

Case No. A11-2220

**STATE OF MINNESOTA
IN COURT OF APPEALS**

21st Century Bank,*Appellant*

vs.

Big Lake Lumber, Inc.,

*Respondents,*Security Property Investments, Inc.; Christopher
Schonning; Wright Lumber & Millwork, Inc.,
Pearson Plumbing Corp.; J.DesMarais Construction, Inc.,*Defendants.*

**RESPONDENT J. DESMARAIS
CONSTRUCTION, INC.'S BRIEF**Steven R. Little, #0304244
Stephen F. Buterin, #0248642
COLEMAN, HULL & VAN VLIET, PLLP
8500 Normandale Lake Blvd., Suite 2110
Minneapolis, MN 55437
(952) 841-0001
*Attorneys for Appellant*Gerald W. Von Korff, #113232
RINKE NOONAN
1015 West St. Germain St., Suite 300
P.O. Box 1497
St. Cloud, MN 56302
(320) 251-6700
*Attorneys for Respondent J. DesMarais
Construction, Inc.*Karl Robinson, #0274045
HELLMUTH & JOHNSON, PLLC
8050 West 78th Street
Edina, MN 55439
(952)941-4005
*Attorneys for Respondent Big Lake
Lumber, Inc.*Steven B. Szarke, #108145
SZARKE LAW OFFICE
11 - 1st Street NE
PO Box 485
Buffalo, MN 55313
(763) 682-4621
*Attorney for Wright Lumber & Millwork,
Inc.*Bridget A. Brine, #022778X
2009 London Road, Suite 100
Duluth, MN 55812
(218) 724-3370
*Bankruptcy Trustee for Pearson Plumbing
Corp.*

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ISSUES PRESENTED

Does this Court's decision in Big Lake Lumber v. Security Property Investments, (A09-2129 Minn. App. 2010) prevent Twenty-First Century Bank from rearguing its contention that the facts cannot sustain a finding in favor of lien claimants?

Did the District Court clearly err in concluding that all work performed on the project site contributed to a single permanent improvement and that continuation of the project throughout 2006 was objectively demonstrated through engineering, staking, purchasing and building of silt fencing, the drawing of building plans, and other miscellaneous work to advance the project?

I. STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In August 2005, Mark Hilde and his construction company, MLH Construction, began to develop a spec-home to be constructed on a forested lot owned by Hilde's cabinet company, M&L Countertop and Cabinets, Inc (M&L). Hilde's excavation subcontractor, Wruck, cleared, grubbed, and leveled the lot to Hilde's specifications and designed the septic system. After the 2005-2006 winter months, Hilde continued to move forward with the project. He ordered and obtained preliminary and final plans, ordered and obtained a final framing bid from DesMarais, and had Bogard-Pederson Engineering survey and stake the final lot and pad location. All of this happened before Twenty-First Century Bank recorded its mortgage. In October of 2006, after Hilde sold his the lot to spec home investors, 21st Century Bank approved a loan and mortgage so that Hilde's construction company could complete the spec home. By the time the mortgage was recorded, lienable work had already been performed on the property both in 2005 and 2006. Following mortgage recordation, Hilde's construction company continued its work

on the home, using the same excavating company (Wruck), the same framing subcontractor (DesMarais), the same lumber yard (Big Lake), the same plans, the same septic design, and the same lot staking on the pad which had been previously cleared, grubbed, and leveled.

This mechanics lien action resulted when 21st Century Bank attempted to foreclose its mortgage and various mechanics lien claimants challenged the mortgage's priority, since lienable work pre-dated mortgage recordation. Following discovery, 21st Century Bank and lien claimants both advised the Court that they believed that the case could be decided on cross motions for summary judgment, the principal issues being the Bank's contention that Hilde and his construction company had abandoned the spec-home project, or alternatively, that the completed home was a separate project from the home that was begun.

The Bank contended that purchase by spec home investors shortly before the mortgage recordation established as a matter of law that the home construction project was a different project, or that Hilde had abandoned his intentions to build a spec home. For their part, lien claimants contended that clearing of the previously forested lot, grubbing, leveling of a pad, excavation of an unpaved driveway with heavy equipment, septic system design, staking of the outer boundaries of the property and staking of the home construction site itself were actively underway, and that Schonning and Glime's

acquisition of the property was a continuation of Hilde's plan to construct a spec home and to sell that home to developers or speculators.

Lien claimants pointed out that if an inspection had been performed before the mortgage was recorded, objective facts on the ground would have disclosed that lienable work which contributed to the ultimate project had already been completed. The District Court granted summary judgment for DesMarais and Big Lake Lumber, finding that the undisputed evidence established that the work performed before recordation of the mortgage was not a separate project, and that the project had been conducted continuously and was not abandoned.

Twenty-First Century Bank's first appeal contended that it was entitled to judgment as a matter of law because, as the Bank alleged, undisputed facts compelled a conclusion that Hilde had abandoned his spec home project. In advancing this proposition, 21st Century Bank (incorrectly) ignored Hilde's efforts in the Spring and Summer of 2006 and contended that the spec home project had been interrupted for 14 months. Appellant's first appeal thus asked this court to "reverse the decision of the district court and rule that its mortgage is prior and superior to all mechanics liens." As this Court's first decision explains, the Bank's appeal contended that:

the district court erred in ruling that its mortgage is junior to respondents' mechanics' liens because the liens could not, as a matter of law, relate back to certain earlier work provided before the mortgage was recorded.

This Court's ultimate decision rejected 21st Century Bank's contention it was entitled to a judgment as a matter of law. It ruled, instead, that because "a genuine issue of material fact exists as to whether respondents' work was performed as a part of the same continuous improvement as work performed prior to the mortgage being recorded, we reverse and remand."

The evidence at trial showed that visible lienable work was performed in both 2005 and 2006, before the mortgage was recorded, and that Hilde continued through with the same home construction project, with only minor modifications, using the same plans and the same subcontractors. The home was built on the pad and lot that Wruck leveled and cleared before mortgage recordation. The Bank offered no evidence that it had performed an inspection to determine if lienable work had been performed before recordation. The Bank did not call Randy Lee, the loan officer who managed the bank's financing and disbursements. The Bank did not call witnesses Glime, Schonning or Shackleton, persons investing in the spec home project.

