

Nos. A08-418 and A08-569

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State of Minnesota  
**In Supreme Court**

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S.M. Hentges & Sons, Inc., a Minnesota corporation,

*Appellants,*

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,

*Respondents,*

Land Geeks, L.L.C., a Minnesota limited liability company;  
Michael Vincent; the City of Cannon Falls; and the County of Goodhue,

*Defendants.*

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**RESPONDENT SHORT ELLIOTT HENDRICKSON, INC.'S  
BRIEF AND APPENDIX**

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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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## STATEMENT OF LEGAL ISSUES

- I. Under Minnesota's mechanic's lien statute, prelien notice is not required where the improvement to real property consists of more than four family units and is wholly residential in character. Despite finding the improvement was wholly residential in character and consisted of more than 20 residential lots, the district court invalidated SEH's mechanic's lien for failure to provide prelien notice. Did the district court err when it ruled that SEH was required to provide prelien notice?**

The district court invalidated SEH's mechanic's lien after ruling that the prelien notice exception in Minn. Stat. § 514.011, subd. 4b did not apply to a residential subdivision consisting of or providing for more than four single-family lots.

In a published decision, the court of appeals reversed and remanded, holding that the term "family units" within Minn. Stat. § 514.011, subd. 4b, includes single-family lots. Because the district court found that the improvement was wholly residential in character and consisted of more than 20 single-family lots, the court of appeals ruled that SEH was not required to provide prelien notice.

Apposite Authority:

Minn. Stat. § 514.011 (2008)

*Polivka Logan Designers, Inc. v. Ende*, 312 Minn. 171, 251 N.W.2d 851 (1977)

- II. Minnesota's mechanic's lien statute distinguishes between those who perform engineering services and those who contribute to an improvement to real property by performing or furnishing labor, skills, materials or machinery. The prelien notice statute only requires those who contribute to the improvement of real property to provide prelien notice and not those performing or furnishing engineering services. Are engineers, as a class, required to provide prelien notice?**

Because it reversed the district court on other grounds, the court of appeals did not address this issue.

Apposite Authority:

Minn. Stat. § 514.01 (2008)

Minn. Stat. § 514.011 (2008)

*Kirkwold Constr. Co. v. M.G.A. Constr., Inc.*, 513 N.W.2d 241 (Minn. 1994)

*London Constr. Co. v. Roseville Townhomes, Inc.*, 473 N.W.2d 917 (Minn. App. 1991)

## STATEMENT OF CASE

This case arises from the failed Woodridge Bluffs development in Cannon Falls, Minnesota. Defendants Richard and Martha Mensing, and the Martha A. Mensing Revocable Living Trust (Mensings), entered into a Purchase Agreement with defendant Land Geeks, LLC, (Land Geeks) for the sale of unimproved and undeveloped property that the Mensings owned. Land Geeks, whose sole owner is defendant Michael Vincent, intended to develop the property into a wholly residential subdivision consisting of 20 or more single-family homes. Land Geeks contracted with appellant S. M. Hentges & Sons, Inc. (Hentges) to serve as the general contractor for the project. It retained respondent Short Elliott Hendrickson, Inc. (SEH) to provide all of the necessary engineering for the project.

After Land Geeks defaulted on its agreements and contracts with the various parties, Hentges initiated a mechanic's lien foreclosure action against the subject property for the unpaid work it performed in developing the subdivision. As part of that action, SEH also commenced a mechanic's lien foreclosure action against the subject property for the unpaid engineering and surveying services that it performed as part of the subdivision development. In addition, SEH brought claims for breach of contract, account stated, and unjust enrichment against Land Geeks and Vincent.

Following a three-day court trial, the district court found that the project was wholly residential and consisted of more than 20 single-family lots. It also found that SEH furnished and delivered engineering services for the improvement of the subject property and that all of SEH's services were used in the development of the subject

property. The district court, however, refused to apply the prelien notice exception set forth in Minn. Stat. § 514.011, subd. 4b, and instead, invalidated SEH's mechanic's lien because SEH had not provided the Mensings with prelien notice. The district court awarded SEH damages and attorney fees on SEH's remaining claims against Land Geeks and Vincent after finding those two parties in default for failing to appear at trial.

The district court denied SEH's post-trial motions for amended findings and conclusions of law, or in the alternative, for a new trial, after rejecting SEH's claim it was not required to provide prelien notice because the project fell within the prelien notice exception contained in Minn. Stat. § 514.011, subd. 4b (2008).

In a published decision, the court of appeals reversed the district court's decision invalidating SEH's mechanic's lien. *See S.M. Hentges & Sons, Inc. v. Mensing*, 759 N.W.2d 229 (Minn. App. 2009). The court ruled that the phrase "family units" used in Minn. Stat. § 514.011, subd. 4b, includes single-family lots. *Id.* at 237. It reached this conclusion after considering the language of the prelien notice statute and this court's decisions interpreting other exceptions to the prelien notice statute, most notably this court's decision in *Polivka Logan Designers, Inc. v. Ende*, 312 Minn. 171, 251 N.W.2d 851 (1977). *See S.M. Hentges & Sons, Inc.*, 759 N.W.2d at 233-35. The court of appeals noted that the purpose of the prelien notice statute was to protect homeowners and small businessmen who out of ignorance might be forced to pay twice for the same improvement because a contractor did not pay a subcontractor. *Id.* at 234. It concluded that the prelien notice exceptions contained in Minn. Stat. § 514.011, reflected the legislature's determination that, depending on the size and character of the improvement,

certain businessmen are not entitled to the protection of the prelien notice statute. *Id.* The court of appeals adopted this court's reasoning in *Polivka*, and ruled that there were no significant reasons to distinguish between an owner whose property improvement consists of a five-unit condominium building or a five-unit townhome complex and an owner whose property improvement consists of a five-lot, residential development. *Id.* In each instance, the property owner falls within the legislature's designation of a larger businessman who is not entitled to the protection of the prelien notice. *Id.*

Because the district court found that the improvement was wholly residential in character and contained 22 single-family lots, the court of appeals held that the prelien notice exception contained in Minn. Stat. § 514.011, subd. 4b applied and did not require SEH to provide prelien notice. *Id.* at 235. Based on this decision, the court of appeals declined to address SEH's argument that engineers, as a class, are not required to provide prelien notice under the mechanic's lien statute. *Id.*

This court granted Hentges' petition for further review by order dated March 31, 2009.

