

NO. A09-0312

State of Minnesota
In Supreme Court

Riverview Muir Doran, LLC,

Respondent,

vs.

JADT Development Group, LLC, et al.,

Respondents,

First Choice Bank,

Respondent,

Darg, Bolgrean, Menk, Inc., et al.,

Defendants,

and

First Choice Bank,

Respondent,

vs.

JADT Development Group, LLC, et al.,

Respondents,

Riverview Muir Doran, LLC,

Respondent,

Darg, Bolgrean, Menk, Inc.,

Defendant,

KKE Architects, Inc.,

Appellant,

and

KKE Architects, Inc.,

Appellant,

vs.

JADT Development Company, LLC,

Respondent,

First Choice Bank, et al.,

Respondents,

Darg, Bolgrean, Menk, Inc., et al.,

Defendants.

BRIEF OF MINNESOTA LAND TITLE ASSOCIATION, AS AMICUS CURIAE

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STATEMENT OF INTEREST

Minnesota Land Title Association (“MLTA”) submits this brief as amicus curiae requesting that the decision of the Minnesota Court of Appeals be affirmed.¹ MLTA’s interest in this action is public in nature. MLTA was established in 1908 as a professional organization interested in securing the integrity of land titles throughout Minnesota. Now with over 130 members statewide, MLTA is Minnesota’s largest land title association. MLTA’s members provide abstracts of title, real estate closing services, title insurance and related assistance to the real estate and lending industries on behalf of the public. In such capacity, MLTA has a public interest in ensuring that the laws governing real estate and land titles in Minnesota operate fairly for all and promote sound public policy. MLTA will offer insight as to the public benefits of affirming the Court of Appeals to ensure the lien priority framework established by Minnesota’s mechanic’s lien statute operates as intended and fairly for lien claimants, owners, and lenders alike.

SUMMARY OF DISCUSSION

The Court of Appeals held that actual notice under Minn. Stat. § 514.05 as interpreted by *Kirkwold Construction Company v. M.G.A. Construction, Inc.*, 513 N.W.2d 241 (Minn. 1994) means actual notice of unpaid design services, not merely notice that design services have been provided for an improvement. This decision should be affirmed because it accurately interpreted and applied the statute’s lien priority

¹ In accordance with Minn. R. Civ. App. P. 129.03, Minnesota Land Title Association hereby certifies that its counsel authored this brief and that no person or entity, other than Minnesota Land Title Association, has made a monetary contribution to the preparation or submission of this brief.

framework for determining the relative priority of mortgages and mechanic's liens for design services. Appellant KKE Architects and their supporting amici curiae suggest an unfounded and misleading interpretation of Minn. Stat. § 514.05 and *Kirkwold* that would give mechanic's liens for design services an unwarranted heightened priority status over mortgages anytime a mortgagee knows that initial design services have been provided before the mortgage recording. Such outcome would have a chilling effect on the construction lending necessary for vital property improvements. This is an outcome that is directly contrary to the intent of the statute's lien priority scheme and is a result Minnesota courts have consistently guarded against since the enactment of Minnesota's mechanic's lien law.

DISCUSSION

I. Minn. Stat. § 514.05 as Interpreted by *Kirkwold* Provides a Clear and Efficient Framework for Determining the Lien Priority of Mortgages and Mechanic's Liens for Design Services.

A. The statute's lien priority scheme is intended to protect bona fide mortgagees whose mortgages are recorded before the first visible improvement.

Mechanic's liens are governed by Minnesota Statutes chapter 514. They exist purely as creatures of statute and thus lien claimants are limited to the rights conferred by the statute. *M.E. Kraft Excavating and Grading Co. v. Barac Constr. Co.*, 279 Minn. 278, 283, 156 N.W.2d 748, 751 (1968). Lien priority between mortgagees and mechanic's lien claimants is determined by Minn. Stat. § 514.05. The statute provides that, "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 (2008). Under the statute, “Visible staking, engineering, land surveying, and soil testing services do not constitute the actual and visible beginning of the improvement on the ground referred to in this section.” *Id.* at subd. 2. Lien claimants who contribute to the same property improvement generally have coordinate priority as of the actual and visible beginning of the improvement on the ground. *See id.* at §§ 514.05, .15. This lien priority scheme is intended to protect the bona fide mortgagee whose mortgage is recorded before the first visible improvement. *Home Lumber Co. v. Kopfmann Homes, Inc.*, 535 N.W.2d 302, 304 (Minn. 1995); *Reuben E. Johnson Co. v. Phelps*, 279 Minn. 107, 112, 156 N.W.2d 247, 251 (1968) (explaining that “[i]t must be assumed that the legislature chose the precise language of this statutory provision 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”).