After trial, the District Court issued factual findings rejecting the contention that the home actually constructed was a separate home construction project from the spec home contemplated by Hilde and his construction company and rejected as well the contention that Hilde had abandoned the work done in 2005 and 2006. The Court found that work performed by excavating subcontractor Wruck in 2005 resulted in an open, obvious, and noticeable clearing upon which a driveway and residential home could be,

and later were, built. Findings of Fact ¶¶ 3-5. The Court noted that “Defendant 21st Century Bank contends that Wruck’s work in 2005 was for a separate and distinct improvement from the improvement that Plaintiff Big Lake Lumber and Defendant J. DesMarais Construction contributed to after October 26, 2006.” The Court rejected the Bank’s contention, finding instead that:

Gathering together Wruck’s 2005 work with the work of Plaintiff Big Lake Lumber, Defendant J. DesMarais Construction, and the other subcontractors, it is clear the work forms the single improvement of constructing a home on the Property.

The Court further rejected Twenty First Century Bank’s contention that Schonning’s purchase of the lot, with spec home construction underway, created a separate improvement:

Ownership was transferred from an originator who built, occupied and sold homes for profit to an investor who intended to have the home constructed and sold to a third party, but the “one single improvement” was, and always appeared to be, construction of a home on the Property. All work performed on the site contributed to that single end. . . .Continuation of the project throughout 2006 was objectively demonstrated through engineering, staking, purchasing and building of silt fencing, drawing of building plans, and other miscellaneous work on the project. At no time was there an objective manifestation of an attempt by any other involved parties to abandon the project of building a home on the Property. On the contrary, inspection of the Property shortly before Defendant 21st Century Bank recorded its mortgage would have shown the actual and visible signs that a project was underway, and would not have revealed any signs that the project had been abandoned.

Twenty First Century Bank then filed this second appeal, seeking to reargue its contention in the first appeal, that the evidence could not sustain the factual conclusion that work performed before and after mortgage recordation was part of one single improvement.

II. STATEMENT OF FACTS

In 2005, Mark Hilde decided he wanted to develop a home on the last remaining available undeveloped lot along Zimmerman, Minnesota. Tr. 27-28. The home would be a spec home, that is, built without a buyer, for subsequent sale. Tr. 36, 125. Mr. Hilde owned two corporations, a cabinet making company, M & L Cabinets & Countertops, Inc., (M&L) Tr. 25-26, and a home remodeling and home construction company, MLH Construction, Inc, Tr. 26-27. Hilde acquired the lot in the name of his cabinet company, M & L, on the advice of his banker and accountant. Tr. 28-29. When Hilde's cabinet company purchased the property, it was heavily forested and was a "prime location" for development. Tr. 28. Finding of Fact ¶ 1. A pre-construction aerial photograph, Exhibit 3(A), shows that the lot was still heavily forested in 2005, just before Hilde commenced construction work on the site. Tr. 28-31.

In 2005, Hilde asked Big Lake Lumber to design the home and create preliminary plans, so that the lot could be cleared and laid out in conformance with those plans. Tr. 32-33. At Hilde's request, his excavation subcontractor, Wruck, designed a septic system layout for the proposed home and filled out Exhibit 1 so that the property could be qualified for home construction under local building and zoning codes. This septic

system layout became the official septic system design for the home that was ultimately built on this lot, and it was used throughout the construction project.

Hilde also retained Wruck to clear the lot and haul away stumps. Tr. 33. In late August, 2005, Hilde cleared an entry path to access the lot from the road, cleared trees and brush, and hauled in dirt so that one could drive into the construction site. Finding of Fact ¶ 4. Wruck also leveled and prepared a pad site on which the home itself could be built. The change in the lot was open and obvious to any person who inspected. Finding of Fact ¶ 5. An aerial photograph taken after Wruck's work, Exhibit 3(B), demonstrates that anyone visiting the site could see that a marked change in the lot had taken place. Exhibit 3(B). Had the Bank's title company inspected this site, it would have recognized that construction had already begun on this site. The work that was done up to this point was permanent and necessary for the completion of the ultimate construction project. Tr 34-35. The septic system that was designed and cleared in August of 2005 was the same septic system that was actually implemented when the home was built, Finding of Fact ¶ 6, and the excavator who did the excavation work for the septic system was the same excavator who continued working on the project after the mortgage was recorded.

Perhaps in order to create the faulty impression that Hilde abandoned his spec home project in 2006, Twenty-First Century Bank's Statement of the Facts completely omits the actions to continue the project during Spring and Summer of 2006. In April of 2006, Hilde contacted Jake DesMarais Construction to submit a preliminary framing bid

to MLH Construction for work on his spec home. Tr. 91. Hilde gave DesMarais the set of preliminary plans that had been prepared by Big Lake Lumber. These plans reflected the home pad, septic system, and driveway location that Hilde had asked Wruck to clear. In June, 2006, DesMarais provided a preliminary estimate to Hilde based on the preliminary plans, and Hilde then asked Big Lake Lumber to finish the final plans. Hilde also used the preliminary plans to shop for construction financing for the project.

By June of 2006, Big Lake Lumber had completed the final plans, Exhibit 8, which contained only slight revisions to the preliminary plans. Based on DesMarais' preliminary estimate, Hilde wanted DesMarais to serve as framing subcontractor to MLH Construction, and so Hilde transmitted the final plans to DesMarais so he could prepare and submit his final Framing Proposal. Any suggestion that DesMarais built a different project than the project that MLH was advancing in June of 2006 is completely contradicted by the evidence. The testimony established that no new plans were generated after Exhibit 8. Everybody – from the lumber yard, to the excavator, to the engineer and his survey crew worked off of these plans throughout. Tr. 87-88.

With Exhibit 8 in hand, DesMarais went out to the lot and inspected. He saw that the driveway had been cleared so that construction equipment could access the pad area in the interior of the lot. He saw that an excavator had already been out to the site to clear a pad site. See also Tr. 46. Trees and stumps had been removed. DesMarais testified:

As a subcontractor, at this point, I would consider it a lot. It was something that we were able to drive into. There wasn't tons and tons of room, but

enough to get the equipment up there, and a contour pad. When I say contour, level, you know, had been turned soil more or less for an opening of some kind of some kind of structure.....The access in my mind would be a first code[sic] of a driveway. Pretty rough for the reason being that there's a lot of equipment coming in and going to get rutted up. Just kind of something quick to get us as subcontractors into the property.....You could tell either a bobcat or a dozer or something had turned the soil more or less to make the pad bigger, you know, on the knoll or kind of the hillside where this house was located. Tr. 93-94.

