

NO. A08-1883

State of Minnesota
 In Supreme Court

Imperial Developers, Inc.,

Plaintiff,

vs.

Calhoun Development, LLC,

Defendant,

Regal Custom Homes, Inc., et al.,

Defendants,

Lind Homes, Inc.,

Defendant,

Thompson Plumbing Corp.,

Defendant,

Great Northern I. Inc.,

Defendant,

Southview Design & Construction, Inc.,

Respondent,

BankFirst,

Appellant,

and

The Woodshop of Avon, Inc.,

Additional Defendant,

and

Scherer Bros. Lumber Co., intervening defendant and third party plaintiff,

Respondent,

vs.

Matthew Lind, et al,

Third Party Defendants,

and

Simonson Lumber of Ham Lake, Inc.,

Third Party Plaintiff,

vs.

Contractors Capital Corporation, et al.,

Third Party Defendants.

APPELLANT BANKFIRST'S BRIEF, ADDENDUM AND APPENDIX

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. Is a Mortgage on Torrens Property “Of Record” for Priority Purposes Within the Meaning of Minn. Stat. § 514.05, Subd. 1, When It Is Filed With the County Registrar of Titles or Only After It Is Subsequently Memorialized on the Certificate of Title?

Mortgagee BankFirst and the mechanics’ lien claimants brought cross-motions for summary judgment, seeking a legal determination of the priority of their competing interests in the subject property. (A.1, 4.)¹ The district court granted summary judgment in BankFirst’s favor, ruling that the mortgage was “of record” for priority purposes upon its filing with the county registrar. (Add.1-22.)²

By their Notice of Appeal, the mechanics’ lien claimants challenged the district court’s priority ruling. (A.32.) The court of appeals reversed, ruling that a Torrens mortgage is “of record” only upon its memorialization on the certificate of title. (Add.23-32.) BankFirst challenged the court of appeals’ decision in its Petition for Further Review. (A.35-42.)

Apposite Cases and Statutes:

C.S. McCrossan, Inc. v. Builders Fin. Co., 304 Minn. 528, 232 N.W.2d 15 (1975).

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

In re Ocwen Fin. Servs. Inc., 649 N.W.2d 854 (Minn. App. 2002).

Minnesota Statutes section 386.31.

Minnesota Statutes section 507.34.

Minnesota Statutes section 508.48

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Minnesota Statutes section 514.05, subdivision 1.

¹ “A. ___” refers to Appellant BankFirst’s Appendix.

² “Add. ___” refers to Appellant BankFirst’s Addendum.

II. Did the Court of Appeals Err in Declining to Consider Whether the Mechanics' Liens Were Invalidated in Their Entirety By the Lien Claimants' Failure to Deliver Pre-Lien Notice on the Record Owner Listed on the Certificate of Title in Effect at the Commencement of the Improvements?

In opposing the mechanics' lien claimants' cross-motion for priority, mortgagee BankFirst argued that if the district court ruled no mortgagee interest existed prior to memorialization of the mortgage on the certificate of title, then the mechanics' liens would be invalid because no pre-lien notice was delivered on the record owner listed on the same certificate of title. (A.16-18, 23). The district court stated that the mechanics' lien claimants "could not have it both ways," by relying on the erroneous certificate of title to determine whether the mortgage was "of record" for priority purposes, while ignoring the same certificate of title for pre-lien notice purposes. (Add.14.)

When the mechanics' lien claimants appealed the district court's priority ruling, BankFirst argued that if the court of appeals were to rule the mortgage only became "of record" upon its memorialization on the certificate of title, the mechanics' liens would be invalid because of the lienholders' failure to deliver pre-lien notice pursuant to Minn. Stat. § 514.011 on the record owner listed on the certificate of title in existence at the commencement of the improvement. (BankFirst's Court of Appeals' Brief, pp. 29-30.) Nonetheless, in reversing the district court's ruling on priority, the court of appeals declined to consider the pre-lien notice argument, stating it had not been "formally . . . decided by the district court." (Add.31.)

Apposite Cases and Statute:

Thiele v. Stich, 425 N.W.2d 580 (Minn. 1988).

Merle's Constr. Co. v. Berg, 442 N.W.2d 300 (Minn. 1989).

In re Livingood, 594 N.W.2d 889 (Minn. 1999).

Singelman v. St. Francis Med. Ctr., 777 N.W.2d 540 (Minn. App. 2010).

Minnesota Statutes section 514.011.

STATEMENT OF THE CASE

This priority dispute between Appellant BankFirst and the Respondent mechanics' lien claimants involves an improvement to Torrens property in Eden Prairie, Minnesota – one of eight parcels in a high-end residential development known as Edenvale Highlands. Developer Calhoun Development, LLC (“Calhoun”) hired Imperial Developers, Inc. to perform the necessary site preparation work on all eight lots. Subsequent to that work, 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 4,³ 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 BankFirst and a second mortgage in the amount of \$243,817.76 to Calhoun. Both mortgages were filed with the Hennepin County Registrar of Titles on June 28, 2005. (Add.35; Ex. 12 to Affidavit of Ann O'Reilly, dated October 17, 2007 (“O'Reilly Aff.”).) However, for unknown reasons, a new certificate of title for Lot 4 – listing Lind Homes, Inc. as record owner and containing a memorial of BankFirst's and Calhoun's respective mortgages – was not issued until September 20, 2006. (Add.43.)

Although the luxury residence was completed, the contractors were not paid in full. Accordingly, in October 2006, Imperial commenced a mechanic's lien foreclosure action for its unpaid improvements to Lots 1-8. In addition, Contractors Southview Design & Construction, Inc. (“Southview”) and Scherer Bros. Lumber Co. (“Scherer Bros.”) [collectively, “the mechanics' lien claimants” or “Respondents”] asserted cross-

claims to foreclose on mechanics' lien claims for their improvements to Lot 4. Because Lind Homes, Inc. had defaulted on its mortgages, BankFirst also cross-claimed to foreclose upon its mortgagee interest in Lots 3-5.

On November 14, 2007, BankFirst and the mechanics' lien claimants brought cross-motions for summary judgment on the issue of priority before the Honorable William R. Howard, Judge of District Court for Hennepin County. In his Amended Findings of Fact, Conclusions of Law and Order for Summary Judgment, filed on February 14, 2008, Judge Howard granted BankFirst's motion for summary judgment, concluding that: (1) Imperial's basic site-preparation work on all eight lots constitutes a separate improvement from the construction of a luxury home on Lot 4;⁴ (2) BankFirst's mortgage is prior and superior to all mechanics' liens (apart from Imperial's) because it was "registered and of record" on June 28, 2005, well before the mechanics' liens had attached; and (3) the mechanics' lien claimants had actual knowledge that the certificate of title upon which they claim to have relied when deciding whether to perform improvements was inaccurate as it listed Calhoun – rather than Lind Homes, Inc. – as record owner. (Add.1-15.) In his accompanying Memorandum, Judge Howard further noted that under the lien claimants' proposed "view of Torrens law," their liens would be **invalid** because they failed to deliver pre-lien notice to Calhoun. (Add.14.)

To facilitate appeal of the district court's priority ruling, BankFirst and Respondents stipulated to the validity of the claimed lien amounts and to the attorney fees

³ The property is legally described as Lot 4, Block 1, Edenvale Highlands, Hennepin County, Minnesota ("the subject property").

⁴ Southview and Scherer Bros. did not appeal the district court's ruling that their work constitutes a separate improvement from Imperial's basic site preparation.

incurred in prosecuting those liens. (A.25-28.)⁵ 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. (Add.16-22.)