B. Minnesota courts have consistently guarded against giving a heightened priority status to mechanic’s liens for initial design services in order to avoid a chilling effect on construction lending.

Though design services can be the basis for a mechanic’s lien, Minnesota courts have long been concerned with preventing liens for these services from having a heightened priority status over the mortgages that enable property improvements. This stems from the unique nature of architectural, engineering, and surveying work. Most often these services begin well before the mortgage recording and first visible improvement. This is because these services are typically necessary to determine a project’s initial design and feasibility and to obtain preliminary governmental approvals.

Once initial design plans are set, the developer can proceed with obtaining mortgage financing and begin actual construction work. However, these initial design services are “invisible” in that they do not involve site work that a mortgagee could identify by viewing the property. Rather, the design work is performed in offices away from the property. Nonetheless, these are services that lenders are often aware of based on standard loan approval processes. Thus, the prevalent concern has been that since these services typically begin before the mortgage recording, depending on when and under what circumstances liens for such services are held to attach, these and other mechanic’s liens could always have priority over the mortgages that finance property improvements.

In 1987 the legislature amended Minn. Stat. § 514.05 to specifically state that services such as visible staking, engineering, and land surveying cannot constitute the first visible improvement. *Kirkwold*, 513 N.W.2d at 243-44. Since long before this amendment though, Minnesota courts consistently held that neither the commencement of design services nor a mortgagee’s notice of such services could operate to subordinate a mortgage to mechanic’s liens. *See, e.g., Jadwin v. Kasal*, 318 N.W.2d 844, 849 (Minn. 1982) (explaining that where a mortgagee acquires its interest with actual notice that architectural services have been performed before the first visible improvement such knowledge will not deprive the mortgagee of priority); *M.E. Kraft*, 279 Minn. at 286, 156 N.W.2d at 753 (holding that neither initial surveying nor architectural services constitute the actual and visible beginning of an improvement for purposes of establishing mechanic’s lien priority); *Phelps*, 279 Minn. at 114-15, 156 N.W.2d at 252 (explaining that preliminary survey cannot constitute actual and visible beginning of an improvement

otherwise construction mortgages would be subordinated to all mechanic's liens for an improvement contrary to legislature's intent); *Landers-Morrison-Christenson Co. v. Ambassador Holding Co.*, 171 Minn. 445, 448, 214 N.W. 503, 505 (1927) (holding that a mortgagee's notice of a contemplated improvement via plans for construction of the improvement cannot subordinate the mortgage to mechanic's liens); *Wentworth v. Tubbs*, 53 Minn. 388, 395, 55 N.W. 543, 544 (1893) (holding that earliest date of architectural services cannot constitute first visible improvement and lien attachment date for establishing mechanic's lien priority).

The primary concern underlying these decisions was that the mortgages that enable property improvements could be unfairly subordinated to mechanic's liens based on initial design services that lenders are commonly aware of, or that lenders may never know about because of the "invisible" nature of such work. This potential outcome runs contrary to the basic intent of the statute's lien priority scheme to protect mortgagees and ensure availability of financing for property improvements. As explained in *Carlson-Greife Construction, Inc. v. Rosemount Condominium Group Partnership*, 474 N.W.2d 405, 408 (Minn. Ct. App. 1991), *rev. denied* (Oct. 31, 1991):

The underlying policy of the statute enables property owners and developers to procure financing by granting mortgagees priority against lien claimants filing claims after the mortgage is recorded, so long as the mortgagee's inspection of the property does not reveal the actual and visible beginning of the improvement on the ground. [Citations omitted.] This policy prevents the injustice that would occur

if the land could be afterwards swallowed up by mechanics' liens for work which had not been commenced on the ground, and of which consequently one who might buy the property or take a mortgage upon it had no notice or means of

knowledge when he took his deed or mortgage. *Wentworth v. Tubbs*, 53 Minn. 388, 395, 55 N.W. 543, 544 (1893).

