

Nos. A08-1252 and A08-1700

State of Minnesota
In Court of Appeals

PREMIER BANK, a Minnesota corporation,

Appellant,

vs.

BECKER DEVELOPMENT, LLC, a Minnesota limited liability company,
BOONE FAMILY INVESTMENTS, LLC, a Minnesota limited liability company,
STEVEN L. BOONE, an adult resident of Minnesota, ANNETTE C. BOONE,
an adult resident of Minnesota, NANCY C. BUEHLER, an adult resident of
Minnesota, ROBERT G. BUEHLER, an adult resident of Minnesota, MICHAEL
S. UZELAC, an adult resident of Minnesota, PAMELA J. NOLL, an adult resident
of Minnesota, DEANNA M. LASSER, an adult resident of Minnesota, ANN-
MARIE RASMUS, an adult resident of Minnesota, DANIEL P. BOONE, an adult
resident of Minnesota, BAUERLY BROTHERS, INC., a Minnesota corporation,
KUECHLE UNDERGROUND, INC., a Minnesota corporation, JOHN OLIVER
& ASSOCIATES, INC., a Minnesota corporation, and
JOHN DOES 1 THROUGH 5,

Respondents,

PAMELA J. NOLL,

Respondent,

vs.

GORDON JENSEN and JENSEN ANDERSON SONDRALL, P.A.,

Respondents.

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ARGUMENT

This consolidated appeal presents two distinct and separate issues. First, whether the District Court was correct in allowing Kuechle to selectively foreclose the entirety of its lien on only those lots where it has priority. The District Court's decision on that issue was erroneous and must be reversed. Second, whether the District Court was correct in allowing the individual guarantors to avoid the parties' intentions and evade responsibility under the guarantys. The District Court must be reversed on that issue as well. This reply brief, addressing the respective Respondents' arguments, will discuss both of those issues in turn.

I. Minnesota's Mechanic's Lien Statute Does Not Allow A Mechanic's Lien Claimant To Foreclose The Full Amount Of A Blanket Mechanic's Lien Against Less Than All The Lots Subject To Its Lien.

Kuechle mechanic's lien is junior to Premier's \$3.2 million development mortgage on all but 11 lots, and for this reason it is seeking to extract the full amount of its blanket mechanic's lien against the three lots where its mechanic's lien has priority, even though, by its own admission, the work giving rise to its lien benefited all 59 lots equally. Because there is no statutory or other legal basis for such a remedy, Kuechle may not selectively foreclose the full amount of its blanket lien against only those of the 59 lots subject to its lien that enjoyed priority over Premier's development mortgage. Rather, it must apportion its lien claim on a per lot basis.

A. The principles of statutory interpretation do not entitle Kuechle to a remedy not found in the mechanic's lien statute.

Kuechle argues that this court must interpret the mechanic's lien statute in such a manner to allow it to foreclose the full amount of its blanket mechanic's lien against all of the lots encumbered by its lien. Kuechle then suggests that Premier is asking that this court strictly construe the mechanic's lien statute against Kuechle. This is, however, a mischaracterization and distortion of Premier's position and existing Minnesota law.

Premier is not asking that this court strictly construe the statute against Kuechle. Premier recognizes and agrees that Minnesota courts have long held that the mechanic's lien statute "is remedial in nature and is to be liberally construed in favor of workman and materialmen." *Anderson v. Breezy Point Estates, Inc.*, 283 Minn. 490, 493, 168 N.W.2d 693, 693 (1969). The only times courts strictly construe the mechanic's lien statute are in situations that concern the creation, perfection, and continued existence of the lien. *David-Thomas Co., Inc. v. Voss*, 517 N.W.2d 341, 343 (Minn. App. 1994). Those issues are not present in this case. Premier concedes and agrees that Kuechle perfected its blanket mechanic's lien, and therefore, has a valid and enforceable mechanic's lien. Indeed, Premier has stipulated to the validity, amount, and enforceability of Kuechle's mechanic's lien. Kuechle, therefore, is entitled to a liberal construction of the mechanic's lien statute.

Although Kuechle may be entitled to a liberal construction of the mechanic's lien statute, this principle of statutory interpretation is merely an aid for the court in interpreting the provisions of the mechanic's lien statute. It is not a device that operates

to grant or confer rights and remedies to Kuechle that are beyond those provided by the mechanic's lien statute. The Minnesota Supreme Court has long held, "it is . . . clear from the cases that mechanic's liens are purely creatures of statute and the rights of the parties are governed by the language of the statutes." *Anderson*, 283 Minn. at 493, 168 N.W.2d at 693 (citing *M. E. Kraft Excavating & Grading Co. v. Barac Constr. Co.*, 279 Minn. 278, 283, 156 N.W.2d 748, 751 (1968)). And, in the context of priority disputes, Minnesota courts recognize that the statutory principles set forth in the mechanic's lien statute "balance the policy of protecting mortgagees . . . against the policy of safeguarding the rights of persons who furnish labor and material to the improvement." *Superior Constr. Servs., Inc. v. Belton*, 749 N.W.2d 388, 391 (Minn. App. 2008) (citing *Suburban Exteriors, Inc. v. Emerald Homes*, 508 N.W.2d 811, 813 (Minn. App. 1993)).

