NO. A08-1883

State of Minnesota

In Supreme Court

Imperial Developers, Inc.,

Plaintiff,

vs.

Calhoun Development, LLC,

Defendant,

Regal Custom Homes, Inc., et al.,

Defendants,

Lind Homes, Inc.,

Defendant,

Thompson Plumbing Corp.,

Defendant,

Great Northern I. Inc.,

Defendant,

Southview Design & Construction, Inc.,

Respondent,

BankFirst,

Appellant,

and

The Woodshop of Avon, Inc.,

Additional Defendant,

and

Scherer Bros. Lumber Co.,

Respondent,

vs.

Matthew Lind, et al,

Third Party Defendants,

and

Simonson Lumber of Ham Lake, Inc.,

Third Party Plaintiff,

vs.

Contractors Capital Corporation, et al.,

Third Party Defendants.

BRIEF, ADDENDUM AND APPENDIX OF RESPONDENTS SOUTHVIEW DESIGN & CONSTRUCTION, INC. AND SCHERER BROS. LUMBER CO.

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LEGAL ISSUES PRESENTED

I. Did the Court of Appeals correctly hold that, absent actual notice, Respondents' mechanic's liens take priority over mortgages that were not memorialized on the property's certificate of title, and thus not registered or "of record" for Torrens property at the time that the mechanic's liens attached?

The parties brought cross motions for partial summary judgment on the sole issue of the competing priorities of Respondents' mechanic's liens and the mortgages. (A.App.1-5).[1] The district court denied Respondents' motion and granted partial summary judgment for the mortgagees, ruling that the mortgages were (1) prior to Respondents' liens, and (2) "registered" and "of record" upon the date of filing with the registrar of titles. (A.Add.1-15). In lieu of trial, the parties entered into an Amended Stipulation of Facts, from which the court issued Findings of Fact, Conclusions of Law, Order for Judgment, and Judgment ("Order") declaring Respondents' liens valid and incorporating its decision regarding the priority of the mortgages. (R.Add.1-2; A.App.24-31; A.Add16-22).

The Court of Appeals reversed, holding that under the clear terms of Minn. Stat. § 508.55, mortgages that were not memorialized on the certificate of title to Torrens property were not registered or "of record" when Respondents' liens attached, and thus, as long as Respondents had no actual notice of the mortgages, Respondents' liens were prior and superior to the mortgages. (A.Add.23-34).

Apposite Authority: *Horgan v. Sargent,* 182 Minn. 100, 233 N.W. 866 (1930); *United States v. Ryan,* 124 F. Supp. 1 (D.Minn. 1954); *In re Juran,* 178 Minn. 55, 226 N.W. 201 (1929). Minn. Stat. §§ 514.05, subd.1; 508.49; 508.54; 508.55.

II. Given the undisputed facts that Respondents did not have actual notice of the mortgages, do Respondents' mechanic's liens take priority over the mortgages?

The parties brought cross motions for partial summary judgment on the sole issue of the competing priorities of Respondents' mechanic's liens and the mortgages. (A.App.1-5). The district court denied Respondents' motion and granted partial summary judgment for the mortgagees, ruling that Respondents had "actual knowledge" that the certificate of title was "inaccurate" merely because it listed Calhoun as the fee owner. (A.Add.1-15). The court reasoned that the listing of Calhoun as fee owner "should have been enough to

[1] "A.App.__" refers to Appellant's Appendix; "A.Add.__" refers to Appellant's Addendum; "R.App.__" refers to Respondents' Appendix; and "R.Add.__" refers to Respondents' Addendum.

raise questions" and that Respondents "had a duty...to inquire" as to whether there were mortgages or other interests not appearing on the certificate. (A.Add.13).

The Court of Appeals held that the district court's reasoning regarding the notice issue amounted to "constructive notice" and remanded for reconsideration of whether Respondents had actual notice of the mortgages. (A.Add.23-34).

In its Brief, Appellant asserts that it has never argued that Respondents had actual notice of the mortgages and that remand is unnecessary. (Appellant's Br. at 38-39).

Apposite Authority: Minn. Stat. § 514.05, subd.1; *In re Juran,* 178 Minn. 55, 226 N.W. 201 (1929); *Comstock & Davis, Inc. v. G.D.S. & Assocs.,* 481 N.W.2d 82 (Minn. Ct. App. 1992); *In re Alchemedes/Brookwood, Ltd. Partnership*, 546 N.W.2d 41 (Minn. Ct. App. 1996).

III. Did the Court of Appeals properly preclude Appellant's challenge to the validity of Respondents' mechanic's liens where Appellant stipulated to validity of the liens, where the issue of pre-lien notice was not decided by the district court, and where Appellant never appealed the district court order declaring the liens valid?

The parties brought cross motions for partial summary judgment on the sole issue of the competing priorities of Respondents' mechanic's liens and the mortgages. (A.App.1-5). The district court denied Respondents' motion and granted partial summary judgment for the mortgagees, ruling that the mortgages were prior to the liens. (A.Add.1-15). Because priority, not validity, was the subject of both summary judgment motions, the court refused to address the validity of Respondents liens and stated that "The Court takes no position on the validity of any of the mechanic's liens in this action as that matter is not currently before the court." (A.Add.14, n.1).

Subsequently, Appellant stipulated that it was "not contesting the validity of the liens" and, in lieu of trial, the parties entered into an Amended Stipulation of Facts. (R.Add.1-2; A.App.24-31). Based upon the parties' stipulations, the district court issued an Order declaring Respondents' liens valid. (A.Add.16-22). Appellant did not contest or appeal from the Order and did not preserve any issue for appeal.

On Respondents' appeal, the Court of Appeals held that Appellant was precluded from raising the issues of pre-lien notice or validity of the liens because the issues were "not formally argued or decided by the district court." (A.Add.31).

Apposite Authority: Minn. Stat. § 514.011, subd. 2(a), 4a, and 5; *Thiele v. Stich,* 425 N.W.2d 580 (Minn. 1988); *Mill City Heating & Air Conditioning Co. v. Nelson,* 351 N.W.2d 362 (Minn. 1984); *Carey v. Brown,* 194 Minn. 127, 260 N.W. 320 (1935).

STATEMENT OF THE CASE

Appellant BankFirst appeals the Court of Appeals decision holding that, absent actual notice, the mechanic's liens of Respondents Southview Design & Construction ("Southview") and Scherer Bros. Lumber Company ("Scherer") are prior and superior to mortgages that were not memorialized on the certificate of title, and thus not "of record" to the Torrens property, at the time Respondents' liens attached.

Minnesota Statute § 514.05, subd.1 provides that a mechanic's lien attaches and takes effect from the time the first item of material or labor is furnished to the premises and shall take priority over any mortgage not then "of record" unless the lienholder had actual knowledge thereof. As the Court of Appeals correctly held, to be "of record" for Torrens property, a mortgage must be registered and appear as a memorial on the property's certificate of title. The Court of Appeals held that under the clear and unambiguous terms of Minn. Stat. § 508.55, to be registered, a mortgage must both be filed with the registrar of titles and memorialized on the certificate of title.

An application of law to the undisputed facts mandates affirming the Court of Appeals decision and granting judgment in favor of Respondents. As the Court of Appeals correctly determined, as a matter of law, the mortgages were not "of record" at the time Respondents' liens attached. Thus, unless Respondents had actual notice of the mortgages at the time their liens attached, Respondents were entitled to judgment declaring their liens prior to the mortgages.

In its appeal, Appellant concedes that it "has never argued" that Respondents had actual notice of the mortgages and remand on the issue of notice is unnecessary.

(Appellant's Br. at 38-39). Based upon the undisputed facts and Appellant's concession regarding the lack of actual notice, this Court should reverse the district court and grant judgment for Respondents, declaring Respondents' liens prior to the mortgages.

In addition, by repeatedly stipulating to the validity of Respondents' liens and by failing to appeal the district court Order declaring Respondents' liens valid, Appellant waived its right to challenge the validity of the liens based upon a meritless pre-lien notice issue. Accordingly, this Court should uphold the Court of Appeals decision precluding Appellant from raising this issue on appeal.

STATEMENT OF FACTS

This appeal involves Lot 4 ("Property") of a residential subdivision known as Edenvale Highlands. (A.App.25; A.Add.17). The Property and all eight parcels in the subdivision are Torrens property, registered with the Hennepin County Registrar of Titles ("Registrar") and subject to the Torrens Act. (A.App.25; A.Add.17). Each lot in the subdivision was issued a separate certificate of title. (O'Reilly Aff. Ex.1-8). At the time of registration, the developer, Calhoun Development, LLC ("Calhoun"), was the fee owner of each lot. *Id.*

On June 27, 2005, Calhoun conveyed Lots 3, 4, and 5 to Lind Homes, Inc. ("Lind") by Warranty Deed. (R.Add.7). Lind took title to the Property on June 27, 2005, and thus was the fee owner of the Property at that time.[2] (A.Add.18; A.App.25). The Warranty Deed was filed with the Registrar on June 28, 2005 (Document No.4129639). (R.Add.7).[3]

At the time of the conveyance on June 27, 2005, Lind granted a mortgage to Appellant. (A.Add.35-38). Said mortgage was filed with the Registrar on June 28, 2005 (Document No. 4129640) ("Mortgage"). *Id.* Lind granted a second mortgage to Calhoun, which was also filed with the Registrar on June 28, 2005 (Document No.4129641). (O'Reilly Aff. Ex. 12).

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[2] Appellant stipulated that Lind took title to the Property on June 27, 2005, and owned the Property at the time this action was commenced in October 2006. (A.App.25 at ¶4).