The cleared driveway exhibited impressions left by heavy equipment. DesMarais saw that a pad had been cleared out of the previously wooded lot in the size and location that would allow construction of the home indicated on the plans, Exhibit 8, and the septic system indicated on Exhibit 1. After inspecting the site and the plans, DesMarais submitted his framing proposal to MLH Construction. The project that DesMarais bid on July 2, 2006 to M&H Construction is the project that MLH Construction built and the project for which the Bank later authorized draws.

Hilde and MLH continued to move forward without interruption. Hilde next retained the services of Bogart-Peterson (land surveyors and civil engineers), and on July 28, 2006, Bogart-Peterson, using Wruck's initial septic plan and the final plans (Exhibit 8), completed a staking and survey of the lot. Tr. 45-46, Exhibit 9, 10. The Engineer staked the property in accordance with Wruck's septic system design, Exhibit 1, and Big Lake Lumber's home plans, Exhibit 8, so the home could be located exactly within the boundaries contemplated by the existing plans and septic design. The project was still moving forward in July and August.

The property was now staked so that construction could begin. At this point, the home building project involved MLH as general contractor, DesMarais as framing subcontractor, Big Lake lumber as designer and lumber supplier, and the plans and specifications for the home were the same plans and specifications contemplated throughout 2006. If the Bank or its title company had visited the site to determine if work had already begun, it would have seen that the formerly heavily wooded site had been cleared and grubbed in conformance with the building plans and site plan. It would have seen that a drive had been cleared and that construction equipment was already using the drive to level a pad site. It would have seen that the entire lot and the pad itself had been recently staked. As the District Court explained:

Wruck's excavation work in 2005 was visible, and was performed for the undisputed purpose of clearing the Property to create a home site. Gathering together Wruck's 2005 work with the work of Plaintiff Big Lake Lumber, Defendant J. DesMarais Construction, and the other subcontractors, it is clear the work forms the single improvement of constructing a home on the Property. See Witcher, 465 N.W.2d at 407. It is true that there was an approximately fourteen (14) month delay between Wruck's work in 2005 and the filing of the Mortgage in 2006. However, during that time the Property was engineered, staked, soil borings were taken, building materials were purchased, building plans were drawn, and silt fencing was installed. District Court Memorandum.

If the Bank had any doubt about whether this work was connected to the project it was financing, it would only have had to look at the site plan, the design, or check with the parties who had already been engaged by the owner. The District Court found:

Here, there was an approximately fourteen (14) month delay between Wruck's work in 2005 and the filing of the Mortgage in 2006. However,

delay alone does not constitute abandonment. Continuation of the project throughout 2006 was objectively demonstrated through engineering, staking, purchasing and building of silt fencing, drawing of building plans, and other miscellaneous work on the project. At no time was there an objective manifestation of an attempt by any other involved parties to abandon the project of building a home on the Property. On the contrary, inspection of the Property shortly before Defendant 21st Century Bank recorded its mortgage would have shown the actual and visible signs that a project was underway, and would not have revealed any signs that the project had been abandoned. See *id.*; Minn. Stat. § 514.05. District Court Memorandum.

Nothing on the site objectively warned that this project had ceased, or was abandoned.

There was no barrier, nor any posting warning materialmen or contractors to stay off site.

During this time, MLH and Hilde were looking for financial backers. Hilde discussed a financing arrangement with a company called Security Properties. Tr. 37-38. The idea was that Security Properties would purchase the property with the construction already underway, but that Hilde would continue to construct the same home, on the same cleared lot, using the same staking, the same septic plan, and the same building permit. Twenty-First Century Bank argues that there was no connection between the contracts, but they offered no evidence to support that inference. It didn't call Shackleton, Glime or Schonning. It didn't call the officer at the Bank who arranged for the construction financing. It didn't call the person who conducted mortgage priority inspection. Thus, the Bank made no effort to establish that it had performed the due diligence which forms a central inquiry in all of the cases. Kloster-Madsen, Inc. v. Tafi's, Inc., 226 N.W.2d 603, 607 (1975); Superior Construction Services, Inc. v. Belton, 749 N.W.2d 388, 391 (Minn. App. 2008); Langford Tool & Drill Co. v. Phenix Biocomposites, LLC, 668 N.W.2d 438,

443 (Minn. App. 2003). Instead, it tried to convince the Court, by indirect inference, that it could somehow conclude from the purchase agreement that a different project was underway. The only evidence on this topic was Exhibit 7, a purchase agreement with July, 06, 2006 crossed out and a purchase agreement with the date of October 4, 2006 written in its place.

Jake DesMarais Construction started its work on the premises as subcontractor of Hilde's construction company, MLH. With framing underway, DesMarais ran into Schonning and Shackleton for the first time long after DesMarais' framing work had begun:

[A]ctually the first day, I remember this very well -- the first day that we start doing the roofing, the structure was up. There was numerous people stopping by. I later come to find out that it was Security Investments, Chris Schonning, and Jason Shackleton, came in walking around the house and stuff. As a sub we ask that everybody stays out of the structure. It's unsafe. They had clearly stated to me that this was their house. And kind of lit a whole 'nother page on me, more or less, you know, what's going on? At this point, I was assuming or had thought I knew that this was Mark Hilde's property. Tr. 97.

When the structure was up, but before roofing had been completed, DesMarais didn't get his next draw, so he called the Bank's representative, Randy Lee. The Bank provided reassurance that payment would be made. DesMarais testified:

Once the structure was up, normally the next step is, first of all, to get a payment, like a progress payment. And then at that point get the house weather-tight, which would include setting windows, getting roofing on, and getting some kind of building wrap on so that the house was secure for the weather. At that point we didn't receive any payment. So, I had found out who the banker was, had called them directly to find out what was going

on. Tr. 96. . . .At that point I had called Century 21 Bank, Randy Lee, to find out what was going on. It was a concern of mine as a contractor that we get this house weathered up. We're in November coming into winter. I need to know are we going to get paid, number one, and number two, should we move forward to get this thing weather-tight. . . .He told me we would be getting a payment on the framing, and that there would be a payment as far as getting the roof and the siding done to proceed. Tr. 96-97.

