

NO. A11-2220

5

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 BRIEF AND ADDENDUM**

---

Steven R. Little, Esq. (#0304244)  
 Stephen F. Buterin, Esq. (#0248642)  
 COLEMAN, HULL & VAN VLIET, PLLP  
 8500 Normandale Lake Boulevard  
 Suite 2110  
 Minneapolis, MN 55437  
 (952) 841-0001

*Attorneys for Appellant*

Karl Robinson (#0274045)  
 HELLMUTH & JOHNSON, PLLC  
 8050 West 78th Street  
 Edina, MN 55439  
 (952) 941-4005

*Attorneys for Respondent Big Lake Lumber*

Gerald W. Von Korff (#113232)  
 RINKE-NOONAN  
 P.O. Box 1497  
 St. Cloud, MN 56302-1497  
 (320) 251-6700

*Attorneys for J. DesMarais Construction*

Steven B. Szarke (#108145)  
 SZARKE & SZARKE LAW OFFICE  
 Szarke Building, P.O. Box 485  
 11 First Street N.E.  
 Buffalo, MN 55313

*Attorney for Wright Lumber & Millwork*

Bridget A. Brine (#022778X)  
 2009 London Road, Suite 100  
 Duluth, MN 55812  
 (218) 724-3370

*Bankruptcy Trustee for Pearson Plumbing Corp.*

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

**TABLE OF CONTENTS**

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... ii

STATEMENT OF LEGAL ISSUES ..... 1

STATEMENT OF CASE ..... 2

STATEMENT OF FACTS ..... 7

ARGUMENT ..... 11

    I.    STANDARD OF REVIEW ..... 11

    II.   THE DISTRICT COURT ERRED IN RULING THAT THE  
          MECHANIC'S LIEN OF BIG LAKE LUMBER AND  
          DESMARAIS ENJOYED PRIORITY OVER THE  
          MORTGAGE OF 21ST CENTURY BANK. .... 11

        A.   THE BANK'S MORTGAGE HAS PRIORITY OVER ALL  
              MECHANIC'S LIENS UNDER MINN. STAT. § 514.05. .... 12

        B.   THE DISTRICT COURT ERRED IN RULING THAT BIG  
              LAKE AND DESMARAIS COULD RELATE BACK TO THE  
              WORK DONE FOR THE PREVIOUS PROPERTY OWNER. .... 14

        C.   THE WORK OF WRUCK WAS MERELY PREPARATORY  
              SITE WORK THAT DID NOT RESULT IN THE FIRST  
              ACTUAL AND VISIBLE IMPROVEMENT TO PROPERTY. .... 19

CONCLUSION ..... 22

## TABLE OF AUTHORITIES

### CASES

#### Minnesota

<i>Carlson-Grefe Constr., Inc. v. Rosemount Condo. Group P'ship.</i> , 474 N.W.2d 405 (Minn. App. 1991), <i>review denied</i> (Minn. Oct. 31, 1991) .....	13, 20, 21
<i>Carr-Cullen Co. v. Deming</i> , 176 Minn. 1, 222 N.W. 507 (1928) .....	1
<i>David-Thomas Co., Inc. v. Voss</i> , 517 N.W.2d 341, 342 (Minn. App. 1994) .....	11
<i>E.H. Renner &amp; Sons v. Sherburne Homes</i> , 458 N.W.2d 177 (Minn. App. 1990) .....	15, 20
<i>Kloster-Madsen, Inc. v. Tafi's, Inc.</i> , 303 Minn. 59, 226 N.W.2d 603, 607 (Minn. 1975) .....	13
<i>Lamoreaux v. Andersch</i> , 128 Minn. 261, 150 N.W. 908 (1915) .....	1
<i>Modrow v. JP Foodservice, Inc.</i> , 656 N.W.2d 389, 393 (Minn. 2003) .....	11
<i>Nat'l Lumber Co. v. Farmer &amp; Son, Inc.</i> , 251 Minn. 100, 887 N.W.2d 32 (1957) .....	14, 15, 16, 20
<i>Poured Concrete Foundation, Inc. v. Andron, Inc.</i> , 529 N.W.2d 506 (Minn. App. 1995), <i>review denied</i> (Minn. May 31, 1995) .....	15, 17, 19
<i>Premier Bank v. Dan-Bar Homes, Ltd.</i> , 2011 WL 4941681 (Minn. App. Dec. 2, 2010) .....	21
<i>R. B. Thompson, Jr. Lumber Co. v. Windsor Dev. Corp.</i> , 374 N.W.2d 493 (Minn. App. 1985), <i>review denied</i> (Minn. Nov. 26, 1985) .....	12
<i>Runia v. Marguth Agency, Inc.</i> 437 N.W.2d 45, 48 (Minn. 1989) .....	11