[3] Throughout Appellant's Statement of Facts, Appellant improperly states that the Deed and Mortgages were "registered" on June 28, 2005, and that the Deed was "re-registered" on September 20, 2006. (Appellant's Br. at 5-8). The date of registration is a central question of law in dispute in this case. Appellant cannot claim as fact that the Mortgages or Deed were anything more than filed on June 28, 2005, and September 20, 2006.

As a result of the conveyance, the Registrar issued a new Certificate No.1157096 for Lot 5. (A.Add.41-42). No new certificates were issued for Lots 3 or 4. (R.Add.3-6; A.Add.39-40). The Registrar memorialized the BankFirst and Calhoun mortgages ("Mortgages") on the Certificate No.1157096 for Lot 5, but not on the existing certificates for Lots 3 or 4 (Nos. 1144973 and 1144974). (*Id.*; A.Add.41-42). Accordingly, the certificate for the Property (Lot 4) did not contain any memorial or notice of the Mortgages. (A.Add.39-40; R.Add.3-4.).

On May 17, 2006, pursuant to a written agreement with Property owner Lind, Southview provided its first item of material and labor for the improvement of the Property. (A.App.27; A.Add.19). At the time that Southview's Lien attached on May 17, 2006, the Property's certificate (No.1144974) did not include any memorial or notice of the Mortgages. (A.Add.39-40; R.Add.3-4). In fact, all mortgages appearing on the certificate were satisfied. *Id.* As a result, Southview had no actual notice or knowledge of the Mortgages. (Iverson Aff. ¶4).

On August 29, 2006, Southview properly served its Lien Statement on Lind and Calhoun, and filed the same with the Registrar. (A.A.27; A.Add.19). Southview's Lien was then memorialized on the certificate of title for the Property, thereby perfecting the Lien. (A.Add.39-40).

Like Southview, Respondent Scherer furnished labor and materials for the improvement of the Property as part of a direct contract with the Property owner, Lind. (A.App.26; A.Add.18). Scherer's Lien attached on October 13, 2005, with the first item of labor and material furnished to the Property. *Id.* At the time that Scherer's Lien

attached on October 13, 2005, the Property's certificate (No.1144974) did not include any memorial or notice of the Mortgages. (A.Add.39-40). There is no evidence in the record that Scherer had actual notice or knowledge of the Mortgages. On September 21, 2006, Scherer properly served its Lien Statement on Lind, and filed the same with the Registrar. (A.App.26; A.Add.18).

On September 20, 2006, nearly a year after Scherer's Lien attached and over four months after Southview's lien attached, the Deed conveying Lots 3, 4, and 5 from Calhoun to Lind, which was previously filed with the Registrar as Document No.4129639, was re-filed as Document No.4307439 (a new document number). (R.Add.9-10). At this time, the Register issued a new, joint Certificate No.1189682 for Lots 3 and 4. (A.Add.43-44).

Immediately thereafter, on September 20, 2006, a "New Certificate" document (No. 4307440) was filed; the certificates for Lots 3 and 4 (No.1189682) and Lot 5 (No. 1157096) were cancelled; and a new, joint certificate (No.1189683) was issued for Lots 3, 4, and 5. (R.Add.11; A.Add.41-46). Certificate No.1189683 is the current certificate of title for Lots 3, 4, and 5. (A.Add.45-46). Certificate No.1189683 contains a memorial of the Mortgages; however, these Mortgages did not appear as memorials on the Property's certificate of title until September 20, 2006 -- long after Respondents' Liens attached. (A.Add.39-40; 45-46).

Procedural History

The issues of priority and validity of the Liens were bifurcated by the district court. The parties brought cross motions for partial summary judgment on the sole issue

of the competing priorities of Respondents' Mechanic's Liens and the Mortgages. (A.App.1-5). The district court granted the summary judgment motions of Appellant and Calhoun, and denied Respondents' motions. (A.Add.1-15). Because priority was the only issue contested and decided on summary judgment, the case proceeded to trial on the issues of validity and amount of the Liens. At the pre-trial conference, Appellant expressly stipulated to the validity of Respondents' Liens. ("We are not contesting any of the validity of the liens. Bank First is not.") (R.Add.1-2). In lieu of trial, the parties stipulated to the validity and amount of Respondents' Liens. (*Id.*; *See also* Amended Stipulation of Facts, A.App.24-31).

Based upon the stipulations, the district court issued Findings of Fact, Conclusions of Law, Order for Judgment, and Judgment ("Order").[4] (A.Add.16-22). The Order specifically found that Respondents hold valid Mechanic's Liens against the Property, and that said Liens are coordinate and of equal standing.[5] (A.Add.21). Appellant did not contest or appeal the Order declaring Respondents' Liens valid.

Respondents appealed the summary judgment order denying their motion and granting summary judgment in favor of Appellant and Calhoun with respect to priority. The Court of Appeals reversed the district court, holding that the Mortgages were not of record when Respondents' Liens attached and that the Liens had priority over the

[4] With respect to the priority of Respondents' Liens, the Order incorporates the court's Amended Findings of Fact, Conclusions of Law, and Order for Summary Judgment. (A.Add.21).

[5] No other liens against the Property were declared to be coordinate to Respondents' Liens, and no other lienholder has pursued an appeal.

Mortgages if Respondents lacked actual notice of the Mortgages. *Imperial Developers, Inc. v. Calhoun Development, LLC,* 775 N.W.2d 895, 905 (Minn. Ct. App. 2009). The Court of Appeals remanded for reconsideration on whether Respondents had actual notice of the Mortgages at the time their Liens attached. *Id.* In its appeal, Appellant does not challenge whether Respondents had actual notice of Appellant's Mortgage and states that there is no need to remand on that issue. (Appellant's Br. at 38-39).

STANDARD OF REVIEW

Whether summary judgment was properly granted or denied is a question of law reviewed *de novo* by the appellate court. *Prior Lake American v. Mader*, 642 N.W.2d 729, 735 (Minn. 2002). When a district court grants summary judgment based on the application of a statute to undisputed facts, the result is a legal conclusion that the appellate court reviews *de novo*. *Weston v. McWilliams & Assoc., Inc.*, 716 N.W.2d 634, 638 (Minn. 2006). Accordingly, the appellate court need not give any deference to the district court's application of law to the undisputed facts. *Hubred v. Control Data Corp.*, 442 N.W.2d 308, 310 (Minn. 1989).

As Appellant acknowledges, there are no disputed facts in this case. (Appellant's Br. at 9). Accordingly, the sole issues on appeal are questions of law to be determined *de novo* by this Court.

ARGUMENT

Given the undisputed facts of this case, the priority of Respondents' Liens over the Mortgages, is solely an issue of law, not of fact, mandating the reversal of the district court's summary judgment order and the granting of judgment in favor of Respondents.

Because Appellant stipulated to the validity of Respondents' Liens, and never appealed the district court Order declaring such Liens valid, the validity of Respondents' Liens, including the issue of pre-lien notice, is not properly before the Court and must be disregarded.

The parties agree that the issue of priority is dictated by Minn. Stat. § 514.05, subd.1, which provides:

> All liens, as against the owner of the land, shall attach and take effect from the time the first item of material or labor is furnished upon the premises for the beginning of the improvement, and shall be preferred to any mortgage or other encumbrance not then **of record**, unless the lienholder had **actual notice** thereof.
>
> (Emphasis added). [6]

Consequently, the issues properly before the Court are simple and twofold: (1) whether the Mortgages were "of record" at the time Respondents' Liens attached; and (2) whether Respondents had actual notice of the Mortgages when their Liens attached. The indisputable answer to both questions is no.

The facts are clear and undisputed that the Mortgages were not "of record" on the Torrens Property at the time Respondents' Liens attached, as the Mortgages did not appear on the Property's certificate of title. The facts are similarly clear and uncontroverted[7] that Respondents had no actual notice of the Mortgages at the time their

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[6] Amicus completely misstates Minn. Stat. § 514.05, subd.1. (Amicus Br. at 3). Priority under Section 514.05, subd.1 depends on a lienor's notice of a mortgage, not a mortgagee's notice of a lien. Mortgagees and others take title subject to a mechanic's lien not appearing on a certificate of title. Minn. Stat. § 508.25(7).

[7] Appellant concedes that it does not and has never argued that Respondents had actual notice of the Mortgages at the time their Liens attached. (Appellant's Br. at.38-39).

Liens attached. Accordingly, the district court erred when it denied Respondents' Motion for Partial Summary Judgment as to the priority of their Liens over the Mortgages. As a result, this Court should affirm the Court of Appeals decision declaring that the Mortgages were not of record at the time Respondents' Liens attached; and based upon Appellant's concession regarding Respondents' lack of actual notice of the Mortgages, reverse the trial court and grant judgment in favor of Respondents, declaring Respondents' Liens prior and superior to the Mortgages.

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE MORTGAGES WERE NOT "OF RECORD" AT THE TIME RESPONDENTS' LIENS ATTACHED, THEREBY RENDERING RESPONDENTS' LIENS PRIOR TO THE MORTGAGES.

It is undisputed that this case involves the priority of interests in Torrens property. It is further undisputed that, at the time the Respondents' Liens attached on October 13, 2005 and May 17, 2006, the Mortgages did not appear as memorials on the Property's certificate of title. Accordingly, the Mortgages were not "of record" with respect to the Torrens Property at the time the Liens attached and, therefore, cannot claim priority under the law.

As set forth in detail below, to be "of record" under Section 514.05, subd.1 with respect to Torrens property, an interest must be both filed with the registrar of titles and memorialized on the certificate of title. After all, it is the memorialization of the interest on the certificate that provides notice to the world for Torrens property. If filing a document alone were sufficient to establish priority of an interest in Torrens property, as Appellant contends, then the Torrens Act would be rendered meaningless, and there would be no need (and, indeed, no effect to) certificates of title.