Hilde and the Bank then evidently had some kind of falling out. But the upshot was that the Bank decided that it wanted DesMarais to complete the home instead of Hilde:

From that point, you know, they had kind of talked about Mark Hilde and whatnot, that they weren't very happy with what was going on, and that they were thinking about firing him. From that point, we got a call from Century 21 Bank asking me if I would be at all interested in contracting the project, being that we had already been in the project, already started the work, to their favor they would like us to see -- come in and finish contracting it. Tr. 98

Initially reluctant, DesMarais then agreed to accommodate the Bank's request, and he proceeded to take over construction. When the house was complete, however, the Bank refused to provide funds necessary to complete construction, leaving DesMarais on the hook for the work that the Bank had asked him to perform, and this mechanics' lien action ensued.

III. ARGUMENT

A. This Court's Prior Decision Squarely Rejected Mortgage Lender's Contention that it was Entitled to Prevail as a Matter of Law

Twenty-First Century's argument here that the evidence compels a finding of abandonment (or separate project) is precisely the argument that this Court rejected in the

first appeal. Twenty-First Century's briefs on its first appeal to this Court specifically asked this Court to "reverse the decision of the district court and rule that its mortgage is prior and superior to all mechanics liens." The Bank's brief did not even assert that a new trial should be provided. As framed by this Court, the issue presented on appeal was Twenty First Century's contention that:

the district court erred in ruling that its mortgage is junior to respondents' mechanics' liens because the liens could not, as a matter of law, relate back to certain earlier work provided before the mortgage was recorded.

This Court's first decision squarely rejected that contention, holding instead, that whether the work performed prior to recordation was part of the same continuous improvement was a factual decision to be rendered by the District Court:

Here, the parties primarily dispute whether the work performed by Wruck prior to appellant's mortgage is part of the same continuous improvement as the work performed by respondents after appellant's mortgage. According to our caselaw, this is a factual determination. See Witcher, 465 N.W.2d at 406. We acknowledge that summary judgment may still be appropriate when no genuine issue of material fact exists because the record as a whole "could not lead a rational trier of fact to find for the non-moving party." DLH, Inc. v. Russ, 566 N.W.2d 60, 69 (Minn. 1997) (quotation omitted). But here, the central issue is whether Wruck's work is part of the same improvement as respondents' work, and the facts do not appear so one-sided that a rational factfinder could not find for the non-moving party.

Construction work is considered a single continuous improvement if it is all done for the same general purpose, or if the contributed parts form one single improvement. Witcher, 465 N.W.2d at 407. To determine whether respondents' contributions and Wruck's initial site-clearing work may be considered one continuous improvement, "we focus on the parties' intent, what the contracts covered, the time lapse between projects, and financing." Poured Concrete Found., Inc., 529 N.W.2d at 510. . . The parties' real dispute is whether the improvement was continuous in the first place, and if

so, whether the improvement was abandoned. Because a genuine issue of material fact exists in this case, summary judgment was inappropriate.

The Court's syllabus summarizes its holding in the Syllabus as follows:

On appeal from summary judgment, appellant bank argues that the district court erred in ruling that its mortgage is junior to respondents' mechanics' liens because the liens could not, as a matter of law, relate back to certain earlier work provided before the mortgage was recorded. Because a genuine issue of material fact exists as to whether respondents' work was performed as a part of the same continuous improvement as work performed prior to the mortgage being recorded, we reverse and remand. (Emphasis added)

Issues decided in the first appeal become binding on the second. Lange v. Nelson-Ryan Flight Service, Inc., 263 Minn. 152; 116 N.W.2d 266 (Minn. 1962). Since this Court has already once rejected Twenty First Century Bank's contention that the facts cannot support a finding in lien claimant's favor, Bank's appeal on the same theory must be rejected as a matter previously decided.

B. Wruck's Clearing, Grubbing, Grading, and Other Work Constitutes the First Item of Labor Furnished on the Premises

Relying on Nat'l Lumber Co. v. Farmer & Son, Inc., 251 Minn. 100, 887 N.W.2d 32 (1957), Twenty First Century Bank argues at pages 19-20 of its brief that the clearing, grubbing and grading that occurred on site cannot constitute a first beginning as a matter of law, because that work was "merely preparatory." A long line of decisions, beginning with In re Zachman Homes, Inc., 47 Bankr. 496, 509, 47 B.R. 496; 1984 Bankr. LEXIS 4519, (Bankr. D. Minn.), have rejected the argument that "merely preparatory" improvements are not qualified to be first visible improvements. On the contrary, any

visible permanent contribution to the improvement that is lienable under section 514.01 establishes the date of priority, unless expressly excepted by section 514.05 subdiv. 2. For example, this Court affirmed the trial court's finding that evidence of digging and tree clearing, including using a backhoe to excavate a tree, was a sufficient beginning to the improvement. Northwest Wholesale Lumber, Inc. v. Citadel Co., 457 N.W.2d 244 (Minn. App. 1990). Likewise, in Kloster-Madsen, the Minnesota Supreme Court affirmed the trial court's decision that, on a remodel project, visible improvement had commenced where one electric employee had spent an eight hour day working on the premises, removed four light fixtures, cut four new holes in the ceiling, placed the removed light fixtures in the new holes, cut a crawl hole in the ceiling, and removed two electrical outlet receptacles from a partition. Kloster-Madsen, Inc. v. Tafi's Inc., 303 Minn. 59, 226 N.W.2d 603 (1975). This work in Kloster-Madsen constituted the beginning of the visible improvement despite the fact that the work was commenced without the actual knowledge or authorization of mortgagee. Id. Similarly, in R.B. Thompson, Jr. Lumber Co. vs. Windsor, 383 N.W.2d 362 (Minn. Ct. App. 1986), this Court reversed the trial court's finding that a mortgage had priority over the mechanic's liens where an excavator testified that he cut down the level of the lot three to five feet, he pushed the dirt onto adjoining lots, and the building pad had been constructed. Id., at 365; See also In Re Zachman Homes, Inc., 47 B.R. 496, 514 (D. Minn. 1984) (clearing, grubbing and rough grading are sufficient to place mortgagee on notice that work had commenced); Jadwin v.