## STATEMENT OF FACTS

On April 19, 2003, the Mensings entered into a Purchase Agreement with Land Geeks for the sale of certain undeveloped and unimproved property that the Mensings owned in the City of Cannon Falls, Minnesota. (Trial Ex. 1, T. 58) The Purchase Agreement was contingent on Land Geeks receiving preliminary plat approval for a residential development. (Trial Ex. 1; App. 3) It was the intent of Land Geeks to develop the property into a wholly residential neighborhood called "Woodridge Bluffs." The property is legally described as: Lots 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12, Block 1, Woodridge Bluffs, Goodhue County, Minnesota; Lots 3 and 5, Block 2, Woodridge Bluffs, Goodhue County, Minnesota; and Lots 1, 2, 3, 4, 9, 10, 11, 12, and 13, Block 3, Woodridge Bluffs, Goodhue County, Minnesota. ("Subject Property") (App. 2-3) At the time of the Purchase Agreement, the property was unimproved and had no significant buildings or improvements on it. (Trial Ex. 1, T. 58)

Land Geeks entered into a construction contract with Hentges, along with a Financing and Profit Sharing Agreement (FPS), to develop the property. (Trial Ex. 2; T. 58) Under these agreements, Hentges agreed to perform all site work necessary to develop and construct the Woodridge Bluffs subdivision, including grading, streets, curb, sidewalk, sanitary sewers, city water, and storm sewers for \$1,082,522.00. (*Id.*) In a later amendment to the FPS, Land Geeks assigned all of its rights, title, and interest in the Purchase Agreement to Hentges as security for the FPS. (Trial Ex. 4; T. 58)

Two days after it entered into the Purchase Agreement with the Mensings, Land Geeks entered into an Agreement for Professional Services with SEH. (App. 79-101)

Under this agreement, SEH agreed to provide engineering services to Land Geeks for the development of the Woodridge Bluffs subdivision that included, among other things: planned unit development concept development; preliminary and final design; preliminary and final plats; construction drawings and specifications; grading and landscaping plans; staking; and assistance with agency review and permitting. (*Id.* at 86-88) In addition, SEH agreed to illustrate the lot density, types of dwellings, and the approximate building sites, and to "work with owner to define [the] architectural style of buildings, including building heights to be presented to the City." (*Id.* at 86-87)

Later, Land Geeks and SEH amended their professional services agreement to provide a maximum price for SEH's services not to exceed \$277,156, unless the parties agreed to additional budget increases. (*Id.* at 102-103) Land Geeks also agreed to pay SEH \$14,000 at the time of closing on each lot sale of the Woodridge Bluffs development until SEH's current account due was paid in full (*Id.*). At the time of the agreement, the outstanding balance that Land Geeks owed SEH was \$218,000. (*Id.*)

Hentges completed the improvements to the property in the summer of 2005. (*Id.* at 7) Because the lots did not sell as anticipated, Land Geeks defaulted on its obligations. On August 3, 2005, the Mensings served a Notice of Cancellation of the Purchase Agreement on Land Geeks, Hentges, and SEH. (Trial Ex. 14; T. 58) Land Geeks was unable to cure the defaults and the Purchase Agreement was cancelled.

On February 24, 2005, Hentges filed its final mechanic's lien statement with the Goodhue County Recorder, along with a Memorandum of Contract. (Trial Ex. 10; T. 58)

On June 28, 2005, SEH filed a blanket mechanic's lien statement with the Goodhue County Recorder in the principal amount of \$265,017.88. (App. 104)

The following November, Hentges commenced its mechanic's lien foreclosure action naming as parties: the Mensings; Land Geeks; Michael Vincent, the sole owner of Land Geeks; SEH; Goodhue County; and the City of Cannon Falls. (*See Complaint*) As part of that action, SEH brought a claim to foreclose on its mechanic's lien, along with claims for breach of contract, account stated, and unjust enrichment against Land Geeks. (App. 108)

Following a three-day court trial, the district court issued Findings of Fact, Conclusions of Law and Order for Judgment and Judgment on February 27, 2007. (App. 1-18) The court found that the project was wholly residential in character and consisted of more than 20 single-family lots. (*Id.* at 2-4) It also found that SEH's contract with Land Geeks was "in connection with Land Geeks' proposal to plat and construct residential lots on the Property." (*Id.* at 4) The court found that "SEH issued construction plans and a Project Manual describing the grading, sanitary sewer, street and associated improvements for the Project." (*Id.*) It also found that "SEH furnished and delivered engineering services to the Subject Property at the request of LandGeeks [and a]ll of SEH's services were used in the improvement of the property. (*Id.*) In its conclusions of law, the district court determined that "[the Mensings] are sophisticated landowners, and were probably fully aware of the applicable lien laws." (*Id.* at 11)

In its attached memorandum, the district court found that the Mensings had every reason to know that work was being done on the subject project because they lived on it

for at least part of the time, and they "knew about the plans for development of the property." (*Id.* at 15) Based on this fact, the court concluded that "there is no issue of an 'unsuspecting owner.' The Mensings knew very well about the work currently being performed and about work to be done on the land . . . [t]hus, the purpose of Subdivision 2 [of Minn. Stat. § 514.011] did not exist in this case." (*Id.* at 18)