<i>Schweich v. Ziegler, Inc.</i> , 463 N.W.2d 722, 729 (Minn. 1990) .....	11
<i>Suburban Exteriors, Inc. v. Emerald Homes, Inc.</i> , 508 N.W.2d 811 (Minn. App. 1993) .....	1, 21
<i>Thompson Plumbing Co. v. McGlynn Co.</i> , 464 N.W.2d 781 (Minn. App. 1992) .....	1, 14, 15, 16, 18, 19
<i>Tonka Tours, Inc. v. Chadima</i> , 372 N.W.2d 723, 726 (Minn.1985) .....	11
<i>Witcher Constr. Co. v. Estes II Ltd. P'ship</i> , 465 N.W.2d 404 (Minn. App. 1991) .....	11, 15

**STATUTES AND RULES**

Minn. Stat. § 514.01 (2010) .....	12, 20
Minn. Stat. § 514.05 (2010) .....	1, 12, 13, 14, 15, 16, 19, 20, 21, 22

## STATEMENT OF LEGAL ISSUES

- I. To establish priority under Minn. Stat. § 514.05, a lien claimant's work may relate back only to the beginning of the particular improvement to which it contributed labor or materials. Here, the earlier work to which respondents seek to relate back was not directly related to the improvement to which they contributed. Did the district court err when it ruled that respondents' mechanic's liens enjoyed priority over appellant's mortgage?**

The district court ruled that respondents could relate back to earlier work done for the previous property owner because the original project had not been abandoned and there were indications that actual and visible improvements were being made to the property at the time appellant recorded its mortgage.

**Apposite Authority:**

Minn. Stat. § 514.05 (2008)

*Lamoreaux v. Andersch*, 128 Minn. 261, 150 N.W. 908 (1915)

*Carr-Cullen Co. v. Deming*, 176 Minn. 1, 222 N.W. 507 (1928)

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

*Suburban Exteriors, Inc. v. Emerald Homes, Inc.*, 508 N.W.2d 811 (Minn. App. 1993)

## STATEMENT OF CASE

Respondent Big Lake Lumber, Inc. brought this mechanic's lien foreclosure action in Sherburne County District Court after it was not paid for lumber and building materials it had furnished for the construction of a home located on real property in Zimmerman, Minnesota. (*See* Summons and Complaint dated August 22, 2007) It also asserted claims for unjust enrichment and quantum meruit against the property owners, defendants Christopher Schonning and Security Property Investments, Inc. ("SPII"). (*Id.*) In addition, it sought injunctive relief to postpone the sheriff's sale that appellant 21st Century Bank ("Bank") had scheduled as part of the Bank's mortgage foreclosure proceedings. (*Id.*) At the time Big Lake Lumber commenced suit, the Bank was in the midst of foreclosure proceedings after Schonning had defaulted on the \$290,000 mortgage he had given the Bank to finance his purchase of the property. (Add. 6)

In their Joint Answer, Counterclaim and Crossclaim, respondents Pearson Plumbing Corporation and J. DesMarais Construction, Inc. sought to foreclose their respective mechanic's liens against the property. (*See* Joint Answer, Counter Claim & Crossclaim of Pearson Plumbing Corp. & J. DesMarais Construction dated October 9, 2007) They also asserted claims against Schonning and SPII for breach of contract, unjust enrichment, and accounts stated. (*Id.*) And like Big Lake Lumber, they also sought to postpone the scheduled sheriff's sale. (*Id.*) Although defendant Wright Lumber and Millwork, Inc. ("Wright Lumber") served and filed an Answer, it did not assert a crossclaim to enforce its mechanic's lien against the property. (*See* Answer dated September 11, 2007) The property owners answered, denying Big Lake Lumber's claims. (*See* Answer to Complaint dated

September 16, 2007) In its Answer, the Bank denied the various claims of the parties and asserted, in part, that its mortgage was prior and superior to all of the mechanic's liens. (*See* Answer of Defendant 21<sup>st</sup> Century Bank dated October 4, 2007)