Kasal, 318 N.W.2d 844, 846 (Minn. 1982) (visible improvement to the property began no later than the date of first delivery of materials to the site).

National Lumber Co. v. Farmer & Son, Inc., 251 Minn. 100, 87 N.W.2d 32 (Minn. 1957) is superceded on this question by the decisions in R.B. Thompson, Zachman Homes, and a subsequent curative amendment passed by the legislature. Taken together, these cases, and the amendment which followed, confirm that visible clearing and grubbing constitute a first visible beginning, because it is lienable work, but not excluded by section 541.05. See R.B. Thompson, Jr. Lumber Co. v. Windsor Dev. Corp., 383 N.W.2d 362, 367 (Minn. Ct. App. 1986); In re Zachman Homes, Inc., 47 Bankr. 496, 509, 47 B.R. 496; 1984 Bankr. LEXIS 4519, (Bankr. D. Minn.)¹

A careful, albeit somewhat lengthy, examination of the history of amendments to the mechanics lien statutes which occurred in the period from 1974 through 1987, and the cases that construed those amendments makes it clear that the argument that clearing and grubbing is “merely preparatory” has been emphatically rejected by both this Court and the legislature. Our exposition begins with Laws 1974 Chapter 381 Section 1, which

¹ Zachman Homes is cited by: Phillips-Klein Cos. v. Tiffany Partnership, 1989 Minn. App. LEXIS 1284 (Minn. Ct. App. Dec. 12, 1989); R.B. Thompson, Jr. Lumber Co. v. Windsor Dev. Corp., 383 N.W.2d 362, 1986 Minn. App. LEXIS 4089 (Minn. Ct. App. 1986); R.B. Thompson, Jr. Lumber Co. v. Windsor Dev. Corp., 383 N.W.2d 357, 1986 Minn. App. LEXIS 4077 (Minn. Ct. App. 1986)

added engineering and land surveying services to the list of work for which a lien could be had². The statute also added to section 514.05 the following language:

Engineering or land surveying services with respect to real estate shall not constitute the actual and visible beginning of the improvement on the ground referred to in this section except when such engineering or land surveying services include a visible staking of the premises. No lien shall attach for engineering or land surveying services rendered with respect to a purchaser for value if the value of those services does not exceed \$250.

The addition of this amendment to section 514.05 led inevitably to the conclusion that the legislature believed that any item of work that was enumerated in section 514.01 as lienable could constitute a first visible beginning, but that engineering and land surveying services could not constitute a first visible beginning unless rendered visible with staking.

In 1984, the United States Bankruptcy Court so construed the 1974 amendment when it issued its comprehensive Zachman Homes decision involving a major litigation and impacting a number of economically significant projects. In re: Zachman Homes, Inc., 47 B.R. 496; 1984 Bankr. LEXIS 4519³. The Zachman Homes decision is notable because it painstakingly analyzed the statutory language, and carefully reviewed the

² Specifically, that amendment added to Section 514.01, “Whoever performs engineering or land surveying services with respect to real estate” to the enumerated services on the theory that both were providing value to the improvement.

³ Zachman Homes is cited by: Phillips-Klein Cos. v. Tiffany Partnership, 1989 Minn. App. LEXIS 1284 (Minn. Ct. App. Dec. 12, 1989); R.B. Thompson, Jr. Lumber Co. v. Windsor Dev. Corp., 383 N.W.2d 362, 1986 Minn. App. LEXIS 4089 (Minn. Ct. App. 1986); R.B. Thompson, Jr. Lumber Co. v. Windsor Dev. Corp., 383 N.W.2d 357, 1986 Minn. App. LEXIS 4077 (Minn. Ct. App. 1986).

legislative testimony and legislative author statements, as well as precedents from other jurisdictions. And, Zachman Homes became the foundation for analysis by subsequent state appellate cases as well as legislative action. Zachman Homes concluded that it was the legislature's clear intent to provide broad and liberal coverage to anything lienable under section 514.01, except for engineering or land surveying services that did not include visible staking. Under this decision, even visible staking alone, as well as clearing and grubbing, clearly constitute a visible beginning of the improvement. The Court held:

The plain reading of section 514.05, as further illuminated by the legislative history of the 1974 amendments and existing Minnesota case law, supports a determination that the staking, clearing, grubbing, and grading of the building sites reasonably placed the mortgagees on notice that something was in the process of being constructed.

Zachman Homes explicitly rejected the "merely preparatory" argument that 21st Century Bank is making here. It held:

Section 514.05 draws no distinction between preparatory work and labor contributed to the actual erection of the improvement. Moreover, it would be materially inconsistent to allow liens to attach upon the visible staking of the premises, as explicitly provided for in the statute, but not upon generally sub-sequent and more visible beginnings of an improvement such as clearing, grading, and filling of the premises.

Zachman Homes was followed by the RB Thompson series of cases. R.B. Thompson, Jr.

Lumber Co. v. Windsor Dev. Corp., 374 N.W.2d 493 (Minn. Ct. App. 1985); R.B.

Thompson, Jr. Lumber Co. v. Windsor Dev. Corp., 383 N.W.2d 357 (Minn. Ct. App.

1986); R.B. Thompson, Jr. Lumber Co. v. Windsor Dev. Corp., 383 N.W.2d 362, 367

(Minn. Ct. App. 1986). These companion cases resulted in an emphatic reaffirmation of the Zachman Homes decision. They explicitly reaffirmed Zachman Homes holding that the section 514.05 and section 514.01, taken together, establish that lienable work described in section 514.01 can constitute the first visible beginning, unless an exception is carved out in section 514.05. R.B. Thompson joined Zachman Homes in holding that “The clear import of the [1974] amendment is that where lienable items of labor are an improvement, such items, when visible constitute the ‘actual and visible beginning of the improvement on the ground.’”

