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NO. A11-0322

State of Minnesota
In Court of Appeals

Slattengren & Sons Properties, LLC,

Respondent,

vs.

RTS River Bluff, LLC, et al.,

Defendants,

The RiverBank, a Banking Corporation
Under the Laws of the United States of America,

Appellant.

APPELLANT THE RIVERBANK'S BRIEF AND ADDENDUM

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

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STATEMENT OF LEGAL ISSUES

- I. Whether the district court erred in concluding that the Slattengren mortgage was prior and superior to the mortgage of The RiverBank.

Slattengren & Sons commenced this action seeking to foreclose its mortgage against certain lots within the St. Croix River Bluffs Development. (App. 155-168) It claims, in part, that its mortgage has priority over all other mortgages or liens that may encumber the lots. (App. 164) The RiverBank denied the claims of Slattengren & Sons, and asserted that its mortgage was a purchase money mortgage that was prior to and superior to the mortgage of Slattengren & Sons. (App. 151-153) Following a court trial, the district court found that The RiverBank's mortgage and the Slattengren mortgage were both valid purchase money mortgages. (App. 6, 43, 45, 53) It found, however, that the Slattengrens' knowledge of The RiverBank's financing of the purchase of their property did not prevent the Slattengren's purchase money mortgage from being prior and superior to the mortgage of The RiverBank, notwithstanding the fact that the Slattengrens signed a Letter of Undertaking two months before closing which referenced a mortgage to be held by The RiverBank and to encumber the Slattengren parcel and Helen Slattengren signed a HUD Settlement Statement at closing on the Slattengren parcel which referenced a "2nd Mortgage." (App. 46-58) Based on these findings, among others, the district court ruled that the Slattengren mortgage was prior and superior to the lien of The RiverBank mortgage.

Apposite Authority:

Minn. Stat. § 507.34 (2010)

Olson v. Olson, 203 Minn. 199, 280 N.W. 640 (1938)

Schoch v. Birdsall, 48 Minn. 441, 51 N.W. 382 (1892)

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

STATEMENT OF THE CASE AND FACTS

This case involves the purchase, sale, development and financing of three parcels of certain real property located in Chisago County, Minnesota. (App. 40 ¶ 1) Mark S. Plumley and Barbara L. Plumley (the "Plumleys") were the former owners of one parcel (the "Plumley Parcel"). (App. 40 ¶ 2 & at 61-62) Linn Slattengren and Helen Slattengren (the "Slattengrens") were the former owners of a second parcel (the "Slattengren Parcel"). (App. 41 ¶ 3 & at 63-64) Alan D. Rasmussen and Cynthia M. Rasmussen (the "Rasmussens") were the former fee owners of a third parcel (the "Rasmussen Parcel"). (App. 41 ¶ 4 & at 65-66) These three parcels were eventually platted into one development known as "St. Croix River Bluffs." (App. 42 ¶ 10) The initial developer was RTS Investments, Inc. ("RTS Investments"). (App. 41-42 ¶¶ 5-9)

RTS Investments entered into a purchase agreement with the Slattengrens dated March 24, 2003, under which the Slattengrens agreed to sell a portion of the Slattengren Parcel to RTS Investments for the sum of \$275,000.00 (the "Slattengren March 24, 2003 Purchase Agreement"). (App. 41 ¶ 7 & at 178-187) The March 24, 2003 Purchase Agreement was amended by way of a handwritten "Land Sale Agreement", dated July 16, 2003, under which the Slattengrens agreed to sell the remaining approximately 20 acres of the Slattengren Parcel to RTS Investments for the sum of \$260,150.00 (the "July 16, 2003 Land Sale Agreement"). (App. 41-42 ¶ 8 & at 188) RTS Investments assigned the Slattengren March 24, 2003 Purchase Agreement, and the Slattengren July 16, 2003 Land Sale Agreement to RTS River Bluff, LLC ("RTS River Bluff") by an assignment of purchase agreements dated October 31, 2003 (App. 42 ¶ 9 & at 189)

Appellant The RiverBank (“RiverBank”) financed RTS River Bluff’s purchase and development of the Plumley Parcel, the Slattengren Parcel and the Rasmussen Parcel as one development platted as “St. Croix River Bluffs.” (App. 42 ¶ 10) To secure this financing, RTS River Bluff, as mortgagor, granted a mortgage against the entire development in favor of The RiverBank, as mortgagee, dated December 12, 2003, in the original principal amount of \$2,300,000.00, and recorded with the Office of the Chisago County Recorder on December 31, 2003, as Document No. 420873 (the “RiverBank Mortgage”). (App. 42 ¶ 13, 57, & at 190-196)

The Slattengrens sold the Slattengren Parcel to RTS River Bluff for \$559,679.00 pursuant to a warranty deed dated December 22, 2003, from the Slattengrens, as grantors, to RTS River Bluff, as grantee, which warranty deed was recorded with the Office of the Chisago County Recorder on December 31, 2003, as Document No. 420868. (App. 6 ¶ 2, 43 ¶¶ 18-19 & at 169-171) The closing for the sale of the Slattengren Parcel took place on December 22, 2003. (App. 6 ¶ 2 & at 43 ¶¶ 18-19) As consideration for conveying the Slattengren Parcel to RTS River Bluff, the Slattengrens were paid \$348,856.00 from the proceeds of the RiverBank Mortgage. (App. App. 45 ¶ 23) The remaining \$210,823.00 in funds for RTS River Bluff’s purchase were provided by the Slattengrens, as evidenced by Promissory Note, and secured by a “carry-back mortgage” by RTS River Bluff, as mortgagor, to the Slattengrens, as mortgagees, dated December 22, 2003, in the original principal amount of \$210,823.00, and recorded with the Office of the Chisago County Recorder on December 31, 2003, as Document No. 420875 (the “Slattengren Mortgage”). (App. App. 6 ¶ 2, 43 ¶¶ 18-19 & at 172-175)

Burnet Title, serving as the settlement agent at the closing for both the RiverBank Mortgage and Slattengren Mortgage, intentionally recorded the RiverBank Mortgage first, because it was issuing a lender's policy of title insurance insuring that the lien of the RiverBank Mortgage would have priority over the Slattengren Mortgage. (App. 45 ¶ 24 & at 47 ¶ 37) Consistent with this understanding and intent, The RiverBank would not have provided the funding for RTS River Bluff's purchase of the Plumley Parcel, the Slattengren Parcel and/or the Rasmussen Parcel unless it was assured of a first lien position. (App. 46 ¶ 35)

Nearly two months before the closing, the Slattengrens executed a letter of undertaking addressed to Burnet Title, dated October 31, 2003, in which the Slattengrens agreed to clarify the legal description contained in their warranty deed to RTS River Bluff, in consideration of Burnet Title issuing an owner's policy of title insurance to RTS River Bluff and **a lender's policy of title insurance to The RiverBank, in connection with a mortgage being placed upon the property covered by Commitment No. 3-34470** (the "Slattengrens' Letter of Undertaking"). (App. 47 ¶ 38 & at 197)

