

Nos. A08-418 and A08-569

State of Minnesota  
 In Supreme Court

S.M. Hentges &amp; Sons, Inc.,

*Appellant,*

vs.

Richard Mensing and Martha A. Mensing, husband and wife;  
 a/k/a Richard D. Mensing; Martha A. Mensing Revocable Living Trust,  
 Martha A. Mensing and Richard D. Mensing, Trustees; Short Elliott  
 Hendrickson, Inc., a Minnesota corporation; the City of Cannon Falls,  
*Respondents,*

and

Land Geeks, L.L.C., a Minnesota limited liability company;  
 Michael Vincent; and the County of Goodhue,  
*Defendants.*

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**APPELLANT'S BRIEF AND ADDENDUM**


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

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## ISSUE PRESENTED

Whether the Minnesota Supreme Court should reverse the decision of the Court of Appeals that Short Elliott Hendrickson was not required to provide prelien notice based on the exception contained in Minn. Stat. § 514.011, subd. 4b.

**The Court of Appeals reversed the district court's invalidation of Short Elliott Hendrickson's mechanic's lien.**

- Minn. Stat. § 514.011, subd. 4b.
- Christle v. Marberg, 421 N.W.2d 748 (Minn. App. 1988).

## STATEMENT OF THE CASE

This appeal arises out of mechanic's lien foreclosure actions initiated by S.M. Hentges & Sons, Inc. ("Hentges") and Short Elliott Hendrickson, Inc. ("SEH"), against Richard and Martha Mensing, in their capacity as individuals and trustees, and the Martha A. Mensing Revocable Living Trust (collectively, "the Mensings").

The Mensings entered into a Purchase Agreement with Land Geeks, LLC ("Land Geeks") for the sale of their unimproved and undeveloped property, which Land Geeks intended to develop as part of a residential housing project. In anticipation of the development project, Land Geeks hired SEH to perform survey and platting work, and Hentges to perform the utilities and earth work. Subsequently, Land Geeks defaulted on the terms of the Purchase Agreement, resulting in cancellation of the contract. Hentges and SEH were paid only a fraction of what was owed for their work.

Hentges and SEH filed mechanic's liens on the property for the completed improvements and initiated foreclosure actions. The district court determined that Hentges satisfied the statutory requirements for a valid mechanic's lien and was therefore entitled to a mechanic's lien on the subject property. In contrast, the district court

concluded that SEH failed to establish a valid mechanic's lien because it did not provide the Mensings with prelien notice.

Both the Mensings and SEH appealed the district court's Order to the Court of Appeals. The Court of Appeals affirmed the district court's decision as to Hentges, but reversed as to SEH on the basis that it was exempted from providing prelien notice. Hentges petitioned for review on the sole issue of the validity of SEH's mechanic's lien, and this appeal follows.

### **STATEMENT OF THE FACTS**

This case arises from an uncompleted real estate development in Cannon Falls, Minnesota. App-2. The real property in question was owned by the Mensings through their estate planning trust. Id. The Mensings sold the property on a purchase agreement to Land Geeks, a development company. App-3. Land Geeks intended to develop the property into a residential housing development. App-2.

Land Geeks then hired SEH to do the survey and platting work, and Hentges for the utilities and earth work. App-4. SEH is a Minnesota corporation engaged in the business of providing engineering, surveying, and other services to those developing property into city platted lots and blocks. Hentges, a Minnesota corporation engaged in providing utilities such as streets, sewers, and water, gave the Mensings prelien notice, while SEH did not. App-5-6.

SEH proceeded to do the survey work and the platting work with the City of Cannon Falls where the Mensing property was located. App-5. Hentges proceeded to do all of the earth moving work and put in all of the sewer, water and other utilities. App-6.

The subdivision never progressed past these initial improvements, and the Mensings ultimately cancelled the Purchase Agreement with Land Geeks. App-8. After SEH and Hentges were each paid only a fraction of what they were owed, Hentges commenced a mechanic's lien foreclosure action in Goodhue County District Court, and SEH counterclaimed for its lien. App-1.

The matter was tried before the Honorable Robert J. King, Jr. who rejected the Mensings' defenses against the Hentges' mechanic's lien. App-1, App-9. The district court also concluded that SEH failed to establish a valid mechanic's lien because it did not provide the Mensings with the requisite prelien notice. App-11. Specifically, the district court rejected SEH's contention that it was exempt from filing prelien notice under Minn. Stat. § 514.011, subd. 4b. Id.