The R.B. Thompson Court’s holding is set out as follows:

This [1974] amendment explicitly provides that any visible staking in connection with engineering or land surveying services constitutes the requisite beginning of improvement. The clear import of the amendment is that where lienable items of labor are an improvement, such items, when visible, constitute the “actual and visible beginning of the improvement on the ground.” 383 N.W.2d at 357. In re: Zachman Homes, Inc., 47 Bankr. 496, 509 (Bankr. D. Minn. 1984) (court construing the same amendment and reaching the same result); Jesco, 357 N.W.2d at 127 (“The amendment now charges mortgagees with notice of mechanic’s liens whenever there is visible surveying work.”). Improvements are visible if they would be found during a reasonably diligent inspection of the site. Id. Thus, it is clear that the 1974 amendment drastically extended the priority law by extending priority back to all reasonably visible preparatory work....Because the language of the 1974 amendment is free from ambiguity, this court cannot disregard the explicit words of section 514.05 in order to reach a result which comports with the clear legislative intent. R.B. Thompson, Jr. Lumber Co. v. Windsor Dev. Corp., 383 N.W.2d 362, 367 (Minn. Ct. App. 1986).

The R.B. Thompson Court urged the legislature to review whether staking alone shall constitute the first item of visible improvement. This Court’s invitation to the

legislature led to Laws 1987 Chapter 95 which altered Chapter 514 so that staking alone would no longer constitute a priority creating event, and added instead subdivision 2. The new subdivision 2 stated:

[EXCEPTION.] 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. This subdivision does not affect the validity of the liens of a person or the notice provision provided in this chapter and affects only the determination of when the actual and visible beginning of the improvement on the ground, as the term is used in subdivision 1, has commenced.

The 1987 amendment left R.B. Thompson and Zachman Homes completely in tact in Minnesota, with the exception that staking, engineering, land surveying and soil testing were now excluded from the list of improvements which would per se qualify as a first visible beginning.

E.H. Renner & Sons, Inc. v. Sherburne Homes, Inc., 458 N.W.2d 177, 179 (Minn. Ct. App. 1990), cited by 21st Century Bank, does not support the Bank's position that "merely preparatory" lienable work cannot be a first visible beginning. In the E. H. Renner case, the Court of Appeals rejected a contention that curbs and gutters, constructed on the public right of way, could constitute the first beginning of construction on the owner's property. The problem for lien claimants in E.H. Renner was not that their work was "merely preparatory," but that it was not work performed on the construction site in order to advance construction of the improvement.

Similarly Carlson-Greffe Constr., Inc. v. Rosemount Condo. Group P'ship., 474 N.W.2d 405 (Minn. App. 1991), review denied (Minn. Oct. 31, 1991) affords no assistance to Twenty First Century Bank. In that case, the Court of Appeals affirmed summary judgment for the mortgage lender where lien claimants argued that a temporary construction trailer, parked on the subject lot, was the first visible beginning of the improvement. As in National Lumber, the item that was offered by lien claimants as the first visible improvement was temporary and not a permanent part of the improvement to be constructed. The Court held that the presence of a construction trailer containing plumbing materials does not constitute a visible improvement on the ground, stating that "By definition, an improvement must have an aspect of permanence which is not met here."

There can be no question that the work done on this site prior to the mortgage was a first visible beginning. Any visitor to the site would have seen the contractor's engineering firm staking the outer perimeter of the lot as described on the plans, conducting a site survey, and also staking the foundation exactly as shown on the plans, Exhibit 8, that were used to complete the home construction in October. The staking framed Wruck's permanent improvements to the site and directed the viewer's eye to clearing, grubbing, and grading specifically designed to make further home construction possible. The problem here is that there is no evidence that anyone from the Bank even made a site visit, let alone conducted that visit with due diligence.

C. Bank's Position on Single Project Does Not Defer to the District Court's Fact-Finding Function

In its first decision, this Court correctly held that “[W]hether labor was performed as part of distinct improvements or was part of one continuous improvement is a question of fact.” (Citing Witcher Constr. Co. v. Estes II Ltd. P’ship, 465 N.W.2d 404, 406 (Minn. App. 1991), review denied (Minn. Mar. 15, 1991)). Beginning at page 17 of its brief, Twenty First Century Bank purports to identify various factors, which it claims should have compelled a District Court finding that Wruck’s clearing, grubbing and other site work was for a separate improvement, but this analysis does not afford deference to the District Court’s fact finding function.

The basic thrust of mechanics lien law is to create a rule of decision that provides certainty of result while protecting tradesmen whose work provides benefits to the improvement under way. Under the current paradigm, contributors to improvements are protected by the principle that all liens attach when the first item of material or labor is furnished on the premises for the beginning of the improvement. Section 514.05, subd. 1. Under the first item of work principle, the mortgage is inferior to all liens if the first lien attaches prior to recordation of mortgage. Kloster-Madsen, Inc v. Tafi's, Inc., 226 N.W.2d 603 (1975). Banks protect themselves by inspecting the property at the time the mortgage is recorded to determine if objective facts on the ground disclose that work has already been performed contributing to the improvement, hence the doctrine that section 514.05 “in effect imposes a duty on a purchaser or encumbrancer to examine the premises

for the beginning of any actual and visible improvements before a sale or mortgage transaction is completed.” Kloster-Madsen, Inc v. Tafi's, Inc., 226 N.W.2d 603 (1975). See. R.B. Thompson, Jr. Lumber Co. v. Windsor Development Corp., 383 N.W.2d 357, 360 (Minn. App. 1986.) (The purpose of the statute is to protect the interest of mechanics lien claimants over mortgage interests where there has been a first visible improvement). If the Bank discovers a first beginning, the Bank protects itself by refusing to make the loan without appropriate subordination agreements, not by taking a risk that it can prove in a trial that the work involves a separate improvement. This appeal is essentially a post-hoc rationalization by a mortgage lender that failed to conduct the due diligence upon which the mechanics lien law depends.

The Bank begins by arguing that “Unlike Poured Concrete, there was no unity of parties or purpose in this case.” But that is based upon the Bank’s own self-serving interpretation of the facts, not based upon the evidence as found by the District Court. The evidence actually established that Mr. Hilde, whose construction company served as general contractor before mortgage recording and after, had the construction of one, and only one, spec home from start to finish. Twenty-First Century Bank calls this home “the Schonning home,” but there is not a shred of evidence that Schonning intended to live in this home. Schonning’s acquisition of the lot and home construction in progress was fully consistent with the one central purpose here, and that was to construct a spec home. Twenty First Century Bank contends that the home that was constructed was different

than the design for what the Bank calls the Schonning home. But that too is contrary to the evidence. The plans for the home, Exhibit 8, were developed from Big Lake Lumber's preliminary plans, and both the final plans and the original plans were created for Hilde before Schonning purchased the property.