The mechanics' lien claimants filed their joint Notice of Appeal on October 28, 2008. (A.32.) The Minnesota Court of Appeals reversed the district court's ruling on priority. (Add.23-32.) On February 16, 2010, this Court granted BankFirst's petition for review.

STATEMENT OF FACTS

On June 27, 2005, developer Calhoun conveyed Lots 3-5 of Edenvale Highlands in Eden Prairie, Minnesota, to builder Lind Homes, Inc. The Warranty Deed for those lots was filed with the Hennepin County Registrar of Titles on June 28, 2005, and registered as Document No. 4129639. (Ex. 9 to O'Reilly Aff.) Also on June 27, 2005, Lind Homes, Inc. granted a mortgage to BankFirst on Lots 3-5 in the amount of \$2,155,000.00, which was filed with the Hennepin County Registrar of Titles on June 28, 2005, at 11:00 a.m. and registered as Document No. 4129640. (Add.35.)

Upon registration of the Warranty Deed, the registrar did not issue new certificates of title for all three lots. Instead, the registrar only issued a new certificate of title for Lot 5 (Certificate No. 1157096), upon which BankFirst's mortgage was memorialized and

⁵ The court of appeals has erroneously represented that the parties stipulated to the validity of Respondents' liens. *Imperial Developers, Inc. v. Calhoun Dev., LLC*, 775 N.W.2d 895, 898 (Minn. App. 2009) (Add.26). Validity based on defective pre-lien notice was argued in BankFirst's summary judgment motion (A.16-18, 23) and was not waived in the Amended Stipulation of Facts.

Lind Homes, Inc. was listed as owner of record. (Add.41.) Due to an apparent clerical error, no new certificates of title were issued for Lots 3 and 4. Thus, the existing certificates of title for Lot 3 (Certificate No. 1144973) and for Lot 4 (Certificate No. 1144974) neither referenced the Warranty Deed from Calhoun to Lind Homes, Inc. nor BankFirst's mortgage.⁶ In fact, Certificates of Title Nos. 1144973 and 1144974 listed Calhoun – not Lind Homes, Inc. – as record owner of Lots 3 and 4.

Having purchased Lot 4, Lind Homes, Inc. served as its own general contractor in constructing a luxury home thereon and hired Scherer Bros. to provide lumber and other necessary materials. Scherer Bros. furnished contributions from October 13, 2005-June 29, 2006, and filed its mechanic's lien with the Registrar of Titles (Document No. 4307732) in the amount of \$250,657.34 on September 21, 2006. (A.26.) Scherer Bros. did not deliver a pre-lien notice.⁷ (Add.18.)

In addition, Lind Homes, Inc. contracted with Southview for the provision and installation of landscaping materials. Southview furnished materials and services from May 17, 2006-June 9, 2006, delivering a pre-lien notice on Lind Homes, Inc. on May 11, 2006. (Ex. 13 to O'Reilly Aff.; A.27.) Southview filed its mechanic's lien with the Registrar of Titles (Document No. 4299632) in the amount of \$74,415.53 on August 29, 2006. (*Id.*)

For unknown reasons, on September 20, 2006, the Hennepin County Registrar of Titles re-registered the Warranty Deed for Lots 3-5 from Calhoun to Lind Homes, Inc.,

⁶ Pursuant to Minn. Stat. § 508.52 (2008), when registered land is conveyed to a new owner and the deed is memorialized, the existing certificate of title must be cancelled and a new one – showing the new registered owner – must be issued.

⁷ Pursuant to Minn. Stat. § 514.08 (2008), a lien claimant must file its mechanic's lien statement within 120 days of its last contribution to an improvement of property.

that had previously been registered on June 28, 2005 as Document No. 4129639; the Warranty Deed was re-registered as Document No. 4307439 (Ex. 17 to Reilly Aff.) In addition, on September 20, 2006, the Registrar cancelled the certificates of title for Lot 3 and for Lot 4 (Add.39) and issued a new certificate of title (Certificate No. 1189682) for Lot 3 and Lot 4 jointly, which lists Lind Homes, Inc. as record owner and memorializes BankFirst's mortgage as having been **registered on June 28, 2005 at 11:00 a.m.** (Add.43.) That same day, the Registrar cancelled this 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). (Add.41, 43.) The Registrar then issued a new certificate of title (Certificate No. 1189683), merging Lots 3-5 all onto the same certificate, correctly listing Lind Homes, Inc. as record owner. (Add.45.) **Notably, Certificate No. 1189683 memorializes BankFirst's mortgage as having been registered at 11:00 a.m. on June 28, 2005.**⁸ (*Id.*)

Although a home was completed on Lot 4, Lind Homes, Inc. defaulted on its mortgage, and various contractors were not paid in full for their improvements. In October 2006, Imperial commenced a mechanic's lien foreclosure action for its work on Lots 1-8, with contractors Southview and Scherer Bros. cross-claiming to foreclose on mechanics' lien claims for their unpaid improvements to Lot 4. BankFirst also asserted a cross-claim to foreclose its mortgage.

On November 14, 2007, BankFirst, Southview, and Scherer Bros. brought cross-motions for partial summary judgment, seeking a legal ruling on the priority of their

⁸ Upon filing an instrument (mortgage) with the registrar of title, the registrar assigns a document number to it that reflects the time, day, month, and year said instrument is filed. Minn. Stat. § 508.38 (2008).

respective interests in Lot 4. (A.1, 4.) In its February 14, 2008 Amended Findings of Fact, Conclusions of Law and Order for Summary Judgment, filed on February 14, 2008, the district court concluded that BankFirst's mortgage is prior and superior to Southview and Scherer Bros.' coordinate mechanics' liens because it was registered and "of record" upon its filing with the registrar – not upon its subsequent memorialization on the certificate of title. (Add.1-15.)

To facilitate appellate review of the district court's ruling granting priority to BankFirst over the coordinate lien claimants, the parties agreed to forego trial by stipulating to the amount of the claimed mechanics' liens and to the amount of attorney fees the contractors incurred in prosecuting those liens. (A.24-31.) This Amended Stipulation of Facts did not waive the issue of whether the mechanics' liens were invalid for lack of pre-lien notice. Final judgment was entered on September 16, 2008, with the mechanics' lien claimants filing their joint Notice of Appeal on October 28, 2008. (A.32.)

The Minnesota Court of Appeals reversed the district court's priority ruling. (Add.23-32.) On February 16, 2010, this Court granted BankFirst's Petition for Review.

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, solely the interpretation of the apposite Minnesota statutes discussed below are at issue in this appeal. 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 BankFirst’s Mortgage Is Prior and Superior to Respondents’ Mechanics’ Liens.

The property at issue in this case is registered under the Torrens Act. It is instructive to consider the underlying purpose of land registration.

A. The Torrens Act Facilitates the Transfer of *Ownership* Interests.

According to this 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 *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). The Torrens system enables ownership interests to be “conclusively evidenced by certificate and thereby made determinable and transferable quickly, cheaply and safely.” *U.S. v. Ryan*, 124 F. Supp. 1, 4 (D. Minn. 1954).

When a party seeks to register an ownership interest in property pursuant to the Torrens Act (Minnesota Statutes chapter 508), ownership and any other interests in the property must be adjudicated. *Hersh*, 588 N.W.2d at 733-34; *In re Collier*, 726 N.W.2d 799, 804 (Minn. 2007). Once the state of title is thoroughly assessed, the registrar of titles then issues a certificate of title **to the owner**, who holds the land “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 in the office of the registrar. . . .” *Id.* (quoting Minn. Stat. § 508.25). From that point on, all subsequent conveyances, liens, and mortgages only affect the property’s title if filed and registered. *Collier*, 726 N.W.2d at 804; Minn. Stat. § § 508.48, 508.54. When registered land is sold to a good faith purchaser, the deed is noted on the “last” certificate of title, which is then cancelled; a new certificate of title listing the new owner and making a memorial of the new owner’s mortgage is then issued to the new owner. Minn. Stat. § 508.52.

