

NO. A08-1883

State of Minnesota  
 In Supreme Court

Imperial Developers, Inc.,	<i>Plaintiff,</i>
vs.	
Calhoun Development, LLC,	<i>Defendant,</i>
Regal Custom Homes, Inc., et al.,	<i>Defendants,</i>
Lind Homes, Inc.,	<i>Defendant,</i>
Thompson Plumbing Corp.,	<i>Defendant,</i>
Great Northern I. Inc.,	<i>Defendant,</i>
Southview Design & Construction, Inc.,	<i>Respondent,</i>
BankFirst,	<i>Appellant,</i>
and	
The Woodshop of Avon, Inc.,	<i>Additional Defendant,</i>
and	
Scherer Bros. Lumber Co., intervening defendant and third party plaintiff,	<i>Respondent,</i>
vs.	
Matthew Lind, et al,	<i>Third Party Defendants,</i>
and	
Simonson Lumber of Ham Lake, Inc.,	<i>Third Party Plaintiff,</i>
vs.	
Contractors Capital Corporation, et al.,	<i>Third Party Defendants.</i>

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## ARGUMENT

Respondents' argument is flawed in the following significant aspects:

- Although Minn. Stat. § 514.05, subd.1, governs the priority of competing mortgagee and mechanic's lien interests, Respondents incorrectly parse noncontrolling sections of the Torrens Act in a misguided attempt to establish the priority of their liens. Because section 514.05, subdivision 1, makes no distinction between abstract and Torrens property, whether the subject property is abstract or Torrens is irrelevant to the priority analysis. (*See Appellant's Brief*, pp. 13-14.)

- Contrary to Respondents' exhortations, BankFirst is not requesting that this Court carve out a "mortgage exception" to the existing legal framework for resolving priority disputes. There is no need for this Court to re-define or even to delve into the intricacies of the Torrens System. Rather, under established principles outlined by this Court in the *Home Lumber* decision, *any mortgage* filed with the county recorder or with the county registrar takes priority over a mechanic's lien that attaches after the mortgage's date of filing.

- Minn. Stat. § 508.25 of the Torrens Act does not provide any special protections to a mechanic's lienholder claiming priority over a mortgagee. In fact, neither claimant here is the "good faith" holder of the certificate of title to the subject property. As discussed in BankFirst's opening brief, section 514.05, subdivision 1, is intended to strike a balance between the competing interests of the property owner's creditors – the lender whose financing made any development possible versus the contractor who performed improvements to the parcel. (*See Appellant's Brief*, p. 11) (unlike lenders, contractors are

not driven by priority concerns and generally expect financing to be in place before they begin work).

- Respondents' position that a mortgage against Torrens property is only "of record" upon its memorialization on the certificate of title constitutes a significant departure from established "real world" practices and contravenes Minn. Stat. § 514.05's purpose of fixing relative lien interests with "definiteness and certainty." Defining "of record" as meaning "memorialized" creates an utterly unworkable rule given that the certificate of title bears no indicia of when a mortgage is ultimately memorialized thereon. Under the court of appeals' ruling, Torrens mortgagees will have no basis for knowing or predicting their priority date. (*See* Appellant's Brief, pp. 28-31.)

- Certificate of Title No. 1144974 (R.Add.3) provides "conclusive evidence" that Calhoun Development, LLC was the owner of the subject property when Respondents commenced improvements. Because Respondents neither had a direct contract with Calhoun nor delivered pre-lien notice on Calhoun, their mechanics' liens are void pursuant to Minn. Stat. § 514.011.

**I. "Of Record" Means Filed with the County Recorder or with the County Registrar.**

BankFirst has extensively briefed its position that a mortgage is "of record" within the meaning of Minn. Stat. § 514.05, subd.1, upon its filing with the county recorder or registrar. (*See* Appellant's Brief, pp. 12-14.) Respondents' bid for priority necessarily fails under the *Home Lumber* court's explanation of the framework for resolving competing mortgagee and mechanic's lien interests -- namely, comparing the mortgage's

filing date with the date visible improvements began. *Home Lumber Co. v. Kopfmann Homes, Inc.*, 535 N.W.2d 302, 304 (Minn. 1995).