In particular, concern has centered on the threat of a chilling effect on construction lending if mere commencement or notice of initial design services could subordinate mortgages to mechanic's liens. As expressed by the Minnesota Supreme Court in *Phelps*:

If a preliminary survey of this kind were to be held an actual and visible beginning of the improvement on the ground so that all liens filed thereafter would have priority over a mortgage given to secure advances for completion of the improvement, it is safe to say that it would be difficult, if not impossible, to procure financing for any such improvement. We do not believe the legislature could have intended such result.

Phelps, 279 Minn. at 114-15, 156 N.W.2d at 252.

The 1987 amendment to Minn. Stat. § 514.05 clarified that services such as visible staking, engineering, and land surveying cannot constitute the first visible improvement. This assured that mortgages could not be subordinated to all mechanic's liens for an improvement based only on initial design services performed before the mortgage recording but where no visible construction work had occurred. However, under the statute's system of coordinate priority, this left design professionals in a precarious position. If all mechanic's liens were to be truly coordinate as of the first visible improvement, then even liens for unpaid design services that a mortgagee knew of and that were performed before the mortgage recording and first visible improvement could not have priority over the mortgage. Application of the statute's lien priority scheme to such situation was the issue confronting the Minnesota Supreme Court in *Kirkwold*.

- C. ***Kirkwold* provides a heightened priority status to mechanic's liens for design services only in narrowly defined circumstances that do not exist in this case.**

Kirkwold addressed the issue of whether under Minn. Stat. § 514.05 a mortgage recorded before the first visible improvement could have priority over engineering or surveying liens where the mortgagee knew that engineering and surveying work was performed—which expressly cannot constitute the first visible improvement—but knew or should have known the work was unpaid. *Kirkwold*, 513 N.W.2d at 242. The *Kirkwold* Court was concerned with protecting engineers and surveyors who have provided work that is unpaid but whose work cannot constitute the first visible improvement for purposes of establishing mechanic’s lien priority. *See id.* at 244, 245. Further, the Court was concerned with protecting engineers and surveyors when a lender knows of unpaid engineering or surveying work at the time of its mortgage but before the first visible improvement has occurred. *See id.* at 244.

In addressing the issue and seeking to balance the interests of lien claimants and mortgagees alike, *Kirkwold* held that “if a bona fide purchaser or mortgagee has notice of lienable work performed by engineers or surveyors, its interest is subordinated to these liens for the work completed by the engineers and surveyors up to the time of the actual and visible improvement on the ground.” *Id.* at 245. Under *Kirkwold*, liens of engineers or surveyors may attach as against a mortgagee prior to the first visible improvement, and thus have heightened priority over mortgagees, but only where the mortgagee had actual notice of the lienable work performed by the engineer or surveyor. *Id.* However, where a mortgagee does have actual notice of lienable engineering or surveying work, the mortgage will only be subordinated to the liens for this work “up to the time of the actual

and visible improvement on the ground.” *Id.* Thus *Kirkwold* only gives heightened priority status to engineering and surveying liens for unpaid work known to the mortgagee at the time of the mortgage recording and completed before the first visible improvement. *Id.* Liens for any later unpaid design work attach as of the first visible improvement in a system of split priority for mechanic’s liens for design services. *See id.*

Under Minn. Stat. § 514.05 and *Kirkwold*, what a mortgagee must specifically have actual notice of in order for a design professional to have heightened priority is “lienable work,” not merely awareness that design services had been performed for a project. *Id.* If the *Kirkwold* Court had required that a mortgagee simply have actual notice of only “work” or “services” of an architect, engineer, or surveyor, then mortgages would be subordinated to all design services liens merely by virtue of lenders knowing that these services had been provided for a project. But the *Kirkwold* Court was surely cognizant that this would give design professionals an unfair heightened priority status in virtually every development project because lenders are almost always aware of some form of engineering or surveying work as part of standard loan approval processes.