Following discovery, the parties agreed the district court should decide the issue of priority on cross-motions for summary judgment. (Add. 28) It was undisputed that Big Lake Lumber's first date of work was November 8, 2006; DesMarais's first date of work was January 11, 2007; and Pearson Plumbing's first date of work was January 10, 2007. (Add. 6) The issue was whether the Bank's mortgage, which was recorded on October 27, 2006, was prior and superior to the mechanic's liens. (Add. 28)

The Bank argued that its mortgage enjoyed priority because none of the mechanic's lien claimants had furnished lienable work until after the Bank had recorded its mortgage. (Add. 28-29) The mechanic's lien claimants argued that their liens had priority because actual and visible improvements had been made to the property before the Bank recorded its mortgage and they should be allowed to relate to the work of a contractor the previous property owner had hired to remove trees and vegetation from the property 14 months earlier. (Add. 29) Big Lake joined DesMarais's motion and argued that all of the improvements to the property, regardless of when they were furnished, were done for the same purpose, and therefore, constituted a single improvement. (*Id.*)

By order dated September 17, 2008, the district court granted DesMarais's motion and determined that DesMarais's mechanic's lien enjoyed priority over the Bank's mortgage. (Add. 9) The district court ruled the project had not been abandoned, and therefore, the lien claimants could relate their work back to that of the earlier contractor. (Add. 29)

Following its decision, the district court approved the parties' stipulations as to the validity and amount of the various mechanic's liens, and that preserved the Bank's appeal rights. (Add. 9) In a series of later orders and judgments, the district court, among other things, awarded costs, disbursements, interest and attorney fees to Big Lake and DesMarais. (Add. 10)

The Bank then appealed the district court's decision on the issue of priority. (*Id.*) On appeal, this court reversed the district court and ruled that genuine issues of material fact existed as to whether the work of Big Lake Lumber and DesMarais was performed as a part of the same continuous improvement the as the work performed before the mortgage was recorded. (Add. 27) This court remanded the case for trial on the issue of priority. (*Id.*)

On May 4 and 5, 2011, the district court conducted a bench trial on the issue of priority. (Add. 2) It issued its decision on August 15, 2011. (*Id.*) The district court found that Mark Hilde ("Hilde") through his company M&L Cabinets and Countertops, Inc., ("M&L") purchased the property and that Hilde intended to build a home on the property. (Add. 3) The court found that in 2005, M&L took steps to prepare the property for the building of a home, which included obtaining a survey to determine if the property was suitable for construction; obtaining soil samples; the clearing of trees, shrubs, and vegetation to allow engineering and staking of the property; and having a preliminary blueprint prepared by Big Lake Lumber. (*Id.*) The court found that M&L hired Wruck Excavating ("Wruck") to prepare the site for the building of the home. (*Id.*) This work included the clearing of trees and underbrush for a rough driving path and building pad; hauling dirt to the property; hauling trees and stumps form the property; and the preparing of a septic

system designed for the anticipated home. (*Id.*) The court also found that Hilde executed an Affidavit Regarding Corporation on behalf of M&L that the driveway and residential home could be, and later were, built. (Add. 4) The district court also found that at the closing, Hilde executed an Affidavit Regarding Corporation on behalf of M&L that stated "there has been no labor or materials furnished to the [property] for which payment has not been made. (*Id.*) It also found that after August 2005, Wruck did not perform any other work or supply any materials to the property until after the closing on October 27, 2006. (Add. 5) Likewise, it found that neither Big Lake Lumber nor DesMarais or any other defendants performed work on the property prior to the recording of the bank's mortgage. (Add. 6)

Based on these findings, the district court concluded that "[g]athering 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." (Add. 13) It concluded that the "one single improvement" was and always appeared to be the construction of a home on the property. (Add. 14) The court concluded that because the construction constitutes a single improvement to the property and the improvement had not been abandoned during the fourteen months between Wruck's work and the work of the lien claimants, the lien claimants were entitled to have their claims relate back to the commencement of the improvement at the time of Wruck's work in August 2005. (Add. 15) The district court then ruled that the mechanic's liens of Big Lake Lumber and DesMarais were prior and superior to the bank's mortgage. (Add. 17) The Judgment was entered on August 15, 2011. (Add. 18)

In a separate order and amended judgment filed and entered on September 23, 2011, the district court awarded costs and disbursements, including attorney fees, to Big Lake Lumber and DesMarais. (Add. 19)

By Order filed October 10, 2011, the district court denied the Bank's post-trial motions for amended findings, or a new trial. (Add. 20) This appeal follows.