B. Minn. Stat. § 514.05, Subd. 1 – Not the Torrens Act – Governs Lien Priority and Ensures the Priority of a Torrens Mortgage Filed Prior to First Visible Improvements.

While section 508.25 protects the property interests of a purchaser for value of registered land, **it does not govern priority disputes between mortgagees and mechanics’ lien claimants.** Instead, Minn. Stat. § 514.05, subd. 1, provides the mechanism for resolving priority disputes between competing mortgagee and mechanics’ lien interests:

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. As against a bona fide purchaser, mortgagee, or

encumbrancer without actual or record notice, no lien shall attach prior to the actual and visible beginning of the improvement on the ground. . . .

Minn. Stat. § 514.05, subd. 1 (emphasis added); *see also Landers-Morrison-Christenson Co. v. Ambassador Holding Co.*, 171 Minn. 445, 448, 214 N.W. 503, 505 (1927) (purpose of section 514.05 is to “fix the relative rights and priorities of purchasers, incumbrancers and lienholders with definiteness and certainty”). Section 514.05, subdivision 1’s goal of balancing the interests of mortgagees who have first inspected the property to verify that no visible improvement has occurred against the right of contractors who deserve payment for furnishing labor and material for the improvement is best served “when the rights of both mortgagees and lien claimants are fixed with definiteness and certainty.” *Carlson-Greife Constr., Inc. v. Rosemount Condo. Group P’ship*, 474 N.W.2d 405, 408-09 (Minn. App. 1991), *review denied* (Minn. Oct. 31, 1991); *Reuben E. Johnson Co. v. Phelps*, 279 Minn. 107, 116, 156 N.W.2d 247, 253 (1968).

This Court has previously explained that the legislature “chose the precise language of [section 514.01, subdivision 1] 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”). *Phelps*, 279 Minn. at 112-13, 156 N.W.2d at 251-52. The legislature’s concern for protecting lenders who provide construction funds and record their mortgage prior to any visible improvements is logical in view of the real-world realities at play. Namely, lenders will only fund a construction project if able to assure the priority of their mortgage. Contractors, on the other hand, are not driven by concerns of priority; rather, their goal is to be paid during the construction process and to perfect their liens in the event they are not paid in full. As a matter of

common sense, a contractor is far more likely to be paid when financing is in place. It is difficult to fathom any circumstance under which an owner would not have a mortgage secured prior to hiring a contractor to begin improvements, especially in a new construction setting involving millions of dollars where there is no equity in the property prior to construction.

In this case, the district court correctly ruled that BankFirst's mortgage was superior to Respondents' liens because it was "of record" within the meaning of section 514.05, subdivision 1, prior to the attachment of Respondents' coordinate liens. As demonstrated below, in reversing the district court, the Minnesota Court of Appeals erred in its interpretation of section 514.05 and misunderstood the scope of section 508.55 as applying to priority disputes between competing lien interests. In fact, section 508.55 merely governs the process required for registering and rendering effective mortgagee interests in Torrens property. The court of appeals' view that section 514.05, subdivision 1, somehow constitutes "an exception" to the rule that an interest in Torrens property "is established upon the registration of that interest," demonstrates the court's confusion. *See Imperial*, 775 N.W.2d at 898 (citing Minn. Stat. § 508.47, subd. 1) (Add.26). Thus, from the outset, the court of appeals' reasoning is flawed since section 514.05, subdivision 1, is not designed to determine when an interest in Torrens property attaches; rather, section 514.05 determines priority between competing lien interests in property, regardless of whether that property is registered or abstract.

C. The Same Statutory Framework Applies for Resolving Priority Disputes Regardless of Whether Torrens or Abstract Property Is At Issue.

Although section 514.05, subdivision 1, does not explicitly define the term “of record,” the caselaw and other statutes discussed below provide a legal framework under which it is clear that a mortgage – whether against abstract or Torrens property – is “of record” upon its filing.

1. Pursuant to Minnesota’s Recording Act, Any Mortgage’s Priority Date is Determined by Its Date of Filing With the County Recorder or Registrar.

In *Home Lumber*, this Court explained the procedure for determining priority between competing mortgagee and mechanic’s lien interests. *Home Lumber Co. v. Kopfmann Homes, Inc.*, 535 N.W.2d 302, 304 (Minn. 1995). As a first step, the mortgage’s priority date must be determined. Minn. Stat. § 507.34 of the Recording Act “establishes mortgage [lien] priority from the date of recording with the county recorder **or the registrar of titles.**” *Home Lumber*, 535 N.W.2d at 304 (emphasis added); *Ripley v. Piehl*, 700 N.W.2d 540, 544 (Minn. App. 2005) (also citing Minn. Stat. § 507.34 in noting that a mortgage’s priority is determined by its date of recording with either “the county recorder or the registrar of titles”);⁹ Minn. Stat. § 508.48 (2008) (the filing of an instrument affecting title to registered land with the registrar serves as notice of that interest to all other parties in same way that the filing of an instrument affecting title to unregistered land with the recorder provides notice).

⁹ In this context, “recording with the county recorder or the registrar of titles” can only mean “filing” the mortgage either in the office of the county recorder or in the office of the county registrar.

Next, the mortgage's priority date must be compared to the date the mechanic's lien attaches pursuant to Minn. Stat. § 514.05, subd. 1, of the Mechanic's Lien Statute. *Home Lumber*, 535 N.W.2d at 304. Section 514.05, subdivision 1, dictates that a mechanic's lien generally attaches at the first visible on-the-ground improvement and takes priority over any mortgage not then "of record."

2. Minn. Stat. § 514.05, Subd. 1 Does Not Distinguish Between Abstract and Torrens Property.

In crafting section 514.05, subdivision 1, the Minnesota legislature made no distinction as to whether the competing mortgage and mechanic's lien interests are against abstract or Torrens property. Had the legislature deemed such a distinction necessary, it most assuredly would have created separate priority rules in section 514.05 for abstract and for Torrens property. Similarly, as discussed above, section 507.34 also applies to both abstract and Torrens mortgages,¹⁰ with mortgages taking as their priority date the date they are filed with the county recorder or registrar.

If these statutes did not apply to all types of property, a mortgage against land that is both abstract and Torrens would be "of record" at two separate points in time – upon time-stamping of the mortgage (for the abstract portion), but only upon subsequent memorialization of the mortgage (for the Torrens portion). Thus, the court of appeals' ruling that under section 514.05, subdivision 1, a Torrens mortgage does not become "of record" upon filing, but rather, only upon its subsequent "memorialization" is clearly

¹⁰ Minn. Stat. § 508.48 (2008); *see also* *Armstrong v. Lally*, 209 Minn. 373, 375-76, 296 N.W. 405, 405-06 (1941) (the Recording Act applies to both Torrens and to abstract property, except where the Torrens Act specifies otherwise); *see also* *Home Lumber*, 535 N.W.2d at 304; *In re Ocwen Fin. Servs. Inc.*, 649 N.W.2d 854, 857 (Minn. App. 2002) (resolving priority dispute between competing mortgagee interests in Torrens property by applying priority dates dictated by the Minnesota Recording Act).

flawed and unworkable. *See* Minn. Stat. § 645.17 (1) (legislature does not intend result that is “absurd, impossible of execution, or unreasonable”).