Apparently recognizing their inability to establish priority under the existing framework, Respondents take this Court to task for its analogous treatment (for priority purposes) of a mortgage's filing with either the county recorder or registrar of titles; without citing any authority, Respondents go so far as labeling the *Home Lumber* court's reference to the "registrar of titles" as "erroneous" and "inadvertent." (See Respondent's Brief, p. 37.) However, the fact that *Home Lumber* involved an abstract parcel has no bearing on this Court's articulation of the proper mechanism under Minnesota law for resolving the priority of competing mortgage and mechanic's lien interests.

Respondents have ignored the fact that Minnesota is a race-notice state, regardless of the method (abstract or Torrens) for providing notice of property interests. See Minn. Stat. § 508.48 (applying the Recording Act's race-notice standards to the Torrens System);<sup>1</sup> *In re Collier*, 726 N.W.2d 799, 809 (2007); *Home Lumber*, 535 N.W.2d at 304; *Henry v. White*, 123 Minn. 182, 184, 143 N.W. 324, 325 (1913); *In re Ocwen Fin. Servs., Inc.*, 649 N.W.2d 854, 857 (Minn. App. 2002). Respondents' claims that the priority determination between two competing creditor interests should depend on whether the subject property is registered or abstract lacks any basis in law or logic – particularly since Minn. Stat. § 514.05, subd. 1, makes no distinction between Torrens and abstract parcels.

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<sup>1</sup> The Recording Act, under Minnesota law, applies to both Torrens and abstract property unless a specific section of the Torrens Act specifies to the contrary. *Armstrong v. Lally*, 209 Minn. 373, 375-76, 296 N.W. 405, 405-06 (1941). Respondents have not identified any such section.

Here, the Minnesota Court of Appeals erred in concluding that the meaning of “of record” as used in Minn. Stat. § 514.05, subd. 1, can only be determined by reference to the Torrens Act. *Imperial Developers, Inc. v. Calhoun Dev., LLC*, 775 N.W.2d 895, 899 (Minn. App. 2009). There is no reason to go beyond the unambiguous language of section 514.05. “Of record” under section 514.05 is plain and clearly means date of filing for very simple but significant reasons.

First, this definition provides certainty, definiteness and clarity. It avoids the unintended result of creating a dual standard, one that affords certainty and effectiveness for one property (abstract), but another that does just the opposite and that rests on the whims, caprice and actions of a third party (Torrens). *See* Minn. Stat. § 645.17(2) (2008) (directing courts to presume that the legislature intends the entire statute to be “effective and certain”); *see also In re Collier*, 726 N.W.2d at 805. Respondents’ and the court of appeals’ view that priority is determined differently for Torrens than for abstract property flies in the face of section 514.05, subdivision 1, ’s purpose of fixing the relative priority rights of mortgagee and lienholders with “definiteness and certainty.” *See, e.g., Reuben E. Johnson Co. v. Phelps*, 279 Minn. 107, 116, 156 N.W.2d 247, 253 (1968). Simply put, the legislature could not have intended for lenders to have the ability to protect the priority of their abstract mortgages by taking priority pictures at the time of recording, while leaving the priority date for Torrens parcels *to chance* according to some indefinite time in the future when the mortgage eventually gets memorialized on the certificate of title.

Second, that “of record” means date of filing provides the equitable balance

between mortgagees and contractors sought under section 514.05 (*see* Appellant's Brief, p. 11) and allows the lender to control its fate in Torrens, the same as it does in abstract. A diligent lender is presumed to control or assure its right to priority under section 514.05, especially in situations where *but for* that priority position of the mortgage, no lending will occur. Clearly, there is no "balance" between mortgagees and contractors if the former must relinquish control of its priority position to third parties.

Third, once the mortgage is filed, a third party (purchasers, contractors, lenders, etc.) could visit the county registrar's office and find that mortgage as a matter of public record. Therefore, by definition, a filed document must be "of record."

Fourth, a holding that "of record" simply means filing with the county recorder or registrar (according to whether the property is abstract or Torrens) in no way diminishes the purpose of the Torrens Act, which is to "simplify conveyancing by eliminating the need to examine lengthy and extensive abstracts of title." *Hersh Props., LLC v. McDonald's Corp.*, 588 N.W.2d. 728, 733 (Minn. 1999). Thus, any distinctions between the Torrens and abstract land title systems are irrelevant to determining whether competing mortgage and mechanic's lien interests take priority under section 514.05. Were this not the case, mortgages against properties that are part Torrens and part abstract would have different priority dates for different portions of the same mortgaged property. This would create an absurd result that the legislature clearly avoided by declining to draw a distinction between Torrens and abstract parcels when enacting section 514.05, subdivision 1.