## STATEMENT OF FACTS

This case involves real property located in Sherburne County, Minnesota, legally described as: Lot 1, Block 1, Fox Hollow, and commonly known as

Zimmerman, Minnesota. (Add. 2 ) Mark Hilde and his wife, through their company, M&L Cabinets and Countertops, Inc. ("M&L") purchased the property from friends with the idea of building their own home on it. (T. 28, 31, 70; 75; Add. 2). In order to obtain a construction loan from their lender, FCC Acquisition, the Hildes had to undertake a number of steps to "make sure the lot was buildable." (T. 31-32; 74) This included having a survey done; soil sampling; and having "a little path cleared so that we could get up there to do a little engineering." (T. 32) They also had Big Lake Lumber prepare a preliminary blueprint, which was necessary to securing the construction loan. (T. 32) According to Hilde, this work was required "so that we could approach the banker." (T. 32)

In August 2005, M&L contracted with Wruck Excavating, Inc. ("Wruck") to clear "a little path" so that he and his wife could walk up into the lot to see where they wanted to place their house. (T. 33-34) The work included clearing a few trees and some underbrush "kind of where we had an idea where we wanted to put the house." (T. 34) Hilde testified that Wruck's work was necessary because he needed to show the approximate location of the house in his construction loan application to FCC. (T. 34) The invoice that M & L received from Wruck states: "Clear lot and haul away stumps." (Trial Exh. 2; T. 35) It is dated August 14, 2005. (*Id.*) The amount of the invoice was \$2,600, which M & L paid to Wruck. (T. 62)

Ultimately, the Hildes decided to sell the property and not to construct the home. (T. 31, 35) They put the property up for sale through Dynamic Real Estate. (T. 35) Sometime in early 2006, SPII approached the Hildes about purchasing the property. (T. 36-37) Although the property listing indicated that a "spec home" could be built on the lot, SPII decided that it just wanted to purchase the lot only. (T. 38) SPII never closed on the property. (T. 38)

Then, in early July 2006, Jason Shackelton entered into a purchase agreement with M&L for purchase the property. (Add. 4). On October 4, 2006, the purchase agreement was modified and Schonning was substituted in place of Shackelton. (Add. 4; Trial Exh. 7; T. 38) Schonning also entered into a "Construction Agreement" with MLH Construction, Inc., which was Mark Hilde's other company, for the construction of a home on the lot. (Trial Exh. 42; T. 73)

At the closing on October 26, 2006, M&L conveyed the property to Schonning by way of a warranty deed, which was recorded the next day with the Office of the Sherburne County Recorder, as Document No. 636168 (the "Warranty Deed"). (Add. 4; Trial Exh. 15) Hilde executed the Warranty Deed as Vice President of M&L. (*Id.*) He also executed an Affidavit Regarding Corporation on behalf of M & L that stated: "[t]here has been no labor or materials furnished to the [Property] for which payment has not been made." (Add. 4; T. 63-64)

In addition, at the closing Schonning executed and delivered a mortgage in favor of the Bank in the principal amount of \$290,000.00. (Add. 5; Trial Exh. 36) the mortgage financed Schonning's purchase of the property. (Add. 5) The Bank recorded the

mortgage with the Sherburne County Recorder's office on October 27, 2006, as Document No. 635169 (the "Mortgage"). (*Id.*)

The day after the closing Wruck provided MLH Construction with a bid for work to be done on the property. (Trial Exh. 17; T. 67) The proposed work included digging backfill and final grading; removing stumps onsite; building a driveway approach, which included hauling; and installing an in-ground septic system. (*Id.*) According to Tony Wruck, the owner of Wruck Excavating, this work occurred after the closing. (T. 136) On November 7, 2006, Wruck submitted an invoice to Schonning for the work in the amount of \$11, 415.00. (Trial Exh. 45; T. 136)

After construction on the Schonning home started, MLH Construction was asked to leave the project. (T. 61) DesMarais, who was the framing contractor, took over as the project's general contractor. (T. 98-99)

On March 5, 2007, Big Lake Lumber recorded a mechanic's lien statement in the original principal amount of \$43,475.01, with the Sherburne County Recorder, as Document No. 644425. (Add. 5; Trial Exh. 40) Its mechanic's lien statement states that it supplied its first item of material for the improvement on November 8, 2006. (*Id.*)

On May 23, 2007, Wright Lumber recorded a mechanic's lien statement against the Property in the original principal amount of \$29,727.00, with the Sherburne County Recorder, as Document No. 60712. (Add. 5; Trial Exh. 37) Its mechanic's lien statement states that it supplied its first item of material for the improvement on January 25, 2007. (*Id.*)

