

NO. A11-2220

State of Minnesota  
**In Court of Appeals**

21st Century Bank,

*Appellant,*

v.

Big Lake Lumber, Inc.,

*Respondent/Plaintiff,*

v.

Security Property Investments, Inc.; Christopher Schonning;  
Wright Lumber & Millwork, Inc.; Pearson Plumbing Corp.;  
J. DesMarais Construction, Inc.; XYZ Corporation; ABC Partnership;  
John Doe and Mary Roe, whose names are unknown to Plaintiff,

*Defendants.*

**APPELLANT 21ST CENTURY BANK'S REPLY BRIEF**

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## ARGUMENT

### I. THE DISTRICT COURT ERRED IN INTERPRETING AND APPLYING THE RELATION BACK DOCTRINE IN THIS CASE.

In their response briefs, respondents Big Lake Lumber, Inc. (“Big Lake Lumber”) and J. DesMarais Construction, Inc. (“DesMarais”) argue that because Wruck’s earlier work in 2005 constitutes an actual and visible improvement to the Property, the district court properly concluded that they are entitled to have their work relate back to Wruck’s earlier work. They also argue that because the original property owner, the Hildes, had planned to build a home on the Property, and a home was eventually built on the Property, their contributions and those of Wruck in 2005 are part of the same continuous project. Like the district court, Big Lake Lumber and DesMarais have erred in their formulation and application of the relation-back and separate improvement doctrines to the facts of this case.<sup>1</sup>

The application of the relation-back and separate-improvement doctrines for the purpose of establishing priority under Minn. Stat. § 514.05, subd. 1 (2010), does not depend solely on whether the work of an earlier contractor or material supplier constitutes an actual and visible improvement to the property. The issue is whether the earlier contributions bear directly on the particular improvement to which the later

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<sup>1</sup> The Statement of Facts set forth in DesMarais’s Response Brief fails to comply with, or ignores, the Minnesota Rules of Civil Appellate Procedure because in many instances it fails to appropriately cite to the record and it contains impermissible argument. Under Minn. R. Civ. App. P. 128.02(c), each statement of material fact shall be accompanied by a reference to the record and that they be stated fairly and with complete candor. 21st Century Bank, therefore, respectfully requests that this court disregard those portions of DesMarais’ Statement of Facts that fail to comply with Rule 128.

contributions were made. The resolution of this issue turns on consideration of the four factors that this court identified in *Poured Concrete Foundation, Inc. v. Andron, Inc.*, 529 N.W.2d 506, 510 (Minn. App. 1995), *review denied* (Minn. May 31, 1995).

**A. The Relation-Back Doctrine requires that the earlier work must contribute to the same improvement to which the later lien claimant contributed.**

Under Minnesota law, a project may consist of separate and distinct improvements and the relation-back doctrine does not apply where the later lien claimant contributes to an improvement different than the improvement to which the earlier contractor or material supplier contributed, even though both improvements were part of the same overall construction project and resulted in actual and visible improvements on the ground.<sup>2</sup> In other words, a lien claimant's contribution to an improvement may relate back to the contribution of an earlier contractor or material supplier only if that earlier contribution is made to the same improvement to which the later lien claimant contributed. *Nat'l Lumber Co. v. Farmer & Son, Inc.* 251 Minn. 100, 104, 87 N.W.2d 32,

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<sup>2</sup> See *Nat'l Lumber*, 251 Minn. at 102-104, 87 N.W.2d at 34-36 (holding lumber supplier who contributed materials to construction of home could not relate back to earlier contribution of another lumber company who erected fence to protect tree even though fence was actual and visible improvement and part of overall project to erect home because fence did not directly bear on construction of home); *Suburban Exteriors, Inc. v. Emerald Homes, Inc.*, 508 N.W.2d 811 (Minn. App. 1993) (holding mechanic's lien claimant could not have its lien relate back to work of contractor who removed trees from property even though trees had to be removed before construction of home because removal did not further actual excavation necessary to build home); *Thompson Plumbing*, 464 N.W.2d at 782 (holding contractors who furnished labor and materials for construction of home could not relate back to staking of lot because earlier work was not for same improvement to which contractors contributed); *E.H. Renner & Sons, Inc. v. Sherburne Homes, Inc.*, 458 N.W.2d 177 (Minn. App. 1990) (holding construction of curbs and gutters for subdivision is separate improvement from construction of dwelling even though it is part of same overall project to construct residential subdivision).

36 (1957); *Thompson Plumbing Co. v. McGlynn Co.*, 464 N.W.2d 781, 782 (Minn. App. 1992).

In *Thompson Plumbing*, this court held that the contributions of the earlier and later contractor or material supplier must relate directly to the same improvement and not simply to any improvement made to the property at issue. In that case, a plumber and an electrician brought mechanic's lien claims for contributions they made to the construction of a house. 464 N.W. 2d at 783. Because they made their contributions after the lender recorded its mortgage for the subject property, the lien claimants argued their liens related back to the staking of the lot corners. *Id.* This court rejected this argument, recognizing that "different contributions may relate to different improvements even though all the contributions and resulting improvements are part of the same overall project." *Id.* (citing *Nat'l Lumber*, 251 Minn. at 104, 87 N.W.2d at 36).