A U.S. Department of Housing and Urban Development Settlement Statement ("HUD Settlement Statement") from the closing of the sale of the Slattengren Parcel to RTS River Bluff identifies the Slattengren Mortgage "**2nd Mortgage (seller carry back) \$200,000.00.**" (App. 46 ¶ 32 & at 176-177) Helen Slattengren signed the HUD Settlement Statement at closing on behalf of herself and on behalf of her husband, Linn Slattengren, pursuant to a statutory short form power of attorney. (App. 47 ¶ 40, 48 ¶ 42 & at 176-177) Linn Slattengren, an attorney formerly licensed in the State of Minnesota

and a former Judge of the Tenth Judicial District, was in the country of Kosovo and did not attend the closing of the Slattengren Parcel on December 22, 2003 (App. 47 ¶ 39 & at 48 ¶ 41) Believing his mortgage to be primary, Linn Slattengren took no action and made no effort to ensure that the Slattengren Mortgage had a first lien position on the Slattengren Parcel (App. 48 ¶ 44)

The Slattengrens' realtor, Thomas Delaney, was present at the closing for the sale of the Slattengren Parcel and was aware of The RiverBank providing financing for RTS River Bluff's purchase of the Slattengren Parcel. (App. 230, 233) Delaney received a copy of the closing documents from Burnet Title prior to the sale of the Slattengren Parcel, including the Settlement Statement, but also did absolutely nothing to ensure that the Slattengren Mortgage was in a first priority position. (App. 231-232)

RTS River Bluff eventually defaulted on both the RiverBank Mortgage and the Slattengren Mortgage. (App. 49 ¶ 49 & at 50 ¶ 51) The RiverBank foreclosed the RiverBank Mortgage against the unsold lots in the St. Croix River Bluffs development and obtained title on August 14, 2009, following the expiration of the redemption period of a sheriff's sale. (App. 50 ¶ 51, & at 51 ¶ 54-55)

The Slattengrens assigned the Slattengren Mortgage to Respondent Slattengren & Sons, LLC ("Slattengren & Sons") by way of an assignment of mortgage dated July 8, 2007, recorded with the Office of the Chisago County Recorder on July 27, 2007 as Document No. 487973. (App. 49 ¶ 47) Slattengren & Sons commenced this action seeking to foreclose its mortgage against certain lots within the St. Croix River Bluffs Development. (App. 155-168) It claims, in part, that its mortgage has priority over all other

mortgages or liens that may encumber the lots. (App. 164 ¶ 26) The RiverBank denied the claims of Slattengren & Sons, and asserted that its mortgage was a purchase money mortgage that was prior to and superior to the mortgage of Slattengren & Sons. (App. 151-153)

Each of the above-described facts was included in the district court's findings of fact following a court trial. (App. 40-52) The one exception was realtor Thomas Delaney's admission at trial of his awareness of RiverBank's financing to RTS River Bluffs for the purchase of the Slattengren Parcel, his receipt of the HUD Settlement Statement at the closing, and his doing nothing to ensure that the Slattengren Mortgage was in a first priority position. These facts were among facts proposed by RiverBank in its proposed findings of fact. (App. 135 ¶¶ 31-32) Most importantly, the district court found and concluded that The RiverBank Mortgage and the Slattengren Mortgage were both valid purchase money mortgages. (App. 6 ¶ 2, 43 ¶ 19, 45 ¶ 23, & at 53)

Although it found the two mortgages have the same equitable claim to priority in the Slattengren Parcel, the district court decided that the Slattengren Mortgage should have priority over the RiverBank Mortgage. (App. 57-58, 59) It made several findings concerning Burnet Title's purported duty to advise the Slattengrens about the RiverBank Mortgage and its intent to have the RiverBank Mortgage recorded first. (App. 46 ¶¶ 31, 34, 47 ¶¶ 37-38, & at 48 ¶ 43) The district court cited no authority to support its decision as to Burnet Title's purported duty and apparently decisive role in a priority determination between two purchase money mortgages. (App. 46 ¶¶ 31, 34, 47 ¶¶ 37-38, 48 ¶ 43, & at 52-58)

The district court noted that the RiverBank Mortgage “was signed and acknowledged on December 12, 2003, i.e. 10 days prior to the closing on the sale of the subject property from the Slattengrens to RTS River Bluff.” (App. 42 ¶ 13 & at 57) It also found that the RiverBank Mortgage was recorded before the Slattengren Mortgage. (App. 6 ¶ 1, 43 ¶ 19, & at 42 ¶ 13)

The court found that the reference to “2nd Mortgage (seller carry back) \$200,000” in the HUD Settlement Statement Helen Slattengren had signed at the closing, and which the Slattengrens’ realtor Thomas Delaney received prior to closing, “is at best confusing and does not place any party on notice of the respective priority positions of potentially competing mortgages.” (App. 46 ¶ 33, 48 ¶ 42) The court also concluded that this reference “is at most ambiguous and confusing.” (App. 55) However, the district court concluded that “the Slattengrens should have known that the RiverBank was providing some funding for the development” (App. 55) The court also concluded that the Slattengrens “knew that, at some point in time, there may be mortgage to The RiverBank.” (App. 56) Nevertheless, the court concluded that in the absence of actual notice from The RiverBank or Burnet Title of the intent to have the RiverBank Mortgage take first priority position, “the Slattengrens were entitled to take that representation [in their mortgage of no encumbrances taking priority] at face value and proceed without further inquiry.” (App. 55)

The district court also found that the Slattengrens had executed the October 31, 2003 Letter of Undertaking submitted for issuance of title insurance to The RiverBank in connection with a mortgage being placed on the Slattengren Parcel. (App. 47 ¶ 38) In

addition, the court found that Linn Slattengren, an attorney formerly licensed in the State of Minnesota and former Judge of the Tenth Judicial District, “took no further action [beyond believing his mortgage to be primary] and made no efforts to ensure that the Slattengren Mortgage had a first lien position on the Slattengren Parcel.” (App. 47 ¶ 39, 48 ¶ 44)

Despite these findings and conclusions, the district court ruled that the Slattengren Mortgage was prior and superior to the RiverBank Mortgage based on its reading of *Schoch v. Birdsall*, 48 Minn. 441, 51 N.W. 382 (1892) and its distinguishing of the facts of this Court’s decision in *In re Ocwen Financial Services, Inc.*, 649 N.W.2d 854 (Minn. App. 2002). (App. 53-55, 56-57) The district court concluded that that The RiverBank had superior knowledge of the facts and was less diligent in taking steps to ensure that its purchase money mortgage had priority over the Slattengren Mortgage. (App. 56)

The RiverBank moved for amended findings of fact, conclusions of law, order for judgment and judgment, or in the alternative, a new trial. (App. 14-20) Among other issues, RiverBank reiterated arguments made in its post-trial memorandum and raised the issue of priority of its mortgage based on both legal and equitable principals. (App. 21-35, 121-129) The district court granted the motion to amend in part and denied it in part. (App. 5-8) It granted the motion to include the correct legal description of the Slattengren property in paragraph 19, and also to correct misspellings in three other paragraphs. (App. 5-7) The district court denied the remainder of The RiverBank's requested relief. (App. 5-8)

This appeal follows.