Both the Mensings and SEH appealed to the Minnesota Court of Appeals. See S.M. Hentges & Sons, Inc. v. Mensing, 759 N.W.2d 229 (Minn. App. 2009) (consolidated appeals A08-0418, A08-1569). The Mensings' appeal was resolved in favor of Hentges and is not before this Court. In its appeal, SEH again argued that a prelien notice was not required for this 22-lot subdivision because of the following language found at Minn. Stat. § 514.011, subd. 4b: "Exceptions; multiple dwelling. The notice required by this section shall not be required to be given in connection with an improvement to real property consisting of or providing more than four family units when the improvement is wholly residential in character." The counter-argument was that the phrase "family units" clearly connotes a multi-unit building such as a condominium or townhome, and not simply more than four bare lots.

SEH argued that its position was supported by the unpublished Court of Appeals case of E&H Earth Movers, Inc. v. Waland Cos., 1998 Minn. App. LEXIS 385 (Minn. App. Apr. 7, 1998). The Court of Appeals ignored this decision completely, focusing upon what it perceived as the district court's error in concentrating on Mensings' status as land owners, as opposed to land developers, and emphasizing the difference between those two categories. The Court of Appeals concluded that the relevant statutory language in subd. 4b does not distinguish between land owners and land developers, but rather the statutory exception is based on the size and character of the improvement.

The appellate court instead relied upon the case of Polivka Logan Designers, Inc. v. Ende, 312 Minn. 171, 173, 251 N.W. 2d 851, 852 (1977),<sup>1</sup> a case involving interpretation of a different statutory exception to the pre-lien notice requirement. Based on Polivka, the Court of Appeals concluded there was no reason to distinguish between the owner whose property consists of a five-unit condominium or a five-lot residential development. Accordingly, the Court of Appeals held that the statutory exception to prelien notice applied to SEH and reversed the district court's invalidation of SEH's mechanic's lien.

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<sup>1</sup> Ironically, the Polivka court pointed out that since the mechanic's lien statute was enacted to remedy the unfairness of foreclosures on unsuspecting property owners, the exceptions should be narrowly construed. 312 Minn. at 176, 251 N.W.2d at 854. The Court of Appeals, however, went on to broadly construe the exception contained in section 514.011, subdivision 4b, despite recognizing that prelien notice requirements are to be strictly construed. S.M. Hentges & Sons, Inc. v. Mensing, 759 N.W.2d 229, 233 (Minn. App. 2009).

Hentges petitioned this Court for further review on the theory that the Court of Appeals' decision was contrary to a clear reading of the statute itself. This Court granted review and the present appeal follows.

## ARGUMENT

### **I. STANDARD OF REVIEW.**

On appeal from a judgment, the scope of review is limited to determining whether the district court's factual findings are clearly erroneous and whether the district court erred in its legal conclusions. In re Geis, 576 N.W.2d 747, 749 (Minn. App. 1998). The availability of a mechanic's lien is controlled by statute; and the interpretation of this statute presents a question of law, which appellate courts review de novo. David-Thomas Cos. v. Voss, 517 N.W.2d 341, 342 (Minn. App. 1994).

### **II. THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE PRELIEN NOTICE EXCEPTION APPLIED TO BARE SINGLE-FAMILY LOTS.**

#### **A. The plain language of the statute conflicts with the Court of Appeals' broad interpretation of the prelien notice exception.**

The mechanic's lien statute requires that "[e]very person who enters into a contract with the owner for the improvement of real property and who has contracted or will contract with any subcontractors or material suppliers to provide labor, skill or materials for the improvement shall include in any written contract with the owner the notice required in this subdivision[.]" Minn. Stat. § 514.011, subd. 1. As this Court has recognized: "prelien notice is no mere technicality. Failure to give the notice defeats the

mechanic's lien. There must be strict compliance with the prelien notice statutory requirements." Merle's Construction Co. v. Berg, 442 N.W.2d 300, 302 (Minn. 1989).

As noted in footnote 1, and consistent with the strict enforcement of the prelien notice requirements, the statutory exceptions to prelien notice are narrowly construed. Polivka Logan Designers, Inc. v. Ende, 312 Minn. 171, 176, 251 N.W.2d 851, 854 (1977). The statutory exception at issue here provides the following:

**Exceptions; multiple dwelling.**

**The notice required by this section shall not be required to be given in connection with an improvement to real property consisting of or providing more than four family units when the improvement is wholly residential in character.**

Minn. Stat. § 514.011, subd. 4b.