The court, however, invalidated SEH's mechanic's lien after ruling that the prelien notice exception in Minn. Stat. § 514.011, subd. 4b did not apply and SEH had failed to provide prelien notice. (*Id.* 11-12) The court reasoned that the lien statutes were primarily designed to protect the interests of less sophisticated landowners, and although the Mensings were sophisticated landowners who were probably fully aware of the applicable lien laws, it was "unable to carve out a new exception to the pre-lien notice requirements by concluding that sophisticated landowners should be excluded from prelien notice requirements." (*Id.* at 11) It also declined to adopt the rationale of the court of appeals' unpublished decision in *E & H Earth Movers, Inc. v. Waland Cos.*, 1998 WL 157351 (Minn. App. Apr. 7, 1998), *review denied* (Minn. June 23, 1998), which at the time was the only appellate court decision to consider the scope of Minn. Stat. § 514.011, subd. 4b. In *E & H Earth Movers*, the court of appeals held that the prelien notice exception in Minn. Stat. § 514.011, subd. 4b applied to a subdivision that was wholly residential in character and consisted of 10 single-family lots.

Despite invalidating SEH's mechanic's lien, the district court awarded SEH damages against Land Geeks and Vincent in the principal amount of \$289,667, plus interest, together with collection costs and attorney fees. (*Id.* at 12) It reserved the issue

of SEH's actual award of attorney fees and costs for later consideration. (*Id.*) The district court entered judgment on March 2, 2007. (*Id.* at 1)

On April 2, 2007, SEH filed motions for amended findings of fact, conclusions of law and order for judgment, or the alternative, a new trial. (App. 19-25) SEH argued that the exception set forth in Minn. Stat. § 514.011, subd. 4b did not require it to provide prelien notice in this case because the subject property consisted of more than 20 residential lots and the improvement was wholly residential in character. (App. 19-35) The district court denied SEH's motions by Order filed on May 15, 2007. (App. 50-52)

The district court granted SEH's motion for costs and disbursements and attorney fees by order dated December 26, 2007. This order was filed on February 8, 2008, the date on which final judgment was entered. (App. 53-55)

This appeal follows.

## SUMMARY OF THE ARGUMENT

This case involves the interpretation and application of the prelien notice requirements and exceptions under Minnesota's mechanic's lien statute. At issue is whether the prelien notice exception in Minn. Stat. § 514.011, subd. 4b (2008), applies to a wholly residential subdivision consisting of more than 20 single-family residential lots. The court of appeals correctly held that it does.

The purpose of the prelien notice statute is to protect homeowners and small businessmen by alerting them to the possibility that a subcontractor or material supplier may assert a mechanic's lien against the property if they are not paid by the contractor. But as this court has recognized, not all property owners are entitled to receive prelien notice. The prelien notice statute provides that a subcontractor or material supplier is not required to provide prelien notice to a property owner in connection with an improvement to real property that consists of or provides for more than four family units and the improvement is wholly residential in character. Minn. Stat. § 514.011, subd. 4b (2008). Contrary to the district court's decision, the application of Subdivision 4b depends not on the relative sophistication of the landowner. Rather, it depends solely on the size and character of the improvement before or after construction.

On appeal, Hentges argues that the exception in Subdivision 4b is unambiguous and applies solely to fully completed, multi-unit residential buildings, such as apartment buildings, condominiums, and townhomes. This narrow interpretation does not find support in the express language of Subdivision 4b, the legislative history of the prelien notice statute, or the decisions of this court and the court of appeals. The language of

Subdivision 4b does not, on its face, reference multi-unit residential buildings nor expressly limit its application to multi-unit buildings. The heading of the Subdivision 4b also does not shed light on the meaning of Subdivision 4b because it was added eight years after the legislature first enacted the prelien notice statute and this exception. The fact that the legislature did not define the terms "improvement" or "family units" indicates its intent that they have broad application and are not limited to multi-unit residential buildings.

Because the language of Subdivision 4b does not explicitly define the terms "improvement" or "family units", the court of appeals properly considered the legislative history of the prelien notice statute to ascertain the meaning and legislative intent behind Subdivision 4b. There is nothing in the contemporaneous legislative history that indicates the legislature intended to limit the application of Subdivision 4b to multi-unit residential buildings only. The legislative history establishes that the term "more than four family units" represents the legislature's determination of which property owners are entitled to receive prelien notice and those that are not. As the court of appeals correctly determined, there are no significant reasons to distinguish between an owner whose property improvement consists of a five-unit apartment building or condominium and one whose property improvement consists of a five-lot residential subdivision – each type of owner falls within the legislature's designation of a large businessman who is not entitled to the protection of the prelien notice statute because they are presumably familiar with the lien laws.

Based on the district court's findings that the project consisted of more than four family units and was wholly residential in character, and that SEH performed engineering services with respect to the project, the court of appeals properly ruled that the exception in Subdivision 4b applied and did not require SEH to provide prelien in this case.

In addition, SEH was also not required to provide prelien notice because, unlike one who contributes labor, skill, or material to real estate improvement, one who provides engineering services with respect to real estate is not required to provide prelien notice to have a valid and enforceable mechanic's lien.

## ARGUMENT

### I. Standard of Review

The scope of review for a bench trial is limited to determining whether the district court's findings are clearly erroneous and whether it erred in its conclusions of law. *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722, 729 (Minn. 1990). A finding of fact that has not been assigned as error is considered as true on appeal. *Gamble-Skogmo, Inc. v. St. Paul Mercury Indemn. Co.*, 242 Minn. 91, 103, 64 N.W.2d 380, 388 (1954). The construction of Minnesota's mechanic's lien statute is a question of law that this court reviews de novo. *Mavco, Inc. v. Eggink*, 739 N.W.2d 148, 152 (Minn. 2007).

### II. The Court Of Appeals Correctly Interpreted And Applied Minn. Stat. § 514.011, Subd. 4b To The Facts Of This Case.