A. What it Means to Be "Of Record" Under Section 514.05, subd.1 Necessarily Depends on the Type of Property At Issue (Abstract vs. Torrens Property).

The parties agree that Section 514.05, subd.1 dictates the priority of the parties' interests in this case. Thus, priority depends on what it means for an interest in Torrens property to be "of record."

In Minnesota, there are two distinct types of real property – abstract property (governed generally by the Recording Act, Minn. Stat. Chapter 507) and Torrens property (governed by the Torrens Act, Minn. Stat. Chapters 508 and 508A). "The distinction between the two types of property is significant because Minnesota law establishes that when an interest is land is created depends on the type of property at issue." *United States v. 392 Lexington Parkway South*, 386 F. Supp.2d 1062, 1070 (D.Minn. 2005) (*citing Chaney v. Minneapolis Cmty. Dev. Agency*, 641 N.W.2d 328, 335 (Minn. Ct. App. 2002)) (emphasis added).

Until 1901, all property in Minnesota was abstract property. *In re Collier,* 726 N.W.2d 799, 803 (Minn. 2007) (*citing Hersh Properties, LLC v. McDonald's Corp.*, 588 N.W.2d 728, 733 (Minn. 1999)). Under the abstract system of property recording, transactions that affect real property are filed or "recorded" with the county recorder's office where the property is located. *Id.* at 803-04. Recorded documents are public records and a source for interested parties to ascertain the status of the title. *Id.* The recorded documents are summarized in an abstract of title, but such abstract is not conclusive of all interests that may affect title to the property. *Id.* Accordingly, an

interested party must carefully conduct "time-consuming and expensive title searches" to ascertain the status of title to that property. *Id.* at 804.

In 1901, the Minnesota Legislature adopted the Torrens system of property registration. *Id.* Under the Torrens system, a party seeking to register property applies for court adjudication of its ownership and obtains a decree converting the abstract property into Torrens property. *Id.* After the ownership and other interests in the property are adjudicated, the registrar of titles creates a certificate of title, a single document that sets forth all interests in and encumbrances on the property. *Id.* Once the certificate is issued, all conveyances, liens, instruments, encumbrances, and other matters that affect the title to the property must be filed and registered with the registrar in order to affect the title to the property. *Id.* (*citing* Minn. Stat. § 508.48).

"The purpose of the Torrens system was to create a title registration procedure intended to simplify conveyancing" by eliminating the need to perform extensive title examinations through "the issuance of a single certificate of title, free from 'any and all rights or claims not registered with the registrar of titles.'" *Hersh,* 588 N.W.2d at 733 (*citing In re Juran*, 178 Minn. 55, 58, 226 N.W. 201, 202 (Minn. 1929)). Under the Torrens system, interested parties may avoid the time and expense of title searches, and, subject to very limited exceptions,[8] determine the status of the title by merely inspecting the certificate. *Id.* The certificate is conclusive evidence of all effective interests in the property. *Collier*, 726 N.W.2d at 804. *See also* Minn. Stat. § 508.36. Thus, interests that

[8] Notwithstanding the seven specific exceptions set forth in Minn. Stat. § 508.25, none of which are applicable to the Mortgages in this case.

do not appear as memorials on the certificate are without effect, and one can rely upon the certificate to contain all interests which affect the title to the property. *Id.* In this way, the Torrens Act "abrogates the doctrine of constructive notice except as to matters noted on the certificate of title." *Juran*, 178 Minn. at 60, 226 N.W. at 202 (emphasis added). This simplification and certainty is the purpose of the Torrens Act.

Therefore, unlike abstract property where filing an instrument is sufficient, in and of itself, to give constructive notice and be "of record" to the world; under the Torrens system, an interest must appear on the certificate of title to give notice and be "of record." This is the key distinction between the two systems of property registration.

B. Section 514.05, Subd.1 and Section 508.25(7) Create Specific Exceptions for the Priority of Mechanic's Liens, and No Similar Exception Exists for the Priority of Mortgages in Torrens Property.

As set forth above, when an interest in land is created depends on the type of property at issue.[9] *392 Lexington Parkway*, 386 F.Supp.2d at 1070. With abstract property, an interest in property is generally established upon the filing/recording of an instrument creating such interest with the country recorder's office. *See e.g.*, Minn. Stat. § 507.34. In Torrens, an interest in property is generally established only upon the registration of that interest. Minn. Stat. § 508.47 ("The act of registration shall be the operative act to convey or affect the land."); *Fingerhut Corp. v. Suburban Nat'l Bank*,

[9] While Appellant suggests it would be "absurd" for interests in Torrens and abstract to arise at different times, the court in *392 Lexington Parkway* correctly concluded that Minnesota's property laws require exactly this result. *Id.* at 1070-71 (holding mortgages on property comprised of both Torrens and abstract parcels arose at different times and had different priorities, because mortgages on Torrens parcel did not exist before registration).

460 N.W.2d 63, 65-66 (Minn. Ct. App. 1990). "Indeed, the necessity of registration to create an interest in the property is what distinguishes the Torrens law from the recording act for abstract property." *In re Ocwen Financial Services, Inc.*, 649 N.W.2d 854, 856-57 (Minn. Ct. App. 2002) (*citing Fingerhut*, 460 N.W.2d at 65).

Section 514.05, subd.1 provides an exception to the general rules of filing and registration specifically for mechanic's liens. According to Section 514.05, subd.1, a mechanic's lien attaches and takes effect from the date the first item of material or labor is furnished on the property and shall be preferred to any mortgage not then of record, unless the lienholder had actual notice thereof. Unlike mortgages and other property interests, a mechanic's lien attaches and takes effect upon the property before any instrument documenting the lien (e.g., the mechanic's liens statement) is recorded (for abstract property) or registered (for Torrens property) against the property. *Id. See also Armstrong v. Lally*, 209 Minn. 373, 375-78, 296 N.W. 405, 406 (1941). Thus, regardless of the type of property affected (abstract or Torrens), a mechanic's lien takes effect (and has priority) from the date of the first item of material or labor furnished. *See id.*

The Torrens Act adopts this exception. Section 508.25 of the Torrens Act provides that one shall hold property free from all encumbrances and adverse claims except: (1) those noted on the last certificate of title; and (2) seven specific exceptions, including mechanic's liens arising under Sections 514.01 – 514.17. *Id.* By enacting Sections 514.05, subd.1 and 508.25(7), the legislature created a special exception for mechanic's liens, granting them priority in both abstract and Torrens property before they file or register any proof of their lien. Such an exception is consistent with the general

purpose and intent of the mechanic's lien statutes – to protect lien claimants. *See Eischen Cabinet Co. v. Hildebrandt,* 683 N.W.2d 813, 816 (Minn. 2004) ("It is clear...that the mechanic's lien statute is remedial in nature and its essential purpose is to reimburse laborers and material providers who improve real estate and are not paid for their services.")

The law makes no similar exception for mortgages. Rather, the type of property (abstract or Torrens) dictates when a mortgage takes effect upon real property. *Fingerhut,* 460 N.W.2d at 65. It is established law that a mortgage on Torrens property only becomes effective against the property when that mortgage is registered. Minn. Stat. § 508.47, subd.1 ("The act of registration shall be the operative act to convey or affect land."); Minn. Stat. § 508.54 (A mortgage "shall be registered and take effect upon the title only from the time of registration.") (emphasis added); *392 Lexington Parkway*, 386 F.Supp.2d at 1070 ("Under Minnesota law, when Torrens property is at issue, the act of registration is the operative act that creates an interest in land.") "The act of registration not only create[s] an interest in the property, but also define[s] the priority of that interest." *United States v. 7725 Unity Avenue North*, 294 F.3d 954, 957 (8th Cir. 2002) (emphasis added).

Thus, while the legislature carved out a priority exception for mechanic's liens from the requirement of filing of an instrument (for abstract property) or registration of the interest (for Torrens property) by enacting Minn. Stat. §§ 514.05, subd.1 and 508.25(7), there is simply no similar statutory or common law exception for mortgages.

Instead, this Court must look to the specific type of property at issue (Torrens or abstract) to determine what was "of record" at the time Respondents' Mechanic's Liens attached.

C. The Court of Appeals Correctly Held that to be "Of Record" in Torrens Property, the Mortgages had to be Properly Registered.

Minnesota law specifies that a mortgage on Torrens property "shall be registered and take effect upon the title only from the time of registration." Minn. Stat. § 508.54 (emphasis added). In *Fingerhut*, this Court held that that the act of registration was the operative act which created the mortgage interest in Torrens property for purposes of priority. 460 N.W.2d at 65-66. Until a mortgage is properly registered, it is not effective against the property and is only effective as a private contract between the mortgagee and mortgagor. *Id.* at 66.

Relying on Minnesota law, the Eighth Circuit similarly declared that a mortgagee has no legal interest in property before it is properly registered. *7725 Unity Ave.*, 294 F.3d at 957 ("Because only the act of registration creates an interest in [Torrens] land, [the mortgagee] had no legal interest in the property before it registered its mortgage."). Indeed, as the court noted, "[t]he act of registration not only create[s] an interest in the property, but also define[s] the priority of that interest." *Id.* (emphasis added).