On June 14, 2007, Pearson Plumbing recorded a mechanic's lien statement against the Property in the original principal amount of \$10,918.00, with the Sherburne County Recorder, as Document No. 652476. (Add. 6; Trial Exh. 38) Its mechanic's lien statement states that it supplied its first item of labor and material for the improvement on January 10, 2007. (*Id.*)

On July 19, 2007, DesMarais recorded a mechanic's lien statement against the Property in the original principal amount of \$103,985.85, with the Sherburne County Recorder, as Document No. 654957. (Add. 5; Trial Exh. 29) Its mechanic's lien statement states that is supplied its first item of material for the improvement on January 11, 2007. (*Id.*)

In May 2008, the Bank proceeded to foreclose its mortgage by advertisement against the property after Schonning defaulted on his mortgage. (Add. 6; Trial Exh. 41)

This litigation followed.

## ARGUMENT

### I. STANDARD OF REVIEW

"The standard of review of a bench trial is broader than the standard for jury verdicts." *Runia v. Marguth Agency, Inc.* 437 N.W.2d 45, 48 (Minn. 1989). A reviewing court must determine whether the district court's findings are clearly erroneous and it erred in its conclusions of law. *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722, 729 (Minn. 1990). A district court's factual findings are clearly erroneous when they are "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *Tonka Tours, Inc. v. Chadima*, 372 N.W.2d 723, 726 (Minn.1985). "But findings of fact that are influenced by an error of law may be set aside by the reviewing court." *Witcher Const. Co. v. Estes II Ltd. Partnership* 465 N.W.2d 404, 406 (Minn. App.1991), *review denied* (Mar. 15, 1991) (citation omitted).

A reviewing court is not bound by and need not give deference to a lower court's decision on a purely legal issue. *Modrow v. JP Foodservice, Inc.*, 656 N.W.2d 389, 393 (Minn. 2003). The construction of Minnesota's mechanic's lien statute is a question of law that this court reviews de novo. *David-Thomas Co., Inc. v. Voss*, 517 N.W.2d 341, 342 (Minn. App. 1994).

### II. THE DISTRICT COURT ERRED IN RULING THAT THE MECHANIC'S LIEN OF BIG LAKE LUMBER AND DESMARAIS ENJOYED PRIORITY OVER THE MORTGAGE OF 21ST CENTURY BANK.

The district court erred in ruling that the mechanic's liens of Big Lake Lumber and DesMarais were prior and superior to the Bank's mortgage because their liens related back to the work of Wruck in 2005. The district court's findings of fact, and the

undisputed evidence at trial, do not support the court's conclusions of law that the contributions of Big Lake Lumber and DesMarais and the work of Wruck were part of the same continuous improvement – the construction of the Schonning home. Their respective work was furnished 14 months apart for different homes and different property owners, under separate contracts between different parties that were separately financed, and that were not part of one continuous and unified development plan.

**A. THE BANK'S MORTGAGE HAS PRIORITY OVER ALL MECHANIC'S LIENS UNDER MINN. STAT. § 514.05.**

The mechanic's lien statute provides, in part, that whoever contributes to the improvement of real estate by performing labor or furnishing material shall have a lien on the improvement, and on the land on which the improvement is situated. Minn. Stat. § 514.01 (2010). With respect to the owner of the land, all liens attach and take effect from the time the first item of material or labor is furnished on the premises for the beginning of the improvement and shall be preferred over any mortgage not then of record, unless the lienholder had actual notice of the mortgage. Minn. Stat. § 514.05, subd. 1 (2010). But, "[a]s against a bona fide purchaser, mortgagee, or encumbrancer without actual or record notice, no lien shall attach prior to the actual and visible beginning of the improvement on the ground." *Id.* The lien claimant has the burden of proving the date of first improvement. *R. B. Thompson, Jr. Lumber Co. v. Windsor Dev. Corp.*, 374 N.W.2d 493, 497 (Minn. App. 1985), *review denied* (Minn. Nov. 26, 1985).

In construing the priority provisions of Minn. Stat. § 514.05, Minnesota courts recognize that the status of bona fide mortgagee without notice depends on whether there

is an actual and visible beginning of an improvement on the ground before the mortgage is recorded. *Carlson-Greife Constr., Inc. v. Rosemount Condo. Group P'ship.*, 474 N.W.2d 405, 408 (Minn. App. 1991), *review denied* (Minn. Oct. 31, 1991). Once visible improvement on the ground has begun, a mortgagee is deemed to have notice of mechanic's liens, and for priority purposes, stands in the same position as an owner. *Id.* “Knowledge of *planned* improvements, however, is not sufficient to charge a mortgage with notice of *existing* mechanic’s lien claims.” *Id.* at 409 (emphasis in original).