Even with a perfected lien, Kuechle is confined to the remedies and foreclosure procedures set forth in the mechanic's lien statute. Kuechle's misguided argument suggests a belief that simply because it has perfected its lien, it may foreclose that lien in any manner it sees fit. Mechanic's liens are creatures of statute, however, and, thus, Kuechle may foreclose only in the manner that the mechanic's lien statute provides. There is nothing within the statute that authorizes Kuechle's suggested approach. Even applying a liberal construction of the mechanic's lien statute, the district court erred in allowing Kuechle to foreclose the full amount of its blanket mechanic's lien against less than all the lots subject to its lien.

Both the district court and Kuechle appear to be laboring under the mistaken belief that Kuechle is precluded from foreclosing its blanket mechanic's lien against all 59 lots,

even though its lien is junior to Premier's development mortgage on all but 11 lots. The priority of Kuechle's blanket mechanic's lien relative to any particular lots has no bearing on the validity of the lien or Kuechle's right to foreclose on the lien. The mechanic's lien statute permits Kuechle to foreclose its mechanic's lien for the full amount, plus any statutory costs and interest, against all the lots that its lien encumbers regardless of priority. Where its mechanic's lien is junior, it simply takes subject to any senior interest that may encumber the lot. *See* Minn. Stat. § 514.15 (2008) (providing sale of property is "subject to the rights of all persons which are paramount to such liens"). Thus, the district court erred when it ruled that Kuechle was precluded from foreclosing its blanket mechanic's lien against those lots on which Premier's \$3.2 million development mortgage has priority. (*See* A-36) Kuechle is entitled to foreclose on its blanket mechanic's lien for the full amount of the lien against all the lots subject to its lien; it just cannot selectively foreclose the full amount of its lien against only those lots on which its lien has priority.

B. Minn. Stat. § 514.09 does not permit a lien claimant to foreclose a blanket mechanic's lien against less than all the lots subject to the lien.

Kuechle contends that Minn. Stat. § 514.09 permits a lien claimant with the choice between apportioning a lien and filing a blanket lien. It argues that a lien claimant who chooses to file a blanket lien is not required to apportion its lien, which a lien claimant who does not file a blanket lien must do. But there is nothing within Minn. Stat. § 514.09 that expressly permits a lien claimant to file a blanket mechanic's lien against multiple lots, and then, as Kuechle is attempting to do in this case, foreclose the full amount of the

lien against only those lots where the lien enjoys priority. Minn. Stat. § 514.09 does nothing more than set forth the type of lien statement that a mechanic may choose to file. The statute is silent on how a lien claimant is to foreclose on a blanket lien filed against two or more parcels.

C. The foreclosure procedures set forth in Minnesota Statutes Chapter 580 do not apply nor govern the foreclosure of mechanic's liens.

The central, and incorrect, premise of Kuechle's argument on appeal is that the mechanic's lien statute, by operation of Minn. Stat. § 514.10 (2008), incorporates by reference and utilizes the foreclosure procedures set forth Minnesota's mortgage foreclosure by advertisement statute, specifically Minn. Stat. § 580.08 (2008). Kuechle contends that Minn. Stat. § 580.08 requires it to foreclose the full amount of its blanket mechanic's lien one lot at a time until the lien is satisfied. It further asserts that Minn. Stat. § 580.08 does not allow, and in fact, forbids the apportionment of a blanket mechanic's lien under Minn. Stat. § 514.09.

The plain language of Minn. Stat. § 514.10, which is entitled "Foreclosure of liens", provides, in part, that:

[s]uch liens may be enforced by *action in the district court* of the county in which the improved premises or some part thereof are situated . . . which *action* shall be begun and conducted in the same manner as *actions* for the foreclosure of mortgages upon real estate, except as herein otherwise provided

Minn. Stat. § 514.10 (emphasis added).

Under Minnesota law, an "action" is defined as "any proceeding in any court of this state." Minn. Stat. § 645.45(2) (2008); *see also Baker v. Ploetz*, 616 N.W.2d 263,

269 (Minn. 2000) (noting action is defined as "[a] civil or criminal judicial proceeding") (citing *Black's Law Dictionary* 28 (7th ed. 1999)); *Muirhead v. Johnson*, 232 Minn. 408, 46 N.W.2d 502, 505 (1951) (recognizing statutory definition of action under Minn. Stat. § 645.45 and noting courts generally state "action is the prosecution in a court of justice of some demand or assertion of right by one person against another") (citation omitted). Thus, the sole means by which a mechanic's lien claimant may foreclose its lien is by commencing an action, i.e. judicial proceeding, in district court.