ARGUMENT

I. STANDARD OF REVIEW

“The standard of review of a bench trial is broader than the standard for jury verdicts.” *Runia v. Marguth Agency, Inc.* 437 N.W.2d 45, 48 (Minn. 1989). A reviewing court must determine whether the district court's findings are clearly erroneous and it erred in its conclusions of law. *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722, 729 (Minn. 1990). “Findings of fact are considered clearly erroneous only if they are not reasonably supported by the evidence.” *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999). An appellate court, however, is not bound by the district court's decision on a purely legal issue. *Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984).

II. THE RIVERBANK MORTGAGE HAS PRIORITY OVER THE SLATTENGREN MORTGAGE UNDER LONGSTANDING PRINCIPLES OF LAW AND EQUITY.

The district court found that both The RiverBank Mortgage and the Slattengren were valid purchase money mortgages. Because purchase money mortgages derive from equity, a priority determination between competing purchase money mortgages requires analysis of equitable principles in addition to legal principles. Under these longstanding principles, The RiverBank Mortgage has priority over the Slattengren Mortgage.

A. Minnesota law on purchase money mortgages.

Minnesota law has long recognized the priority of a purchase money mortgage, which is given to secure unpaid purchase money “used for the payment of the purchase

price of the real property or any portion of it.” *Gores v. Schultz*, 777 N.W.2d 522, 528 (Minn. App. 2009) (quoting Minn. Stat. § 507.03 (2008)). Minnesota law deems the entire mortgage debt as purchase money secured by a purchase money mortgage. Minn. Stat. § 507.03 (2010).

The doctrine recognizing the priority of a purchase money mortgage “is one of equity, and not of statutory origin, and applies to any claim to or lien upon the property arising through the mortgagor.” *Stewart v. Smith*, 36 Minn. 82, 83, 30 N.W. 430, 431 (1886) (Mitchell, J.). Under this doctrine, third parties can have purchase money mortgages identical in every respect to the purchase money mortgage of a property’s vendor: “It is also the settled law in this state that a person other than the vendor may obtain a purchase-money mortgage, so called, thereby acquiring the same equities as would the vendor, had he taken the mortgage.” *Marin v. Knox*, 117 Minn. 428, 431, 136 N.W. 15, 16 (1912). A purchase money mortgage takes precedence over other liens created by the mortgagor through the equitable doctrine of instantaneous seisin “under which the title becomes encumbered with the mortgage the moment it passes from seller to purchaser” *Kloster-Madsen, Inc. v. Tafi's, Inc.*, 303 Minn. 59, 65, 226 N.W.2d 603, 608 (1975). *Schoch v. Birdsall*, 48 Minn. 441, 443, 51 N.W. 382, 382 (1892) (explaining instantaneous seisin for a purchase money mortgage). The policy underlying the priority of purchase money mortgages through instantaneous seisin ““is that the loan funds are used to make the purchase of the property possible”” *Wells Fargo Home Mortg., Inc. v. Chojnacki*, 668 N.W.2d 1, 4 (Minn. App. 2003) (quoting 4 Richard R. Powell, *Powell on Real Property* 37.28[1] (2003)). In other words, but for the provision

of purchase money loan funds from a vendor or third party there would be no real property against which other liens could attach. Minnesota courts continue to recognize the priority of third party purchase money mortgages created through a continuous transaction:

“When a third party furnishes a part of the purchase price and takes a mortgage therefor from the vendee, the mortgage may be given effect as a purchase-money mortgage. It is unnecessary that the deed and the mortgage should be executed at the same moment, or even on the same day, provided the execution of the two instruments constitutes part of one continuous transaction and was so intended.”

Wells Fargo Home Mortg., Inc. v. Newton, 646 N.W.2d 888, 893 (Minn. App. 2002) (quoting *Olson v. Olson*, 203 Minn. 199, 202, 280 N.W. 640, 641 (1938)).

Because purchase money mortgages derive from equity, equitable principles govern priority determinations between two purchase money mortgages encumbering the same property. The following equitable principles are among those to be considered in this priority determination: (1) priority is held by a bona fide purchaser for value without notice who records first; (2) the equities being equal the law must prevail; (3) if equities are equal, the first in time is best in right; and (4) equity aids the vigilant, and not the negligent. The discussion below will address, in turn, each of these principles, their application by Minnesota courts, and their application to the facts of this case. In each instance, application of these principles requires a determination that The RiverBank Mortgage has priority over the Slattengren Mortgage.

B. Priority is held by a bona fide purchaser for value without notice who records first.

The doctrine giving priority to a bona fide purchase for a valuable consideration and without notice “was exclusively equitable” and “had its origin exclusively in equity” before its recognition in recording acts. John Norton Pomeroy, *A Treatise on Equity Jurisprudence* §§ 735, 736, 738, at 353, 354 (John Norton Pomeroy, Jr., ed., Students’ Edition 1907). This equitable doctrine is recognized in Minnesota’s Recording Act, as well as Minnesota’s Torrens Act. *See* Minn. Stat. §§ 507.34, 508.25. Minnesota’s Recording Act, which has existed in some form since Minnesota’s territorial days, protects “those who purchase property in good faith, for valuable consideration, and who first record their interests” *Citizens State Bank v. Raven Trading Partners, Inc.*, 786 N.W.2d 274, 278 (Minn. 2010) (citing Minn. Stat. § 507.34; Act of Mar. 4, 1854, ch. 22, § 1, 1854 Minn. Laws 62, 62). A “good faith purchaser” under the Recording Act “is someone ‘who gives consideration in good faith without actual, implied, or constructive notice of inconsistent outstanding rights of others.’” *Id.* (quoting *Anderson v. Graham Inv. Co.*, 263 N.W.2d 382, 384 (Minn.1978)). A mortgage is a conveyance of real estate for purposes of the Recording Act. *Id.* at n.3 (citing *MidCountry Bank v. Krueger*, 782 N.W.2d 238, 244 (Minn. 2010)). The priority of a mortgage is based on the date of recording. *Id.* (citing Minn.Stat. §§ 386.41, 507.34 (2008)).