Respondents nonetheless cite *392 Lexington Parkway* to support their erroneous contention that section 514.05 imposes separate priority dates for a mortgage encumbering land that is part Torrens and part abstract. (See Respondents' Brief, p. 14 n. 9.) While that case does involve property that is both Torrens and abstract, it in no way stands for the proposition that a mortgage against such property has different priority dates for purposes of section 514.05. *392 Lexington Parkway* does not determine or even address the definition of "registered," or deal with a mortgage that was filed but not memorialized.

**II. Even If "Of Record" Means "Registered" Within the Meaning of Minn. Stat. § 508.55, BankFirst's Mortgage Is Prior to Respondents' Coordinate Mechanics' Liens.**

Alternatively, in the event this Court were to rule that a Torrens mortgage only becomes "of record" for section 514.05 priority purposes once it is "registered" pursuant to section 508.55 of the Torrens Act, BankFirst still prevails.<sup>2</sup> (See Appellant's Brief, pp. 20-23) (demonstrating that a Torrens instrument is "registered" when it has *been* filed, time-stamped, and assigned a registration document number). Indeed, the *392 Lexington Parkway*, *Ocwen*, and *Fingerhut* courts have all employed the date of filing as the date of registration. See *392 Lexington Parkway*, 386 F.Supp. 2d at 1065, 1071 (referencing the date of registration as December 5, 2003 -- the date MGIII's mortgage was filed with the registrar); *Ocwen*, 649 N.W.2d at 857; *Fingerhut*, 460 N.W.2d at 65, 68 (notice of lis pendens was registered at 9:00 a.m. on August 29, 1986, when filed).

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<sup>2</sup> Respondents' reliance on Minn. Stat. § 508.49 is misplaced (see Respondents' Brief, p. 19) as section 508.55 deals more specifically with registration of mortgage interests. See Minn. Stat. § 645.26, subd. 1. Were the process of registration not different in section 508.55 from section 508.49, the legislature would not have crafted two different sections. See Minn. Stat. § 645.17(1) (statutes should be interpreted "to give effect to all of its

Paramount to this analysis is the fact that **a certificate of title bears no indicia of when a mortgage is ultimately memorialized thereon.** *Imperial*, 775 N.W.2d at 907 (Schellhas, J., concurring in part, dissenting in part) (Add.34). Instead, Minn. Stat. § 508.38 requires the registrar to note upon the mortgage instrument a document number as well as **“the date, hour, and minute when the instrument is filed.”** Section 508.38 further requires the registrar to note this same information as a memorial<sup>3</sup> on the certificate of title. Accordingly, a certificate of title lists the “Date of Registration,” down to the Month, Day, Year, and Time, **which all correspond to the precise time of filing with the county registrar.**

Significantly, Minn. Stat. § 508.36 provides that a certificate of title shall be “conclusive evidence of all matters and things contained in it” and that it “shall be received in evidence in all the courts of this state, without further or other proof, and be prima facie evidence of the contents of it.” Accordingly, Certificate of Title No. 1189682’s listing of the Date of Registration of BankFirst’s mortgage as June 28, 2005 is **conclusive, prima facie evidence that the mortgage was “registered” on that date.** (Add.43-44.) This Court must, therefore, reverse the court of appeals and re-affirm the district court’s judgment granting priority to BankFirst.

### **III. Recognition of the Gap between Filing and Memorialization Does Not Render This Court’s Decision Into an Advisory Opinion Based on “Hypothetical” Facts.**

Respondents claim that BankFirst is actually seeking an “advisory opinion,” contending that the gap between the filing of a mortgage and its subsequent

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provision,” with no part deemed superfluous).

<sup>3</sup> By its common meaning, a “memorial” is a notation or transfer of an act that has already

memorialization on the certificate of title constitutes a “hypothetical” situation that did not occur here. (*See* Respondents’ Brief, pp. 29-30.) According to Respondents, BankFirst has no right to point to this known gap as the reason for using the filing date as the mortgage’s priority date because the delay in memorialization here was not caused by the typical gap period, but rather by a “defective registration.” (*See* Respondents’ Brief, pp. 30-31.)