Thus, until the Mortgages were properly registered on September 20, 2006, Appellant had no legal interest in the Property. It necessarily follows that if Appellant had no legal interest in the Property until its Mortgage was properly registered on September 20, 2006, then the Mortgages could not possibly have been "of record" with respect to the Property before that date. In other words, a mortgage that has no legal

effect on the Property could not possibly be "of record" with respect to the Property. Moreover, because registration not only creates the mortgage interest in Torrens property but defines its priority, the Mortgages could not claim priority until after they were properly registered on September 20, 2006. Consequently, because the Mortgages were not registered until well after Respondents' Liens attached, Section 514.05, subd.1 and the Torrens Act dictate that Respondents' Liens are prior to the Mortgages.

D. The Court of Appeals Correctly Held that to be Registered and Thus "Of Record" in Torrens Property, a Mortgage Must Both be Filed and Memorialized on the Certificate of Title.

In accordance with established law, the Court of Appeals properly held that to be "of record" under the Torrens Act, the Mortgages had to be properly registered under Minn. Stat. § 508.54 and § 508.55. Appellant has previously conceded that that to be "of record" on Torrens property, a mortgage must be registered. (Appellant's Court of Appeals Br. at 9) ("The law in Minnesota is clear that within the context of a Torrens property, 'of record' constitutes a document that has been registered.").[10] **Thus, the single deciding issue before this Court is what constitutes "registration" under the Torrens Act.**

Relying on provisions in the Recorder's Act and laws applying to abstract property, Appellant asserts that the act of "registration" is completed when a document is filed, date stamped, and assigned a document number, and that memorialization of the interest by the registrar on the certificate of title is "inconsequential." (Appellant's Br. at

[10] A party cannot shift its position on appeal. *Gillen v. Comm'r of Taxation*, 305 Minn. 525, 531, 232 N.W.2d 894, 898 (1975).

16, 20-21). Appellant, however, ignores the fundamental differences between the abstract and Torrens property systems, the unambiguous language of the Torrens Act, and the case law interpreting the requirements of registration under the Torrens Act.

Because this case involves Torrens property, the Torrens Act and cases interpreting it dictate the outcome of this case. As the Court of Appeals correctly held, under the plain text of the Torrens Act and the case law applying the Act, to be registered under the Torrens Act (and thus "of record"), a mortgage must not only be filed with the registrar of titles, it must also appear as a memorial on the certificate of title, giving notice to all the world of the interest.

1. The Plain and Unambiguous Language of the Torrens Act Requires Both the Filing and Memorialization of the Interest on a Certificate of Title to Perfect Registration of a Mortgage.

As expressly set forth in Minn. Stat. §§ 508.49 and 508.55, the Torrens Act requires two separate but equally important acts to register a mortgage: (1) the presentation (or filing) of the instrument with the registrar of titles; and (2) the entering of a memorial upon the certificate of title of the instrument so registered.

> **§508.49. Interest less than fee; notice by memorial**
>
> All interests in registered land, less than an estate in fee simple, shall be registered by filing with the registrar the instrument which creates, transfers, or claims the interest, and by brief memorandum or memorial of it made and signed by the registrar upon the certificate of title.
>
> (Emphasis added).
>
> **§508.55. Registration of mortgage; memorial entered on certificate of title**
>
> The registration of a mortgage made by the registered owner, the registered owner's attorney-in-fact, or by a party having an interest registered on the

> certificate of title, other than the registered owner or the registered owner's attorney-in-fact, shall be made in the following manner: The mortgage deed or other instrument to be registered shall be presented to the registrar, and the registrar shall enter upon the certificate of title a memorial of the instrument registered, the exact time of filing, and its file number. The registrar shall also note upon the registered instrument the time of filing and a reference to the volume and page where it is registered.
>
> (Emphasis added).

Section 508.55 requires that the registration of a mortgage be completed as follows: (1) the mortgage shall be presented to the registrar (i.e., filed); and (2) the registrar shall enter a memorial of the instrument upon the certificate of title. As these provisions expressly provide, the "registration" of a mortgage interest requires both the filing of the mortgage instrument and the entry of a memorial of that mortgage on the certificate. The isolated act of filing is insufficient to register the mortgage.

Appellant concedes that Section 508.55 establishes the process by which a mortgage is registered. (Appellant's Br. at 20). However, Appellant argues that the mere filing of the instrument with a date stamp and document number is enough for registration because Section 508.55 refers to the "instrument registered" in the past tense. Appellant ignores the fact that before the words "instrument registered" are the words "the registrar shall enter upon the certificate of title a memorial of the instrument registered." *Id.* Thus, once the memorial is entered, the instrument is "registered." *Id.*

As the Court of Appeals correctly held:

> Applying basic grammar principles, the statutes announces the registration requirements using a colon, thereby linking 'the mortgage deed...shall be presented to the registrar' with a conjunctive 'and' to 'the registrar shall enter upon the certificate of title a memorial' as joint requirements for registration. *See* Minn. Stat. § 508.55. Thus, there are two unambiguous

> statutory requirements for a mortgage to be registered: the presentation of the legal instrument creating the interest to the registrar, *and* the registrar memorializing the interest on the certificate of title. This plain meaning is not subject to more than one reasonable interpretation, and is therefore unambiguous.

Imperial, 775 N.W.2d at 900.

Section 508.55 dictates the manner of registration and expressly includes a memorialization requirement. Appellant's theory that the existence of the word "registered" in the statute stands for the rule that memorialization is not a requirement of the registration process ignores the express language of Section 508.55. Following Appellant's interpretation of this statute, the only act necessary to perfect registration would be to present a document to the registrar. If this were the rule, even documents eventually rejected by the registrar would be "registered" so long as the document had been presented. This conclusion is illogical and is clearly contrary to the principles underlying the Torrens Act.

The difference between filing and registration is specifically highlighted in Minn. Stat. § 508.48, which provides:

> Every conveyance, lien, attachment, order, decree, or judgment, or other instrument or proceeding, which would affect the title to unregistered land under existing laws, if recorded...shall, in like manner, affect title to registered land <u>if filed ***and*** registered.</u>

(Emphasis added.) Section 508.48 makes clear that filing alone is insufficient and is merely the first part of the registration process. Accordingly, as the Court of Appeals correctly held, the plain and unambiguous language of the Torrens Act dictates that

registration is a two-part process, requiring both filing and memorialization on the certificate of title.

2. Minnesota Case Law Confirms That Torrens Registration Requires Both Filing and Memorialization on the Certificate of Title.

Like the language of the Act itself, Minnesota case law holds that the Torrens Act requires both filing and memorialization to register an interest in Torrens property.

In 1930, this Court unambiguously held that the act of registration of an interest necessarily "includes the entering of a proper memorial of the instrument filed...upon the certificate of title." *Horgan v. Sargent*, 182 Minn. 100, 104, 233 N.W. 866, 868 (1930).[11] Thus, it has been the law in Minnesota for 80 years that registration requires memorialization.

More recently, in *United States v. Ryan*, the court confirmed that registration is a two-part process, requiring both filing and memorialization. 124 F. Supp. 1, 6 (D.Minn. 1954). *Ryan* is directly on point and has guided Minnesota courts since 1954. Even then, *Ryan* noted that the joint requirements of filing and memorialization had "been a permanent rule of property in Minnesota for more than half a century." *Id.* at 12.

The question in *Ryan* was whether tax liens that had been filed with the registrar of deeds but which the registrar of titles did not memorialize on the certificate of title were effective against the property. *Id.* at 1. The court expressly held:

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[11] Appellant miscites *Horgan* for the proposition that parties may examine documents filed with the register. *Horgan* holds that a party may rely on the certificate without inspecting underlying instruments. *Compare Horgan*, 182 Minn. at 105-06, 233 N.W. at 868-69, *with* Appellant's Br. at 17, n.13.

> The mere filing of a notice, by debtor's name only, in the office of the register of deeds cannot, and does not, create a lien on registered land. It is plainly evident to this Court that the liens authorized by M.S.A. § 272.48, to be filed with the register of deeds, must, in the case of registered property, be filed with the register of deeds in his capacity as registrar of titles, and to be effective, they must be noted as memorials on the certificate of title covering the specific parcel of registered land intended to be affected by such filing.

Id. at 6 (emphasis added).

In reaching its decision, the court noted the important difference between abstract and Torrens property and the differentiating element in Torrens which requires memorialization on the certificate as a part of the registration process:

> [T]o effect a lien...the instrument must be noted as a memorial on the specific certificate of title outstanding for the property intended to be affected, otherwise the filing of the instrument does not create a lien. The method of filing documents intended to affect registered property was, by statute, made definite and certain.

Id. at 6-7.

The court reasoned that if the filing alone was sufficient to create the lien, without a memorial on the certificate, the entire Torrens system would be rendered "meaningless." *Id.* at 7. As the court explained:

> The purpose of the Torrens law is to establish an indefeasible title free from any and all rights or claims not registered with the registrar of titles, ...to the end that anyone may deal with such property with the assurance that the only rights or claims of which he need take notice are those registered.

Id. at 9 (*quoting Juran*, 178 Minn. at 58, 226 N.W. at 202).

If filing, date-stamping, and issuance of a document number alone were sufficient to perfect registration in Torrens property (as it is to perfect an interest in abstract property), then there would be no difference between abstract and Torrens property, and

no one could ever rely upon a certificate to contain all interests that may affect the property. *Id.* at 6.

Ryan confirms what this Court held in *Horgan* 80 years ago: That for an interest to be registered (and thus "of record") in Torrens, such interest must be both filed with the registrar and memorialized on the certificate of title. To hold otherwise would ignore the plain language of the Torrens Act, disregard 80 years of case law, and defeat the entire purpose of the Torrens system.

3. The Electronic Filing Act of 2008 Codifies a Definition of Registration Which Adopts the Two-Part Process Set Forth in the Torrens Act and Case Law.