The purpose of this race-notice priority scheme is to protect subsequent purchasers of real estate who rely on the record. *Miller v. Hennen*, 438 N.W.2d 366, 369 (Minn. 1989) (citing *Strong v. Lynn*, 38 Minn. 315, 317, 37 N.W. 448, 449 (1888)). The

Recording Act allows protection to a recorded mortgagee as against any prior unrecorded interest in a property unknown to the mortgagee. *Id.* Consistent with the equitable origins of this protection of good faith purchasers, this section of the Recording Act is meant “to protect recorded titles against the gross negligence of those who fail to record their interests in real property”—an aim consistent with the equitable principle that “[e]quity aids the vigilant, and not the negligent,” discussed below. *Citizens State Bank*, 786 N.W.2d at 278, 287 (citing *Akerberg v. McCraney*, 141 Minn. 230, 233, 169 N.W. 802, 803-04 (1918) and quoting *Sinell v. Town of Sharon*, 206 Minn. 437, 439, 289 N.W. 44, 46 (1939)).

Notice under the Recording Act may be actual notice, implied notice, or constructive notice. *Id.* Actual knowledge is generally held as knowledge or notice given directly to, or received personally by, a party. *See Washington Mutual Bank, F.A.*, 756 N.W.2d 501, 507 (citing M.S.A. § 507.34). “Actual notice, like any other fact, may be proved by circumstantial, as well as by direct, evidence.” *Industrial Loan & Thrift Corp. v. Swanson*, 223 Minn. 346, 353, 26 N.W.2d 625, 630 (1947). “Constructive notice is a creature of statute and, as a matter of law, imputes notice to all purchasers of any properly recorded instrument even though the purchaser has no actual notice of the record.” *Miller*, 438 N.W.2d at 370 (quoting *Anderson*, 263 N.W.2d at 384).

Implied/inquiry notice “has been found where one has ‘actual knowledge of facts which would put one on further inquiry.’” *Id.* (quoting *Anderson*, 263 N.W.2d at 384-85). In *Bergstrom v. Johnson*, the Minnesota Supreme Court explained implied/inquiry notice and the duty of further inquiry as follows:

The law imputes to a person knowledge of all facts which the exercise of common prudence or ordinary diligence would by investigation and inquiry develop and disclose. No person can claim the position of bona fide purchaser of property, when he is informed before making the purchase that a third person has some title or interest adverse to the grantor. *If he is informed of an outstanding claim, he is under legal obligation to investigate and inquire into its merits, and, failing to do so, is not a purchaser in good faith, within the meaning of the law,* if such outstanding claim or title be valid.

111 Minn. 247, 250, 126 N.W. 899, 900 (1910) (emphases added). The court later elaborated on facts giving rise to implied/inquiry notice and the consequences of this knowledge: “Anything sufficient to put a person of ordinary prudence on inquiry is constructive notice of everything to which that inquiry presumably would have led.” *Faulkenburg v. Windorf*, 194 Minn. 154, 160, 259 N.W. 802, 805 (1935) (citing *Bergstrom v. Johnson*).

1. Minnesota courts consider the parties’ knowledge in determining which purchase money mortgagee may have a superior equity.

Consistent with the equitable principle favoring good faith purchasers for value without notice, Minnesota courts have reviewed the facts of transactions, including the parties’ knowledge and the sequence of the mortgages’ recording, in cases addressing priority between mortgages for purchase money held by both a third party and a vendor. *See Olson v. Olson*, 203 Minn. 199, 280 N.W. 640 (1938), *modified on other grounds*, 203 Minn. 199, 281 N.W. 367 (1938); *Schoch v. Birdsall*, 48 Minn. 441, 51 N.W. 382 (1892); *In re Ocwen Financial Services, Inc.*, 649 N.W.2d 854 (Minn. App. 2002), *review denied* (Minn. Nov. 19, 2002). Knowledge in this regard appears to be measured by the standard of a good faith purchaser without notice under Minnesota law. *See*

Schoch, 48 Minn. at 441, 51 N.W. at 382 (referencing “good faith” and “without notice” in the Syllabus). Knowledge of a purchase money mortgage can therefore be shown by actual or implied/inquiry notice. *Cf. Citizens State Bank*, 786 N.W.2d at 278 (defining “good faith purchaser” as “someone ‘who gives consideration in good faith without actual, implied, or constructive notice of inconsistent outstanding rights of others’”).

In *Schoch v. Birdsall*, the Minnesota Supreme Court identified knowledge as a key factor for deciding priority in favor of vendor’s purchase money mortgage over a third party mortgage. 48 Minn. 441, 51 N.W. 382 (1892). In that case, a buyer used \$375 of a \$400 loan from a third party—secured by a mortgage—to purchase a village lot from the vendor for \$750 on May 26, 1887. *Id.* The buyer paid only \$375 at the time of purchase and the remaining balance was secured by a mortgage delivered to the vendor simultaneously with the delivery of the deed to the buyer. *Id.* The vendor’s mortgage was recorded on May 28, 1887—three days after the third party lender’s mortgage was recorded. *Id.*

Notwithstanding the fact that the third party provided purchase money, it is apparent that the *Schoch* court did not view the third party lender’s mortgage as a purchase money mortgage on equal footing with, and attaching at the same time as, the vendor’s purchase money mortgage:

The mortgage to the defendant [third party lender] had not attached before the conveyance by plaintiff [seller] to Bothman [buyer]; neither did the lien thereof intervene between the conveyance to her and her purchase-

money mortgage back to plaintiff. The seisin being instantaneous, the lien of plaintiff's mortgage took precedence of any lien, general or specific, created by her.

Id.

The *Schoch* court observed that “at the time of the sale of the lot . . . and the execution and receipt of her mortgage to him, and for a long time thereafter, he [the vendor] had no knowledge whatever of defendant's [third party lender's] mortgage.” *Id.* The court therefore concluded that the vendor's mortgage “was clearly entitled to the priority.” *Id.*

The last of these facts—the vendor's lack of knowledge of the third party lender's mortgage prior to the sale—appears to be the *Schoch* court's basis for deciding priority in favor of the vendor. The other facts cannot be determinative because the third party lender recorded its mortgage first and it is the common scenario for buyers to not own the property at the time of giving a third party purchase money mortgage. Not owning the property is the reason such a mortgage is a purchase money mortgage: a third party loans funds to make possible the purchase of real property in exchange for a mortgage on the property to be purchased. Because this is the common fact pattern for third party purchase money mortgages and because Minnesota courts gave equal recognition to third party purchase money mortgages before *Schoch* was decided, this fact cannot be the critical fact in the *Schoch* court's analysis. See *Stewart v. Smith*, 36 Minn. 82, 83, 30 N.W. 430, 431 (1886) (stating that a purchase money mortgage will take the precedence, whether executed to the vendor, or to a third person who advanced the purchase money which was paid to the vendor).