The mechanic's lien statute does not, as Kuechle contends, incorporate by reference and follow the foreclosure procedures set forth in Minn. Stat. § 580.08, or any other provision of Minnesota Statutes Chapter 580, which provides a nonjudicial procedure to foreclose on a mortgage. The plain language of Minn. Stat. § 514.10, requires a mechanic's lien claimant to foreclose its lien by means of a judicial action commenced in district court. The provisions of Minnesota Statutes Chapter 581 provide for and govern judicial proceedings to foreclose on mortgages. Thus, rather than Minnesota Statutes Chapter 580, the mortgage foreclosure procedures set forth in Minnesota's mortgage foreclosure by action statute, Minn. Stat. § 581.01-12 (2008), apply to and govern the foreclosure of mechanic's liens.

D. Legislative Intent

In the event that this court concludes that the mechanic's lien statute is ambiguous regarding the foreclosure of blanket mechanic's liens, Kuechle contends that the Minnesota Legislature has explicitly recognized that the enforcement of a mechanic's lien against less than all of the lots subject to the lien is equitable. But, there is nothing in the

mechanic's lien statute that demonstrates, or even suggests, that the legislature ever considered, much less authorized, the method of foreclosure that Kuechle seeks to employ in this case. The mechanic's lien statute is silent on the issue.

Kuechle relies on Minn. Stat. § 514.03, subd. 3 (2008). This statutory provision simply limits the extent of a mechanic's lien to 80 acres, or 40 acres for homesteaded agricultural land. Minn. Stat. § 514.03, subd. 3. It does not in any way address the procedure to be used when a lien claimant forecloses on a blanket lien nor does it provide any guidance on the issue. It therefore is inapplicable to the resolution of this case and does not shed light on the legislature's intentions regarding the foreclosure of blanket mechanic's liens.

Kuechle also cites to the decision in *LaValle v. Bayless*, 257 N.W.2d 283 (Minn. 1977). There, in a footnote, the supreme court indicated that the district court properly reduced the mechanic's lien at issue in that case from 55 acres to 40 acres pursuant to Minn. Stat. § 514.03, subd. 3. *Id.* at 285 n. 2. It is not clear from the decision, however, if the district court reduced the amount of the lien in proportion to the reduction from 55 to 40 acres, or if it allowed the lien claimant to foreclose the full amount of the original lien against the 40 acres. Regardless, the parties in that case did not raise, and the supreme court did not address the issue of apportionment. The decision in *LaValle*, therefore, is inapposite to the issues in this case.

II. Minnesota Case Law Supports And Requires Kuechle To Apportion Its Blanket Lien On A Per Lot Basis.

Kuechle argues that there are no Minnesota appellate decisions that address the controlling statutory provisions, or what it characterizes as the unique equities at issue in this case. It then attempts to distinguish the decisions in *Carr-Cullen Co. v. Cooper*, 144 Minn. 380, 175 N.W.2d 696 (1920), and *Albert & Harlow, Inc. v. Great Northern Oil Co.*, 283 Minn. 246, 167 N.W.2d 500 (1969). But, despite Kuechle's attempt to distinguish it, *Carr-Cullen* is controlling.

A. *Carr-Cullen Co. v. Cooper*

Although one of the issues in *Carr-Cullen* involved the question of whether the lumber supplier was entitled to file a blanket mechanic's lien under the predecessor to Minn. Stat. § 514.09, the case also involved the equally important issue of how the lumber supplier was to foreclose on its blanket lien. In the event the lumber supplier was entitled to assert one blanket lien against all the lots, the property owners and assignees of the mortgages on the property who were challenging the lumber supplier's lien claim asked that the court direct the lumber supplier to apportion its blanket mechanic lien on a per lot basis. *Id.* at 382-83, 175 N.W. at 697-98. The request for apportionment did not come from the lumber supplier. There is thus no merit to Kuechle's claim that the issue of apportionment was never litigated in *Carr-Cullen*.

In addition, there is no merit to Kuechle's argument that the case is legally distinguishable because the case did not address Minn. Stat. § 580.08 or its predecessor. As noted, Minn. Stat. § 580.08 does not apply to the present case. The decision in *Carr-*

Cullen involved the interpretation of Minn. Stat. § 514.09, the statutory provision at issue in this case. It established the rule that a mechanic's lien claimant who files a blanket lien against multiple lots pursuant to Minn. Stat. § 514.09 may not foreclose the full amount of the lien against less than all the lots subject to the lien, but must apportion its full lien claim against all of the lots subject to its lien on a per lot basis. It is the only appellate decision to address this issue, and therefore, is significant precedent on this point.