Instead, the *Kirkwold* Court specifically held that engineers or surveyors are only entitled to heightened priority when a mortgagee has actual notice of “lienable work.” *Id.* The lienable work contemplated by the Court that a mortgagee must have actual notice of is that a design professional performed services, is unpaid, and attachment of a lien is possible. This is specifically illustrated by the facts upon which *Kirkwold* was based and upon which the Court explained the circumstances where engineers and surveyors are

entitled to heightened priority. *Id.* at 244. As the Court explained in its discussion of what actual notice under Minn. Stat. § 514.05 means:

The trial court found that [the mortgagee] knew that [the engineers and surveyors] had performed lienable work, and knew or should have known that they had not been paid. Under these circumstances, [the mortgagee] had actual knowledge and, therefore, ‘actual notice’ of the possibility that a mechanics lien would attach.

Kirkwold, 513 N.W.2d at 244.

Only allowing design professionals to have heightened priority status when a mortgagee knows of outstanding unpaid design work is completely logical and in direct accord with the statute’s priority scheme. A mortgagee who knows that a design professional is unpaid before the mortgage recording is in a position to ensure that this work is paid. Once this work is paid, any lien arising for later unpaid design services must attach at the same time as all other liens, namely at the time of the first visible improvement. There is no reason or basis for treating design professionals any differently from other lien claimants when they have been fully paid for their work completed before the mortgage recording and the first visible improvement.

To hold otherwise, and allow mechanic’s liens for design services to have ongoing priority as of the first date of design work merely because a lender knew these services had been performed, would unfairly give these liens a super-priority status throughout the life of every project. After the recording of the mortgage and the subsequent start of visible improvements, it is unfair for the lender to have a continuing heightened risk as to the work of architects, engineers, or surveyors as opposed to that of any other lien claimant. Specifically, design professionals would always have a heightened priority

status over lenders, as well as all other lien claimants whose liens do not attach until the first visible improvement, merely because the lender knew that design services had been performed. Since in almost every development lenders become aware of some form of design services work before the mortgage recording, lenders would almost always have notice of design services and would thereby be subordinated to liens for such services even if the unpaid work only occurred after the mortgage and first visible improvement. There is no basis for this position in Minnesota's mechanic's lien law and it is directly contrary to the narrowly defined *Kirkwold* holding.

The *Kirkwold* analysis does not change if, as here, a visible improvement never occurs for a project. Under *Kirkwold*, if a mortgagee knew there was outstanding unpaid design work at the time of the mortgage, then the mortgage is subordinated to the liens for this work "up to the time of the actual and visible improvement on the ground." *Kirkwold*, 513 N.W.2d at 245. Thus, if the design professional is fully paid for all work provided before the mortgage that the mortgagee knew of, then liens for any later unpaid design services must attach with all other mechanic's liens and have coordinate priority as of the first visible improvement. If, however, no visible improvement occurs, but the design professional is fully paid for all work provided before the mortgage that the mortgagee knew of, then any liens for later unpaid design services must still necessarily be subordinate to the mortgage.

Kirkwold's holding is in line with the decades of prior Minnesota case law that guarded against giving heightened priority to mechanic's liens for initial design services in order to avoid a chilling effect on construction lending. In *Kirkwold*, the Court had

several options for interpreting the statute, but ultimately chose the course that most fairly balanced the interests of lien claimants and mortgagees. The Court could have held that actual notice means merely a mortgagee's knowledge that design services had been provided for a project. But the Court did not choose this reading because this would virtually always subordinate mortgages to liens for design services and have the chilling effect on construction lending that Minnesota courts have long sought to prevent.

