

Case No. A05-2018

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State of Minnesota  
**Supreme Court**

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*Mavco, Inc., d/b/a Maverick Construction,*  
Appellant/Petitioner,

vs.

*Rodney Eggink and Karla Eggink,*  
*Wells Fargo Bank, N.A.,*  
*Craig A. Moore and Nicole M. Moore,*  
*And Great River Federal Credit Union,*  
Respondents.

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**BRIEF OF MINNESOTA STATE BAR ASSOCIATION,  
CONSTRUCTION LAW AND REAL PROPERTY LAW SECTIONS,  
AS AMICUS CURIAE**

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## I. STATEMENT OF INTEREST

The Construction Law Section and the Real Property Law Section (the "MSBA Sections") of the Minnesota State Bar Association submit this brief as amicus curiae requesting reversal of the Court of Appeal's holding.<sup>1</sup>

The MSBA Sections' interest is public in nature. With nearly 16,000 members, the Minnesota State Bar Association is the State's largest voluntary organization of attorneys. Among its missions are to aid the courts in the administration of justice, to apply the knowledge and experience of the profession to the public good, and to provide a forum for discussion of subjects pertaining to the practice of law and law reform. The Construction Law Section is dedicated to the field of construction law, including mechanic's liens. The purpose of the Real Property Law Section is to further the Minnesota State Bar Association's work in the field of real property law. This section also promulgated and updates the Minnesota Title Standards and White Pages, a comprehensive code of standards to guide attorneys examining real estate titles and documenting real property transfers. Both sections monitor court precedents and legislation that affect construction, real estate and real estate transactions. The Court of Appeals' holding in this case impacts the practice of all attorneys that

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<sup>1</sup> In accordance with Minn. R. Civ. App. P. 129.03, the MSBA Sections hereby certify that their counsel authored this brief and that no person or entity, other than the MSBA Sections, has made a monetary contribution to the preparation or submission of this brief.

practice in construction and real estate law, including members of the MSBA Sections.

## II. SUMMARY OF DISCUSSION

Minn. Stat. § 514.12 subd. 3 states, in part, that “no person shall be bound by any judgment in such action unless made a party thereto within the year....” This Court must determine the “person” to whom the legislature is referring in this statute. The Court of Appeals agreed with Respondent Wells Fargo’s definition of “person” as anyone who has an interest in the real estate at any time, even if that interest is first recorded after the commencement of the mechanic’s lien foreclosure action and filing of the Notice of *Lis Pendens*. This interpretation ignores the context that precedes this clause, all of which refers to mechanics’ lien claimants. The interpretation also ignores the very next clause of Minn. Stat. § 514.12 subd. 3 that expressly refers to a mortgagee such as Wells Fargo and renders this language a nullity. Viewed in context, the “person” being referred to in this clause is a mechanic’s lien claimant.<sup>2</sup>

The Court of Appeals’ interpretation of Minn. Stat. § 514.12 subd. 3 is also contrary to the Recording Act and creates an absurd result by giving priority to a subsequently-recorded mortgage over a prior-recorded mechanic’s lien.

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<sup>2</sup>Mavco interprets “person” as being any person with a recorded interest in the property at the time that the action is commenced. The MSBA Sections agree that this is a reasonable interpretation of the statute and avoids the inconsistencies with other statutes described in this brief. The MSBA Sections offer their interpretation as an alternative for the Court to consider.

Additionally, the Court of Appeals' interpretation is contrary to the Notice of *Lis Pendens* statute and renders it a nullity. Appellant Mavco filed its Notice of *Lis Pendens* two months prior to Wells Fargo filing its mortgage. Under the Court of Appeals' interpretation of Minn. Stat. § 514.12 subd. 3, Wells Fargo took an interest in the property without being subject to the previously-recorded Notice of *Lis Pendens* and the underlying lawsuit.