The *Schoch* court did not acknowledge the general principle—made clear in subsequent decisions of the Minnesota Supreme Court— that a third party purchase money mortgage also attaches by instantaneous seisin in the same way as a vendor purchase money mortgage. See *Olson v. Olson*, 203 Minn. 199, 202, 280 N.W. 640, 641 (1938) (noting that a third party purchase money mortgage attached at the same time as vendor purchase money mortgage). See also *Marin v. Knox*, 117 Minn. 428, 431, 136 N.W. 15, 16 (1912) (stating the rule that a person other than the vendor may obtain a purchase money mortgage, thereby acquiring the same equities as would the vendor).

The district court in this case failed to acknowledge these authorities and overlooked *Schoch* court's apparent view that the third party lender's mortgage in that case was not a purchase money mortgage on equal footing with, and attaching at the same time as, the vendor's purchase money mortgage. The district court concluded: "Since the vendor's mortgage attaches instantaneously with the delivery of the deed, the vendor's mortgage must attach before any third-party mortgage." (App. 54-55). While this conclusion would be correct for ordinary third party mortgages, it is erroneous for third party purchase money mortgages, which the district court found The RiverBank Mortgage to be in this case. Because the *Schoch* court did not view the third party mortgage as a purchase money mortgage, the district court was also incorrect in reading *Schoch* to support a general rule that a vendor's purchase money mortgage "is given priority over a competing purchase-money mortgage of a third-party lender, where the seller's purchase-money mortgage is taken in good faith and without notice of the existence of the third party's prior mortgage." (App. 55). Under *Olson v. Olson* and

Marin v. Knox, a third party purchase money mortgage attaches at the same time as vendor purchase money mortgage, thereby acquiring the same equities as would the vendor. *See* 203 Minn. 199, 202, 280 N.W. 640, 641 (1938); 117 Minn. 428, 431, 136 N.W. 15, 16 (1912). Accordingly, the district court was also incorrect in concluding that a “vendor’s mortgage must attach before any third-party mortgage” through instantaneous seisin. (App. 55)

In light of these later authorities, *Schoch* only means that the parties’ knowledge is a factor in determining a superior equity between the otherwise equal equities of two competing purchase money mortgages attaching at the same time by instantaneous seisin. The district court’s understanding of *Schoch* runs contrary not only to these later authorities, but also to general principles of equity:

. . . Two persons have equal equitable interests in the same subject-matter, when each is equally entitled, with respect of his equitable interest, to the protection and aid of a court of equity. When the court is dealing with such successive equitable interests in the same subject-matter and they are all thus equal, the priority in time determines the priority in right; and the fact that the holder of the subsequent interest, under these circumstances, acquired it without notice of the prior one does not, in general, give him any right to be preferred.

Pomeroy, *A Treatise on Equity Jurisprudence* § 684, at 315.

Therefore, the mere fact that Slattengrens had a vendor’s purchase money mortgage and the district court found they did not have sufficient notice does not end the matter. The RiverBank mortgage was also a purchase money mortgage with an equal equity, there is no evidence or finding that RiverBank had notice that the Slattengren Mortgage was anything other than a second mortgage, and The RiverBank Mortgage

accrued and was recorded first in time. These facts establish priority in favor of the RiverBank Mortgage under this Court's more recent decision in *In re Ocwen Financial Services, Inc.*, 649 N.W.2d 854 (Minn. App. 2002), *review denied* (Minn. Nov. 19, 2002), in which this Court addressed facts very similar to the facts of this case.

This Court held in *Ocwen* that a third party lender's mortgage had priority over a vendor's mortgage because the third party lender's mortgage was recorded first and because the third party lender did not have notice of the superiority of a vendor's subsequently-filed mortgage where the HUD Settlement Statement unambiguously demonstrated that the vendor's subsequently-filed mortgage was understood to be a "2ND MTG." *Id.* 857-59. *Ocwen's* facts reveal a priority dispute between competing purchase money mortgages, although the court of appeals did not discuss the mortgages as such. The two mortgages in *Ocwen* were clearly purchase money mortgages: proceeds from the *Ocwen* loan were used to purchase the property and the seller secured a portion of the purchase price with a second seller carry back mortgage. *See generally id.* at 855-57. The court noted that although the parties never discussed mortgage priority, the property's vendor and vendee memorialized the financing arrangement by signing a HUD-1 Settlement Statement indicating that the vendor's mortgage was a "2ND MTG." *Id.* at 855-56, 858. Thereafter, the closing agent took the two mortgages to the Hennepin County Registrar of Titles to be recorded and both mortgages were recorded at 11:00 a.m. that day. *Id.* at 856. However, the third party lender's mortgage was filed first, and was given the document number 3228150; the vendor's mortgage was given one document number higher: 3228151. *Id.*

From these facts, the *Ocwen* court concluded that the third party lender's mortgage had priority because it was filed first:

Although the date/time stamp at the registrar's office shows that both mortgages were registered at 11:00 a.m., they could not have actually been stamped at the same time-even if the time differential was only seconds. Most importantly, however, Ocwen's [the third party lender's] mortgage was assigned document number 322815 0, and the Jacox [vendor's] mortgage was assigned the higher document number 322815 1 (emphasis added). The registration document numbers are conclusive evidence of the order in which the mortgages were filed and demonstrate that Ocwen's [the third party lender's] mortgage was registered first.

Id. at 857. This priority determination was not changed by the fact that the third party lender was aware of the vendor's mortgage, because the third party lender was only aware of the vendor's mortgage **as a second mortgage**:

Minnesota is a race-notice state, which means that a purchaser who has actual, implied, or constructive notice of inconsistent outstanding rights of others is not a bona fide purchaser entitled to protection under Minnesota's Recording Act. Thus, as Jacox correctly notes, there is no need for parties to race to the Registrar of Titles because mortgage priority as established by a filing order is defeated by actual notice or knowledge of a superior mortgage or encumbrance.

In this case, however, Ocwen [the third party lender] had no knowledge of an encumbrance inconsistent with its interest in the property because the Jacox [vendor's] mortgage was clearly a "second mortgage" as designated on the HUD-1 Settlement Statement. . . . The fact that Ocwen had notice of the Jacox *second* mortgage does not affect Ocwen's status as a bona fide purchaser at the foreclosure sale. Because Ocwen's mortgage was registered first and Ocwen was a bona fide purchaser, we conclude that Ocwen's mortgage had priority over the Jacox mortgage.

Id. (emphasis in original) (citation omitted). In addressing the vendor's argument that the HUD-1 Settlement Statement was ambiguous, the court disagreed and concluded that the

HUD-1 Settlement Statement unambiguously designated the vendor's mortgage as a second mortgage subordinate to the third party lender's mortgage:

When the contract is read as a whole, we cannot escape the conclusion that the HUD-1 Settlement Statement unambiguously established that Jacox's mortgage was a second mortgage and was subordinate to Ocwen's mortgage. . . .