In 2008, the Minnesota Legislature enacted the Minnesota Real Property Electronic Recording Act, which governs the recording and registration of electronically filed instruments for both abstract and Torrens property. 2008 Minn. Laws c. 238, art. 2 §§ 1-10. The Act defines when an instrument becomes "registered" and thus "of record" under the Torrens Act, thereby confirming the rules set forth above and underscoring the difference between abstract and Torrens property.

According to Minn. Stat. § 507.0943(e), which governs Torrens property:

> Notwithstanding the time of its delivery, 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.

(Emphasis added).

In contrast, under Minn. Stat. § 507.0943(d), a document filed electronically with the recorder's office for abstract property is deemed "recorded" when it is filed and

accepted by the office (or by the next close of the office following the delivery). Thus, an electronically-filed document is "registered" for Torrens property only upon memorialization on the certificate of title, not upon mere filing or delivery; whereas a document filed for abstract property is "recorded" upon filing and acceptance. The Act's definitions simply codify the courts' interpretations of when an instrument conveying an interest in property becomes effective or "of record" in the two different property systems.

The Electronic Recording Act provides important guidance to the Court as to the definition of "registered" as it relates to Torrens property. When a statute does not expressly define a term, but a related statute does, "the statutes are *in pari materia*[12] and should be construed together." *In re Comm'n Investigation of Issues Governed by Minnesota Statutes, Section 216A.036*, 724 N.W.2d 743, 746 (Minn. Ct. App. 2006). When a term is not expressly defined in a statute being interpreted, it is appropriate for the court "to consider other statutes relating to the same subject matter as far as they shed light on the question" before the court, to ensure consistency among related statutes. *Carlson v. Dep't of Employment and Econ. Dev.*, 747 N.W.2d 367, 372 (Minn. Ct. App. 2008).

This Court presumes the Legislature was aware of Sections 508.48, 508.49, 508.55, *Horgan*, and *Ryan* when it enacted the Electronic Recording Act. *See Rockford Twp. v. City of Rockford*, 608 N.W.2d 903, 908 (Minn. Ct. App. 2000) (courts "presume

[12] "Statutes 'in pari materia' are those relating to the same person or thing or having a common purpose." *Apple Valley Red-E-Mix, Inc. v. State*, 352 N.W.2d 402, 404 (Minn. 1984).

the legislature acts with full knowledge of existing statutes and judicial interpretations of those statutes"). The definition of the term "registered" in Section 507.0943(e) validates this presumption.

If this Court holds that filing, date-stamping, and issuance of a document number are sufficient to accomplish registration under the Torrens Act, it would create an unworkable conflict between paper filings (which would be "registered" upon filing) and electronic filings (which would be "registered" only upon memorialization on the certificate). Such inconsistency is absurd and contrary to the plain language of Sections 508.49 and 508.55. It would also discourage more efficient electronic filing. Accordingly, this Court should construe "registration," as set forth in Sections 508.49 and 508.55, consistent with Section 507.0943(e), and hold that the Mortgages were not "registered" (and thus not "of record") until they appeared as memorials on the Property's certificate of title on September 20, 2006.

E. The Court of Appeals Correctly Held that the Failure to Memorialize the Mortgages on the Certificate Was the Result of Defective Registration, Not a "Gap" in Time Between Filing and Memorialization.

Appellant and Amicus ask this Court to ignore the fact that this case involves a rare and isolated instance of defective registration resulting from an apparent registrar error and, instead, decide this case as if the defective registration was the result of a mere delay or "gap" in the time between filing and memorialization in the Registrar's office. While Appellant acknowledges that the 15-month delay in registration was the result of

an apparent registrar error and not a "gap" situation,[13] it nonetheless asks this Court to create a priority exception favoring mortgages based upon the date of filing in Torrens (as opposed to the completion of the registration process), so as to avoid a hypothetical "gap" situation that does not exist here.

1. This Case Involves Defective or Incomplete Registration, Not a Mere "Gap" in Memorialization.

The filing and registration processes in this case clearly show that this is not a "gap" situation and should not be decided like one. Here, a Deed (No.4129639) was filed contemporaneously with the Mortgages on June 28, 2005. (R.Add.7; A.Add.35-38). However, because of "an apparent registrar error," a new certificate of title for the Property was not issued at that time, and the existing certificate (No.1144974) was not updated to contain any memorials of the Mortgages. (A.Add.39-40). For 15 months, the Property's certificate contained no memorials of the Mortgages. *Id.* During that time, Respondents' Liens attached and Southview's Lien and several other instruments were properly registered and memorialized on the existing certificate of title. *Id.* Then, on September 20, 2006, when the failed registration was apparently discovered, the Deed was re-filed and given a new and different document number (No.4307439). (R.Add.8-10). The new document number to the Deed evidences the failed registration of the Deed and Mortgages on June 28, 2005. *Id.* Upon re-filing the Deed on September 20, 2006, a

[13] *See e.g.,* Appellant's Brief, p. 6 (attributing failure to issue new certificate to "apparent clerical error."); p. 27 (acknowledging that a "gap" situation "does not explain why the memorialization of BankFirst's mortgage was so late in this particular case.")

new certificate was issued and the Mortgages were then memorialized on that certificate, out of sequence and **after** the Liens. (A.Add.45-46).

If this were a "gap" situation, the Deed would not have been re-filed as a new document with a new document number and a new registration date.[14] Rather, a new certificate would have been issued (even if delayed) upon the original filing of Deed (No.4129639) in June 2005, and all documents filed after the Deed (No.4129639) (including the Mortgages) would have appeared on the new certificate (not on Certificate No.1144974), and they would have appeared in the same order filed. Instead:

(1) The old Certificate No.1144974 continued to exist after the original filing of the Deed (No.4129639) and contains multiple memorials of instruments that were filed after the Mortgages; and

(2) The new Certificate (No.1189683) contains multiple memorials of instruments that were filed after the Mortgages but appear in sequence before (or ahead of) the Mortgages.[15]

(A.Add.39-40;45-46). If there had been a simple "backup" in the Registrar's office that caused the delay in memorialization, all interests would have been similarly affected and still memorialized on a new certificate in the same sequence as filed.

Moreover, if there had been a simple "backup," registration of interest on Lot 5 would have suffered the same 15-month delay as Lots 3 and 4. That did not happen.

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[14] Certificate No.1144974 lists the registration date of the Deed (No.4307439) as September 20, 2006. (A.Add.39-40).

[15] E.g., the mechanic's lien statements of Minnesota State Curb & Gutter (filed Feb. 3, 2006), Imperial (filed Feb. 9, 2006), Thompson PLBG (filed July 27, 2006), Southview (filed Aug. 29, 2006), and Great Northern I, (filed Sept. 8, 2006). (A.Add.45-46).

Rather, the Register **timely and properly** issued a new certificate (No.1157096) for Lot 5 and memorialized the Mortgages on that certificate upon the initial filing of the Deed and Mortgages in 2005; conclusively demonstrating that this is not a "gap" situation. (A.Add.41-42).

Minnesota law is clear that "[i]f an incorrect memorial is made, the registration is defective, just as much as if no memorial had been entered." *Horgan*, 182 Minn. at 104, 233 N.W.2d at 868. It necessarily follows that if no memorial is entered on the certificate registration is defective and has no effect. *See id.*

Here, registration of the Mortgages was defective because the Registrar failed to issue a new certificate and failed to memorialize the Mortgages on the Property's certificate of title. It was not until the Deed was re-filed as a new document (No.4307439) on September 20, 2006, that: (1) the new Certificate No.1189683 was issued; (2) the Mortgages were memorialized; and (3) the registration of the Mortgages was finally accomplished. Consequently, the defective registration in this case has nothing to do with a "gap" situation.

2. This Court Should Not Use a Hypothetical "Gap" Argument as the Basis for Creating a Priority Exception for Mortgages That Contravenes Torrens Law.

It is well-established that appellate courts do not issue advisory opinions concerning hypothetical factual situations. *State v. Marinaro*, 768 N.W.2d 393, 399 (Minn. Ct. App. 2009). Instead, this Court must decide this case on the facts before the Court, not on facts that may someday be present in other cases. *Brainerd Daily Dispatch v. Dehen*, 693 N.W.2d 435, 443 (Minn. Ct. App. 2005). As set forth above, a "gap"

situation does not exist in this case. Accordingly, a hypothetical "gap" situation should not be used to either decide this case or as a policy argument to create a priority exception for mortgages that contravene established law.

Appellant improperly asserts that a delay or "gap" can theoretically occur between filing and memorialization in a registrar's office. (Appellant's Br. at 27). However, there are no facts in the record to support any such assertion. Instead, Appellant cites Judge Schellhas' dissent in *Imperial* in an attempt to inject unfounded "facts" in the record. *Id.* Judge Schellhas' assertion of the time it "may take" to memorialize is entirely hypothetical and without foundation in the facts of this case. *Id.* at 29. The only facts properly before this Court are those in the record demonstrating the defective registration of these particular Mortgages. Accordingly, for this Court to base its decision on the speculation of a dissenting judge who asserts, without any basis in the record or in evidence, that there may be (in some registrar's office at some point in time) a short delay between filing and memorialization, would be to base a decision on a hypothetical situation that did not exist and is not presented here.

3. Where Registration is Defective, the Presumption that the Date of Filing is the Date of Registration is Effectively Rebutted, and the Date Registration is Completed Prevails.

The Torrens Act requires the registrar to note on the certificate the date and time of filing, not the date or time of registration. Minn. Stat. §§ 508.38, 508.55. The form certificate has a column labeled "date of registration" in which the registrar inserts the date of filing. While the nomenclature of the column is not technically correct, it is apparent that the Act presumes that filing and memorialization are contemporaneous.