Finally, Wells Fargo's interpretation creates an impossible burden on a mechanic's lien claimant. Under Wells Fargo's interpretation, the mechanic's lien claimant would need to update continuously its search of the property records and continue to add new parties over the one-year period. Property interests can be transferred at any time, and property records are therefore dynamic. Because the property records are often not up to date, it would be impossible for a mechanic's lien claimant to meet this burden. Instead, the burden should be borne by a party such as Wells Fargo who records an interest in real estate after, and subject to, a prior recorded mechanic's lien statement and Notice of *Lis Pendens*.

### III. DISCUSSION

#### A. The One-Year Limitation in Minn. Stat. § 514.12 subd. 3 Applies to Lien Claimants.

Read in context, the one-year limitation in Minn. Stat. § 514.12 subd. 3 refers to lien claimants. Minn. Stat. § 514.11, which is entitled, "Commencement of Action; Proceedings" provides as follows: "the action may be commenced by

any lien holder who has filed a lien statement for record and served a copy thereof on the owner pursuant to § 514.08, and all other such lien holders shall be made defendants therein.” Under a literal reading of this statute, it would appear as though the legislature originally intended that only mechanic’s lien holders and possibly the owner would be proper parties to the mechanics’ lien foreclosure.

Minn. Stat. § 514.12, in its entirety, provides as follows:

#### **514.12 NOTICE OF LIS PENDENS.**

Subdivision 1. **Recording.** At the beginning of the action the plaintiff shall file for record with the county recorder or, if registered land, with the registrar of titles of the county in which it is brought, and of the several counties if the lien be claimed under section 514.04, a notice of the pendency thereof, embracing therein a copy of the summons, omitting the caption.

Subd. 2. **One action for all.** After such filing, no other action shall be commenced for the enforcement of any lien arising from the improvement described, but all such lienholders shall intervene in the original action by answer, as provided in section 514.11. Any such lienholder not named as a defendant may answer the complaint and be admitted as a party. If more than one action shall be commenced in good faith, all shall be consolidated and tried as one, under such order of the court as may best protect the rights of all parties concerned.

Subd. 3. **One-year limitation.** No lien shall be enforced in any case unless the holder thereof shall assert the same, either by filing a complaint or answer with the court administrator, within one year after the date of the last item of the claim as set forth in the recorded lien statement; and, no person shall be bound by any judgment in such action unless made a party thereto within the year; and, as to a *bona fide* purchaser, mortgagee, or encumbrancer without notice, the absence from the record of a notice of lis pendens of an action after the expiration of the year in which the lien could be so asserted shall be conclusive evidence that the lien may

no longer be enforced and, if the case of registered land, the registrar of titles shall refrain from carrying forward to new certificates of title the memorials of lien statements when no such notice of lis pendens has been registered within the period.

Subd. 2 of this statute initially refers to “any lien arising from the improvement described,” which in this context would be a mechanic’s lien, and then refers to the mechanic’s lien claimants as “such lien holders.”

Subd. 3 of the statute initially continues to discuss and apply to mechanic’s lien claimants. This subdivision has three clauses separated by semi colons. In the first clause, “lien” and “holder thereof” refers to mechanics’ liens and to mechanic’s lien claimants. In the second clause, “and no person shall be bound by any judgment in such action unless made a party thereto within the year,” the term “the year” is referring to the one-year within which a mechanic’s lien claimant must assert its lien in the first clause of subd. 3. The “person” being referred to in this clause is logically also a mechanics’ lien claimant, given that mechanics’ lien claimants are the class of persons subject to the one-year limitation. This interpretation is also consistent with the context found in § 514.11 and the previous language in § 514.12 that, up to this point, have applied to mechanics’ lien claimants and assumed that mechanics’ lien claimants are the primary, and possibly only, parties to the lien foreclosure.

This Court has interpreted the one-year language in the predecessor statutes to Minn. Stat. § 514.12 subd. 3 containing the same language as applying to lien claimants:

But that last clause was and is subject to the clear, emphatic, and concluding provision of section 7030 that no 'person shall be bound by the judgment in such action unless he is made a party thereto within said year.' Obviously, for present if not for all purposes, one is not a party to an action until he is in a position to be bound by the judgment therein.