However, BankFirst’s “gap argument” is not a hypothetical one. The filing date is the *only* method or means by which to determine priority disputes under section 514.05. Given the ever-present gap between filing and memorialization that exists in every case, the registrar has a legislative mandate (Minn. Stat. § 508.38) to note the time of filing and to memorialize it as the “Date of Registration” on the certificate of title. **The legislature’s failure to require that the certificate of title include the time that a document is memorialized is not without significance.** Accordingly, from the inception of this action, BankFirst has maintained that its mortgage was both “of record” and “registered” upon being filed with the registrar, time-stamped, and assigned a document number.

Furthermore, Respondents’ characterization of the registration of BankFirst’s mortgage as “defective” is without merit. (*See* Appellant’s Brief, pp. 25-26.) Again, Certificate of Title No. 1189682 (Add.43-44) provides “conclusive evidence” that BankFirst’s mortgage was registered on June 28, 2005; thus, as a matter of law, this case does not involve a defective registration. Were the registration defective, it would have included an improper property description (*see, e.g., United States v. Ryan*, 124 F. Supp.

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been performed.

1, 4, 6 (D. Minn. 1954)) or an erroneous mortgage amount (*see, e.g., Horgan v. Sargent*, 182 Minn. 100, 101, 104, 233 N.W. 866, 867-68 (Minn. 1930)).

Respondents miss the mark by arguing that under BankFirst's interpretation "the only act necessary to perfect registration would be to present a document to the registrar." (Respondents' Brief, p. 21.) In fact, the mere handing of the document to the registrar does not constitute "registration" -- the registrar must time-stamp and assign a document registration number.

The fact that "registration" occurs prior in time to memorialization is in no way problematic and actually places mortgagees and lien claimants on equal footing. Under the mechanic's lien statute, a lien statement must be filed within 120 days of the last item of work in order to perfect the lien (Minn. Stat. § 514.08). However, the lien's date of attachment for priority purposes under section 514.05 is the date of the first visible improvement -- a date well before the date of filing.<sup>4</sup> Similarly, even though a mortgage is not memorialized on the certificate of title until after the typical gap period, the mortgage's priority date is taken from its earlier date of filing with the registrar. *See Home Lumber*, 535 N.W.2d at 304. In fact, no other result is possible given that the date of memorialization is not documented or noted on the certificate of title.

#### **IV. *Home Lumber, Ocwen, and Minn. Stat. § 514.05, Subd. 1, Provide the Apposite Authority for Resolving this Action.***

Contrary to Respondents' assertions, neither *Ryan* nor *Horgan* are controlling here. As noted in BankFirst's opening brief, *Ryan* involves the invalidation of a **tax lien**, filed without a

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<sup>4</sup> Under Respondents' interpretation of "of record," if a mechanic's lien statement is timely filed pursuant to section 514.08, but the statement is not memorialized until well after the 120-day deadline, the lien would be void as a matter of law. This kind of uncertainty and punitive result must not be sustained.

property description. (See Appellant's Brief, p. 24.) In fact, *Ryan* should be completely disregarded by this Court in resolving the present mechanics' lien priority dispute. In Minnesota, tax liens over Torrens property simply do not need to be filed with the county registrar. See 26 U.S.C. § 6323(f)(1)(A)(i) (tax liens must be filed in single location designated by State); Minn. Stat. § 272.481 (State of Minnesota has designated the County Recorder). Moreover, state courts are not bound by federal interpretations of state law. *E.g.*, *State ex rel. Hatch v. Employers Ins. of Wausau*, 644 N.W.2d 820, 828 (Minn. App. 2002).

Likewise, *Horgan* offers very little guidance as it involves an owner's attempt to obtain relief for the portion of a prior mortgage greater than the mortgage amount noted on the certificate of title; *Horgan* does not involve competing priority interests between mortgagees and coordinate mechanics' lien claimants. 182 Minn. at 101-02, 106, 233 N.W. at 867-69 (owner's reliance on mortgage amount listed on certificate of title instead of "going to the files of the registrar to examine an instrument described in the memorial" did not constitute negligence that would preclude recovery under the state assurance fund).<sup>5</sup> ***Horgan* illustrates that even under the Torrens System, the original instrument conveying an interest in property ultimately controls – not the memorialization thereof.** See also *Nolan v. Stuebner*, 429 N.W.2d 918, 922-23 (Minn. App. 1988) (while a certificate of title may provide conclusive evidence of an easement, "it does not preclude judicial inquiry into the validity of the easement," and may be altered to reflect the easement's proper legal description).