In this context, Twenty-First Century Bank argues that Thompson Plumbing Co. v. McGlynn Cos., 486 N.W.2d 781 (Minn. Ct. App. 1992) somehow supports its contention that the single improvement finding by the District Court must be struck down. But the Thompson Plumbing decision actually states that whether work performed is part of the same improvement is a fact question for resolution by the District Court. Thompson Plumbing, involved work performed in the Spring of 1985, just before the legislature amended Chapter 541 in response to the Zachman-R.B.Thompson decisions discussed above. Recall these two decisions, Zachman Homes in federal court and R.B.Thompson in this Court, had both held that any work that met the definition of lienable work in Chapter 541 would constitute the first item of improvement, provided that it was a visible beginning. Under Zachman and R.B.Thompson, even the staking of a property alone could constitute the first visible beginning of the property. Thompson Plumbing dealt with how the Courts should handle this question in transition cases, after the 1987 Chapter 541 amendments.

As explained in the previous section, effective 1987, the legislature had amended section 541.05 to remove staking from the list of lienable work which could constitute a

visible beginning. As a result, the Zachman-R.BThompson rule was transformed legislatively into a rule that stated that all lienable work could constitute the first item of improvement, except for lienable work expressly exempted in subdivision 2 of section 541.05⁴. In Thompson Plumbing, the Court was dealing with the question whether the staking performed before the effective date of the subdivision 2 amendment constituted the first beginning of work continued and performed after the mortgage was recorded. The Thompson Plumbing Court held that the answer depended upon whether the staking was performed for the project that was actually built. The problem was that the District Court had erroneously applied the 1987 amendments retroactively to facts that occurred before passage of the statute, and consequently made no findings on whether the staking contributed to the ultimate improvement. The last sentence of the Thompson Plumbing decision affirms the very principle for which we argue, that

“whether specific surveying services constitute the actual and visible beginning of an improvement is a question of fact.”

Twenty First Century next argues that it is undisputed that the work of Big Lake Lumber and DesMarais and Wruck were furnished under separate contracts between different parties. But this argument misstates the separate improvement test completely.

⁴ 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. This subdivision * * * affects only the de-termination of when the actual and visible beginning of the improvement on the ground, as the term is used in subdivision 1, has commenced.

The question actually posed by the cases is whether “little or no relationship exists between the underlying contracts.” The District Court properly found that the contracts did have a substantial relationship. They were all designed to implement Wruck’s ultimate objective, to construct a spec home and make a profit from the construction and sale of the improved lot.

This Court has never held that a transfer of property during the course of construction will preclude mechanics liens from attaching to property pursuant to Minn. Stat. § 514.05. The Witcher decision, for example, was concerned with whether the work related to the same general project; it did not create an exception to the single project rule where the work on a single project is performed under separate contracts. See Langford Tool & Drill Co. v. Phenix Biocomposites, LLC., 668 N.W.2d 438, 446 (Minn.App. 2003). The Witcher court’s discussion of contracts was based on two earlier cases, one that held that a home *addition* was not part of a home *repair* project that had been performed earlier, and one that held that contracts to install fixtures to stores throughout a shopping mall were not part of a single project where each store was responsible for its own fixtures. Witcher Construction, 465 N.W.2d at 407 (citing New Prague Limber & Read-Mix Co. v. Bastyr, 117, N.W.2d 7, 13 (Minn. 1962) and Insul-Acoustics, Inc. v. Lee, 186 Cal.Rptr. 324, 326 (1982)). In the context of those cases, the Witcher court noted that work performed for distinct projects under separate contracts should not be considered part of a single project for purposes of Minn. Stat. § 514.05. The

analysis in Witcher is based not on whether there are separate construction contracts, but on whether the contracts serve the same general purpose or are part of a single improvement. Poured Concrete, 529 N.W.2d at 510.

Twenty First Century Bank next wrongly asserts that there was a 14-month gap in which no lienable work was performed⁵. This contention ignores the fact that, except for the intervening winter months, from beginning to end, Hilde was actively pursuing his spec home project. During this 14-month period, Hilde asked Big Lake Lumber to draw up plans for the project, and the drafting of those plans is lienable work⁶. Those plans were based upon the septic design plan prepared by Wruck and the home was designed to fit on the pad which Wruck had been instructed to clear and level. After submission of the first draft of plans, Wruck then asked DesMarais Construction to submit a preliminary framing proposal which Big Lake Lumber then used to draft a final set of plans, Exhibit 8, and the drafting of those plans was likewise lienable work. Here, Wruck's clearing and grading made possible DesMarais' home construction.

As DesMarais' framing proposal was being prepared, Hilde retained the services of a surveying and engineering firm to stake the property and perform soil borings. The

⁵ The Bank writes at page 18 of its brief, "As the district court found, no lienable work was performed from the time of Wruck's work in 2005 until after the Bank recorded its mortgage on October 27, 2006, a time-lapse of more than 14 months" (Add. 5-6; T. 133, 136; Trial Exh. 17, 45, 46 and 50).

⁶ Cf. 31 Dunnell Minn. Digest MECHANICS' LIENS § 3.01. Dunnell's Digest explains: Architectural work is a lienable service as defined by statute, even if the work does not result in visible, physical alterations in the property or increase its capital value.

engineering firm staked location of the foundation pursuant to Exhibit 8, Big Lake Lumber's plans, and created the construction survey. This too was lienable work. Minn. Stat. Sections 514.01, 514.05 subdivision 2. Big Lake Lumber ignores all of this activity, because, the actions of Big Lake Lumber, DesMarais, and Bogart Pederson Engineering⁷ in the summer of 2006 could not constitute the first visible beginning of the improvement. Section 514.05 subdivision 2. But the first visible beginning of the improvement had already occurred when Wruck cleared, grubbed, levelled, and built the driveway so that construction equipment could reach the job site. The question presented is, rather, the Bank's contention that Wruck had stopped pursuing the spec home reflected in Exhibit 8. The District Court properly rejected the Bank's contention that there had been a 14-month interruption in the project; in fact, lienable work as well as other activities during the Spring and Summer of 2006 demonstrate that the project was still underway.