\* \* \*

Unless within the year's life of his own lien, such a defendant files an answer asking for its enforcement, he has lost his lien. The commencement of an action by another, without his becoming in fact a party thereto, while his own lien is alive, is of no avail to a defendant lienor.

Thompson Yards v. Standard Home Bldg. Co., 161 Minn. 143, 146-147, 201 N.W. 300, 302 (1924). In Thompson Electric Co. v. Milliman & Larson, Inc., 268 Minn. 299, 128 N.W. 2d 751 (1964) the Court cited Minn. Stat. § 514.12 subd. 3 for the proposition that "to become a party defendant, it was only necessary for the petitioner [mechanic's lien claimant] to file his answer with the Clerk of the District Court within a year after the furnishing of the last item mentioned in his lien statement." Id. 268 Minn. at 302, 128 N.W. 2d at 754.

Interpreting the second clause of Minn. Stat. § 514.12 subd. 3 as applying to mechanics' lien claimants imposes obligations on a mechanic's lien claimant beyond those imposed under the first clause of that subdivision. In a mechanic's lien lawsuit, the plaintiff mechanic's lien claimant must also name all other mechanic's lien claimants as defendants as required by Minn. Stat. § 514.11. It is possible that a mechanic's lien claimant may not be named as a defendant in the original lawsuit for several reasons, including inadvertence on the part of the

plaintiff or timing issues, such as the omitted lien being filed after the plaintiff files the suit to foreclose the mechanic's lien. See Thompson Electric Co. 268 Minn at 300, 128 NW 2d at 753 (Mechanics' lien holder with filed lien statement not joined as defendant in mechanics' lien foreclosure). Interpreting "no person" in the second clause of Minn. Stat. § 514.12 subd. 3 as referring to other lien claimants, means that this omitted lien claimant would not be bound by the judgment in the mechanic's lien action unless the mechanic's lien claimant was made a party to the suit within one year of the omitted lien claimant's last item of work. This interpretation is consistent with the requirement in Minn. Stat. § 514.12 subd. 2 that there be only one lawsuit for all liens arising from the improvement. Because there is only one lawsuit and each mechanic's lien claimant has coordinate priority and would share in the proceeds from the eventual foreclosure and sale of the subject property, to not "be bound by any judgment in such action" means that a lien claimant that is not made a party to the suit within the one-year period would not receive the benefit of foreclosure of the mechanics' lien.<sup>3</sup>

The third clause in § 514.12 subd. 3 applies to a different class of persons. This clause starts with "and, as to a *bona fide* purchaser, mortgagee, or

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<sup>3</sup> That Minn. Stat. § 514.12 subd. 3 uses the term "bound" rather than "benefit" does not diminish the validity of the MSBA Sections' interpretation. The mechanic's lien claimants who are named as defendants in a mechanics' lien foreclosure would be bound by the judgment, as would be the plaintiff lien claimant, and all lien claimants would receive the benefit of the mechanics' lien foreclosure. See e.g. the quotation from Thompson Yards on p. 6 above wherein the Court referred to the defendant mechanic's lien claimant as being "bound" by the judgment therein.

encumbrancer without notice....” The “as to” indicates that this clause is now applying to a different class of persons from the previous portions of the subdivision. This is the first reference to a mortgagee and, therefore, governs Wells Fargo. Wells Fargo, however, does not meet the requirements for Mavco’s mechanic’s lien to “no longer be enforced.” For Mavco’s lien to no longer be enforced against it, Wells Fargo would need to be a *bona fide* mortgagee “without notice.” A *bona fide* purchaser is a purchaser who does not have actual or constructive notice of outstanding rights in another. See Chaney v. MCDA, 641 N.W.2d 328, 332 (Minn. Ct. App. 2002) (quotations and citations omitted). Mavco’s mechanic’s lien was of record approximately four months prior to Wells Fargo’s mortgage being signed. Consequently, because a recorded document (here, the lien) provides constructive notice to the public as well as to Wells Fargo, Wells Fargo was not a *bona fide* mortgagee without notice.