B. *Albert & Harlow, Inc. v. Great Northern Oil Co.*

Next, Kuechle argues that the holding of *Great Northern* is of little value given what it contends were the unique policy and geographic considerations at play in that case. While the facts in that case were somewhat unique, the supreme court did not confine its holding to the facts of that case. In reaching its decision, the Minnesota Supreme Court engaged in a comprehensive discussion and analysis of the purpose and object of the mechanic's lien statute and the significant impact that a mechanic's lien places on real property and those with an interest in the lien property. *Albert & Harlow, Inc. v. Great Northern Oil Co.*, 283 Minn. 246, 248-55, 167 N.W.2d 500, 503-507 (1969). After considering the equitable and remedial purposes of the mechanic's lien statute in great detail, the court in *Great Northern* held that the "purpose of the [lien] law implies that there is a *direct relationship* between the value contributed to the property by the lien claimant and the extent of the lien granted." *Id.* at 253, 167 N.W.2d at 506 (emphasis added). This rule has broad application and protects real property from being subject to a lien that is grossly disproportionate or has no relation to the value of the material and labor actually furnished for the improvement on the property.

C. *Reilly v. Williams*

In support of its argument, Kuechle relies on *Reilly v. Williams*, 47 Minn. 590, 50 N.W. 826 (1891). This reliance is misplaced.

In that case, Williams contracted with Jackson to furnish the labor and materials necessary for the construction of two houses on two separate lots for \$6,580 under one general contract with Williams, who owned the two lots at the time. *Id.* at 591, 50 N.W. at 826. The two houses had the same plan and were of equal value in terms of labor and materials. *Id.* at 591-92, 50 N.W. at 826. After construction on the two houses started, Williams executed two first mortgages, one on each lot, to defendant insurance company. *Id.* at 592, 50 N.W. at 826. He then executed a second mortgage on each lot to Berryhill, the individual from whom he purchased the lots. *Id.* Later, while construction was still taking place, Williams conveyed the lots back to Berryhill without Jackson's knowledge. *Id.* When the first house was completed, Williams requested and Jackson agreed to release that lot from any and all liens. *Id.* They further agreed that Jackson would retain his lien on the second lot for the full balance remaining due under their contract. *Id.* Ultimately, Williams paid Jackson \$3,915 of the contract price, leaving an unpaid balance due of \$2,675.50. *Id.* Jackson then filed a lien for this unpaid amount against the second house and lot. *Id.* The supreme court rejected Williams' argument that Jackson's lien was invalid because the release of the one lot operated as release of both liens. *Id.* at 593, 50 N.W. at 827.

The decision in *Reilly* does not establish precedent that a mechanic's lien is entitled to foreclose a blanket mechanic's lien against less all the lots subject to the lien.

Most problematic for Kuechle is the fact that the lien claimant in *Reilly* did not file a blanket lien against multiple lots. As the reported facts of the case make clear, Jackson filed a single lien against the second house and lot. *Id.* at 592, 50 N.W. at 826. In addition, the amount of Jackson's lien did not exceed the value of the labor and materials furnished for the second house and lot. Because the case did not involve a mechanic's lien claimant's attempt to foreclose the full amount of a blanket mechanic's lien against less than all the lots subject to the lien, the decision in *Reilly* is inapposite to the issues in this case.

III. The Cases From Foreign Jurisdictions Offer Guidance And Persuasive Authority On The Specific Issue Of Whether A Mechanic's Lien Who Files A Blanket Lien Must Apportion His Lien When He Seeks To Foreclose The Lien Against Less Than All The Property Subject To The Lien.

In its response, Kuechle seeks to dismiss as irrelevant the decisions from the 23 state courts that have either explicitly or implicitly adopted the general rule that a mechanic's lien who files a blanket lien against two or more parcels cannot enforce the full amount of the lien against less than all of the parcels subject to the lien. These cases, however, are instructive and offer valuable guidance on the specific blanket lien foreclosure issues in this case.

Kuechle argues, in part, that it is inappropriate for this court to consider these cases because they are based on different mechanic's lien statutes and do not advance Minnesota's policy of protecting mechanic's lien claimants. This argument, however, ignores the fact that both this court and the Minnesota Supreme Court have often looked to and considered decisions from other jurisdictions when considering issues arising