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<sup>5</sup> Similarly, Respondents would not be precluded from recovery under the state fund for losing priority due to the extraordinary delay in memorialization of BankFirst's mortgage because of their failure to look at the instruments on file with the registrar.

Nor is Respondents' reliance on the *392 Lexington Parkway*, *Fingerhut*, and *Chaney* decisions well-placed. None of those cases involves a priority dispute governed by section 514.05, defines "registration," or deals with documents that were filed but not memorialized until after a significant delay.

Instead, *Home Lumber* and *Ocwen* provide the dispositive authority for resolving the present case. As explained above, *Home Lumber* provides the blueprint for resolving priority disputes between mortgagees and mechanics' lien claimants. In addition, *Ocwen* confirms that "**registration document numbers** are conclusive evidence of the order in which the mortgages were filed and demonstrate [which] mortgage was **registered** first." 649 N.W.2d at 857 (emphasis added); *see also* Minn. Stat. § 386.31 (document numbers constitute "prima facie evidence of priority of registration"). Respondents' attempt to minimize the relevance of *Ocwen* by arguing that the competing mortgages in that case were memorialized misses the mark for three reasons: (1) *Ocwen* never states that the mortgages at issue there were memorialized; (2) *Ocwen* does not define "registration" as including memorialization; instead, the *Ocwen* court clearly relied on **the time of filing** as conclusive evidence of the time of registration; and (3) most important, in this case, BankFirst's mortgage was, in fact, memorialized on Certificates of Title Nos. 1189682 (Add.43-44) and 1189683 (Add.45-46).

**V. Respondents' Reliance on a Post-Facto Electronic Filing Statute Is Irrelevant to the Instant Priority Dispute.**

Notably, the court of appeals did not find Respondents' reliance on the 2008 Minnesota Real Property Electronic Recording Act (2008 Minn. Laws c. 238, art 2 §§1-10) to be remotely dispositive as evidenced by *Imperial's* lack of any reference to this

post-facto legislation. Nonetheless, in their brief, Respondents' have revived the argument that the Electronic Recording Act should be read in *pari materia* with section 508.55. (See Respondents' Brief, p. 25.)

This analysis is flawed because Minnesota law is clear that mechanic's lien actions are determined by the law in effect when work was completed. *Thompson Plumbing Co., Inc. v. McGlynn Cos.*, 486 N.W.2d 781, 784 (Minn. App. 1992). Here, the lien claimants' last day of work was on June 29, 2006 (Add.18-19), while the Electronic Recording Act did not take effect until July 1, 2008. A statute enacted after the fact simply cannot be read in *pari materia* with an unambiguous statute<sup>6</sup> already in effect. Moreover, Minn. Stat. § 645.21 provides that no law shall be construed retroactively "unless clearly and manifestly so intended by the legislature." Here, there is no evidence that the legislature intended section 507.0943 of the Electronic Recording Act to be applied retroactively.<sup>7</sup> In fact, that would be *impossible* given that Minn. Stat. §§ 507.0941-.0948 (2008) essentially provide authority for *developing* a framework for electronically filing instruments affecting an interest in abstract or Torrens property. Respondents are apparently unaware that the system for electronic filing of a Torrens mortgage is not yet operational in Hennepin County. See Minn. Stat. § 507.0945(a) & (f) (creating Electronic Real Estate Recording Commission to adopt standards to implement sections 507.0941-.0948 and to identify "the information technology expertise it requires").

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<sup>6</sup> Section 508.55 already explains how a mortgage against Torrens property is registered.

<sup>7</sup> Although retroactive application of a statute is permissible when the statute constitutes a clarification as opposed to a modification of existing law, Minn. Stat. §§ 507.0941-.0948 obviously do not fall within this exception since the planned electronic registration of Torrens mortgage constitutes a clear departure from the status quo. See *Nardini v. Nardini*, 414 N.W.2d 184, 196 (Minn. 1987).

Respondents, nonetheless, argue that section 507.0943(e) must be viewed as validating their interpretation that a Torrens mortgage is only “registered” upon memorialization. *See* Minn. Stat. § 507.0943(e) (“an electronic document is registered as to a parcel of registered land for purposes of chapters 508 and 508A when the electronic document is memorialized or otherwise noted on the certificate of title for the parcel”). They further contend that since the Electronic Registration Act will allow either paper or electronic filing, BankFirst’s interpretation of “registered” as meaning filed with the registrar, time-stamped, and assigned a document number will result in an unworkable conflict between paper and electronic registrations. (Respondents’ Brief, p. 26.)