The Court of Appeals’ interpretation of the second clause of § 514.12 subd. 3 would render the third clause to be meaningless – there would be no need for a third clause of subd. 3 if every purchaser, mortgagee, or encumbrancer needed to be made a party to the mechanic’s lien foreclosure within the one-year period. Interpreting “person” in the second clause as referring to lien claimants gives effect to all of Minn. Stat. § 514.12 subd. 3.

**B. The Court of Appeals' Ruling Ignores and Conflicts with the Priorities Established in Minn. Stat. § 514.05 and the Recording Act.**

Minn. Stat. § 514.05 subd. 1, part of the mechanics lien statute, provides that:

All liens, as against the owner of the land, shall attach and take effect from the time the first item of material or labor is furnished upon the premises for the beginning of the improvement, and shall be preferred to any mortgage or other encumbrance, not then of record, unless the lienholder had actual notice thereof.

(Emphasis added).

According to Mavco's mechanics lien statement, the first item of material or labor was furnished on May 20, 2003. A-2. There is no question that Wells Fargo's mortgage was not then of record and was in fact recorded over one year later. In holding that the mortgage had priority over the mechanics lien, the Court of Appeals ignored Minn. Stat. § 514.05.

Similarly, under the Recording Act, Minn. Stat. § 507.32 and § 507.34, the interest conveyed under the subsequently-recorded mortgage would be subject to the prior-recorded mechanics lien. Minn. Stat. § 507.32 provides that "the record, as herein provided, of any instrument properly recorded shall be taken and deemed notice to parties." Under this statute, Wells Fargo had constructive notice of Mavco's mechanic's lien that was filed four months prior to the Eggink's signing the mortgage to Wells Fargo.

Minn. Stat. § 507.34 provides as follows:

Every conveyance of real estate shall be recorded in the office of the county recorder of the county where such real estate is situated; and every such conveyance not so recorded shall be void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate, or any part thereof, whose conveyance is first duly recorded....<sup>4</sup>

These statutes create a race-notice system of recording. See Minn. Cent. R. R. Co. v. MCI Telecommunications Corp., 595 N.W.2d 533, 537 (Minn. Ct. App. 1999) *review denied* (Minn. Sept. 14, 1999). Under a race-notice priority system, a party who first records an interest in real estate and who does not have notice of any prior unrecorded instrument has priority over any unrecorded instrument or later-recorded instrument:

Mortgagees are *purchasers* within the meaning of the statute. As between several purchasers or mortgagees from the same grantor, it is a race of diligence to secure the protection of the statute. Such conveyances take precedence in the order of their filing and not in the order of their execution.

40 Dunnell Minn. Digest *Recording Act* § 4.01(a) (4<sup>th</sup> ed. 1998).

Under Minn. Stat. § 507.32, Mavco's mechanic's lien, filed January 23, 2004, is deemed notice to the world of Mavco's mechanic's lien. Under Minn. Stat. § 514.05 subd. 1, Mavco's lien had priority as of the first item of material or labor being furnished to the property. According to the lien statement, this was

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<sup>4</sup> In its brief to the Court of Appeals, Wells Fargo asserted that Minn. Stat. § 507.34 did not apply to it because "this case does not involve a subsequent purchaser." Wells Fargo Brief at p. 12. Minn. Stat. § 507.01, however, defines the word "purchaser" as "every person to whom any estate or interest in real estate is conveyed" and the word "conveyance" as including "every instrument in writing whereby any interest in real estate is created, alienated, mortgaged, or assigned...." (Emphasis added).

May 20, 2003. Also under this statute, the lien is “preferred to any mortgage or other encumbrance, not then of record....” Wells Fargo recorded its mortgage fourteen months after Mavco’s first date of work, and Mavco’s lien is therefore entitled to priority under Minn. Stat. § 514.05 subd. 1 and § 507.34. The Court of Appeals’ holding ignores all of these statutes and renders them a nullity. The interpretation of Minn. Stat. § 514.12 subd. 3 suggested by the MSBA Sections gives effect to all of these statutes.