In the past (and currently in many counties), that was/is the case. Where registration is completed correctly (and is not defective), equating the date of filing with the effective date of registration makes sense. However, where (as here) registration is defective or where a filed document is rejected by the registrar due to a defect before memorialization, the date of filing cannot be used as the date of priority. *See* Minn. Stat. § 508.71, subd.1a (when correcting omission, registrar must enter date and time of correction memorial for omitted interest.) Otherwise, rejected or unregistered documents (documents that were never memorialized on the certificate) could claim priority from the date of original filing (as Appellant is trying to do here). Such a result is antithetical to the essence of the Torrens Act.

While relating back to the date of filing as the effective date of registration may work in the majority of cases where the registration process is effective, it does not work and, in fact, conflicts with the clear dictates of the Torrens Act, where, due to an error or defect in registration, the date of registration is conclusively shown to be a date different from the date of filing. In such case, any presumption that the date of filing is the effective date of registration is effectively rebutted, and the date that registration is completed must prevail.

F. This Court Must Reject Appellant's Request for the Judicial Creation of an Exception to the Torrens Act for the Priority of Mortgages Based Upon Filing Date.

Unable to find any exception in law for the priority of unregistered mortgages, Appellant asks this Court to create an exception to the Torrens Act that, for purposes of priority under Section 514.05, subd.1, a mortgage is "of record" as soon as it is filed with

the registrar. (Appellant's Br. at 13-17). However, it is not the province of the appellate courts to create law, but rather, to interpret law and legislation. *In re Welfare of S.J.T.*, 736 N.W.2d 341, 355 (Minn. Ct. App. 2007). Courts are to apply laws, not make, amend, or change them. *City of St. Louis Park v. King*, 246 Minn. 422, 433, 75 N.W.2d 487, 495 (1956). By cobbling together inapplicable excerpts from the Recording Act, cases involving abstract property, and misstatements of law, Appellant asks the Court to create an exception just for mortgages establishing priority in Torrens from the date of filing. Not only is Appellant's proposed exception without foundation in law, it contravenes the express language of Torrens Act, 80 years of Torrens case law, and the fundamental purpose of the entire Torrens registration system.

First, Appellant erroneously argues that under Section 386.31, assignment of a document number is sufficient to complete registration under the Torrens Act. Section 386.31, however, is specific to county recorder's offices (not registrars of titles) and applies only to abstract property. Chapter 386 is entitled, "County Recorder; Abstracter." Registrars of titles, not county recorders, assign document numbers to instruments filed against Torrens property.[16] *See* Minn. Stat. § 508.55.

[16] Under Section 386.31, a document number in abstract property is merely "prima facie evidence" of priority. Prima facie evidence is evidence that "will prevail until contradicted and overcome by other evidence." Black's Law Dictionary (6th ed. 1991). Thus, even if a document number was prima facie evidence of priority in Torrens property (which Respondents deny), it is not conclusive evidence of priority where a party can show (as here) that registration was defective and was not completed when that party's mechanic's lien attached. In cases such as this, the presumption is effectively rebutted and the Court must rely on the date that registration actually became effective (here, 15 months after filing, on September 20, 2006).

Second, Appellant egregiously miscites Minn. Stat. § 508.48 to assert that filing an interest with the registrar serves as notice of the interest in the same way that filing with the recorder's office affects title for abstract property. (Appellant's Br. at 13). Quite the opposite is true. Section 508.48 actually states that an instrument only affects title to Torrens property if "filed and registered." (Emphasis added). Thus, Section 508.48 confirms that filing alone is insufficient for an interest to be "of record" in Torrens property. To be of notice (and thus "of record") in Torrens property, Section 508.48 requires that the interest be both filed and registered.

In a similarly flawed analysis, Appellant relies upon *In re Ocwen Financial Services, Inc.*, 649 N.W.2d 854 (Minn. Ct. App. 2002), *C.S. McCrossan, Inc. v. Builders Finance Co.*, 304 Minn. 538, 232 N.W.2d 15 (Minn. 1975), and *Home Lumber Co. v. Kopfmann Homes, Inc.*, 535 N.W.2d 302 (Minn. 1995) to support its assertion that filing and assignment of a document number is sufficient to register an interest in Torrens property. As the Court of Appeals noted, *Ocwen*, *McCrossan*, and *Home Lumber* are inapplicable to the issues of this case.

In *Ocwen*, two mortgages were contemporaneously filed with the registrar and both met all registration requirements under Section 508.55. 649 N.W.2d at 855-856. As a result, both mortgages were properly registered. *Id.* The sole issue for the court was which properly-registered mortgage had priority. *Id.* Because no registration requirements were at issue, and because the Torrens Act was silent as to priority for two, properly-registered and contemporaneously filed mortgages, the court looked to the document number to determine the filing order, and used that information to "break the

tie" in determining priority. *Id.* at 857. An entirely different result would have occurred if one of the mortgages had never been memorialized on the certificate. In that situation, the unmemorialized mortgage would not have met the registration requirements under Section 508.55, and would not, by application of the Torrens Act, be effective against a party without notice of the same. *See Horgan*, 182 Minn. at 104, 233 N.W. at 868; *Ryan*, 124 F. Supp. at 6, 7. Thus, as the Court of Appeals noted, Appellant's "argument mischaracterizes the issues decided...in *Ocwen*." *Imperial*, 775 N.W.2d at 902.

McCrossan is similarly inapplicable. *McCrossan* involved a mortgage that had been "properly registered, filed, and memorialized" on a certificate of title when the mechanic's lien attached, but not carried over to a subsequent certificate. 304 Minn. at 540-42, 232 N.W.2d at 16-18. The Court held that McCrossan had actual notice of the mortgage when its lien attached, and for this reason, and the fact that the error did not occur until after McCrossan completed its work, McCrossan had not relied on the erroneous certificate. *Id.* The Court allowed the mortgage to retain its priority only because the error could not have affected McCrossan. *Id.*

The single passage that Appellant relies upon from *McCrossan* to argue that "of record" in Torrens does not depend upon memorialization is misleading and out of context. (Appellant's Br. at 18). In that passage, this Court distinguishes between situations where a "properly filed, registered, and memorialized" mortgage was not carried over to a new certificate and situations where a mortgage was never "registered or filed at all" (i.e., never memorialized or filed at all). *Id.* at 543-44, 232 N.W.2d at 18-19. Specifically limiting its holding to the "particular facts" of the case, the Court held that

because the mortgage had been properly "registered, filed and memorialized" by initially completing the Section 508.55 requirements of filing and memorialization, and because McCrossan had actual notice of the "properly registered" mortgage, the mortgage retained its priority. *Id.* Contrary to Appellant's claim, the court did not hold that registration is complete without memorialization. *See id.* Moreover, while the Court declined to require mortgagees to re-inspect every new certificate issued after initial memorialization/registration is completed, it did not hold that a mortgagee has no duty to ensure that its mortgage is properly registered in the first place.

In this case, the question is the priority of Mortgages that were filed but not memorialized on the certificate, and thus not registered until well after Respondents' Liens attached. Here, the Mortgages did not complete the registration process until September 20, 2006. Accordingly, at the time Respondents' Liens attached, the Mortgages were not yet registered or appearing on the certificate. As set forth above, while a document number may be evidence of the order in which properly-registered documents were filed, if registration is defective, document numbers and the date of filing are not controlling over the date that registration is completed.

Because *Ocwen* did not involve defective registration, and *McCrossan* involved a party with actual notice of a mortgage that had been properly memorialized and registered, *Horgan* and *Ryan*, not *Ocwen* or *McCrossan*, control the issue of priority in this case. As the court in *Ryan* held, where the memorialization requirement of the registration process is lacking, merely filing the document and obtaining a document

number are insufficient to establish priority. 124 F.Supp. at 6-7; *Horgan*, 182 Minn. at 104, 233 N.W. at 868.

Home Lumber is similarly inapplicable to the case at hand. First, *Home Lumber* involves abstract property, not Torrens property.[17] Thus, this Court's reference to Section 507.34 was appropriate, as that statute applies to abstract, not Torrens, property.

In *Home Lumber*, the issue was whether a mortgage, which was "duly recorded" against abstract property prior to the attachment of mechanic's liens, took priority over mechanic's liens where disbursements under the loan were not made until after the attachment of the mechanic's liens. 535 N.W.2d at 302-303. The central issue was whether loan disbursements were discretionary or obligatory, not whether the mortgage was first recorded. *Id.* at 304-305. In its preliminary discussion of the recording of the mortgage, the Court looked to Minn. Stat. § 507.34 for guidance and stated in *dicta* that a mortgage establishes priority from the date of recording with the county recorder. *Id.* at 304. Indeed, because the property was abstract, the filing of the mortgage alone was sufficient to establish priority of the mortgage under Section 507.34.

Section 507.34 does not, however, apply to this case. Section 507.34 is part of the Recording Act applicable to abstract property. Section 507.34 provides that "[e]very conveyance of real estate shall be recorded in the office of the county recorder where such real estate is situated...." (emphasis added). Section 507.34 does not mention or

[17] The court's multiple references to the recording of the mortgage indicate the property in *Home Lumber* was abstract. *Id.* at 302, 303, 304, 306.

even apply to the registration of mortgages with the registrar of titles or Torrens property. *Id.*

Appellant relies upon an obviously erroneous sentence fragment in *Home Lumber* where the Court states that Section 507.34 "establishes mortgage priority from the date of recording with the county recorder or the registrar of titles." *Id.* at 304. The fragment "or the registrar of titles" is an obvious misstatement of law because Section 507.34 makes no mention of the registrar of titles and does not apply to Torrens property. Because *Home Lumber* involved abstract property and the filing of a mortgage with a county recorder, and concerned other issues, the Court's erroneous mention of the registrar of titles was mere *dicta*. The Court's apparently inadvertent inclusion of "the registrar of titles" in its recitation of Section 507.34 should not be used as authority for the proposition that the date of the filing of a mortgage with the registrar establishes priority in Torrens property. Such an application of *Home Lumber* would contradict the express language of Section 507.34 and the Torrens Act, which requires the registration of mortgages to be effective. *See* Minn. Stat. §§ 508.47-49; 508.54; 508.55.