However, in stating that interests in Torrens property **filed electronically** will be deemed “registered” upon memorialization, the legislature apparently intends electronic filing to eliminate the standard gap between filing and memorialization. Thus, Respondents’ concerns that an “unworkable conflict” between paper filings and electronic filings would result under BankFirst’s interpretation of what constitutes registration are unfounded. In fact, *only* BankFirst’s interpretation would avoid such an “unworkable conflict.” That is, once electronic filing of Torrens mortgages is up-and-running, filing and memorialization will become simultaneous or nearly simultaneous. Yet, there will always be a gap between the submission of a paper filing with the registrar and the subsequent memorialization of that interest on a certificate of title. Surely, the legislature could not have intended the absurd result that the priority date of a Torrens mortgage depends on whether it was filed electronically or by paper. *See* Minn. Stat. §

645.17 (1) (legislature does not intend a result that is absurd, impossible of execution, or unreasonable”).

To eliminate any such discrepancy, the time of registration (or priority date) of paper filings must be taken from the time-stamp noted on the mortgage instrument when filed with the registrar. That way, both electronic filings and paper filings would take a priority date based on when they are filed for record with the registrar. The two systems must work in such a harmonious fashion. **Frankly, no other framework would be workable given the fact that certificates of title do not indicate the time of memorialization.**

In any event, the system contemplated by the Electronic Recording Act has yet to be implemented. Accordingly, the Act is inapplicable to the resolution of this priority dispute that arose in 2006.

**VI. This Court Is Not Precluded from Affirming the District Court's Judgment in Favor of BankFirst Based on Respondents' Failure to Deliver Pre-Lien Notice.**

A. Procedure

Respondents' position that BankFirst has waived or failed to preserve the issue of pre-lien notice is without merit. The record shows that BankFirst raised this issue before both the district court and the court of appeals. (A.16-18, 23; BankFirst's Court of Appeals Brief, pp. 29-30.) The district court clearly agreed with BankFirst's alternative position that in the event its mortgage was not "of record" upon filing with the registrar, BankFirst would still prevail since Respondents' failure to deliver pre-lien notice on the owner of record would operate to extinguish their mechanics' liens. (Add.14.)

To be clear, when the district court granted summary judgment in BankFirst's favor on the issue of priority, the parties agreed to stipulate to the validity of Respondents' lien amounts and to the amount of claimed attorney fees in order to facilitate appeal of the summary judgment priority ruling. (A.24, ¶¶14-16,18; A.28, ¶¶27-29.) The district court's final judgment (Add.21, Conclusion of Law, ¶ 4) explicitly incorporates the summary judgment order granting priority to BankFirst as well as the court's memorandum explaining that Respondents cannot have it both ways by relying on the certificate of title to deny that BankFirst's mortgage was "of record" at the time of their improvements, while arguing they had no duty to deliver pre-lien notice on the owner of record listed on that same certificate. (Add.14.) BankFirst had no reason to appeal the district court judgment.

BankFirst did, however, request that the court of appeals uphold the judgment in its favor based on the pre-lien argument should it disagree with the district court's priority ruling. (BankFirst's Court of Appeals Brief, pp. 29-30.) Similarly, should this Court disagree with the district court's ruling on priority, it can still uphold judgment in BankFirst's favor. *See In re Livingood*, 594 N.W.2d 889, 896 (Minn. 1999) (appellate courts may even consider evidence never filed with the trial court where that evidence is of a conclusive nature and "supports the result obtained in the lower court"); *Kunza v. St. Mary's Reg'l Health Ctr.*, 747 N.W.2d 586, 589-90 (Minn. App. 2008) ("an appellate court will consider an issue not decided below where it played a prominent role in briefing and may be dispositive").

B. Law

Respondents now argue for the first time<sup>8</sup> that they were not required to deliver pre-lien notice upon Calhoun (listed as record owner on Certificate of Title No. 1144974)<sup>9</sup> because Minn. Stat. § 514.011, subd. 5, defines "owner" as "the owner of any legal or equitable interest in real property whose interest in the property (1) is known to one who contributes to the improvement of the real property, or (2) has been recorded or filed for record if registered land, and who enters into a contract for the improvement of the real property." Respondents claim that Lind Homes – not Calhoun – was the owner of a legal or equitable interest in the property since "filed for record" does not mean "registered." (*See* Respondents' Brief, pp. 46-47.) This argument lacks merit as it

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<sup>8</sup> *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (barring issues presented for the first time on appeal).