In invalidating SEH's mechanic's lien, the district court erred in its interpretation and application of the prelien notice exception contained in Minn. Stat. § 514.011, subd. 4b. After carefully considering the statutory language of Minn. Stat. § 514.011 in light of its purpose and the cases interpreting its provisions, the court of appeals correctly reversed the district court and held that Subdivision 4b applied and did not require SEH to provide prelien notice in this case. *See S.M. Hentges & Sons, Inc.*, 759 N.W.2d at 237. The court correctly held that the exception in Subdivision 4b applies to a wholly residential subdivision that consists of more than four single-family lots and is not limited solely to multi-unit residential buildings such as apartments, condominiums, or townhomes. *Id.* at 234.

**A. Minnesota's prelien notice statute and notice exceptions**

Generally, a subcontractor or material supplier who is not under direct contract with the owner and whose contribution to the improvement of real property entitles him to a lien under Minnesota's Mechanic's Lien Statute must provide prelien notice to the property owner or the owner's authorized agent advising that their property may be subject to a mechanic's lien if it is not paid for its contribution. *See* Minn. Stat. § 514.011, subd. 2(a) (2008).<sup>1</sup> This notice is a necessary prerequisite to establishing the validity of any claim or lien. *Id.*; *Polivka*, 312 Minn. at 173, 251 N.W.2d at 852. The failure to provide prelien notice when and in the form required invalidates a subcontractor's mechanic's lien claim. *Wong v. Interspace-West, Inc.*, 701 N.W.2d 301, 303 (Minn. App. 2005), *review denied* (Minn. Oct. 18, 2005).

The purpose of the prelien notice statute is to protect property owners and small businessmen by alerting them to the risk of double liability if a contractor fails to pay its subcontractors. *Polivka*, 312 Minn. at 173, 251 N.W.2d at 852. But, "[n]ot all owners . . . are entitled to receive notice." *Id.* The prelien notice statute contains a number of exceptions to the general notice requirement. *See* Minn. Stat. § 514.011, subsd. 4a, 4b, and 4c (2008). In particular, Subdivision 4b applies to residential improvements to real property and provides:

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<sup>1</sup> In its brief, Hentges cites to Minn. Stat. § 514.011, subd. 1. This subdivision applies to contractors who are under contract with the owner and who will contract with subcontractors or material suppliers for the improvement. It does not apply in this case because SEH's contract was with Land Geeks and not the Mensings or their land trust, the Richard D. Mensing; Martha A. Mensing Revocable Living Trust. This oversight does not affect the legal analysis of the issues presented in this appeal.

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.

Minn. Stat. § 514.011, subd. 4b.

Thus, under this provision, where the improvement consists of or provides for more than four family units and the improvement is wholly residential in character, a subcontractor or material supplier is not required to provide a property owner with prelien notice as a necessary prerequisite to establishing a valid lien claim.

Here, the district court refused to apply Subdivision 4b despite finding that SEH provided engineering services for an improvement to real property that was wholly residential in nature and consisted of 22 single-family lots. It reasoned that the protections of Minn. Stat. § 514.011 apply with greater force to landowners as opposed to land developers, who it presumed to be more sophisticated and familiar with the lien statutes than landowners. (App. 11) Even though it acknowledged that the Mensings "are sophisticated landowners, and probably fully aware of the applicable lien laws," the district court believed that by applying Subdivision 4b it would be "carv[ing] out a new exception to the pre-lien notice requirements by concluding that sophisticated owners should be excluded from prelien notice requirements." (*Id.*) The district court was in error.

As the court of appeals noted, Subdivision 4b does not distinguish between landowners and land developers on its face. *S.M. Hentges*, 759 N.W.2d at 233. Its focus is on the size and character of the improvement. *Id.* It was therefore improper for the

district court to consider the status of the Mensings as either landowners or land developers in deciding whether the exception in Subdivision 4b applied – the application of Subdivision 4b depended solely on the size and character of the improvement. Because the improvement at issue here was wholly residential in character and consisted of and provided for more than four family units, Subdivision 4b applied and did not require SEH to provide prelien notice.

In this appeal, Hentges argues that the court of appeals has broadly construed the language of Subdivision 4b to hold that all large business owners and real estate developers are excluded from the prelien notice requirements of Minn. Stat. § 514.011. It urges this court to adopt a narrow interpretation of Subdivision 4b and rule that it applies solely to multi-unit residential buildings, such as apartment buildings, condominiums, or townhomes. Hentges, however, has overstated the reach of the court of appeals' decision and its proffered interpretation of Subdivision 4b is unduly narrow and finds no support in the statutory language of Subdivision 4b. Moreover, its interpretation finds no support in the legislative history and purpose of the prelien notice statute or the legislative intent behind the statutory exceptions.

**B. The interpretative aid that exceptions to the prelien should be narrowly construed does not apply.**

Hentges argues that this court must apply its decision in *Polivka* and narrowly construe the statutory exceptions to the prelien notice statute. This argument is premised on an incomplete reading of *Polivka*. As this court recognized in *Polivka*, there are two competing policy considerations that confront courts when interpreting the provisions of

the prelien notice statute. The first is the remedial purpose of the prelien notice statute to protect against the unfairness arising from the foreclosure of mechanic's liens on the property of unsuspecting owners. *Polivka*, 312 Minn. at 176, 251 N.W.2d at 854. The second is this court's long-standing policy of liberally construing the mechanic's lien statute in favor of lien claimant. *Id.*; see also *Eischen Cabinet Co. v. Hildebrandt*, 683 N.W.2d 813, 816 (Minn. 2004) (holding "mechanic's lien statute is remedial in nature and its essential purpose is to reimburse labors and material providers who improve real estate and are not paid for their services") (citation omitted). In *Polivka*, this court recognized both that the mechanic's lien statute is to be liberally construed and the exceptions to the prelien notice statute narrowly construed. *Id.* at 138, 149 N.W.2d at 26. But after concluding that these two policy considerations were counterpoised, this court refused to let either one influence its decision. *Id.* It would therefore appear that these two policy considerations negate one another.