In sum, the statutes and case law cited by Appellant are inapplicable to this case and do not supply a basis for this Court to create a priority exception favoring mortgages on Torrens property. The court looks to the Recording Act with respect to registered property only when the Torrens Act fails to specify otherwise. *See* Minn. Stat. § 508.02; *Armstrong,* 209 Minn. at 375-76, 296 N.W. at 405-06. Because the Torrens Act provides specific requirements for registering a mortgage, and thus making such mortgage appear "of record," there is no need to consult the Recording Act or cases involving abstract

property. To determine what was and was not "of record" for Torrens property when Respondents' Liens attached, this Court must look to the Torrens Act and cases involving Torrens property, specifically, Minn. Stat. §§ 508.49; 508.55; *Horgan*, 182 Minn. at 100, 233 N.W. at 868; and *Ryan,* 124, F. Supp. at 6-7.

G. The Torrens Act Provides Certainty to All Parties in Determining the Priority of Interests.

Appellant and Amicus assert that there will be a lending Armageddon if this Court applies established law and does not create a special exception for the priority of mortgages in Torrens based upon the date of filing so as to avoid a hypothetical "gap" situation. Such a claim is not only overly-dramatic, it is without foundation in law or fact.

It is true that lenders, like all other interested parties, need certainty when determining the priority of their interests in Torrens property. An application of established Torrens law provides just that – certainty. Whereas, Appellant's proposed "mortgage priority exception" based upon filing date does not. Such exception would inject uncertainty in the law, render certificates of title meaningless (or unreliable, at best), and undermine the foundation of the Torrens Act.

The Torrens Act provides certainty for determining priority for all parties – not just lenders. It allows everyone to rely on a certificate to contain all interests that affect title to the property and those interests not so appearing are of no effect. *Juran*, 178 Minn. at 58, 226 N.W. at 202. A judicially-created exception that gives mortgages priority as of the filing date destroys the certainty afforded by certificates of title and

undermines the entire foundation of Torrens law. Not only lien claimants, but all other interested parties, would be forced to scour Torrens filings to determine if mortgages had been filed but not appearing on the certificate. Lenders, themselves, could not rely on certificates for fear that a first-filed, but unmemorialized mortgage may exist in the registrar's office. Consequently, certificates would no longer be reliable, rendering Torrens property no different from abstract.

As Amicus acknowledges, lenders will continue to have a variety of measures to protect against the unlikely and hypothetical "gap" situation that does not exist here. Such measures include, but are not limited to, title insurance, lien waivers, subordination agreements, delayed loan disbursements, and other risk management options. Lenders already purchase title insurance to protect against such contingencies.

Lenders, like all others, are best served with a bright-line rule consistent with 80 years of Torrens law -- that to be "of record" in Torrens property, a mortgage must be registered and appearing on the certificate of title. The creation of a special exception favoring mortgagees at the expense of the entire Torrens system, is not only contrary to law, it is, frankly, imprudent.

II. GIVEN THE UNDISPUTED FACTS AND APPELLANT'S RECENT CONCESSION, THE DISTRICT COURT ERRED WHEN IT CONCLUDED THAT RESPONDENTS HAD ACTUAL NOTICE OF THE MORTGAGES.

Because Appellant's Mortgage was not properly registered and appearing of record as a memorial on the certificate at the time Respondents' Liens attached, to obtain priority over Respondents' Liens, Appellant must affirmatively prove that Respondents had actual notice of the Mortgages at the time the Liens attached. Minn. Stat. § 514.05,

subd.1. Appellant concedes that it is not arguing, and has "never argued," that Respondents had actual notice of the Mortgages. (Appellant Br. at 38-39). Accordingly, Respondents are entitled to judgment as a matter of law declaring their Liens prior to the Mortgages, rendering remand unnecessary.

It is long established in Minnesota law that the Torrens Act abrogates the doctrine of constructive notice except for matters listed on the certificate of title.[18] *See Collier*, 726 N.W.2d at 806; *Juran*, 178 Minn. at 60, 226 N.W. at 202. Unless Appellant can show that Respondents had actual knowledge of the Mortgages, the Mortgages are, by operation of Minnesota law, subordinate to Respondents' Liens.

Actual notice means actual knowledge. *In re Alchemedes/Brookwood, Ltd. Partnership*, 546 N.W.2d 41, 42 (Minn. Ct. App. 1996). *See also Black's Law Dictionary,* 1087 (7th ed. 1999) (actual notice means "[n]otice given directly to, or received personally by, a party.") With respect to mortgages, actual notice "requires conveying knowledge of a signed, enforceable agreement." *Comstock & Davis, Inc. v. G.D.S. & Assocs.*, 481 N.W.2d 82, 85 (Minn. Ct. App. 1992) (emphasis added). Accordingly, anything less than actual knowledge of the mortgages is not actual notice, but rather, constructive notice or no notice at all.

The district court erred in holding that Respondents had "actual knowledge." First, the facts are undisputed. There is no evidence whatsoever that Respondents knew about the Mortgages or that Certificate No.1144974 was erroneous. Indeed, the uncontroverted

[18] Because Appellant is not asserting actual notice, this argument has been truncated. For Respondents' full argument regarding actual notice, see Respondents' Court of Appeals Brief at 30-44, and Reply Brief at 18-24.

facts are that Respondents did not know about the Mortgages. (Iverson Aff.). The fact that Calhoun was listed as the owner of the Property on the certificate does not, in any way, prove that Respondents knew the certificate was erroneous or knew about the Mortgages. Just because the certificate listed Calhoun as an owner does not imply the existence of unregistered mortgages. As the Court of Appeals noted, such "speculation amounts to constructive notice and is insufficient under *Juran* and its progeny." *Imperial*, 775 N.W.2d at 905.

Second, the court's conclusion that Respondents had a "duty to inquire" and "should have inquired" demonstrates that the court substituted inquiry or implied notice for actual notice required by Torrens law. The concept of "inquiry notice" does not apply to Torrens property. *Juran*, 178 Minn. at 60, 226 N.W. at 202; *Kane v. State*, 55 N.W.2d 333, 337-38 (Minn. 1952); *In re Petition of Willmus*, 568 N.W.2d 722, 729 (Minn. Ct. App. 1997). Under Torrens law, there is no "duty to inquire" if there are or may be other interests not appearing on the certificate of title. *See id.* "The purpose of the Torrens system...is to ensure that a person dealing with registered property 'need look no further than the certificate of title for any transactions that might affect the land.'" *Willmus*, 568 N.W.2d at 725 (*citing Mill City Heating & Air Conditioning Co. v. Nelson*, 351 N.W.2d 362, 364-5 (Minn. 1984)).

Finally, Section 514.05, subd.1 only provides an exception to priority when a lienor has actual notice of the mortgage over which it is claiming priority – not of any other matter that may appear (or fail to appear) on the certificate. Arguing that

Respondents had "actual notice that the certificate may be inaccurate" is insufficient under Section 514.05, subd.1 to defeat Respondents' priority.

The law is clear that Respondents had no duty to investigate if the certificate was inaccurate or if there were possible mortgages that were not appearing on the certificate. Torrens law does not impose a duty to go beyond the certificate and investigate whether the certificate is inaccurate or if memorials are missing. *See Horgan*, 182 Minn. at 105-06, 233 N.W. at 868-69.

Quite simply, there are no facts supporting (and Appellant "has never argued") that Respondents had actual notice of the Mortgages. Indeed, the uncontroverted facts are to the contrary – Respondents had no actual knowledge of the Mortgages. Appellant concedes this fact and asserts that "there is no need to remand." (Appellant Br. at 38-39). Accordingly, if this Court finds that the Mortgages were not "of record" at the time Respondents' Liens attached, this Court should simply reverse the district court and grant judgment in favor of Respondents declaring their Liens prior to the Mortgages.

III. THE VALIDITY OF RESPONDENTS' LIENS IS NOT PROPERLY BEFORE THIS COURT FOR REVIEW BUT IS, NONETHELESS, WELL ESTABLISHED.

Appellant improperly challenges the validity of Respondents' Lien by making the baseless assertion that Respondents failed to comply with pre-lien notice requirements under Minn. Stat. § 514.011. Not only does this argument lack merit, Appellant's challenge to the validity of Respondents' Liens is improperly before this Court. Appellant repeatedly stipulated to the validity of Respondents' Liens and never appealed the district court Order declaring Respondents' Liens valid. Accordingly, the Court of

Appeals properly precluded Appellant from challenging the validity of the Liens or pre-lien notice on appeal.

A. The Court of Appeals Properly Precluded Appellant's Challenge to the Validity of the Liens Because the Issue of Pre-Lien Notice Was Waived by Appellant, Not Decided by the District Court, and Never Appealed.

The issues of pre-lien notice and the validity of Respondents' Liens are not properly before this Court and have been rendered moot by the stipulations and unchallenged Order declaring Respondents' Liens valid. The only issue properly on appeal is the issue of priority, as initially appealed by Respondents.