This exception is unambiguous and its plain language indicates that it does not apply to the bare residential lots at issue in this matter. First, the title of the statutory exception, "Exceptions; multiple dwelling" indicates that it applies to a multi-unit residential building, such as apartment, condominium or townhome buildings. See Hovet v. Bagley, 325 N.W.2d 813, 814-15 (Minn. 1982) ("The title of an act is properly to be considered in determining legislative intent."); Nw. Airlines, Inc. v. Friday, 617 N.W.2d 590, 594 (Minn. App. 2000) (recognizing that the title of a statute is an indicator of legislative intent). Consistent with the title, courts have interpreted this exception as specifically directed at multi-unit buildings. See, e.g., Kraus-Anderson Constr. Corp. v. Carlson Cos., 1999 Minn. App. LEXIS 109, \*12-13 (Minn. App. Feb. 2, 1999) (noting that subdivision 4b requires no notice for multiple dwellings of more than four units); In

re Zachman Homes, Inc., 47 B.R. 496, 515 n.10 (D. Minn. 1984) (noting that prelien notice requirement “does not apply to multiple dwellings of 4 units or more so it does not apply to the condominium units in this case” pursuant to subdivision 4b); E&H Earth Movers, Inc. v. Waland Cos., 1998 Minn. App. LEXIS 385, \*8 (“no multiple unit building is permitted on the property as it is platted”) (dissent, J. Short).

The reference to “more than four family units” within the body of the provision is further indication of the legislative intent to limit the exception to apartments, condominiums, and similar family units. A “unit” denotes a single thing that is a constituent of a whole, such as an apartment in a building or a condominium in a complex. Merriam-Webster Online Dictionary, Add. 1. By definition, a unit would not encompass the single-family lots that were created in this development. It is difficult to comprehend why the Legislature would have utilized the more technical and labored phrase “family units” if it intended the exception to apply to residential lots, as opposed to constructed family units.

Regardless of the type of structure contemplated by the exception, it has no application where, as here, there was no building construction and only bare lots. The plain and ordinary meaning of “dwelling” is “a shelter in which people live.” Merriam-Webster Online Dictionary, Add. 2; see Nw. Airlines, 617 N.W.2d at 595 (recognizing that the purpose of a statute can be ascertained through the plain meaning of words used by the legislature); Minn. Stat. § 645.08 (“words and phrases are construed according to the rules of grammar and according to their common and approved usage”). SEH performed platting work on bare lots, which clearly do not constitute dwellings. If the

legislature had intended bare lots to be included in this exception, it could have easily added the phrase “multiple lots” after “multiple dwelling.” Its decision to limit the exception to dwellings is indicative of its intent.

**B. The Court of Appeals improperly emphasized legislative history over unambiguous statutory language.**

Notably, the Court of Appeals bypassed an analysis of the plain statutory language, instead erroneously focusing on the perceived legislative purpose of the law. See Auto Owners Ins. Co. v. Perry, 749 N.W.2d 324, 326 (Minn. 2008) (“If the language of a statute is unambiguous, ‘the letter of the law shall not be disregarded under the pretext of pursuing the spirit.’”). Specifically, the Court of Appeals opined that there is “no significant reason to distinguish between an owner whose property consists of a five-unit condominium building or five-unit townhome complex and an owner whose property improvement consists of a five-lot, residential development.” The rationale was that “[e]ach owner falls within ‘the legislature’s designation of larger businessmen who do not require [prelien notice] protection’....” S.M. Hentges, 759 N.W.2d 229, 2009 Minn. App. LEXIS at \*9-10.

As a threshold matter, it appears that the Court of Appeals overreached in its reading of Polivka Logan Designers, Inc. v. Ende, 312 Minn. 171, 251 N.W.2d 851 (1977). While Polivka recognized that the exceptions to prelien notice involved “the legislature’s designation of larger businessmen who do not require such protection,” it did not hold that all large business owners are excluded from the notice requirement by virtue of their size and sophistication. Id. at 174. Rather, the Court concluded that the

legislative intent of protecting homeowners and small businessmen would not be thwarted by interpreting the prelien notice exception for nonresidential structures containing more than 10,000 usable square feet of floor space to apply either before or after the construction work in question. Id.