The District Court applied precisely the test articulated by this Court in its decision. That test is that, "Construction work is considered to be a single improvement if it is done for the same general purpose, or if the parts, when gathered together, form a single improvement." Witcher Construction Co. v. Estes II Ltd. Partnership, 465 N.W.2d 404, 407 (Minn. Ct. App. 1991) (citing Kahle v. McClary, 255 Minn. 239, 241, 96 N.W.2d 243, 245 (1959)). As Respondent Big Lake Lumber explained in its brief on the

⁷ Bogard-Pederson's work was paid for out of the first construction draw.

first appeal, "Construction work is considered to be a single improvement if it is done for the same general purpose, or if the parts, when gathered together, form a single improvement." This Court has recognized that the Minnesota Supreme Court "has consistently held that separate construction phases of the same overall construction project constitute one continuous improvement." Id. (citing Rochester's Suburban Lumber Co. v. Slocumb, 282 Minn. 124, 128-29, 163 N.W.2d 303, 307 (1968); Barrett v. Hampe, 237 Minn. 80, 82, 53 N.W.2d 803, 805 (1952)). The type of contract is not dispositive; the question asked is whether the materials furnished or work performed were all pursuant to one job as a continuous undertaking. In its first decision, this Court held that "close, disputed facts demonstrate that there is a genuine issue of material fact as to whether Wruck's initial clearing work and respondents' work were performed as part of the same improvement." The District Court carefully analyzed the facts and properly found that the work constituted a single project.

D. The District Court Properly Rejected Appellant's Abandonment Claim

Appellant's argument that Hilde abandoned the home construction project is really another way of framing the issue we have been discussing in prior sections – whether the work performed following mortgage recordation was part of an improvement begun before that recordation. In its brief in the first appeal, Twenty First Bank correctly recognized that "the intent to abandon is determined based on the objective manifestations of the parties, rather than their subjective intent" and cited Superior

Constr. Servs. v. Belton, 749 N.W.2d 388, 393 (Minn. App. 2008). Appellants' First Brief, page 19. That sentence and the citation to Superior Construction does not appear in its second brief, perhaps because Superior Construction is directly supportive of the approach taken by the District Court, which focused upon the objective facts manifested on the ground.

Superior Construction illustrates the kind of objective circumstances that justify an inference that a project was abandoned. Superior Construction Services contracted in May 2002 to provide repair and restoration services for a fire-damaged Brooklyn Park property owned by Latoria Belton. The estimated cost for the project was \$ 40,000. In a work-authorization document, Belton agreed to remit her insurance proceeds to Superior within thirty days after receiving them. Superior completed the bulk of the contracted work over the next six months, and Belton was able to move back into the house in January 2003. The homeowner diverted the insurance proceeds and did not pay Superior Construction. Superior Construction took no activity, however, to collect for some considerable time and departed from the site, leaving the home, by all appearances complete.

From all objective appearances, the fire restoration work had been accepted and there was no work underway. If a mortgage lender had visited the home in 2003 or 2004, it would have seen a completed, occupied home with no work at all underway. Then, in December of 2004, the homeowner executed a mortgage in favor of Town and Country

Credit and did not identify any pending construction. But, in 2005, Superior Construction suddenly demanded payment for the previously completed work and complained that the homeowner had wrongly diverted the insurance proceeds. As part of a deal to get Superior paid, Belton arranged to have Superior return to the home and perform some additional interior counter-top repairs not previously ordered in the fire renovation repair. After performing the repairs, Superior now claimed that the counter-top work should be considered part of the two year old fire damage repairs for priority purposes, and thus defeat the mortgage. The Court of Appeals found that, to the extent that there was an original ongoing project, it had been abandoned. The Court further found that the issue of abandonment is not to be determined by the subject intent, but rather the intent as disclosed by the objective facts. The court concluded:

On this record the district court did not err by determining that the facts compelled the conclusion that the project had been abandoned as a matter of law. The district court properly concluded that Superior's and Belton's objective manifestations of intent--the cessation of work for more than two years and a mutual failure to communicate for at least fifteen months--was sufficient to overcome any after-the-fact assertions by Superior of its subjective intent to continue the project.

Langford Tool & Drill Co. v. Phenix Biocomposites, LLC, 668 N.W.2d 438, 443

(Minn. App. 2003) is another case involving abandonment. Prior to 1994, Phenix Biocomposites, LLC (Phenix) secured the rights to an industrial process for turning agricultural waste into various particle board products. This process required custom-made equipment and a building to house that equipment. Phenix located and

chose a site in Mankato, Minnesota as the location for the manufacturing plant. The plant was specifically designed to meet the needs of the production equipment, and construction began in December 1996.

In the spring of 1997, Phenix ran into financial problems, and by April, construction of the manufacturing facility virtually halted. The work on the project had stopped, the construction site was intentionally barricaded, and there were no trespassing signs posted on the property. The focus of the trial court's decision was on the circumstances that were revealed objectively when the new lender conducted its due diligence at the project site. The new lender's attorney surveyed the project site and concluded that the project had been abandoned before the deal for the loan was closed, based on objective facts on the ground. A key factor was the action of lenders to use due diligence to determine that objective facts on the ground would support the abandonment conclusion.

The physical, visible condition, to be determined from an inspection of the premises, is an essential element as part of determining whether a project has been abandoned. . . .

The advantage of this Langford Tool approach is that it provides an objectively simple mechanism to determine whether a project is continuing or is abandoned. The test does not depend on secret contractual discussions, or whether property is transferred from one speculator to another.

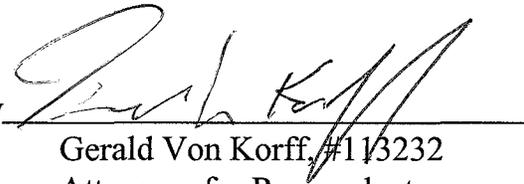
However, even in these circumstances, where clear objective evidence of abandonment was manifest at the project site, the Langford Tool decision still recognized that the District Court's decision had to be examined as a factual issue which must be affirmed unless clearly erroneous. The Court of Appeals' Langford Tool affirmance states that: "The court took everything into account and weighed the facts of abandonment. We cannot find that the district court abused its discretion by concluding that the site had been abandoned."

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Respectfully Submitted,

RINKE NOONAN

By



Gerald Von Korff, #113232
Attorneys for Respondent
300 US Bank Plaza Building
1015 West St. Germain St.
P.O. Box 1497
St. Cloud, MN 56302-1497
(320) 251-6700