3. The *Ocwen* Decision Explicitly Holds that Priority between Competing Torrens Mortgages Is Determined by the Document Number and Time-Stamp Noted on the Mortgages at Filing – Not by Reference to the Certificate of Title.

In its decision here, the court of appeals has failed to recognize the importance of its earlier holding in *Ocwen*, in which it ruled that priority between competing Torrens mortgages is determined by comparing the document numbers stamped onto the mortgages at filing. *In re Ocwen Fin. Servs. Inc.*, 649 N.W.2d 854, 857 (Minn. App. 2002). In that case, separate mortgages on Torrens property were filed with the registrar on the same day, with both mortgages being time-stamped as having been filed at 11:00 a.m. 649 N.W.2d at 855-56. The mortgages were assigned sequential document numbers (3228150 and 3228151, respectively), which shows they could not “have actually been stamped at the same time – even if the time differential was only seconds.” *Id.* at 857 (mortgage with lower registration document number had priority).

The *Ocwen* court specifically held, “[R]egistration 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) (describing Minnesota as a “race-notice state”); *see also* Minn. Stat. § 386.31 (document number “shall be prima facie evidence of priority of **registration**”) (emphasis added); Steven J. Kirsch, *Methods of Practice*, 6A Minn. Prac. § 46.53 (3d ed.) (2009) (“The Torrens property **registration** numbers provide conclusive evidence of the order in which mortgages are filed.”) (emphasis added).

Thus, the mortgage interests in *Ocwen* were **registered** pursuant to Minn. Stat. § 508.55 at filing when the registrar stamped the mortgage with a document number and time-stamp – *not* upon the subsequent “memorialization” of that mortgage on the certificate of title at some undefined time in the future. Significantly, the *Ocwen* court made its priority determination without reference to the certificate of title (apart from noting that one of the mortgagees had commenced a proceeding subsequent action pursuant to Minn. Stat. § 508.58, to compel the issuance of a new certificate of title). *Ocwen*, 649 N.W.2d at 856.¹¹

The absence of any reliance by the *Ocwen* court on the certificate of title or on the memorialization of the mortgage thereon is significant. Were the date of memorialization determinative to the analysis of lien priority, or if “of record” meant the date of memorialization, *Ocwen* would have said so. **The fact that a registered document is subsequently memorialized on a certificate of title is clearly inconsequential as between competing lien interests.**

Accordingly, for priority purposes, a Torrens mortgage that is registered first by time-stamp and document number is clearly “of record” first. *See Ocwen*, 649 N.W.2d at 857. Were this not the case, and a mortgage only became “of record” for priority purposes after being memorialized on the certificate of title, the legislature’s requirement of stamping the date, time and document number on registered documents¹² would be

¹¹ Document numbers are assigned to the instrument on the day of filing, a date that precedes the date a memorial of the said document is made on the certificate of title. The memorial of the registered mortgage is never simultaneous with the filing. *Imperial*, 775 N.W.2d at 906 (Schellhas, J., concurring in part, dissenting in part) (Add.33).

¹² Minn. Stat. § 508.38 (2008) requires “[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

rendered meaningless and superfluous. This result cannot stand under Minnesota law. *See Am. 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); Minn. Stat. § 645.16 (2008).

4. Certificates of Title Do Not Show Time of Memorialization.

Significantly, the Torrens Act neither requires county registrars to memorialize a registered document on the certificate of title within a specific timeframe **nor to note upon the certificate of title the time/date that a particular document was memorialized.** *The only mechanism*, therefore, for ascertaining a mortgage's priority date – when it is “of record” – is the registrar's notation of a time-stamp and document number on the mortgage at filing. Because certificates of title do not indicate the date a given document was memorialized – but rather, only indicate the “**date of registration**” stamped on the document at filing (Add.39-46) – the court of appeals' conclusion here that a document is not “of record” until it is memorialized contravenes all notions of logic, not to mention prior caselaw.¹³ *See Imperial*, 775 N.W.2d at 907 (“priority of competing interests in registered land is determined by the date of filing with the registrar”) (Schellhas, J., concurring in part, dissenting in part) (Add.34).

reference to the proper certificate of title.”

¹³ In any case, once filed with the registrar, a mortgage is clearly “of record” and available for public viewing while stacked in the registrar's office along with other documents relating to various Torrens parcels, all in line to be memorialized on the appropriate certificate of title when time permits. *See Horgan v. Sargent*, 182 Minn. 100, 106-07, 233 N.W. 866, 869 (1930).

In *C.S. McCrossan, Inc. v. Builders Fin. Co.*, this Court previously recognized that a mortgage becomes “of record” upon filing and registration, not upon its subsequent 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) (recognizing distinction between registration and memorialization) (emphasis in bold-facing and italics added). Although *McCrossan* is factually distinguishable from the instant case because the lien claimant there had actual notice of a prior mortgage,¹⁴ the above-quoted passage undeniably shows that a mortgage is “of record” when it is **registered** upon filing, not after its subsequent memorialization.

Were this not the case, a mortgagee would bear the unwarranted burden of continuously checking with the registrar’s office to ascertain whether its registered document had finally been memorialized on the certificate of title. *Imperial*, 775 N.W.2d at 907 (Schellhas, J., concurring in part, dissenting in part) (Add.33-34). The burden of sending agents to the registrar’s office on a day-after-day even week-after-week basis to learn when a mortgage has finally been memorialized (and then arranging for the immediate taking of “priority pictures”) would increase a lender’s costs exponentially; such increased costs would undoubtedly cast a chilling effect on the financing of real

¹⁴ Completely ignoring that the lien claimant’s junior priority was based on the contractor’s “actual knowledge” of a prior mortgagee interest (*McCrossan*, 304 Minn. at 544, 232 N.W.2d at 19), the court of appeals misconstrued *McCrossan* as carving out a narrow exception for “mortgages that were previously memorialized on a certificate of title and the clerical error was made during the reissuance of a subsequent, related certificate of title.” *Imperial*, 775 N.W.2d at 904 (Add. 31).

estate development throughout Minnesota.

Cases such as *Ocwen*, *Home Lumber*, and *McCrossan* illustrate the statutory framework provided by sections 507.34 and 514.05 for determining priority between BankFirst's mortgage and Respondents' mechanics' liens: The registered mortgage's priority date (date of filing) is compared with the date of the first visible improvement. Here, BankFirst duly filed its mortgage with the registrar on June 28, 2005. (Add.35.) Certificate of Title No. 1189683 confirms this by identifying the "**Date of Registration Month Day, Year Time**" (not the "Date of **Memorialization**, Month Day, Year Time" of BankFirst's mortgage as "June 28, 2005 at 11:00 a.m." (Add.45) (emphasis added).

Improvements to Lot 4, on the other hand, did not commence until October 13, 2005, **several months after** BankFirst's mortgage had been filed with the registrar, time-stamped, and assigned a **registration** number. Accordingly, the district court did not err in ruling as a matter of law that BankFirst's mortgage is prior and superior to Respondents' coordinate mechanics' liens. Hence, the court of appeals' contrary ruling must be reversed.

D. In Concluding that BankFirst's Mortgage was Not "Of Record" Until Memorialized on the Certificate of Title, the Minnesota Court of Appeals Misconstrued Both the Plain Language and Purpose of Minn. Stat. § 508.55.