In looking to the language of Minn. Stat. § 514.05, this court concluded that the "legislature intended to distinguish among separate improvements in Minn. Stat. § 514.05 because the legislature employed references to one particular improvement, rather than any improvement." *Id.* According to this court, "[c]learly, the legislature was not referring to 'any' improvement, but 'the' improvement, that is, one particular improvement. The improvement referred to in the statute is the specific improvement to which subsequent suppliers or laborers contributed." *Id.* This court ultimately held that, "[u]nder the plain terms of Minn. Stat. § 514.05, mechanic's liens relate back to the actual and visible beginning of the improvement to which the lienor contributed." *Id.* at 788.

In reaching its decision, this court relied primarily on the Minnesota Supreme Court's decision in *National Lumber*. In that case, a lumber supplier that contributed

materials to construction of home sought to have its contributions relate back to the contribution of another lumber company that had previously erected a fence to protect a tree on site. The supreme court rejected this argument, and observed that different contributions may relate to different improvements even though all the improvements are part of the same overall construction project. *Nat'l Lumber*, 251 Minn. at 104, 87 N.W.2d 32, 36 (1957). The supreme court ruled that the relation-back doctrine under Minn. Stat. § 514.05 does not apply where a mechanic's lien claimant's contribution is to an improvement that is different than the improvement to which an earlier contractor (or material supplier) contributed, even though the two improvements were part of the same overall construction project and the earlier contribution was the first actual and visible improvement of the overall project. *Id.* at 102-104, 87 N.W.2d at 34-36. According to the supreme court, “[t]he line of distinction is whether or not the improvement bears directly on the construction of the building rather than whether it is a part of the overall project involved.” *Id.* at 104; 87 N.W.2d at 36. Based on this rule, the supreme court concluded that, even though the fence was an actual and visible improvement and part of the overall project to the erect home, it was a separate improvement because the erection of the fence did not directly bear on construction of home.

**B. The District Court Failed To Properly Consider the *Poured Concrete* Factors.**

Minnesota courts consider construction projects separate improvements where there is “little or no interrelationship between the contracts under which the project was performed.” *Witcher Constr. Co. v. Estes II Ltd. Partnership*, 465 N.W.2d 404, 407 (Minn. App. 1991), *review denied* (Minn. Mar. 15, 1991). To determine whether the

earlier and later work contributed to the same improvement for purpose of the relation-back doctrine, Minnesota courts consider the four factors that this court identified in *Poured Concrete Foundation, Inc. v. Andron, Inc.*, 529 N.W.2d 506, 510 (Minn. App. 1995), *review denied* (Minn. May 31, 1995). These four factors examine the: (1) parties' intent; (2) contracts under which the labor or materials were furnished; (3) time lapse between contributions; and (4) financing for the improvements. *Id.* No one factor outweighs another, and they all are given equal weight. *See id.* at 510-11; *see also 84 Lumber Co. Ltd. Partnership v. Dan Happe Constr., Inc.*, 201-0 WL 3000555 (Minn. App. Aug. 3, 2010) (noting *Poured Concrete* does not give "intent" factor greater weight than other factors).

Here, the district court erred in its interpretation and application of the law to the evidence before it at trial. The district court, as well as Big Lake Lumber and DesMarais, ignore the fact that the work of Wruck in 2005 did not directly bear on the construction of the home to which Big Lake Lumber and DesMarais contributed labor and materials. They also gloss over the *Poured Concrete* factors, and instead, focus on one single fact to justify the application of the relation-back doctrine in this case. They reason that because the original property owner had planned to build a home on the property when Wruck first performed work on the property, and a home was eventually built on the property, it is axiomatic that the work of Wruck and the later work of Big Lake Lumber and DesMarais fourteen months later were part of the same continuous improvement. This analysis is flawed because it simply compares the previous property owners' planned development of the property with what a later property owner actually had constructed on the property, and concludes that because they are similar in nature, the improvements

must be one and the same for the purpose of establishing priority under Minn. Stat. § 514.05, subd. 1.

An examination of the trial record, along with the district court's own findings, demonstrate that Big Lake Lumber and DesMarais did not contribute to the same improvement as Wruck did in 2005, and that the contracts under which they made their contributions bore little, if any, relationship with each other.