C. **The Court of Appeals Holding Ignores the *Lis Pendens* Statute and Renders Mavco’s Filing of the *Lis Pendens* a Nullity.**

The *lis pendens* statute provides that “[f]rom the time of the filing of such notice, and from such time only, the pendency of the action shall be notice to purchasers and encumbrancers of the rights and equities of the party filing the same to the premises.” Minn. Stat. § 557.02. Here, Mavco filed its Notice of *Lis Pendens* two months prior to the mortgage being recorded. As such, Wells Fargo was put on notice of, and took its mortgage interest subject to, the rights and equities of Mavco. The Court of Appeals’ holding does not cite to, and conflicts with, the *lis pendens* statute and mandates an interpretation contrary to the Court of Appeals’ holding.

D. **The Court of Appeals’ Holding Creates an Impossible Burden for Mechanic’s Lien Claimants.**

1. **Because of the substantial delay in the indexing of its property records, determining the identity of, and commencing suit against, all persons who obtain an interest in the property within the one-year period is impossible.**

Under the Court of Appeals' decision, even after the mechanic's lien claimant has commenced suit to foreclose the lien and filed a Notice of *Lis Pendens* against the subject property, the mechanic's lien claimant would need to continuously to review the property records and continue to name all parties that obtain an interest in the subject property after the filing of the Notice of *Lis Pendens*. In his dissent, Judge Minge posits the following hypothetical:

The rule stated in this case would allow a person who recorded an interest 364 days into the one-year deadline for foreclosure to obtain priority over the holder of the mechanic's lien unless the lienholder amended his complaint and served the newcomer in the brief one-day period before the one-year deadline expired. This is not a reasonable result. Although last-minute checking of real estate records is possible, serving an amended complaint may be physically impossible.

Even the "last-minute checking of real estate records" that the majority's decision would impose upon mechanic lien claimant may not be possible. As of December 18, 2006, when this brief was being written, Ramsey County's Torrens documents were posted through September 12, 2006 and the abstract documents were posted through September 15, 2006, according to the Ramsey County Recorded Document Information website. <http://www.rinfo.co.ramsey.mn.us/public/Documents/index.pasp>. In other words, the indexing of the property records in Ramsey County is behind by over three months.<sup>5</sup>

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<sup>5</sup> The property that is the subject of their appeal is located in Sherburne County. Sherburne County, unlike Ramsey County, does not identify on its website the date through which it has indexed the property records.

The delay in the indexing of property records has become such a state-wide problem that the legislature in 2005 enacted Minn. Stat. § 357.182. Subdivision 3 of this statute requires that each county recorder and registrar of titles shall index an instrument within fifteen business days of receipt. Apparently because of the difficulty of complying with this new requirement, Minn. Stat. § 357.182 subd. 4 phases in this requirement over several years – for calendar year 2007, a county is in compliance with the fifteen business-day deadline if it is met for sixty percent of all recorded documents. By 2010, each county must record and index ninety percent of all documents within the fifteen business-day deadline. Minn. Stat. § 357.182 subd. 4.

Under the Court of Appeals' holding, even though a mechanic's lien claimant has filed suit and recorded a *lis pendens* against the subject property, the mechanic's lien claimant would need to join all persons obtaining an interest in the subject real estate through one year from the last date of work shown on the lien statement.<sup>6</sup> If the property were located in Ramsey County and the lien claimant's one-year period expired on December 18, 2006, a lien claimant examining the real estate records on the very last day of the deadline would only be able to determine the identities of those parties claiming an interest in real

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<sup>6</sup> In theory, the Court of Appeals' interpretation of § 514.12 subd. 3 could even extend to interests in the real estate first obtained after the one-year deadline. In other words, the Court of Appeals' reasoning could provide priority to someone first obtaining an interest in the subject real estate after expiration of the one-year period because no claim was brought against them within the one-year period. Obviously, asserting the claim would be impossible. Again, the Court of Appeals' interpretation creates a result that is absurd and would likely violate due process.