Although the relevant statute here is section 514.05, subdivision 1, the court of appeals considers the "key issue" to be "whether section 508.55 requires the interest to be memorialized on the certificate of title, or if memorializing the title is a separate event apart from the registration process." *Imperial*, 775 N.W.2d at 899, 900 (Add.27). Yet, even were this Court to agree that a Torrens mortgage is only "of record" for priority

purposes upon its “registration,” which it should not, the court of appeals has erred in interpreting what constitutes “registration.”

1. Practical and Plain Meaning of Section 508.55 Does Not Require Memorialization to Register a Mortgage.

The court of appeals properly references Minn. Stat. § § 508.54-.55 as the portion of the Torrens Act specifically pertaining to the registration of mortgages. In pertinent part, section 508.54 provides that a mortgage interest “shall . . . take effect upon the title only from the time of registration.” Section 508.55 further clarifies the meaning of the term “registration”:

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***, 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 in bold-facing and italics.) Thus, under the plain language of section 508.55 (as demonstrated in *Ocwen*), the legislature has delineated the following procedure for registering a mortgage against Torrens property: The mortgage is filed with the county registrar, who immediately registers the document by stamping it with a registration document number and with the precise time of filing. Once the mortgage is registered, the statute further requires the registrar to enter a memorial of “**the instrument *registered***” onto the certificate of title, along with the document’s registration number and exact time of filing. Indeed, by its plain language, contrary to the appellate court’s interpretation, section 508.55 provides that time-stamping and the assignment of a document number constitute registration – not the subsequent memorialization of the

mortgage on the certificate of title. *See, e.g., Hersh*, 588 N.W.2d at 735 (where statute is unambiguous, plain language controls).

The court of appeals has erroneously concluded -- based on the existence of “a colon” in section 508.55 -- that “registration” of an interest in Torrens property does not take place until that interest has subsequently been memorialized on the certificate of title:

Applying basic grammar principles, the statute announces the registration requirements using a colon, thereby linking “the mortgage deed . . . shall be presented to the registrar” with a conjunctive “and” to “the registrar shall enter upon the certificate of title a memorial” as joint requirements for registration. *See* Minn. Stat. § 508.55. Thus, there are two unambiguous statutory requirements for a mortgage to be registered: the presentation of the legal instrument creating the interest to the registrar, *and* the registrar memorializing the interest on the certificate of title.

Imperial, 775 N.W.2d at 900 (Add.28). However, the court of appeals’ analysis is flawed as it fails to take into account that, by its plain language, section 508.55 requires the registrar to enter upon the certificate of title a memorial of “the instrument registered.” In its last sentence, section 508.55 further directs that the registrar note the precise time of filing (i.e., place a time-stamp) on the “instrument registered.” Continuing with the court of appeals’ “grammatical analysis,” the statute’s use of the word “registered” in the **past tense** indicates that the registrar is directed to memorialize on the certificate of title a document that **has already been registered**; otherwise, the legislature would have employed the language, “**to be registered.**”

In addition, as Judge Heidi Schellhas underscored in her well-reasoned dissenting opinion, although the precise time of registration is time-stamped onto the mortgage instrument and later memorialized on the certificate of title by the registrar, **the**

certificate of title itself bears no indicia by time-stamp (or otherwise) of when a given mortgage was memorialized thereon. *BankFirst*, 775 N.W.2d at 907 (“[T]he registrar makes no record of the date and time of memorialization on a certificate of title.”) (Schellhas, J., concurring in part, dissenting in part) (Add.34). This distinction is compelling and cannot be ignored. That is why a rule of law deeming Torrens mortgages to be “of record” only upon memorialization is wholly unworkable, because priority determinations would depend on “the availability of information regarding the exact date and time that instruments are memorialized on a certificate” – information that is not available on the face of the certificate. *Id.*

2. Statutory Construction.

The language on a certificate of title reads, “**Date of Registration**, Month Day, Year Time.” It does not say, “**Date of Memorialization**. . . .” As set forth above, the registrar places a registration document number and time-stamp on an instrument at filing. The memorial of a Torrens interest tells the public *when* that instrument was registered. That is, the memorial reflects the date the document *was* “registered,” which will always pre-date the day and time of the memorial itself. Judge Schellhas correctly noted in her dissent that “the registrar does not simultaneously file-stamp a mortgage, assign a document number to it, *and* enter a memorial of the mortgage on a certificate of title.” *See Imperial*, 775 N.W.2d at 906 (Schellhas, J., concurring in part, dissenting in part) (Add.33). A time gap between the two events is unavoidable.

Thus, as the dissent correctly concluded, a document is clearly “registered” upon filing. Under the basic tenets of statutory construction, the only logical and meaningful

interpretation of section 508.55 is that “registered” means “filed.” The memorial does not create the registration itself. If the memorial were the vehicle by which registration was effectuated, as the court of appeals erroneously held, there would simply be no need to memorialize the time of registration (date of filing); the exercise of stamping the time, day and year the instrument was “registered” would be rendered superfluous and insignificant. In short, there would be no point whatsoever in making a memorial of when the instrument was registered.

The law in Minnesota is clear that the legislature does not intend a result that is “absurd, impossible of execution, or unreasonable.” Minn. Stat. § 645.17(1) (2008). “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.” *Am. Family*, 616 N.W.2d at 277; *see also* Minn. Stat. § 645.16 (2008). The Court must “construe words and phrases according to rules of grammar and according to their most natural and obvious usage.” *ILHC of Eagan, LLC v. County of Dakota*, 693 N.W.2d 412, 419 (Minn. 2005). Accordingly, under basic principles of statutory construction, an instrument is “registered” under section 508.55 when filed and assigned a document number by the registrar of title. This is the only plausible interpretation that avoids creating an “absurd, impossible of execution, or unreasonable” result.

3. Caselaw.

Furthermore, *Ocwen* and *McCrossan* confirm what BankFirst views as the meaning of section 508.55 – namely, that registration occurs when the instrument filed with the registrar is denoted with a registration document number and time-stamp – not

when that interest is subsequently memorialized on the certificate of title. *Ocwen*, 649 N.W.2d at 856-57; *McCrossan*, 304 Minn. at 543, 232 N.W.2d at 18-19. In other words, a mortgage becomes “of record” for priority purposes at the exact instant it is stamped with a registration number and time-stamp. Because certificates of title do not provide a date, hour, and minute of memorialization (*see, e.g.*, Add.39-46), there is simply no other means of ascertaining when a Torrens mortgage could be “of record” within the meaning of Minn. Stat. § 514.05, subd. 1.

On the other hand, the court of appeals’ reliance on *United States v. Ryan*, 124 F. Supp. 1 (D. Minn. 1954) is ill-founded. That case does not stand for the proposition that a mortgage interest in Torrens property only becomes effective upon the mortgage’s memorialization or that “registration” entails both filing with the registrar and the subsequent memorialization on the certificate of title. In fact, *Ryan* neither defines “registration,” nor makes any mention whatsoever of how to resolve competing lien interests. *Ryan* is absurdly **inapplicable** here as it involves the invalidation of a tax lien (not a competing mortgage)¹⁵ that was filed in the wrong office, without a property description. 124 F. Supp. at 6-7. Yet, even were it remotely apposite, *Ryan* would not constitute binding authority. *See, e.g., State ex rel. Hatch v. Employers Ins. of Wausau*, 644 N.W.2d 820, 828 (Minn. App. 2002) (state courts are not bound by federal court interpretations of state law).