Similar overreaching is apparent in the unpublished Court of Appeals decision E&H Movers, Inc. v. Waland Cos., 1998 Minn. App. LEXIS 385, a case upon which SEH relied heavily below. In that case, Waland Companies, a real estate developer and builder, contracted with E&H for grading and road construction for a residential subdivision consisting of ten lots. Id. at \*2. After a dispute arose among the parties, E&H filed a mechanic's lien statement and Waland moved to dismiss for lack of prelien notice. E&H argued that subdivision 4b applied because the improvement involved more than four family units and was wholly residential in character. The district court invalidated the lien on the basis that the exception did not apply because single-family residential lots were not "family units" under subdivision 4b. Id. at \*3.

On appeal, the Court of Appeals reversed the district court, concluding that E&H was not required to provide prelien notice. In so holding, the Court of Appeals focused not on the statutory language, but on Waland's perceived sophistication and awareness of the possibility of mechanic's liens. Citing Polivka, it reasoned that "[t]he legislature has recognized that real estate developers, as a class, are sophisticated businesses aware of the possibility of liens and, therefore, do not need the protection of prelien notice." Id. at \*6.

The reasoning employed in these decisions disregards the plain language of the statutory exception, which clearly delineates between dwellings and bare lots, and multi-unit dwellings and other residential properties. The broad interpretation that all large business owners and real estate developers are excluded from prelien notice is simply not supported by the statutory language.<sup>2</sup>

Further, this subordination of statutory language to legislative purpose is contrary to law. See Beardsley v. Garcia, 753 N.W.2d 735, 737 (Minn. 2008) (“When the language of a statute is plain and unambiguous, it is assumed to manifest legislative intent and must be given effect.”); Toth v. Arason, 722 N.W.2d 437, 442 (Minn. 2006) (“We can disregard a statute’s plain meaning only in rare cases where the plain meaning utterly confounds a clear legislative purpose.”). Indeed, the Court of Appeals previously recognized that legislative intent cannot override plain statutory language in the context of the prelien notice exceptions:

The legislature designed the pre-lien notice requirement to protect individual homeowners and farmers. Read literally, this statute may in some circumstances protect large residential projects such as multi-story apartments or condominiums. In certain cases the excavation, site preparation, etc. for large residential towers could require that pre-lien notice be given to the owner of the property, thus protecting large residential developers. Although this seems at odds with the aforementioned intent, we decline to act contrary to the statute’s plain language.<sup>3</sup>

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<sup>2</sup> If the law allowed the sophistication of the owners to determine the outcome, SEH would lose based on the lack of sophistication of the Mensings, an elderly couple with minimal development experience. The pitfalls of the contract the Mensings had with Land Geeks are a testament to their lack of sophistication.

<sup>3</sup> This is the case relied upon by the district court in concluding that prelien notice was required by both Hentges and SEH.

Christle v. Marberg, 421 N.W.2d 748, 751 (Minn. App. 1988).

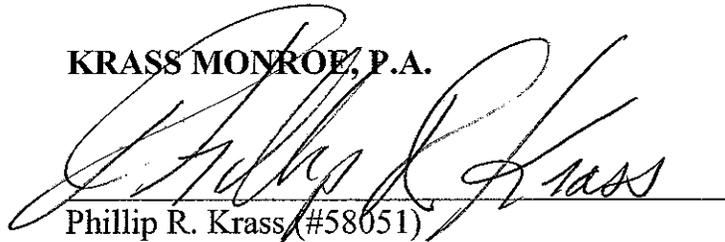
Thus, while the parties may not understand why the legislature chose language that protects certain large business owners or real estate developers and not others, the statutory language clearly does not provide for the blanket exception to prelien notice adopted by the Court of Appeals. Accordingly, it was error for the Court of Appeals to expand the exception beyond the plain statutory language, and its decision must be reversed.

**CONCLUSION**

For the foregoing reasons, the Court of Appeals decision must be reversed and SEH's mechanic's lien invalidated.

Dated: April 30, 2009

**KRASS MONROE, P.A.**

A handwritten signature in black ink, appearing to read "Phillip R. Krass", is written over a horizontal line.

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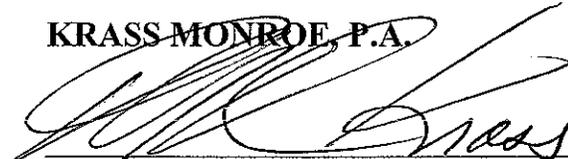
CERTIFICATION

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I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 1 and 3, for a brief produced with a proportional font. The length of this brief is 2,811 words, and the font size is 13 point. This brief was prepared using MicrosoftWord 2003 software.

Dated: April 30, 2009

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