The plain meaning of the term "2ND MTG" as it appears on the HUD-1 Settlement Statement is that Jacox's mortgage was a second mortgage to the mortgage issued to Ocwen at the time of the closing.

Id. at 858.

The district court in this case distinguished the holding in *Ocwen* in part because *Ocwen* "involved Torrens property and was subject to differing statutes regulating the filing of documents." (App. 57) The district court failed to explain why this fact is significant. Minnesota's Torrens Act, like the Recording Act for abstract property, protects good faith purchasers of torrens property for valuable consideration. *See* Minn. Stat. § 508.25 (2010); *In re Collier*, 726 N.W.2d 799, 805 (Minn. 2007) (noting that the "good faith" language of Section 508.25 "remains unchanged from when the Torrens Act was first codified in Minnesota") (citing Minn. Rev. Laws § 3393 (1905)). As noted above, this protection of good faith purchasers originates from equity. *See* Pomeroy, *A Treatise on Equity Jurisprudence* §§ 736, 738, at 354 (stating that "[t]he protection given to the bona fide purchaser had its origin exclusively in equity" before its recognition in recording acts). Because the same equitable principle underlies both the Recording Act and the Torrens Act with respect to priority determinations, *Ocwen* is controlling

authority on the application of this equitable principle to determine priority between competing equities of two purchase money mortgages.

The district court also distinguished *Ocwen* because the HUD-1 Settlement Statement in that case referenced both the vendor's mortgage (as "2ND MTG") and the third-party lender's mortgage. (App. 57) This fact also does not prevent reliance on *Ocwen* in this case. Both cases involve a HUD Settlement Statement expressly denoting the seller's carryback mortgage as a second mortgage. The absence of a reference to The RiverBank Mortgage in the HUD Settlement Statement in this case did not absolve the Slattengrens from inquiry notice of another first mortgage against the property. Moreover, the lack of reference to the RiverBank Mortgage has no bearing on The RiverBank's knowledge in this case; the HUD Settlement Statement's reference to a second seller carryback mortgage would have confirmed The RiverBank's understanding that the RiverBank Mortgage was in first position. Only the Slattengrens were put on inquiry notice that there was an interest in the property inconsistent with their claim to first position priority. Accordingly, *Ocwen* governs this case, notwithstanding the district court's attempt to distinguish it.

2. The Slattengrens had notice of the RiverBank Mortgage and the RiverBank Mortgage was recorded before the Slattengren Mortgage.

The Slattengrens and their realtor Thomas Delany had notice of The RiverBank's financing of RTS River Bluff's purchase of the Slattengren Parcel and notice of the RiverBank Mortgage. (App. 55, 56, 185-188) When the Slattengrens executed the Letter of Undertaking, they were put on inquiry notice that Burnet Title was issuing "a lender's

policy of title insurance to The RiverBank, in connection with a mortgage being placed upon the property covered by Commitment No. 3-34470.” (App. 47 ¶ 38 & at 197)

Even after being made aware of The RiverBank's financing of the Project and being put on inquiry notice as early as October 31, 2003, Linn Slattengren admitted that he did absolutely nothing to ensure his mortgage was to be in a first lien position:

By Katherine Melander:

Q: And once you had signed this document [the Letter of Undertaking] knowing that possibly The RiverBank might be financing the project, what steps after October 31, 2003, did you take to inquire of either The RiverBank or RTS as to the nature of The RiverBank's financing of the project?

By Linn Slattengren:

A: I never spoke to RiverBank whatsoever. I never had any communication with them. I never spoke to Schmidt after October 31st. I don't think I ever spoke with him after that. So none.

Q: And if RTS was not going to be paying you in full at a future closing, then you were willing to carry back the balance of the purchase price by a mortgage; is that correct?

A: Yes.

Q: And you also knew based upon this October 31st letter that RiverBank is also going to be financing some portion, or contemplating financing some portion of the project; is that correct?

A: I knew it was contemplated.

* * *

Q: And on the second page of [the Slattengren Mortgage, Trial Exhibit 4] that, the mortgage, at the bottom it states that this instrument is drafted by; is that correct?

* * *

Q: And it states that—who drafted the mortgage?

A: Burnet Title.

Q: And did you give any instructions to Burnet Title in relation to the December 22, 2003, closing about . . . what position that mortgage should be in?

A: No, there was no discussion about any other mortgage to be any position.

Q: But you knew that RiverBank was also being contemplated to be financing the project; is that correct?

A: Yes.

(App. 225-231)

Linn Slattengren gave Helen Slattengren a power of attorney. Therefore, any knowledge or notice that she had at the time of closing, particularly the reference to “2nd Mortgage (seller carry back) \$200,000.00” is imputed to Linn Slattengren. *See Rognrud v. Zubert*, 282 Minn. 430, 436, 165 N.W.2d 244, 249 (1969) (stating “the general rule that notice given to an agent is notice to the principal”); *Lebanon Sav. Bank v. Hallenbeck*, 29 Minn. 322, 326, 13 N.W. 145, 147 (1882) (imputing notice and knowledge of attorney, as an agent, to clients concerning the claim of mortgage on land as would put a man of ordinary prudence upon inquiry).

The Slattengrens’ realtor, Thomas Delany, admitted that he was aware of The RiverBank’s financing of the purchase of the Slattengren Parcel, that he received at closing the HUD Settlement Statement for the Slattengren Parcel referencing “2nd Mortgage (seller carry back) \$200,000.00”, and that he did nothing at any time to ensure that the Slattengren Mortgage was going to be in first position:

By Steven Little:

Q: Mr. Delany, you knew that The RiverBank was involved in the entire transaction; correct?

A: At some point I did, yes.

Q: You just don't know the details?

A: Well, I don't remember the dates, you know, in conjunction, when I first realized it.

Q: I see. Did you ask for or receive copies of the closing documents on December 22?

A: I would have received them, yes.

Q: And that would have included the settlement statement for the Slattengren transaction?

A: Correct.

* * *

Q: Did you do anything at all at any time to ensure that Mr. Slattengren's carry back mortgage was going to be in first position?

A: I didn't think it was an issue, I guess I could confess that I did not. . .

* * *

Q: But you're aware he [Robert Schmidt of RTS River Bluff] was obtaining financing from the RiverBank?

A: He had shared that.

(App. 230-233)

Thus, because Delany clearly had actual knowledge and inquiry notice of The RiverBank's involvement of the financing and of the RiverBank Mortgage, that

knowledge and notice is imputed to the Slattengrens. *See Rognrud*, 282 Minn. at 436, 165 N.W. 2d at 249; *Lebanon Sav. Banks*, 29 Minn. at 326, 13 N.W. at 147.