It is undisputed that at the time the Hildes purchased the property through Mark Hilde's company M & L Cabinets and Countertops, Inc. ("M&L"), their intent was to build their personal residence on the lot. (T. 28, 31, 70, 75; Add. 2) They then abandoned their plan to construct their home on the property and decided to sell the property. (T. 31, 35) When they put the property on the market, they were approached by Security Property Investments, Inc. ("SPII"). (T. 36-37) SPII did not want the spec home indicated in the property listing, and simply wanted to purchase the property. (T. 38) Then, M&L entered into a Purchase Agreement with Jason Shackleton for just the purchase of the property. (Add. 4) This arrangement eventually changed. Shackleton was replaced with Christopher Schonning, who then decided he did want to build a spec home on the property. (Add. 4; Trial Exh. 7, 42; T. 38, 73)

Contrary to the district court's conclusions, and the assertions of Big Lake Lumber and DesMarais, the intent of the parties with respect to the property was not always to construct a home on the property. SPII wanted to buy the property only, and there is no evidence that Shackleton had intended, or expressed an intent, to construct a home on the property. This is best reflected by the district court's finding No. 12, which noted that when Schonning was substituted for Shackleton, the purchase price was increased to

include the cost of construction of a house on the property. (Add. 4) Presumably, this increase reflected the fact that the original price did not include the cost of building a house on the property. The record evidence is clear that the intended use and development of the property changed over time, and depending on the prospective purchaser or actual owner of the property. There was no unified and consistent plan or project to build a house on the property.

Like the district court, Big Lake Lumber and DesMarais attempt to dismiss the lapse of time between Wruck's work in 2005 and the actual start of construction on the home built for Schonning. They draw on the district court's conclusion that the project of constructing a home had not been abandoned because, during this time, construction activity in the form of engineering, staking, the purchasing of construction materials and the drawing of building plans and other miscellaneous work took place. But, as this court recently recognized, "since a 1987 amendment, section 514.05 has expressly excluded certain types of services – including engineering and soil-testing services – from being the actual and visible improvement beginning of the improvement to the ground." *S. R. Wiedema, Inc. v. Sienna Corp.*, 2011 WL 2201084 \*3 (Minn. App. June 6, 2011) (citing Minn. Stat. § 514.05, subd. 2 (2010)). Indeed, Minn. Stat. § 514.05, subd. 2 expressly provides that "[v]isible 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." Thus, it was improper for the district court in this case to consider contributions that, by statute, do not and cannot constitute evidence of the actual and visible improvement to the property.

Big Lake Lumber and DesMarais casually dismiss the two remaining *Poured Concrete* factors – the contracts under which the work was furnished and the source of financing for the improvements – by claiming they are not dispositive of the issue of whether a project is a separate improvement. But as this court made clear in *Poured Concrete*, these factors are relevant and must be considered when determining whether contributions are part of the same continuous improvement for the purpose of applying the relation-back doctrine.

In this case, there is no dispute that Wruck's work in 2005 was contracted and financed separately from the later work of Big Lake Lumber and DesMarais. The purpose of those contracts differed significantly. Wruck was contracted to clear and haul away trees and underbrush to prepare the property for future development by the Hildes. In contrast, the contracts for Big Lake Lumber and DesMarais were to provide the labor and materials necessary for the actual construction of the home being built for Schonning. Likewise, there is no dispute that their work was separately financed.

Given the distinct and separate contracts, and separate financing, for the work of Wruck in 2005 and the later work of Big Lake Lumber and DesMarais, these *Poured Concrete* factors do not support the district court's conclusion the work was furnished as part of one continuous improvement.

Contrary to the arguments of Big Lake Lumber and DesMarais, the work of Wruck in 2005 did not contribute to the particular improvement to which Big Lake Lumber and DesMarais contributed. It is undisputed that Big Lake Lumber and DesMarais furnished labor and materials for the home being built by Schonning; the work that Wruck furnished in 2005 was for a home that the Hildes hoped to build. This

work was separated by a span of 14 months, during which time, the planned used and development of the property changed, as did, the property owners. And although the Schonning home was based on the plans for the contemplated Hilde home, it is undisputed that the final design for the Schonning was, in fact, different. During the trial, Hilde testified that the design he considered building in 2005 was different than the design used to build the Schonning home. (T. 73). The 2005 work of Wruck and the later work of Big Lake Lumber and DesMarais, therefore, was done pursuant to different design plans.

In sum, the work of Wruck in 2005 and the later work of Big Lake Lumber and DesMarais were for separate and distinct improvements. They performed their work 14 months apart for different property owners under separate contracts that were separately financed and that were based on different design plans. The simple fact that the Hildes' had originally planned to build a home for themselves and a home was eventually built on the property does not establish that Wruck contributed to the same improvement to which Big Lake Lumber and DesMarais contributed. The district court erred in its interpretation and application of the relation-back and separate-improvement doctrines to the evidence before it and its own findings, and in concluding that the work of Big Lake Lumber and DesMarais relates back to Wruck's work in 2005. Because the district court's findings of facts and conclusions of law are based on errors of law, 21st Century Bank respectfully requests that this court reverse the judgment of the district court.

### **CONCLUSION**

Because Wruck and Big Lake Lumber and DesMarais did not contribute to the same improvement, the district court erred when it ruled that Big Lake Lumber and

DesMarais were entitled to have their work relate back to the work of Wruck for the purpose of establishing the priority of its mechanic's lien over the mortgage of 21st Century Bank under Minn. Stat. § 514.05. 21st Century Bank therefore respectfully requests that this court reverse the decision of the district court and rule that its mortgage is prior and superior to all mechanic's liens.

Respectfully submitted,

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Dated: 5/7/12

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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 **2,842** words. This brief was prepared using Microsoft Word 2002.

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