Consequently, this Court should rule that “of record” means the date of filing under section 514.05, subdivision 1, and also under section 508.55, because it results in the only logical and workable method for resolving priority disputes between lienholders

¹⁵ Minn. Stat. § § 508.54-.55, which are specifically tailored to mortgage interests in

of Torrens property. When BankFirst filed its mortgage on June 28, 2005, the registrar duly registered the mortgage with a registration number and time-stamp. At that moment – not a year later upon its memorialization – BankFirst’s mortgage interest was registered within the meaning of section 508.55 and “of record” for priority purposes within the meaning of section 514.05, subdivision 1. Hence, this Court should reverse the court of appeals’ ruling on when a Torrens mortgage is “of record” and its determination of priority in favor of the Respondent mechanics’ lien claimants.

E. BankFirst’s Registration of Its Mortgage Was Not “Defective.”

The court of appeals erroneously concluded that a “defective registration” prevented BankFirst’s mortgage from being “of record” prior to the commencement of improvements to Lot 4. *Imperial*, 775 N.W.2d at 900 (Add.28). First, as demonstrated above, the court of appeals’ erroneous interpretation of “registration” as including the subsequent memorialization of a mortgage on the certificate of title contravenes not only the plain language of Minn. Stat. § 508.55, but the explicit language of *McCrossan* and *Ocwen*.

Second, the record unequivocally shows that on September 20, 2006, when the registrar’s failure to memorialize the **registered** mortgage was discovered, the registrar generated a new certificate of title for Lots 3 & 4 (Certificate No. 1189682). (Add.43.) Significantly, this new certificate of title indicated the “**Date of Registration, Month, Day Year Time**” of BankFirst’s mortgage as being **June 28, 2005 at 11:00 a.m.** Indeed, the registration document number (4129640) and time-stamp (June 28, 2005 11:00 a.m.) memorialized on the new certificate of title are **identical** to those physically noted on

BankFirst's mortgage upon its filing with the registrar. (Add.35.) Moreover, this same registration number (4129640) and time-stamp (June 28, 2005 11:00 a.m.) are also memorialized on the final merged certificate of title for Lots 3-5. (Add.45.) In other words, there was no "defective registration" as BankFirst's mortgage was time-stamped, assigned a document number, and was eventually memorialized on the certificate of title.

To be sure, were circumstances reversed and the mechanic's lien statement had been filed with the registrar but not memorialized on the certificate of title within 120 days of the contractor's last improvement (because of the time gap pervasive in all filing or because of registrar error), no court on either side of the Mississippi would invalidate the mechanic's lien interest pursuant to Minn. Stat. § 514.08 (mechanic's lien ceases to exist 120 after completion of last work unless a lien statement is "filed for record with the county recorder or, if registered land, with the registrar of titles of the county in which the improved premises are situated"); Minn. Stat. § 508.49 (interests in Torrens take effect upon registration). Common sense dictates that for the protection of both contractors and lenders, memorialization of the document filed is not required for it to be "of record" under section 514.05 or under section 508.55. While interests in Torrens property are registered and take effect upon filing with the registrar, memorialization constitutes a separate step intended to facilitate the quick and safe transfer of ownership. *See Ryan*, 124 F. Supp. at 4.

In short, the conclusion that BankFirst's filing of its mortgage with the registrar on June 28, 2005 resulted in a failed registration lacks any substantive merit. The mortgage

was properly filed and registered – only the memorial thereof was delayed due to apparent clerical error.

F. The Known Gap between a Mortgage’s Registration and Its Subsequent Memorialization on the Certificate of Title Is Precisely Why “Registration” Does Not Include Memorialization.

In this case, the eventual memorialization of BankFirst’s mortgage on September 20, 2006, more than a year after its registration, went well beyond any typical gap period between registration and memorialization. Respondents have, however, failed to grasp that while “the typical gap” between registration and memorialization does not explain why memorialization of BankFirst’s mortgage was so late in this particular case, **it is precisely because of this “typical gap” that the registration number and time-stamp must govern the priority date for a Torrens mortgage.**

As Judge Schellhas recognizes in her strong dissent, the “gap” between the registration of a mortgage and its subsequent memorialization is unavoidable and varies from county to county based on such uncontrollable factors as the workload and efficiency of any given registrar’s office. *Imperial*, 775 N.W.2d at 906 (Schellhas, J., concurring in part, dissenting in part) (Add.33). Accordingly, in order to provide a conclusive basis for making priority determinations, the legislature requires that documents filed in the registrar’s office be simultaneously registered with a time-stamp and document number. *See* Minn. Stat. § 508.38 (2008); *Ocwen*, 649 N.W.2d at 857.

Furthermore, *if* a mortgage’s priority date were determined solely by memorialization – as the court of appeals erroneously concluded – an untenable legal vacuum would be created. In short, it would be impossible to assure the priority of a

multi-million dollar mortgage because of 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).

G. The Court of Appeals' Ruling is Unworkable and Will Have a Chilling Effect on Construction Lending.

Prior to the court of appeals' decision, established rules provided lenders with a reliable framework for preserving priority. Although the statutory scheme is intended to protect the priority of a mortgagee who files prior to first visible improvements (*Home Lumber*, 535 N.W.2d at 304), it also "imposes a duty on a purchaser or encumbrancer to examine the premises for the [first visible improvement] before a sale or mortgage transaction is complete." *Kloster-Madsen, Inc. v. Taft's, Inc.*, 303 Minn. 59, 64, 226 N.W.2d 603, 607 (1975). Until now, lenders have been able to fund development of Torrens property with confidence in their priority by taking "priority pictures" (showing the absence of a "first visible improvement") on the same day as filing the mortgage with county officials. However, the court of appeals' decision creates a quagmire for construction lenders; they must now obtain "priority pictures" on the day the mortgage is memorialized – **a date and time that the mortgagee can neither predict, control, nor ascertain from the face of the certificate of title.** *Imperial*, 775 N.W.2d at 906-07 (Schellhas, J., concurring in part, dissenting in part).

If the court of appeals' decision stands, to retain priority, lenders will now need to take control of projects and actively delay the making of the "first visible improvement" until after the registrar has duly made a memorial of the mortgage on the certificate of

title – whenever that might be. Again, construction lenders will now need to check with the registrar’s office and view the construction site on a day-after-day (even week-after-week) basis to learn if the mortgage has finally been memorialized and then arrange for the immediate taking of “priority pictures.” *Imperial*, 775 N.W.2d at 906-07 (citing 6A Steven J. Kirsch, *Minnesota Practice* § 48.3.9 (3d ed. 1990)) (Schellhas, J., concurring in part, dissenting in part) (Add.34).

As the dissent emphatically notes, these new burdens on the lender are utterly “unworkable” in the real world and constitute a significant departure from the status quo:

The majority’s holding presents an unworkable rule under which construction lenders must wait for proof that their mortgages have been memorialized on certificate so title – which may take days or weeks – before disbursing any mortgage funds for fear of risking the loss of priority to mechanics’ lienholders who commence work after the mortgages have been filed with the registrar but before they are memorialized. To wait to disburse mortgage funds until a mortgage is memorialized on a certificate of title has not been the practice of construction lenders, who disburse funds as soon as they can verify that no visible work was done on the building site before the mortgage was filed.

Id.; see also *McCrossan*, 304 Minn. at 543, 232 N.W.2d at 18-19 (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). Indeed, the newly-imposed burden will be prohibitively onerous and will necessarily stymie new construction lending involving registered property. The risk of losing priority, despite all reasonable and diligent efforts to preserve it, is simply too high. The rule imposed under the appellate court’s interpretation of “of record” for Torrens property (i.e., that memorialization is required), will bring construction lending in Minnesota to a standstill. The chilling effect will be palpably detrimental in these difficult economic times.