That a unduly narrow construction of Subdivision 4b should not guide this court's analysis finds support in this court's adherence to the principle that "if a construction is permissible that will sustain a lien, it is preferred to one that will invalidate it." *Armco Steel Corp., Metal Prod. Div. v. Chicago & North Western Ry. Co.*, 276 Minn. 133, 138, 149 N.W.2d 23, 26 (1967) Because the court of appeals' interpretation of Subdivision 4b sustains SEH's mechanic's lien and is consistent with the language and purpose of the prelien notice statute, this court should favor the court of appeals' interpretation of Subdivision 4b over the unduly narrow construction that Hentges urges this court to adopt.

**C. The exception in Subdivision 4b is not limited to multi-unit residential buildings.**

Hentges's principal argument is that the court of appeals erred because the language of Subdivision 4b is unambiguous and applies to multi-unit residential buildings only. But neither the express language of Subdivision 4b nor case law support such a narrow interpretation.

The language of Subdivision 4b does not, on its face, specifically reference multi-unit residential buildings nor expressly limit its application to apartment buildings, condominiums, or other similar multi-unit residential structures. As the court of appeals observed, the prelien notice statute does not define the phrase "family units." Nor does it define the term "improvement." The legislature's failure to identify these terms indicates an intention that their scope have broad application and that it did not intend to confine the meaning of Subdivision 4b to multi-unit residential buildings only. *See Anderson v. Illinois Farmers Ins. Co.*, 269 N.W.2d 702 705 (Minn. 1978) (holding legislature's failure to define term statutory term indicates an intention for term to have broad scope and application). If the legislature had intended to restrict the exception in Subdivision 4b to multi-unit residential buildings only, it could have easily written or amended the statute to specifically refer to a "residential structure that consists of or provides more than four family units." Because the legislature did not do so, this court is not free to rewrite the statute to include such limiting language. *See Genin v. 1996 Mercury Marquis*, VIN No. 2MEBP95F9CX644211, License No. MN 225 NSG, 622 N.W.2d 114, 117 (Minn. 2001) (holding rules of construction forbid adding words or meaning to statute legislature

intentionally or inadvertently left out, and "[w]hen a question of statutory construction involves a failure of expression rather than an ambiguity of expression, courts are not free to substitute amendment for construction and thereby supply the omission of the legislature").

Hentges argues that the term "unit" as used in Subdivision 4b does not encompass the single-family lots that were created in this development. It reasons that a "unit" denotes a single thing that is a constituent of a whole, such an apartment in a building or a condominium within a complex. (*Id.*) But rather than support its interpretation of Subdivision 4b, this reasoning favors the court of appeals' interpretation of Subdivision 4b. Here, the single-family lots that Hentges concedes were created in this development are constituent parts of the larger whole – the wholly residential improvement known as the Woodridge Bluffs subdivision – the improvement acknowledged by the district court with respect to SEH's mechanic's lien.

And, contrary to the Hentges' claim, the lots are not "bare." The lots have been improved from their previous pristine and undeveloped state to include all the improvements necessary to allow further development of the subdivision had the project not failed. Indeed, several homes have been constructed within the subdivision. (App. 12) In arguing that the exception in Subdivision 4b does not apply to "bare lots," Hentges appears to be arguing that the application of Subdivision 4b is dependent on the stage of the improvement's completion. But there is nothing in the language of Subdivision 4b that provides, or even suggests, that its application is dependent on the stage of the completion of the improvement. As this court's decision in *Polivka*

establishes, the application of the prelien notice exceptions are dependent solely on the size and character of the improvement before or after construction. *See Polivka*, 312 Minn. at 74-75, 251 N.W.2d at 853 & n.3.

In support of its argument that Subdivision 4b is limited to multi-unit residential buildings, Hentges points to the heading of Subdivision 4b. This argument is unavailing in this case because under the canons of construction, "[t]he headnotes printed in boldface type before sections and subdivisions in editions of Minnesota Statutes are mere catchwords to indicate the contents of the section or subdivision and *are not part of the statute.*" Minn. Stat. § 645.49 (2008) (emphasis added); *see In re PERA Police and Fire Plan Line of Duty Disability Benefits of Brittain*, 724 N.W.2d 512, 514 n.2 (Minn. 2006) (stating headnotes are not part of statute and do not determine its meaning) (citing Minn. Stat. § 645.49)). Statutory headings are relevant to legislative intent only where they were present in the bill during the initial legislative process. *Minnesota Exp. Inc. v. Travelers Ins., Co.*, 333 N.W.2d 871, 873 (Minn. 1983). Therefore, courts may not rely on the heading of a statute to determine the statutory meaning where the heading was not present in the bill during the legislative process. *Enright v. Lehmann*, 735 N.W.2d 326, 334 (Minn. 2007) (holding court of appeals erred in relying on statutory heading not present in bill during legislative process, but added several years after initial enactment).

As in *Enright*, there was a gap of several years between enactment of Subdivision 4 and the current heading of Subdivision 4b. The Legislature enacted the prelien notice statute in 1973. *See* 1973 Minn. Laws ch. 247, § 2. It did not add the current heading of Subdivision 4b until 1981. *See* 1981 Minn. Laws ch. 213, § 1; 1978 Minn. Laws ch. 703,

§ 2. Because the heading of Subdivision 4b was not present in the bill when it was first enacted, it is not part of the statute and may not be used to determine the meaning of Subdivision 4b. It is also further evidence that at the time it enacted the language now found in Subdivision 4b, the legislature did not intend to limit the application of the exception to multi-unit residential buildings only.