<sup>9</sup> *See* R.Add.3, which constitutes a copy of Certificate of Title 1144974 as it appeared in August 2006, before its cancellation in September 2006. Respondents never provided a copy of Certificate of Title No. 1144974 showing it was obtained in May 2006 before

completely ignores that Calhoun fits within the first prong of section 514.011's definition of owner. That is, Calhoun had a legal interest in the property known to Respondents because Calhoun was listed as the registered owner on the very certificate of title (R.Add.3) that Respondents claim to have relied upon before beginning improvements.

In addition, in parsing the statute's definition of "owner," Respondents ignore the plain language of Minn. Stat. § 508.36 (anything appearing on the face of the certificate of title is "conclusive evidence of all matters and things contained in it"). Accordingly, pursuant to the certificate of title in effect at the time of the improvements (Certificate of Title No. 1144974; R.Add.3), Calhoun was the owner of the subject property. It is undisputed that Respondents neither had a direct contract with Calhoun nor delivered pre-lien notice on Calhoun. Hence, pursuant to Minn. Stat. § 514.011, Respondents' liens over this Torrens parcel are void. *See Merle's Constr. Co. v. Berg*, 422 N.W.2d 300, 302 (Minn. 1989). In short, subcontractors are required to provide pre-lien notice to the owner listed on the certificate of title. *See Mill City Heating & Air Conditioning Co. v. Nelson*, 351 N.W.2d 362, 368 (Minn. 1984) (requiring subcontractor to provide pre-lien notice of a mechanic's lien to record owner contained on certificate of title).

**VII. This Court Should Apply Recognized Equitable Principles to Affirm the District Court's Judgment in BankFirst's Favor.**

Finally, this Court should apply equitable principles to affirm the district court's judgment in BankFirst's favor. Here, as the district court determined, Respondents did

not exhibit good faith. (See Appellant’s Brief, pp. 31-32.) While BankFirst complied with all registration requirements under the Torrens Act, Respondents knew something was awry. If truly relying on Certificate of Title 1144974 before commencing improvements as they claim, Respondents necessarily knew that the certificate did not list Lind Homes, Inc. (the party with which they had contracted) as the owner. In short, Respondent’s claimed “reliance of Certificate of Title No. 1144974 was not in good faith.” (Add.13.) See *In re Collier*, 726 N.W.2d at 808 (recognizing applicability of equitable principles where a result under the Torrens Act “violates notions of justice and good faith”); *Herbert v. City of Fifty Lakes*, 744 N.W.2d 226, 233 n. 6 (Minn. 2008) (equitable principles may be applied “to disputes involving Torrens property”); *Finnegan v. Gunn*, 207 Minn. 480, 292 N.W.2d (1940) (“nothing in Torrens system indicates that the ancient concepts of equity are not applicable under certain circumstances”).

### CONCLUSION

Appellant BankFirst respectfully requests that this Court affirm the district court’s judgment establishing the priority of its mortgagee interests over Respondents’ coordinate mechanics’ lien interests. A mortgage – whether against abstract or Torrens property – is “of record” within the meaning of Minn. Stat. § 514.05, subd. 1, when it is filed with either the county recorder or registrar. Moreover, should this Court deem “of record” to mean “registered” (for priority disputes involving registered property), a Torrens mortgage is “registered” within the meaning of Minn. Stat. § 508.55 when it is filed with the county registrar, time-stamped, and assigned a document registration number.

The district court's judgment in BankFirst's favor is further justified by the fact that the certificate of title is "conclusive evidence of all matters and things contained in it." Thus, Certificates of Title Nos. 1189682 (Add.43-33) and 1189683 (Add.45-46) constitutes conclusive evidence that BankFirst's mortgage was registered on June 28, 2005.

In addition, the certificate of title in effect at the time Respondents commenced their improvements (No. 1144974; R.Add.3) conclusively shows Calhoun Development, LLC to be the owner of record. Thus, even if this Court rules that BankFirst's mortgage was not "of record" upon its filing with the registrar, Respondents' liens would be invalid for failure to provide pre-lien notice to Calhoun.

Finally, BankFirst's mortgagee interest should prevail over Respondents' coordinate liens under equitable principles given Respondents' purported reliance on a certificate of title that did not list Lind Homes, LLC – the party with which they were contracting – as owner.

Respectfully submitted,

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