Alternatively, the *Kirkwold* Court could have held that all mechanic's liens, even those of design professionals, must have true coordinate priority as of the first visible improvement, even if the mortgagee knows of unpaid design services before the mortgage recording and first visible improvement. The Court, however, did not choose this reading because this would allow mortgagees to have priority over liens for initial design services even though the mortgagee knew such work was unpaid at the time of the mortgage recording.

Instead, the *Kirkwold* Court's actual holding struck a balance between these two readings. Design professionals, in narrowly defined circumstances, are entitled to liens with heightened priority status over mortgagees. Mortgagees are assured that their priority status can be preserved so long as any known unpaid design work provided before the mortgage is fully paid, and so long as and the mortgage is recorded before the first visible improvement. This holding provides the protections and confidence necessary for design professionals and mortgagees to continue collaboration with property owners for completion of vital property improvements.

II. The Court of Appeals Decision Should be Affirmed Because It is In Direct Accord With the Lien Priority Scheme of Minn. Stat. § 514.05 and *Kirkwold*.

In holding that the mortgages of Riverview Muir Doran (“Riverview”) and First Choice Bank (“First Choice”) have priority over the mechanic’s lien of KKE Architects, Inc. (“KKE”), the Court of Appeals accurately applied Minn. Stat. § 514.05 as interpreted by *Kirkwold. Riverview Muir Doran, LLC v. JADT Dev. Group, LLC*, 2009 WL 2928770 (Minn. Ct. App. Sep. 15, 2009). Specifically, the Court of Appeals held that the mortgages have priority because Riverview and First Choice did not have actual notice of any unpaid services provided by KKE. *Id.* at *5. By holding that actual notice under Minn. Stat. § 514.05 requires more than merely notice that design services have been performed, the Court of Appeals ensured that KKE’s mechanic’s lien did not receive an unwarranted heightened priority status over the mortgages.

The Court of Appeals decision is correct and should be affirmed because the narrowly defined circumstances outlined by *Kirkwold* under which a mechanic’s lien for initial design services can have heightened priority do not exist in this case. Under *Kirkwold*, mechanic’s liens for design services provided before the mortgage recording and first visible improvement can only have heightened priority over the mortgage where the mortgagee had actual notice of the unpaid design work. *Kirkwold*, 513 N.W.2d at 244, 245. Here, KKE was fully paid for its services provided before the mortgages and that the mortgagees knew about. *Riverview*, 2009 WL 2928770 at *4. Since KKE was fully paid for this work, and because the mortgages were recorded before any visible

improvement occurred, there is no basis for allowing KKE's mechanic's lien to attach with priority before the mortgages.

Under these circumstances, KKE's lien for its later unpaid work must attach after the mortgages otherwise KKE would have a heightened priority status based only on the mortgagees' notice that design services had been provided before the mortgage. This is the exact scenario Minnesota courts have consistently guarded against. This is also the reason why *Kirkwood* only allowed mechanic's liens for design services to have heightened priority in the narrow circumstance where the mortgagee knew there was unpaid design work before the mortgage recording and first visible improvement. In that situation though, the mortgagee is in a position to ensure that this work is paid in order to prevent a lien for this work from attaching before the mortgage and first visible improvement. This is exactly what Riverview and First Choice did in this case.

A decision by the Court of Appeals allowing KKE's mechanic's lien to have priority based only on the mortgagees' knowledge that KKE had provided work would have inhibited the ability of property owners to obtain construction financing. If mortgages can be subordinated to design services liens based on just a mortgagee's notice that design work was performed before the mortgage, virtually no lender would be willing to provide mortgage financing for property improvements. As soon as a lender knows that design services have been performed, the lender would be forever subordinated to any liens arising out of unpaid design work even if that work only occurs years after the mortgage recording and first visible improvement. But lenders are almost always aware of some form of architectural, engineering, surveying work before the

mortgage. As such, no lender would be willing to subject itself to the risk of being subordinated to mechanic's liens for design services that have super-priority. Even if a lender wanted to provide mortgage financing, in order to protect the mortgage's priority the lender would have to seal itself from receiving any notice that design services have been provided for a project. In effect, this is to tell lenders to blindly give loans without the ability to make any assessment of the nature and scope of the improvement to be financed and which will serve as the collateral for the loan. These are of course absurd results and this is the outcome that *Kirkwold* and the Court of Appeals refused to allow.