estate as of September 12, 2006, if the real estate was Torrens, or September 15, 2006, if the real estate was abstract. Under the Court of Appeals' holding, anyone obtaining an interest in the property during the three-month period between these dates and the expiration of the one-year period would automatically be entitled to priority over the mechanic's lien. This is obviously an absurd result. This result would also likely violate due process, because the lien claimant would have no opportunity to assert a claim against those parties first obtaining an interest in the real estate during this three-month "gap" in the indexing of the property records.<sup>7</sup>

2. The burden of protecting their interests or joining in the suit should be borne by these parties that take an interest in the property after the recording of the Notice of *Lis Pendens*.

Wells Fargo, or any other party obtaining an interest in real estate after the filing of a mechanic's lien or Notice of *Lis Pendens*, is in the best position to protect their own interests. When the Egginks signed the mortgage to Wells Fargo, Mavco's mechanic's lien had been of record for approximately four months. If Wells Fargo wanted the mechanic's lien satisfied, it could have required that the mechanic's lien be satisfied as a condition of funding its loan. Chapter II of the "White Pages" published by the Real Property Law Section of the MSBA, addresses "Instruments Required to Remove Encumbrances." In

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<sup>7</sup> Conceivably, under the Court of Appeals' holding, the owner of a property that is subject to mechanics' liens could void all of the liens by deeding the property to another person either shortly before or after the expiration of the one-year period, and the new "owner" of the property would hold the property free and clear of the liens upon the expiration of the one-year period.

order to remove a mechanic's lien as an encumbrance, the White Pages provide as follows:

B. MECHANIC'S LIEN.

1. No Notice of Lis Pendens of Record.

Require:

Satisfaction of lien.

OR

Release of real property from the lien.

OR

Expiration of one year from the date of the last item of material, skill or labor as stated in the recorded mechanic's lien statement. MINN. STAT. § 514.12.

2. Notice of Lis Pendens of Record.

Require:

- a. (1) Dismissal of action with prejudice by plaintiff and all answering lien claimants filed in the District Court file.

OR

- (2) Satisfaction or release of recorded mechanic's lien notice (from answering lien claimants who have not dismissed their answers with prejudice);

NOTE: A mechanic's lien notice from a non-answering lien claimant is governed by B.1. above.

AND

- b. Discharge of notice of lis pendens. See. Minn. Title Standard No. 42.

Section of Real Property Law, Minnesota State Bar Association, *Minnesota Standards for Title Examinations*, II-B (White Pages supp. Rev. May, 2005).

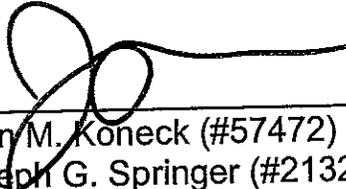
Wells Fargo did not take the steps required to remove Mavco's mechanics' lien as an encumbrance. Wells Fargo took its mortgage with constructive notice of the mechanic's lien. Wells Fargo, and not the lien claimant, was in the best position to protect Wells Fargo's own interests.

### **CONCLUSION**

The Court of Appeals may have been persuaded by the fact that Mavco may have been able to join Wells Fargo within the one-year period but failed to do so. As pointed out in Judge Minge's dissent and in the discussion above, joining all persons who obtain an interest in the one-year period within the same one-year period may be impossible. The Court of Appeals' interpretation of Minn. Stat. § 514.12 subd. 3 takes one clause of this statute out of context and is inconsistent with the rest of that statute and other provisions of the mechanic's lien statute. Interpreting Minn. Stat. § 514.12 subd. 3 as requiring that no mechanic's lien claimant shall be bound by any judgment unless made a party to the action within one year of that claimant's last date of work gives effect to all of Minn. Stat. § 514.12 and is consistent with the rest of the mechanic's lien statute, the Recording Act, and the *lis pendens* statute. This interpretation also places the burden of protecting their interests on a person obtaining an interest in real estate after the filing of a mechanic's lien or *lis pendens*, rather than imposing an impossible burden on the lien claimant.

Respectfully submitted,

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