Minnesota courts have defined an improvement for the purposes of Minn. Stat. § 514.05, subd. 1, as “a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs” *Kloster-Madsen, Inc. v. Taft’s, Inc.*, 303 Minn. 59, 63-64, 226 N.W.2d 603, 607 (Minn. 1975). This definition requires that an improvement must have an “*aspect of permanence.*” *Id.* (emphasis added).

The policy underlying Minn. Stat. § 514.05 enables owners and developers to procure financing by granting mortgagees priority over lien claimants who file claims after the mortgage is recorded, provided the mortgagee's inspection of the property does not reveal the actual and visible beginning of the improvement on the ground. *Id.* This policy protects against the injustice that would occur "if the land could be afterwards swallowed up by mechanic's liens for work which had not been commenced on the ground, and of which consequently one who might buy the property or take a mortgage upon it had no notice or means of knowledge when he took his deed or mortgage." *Id.*

(quotation and citation omitted). The statute balances this policy against the equally important purpose of protecting the rights of workers and suppliers who furnish labor and materials to an improvement by charging the mortgagee with notice of the liens as of the beginning of the actual and visible improvement. *Id.* "This dual purpose is best served when the rights of both mortgagees and lien claimants are fixed with definiteness and certainty." *Id.* at 408-09 (citation omitted).

**B. THE DISTRICT COURT ERRED IN RULING THAT BIG LAKE AND DESMARAIS COULD RELATE BACK TO THE WORK DONE FOR THE PREVIOUS PROPERTY OWNER.**

The work of Wruck was a separate and distinct improvement from the construction of the home to which DesMarais and Big Lake Lumber contributed labor and materials. Wruck's work was not directly related to the improvement to which DesMarais and Big Lake Lumber contributed – the construction of the Schonning home. The district court, therefore, erred in concluding that Big Lake Lumber and DesMarais were entitled to have their work relate back to the work of Wruck for the purpose of achieving priority under Minn. Stat. § 514.05.

Under the relation-back doctrine, a mechanic's lien may relate back and attach based on lienable work of someone other than the lien claimant if the earlier work is part of a single continuous improvement to the property. *Thompson Plumbing Co. v. McGlynn Co.*, 464 N.W.2d 781, 786 (Minn. App. 1992); *see also Nat'l Lumber Co. v. Farmer & Son, Inc.* 251 Minn. 100, 104, 87 N.W.2d 32, 36 (1957). In evaluating projects to determine whether they are separate improvements, Minnesota courts focus on four factors: (1) the parties' intent; (2) what the contracts covered; (3) the time lapse

between projects: and (4) the financing for the improvements. *Poured Concrete Foundation, Inc. v. Andron, Inc.*, 529 N.W.2d 506, 510 (Minn. App. 1995), *review denied* (Minn. May 31, 1995).

A construction project consists of separate improvements if there is little or no interrelationship between the contracts under which the work is performed. *Witcher*, 465 N.W.2d at 407. Construction work is considered a single improvement if it is done for the same general purpose, or if the parts, when gathered together, form a single improvement. *Id.* Different construction contributions may relate to different improvements even though all the contributions and resulting improvements are part of the same overall project. *See Nat'l Lumber*, at 104, 887 N.W. 2d at 36; *see also E.H. Renner & Sons v. Sherburne Homes*, 458 N.W.2d 177 (Minn. App. 1990) (holding construction of curbs and gutters for subdivision is separate improvement from construction of dwelling).

This court has held that "[b]y referring to 'the' improvement, the plain language of Minn. Stat. §514.05, allows a mechanic's lien to relate back only as far as the beginning of the particular improvement to which the mechanic contributed." *See Thompson Plumbing*, 464 N.W.2d at 782. This court has observed 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.* (emphasis added). Accordingly, the improvement referred to under Minn. Stat. §514.05, is not just any improvement – it is limited to "the specific improvement to which subsequent suppliers or laborers contributed." *Id.* "The line of distinction is whether or

not the improvement bears directly on the construction of the building rather than whether it is part of the overall project involved." *Nat'l Lumber*, 887 N.W.2d at 36.