III. Appellant KKE Architects and Their Supporting Amici Curiae Propose an Incorrect and Misleading Interpretation of Minn. Stat. § 514.05 and *Kirkwold* That Will Inhibit Construction Lending for Property Improvements.

The position of KKE and their amici curiae is based on a misguided reading of Minn. Stat. § 514.05 and *Kirkwold* that misconstrues the statute's lien priority scheme and the express holding of *Kirkwold*. KKE asserts that mechanic's liens for design services can have priority over mortgages whenever the mortgagee has notice that design services have been provided to a project. (Appellant's Brief, p. 20; *see also* Joint Brief of Amici Curiae American Institute of Architects Minnesota, American Council of Engineering Companies of Minnesota, and Minnesota Society of Professional Engineers ("Amici Curiae"), p. 5.) Specifically, KKE argues that the Court of Appeals erred by holding that actual notice under Minn. Stat. § 514.05 means notice of unpaid services. (Appellant's Brief, p. 20; *see also* Joint Brief of Amici Curiae, p. 5.)

The interpretation of Minn. Stat. § 514.05 and *Kirkwold* suggested by KKE and their amici curiae misunderstands and contorts *Kirkwold* and the context of the issue the

Court was deciding in that case. KKE interprets “notice of lienable work,” as stated in *Kirkwold’s* holding, to mean simply notice that design services have been provided to a project. (Appellant’s Brief, p. 20; *see also* Joint Brief of Amici Curiae, p. 5.) However, *Kirkwold’s* interpretation of Minn. Stat. § 514.05 does not stand for this proposition. To be sure, design services can be the basis of a mechanic’s lien under Minn. Stat. § 514.01 and thus can be loosely phrased as “lienable work” in that these services, if unpaid, can be “liened.” In the context of the *Kirkwold* case, however, “lienable work” referred directly to the unpaid work of the engineers and surveyors whose mechanic’s liens were at issue. *Kirkwold*, 513 N.W.2d at 244, 245. Specifically, the *Kirkwold* Court was seeking to balance the interests of mortgagees and lien claimants in the narrow circumstance where a mortgage is recorded before the first visible improvement but the mortgagee had knowledge of unpaid design services. *See Kirkwold*, 513 N.W.2d at 244, 245. It was these unpaid design services to which the Court was referring when stating “notice of lienable work” in the *Kirkwold* holding. *Id.* at 245. To misread “notice of lienable work” as meaning only notice that design services have been provided for a project is to misunderstand and contort *Kirkwold* and its context.

Moreover, this misguided reading would allow mechanic’s liens for design services to have priority over mortgages anytime a mortgagee knows that design services have been provided before the mortgage, even if the unpaid work only occurs after the mortgage and first visible improvement. This would impermissibly grant a heightened priority status to mechanic’s liens for design services in virtually every property improvement because lenders are almost always aware that some form of design work

has been provided before the mortgage. Such an outcome is exactly what Minnesota courts have consistently guarded against for decades. It is also an outcome that is directly contrary to the intent of the mechanic's lien statute to protect bona fide mortgagees so as to enable access to construction financing for property improvements.

KKE and their amici curiae assert that even where the mortgagee has notice that initial design services have been provided before the mortgage, mortgagees can still secure mortgage priority by entering subordination agreements. (Appellant's Brief, pp. 41-42; Joint Brief of Amici Curiae, pp. 7-8.) However, under KKE's interpretation of Minn. Stat. § 514.05 and *Kirkwold*, no design professional would ever be likely to enter a subordination agreement. According to KKE and their amici curiae, mechanic's liens for design services have priority over mortgages anytime the mortgagee has actual notice that such work has been provided for an improvement. (Appellant's Brief, p. 20; *see also* Joint Brief of Amici Curiae, p. 5.) They further assert that liens for design services attach as of the first day of design work for an improvement. (Appellant's Brief, p. 32; Joint Brief of Amici Curiae, p. 4.)