Hentges asserts that consistent with Subdivision 4b's heading (not its "title" as Hentges incorrectly describes it), courts have interpreted Subdivision 4b "as specifically directed at multi-unit buildings." (Appellant's Brief and Addendum at p. 6) *Compare Hovet v. City of Bagley*, 325 N.W.2d 813, 814-15 (Minn. 1982) (discussing titles of statutes) with *Enright*, 735 N.W.2d at 334 (discussing headings of statutes). This assertion, however, is directly contrary to the current state of Minnesota caselaw. Not only is there no Minnesota case that has specifically ruled that Subdivision 4b is confined to multi-unit residential buildings, but the only Minnesota case addressing the scope of Subdivision 4b, the court of appeals' unpublished decision in *E & H Earth Movers, Inc. v. Waland Cos.*, 1998 WL 157351 (Minn. App. Apr. 7, 1998), expressly rejected this argument and held that Subdivision 4b applies to a wholly residential subdivision that consists of more than four single-family lots.

In that case, the court of appeals held that prelien notice was not required under Subdivision 4b because a single-family residence is a "family unit" under Subdivision 4b and the improvement consisted of a ten-lot residential subdivision. 1998 WL 157351 at \*3. The court explained that Subdivision 4b was not limited to multi-unit residential buildings, such as apartments or condominiums:

The dissent correctly states that no multiple unit building is permitted on the property as it is platted. That this invalidates the prelien notice exception is incorrect. Read that way, the exception would only apply to developers of condominiums and apartment buildings. No support is offered to show condominium or apartment building developers are more sophisticated and therefore more likely to know about the possibility of liens than residential real estate developers improving multiple single-lot developments.

*Id.* at \*2. The court concluded that each single-family residence in a subdivision platted for ten single-family residences was a "family unit" under Subdivision 4b, and that "[t]he district court improperly held that a single-family residence is not a family unit." *Id.* at \*3. The court held that "[b]ecause Waland's development is platted for ten single-family residences, E & H's work is in connection with an improvement consisting of or providing more than four family units and wholly residential in character. *E & H, therefore, was not required to provide Waland with prelien notice.*" *Id.* (emphasis added).

The court held further that the statutory exception contained in Subdivision 4b would have applied even if the developer's status had been that of landowner: "We need not address Waland's motion to strike E & H's assertion that Waland is an owner-contractor because *regardless of whether Waland was an owner-contractor, E & H was not required to provide prelien notice to Waland.*" *Id.* (emphasis added).

Hentges also relies on the decisions in *Kraus-Anderson Constr. Corp. v. Carlson Cos.*, 1999 WL 44078 (Minn. App. Feb. 2, 1999), and *In re Zachman Homes, Inc.*, 47 B.R. 496 (D. Minn. 1984). This reliance is misplaced because neither court was confronted with nor asked to address the applicability of Subdivision 4b to a wholly

residential subdivision consisting of or providing more than four single-family lots. In *Kraus-Anderson*, the court of appeals ruled that Subdivision 4b did not apply to excuse two finish-work contractors from providing prelien notice where they furnished finish work to individual units within a larger condominium project on a unit-by-unit basis rather than as part of a larger contract applying to the condominium project as a whole. *Kraus-Anderson*, 1999 WL at \* 4-5. It appears from the decision that the contractors had contracted with the owners of each unit directly. *Id.* The decision in *Kraus-Anderson*, therefore, offers little guidance in determining the scope of the prelien notice exception in Subdivision 4b.

Likewise, the decision in *In re Zachman Homes*, which is a nonbinding federal bankruptcy court decision, provides even less support for Hentges' proffered interpretation of Subdivision 4b. In that case, the court cited Subdivision 4b in a footnote in its general discussion of the procedure that a lien claimant must follow in order to perfect a valid mechanic's lien under Minnesota law. *Zachman*, 47 B.R. at 514-15. The issue of whether the prelien notice exception in Subdivision 4b applied in that case was not before the bankruptcy court and the court was not called on to address the scope of its application. *Id.* The decision in that case provides little, if any, guidance in determining the meaning and scope of Subdivision 4b.

**D. The court of appeals properly considered the legislative history of Minn. Stat. § 514.011.**

Contrary to Hentges's argument, the court of appeals did not improperly emphasize the legislative history over the language of Subdivision 4b. The canons of

statutory construction provide that when the words of a statute are not explicit, a court may ascertain the intent of the legislature by considering, among other things, the occasion for the law, the circumstances under which it was enacted, the mischief to be remedied, the object to be attained, the consequences of a particular interpretation, and the contemporaneous legislative history of the statute. Minn. Stat. § 645.16 (2008). Because the prelien notice statute does not explicitly define the term "improvement" or phrase "family units", the court of appeals properly considered the legislative history of the prelien notice statute to determine the meaning and legislative intent behind Subdivision 4b.

In considering the contemporaneous history of a statute, courts "may consider the events leading up to legislation, the history of its passage, and any modifications made during its course." *Handle with Care, Inc. v. Dept. of Human Serv.*, 406 N.W.2d 518, 522 (Minn. 1987) (citation and quotation omitted). This includes legislative committee reports and journal entries, legislative meeting minutes, the notes of the legislation's drafters, and tape-recordings of legislative committee meetings. *Id.*; see also *Shields v. Goldetsky*, 552 N.W.2d 226, 231 (Minn. 1996) (holding resort may be had to notes of drafters of uniform state law to determine legislative intent where statutory language ambiguous); *First Nat'l Bank v. Gregg*, 556 N.W.2d 214, 217 (Minn. 1996) (holding courts may consider statements made in legislative committee to determine legislature's intent where statutory language is ambiguous).

The prelien notice statute was first proposed and drafted by the Office of Minnesota Attorney General Warren Spannaus in 1972-1973 to remedy the perceived

unfairness of small homeowners having to pay twice for improvements to their homes. (App. 59, 61-62, 66, 67) *See also* Warren Spannaus, *Mechanic's Lien Law Reform*, 41 Hennepin Lawyer 10 (May-June 1973) (cited in *Polivka*, 312 Minn. at 173, 251 N.W.2d at 852). (App. 56-57) Prior to this time, those who furnished labor or materials to an improvement on real property were not required to provide the property owner with notice that the property might be subject to a mechanic's lien if they were not paid. A problem arose when unwary property owners were forced to pay twice for the same improvement because their contractor did not pay a subcontractor or material supplier. *See id.* (App. 57) *See also* *Christle v. Marberg*, 421 N.W. 748, 751 (Minn. App. 1988) (stating "[t]he legislature designed the pre-lien notice requirement to protect individual homeowners and farmers").