This court has cautioned against the danger of reading the language of Minn. Stat. § 514.05 too broadly. In *Thompson Plumbing*, the court observed that if the language is read to refer to any improvement, then the lien of a carpenter who adds a deck to an existing house could relate back to the time when the foundation of the house was originally staked or even when the developer staked the corners of the lot. *Id.* at 787. But, by referring to "the" improvement, the plain language of Minn. Stat. § 514.05 would "allow the carpenter's lien to relate back only as far as the time when the first item of labor or material was contributed to the deck, because that was the improvement to which the carpenter contributed." *Id.*

Here, the undisputed evidence established that the design of the home Hilde planned to build differed from the actual design of the Schonning home that was eventually built on the property. During trial, Hilde admitted that the design between the home he had considered building in 2005 differed from the design of the Schonning home that was eventually built. (T. 73) The planned Hilde home, which was never actually started, and the Schonning home that was built 14 months after Wruck's work were based on different designs. Thus, as a matter of law, the improvements to which Wruck and Big Lake Lumber and DesMarais contributed were separate and distinct because they involved the construction of two different homes.

The district court based its decision on its conclusion that because Hilde had contemplated building a home on the property, and a home was eventually built on the

property, the work was necessarily related to and formed “the single improvement of constructing a home on the Property.” This reasoning, however, overemphasizes the intent factor of the *Poured Concrete* analysis to the exclusion of the remaining three factors. Applying equal weight to all four factors of the *Poured Concrete* analysis to the district court’s findings and the undisputed evidence at trial, leads to only one reasonable conclusion – the improvement to which Big Lake Lumber and DesMarais contributed were separate and distinct from the improvement to which Wruck contributed.

**1. Parties’ Intent.**

Unlike *Poured Concrete*, there was no unity of parties or purpose in this case. During his testimony, Hilde stated in 2005, he originally planned on building a house for him and his wife on the Property. (T. 28, 35, 70). He and his wife eventually decided not to build and were approached by SPII, which only wanted to purchase the lot without a home. (T. 38) Eventually, M & L sold the property to Christopher Schonning. (T. 31, 73-74; Exhibits 7, 42). Schonning then entered into a construction agreement with MLH Construction, Hilde’s other company, to build a home. The design for the Schonning home was different than the design for the planned Hilde home. There is no evidence in the record that Wruck's work and the building of the Schonning home were part of a unified development plan between the Hildes and Schonning for the property at the time Wruck furnished its work.

Simply because a home was eventually built on the property is not evidence of unity of purpose or planning. Under the district court’s reasoning, any development of property that is similar to the previous property owner’s plan for the property would

allow a later contractor or material supplier to relate back to the earlier work done and paid for by the previous property owner. This result is contrary to this court's decision in *Thompson*.

## **2. Separate Contracts.**

It is undisputed that the work of Big Lake Lumber and DesMarais and Wruck were furnished under separate contracts between different parties. Wruck Excavating performed its 2005 tree-clearing under an oral contract with M&L when Hilde intended to build a house for himself and his wife. (T. 34, 36, 62, 124; Trial Exh. 2, 44). The work that Big Lake Lumber and DesMarais performed was under a contract with MLH Construction pursuant to MLH Construction's Contractor Agreement with Schonning. (Exhibits 17 and 42). Thus, this factor weighs in favor of separate and distinct improvements.

## **3. Time-Lapse Between Projects.**

The time-lapse factor of the separate improvement analysis addresses how much time passed between finishing work on one contract involved in the improvement and the start of work under another contract. *See Wichter*, 465 N.W.2d at 407. Wruck performed its 2005 tree-clearing in August 2005. (T. 123-24; Exhibits 2, 44). 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). This is a significant lapse of time that establishes Wruck's work was not directly related to the excavation and

construction of the Schonning home. This factor weighs in favor of a finding of separate improvements.

**4. Separate Financing.**

Finally, there is no dispute that the improvements to which Wruck and Big Lake Lumber and DesMarais contributed were financed separately. Hilde initially planned on financing the construction of a house on the Property through his company's construction lender, FCC Acquisition. (T. 74). The work of Big Lake Lumber and DesMarais was financed through the construction loan that Schonning obtained from the Bank. (Add. 5; T. 74; Exhibit 36).

Applying the four *Poured Concrete* factors, and the court's decision in *Thompson Plumbing* to the district court's findings and the undisputed evidence at trial, the work of Wruck Excavating in August 2005 was, as a matter of law, a separate and distinct improvement from the improvement to which Big Lake Lumber and J. DesMarais contributed labor and materials – the Schonning house.