under Minnesota's mechanic's lien statute. *See e.g., Great Northern*, 283 Minn. at 248-55, 167 N.W.2d at 503-507 (considering cases from other jurisdiction as further support for its decision under Minnesota's mechanic's lien statute); *S. H. Bowman Lumber Co. v. Piersol*, 147 Minn. 300, 180 N.W. 106 (1920) (considering cases from other states to determine general rule regarding ability of lien claimant to file and foreclose mechanic's lien against two or more noncontiguous parcels for work furnished to one lot); *Twin City Pipes Trades Serv. Assoc., Inc. v. Peak Mech., Inc.*, 689 N.W.2d 549 (Minn. App. 2004) (considering and basing decision on cases from foreign jurisdiction in case involving standing to assert mechanic's lien claim under Minnesota's mechanic's lien statute); *Langford Tool & Drill Co. v. Phoenix Biocomposites, LLC*, 668 N.W.2d 438 (Minn. App. 2003) (considering decisions from Kansas and Oregon in case involving issue of abandonment under Minnesota's mechanic's lien statute); *Automated Building Components, Inc. v. New Horizon Homes, Inc.*, 514 N.W.2d 826 (Minn. App. 1994), *review denied* (Minn. June 15, 1994).

There is ample precedent that Minnesota courts look to and consider the decisions from other jurisdictions in resolving disputes arising under Minnesota's mechanic's lien statute. It is appropriate, therefore, for this court to consider cases from outside Minnesota and to adopt the general rule followed by the majority of courts who have addressed the issue of apportionment and the foreclosure of blanket mechanic's liens against less than all the parcels subject to the lien.

The most relevant case from another jurisdiction is the decision in *CS & W Contractors, Inc. v. Southwest Savings & Loan Assoc.*, 883 P.2d 404 (Ariz. 1994). This

case involved the same legal issue regarding the foreclosure of a blanket mechanic's lien on nearly identical facts to this case. Kuechle contends this decision is not worthy of this court's consideration because nothing within it indicates that Arizona has a similar policy of liberally construing its mechanic's lien statute in favor of lien claimants. But, contrary to Kuechle's contention, this court recently observed the opposite, noting that Arizona, like Minnesota, applies a liberal interpretation consistent with the remedial purpose of its mechanic's lien statute that favors affording protection to lien claimants. *Twin City Pipes*, 689 N.W.2d at 552 (citing *Performance Funding, L.L.C. v. Ariz. Pipe Trade Trust Funds*, 203 Ariz. 21, 49 P.2d 293, 298-99 (Ariz. Ct. App. 2003)).

In addition, the Arizona Supreme Court decided *CS & W* almost entirely based on equitable principles – the case did not turn on the interpretation of Arizona's mechanic's lien statute. The court was called on to address the issue of whether it is equitable to allow a mechanic's lien claimant who files a blanket mechanic's against multiple lots, all of which benefitted equally from the work, to selectively foreclose the full amount of the lien against only those lots on which its lien has priority. The Arizona Supreme Court ruled it would be inequitable to do so because a lien claimant cannot extract the value of improvements made to several lots from fewer than all those lots. Such a rule could also allow a lien claimant to resurrect an extinguished lien or obtain a priority to which it might not be entitled. *Id.* at 406. Given the factual and legal similarities with this case, it is appropriate for this court to consider and adopt the reasoning and holding of the Arizona Supreme Court in *CS & W*.

IV. Public Policy and Equity Support Apportionment.

In its response, Kuechle argues that equity and public policy support the district court's decision and justify it collecting the full amount of its blanket mechanic's lien against less than all the lots subject to its lien even though all 59 lots benefitted equally from its work.

It first argues that the improvements that it made were for basic infrastructure that serves the entire development and cannot be apportioned on a per lot basis because basic infrastructure works only if it is 100% complete. It maintains that its work is indivisible, and therefore, cannot be apportioned. The Arizona Supreme Court addressed this very situation in *CS & W*, and had little trouble with the issue. As the court there noted, "[b]asic infrastructure, such as roads, sewers, and water lines, benefit the entire subdivision and are only fortuitously located on any given lot. Each lot is equally benefited. Every future homeowner will use the same streets, water lines, sewers and fire hydrants." 883 P.2d at 406. The court continued, holding that "if all lots benefit equally from infrastructure an equal apportionment is satisfactory, unless the claimant can prove disproportionate value was put into a lot over which it had priority." *Id.*

Kuechle fails to explain why the three lots should bear the burden of satisfying its entire blanket mechanic's lien and the remaining lots relieved of that obligation even though, by its own admission, those lots received the same benefit from its work. By seeking to foreclose the full amount of its lien against only those three lots over which its lien has priority, Kuechle is attempting to obtain a priority to which it is not otherwise

entitled. Kuechle has not explained why the principles of equity justify such a manipulation of its lien and the lien statute.