Under the facts and holding of *Ocwen*, RiverBank had no notice that the Slattengren Mortgage was anything other than a second mortgage. In addition to the HUD Settlement Statement's reference to a second seller carry back mortgage, RiverBank's instructions to Burnet Title and Burnet Title's successful effort in ensuring that The RiverBank Mortgage had first lien position were consistent with The RiverBank's knowledge and understanding that its mortgage was in first position. Because The RiverBank had no notice to the contrary, The RiverBank Mortgage has priority because it was recorded prior to the Slattengren Mortgage. *See In re Ocwen Financial Services, Inc.*, 649 N.W.2d at 857. The district court therefore erred in deciding priority in favor of the Slattengren Mortgage. It was recorded after the RiverBank Mortgage with actual and inquiry notice of its second position based on the HUD Settlement Statement. In addition, the Letter of Undertaking confirmed the Slattengrens' notice the RiverBank Mortgage nearly two months prior to closing. The RiverBank is therefore entitled to priority based on the principle that priority is held by a bona fide purchaser for value without notice who records first.

C. The equities being equal the law must prevail.

- 1. Because both mortgages are purchase money mortgages attaching at the same time through instantaneous seisin, the prior recording of the RiverBank Mortgage under The Recording Act must prevail over the later-recorded Slattengren Mortgage.**

The RiverBank's purchase money mortgage has a superior equity this case because The RiverBank provided the funds to RTS River Bluff which made payment to Slattengrens possible. But for the fact that RiverBank gave purchase money to RTS River Bluff for the \$348,856.00 paid down to the Slattengrens at the closing on the Slattengren Parcel, the Slattengrens' subsequent giving of purchase money to RTS River Bluff for the difference would not have occurred. The Slattengrens would not have parted with their title to the Slattengren Parcel without receiving RTS River Bluff's down payment—which originated from The RiverBank.

Even if The RiverBank Mortgage does not have the superior equity on these grounds, its prior recording under the Recording Act's priority scheme must prevail under the equitable principle that "the equities being equal the law must prevail." *Salem Trust Co. v. Manufacturers' Finance Co.*, 264 U.S. 182, 192 (1924). *Cf. Benson v. Saffert-Gugisberg Cement Const. Co.*, 159 Minn. 54, 59, 198 N.W. 297, 299 (1924) (recognizing and applying the equitable principle "'Where there is equal equity, the law must prevail'" in an action by a surety on a bond securing the performance of a contract for a ditch). Under this equitable principle, the prior recording of The RiverBank Mortgage is the legal tiebreaker, since the priority of a mortgage under the Recording Act is based on the time of recording. *Citizens State Bank*, 786 N.W.2d at 278 (citing Minn.Stat. §§ 386.41, 507.34 (2008)).

This conclusion is consistent with the supreme court's decision in *Olson v. Olson*, where the court looked to the sequence of recording of two interests viewed as purchase money mortgages to determine their relative priority. 203 Minn. 199, 280 N.W. 640

(1938), *modified on other grounds*, 203 Minn. 199, 281 N.W. 367 (1938). On March 18, 1930, a son received a conveyance of his father's one-fourth and the three-fourths interests in the farm held by others, thereby acquiring the whole fee. *Id.* 203 Minn. at 200, 280 N.W. at 640. On the same date, March 18, 1930, the father and son executed the contract for support in which the son agreed, in consideration of his father's deed, to pay the \$1,400, to provide a lifetime home for his father on the farm, furnish him board and lodging. *Id.* The contract was made a mortgage on an undivided one-fourth interest. *Id.* 203 Minn. at 200-01, 280 N.W. at 640. This vendor's purchase money mortgage was not recorded until August, 1934. *Id.* 203 Minn. at 201, 280 N.W. at 640. On March 29, 1930, the son executed a mortgage on the whole tract to a third party to secure a loan of \$4,500 to pay for the other three-fourths interest in the farm conveyed by others on March 18, 1930. *Id.* 203 Minn. at 201, 202, 280 N.W. at 640, 641. This third party purchase money mortgage was recorded in April 2, 1930. *Id.* The third party lender had no knowledge of the father-son contract and did not learn of it until 1934. *Id.* 203 Minn. at 201, 280 N.W. at 640.

Based on these facts, the *Olson* court decided priority in favor of the third party purchase money mortgagee. *Id.* The court posited that if both interests were viewed as purchase money mortgages attaching at the same time, thereby having "equality of rights" and "otherwise equal standing", the vendor would have had to exercise diligence in recording first to save his rights:

Which is the superior lien-plaintiff's contract or defendant's mortgage? First of record is ordinarily first of right. Mason Minn.St.1927, § 8226 [the Recording Act].

...

Query, is not the result further buttressed by the fact that defendant's was a purchase-money mortgage? 'When a third party furnishes a part of the purchase price and takes a mortgage therefor from the vendee, the mortgage may be given effect as a purchase-money mortgage.' 4 Dunnell, Minn.Dig. p. 669, § 6208. 'It is unnecessary that the deed and the mortgage should be executed at the same moment, or even on the same day, provided the execution of the two instruments constitutes part of one continuous transaction and was so intended.' 4 Dunnell, Minn.Dig. p. 669, § 6209, and cases cited. **If plaintiff's contract for support may also be taken as a purchase-money mortgage, it too would have attached at the same time as defendant's. Having equality of rights thus far would not plaintiff have had to record to save them? Would or would not defendant's diligence in recording first have saved his and overcome plaintiff's otherwise equal standing?**

The order under review must be reversed and the case remanded for decision agreeably hereto and judgment for defendant [third party purchase money mortgagee].

Id. (emphases added).

The district court found that both mortgages are valid purchase money mortgages and that The RiverBank Mortgage was recorded first. Under *Olson*, the Slattengrens would have had to exercise diligence in recording first to save priority of their mortgage and overcome The RiverBank Mortgage's "otherwise equal standing" as a purchase money mortgage attaching at the same time as the Slattengren Mortgage through instantaneous seisen. Because the Slattengrens failed to record first, the district court erred in deciding priority in favor of the Slattengren Mortgage.

D. **If equities are equal, the first in time is best in right.**

1. **Because both mortgages are purchase money mortgages attaching at the same time through instantaneous seisin, the prior accrual of The**

RiverBank Mortgage and prior recording of the RiverBank Mortgage is the best in right.

Sharing characteristics of the two equitable principles discussed above is the principle that “[i]f equities are equal, the first in time is best in right.” *Salem Trust Co.*, 264 U.S. 182, 199. “The doctrine of priorities in equity is entirely a development of two maxims: Where there are equal equities, the first in order of time shall prevail, and Where there is equal equity, the law must prevail.” Pomeroy, *A Treatise on Equity Jurisprudence* § 678, at 311. *Cf. Olson*, 203 Minn. at 199, 280 N.W. at 640 (citing the Recording Act for the rule that “[f]irst of record is ordinarily first of right” in deciding priority in favor of third party purchase money mortgage recorded first in time).