For this exact reason, the Minnesota legislature has provided a statutory framework wherein the priority date of a Torrens mortgage – i.e., the date it becomes “of record” – is its **registration** date as evidenced by the registered mortgage’s time-stamp and document number – not by the date when a memorial of the mortgage is later made on the certificate of title, a date that is neither noted on the certificate nor can be predicted with any modicum of certainty. Minn. Stat. § § 386.31, 507.34, 508.48, & 508.55.

H. The Court of Appeals’ Ruling Contravenes the Purpose of Section 514.05, Subdivision 1.

Because the time that any given filed document will be memorialized on the certificate of title cannot be predicted with any certainty, the court of appeal’s conclusion that a mortgage is only “of record” upon memorialization thwarts the statutory purpose of fixing the priority of competing lien interests with definiteness and certainty. *See, e.g., Landers-Morrison*, 171 Minn. at 448, 214 N.W. at 505 (section 514.05 serves purpose of fixing relative priorities of lienholders with “definiteness and certainty”); *Phelps*, 279 Minn. at 116, 156 N.W.2d at 253 (citations omitted). The appellate court’s erroneous conclusion that “of record” requires memorialization of the instrument filed creates a paradigm of uncertainty. Lenders have no means for determining when their mortgage has become of record because the memorial of the mortgage filed is subject to an unknown time gap. This result eradicates the statutory purpose of fixing relative priorities.

Furthermore, the court of appeal’s decision severely undermines the statute’s underlying policy of enabling “property owners and developers to procure financing by granting mortgagees [who have verified the absence of visible improvements] priority

against lien claimants.” *Carlson-Greife*, 474 N.W.2d at 408. It is no secret that without financing, no construction project will ever get off the ground. And without certainty, there will be no financing. While the court of appeals’ decision virtually destroys the ability of mortgagees to ensure their priority (commensurately reducing their willingness to lend), mechanics’ liens will continue to attach at the contractors’ volition (i.e., at the “first visible improvement”). In short, the court of appeals’ ruling destroys the balance that section 514.05, subdivision 1, was designed to protect.

I. The Court of Appeals Ruling Contravenes Notions of Justice and Equity Recognized in *Collier*.

This Court has recently recognized the importance of applying 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 district court remarked that Respondents have not demonstrated good faith:

Certificate of Title No. 1144974 listed Calhoun, not Lind Homes, as the owner of Lot 4 and listed no deed to Lind Homes . . . 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. [Respondents] 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, had no notice or knowledge that anything was awry with the certificate of title. BankFirst complied with all requirements under the Torrens Act by duly filing its mortgage and obtaining a registration number and time-stamp. As this Court 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. at 543, 232 N.W.2d at 18-19. Even the court of appeals recognized that “prioritizing two mechanics’ liens over mortgages in excess of \$2 million based on an error of the registrar seems like an **extremely harsh** consequence.” *Imperial*, 775 N.W.2d at 902-03 (emphasis added) (Add.30).

Accordingly, equitable considerations clearly favor BankFirst’s claim to priority. Under notions of justice and fair play, the Respondent mechanics’ lien claimants – who began improvements to Lot 4 nearly *four months* after BankFirst recorded its lien and who knew the certificate of title in place at that time to be inaccurate – are not entitled to priority over the mortgagee.

J. The Court of Appeals’ Reference to State’s General Fund As a Remedy for Any Inequities Is Inappropriate.

In granting priority to the mechanics’ lien claimants, the court of appeals hints that BankFirst need only avail itself of Minn. Stat. § 508.76, subd. 1 (the state’s assurance fund) in order to be rendered whole. *Imperial*, 775 N.W.2d at 904 (noting “the equitable concerns raised by respondents have been anticipated and accounted for” by the legislature’s creation of the general assurance fund, although acknowledging it has not

been asked to determine BankFirst's "eligibility to recover under the fund"). However, the court of appeals' reliance on the general fund is neither compelling nor appropriate. Respondents' argument is akin to telling a jury, "Don't worry about the law or the facts because the defendant has insurance." Moreover, recovery from the general fund is still subject to state defenses, and requires an entirely separate lawsuit to extract funds if the state disputes a claimant's eligibility.

Finally, either all the parties or none of the parties have standing to seek redress under section 508.76, subdivision 1. That is, under the district court's ruling that a mortgage is "of record" upon its filing with the registrar, Respondents could just as well be viewed as the "person who . . . sustains any loss or damage by reason of any omission, mistake or misfeasance of the registrar. . . ." Minn. Stat. § 508.76, subd. 1; *see Horgan v. Sargent*, 182 Minn. 100, 105, 233 N.W. 866, 869 (1930).

Thus, it is inappropriate for the court of appeals to rely upon the existence of the fund when reviewing whether the equities favor upholding the district court's priority determination. As demonstrated above, the equities clearly favor BankFirst (which complied with all requirements of the Torrens Act in perfecting its mortgage), as opposed to Respondents (which had actual knowledge of the inaccuracy of the certificate of title in existence when they began their improvements to Lot 4).

III. Alternatively, Respondents' Failure to Deliver Pre-Lien Notice on Calhoun – the Owner of Record Listed on the Certificate of Title – Invalidates Their Coordinate Liens.

Were this Court to decide that a Torrens mortgage only becomes "of record" when memorialized on the certificate of title, which it must not, it should then affirm the district

court's judgment in BankFirst's favor on the alternative ground that Respondents' liens are invalid because of their failure to deliver pre-lien notices on the record owner listed on the certificate of title in effect at the time of the first visible improvement. *See Myers Through Myers v. Price*, 463 N.W.2d 773, 775 (Minn. App. 1990) (“[w]e will affirm summary judgment if it can be sustained on any grounds”), *review denied* (Minn. Feb. 4, 1991).

In opposing the Respondent lien claimants' cross-motion for summary judgment, BankFirst argued that *if* the district court decided no mortgagee interest existed prior to its memorialization on the certificate of title, then the mechanics' liens would be invalid because no pre-lien notices were delivered on the record owner listed on the certificate of title existing at the commencement of the improvements. (A.16-18, 23.) The district court subsequently agreed that the mechanics' lien claimants “could not have it both ways,” by relying on the erroneous certificate of title to determine whether the mortgage was “of record” for priority purposes,¹⁶ while ignoring the same certificate of title for pre-lien notice purposes. (Add.14.)

Accordingly, when the mechanics' lien claimants initiated their joint appeal, BankFirst duly argued to the court of appeals that should it decide the mortgage was not “of record” until its memorialization, the mechanics' liens would then be invalid pursuant to Minn. Stat. § 514.011 because of the lienholders' failure to deliver pre-lien notice on the record owner listed on the certificate of title in existence at the time first visible

¹⁶ In their motion for partial summary judgment, Respondents claim to have relied upon the then-existing certificate of title when deciding whether to perform their improvements. (Memorandum of Law in Support of the Motion of Southview Design & Construction, Ins. and Scherer Bros. Lumber Co. for Partial Summary Judgment, dated October 17, 2007, pp. 7-8.) When viewing the certificate of title, they would have noted

improvements were performed. (See BankFirst's Court of Appeals Brief, pp. 29-30.) Nonetheless, in reversing the district court's ruling on priority, the court of appeals declined to consider the pre-lien notice argument, stating it had not been "formally . . . decided by the district court." (*Imperial*, 775 N.W.2d at 904) (Add.31).