Kuechle further contends that in considering the equities of this case, this court must consider the effect of title insurance. But, the existence of title insurance is, and should be, immaterial to this court's legal analysis. There is also nothing in the appellate record that title insurance will cover any amount that Premier may be required to pay Kuechle. More broadly, though, Kuechle fails to address the effect of its proposed rule in those situations where title insurance is unavailable or inadequate to cover a mechanic's lien claim that exceeds the value of the property. Contrary to Kuechle's assertion, homeowners have the option to decline title insurance. It is not uncommon, especially in today's difficult market, for homeowners to decline title insurance for cost reasons. In addition, Kuechle's argument fails to consider the fact that title insurance provides coverage only up to the amount of the value of the property being insured. Thus, it is possible that title insurance is unavailable or the amount of a mechanic's lien claim may exceed the amount of available title insurance. In such situations, a homeowner could well be confronted with the prospect of losing their property under the rule that Kuechle urges this court to adopt.

In this case, it would be manifestly inequitable to allow Kuechle to "extract the value of improvements made to several lots from fewer than all those lots." *See CS & W*, 883 P.2d at 406. Equity and sound public policy favor apportioning Kuechle's lien on a per lot basis because it would subject each lot to a lien amount that reflects the value of

the labor and materials actually furnished to each lot, protect others who may have interests in the 11 lots, and allow Kuechle to collect a portion of its outstanding debt.

V. The District Court Must Be Reversed And The Guarantys Enforced.

The district court made each and every finding of fact and had the necessary record before it to enforce the guarantys as the parties intended them to be enforced. There is no dispute that the Loan Agreement, signed by the Individual Guarantors, expressly states that guarantys will be required; that the Loan was made; that the guarantors signed the guarantees; that the guarantors received a financial benefit from the transaction; that the loan is in default; and, critically, that there was no other loan or debt which the parties intended the guarantors to guarantee. The district court, however, contrary to law, let the Individual Guarantors walk away from their obligations. In doing so, the district court deemed controlling a case that dealt with "reverse piercing of the corporate veil", but which has no applicability to present case.

The issue that must be addressed is: What did the parties intend? As Premier argued below, the intent of the transaction is clear and the misidentification of the borrower in the guarantys was simply a "scrivener's error" that, under the law, should not allow the Individual Guarantors to escape from their obligations. As they did in the district court, the Individual Guarantors attempt to reframe the issues, arguing technicalities and supposed procedural irregularities while ignoring the facts. But, as the Individual Guarantors unequivocally admit, there was no other loan to guarantee, no loan to Boone Family Investments, and, therefore, the parties could only have intended to guarantee the loan to Becker Development. The Individual Guarantors cannot credibly

deny that a scrivener's error occurred, because they cannot point to any rational explanation that would suggest that the misidentification of the borrower was anything other than an error. To rule, as the district court did, that Premier, despite the obvious purpose and intent of the transaction, cannot recover on the guarantys because the wrong entity was named in those guarantys, is to create an absurd result. In effect, the district court held that the parties intended to guarantee a debt that never existed. The law of contract interpretation will always avoid such an absurdity. The district court must be reversed.

A. The district court looked to inapplicable case law as "controlling" and ignored the issue of intent.

The district court, in deciding that the Individual Guarantors had no liability, relied on case law that has no applicability to the present case and ignored the intent of the parties. Addressing the Individual Guarantors' argument that they have no exposure under the guarantys¹, the district court stated: "[t]he case of Miller and Schroeder v. Gearman 413 N.W.2d 194 (1987) is controlling." (App. – 46) That case, however, is not controlling and, has no applicability here. In *Miller and Schroeder*, the Minnesota Supreme Court was addressing a claim by a guarantor that he should be allowed to "reverse pierce" the corporate veil and, thus, avoid his obligations under the guaranty by taking refuge under the anti-deficiency statute. *Miller and Schroeder*, 413 N.W.2d at 196-197. The court denied the attempt, noting that a debtor should not be allowed to

¹ The district court incorrectly identified the party making this argument as the "Plaintiff" (See App. - 46). It is clear, though, that the court intended to refer to the "Guarantor Defendants."

"raise or lower his corporate shield" whenever it suits his purpose. *Id.* at 197. The court was looking solely to the law of piercing the veil to make its decision. *Id.* Its decision has no applicability here. (The *Miller and Schroeder* Court did suggest, however, that allowing the guarantor in that case to avoid his obligations would be "unfair and unjust." *Id.* To allow the Individual Guarantors here to avoid their obligations would also be "unfair and unjust.").

The district court, as Premier urged below, should have been looking for the parties' intent. While the Individual Guarantors ignore the issue and, in fact, actively seek to deflect attention from it,² the intent of the parties is always the main focus of contract interpretation. See *Loving & Associates, Inc. v. Carothers*, 619 N.W.2d 782, 786 (Minn. App. 1987). A simple error in a document, moreover, should not defeat the obvious and clear intent of the parties.

In the present case, the intent of the parties is clear. The facts, all of which are delineated in the district court decision, are undisputed:

1. There was only one loan being made.
2. The Loan Agreement expressly recites that guarantys will be required; lists the guarantys; and is signed by the guarantors. The guarantys expressly incorporate the loan documents.
3. The guarantors signed the guarantys in conjunction with the loan to Becker Development; delivered those guarantys in conjunction with the loan; and received economic benefit as a result.
4. The loan is in default.