However, if a design professional has already secured mechanic's lien priority over the mortgage and all other lien claimants for the life of the project merely by virtue of the mortgagee knowing that design services were performed before the mortgage and first visible improvement, no design professional should ever be willing to jeopardize this position through a subordination agreement. This makes sense for design professionals under KKE's reading of Minn. Stat. § 514.05 and *Kirkwold*. Under this reading, even if the design professional's unpaid work only occurs years after the mortgage, which is

common in failed property developments, a lien for this work would still have priority over the mortgage. Knowing this, it is unlikely that any design professional would ever be willing to enter a subordination agreement when he knows he could reserve the protection of a super-priority status over the mortgage and all other lien claimants for the life of the project if his work ever went unpaid.

The argument of KKE and their supporting amici curiae that Minn. Stat. § 514.05 should be read in conjunction with Minn. Stat. § 507.34 overreaches and is without basis. (*See Appellant's Brief, p. 25; see also Joint Brief of Amici Curiae, p. 13.*) Mechanic's liens exist only by statute and the legislature specifically outlined a statutory framework by which mechanic's liens are governed. Included in that framework is Minn. Stat. § 514.05 which governs priority determinations as between mechanic's lien claimants, property owners, and mortgagees. While Minn. Stat. § 507.34 also governs real estate priority determinations, this statute concerns conveyances and subsequent purchasers, not mechanic's liens.

The legislature created a separate and independent statute to govern the unique issues and circumstances regarding how and when mechanic's liens attach as against property owners and mortgagees. If the legislature wanted Minn. Stat. § 507.34 and its concepts of notice to govern priority determinations for mechanic's liens, the legislature would have expressly instructed as such and never would have created an entirely separate statutory priority scheme for mechanic's liens. Thus the notion that Minn. Stat. § 507.34 governs priority determinations for mechanic's liens is misplaced and is a misleading distraction. The Court of Appeals was therefore correct in holding that Minn.

Stat. § 507.34 has no place in determining the relative priority of mechanic's liens and mortgages under Minn. Stat. § 514.05. *Riverview*, 2009 WL 2928770 at *5.

KKE and their supporting amici curiae advocate a misconstrued and misleading interpretation of Minn. Stat. § 514.05 and *Kirkwold* that will inhibit the construction lending necessary for vital property improvements. They suggest an altered priority framework for mechanic's liens for design services the effect of which will be to subordinate mortgages anytime the mortgagee knows initial design services have been provided before the mortgage recording. Since lenders are virtually always aware of some form of design work performed before the mortgage recording, almost no lender will be willing to engage in construction lending for fear of being unable to ever secure a mortgage with first lien priority status. With lenders unwilling to provide the financing necessary for property improvements, property owners and the public alike will be unable to benefit from property improved and employed in its most productive uses.

CONCLUSION

The Court of Appeals held that actual notice under Minn. Stat. § 514.05 and *Kirkwold* means actual notice of unpaid work, not merely notice that design services have been provided. This decision should be affirmed because it accurately interpreted and applied the statute's lien priority scheme for determining the relative priority of mortgages and mechanic's liens for design services. KKE and their supporting amici curiae suggest an interpretation of Minn. Stat. § 514.05 and *Kirkwold* that is without basis and would give liens for design services an unfounded heightened priority status over mortgages in almost every property improvement. This interpretation would have a

detrimental chilling effect on the construction lending necessary for property improvements. The Court of Appeals correctly interpreted and applied the lien priority framework of Minnesota's mechanic's lien law and its decision should be affirmed.

Respectfully submitted,

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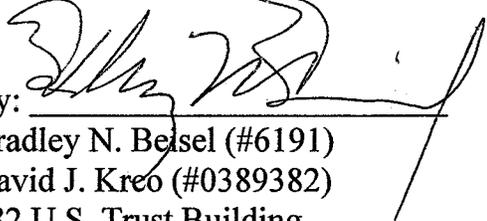
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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms with the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional 13 point Times New Roman font. The length of the brief is 5,283 words. This brief was prepared using Microsoft Word 2007 software.

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