In describing the purpose of the proposed legislation, Attorney General Spannaus wrote:

the problems that the typical residential property owner encounters in connection with the mechanic's lien law stem partly from his lack of knowledge of the law and partly from his inability to learn who is contributing to the improvement. The same difficulties are not encountered by owners of larger commercial properties, who typically have the benefit of legal counsel or of bonding.

Spannaus, *Mechanic's Lien Law Reform*, 41 Hennepin Lawyer 10. Notes from his office at the time address the scope of the proposed prelien notice statute, stating "[t]he notice

requirements of the bill do not apply to residential improvements involving more than four family units . . . ." (App. 64)<sup>2</sup>

The prelien statute was introduced as Senate File 6 during the 1973 Legislature. (App. 69, 72-78) When it was presented to and considered by the Senate Judiciary Committee on February 22, 1973, the following interpretative notes were made in the margins of Page 4 of the bill: "**lien law is not chgd on large jobs.**" (App. 72 - 78) (emphasis added). This notation reflects the apparent understanding of legislators at the time that enactment of the prelien notice statute would not change mechanic's lien law for large jobs. In other words, the prelien notice statute was not intended to require that prelien notice be given in connection with wholly residential improvements consisting of or providing more than four family units, which the legislature considered to be large jobs.

The legislature's use of the phrase "more than four family units" represents the legislature's line of demarcation between those who are entitled to the statute's protection and those who are not. It is the legislature's determination of whether an owner of a wholly residential improvement is insufficiently sophisticated so as to require the protection of pre-lien notice. There is nothing in the contemporaneous legislative history that supports Hentges's argument the prelien notice exception contained in Subdivision 4b is limited solely to the owners of multi-unit residential buildings, such as apartment buildings, condominiums, or townhomes. There is no evidence suggesting that the legislature ever considered the impact of the new prelien notice requirement on the

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<sup>2</sup> These notes were obtained from the Minnesota State Historical Society.

owners and developers of multi-unit residential structures and made the decision to the excuse them from receiving the otherwise newly required notice. The legislative record firmly establishes that the central purpose of the prelien statute was to protect small residential homeowners from the harm of having to pay twice for the same improvement or risk losing their home through the foreclosure of a mechanic's lien filed against their property by a subcontractor or material supplier who was not paid by a contractor.

This court recognized this distinction in its decision in *Polivka*. In that case, this court was called on to consider the prelien notice exception that excused prelien notice in connection with an improvement consisting or providing more than 10,000 total usable square feet of floor space where the improvement is partly or wholly nonresidential in character. *Polivka*, 312 Minn. at 173-74, 251 N.W.2d at 852 (interpreting Minn. Stat. § 514.011, subd. 4(ii) (Supp. 1973)). This court reversed the district court's decision, which had narrowly construed the exception and ruled that it applied only if the improvement increased the total usable square footage by 10,000 square feet. *Id.* at 174, 251 N.W.2d at 853. This court disagreed and held that the exception applies to partly or wholly nonresidential structures containing more than 10,000 usable square feet of floor space *either before or after* the construction of the work in question. *Id.*

In considering the purpose of the prelien statute and the legislative intent behind its exceptions, this court noted that the exception contained in Subdivision 4, which at the time included together the exceptions now found in Subdivision 4b and Subdivision 4c, reflected the legislature's designation of larger businessmen who do not require the protection of the prelien notice statute. *Id.* at 174, 251 N.W.2d 853. The court rejected

the property owner's interpretation that the term "improvement" was limited to the actual work in question because it confounded the legislature's determination that not all owners are entitled to receive prelien notice. *Id.* This court determined there was no significant reason to distinguish between an owner of a building whose floor space is increased to more than 10,000 square feet by new construction and an owner who initially constructs a building of the same size. *Id.*

As the court of appeals in this case correctly determined, both the exception at issue in *Polivka* and Subdivision 4b are based on the size and character of the improvement. *S.M. Hentges*, 759 N.W.2d at 234. The court of appeals correctly adopted this court's reasoning in that case to conclude that there are no significant reasons to distinguish between an owner whose property improvement consists of a five-unit condominium or townhome complex and one whose property improvement consists of a five-lot residential development. Each type of owner falls within the legislature's designation of a large businessman who does not require prelien notice given the size and character of the improvement before or after construction. This interpretation of Subdivision 4b is more consistent with the legislative history than the unduly narrow interpretation that Hentges is urging this court to adopt.

Thus, applying Subdivision 4b in this case to a wholly residential subdivision of more than 20 single-family lots would be in keeping with the text and original intent of the statute and would not be "car[ving] out a new exception to the pre-lien notice requirements," as the district court concluded. The legislature carved out this exception 36 years ago.

**E. The court of appeals did not err in its application of Subdivision 4b to the facts of this case.**

The court of appeals properly applied the language of Subdivision 4b to the facts of this case and correctly held that SEH was not required to provide prelien notice.

In its appeal, Hentges does not challenge the district court's findings of facts. As such, they are considered true for the purposes of this appeal. *Gamble-Skogmo*, 242 Minn. at 103, 64 N.W.2d at 388 (holding finding of fact not assigned as error is considered as true on appeal). In its findings of fact, the district court found that the project consisted of the residential subdivision known as Woodbridge Bluffs. (App. - 5) The district court found "that the project was wholly residential in nature." (App. 2-3) And throughout its findings of fact, the district court found that the project called for the development and construction of at least 22 single-family lots. (App. 2-5) The district court further found that SEH furnished and delivered engineering services to the subject property and that all of these services were used in the improvement of the subject property. (App. 5)

Because the project consisted of more than four family units and was wholly residential in character, the prelien notice exception contained in Subdivision 4b applied, thereby relieving SEH of the necessity of providing prelien notice. The court of appeals did not err in its interpretation of Subdivision 4b or its application to the uncontested facts of this case. For this reason, SEH respectfully requests that this court affirm the decision of the court of appeals.