A. The Court of Appeals Erred in Declining to Consider BankFirst's Pre-Lien Notice Argument.

In declining to review the issue of pre-lien notice, the Minnesota Court of Appeals relied upon *Thiele v. Stich* for the proposition that "issues not presented to the district court may not be argued for the first time on appeal." *Imperial*, 775 N.W.2d at 904 (citing *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988)) (Add.31). The court of appeals further stated, "Although this issue was discussed by the district court it was not formally argued or decided by the district court, and thus respondents are precluded from arguing this issue on appeal." *Id.*

Thiele, however, is **inapplicable** to the present circumstances. As the record conclusively shows, the pre-lien notice argument was both presented to **and considered** by the district court. (A.16-18, 23; Add.14.) Indeed, as the Minnesota Court of Appeals recently acknowledged, in serving interests of justice, appellate courts may depart from the rule prohibiting review of issues not decided by district court, where the issue was argued extensively below and "may be dispositive." *Singelman v. St. Francis Med. Ctr.*, 777 N.W.2d 540, 543 (Minn. App. 2010); *see also Kunza v. St. Mary's Reg'l Health Ctr.*, 747 N.W.2d 586, 589-90 (Minn. App. 2008) ("an appellate court will consider an issue not decided below where it played a prominent role in briefing and may be dispositive").

This willingness to consider arguments briefed but not decided below makes sense given that appellate courts will even consider new documentary evidence never filed with the trial court where that evidence is of a conclusive nature and “supports the result obtained in the lower court.” *In re Livingood*, 594 N.W.2d 889, 896 (Minn. 1999).

In this case, since the pre-lien notice issue was briefed *extensively* before the district court, BankFirst is not precluded from raising this issue on appeal. Significantly, although the district court clearly agreed with BankFirst’s pre-lien notice argument (Add. Add.14), **its priority ruling in favor of the mortgagee essentially rendered moot any need to expressly rule on the pre-lien notice issue.**¹⁷ Thus, in reversing the district court’s ruling on priority, the court of appeals clearly erred in declining to decide the pre-lien notice issue.

B. Pre-Lien Notice Is Not a Mere Technicality.

It is well-established that mechanic’s liens are “purely creatures of statute and that the lien exists only within the terms of the statute.” *Dunham Assocs., Inc. v. Group Invs. Inc.*, 301 Minn. 108, 118, 223 N.W.2d 376, 383 (1974). Minn. Stat. § 514.011, subd. 2(a), requires mechanic’s lien claimants, **who do not have a direct contract with the owner**, to give all owners 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

¹⁷ That is also why BankFirst entered into a stipulation as to the amount of Respondents’ claimed liens and attorney fees, but not to the validity of the liens. (A.24-31.)

(Emphasis added.)

Under Respondents' proffered interpretation of the Torrens Act, Certificate of Title No. 1144974 (Add.39) is **conclusive proof** that Calhoun still owned Lot 4 up and until the issuance of Certificate of Title No. 1189683 on September 20, 2006. It is undisputed that Respondents did not deliver a pre-lien notice upon Calhoun – the owner of record – listed on Certificate of Title No. 1144974. In its Memorandum accompanying its Order for partial summary judgment, the district court cogently stated:

Under [Respondents'] 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 Title and also argue that Lind Homes is the proper owner of Lot 4 for the purposes of pre-lien notice¹⁸ 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.)

Accordingly, should this Court agree with the court of appeals and find Respondents' interpretation of Torrens law compelling, Respondents' coordinate liens are invalid as a matter of law because of their failure to provide the requisite pre-lien notice. *See Merle's Constr. Co. v. Berg*, 442 N.W.2d 300, 302 (Minn. 1989) (“prelien notice is no mere technicality”).

¹⁸ BankFirst fully recognizes that under Minn. Stat. § 514.011, subd. 2(a), no pre-lien notice is required from a contractor who has contracted directly with the owner. Here, if Calhoun is the owner, then a pre-lien notice was required because Appellants' direct contract is with Lind Homes, Inc.

C. BankFirst Never Argued that Respondents Had “Actual Notice” of Their Lien.

Despite the court of appeals’ ruling that this case needs to be remanded for a determination as to whether Respondents’ had “actual notice” of the mortgage (Add.32), BankFirst has never argued that Respondents had “actual notice” of its mortgage within the meaning of Minn. Stat. § 514.05, subd. 1. In fact, in its court of appeals’ brief, BankFirst explicitly stated:

[Respondents Southview and Scherer Bros.] fail to understand that BankFirst is not arguing that [Respondents] had either constructive or actual notice of its mortgage. Rather BankFirst maintains that [Respondents] had *actual notice* that Certificate of Title No. 1144974 was inaccurate.

(BankFirst’s Court of Appeals Brief, p. 26.) In other words, BankFirst argued that the certificate of title constitutes actual notice that Calhoun – not Lind Homes – was the owner of Lot 4.

Nonetheless, the court of appeals misconstrued BankFirst’s alternative argument as being that Respondents had “actual notice” of the mortgage when commencing the improvements to Lot 4. *See Imperial*, 775 N.W.2d at 904-05 (Add.32). The court of appeals even admonished the district court for focusing “on whether [Respondents] had actual knowledge of the inaccuracy in the certificate of title,” instead of whether Respondents had “had actual knowledge of the *mortgages*.” *Id.* at 905. However, nothing in the record supports the court of appeals’ erroneous recitation that the district court determined the lien claimants “had actual notice of the [mortgagee] interests even if the mortgagees were not validly registered.” (*Imperial*, 775 N.W.2d at 898) (Add.26).

Instead, the district court correctly understood the gravamen of BankFirst's alternative argument: If BankFirst's mortgage is junior to the mechanics' liens because it was not memorialized on the certificate of title when improvements to Lot 4 were commenced, then Respondents' liens are invalid because they failed to deliver pre-lien notice on Calhoun – the record owner listed on that same certificate of title.

In summary, the court of appeals erred in declining to consider the pre-lien notice argument, which was clearly raised below and provides a compelling basis for affirming the district court's grant of summary judgment in favor of BankFirst. There is simply no need to remand for a determination of whether Respondents had "actual notice" of BankFirst's mortgage when beginning improvements to Lot 4.

CONCLUSION

Appellant BankFirst respectfully requests that this Court affirm the district court's grant of summary judgment in its favor, deeming its mortgagee interest in the subject property to be prior and superior to Respondents' coordinate mechanics' lien interests. Minnesota law provides that *any mortgage* – whether against Torrens or abstract property – takes for its priority date the date it is filed with either the county recorder or the county registrar. Thus, the subsequent memorialization of a Torrens mortgage on the property's certificate of title has no bearing on that mortgage's priority date, especially since the certificate bears no indicia of when a given document is memorialized thereon. Moreover, Minn. Stat. § 514.05, subd. 1 – which provides the statutory mechanism for resolving priority disputes between competing mortgagee and mechanics' lien interests – makes no distinction between Torrens and abstract property. BankFirst's mortgage was

“of record” on June 28, 2005, when registered by document number and time-stamp (*see Ocwen*) – nearly four months before “first visible improvements” were made to Lot 4. Hence, under Minn. Stat. § 514.05, subd. 1, BankFirst’s mortgage is prior as a matter of law to Respondents’ mechanics’ liens. BankFirst’s mortgage was also “registered” and “of record” on June 28, 2005 within the plain meaning of section 508.55 of the Torrens Act.

Alternatively, the district court’s judgment in BankFirst’s favor should be affirmed based on Respondents’ failure to deliver the requisite pre-lien notice pursuant to Minn. Stat. § 514.011 on the record owner listed on the certificate of title in effect at the time Respondents’ began improving Lot 4. In short, were this Court to reverse the district court’s ruling on priority and adopt Respondents’ strained interpretation of the Torrens Act, Respondents have thus failed as a matter of law to perfect their liens. As the district court noted, Respondents cannot have it both ways.

Respectfully submitted,

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