The issues of priority and validity of the Liens were bifurcated before the district court. The parties' summary judgment motions addressed only the issue of priority, leaving for trial the amounts of the Liens and their validity, including whether the pre-lien notice requirements were met. (A.App.1-5). The district court clearly limited its summary judgment decision to priority and explained that it only mentioned the pre-lien notice issue for the "limited purpose" of argument. (A.Add.14,n.1). In fact, the district court wrote, "The Court takes no position on the validity of any of the mechanic's liens in this action as that matter is not currently before the Court." *Id.* (Emphasis added).

In lieu of a trial on the validity and amount of Respondents' Liens, Appellant stipulated to the validity of the Liens on two separate occasions: First, at the pre-trial hearing (Appellant's counsel: "We are not contesting any of the validity of the liens. Bank First is not.") (R.Add.1-2); and second, when Appellant executed the Amended Stipulation of Facts. (A.App.24-31). The stipulations were adopted by the district court in the Order, in which the court expressly adjudicated Respondents' Liens valid.

(A.Add.21). Appellant neither challenged nor appealed the Order. Therefore, Appellant is estopped from challenging, for the first time on appeal, the validity of Respondents' Liens, including the issue of pre-lien notice.

"Where the parties stipulate as to the facts, the effect of the stipulation is to take the place of evidence." *Anderson v. Anderson*, 303 Minn. 26, 31, 225 N.W.2d 837, 840 (1975) (citations omitted). Courts accord stipulations the "sanctity of binding contracts." *Shirk v. Shirk*, 561 N.W.2d 519, 521-22 (Minn. 1997) (citations omitted). A party cannot repudiate its stipulation to a question of fact without the other party's consent, except by leave of the court for cause shown. *Id.*

In addition to the parties, stipulations of fact bind both district and appellate courts. *State v. Litzau*, 377 N.W.2d 53, 55 (Minn. Ct. App. 1985). "Where a case is submitted for decision upon stipulation of all facts, neither party will be heard on appeal to suggest that facts were other than as stipulated or that any material fact was omitted" *Carey v. Brown*, 194 Minn. 127, 141, 260 N.W. 320, 326 (1935) (quotation omitted).

Service of a pre-lien notice is a prerequisite to the validity of a mechanic's lien, unless one of the exceptions in Minn. Stat. § 514.011 applies. *See e.g. Mill City*, 351 N.W.2d at 363; *Dolder v. Griffin,* 323 N.W.2d 773, 780 (Minn. 1982). By stipulating to the validity of Respondents' Liens, Appellant necessarily stipulated that Respondents complied with the pre-lien notice requirements of Section 514.011 or that no pre-lien notice was required. *Id.* Consequently, Appellant is estopped from now arguing that Respondents failed to comply with Section 514.011. *See Carey*, 194 Minn. at 141, 260 N.W. at 326.

It is well-established that issues first presented on appeal are barred. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). As the Court of Appeals correctly held, although pre-lien notice was "discussed by the district court it was not formally argued or decided by the district court," and, thus, Appellant could not raise the issue on appeal. *Imperial*, 775 N.W.2d at 904 (emphasis added). Indeed, the district court expressly stated that it mentioned pre-lien notice solely for "the limited purpose" of argument and that the validity of the Liens was not before the court for decision. (A.Add.14).

If Appellant truly believed that Respondents failed to comply with pre-lien notice requirements, then Appellant should have: (1) proceeded to trial on the validity of the Liens and challenged whether Respondents complied with pre-lien notice requirements; or (2) challenged/appealed the Order declaring Respondents' Liens valid. By stipulating to the validity of the Liens and not appealing the Order, Appellant prevented Respondents from obtaining a separate appealable order on the issue of pre-lien notice.

In short, Appellant stipulated to the validity of Respondents' Liens and is now asking this Court to invalidate them. A party cannot stipulate to a material fact and then, upon appeal, dispute that same stipulated fact. *See e.g., Carey*, 194 Minn. at 141, 260 N.W. at 326. Nor can a party appeal an issue to the Supreme Court that it never appealed to the Court of Appeals. *See Thiele*, 425 N.W.2d at 582. By stipulating to validity and failing to appeal the Order declaring Respondents' Liens valid, Appellant waived the issues of pre-lien notice and the validity of the Liens. Accordingly, Appellant is precluded from arguing these issues on appeal.

B. Respondents Were Not Required to Serve Pre-Lien Notices.

Even if this Court entertains Appellant's improper validity argument, no pre-lien notice was required.[19] *See* Minn. Stat. § 514.011, subd.2(a), 4a. If a lienor is in direct contract with the owner of the property, no pre-lien notice is required. *Id.*

Both Respondents were in direct contract with Lind, the owner of the Property. (A.Add.16-22). Section 514.011, subd.5 defines "owner" as the owner of any legal or equitable interest in the property whose interest: (1) is known to the lienor, or (2) has been filed for record if registered land, and who enters into a contract with the lienor.

At the time Respondents' contracted with Lind, Lind was the owner of a legal and/or equitable interest in the Property. Lind's ownership interest was known to Respondents and a deed conveying the Property to Lind was delivered and filed on June 28, 2005. (R.Add.7). It is established law that as between grantors and grantees, a deed is effective upon delivery. *Exsted v. Exsted*, 202 Minn. 521, 524, 279 N.W. 554, 557 (1938). According to the Stipulation, Lind "took title to the Property on June 27, 2005," and was thus the fee owner of the Property as of that date. (A.App.25). For Appellant to accept a mortgage from Lind in June 2005, the Property had to have been conveyed from Calhoun to Lind. Appellant cannot, in good faith, deny that Lind was the owner of the Property at the time Respondents' Liens attached.

Because Lind was the owner of the property under Section 514.011, subd.5, and because Respondents were in direct contract with Lind, no pre-lien notices were required of Respondents under Section 514.011, subd. 2(a) and 4a.

[19]It is undisputed that Southview served pre-lien notice on Lind. (A.Add.19).

Appellant argues that Respondents "cannot have it both ways" – it cannot rely on the Certificate No.1144974 for purposes of establishing priority and yet argue that Lind was the "owner" of the Property when their Liens attached. (Appellant's Br. at 34). But, indeed, the law says that Respondents can. Section 514.011, subd.5 provides an express exception to the Torrens registration requirement for the definition of "owner." Under § 514.011, subd.5, filing alone is sufficient to establish the "owner" for purposes of pre-lien notice. No such exception exists for the priority of mortgages. While filing of the Deed was sufficient to establish Lind as the "owner" for purposes of Section 514.011; filing was not sufficient to give Respondents actual notice of the Mortgages under Torrens law. Accordingly, Appellant's argument must fail on all accounts.

IV. THE PRINCIPLES OF EQUITY ARE SERVED BECAUSE APPELLANT CAN RECOVER FROM THE TORRENS GENERAL ASSURANCE FUND.

The Torrens Act, by its very nature, is intended to be strictly enforced. As a result, in rare occasions, an error may occur in a certificate that deprives a party of its interest or priority in property. In acknowledgement of these potentially harsh outcomes, the Act establishes a general assurance fund ("Fund") from which parties aggrieved by an error made by the registrar may seek recovery. Minn. Stat. § 508.76.

Section 508.76, subd.1 provides:

> Any person who, without negligence on that person's part, sustains any loss or damage by reason of any omission, mistake or misfeasance of the registrar...in the performance of their respective duties under this law...may institute an action...to recover compensation out of the general fund for such loss or damage.

If the failure to memorialize the Mortgages on the certificate of title was due to the error of the Register, as Appellant contends, Appellant is eligible for recovery from the Fund. Respondents are not able to recover from the Fund because the Registrar's error was the failure to register Appellant's Mortgage, not the failure to register Respondents' Liens. Thus, only Appellant, not Respondents, have standing to seek recourse from the Fund. In this way, the strict application of the Torrens Act serves the ends of justice: Respondents maintain the priority to which they are entitled as innocent lien claimants without notice, and Appellant is able to seek recovery from the Fund for the damages it suffered as a result of the alleged Registrar error.

In addition to recovery from the Fund, Appellant remains a junior lienor and can recover from the Property's remaining value. Respondents have not been paid for the improvements they made to the Property. If Respondents' Liens are made junior to the Mortgages, Respondents will be left with nothing, whereas, even as a junior lienor, Appellant can recover from the Fund, can recover from the Property's remaining value, and will benefit from the improvements made by Respondents.

Appellant contends that it did everything the law required to establish its priority. In the end, however, Minnesota Torrens law required more – it required that the Mortgages be properly registered by a memorial on the certificate, thereby giving notice to all parties dealing with the Property, including innocent parties like Respondents. As a junior lienholder, Appellant can still be made whole from the Fund and from the value remaining in the improved Property. Otherwise, Respondents will be left with nothing.

Under the clear and established rule of Torrens law, it is Appellant, not Respondents, that lose priority.

Fortunately for Appellant, the law giveth as the law taketh away. In recognition of the sometimes harsh effects of the Torrens Act, the Act itself provides a remedy to Appellant. As the Court of Appeals wisely noted, "the equitable concerns raised by [Appellant] have been anticipated and accounted for by the legislature." *Imperial,* 775 N.W.2d at 904. Appellant can seek recovery from the Fund, whose purpose is precisely to provide recovery to those parties, like Appellant, who are aggrieved by errors made by the registrar. To that end, the principles of equity and justice are well served.

CONCLUSION

For the aforementioned reasons, Respondents respectfully request that this Court: (1) uphold the Court of Appeals decision finding that the Mortgages were not "of record" at the time Respondents' Liens attached; (2) reverse the district court's order for summary judgment; and (3) enter judgment declaring Respondents' Liens prior and superior to the Mortgages of Appellant and Calhoun.

Respectfully submitted,

LEVANDER, GILLEN & MILLER, P.A.

Dated: April 19, 2010

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