFirst on the basis that BankFirst’s mortgagee interest is prior and superior to Appellants Southview and Scherer Bros.’ coordinate mechanics’ lien interests. Respondent BankFirst fully complied with Torrens registration requirements when it filed its mortgage with the county registrar. Accordingly, BankFirst’s mortgage was duly registered with a document number months *before* Appellant Scherer Bros. furnished materials and nearly a year *before* Southview provided its first improvement to the Subject Property. BankFirst’s mortgage was,

therefore, "of record" and prior to Appellants' mechanics' liens as a matter of law pursuant to Minnesota Statutes sections 386.31, 507.34, 508.55, and 514.05.

Furthermore, Appellants Southview and Scherer Bros. – unlike Respondent BankFirst – had actual notice that the Certificate of Title inaccurately listed the owner of record. Under the principles of good faith upon which Torrens law is premised, BankFirst is entitled to a ruling that its mortgage interest was prior and superior to Appellants' lien interests.

Finally, in spite of Appellants' purported reliance on Certificate of Title No. 1144974 when deciding whether to furnish improvements, they failed to serve the requisite pre-lien notice on the "owner" of record. Therefore, were this Court to reverse the district court's ruling on priority, Appellants would have failed to perfect their liens and would forfeit their junior lien status.

Respectfully submitted,

Dated:

2/26/09

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