In this case, the equity of The RiverBank Mortgage accrued first in time, as the district court noted: “In the present case, the evidence shows that the RiverBank Mortgage was signed and acknowledged on December 12, 2003, i.e. 10 days prior to the closing on the sale of the subject property from the Slattengrens to RTS River Bluff.” (App. 57) On December 12, 2003, RTS River Bluff gave a mortgage to RiverBank to secure a loan of \$2,300,000.00, and from these loan proceeds RTS River Bluff paid \$348,856.00 down to the Slattengrens at the closing on December 22, 2003, for the purchase of the Slattengren Parcel. (App. 42 ¶ 13, 43 ¶ 18, & at 45 ¶ 23) The equity of the RiverBank Mortgage necessarily accrued first in time because, as noted above, Riverbank provided the funds to RTS River Bluff which made payment to Slattengrens possible. The entire transaction rested upon the first step of RiverBank providing purchase money RTS River Bluff. Without this action coming first in time, there would

have never been a second step of the Slattengrens providing funds to close the gap and complete the sale.

The RiverBank Mortgage also has a superior equity under this principle because it was also recorded first in time as Document No. 420873. (App. 42 ¶ 13) The Slattengren Mortgage was recorded as Document No. 420875. (App. 6 ¶ 2 & at 43 ¶ 19)

Because the district court findings show accrual and recording of the RiverBank Mortgage to be first in time, the district court erred in deciding priority in favor of the Slattengren Mortgage.

E. Equity aids the vigilant, and not the negligent.

- 1. Because both mortgages are purchase money mortgages attaching at the same time through instantaneous seisin, The RiverBank Mortgage is entitled to priority because The RiverBank ensured that The RiverBank Mortgage, which accrued first, was recorded first, while the Slattengrens did nothing to ensure that the Slattegren Mortgage, which accrued later and was recorded later, would have priority.**

A final consideration should be given to the equitable principle that “[e]quity aids the vigilant, and not the negligent.” *Citizens State Bank*, 786 N.W.2d at 287 (quoting *Sinell v. Town of Sharon*, 206 Minn. 437, 439, 289 N.W. 44, 46 (1939) (brackets in original and modified in quotation). Another way of stating this principle is “equity aids the vigilant, not those who sleep upon their rights.” *In re Jordan's Estate*, 199 Minn. 53, 62-63, 271 N.W. 104, 108 (1937). The district court erred in this case in its determination of who was vigilant and who slept on their right to mortgage priority.

The district court found that Burnet Title, serving as the Settlement Agent at the closing of both The RiverBank Mortgage and Slattengren Mortgage and sale,

intentionally recorded the RiverBank Mortgage ahead of the Slattengren Mortgage on December 31, 2003 (Document No. 420873 vs. Document No. 420875). (App. 6 ¶ 2, 42 ¶ 13, 43 ¶ 19, 45 ¶ 24 & at 47 ¶ 37) These actions were consistent with the district court's finding that The RiverBank would not have provided the funding for RTS River Bluff's purchase of the Plumley Parcel, the Slattengren Parcel and/or the Rasmussen Parcel unless it was assured of a first lien position (App. 46 ¶ 35) Nevertheless, the district court decided that The RiverBank could have taken the additional step of securing a subordination agreement from the Slattengrens to establish priority of The RiverBank Mortgage. (App. 56)

At the same time, the district court concluded that "the Slattengrens should have known that the RiverBank was providing some funding for the development" and "knew that, at some point in time, there may be mortgage to The RiverBank." (App. 55, 56) The district court also found that the Slattengrens had executed the October 31, 2003 Letter of Undertaking submitted for issuance of title insurance to The RiverBank in connection with a mortgage being placed on the Slattengren Parcel. (App. 47 ¶ 38) In addition, the court found that Linn Slattengren, "took no further action [beyond believing his mortgage to be primary] and made no efforts to ensure that the Slattengren Mortgage had a first lien position on the Slattengren Parcel." (App. 47 ¶ 39, 48 ¶ 44) Despite these findings and conclusions, the district court found that the Slattengrens did all they needed to do to ensure priority of their mortgage, especially because the Slattengrens were not provided actual notice by The RiverBank or Burnet Title that their mortgage would not have priority. (App. 47 ¶¶ 37-38, 48 ¶¶ 44-45, & at 55) However, the district court made no

reference to the possibility of the Slattengrens securing a subordination agreement from The RiverBank, even though that they knew of financing by The RiverBank and the RiverBank Mortgage accrued first and was recorded first. If any party needed a subordination agreement, it would be the mortgagee with notice of another mortgage two months prior to closing accrued first and was recorded first.

Equity should not aid the Slattengrens' lack of vigilance in this case. The Slattengrens executed an October 31, 2003 Letter of Undertaking referencing a mortgage by RiverBank being placed on the Slattengren Parcel. In addition, the court found that Linn Slattengren "took no further action [beyond believing his mortgage to be primary] and made no efforts to ensure that the Slattengren Mortgage had a first lien position on the Slattengren Parcel." Linn Slattengren was out of the country at the time of the closing, leaving his wife to handle the closing for both of them. In her capacity as power of attorney, Helen Slattengren signed the HUD Settlement Statement which referenced a "2nd Mortgage (seller carry back) \$200,000.00" She did nothing more to ensure that her mortgage was not second. The Slattengrens' realtor, Thomas Delaney, also present at the closing was aware that RiverBank provided financing for RTS River Bluff's purchase of the Slattengren Parcel and he received a copy the HUD Settlement Statement at closing, but also did nothing to ensure that the Slattengren Mortgage was in a first priority position. The Slattengrens and their agent had knowledge of facts about a mortgage and financing by The RiverBank well before closing which would have put them on inquiry of priority of the RiverBank Mortgage. On December 12, 2003 RiverBank's committed to provide funds to RTS River Bluff which provided the down payment the Slattengrens

pocketed at the closing on December 22, 2003. At the very least, the Slattengrens could have secured a subordination agreement from The RiverBank. They failed to do so. The Slattengrens could have taken steps to ensure that their mortgage was recorded first in time. They failed to do so. Under these facts, the district court erred in deciding priority in favor of the Slattengren Mortgage.

CONCLUSION

Appellant The RiverBank respectfully requests that this court reverse the trial decision of the district court and rule that the mortgage of The RiverBank was prior and superior to the Slattengren Mortgage.

Respectfully submitted,

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Certification of Brief Length

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds.1 and 3, for a brief produced with a proportional 13 point font. The length of this brief is 9,487 words. This brief was prepared using Microsoft Word 2007.

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