**C. The work of Wruck was merely preparatory site work that did not result in the first actual and visible improvement to property.**

Wruck's work clearing the property was temporary and did not result in the first actual and visible improvement to the property.

Minnesota courts recognize and hold that temporary, nonpermanent contributions that may be necessary to an overall construction project, even though visible and indicating that improvements are planned, do not constitute the first actual and visible improvement for the purposes of Minn. Stat. § 514.05, subd. 1. This is because different

construction contributions may relate to different improvements even though all the contributions and resulting improvements are part of the same overall project. *See Nat'l Lumber*, 251 Minn. at 104, 87 N.W. 2d at 36; *see also E.H. Renner & Sons*, 458 N.W.2d at 180 (holding construction of curbs and gutters for subdivision is separate improvement from construction of dwelling). Thus, an improvement that is merely temporary or not visible does not constitute an actual and visible improvement for the purpose of establishing priority under Minn. Stat. §514.05, subd. 1.

In *Carlson-Grefe*, this court ruled that the presence of a construction trailer containing plumbing materials did not constitute the actual and visible improvement on the ground for the purposes of establishing priority under Minn. Stat. § 514.01 because it was not a permanent addition designed to increase the value or usefulness of the property. 474 N.W.2d at 409. The court reasoned that the mobile character of the trailer did not satisfy the permanence requirement in the phrase “visible improvement on the ground.” *Id.* At best, “the trailer’s presence indicated that an improvement was planned [and k]nowledge of planned improvements \* \* \* is not sufficient to charge a mortgagee with notice of existing mechanic’s lien claims.” *Id.* The court observed that “while the presence of equipment may establish a mechanic’s lien against an owner, the facts of the case did not meet the higher standard necessary to establish priority over a mortgagee.” *Id.*

And, in *Nat'l Lumber*, the supreme court rejected the lien claimants’ argument that the erection of a fence around a tree to protect it during construction constituted the actual visible improvement on the ground as defined in Minn. Stat. § 514.05. 251 Minn.

100, 87 N.W.2d 32. The court ruled that the erection of the fence was severable and separable from later work and did not bear directly on the construction of the building, but rather was a part of the overall project. *Id.* at 36.

And more recently, this court has held that preliminary site work is a separate improvement from the construction of a dwelling. In *Suburban Exteriors*, this court held that the removal of trees was not work to which a lien claimant could relate back for the purpose of establishing priority under Minn. Stat. § 514.05 because the work did not have a direct bearing on the construction of the house. *508 N.W.2d* at 812. The court acknowledged that the trees had to be removed prior to construction, but concluded that "their removal did not further the excavation work." *Id.*; see also *Premier Bank v. Dan-Bar Homes, Ltd.*, 2011 WL 4941681 (Minn. App. Dec. 2, 2010) (holding clearing of trees and demolition of existing house to make way for construction of condominium was separate improvement because it did not bear directly on construction of building itself).

Like the trees in *Suburban Exteriors* and *Dan-Bar Homes*, or the construction trailer in *Carlson-Greife* and fence in *National Lumber*, the work of clearing the property for future development in this case was simply a temporary condition affecting the property that did not directly bear on the construction of the Schonning home, the latter being the improvement to which Big Lake Lumber and J. DesMarais contributed. This is best exemplified by Hilde's testimony that Wruck had to redo its work because "too much time passed from the original." (T. 39-40) The work of Wruck in 2005 clearing the property was not a permanent addition to or permanent betterment of the property that enhanced its value. It was merely preparatory site work that does not constitute the first

actual and visible improvement to real property for the purposes of Minn. Stat. § 514.05, subd. 1.

### 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,

COLEMAN, HULL & VAN VLIET, PLLP

Dated: 3/19/12

By Stephen Buterin

Steven R. Little, Esq. (#0304244)

Stephen F. Buterin, Esq. (#0248642)

8500 Normandale Lake Boulevard

Suite 2110

Minneapolis, Minnesota 55437

Telephone No. 952-841-0001

*Attorneys for Appellant*

**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 **5,400** words. This brief was prepared using Microsoft Word 2002.

COLEMAN, HULL & VAN VLIET, PLLP

Dated: 3/19/18

By Stephen Buterin  
Steven R. Little, Esq. (#0304244)  
Stephen F. Buterin, Esq. (#0248642)  
8500 Normandale Lake Boulevard  
Suite 2110  
Minneapolis, Minnesota 55437  
Telephone No. 952-841-0001  
*Attorneys for Appellant*