² See *Brief of Respondents Pamela J. Noll, Nancy U. Buehler and Robert G. Buehler* at 19 ("Courts cannot consider evidence of intent...").

The district court had the record before it and, in fact, made findings supporting each of the above statements. (App – 9-21 – District Court's "Statement of Undisputed Facts", including V, VII, XIII, XIV, XXIII). In its "Memorandum", moreover, the district court noted that the guarantys were "part of a package deal of documents" put together by Gordon Jensen. (App. – 48-49). The Individual Guarantors do not challenge any of these findings, instead arguing that the guarantys have the name wrong and that that must be the end of the matter.

The fallacy of the Individual Guarantors' position is perhaps best highlighted by one of their own assertions. Several times in their response brief, the Individual Guarantors assert that there was only one loan and that it was a loan to Becker Development, not Boone Family Investments. *See Brief of Respondents Pamela J. Noll, Nancy U. Buehler and Robert G. Buehler* at 17 ("There is no such debt, and there is no such Note.") and 19-20 ("Premier did not make a loan to Boone Family Investments and Boone Family Investments never executed a Note with Premier."). While the Individual Guarantors suggest this fact is dispositive of their position, in reality it shows the true intent of the parties was to guarantee the Becker Development loan, the one and only loan being made. The guarantys expressly state that the "Note, the Mortgage, and the Loan Agreement are hereby made a part of this Guaranty by reference thereto with the same force and effect as if fully set forth herein..." (App. 261, ¶ 1) What "Note", what "Loan Agreement" is each guaranty referring to if, as the Individual Guarantors admit, there is no other loan? The reference, of course, can only be to the Becker Development loan and that reference shows the true intent of the parties.

The Individual Guarantors have provided no case in which, like here, a guarantor was allowed to avoid her intended purpose in guaranteeing a loan. There is no case from Minnesota with similar facts. Courts in other jurisdictions, though, have ruled against guarantors who argue technicalities to avoid liability in the face of obvious and compelling evidence of contrary intent. In *Dennen v. Town North National Bank, et al.*, 1996 WL 457954 (Tex. Ct. App. 1996), the Texas Court of Appeals affirmed a trial court's ruling that the misidentification of the borrower in a guaranty, when there was no other loan and the guarantor admitted signing the guaranty, did not allow the guarantor to escape liability. In *Dennen*, the guaranty mistakenly referred to a "R.A. Dennen Corporation, Inc." when the true borrower was "R.A. Dennen Companies, Inc." *Id.* at *13. The Texas Court of Appeals, noting that the "cardinal rule" was that it must give effect to the parties' "real intention", found that where the guaranty was admittedly signed by the guarantor and signed on the same day as the loan was made, and, importantly, where there was no loan to the entity whose name appeared in the guaranty, the guarantor was liable on the guaranty. *Id.* at *13-14. The court held that the guarantor's assertion, like the one being made in the present case, that he never guaranteed the debt of the true borrower, was "merely conclusory and fails to controvert his intent" as shown by his admitted signing of the document and the language of the guaranty. *Id.* at *15.

Like the assertion of the guarantor in *Dennen* that he did not guarantee the true borrower's debt, the exact same assertion by the Individual Guarantors here is "merely conclusory" and should be rejected. As the Individual Guarantors here pointed out when asserting their conclusory denial: "Admittedly, this argument may seem too simplistic

and perhaps too clever." (App. - 46) They are correct; their argument is "too simplistic and perhaps too clever" and the very same argument, for those very reasons, was rejected by the *Dennen* court. To accept the argument, as the district court did, is to ignore the true intent of the parties.³ As the district court noted: "Ostensibly, the '1374 Defendant/Guarantors' guaranteed Becker's full and prompt payment of the indebtedness due under the Note." (App. - 21) That statement is undeniably true and it must guide the decision in this case. There is no rational explanation for the use of "Boone Family Investments" in the guarantys, except that it was an error and that all parties, at all times, understood and agreed that the debt being guaranteed was the debt of Becker Development.

The reasoning in *Dennen* is consistent with the approach of the Minnesota courts. In *Loving & Associates*, 619 N.W.2d at 786, this court refused to allow a guarantor to evade liability where a merger had resulted in the debtor corporation ceasing to exist. In interpreting that guaranty, the Court noted that "its terms must be understood in their plain and ordinary sense **in light of the parties' intentions and the circumstances under which the guarantee was given**" and that the "terms of a **guarantor's obligations** may not be unduly restricted by **technical interpretation**." *Id.* (citations omitted) (emphasis added). The focus, then, must always be on the intent of the parties and the court should avoid allowing a guarantor to avoid her obligations through a

³ It also leads to an absurd result, which the law should avoid. *See Johnson v. Johnson*, 1997 WL 118132 (Minn. App. 1997) at 2, and citations therein.

technicality. The district court should be reversed and summary judgment granted in favor of Premier.⁴

B. The issues were raised below.

The Individual Guarantors spend much of their brief discussing whether Premier should be allowed to argue "scrivener's error" and reformation, claiming that the issues were not raised in the district court. The Individual Guarantors are incorrect.