### III. As An Engineer, SEH Was Not Required To Provide Prelien Notice.

The district court erred in ruling that SEH was required to provide prelien notice to the Mensings as a prerequisite to establishing a valid and enforceable lien because the prelien notice requirements of Minn. Stat. § 514.011, subd. 2(a) do not apply to those who provide engineering services with respect to real estate.

Minnesota's mechanic's lien statute provides, in pertinent part, that:

*Whoever performs engineering or land surveying services with respect to real estate, or contributes to the improvement of real estate by performing labor, or furnishing skill, material or machinery for any of the purposes hereinafter stated, whether under contract with the owner of such real estate or at the instance of any agent, trustee, contractor or subcontractor of such owner, shall have a lien upon the improvement, and upon the land on which it is situated or to which it may be removed*

Minn. Stat. § 514.01 (2008) (emphases added). The legislature's use of the conjunctive "or" creates a distinction between those who provide engineering or land surveying services with respect to real estate, and those who contribute to the improvement of real estate by performing or furnishing labor, skill, material or machinery. The court of appeals has recognized this distinction, noting that "[t]he [Mechanic's Lien] statute is designed to protect two groups: (1) persons who perform engineering or land surveying services, and (2) persons who perform labor or furnish skills, material or machines for any of the *purposes listed in the statute.*" *London Constr. Co. v. Roseville Townhomes, Inc.*, 473 N.W.2d 917, 919 (Minn. App. 1991) (emphasis in original).

This court has also recognized this statutory distinction, noting that the legislature treats engineers and surveyors differently under the mechanic's lien statute:

*Since 1974, the legislature has treated engineers and surveyors differently from others who have a right to a mechanics' lien. Minn. Stat. § 514.01 provides that once engineering and surveying services with respect to the land are performed, the engineer or surveyor shall have a lien upon the land. Persons other than engineers or surveyors have a lien on the land once they "contribute to the improvement of real estate by performing labor, or furnishing skill, material, or machinery for any of the purposes hereinafter stated . . . ." Minn. Stat. § 514.01 (1992). Engineers and surveyors perform their services and qualify for a lien. Others must contribute to the improvement of real estate to qualify for a lien.*

*Kirkwold Constr. Co. v. M.G.A. Constr., Inc.*, 513 N.W.2d 241, 244-45 (Minn. 1994) (emphases added).

The statutory distinction between these two groups is important because the prelien notice statute requires that only those who fall within the second category are required to provide prelien notice. The prelien notice provision of the mechanic's lien statute expressly states that:

*Every person who contributes to the improvement of real property so as to be entitled to a lien pursuant to section 514.01, except a party under direct contract with the owner must, as a necessary prerequisite to the validity of any claim or lien, cause to be given to the owner or the owner's authorized agent, either by personal delivery or by certified mail, not later than 45 days after the lien claimant has first furnished labor, skill or materials for the improvement, a written notice . . . .*

Minn. Stat. § 514.011, Subd. 2(a) (emphasis added). The prelien notice statute, therefore, does not, by its plain language, require those performing engineering or land surveying

services with respect to real estate to provide prelien notice as a prerequisite to establishing a valid lien claim.

While the statutory language is plain and unambiguous, the legislative history supports this interpretation of Section 514.011, subd. 2. The legislature first enacted the prelien notice provision of the mechanic's lien statute in 1973. At the time, the mechanic's lien statute did not specifically make reference to engineers or surveyors. The next year, in 1974, the legislature added the specific references to engineering and land surveying services to both Sections 514.01 and 514.05; it did not, however, add corresponding language to the prelien notice requirements set forth in Section 514.011. See *Kirkwold Constr. Co.*, 513 N.W.2d 241 at 243 (discussing 1974 amendments to Sections 514.01 and 514.05). Because the legislature did not broaden the language of Section 514.011 when it amended the mechanic's lien statute in 1974, or following this court's decision in *Kirkwold*, to add reference to engineers or surveyors, it presumably chose to exclude engineers and surveyors from the prelien notice requirements of Section 514.011, subd. 2. This court recently ruled that "[i]n ascertaining legislative intent, we presume that 'when a court of last resort has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction to be placed upon such language.'" *Zurich American Ins. Co. v. Bjelland*, 710 N.W.2d 64, 69-70 (Minn. 2006) (quoting Minn. Stat. § 645.17(4)).

Here, the district court specifically found that "SEH furnished and delivered engineering services to the Subject Property at the request of Land Geeks [and] [a]ll of the services were used in the improvement of the Subject Property." (App. 17) Based on

these findings, the plain language of Section 514.01 provides that SEH "shall have a lien upon the improvement, and upon the land on which it is situated." And the plain language of Section 514.011, subd. 2a provides that only those who "contribute to the improvement of real property" are required to provide prelien notice. It does not apply to those who perform engineering or surveying services with respect to the real estate. The district court therefore erred in ruling that SEH was required to provide prelien notice pursuant to Section 514.011, subd. 2a.

### CONCLUSION

SEH respectfully requests that this court affirm the decision of the court of appeals reversing the district court's decision, and hold that SEH was not required to provide prelien notice as a prerequisite to establishing a valid and enforceable mechanic's lien.

Respectfully submitted,

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### Certification of Brief Length

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds.1 and 3, for a brief produced with a proportional 13 point font. The length of this brief is 8,662 words. This brief was prepared using Microsoft Word 2002.

Respectfully submitted,

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