In its decision, the district court noted:

It has been argued that the intent of these personal guarantees was to absolutely and unconditionally guarantee the full and prompt payment and performance of all of Defendant Becker's obligations...

(App. – 9) In fact, Premier had made just that argument. *See Reply Memorandum in Response to Robert and Nancy Buehler's Motion to Dismiss and to Strike; And Pamela Noll's Motion to Dismiss and to Strike* at 7 (Premier's Supplemental Appendix filed in Appeal No. A08-1700 at 361).⁵ Premier laid out exactly why the misidentification of the borrower in the guarantys was a simple scrivener's error and that the parties clearly intended to guarantee the Becker Development debt. *Id.*

The guarantors, in fact, anticipated that such arguments would be raised and tried to preempt the issues, stating in their memorandum in opposition to summary judgment: "One expects that Premier Bank will claim that this conclusion [regarding the name on

⁴ Respondents contend that if the district court is reversed there should be a remand so the court can address their defenses to Becker's debt. In the guarantees, however, those defenses were waived. (App. – 262-263)

the guarantees] somehow exalts form over substance (i.e., we 'know' what was intended) or is immaterial because Boone Family Investments itself guaranteed the \$3.2 Million loan, so the individuals are liable because of that." (App. – 322) Having themselves raised the issue, the guarantors should not now claim that the issue was never joined.

Despite what happened in the district court, the Individual Guarantors now argue that the issues were never raised and that a continuance was never sought and claim, then, that this court should not address the issues. This argument, like the Individual Guarantors' argument as to the name on the guarantys, is hyper-technical and ignores reality. As the Minnesota Supreme Court held in *Jacobson v. \$55,900 in U.S. Currency*, 728 N.W.2d 510, 522 (Minn. 2007), an appellate court should only refuse to address an issue where the argument made on appeal is "entirely different in kind" from that made below. When the argument made on appeal is a mere refinement of the argument made below and where the record allows for evaluation of the argument, there is no reason for the appellate court to refuse to address the merits of the issue. *Id.* at 522-523.

Here, the arguments regarding reformation are a mere refinement of the arguments raised below. A claim of "scrivener's error" clearly implies a request that the court reform the document in question. *See e.g., Nichols v. Shelard Nat'l Bank*, 294 N.W.2d 730, 734 (Minn. 1980). This court, moreover, has before it a record that contains all that is needed to address the issues. It must be remembered that the Individual Guarantors do not contest the facts. Instead, as noted above, they wish the court to adopt their "merely

⁵ Note that counsel for Premier, contrary to Respondents' suggestion of a pell-mell rush to judgment, also requested continuation of the summary judgment motion to allow time

conclusory" position that they never intended to guarantee the debt of Becker Development. This is a further attempt to push through what is clearly "unfair and unjust" and should be rejected.⁶

for discovery to address the issues raised by Noll and the Buehlers. *Id.*

⁶ If this Court determines that there are facts in dispute a remand is certainly required. It must be noted that the district court moved the date of the summary judgment hearing, so that it occurred five days before it was originally scheduled, which meant that Respondents opposition was filed four days before the hearing instead of the required nine days. *See* Minn. R. Gen. Pract. 115.03(b). Premier had no time to submit the allowed reply memorandum. *Id.* at .03(c). Premier was allowed to submit a reply after the hearing and, as it had at the hearing, raised the issue of scrivener's error and, as noted above, also requested that the summary judgment hearing be continued so that discovery could be undertaken and all the issues could be addressed. The district court obviously rejected that request. Respondents contend that Premier then had several other opportunities to raise the issue of reformation, but a litigant is not required to continually repeat arguments and request continuances, once rejected, simply to preserve issues for appeal.

CONCLUSION

The district court erred in ruling that Kuechle was not required to apportion its mechanic's lien on a per lot basis; when it refused to allow Kuechle to foreclose its mechanic's lien against all 59 lots; when it refused to issue Premier a decree of foreclosure against the three lots on which the model homes were situated, and in dismissing the Individual Guarantors and denied Premier's motion for summary judgment against them. Premier therefore respectfully requests that, in a published opinion, this court reverse the decision of the district court and remand this case to the district court for further proceedings consistent with this court's opinion.

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, subs.1 and 3, for a brief produced with a proportional 13 point font. The length of this brief is **6,966** words. This brief was prepared using Microsoft Word 2002.

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