
IN THE SUPREME COURT OF MISSOURI

BOB DEGEORGE ASSOCIATES, INC. and)
KD CHRISTIAN CONSTRUCTION CO.,)

Respondents,)

v.)

Supreme Court No. SC91897

HAWTHORN BANK,)

Appellant.)

Appeal from the Jackson County Circuit Court
The Honorable John M. Torrence, Judge

Amicus Curiae Brief of Missouri Bankers Association
In Support of Appellant Hawthorn Bank

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Table of Contents

Table of Authorities	2
Interest of <i>Amicus Curiae</i>	4
Consent of the Parties	4
Jurisdictional Statement	5
Statement of Facts	5
Point Relied On	7
Argument	8
Conclusion	21
Certification of Service and of Compliance with Rule 84.06(b) and (c)	22

Table of Authorities

Cases:

<i>Allied Pools, Inc. v. Sowash</i> , 735 S.W.2d 421 (Mo. App. W.D. 1987)	17, 18, 20
<i>Bob DeGeorge Assoc., Inc. v. Hawthorn Bank</i> , No. WD 72651, 2011 Mo. App. LEXIS 709 (Mo. App. W.D. May 24, 2011)	18
<i>Butler Supply, Inc. v. Coon's Creek, Inc.</i> , 999 S.W.2d 748 (Mo. App. W.D. 1999)	20
<i>Dave Kolb Grading, Inc. v. Lieberman</i> , 837 S.W.2d 924 (Mo. App. E.D. 1992)	20
<i>Demeter v. Wilcox</i> , 22 S.W. 613 (Mo. 1893)	9
<i>Ellsbury v. Duval-Percival Trust Co.</i> , 282 S.W. 1054 (Mo. App. 1926)	13
<i>Fredco Realty, Inc. v. Jones</i> , 906 S.W.2d 818 (Mo. App. E.D. 1995)	13
<i>Glenstone Block Co. v. Pebworth</i> , 264 S.W.3d 703 (Mo. App. S.D. 2008)	20
<i>Glenstone Block Co. v. Pebworth</i> , 330 S.W.3d 98 (Mo. App. S.D. 2010)	18, 20
<i>ITT Commercial Finance v. Mid-Am. Marine</i> , 854 S.W.2d 371 (Mo. banc 1993)	8
<i>Jenni v. E.R.B. Land, Inc.</i> , 602 S.W.2d 696 (Mo. App. E.D. 1980)	14
<i>Joplin Cement Co. v. Greene County Bldg & Loan Ass'n</i> , 74 S.W.2d 250 (Mo. App. 1934)	16, 17
<i>Russell v. Grant</i> , 26 S.W. 958 (Mo. 1894)	16
<i>Schroeter Bros. Hardware Co. v. Croatian "Sokol" Gymnastic Ass'n</i> , 58 S.W.2d 995 (Mo. 1933)	9, 13
<i>Sutton Funding v. Forrest Muekker</i> , 278 S.W.3d 702 (Mo. App. E.D. 2009)	12
<i>Trout's Invest., Inc. v. Davis</i> , 482 S.W.2d 510 (Mo. App. K.C. 1972)	11
<i>Westinghouse Elec. Co. v. Vann Realty Co.</i> , 568 S.W.2d 777 (Mo. banc 1978)	9, 20

Wilson v. Lubke, 75 S.W. 602 (Mo. 1903) 15

Satutory Provisions:

§ 429.050, RSMo 2000 11

§ 442.400, RSMo 2000 19

Other:

Black's Law Dictionary 1235 (6th ed. 1990) 8, 9

Missouri Supreme Court Rule 84.05(f)(2) 4

Restatement (Third) Property (Mortgages) § 7.2 cmt. b (1997) 10, 11

Interest of *Amicus Curiae*

The Missouri Bankers Association (the “Association”) is a trade association founded in 1891. The Association’s membership includes more than 360 commercial banks and savings and loan associations representing more than 2,000 banking locations and over 30,000 bank employees throughout Missouri. The Association is the principal advocate for the banking industry in Missouri and dedicates its efforts to protecting the interests of its members. This *amicus curiae* brief is in furtherance of those efforts.

This case presents an issue of great importance to the Association: the priority of purchase money loans and mechanic’s liens. As will be set out in this brief, the Association’s position is that the Judgment of the Circuit Court of Jackson County, granting mechanic’s liens priority over a purchase money deed of trust, conflicts with long-standing Missouri case law and the equitable policies that are the foundation of over 100 years of legal precedent. If the trial court’s decision is not reversed, the interests of the Association and its members, as well as individuals and entities seeking purchase money loans from lending institutions, will suffer significant harm.

Consent of the Parties

Pursuant to Missouri Supreme Court Rule 84.05(f)(2), *Amicus Curiae* certifies that it received verbal consent from counsel for each party to this case to file this brief.

Jurisdictional Statement

Amicus Curiae adopts and incorporates by reference the Jurisdictional Statement set forth in Hawthorn Bank's substitute brief filed with this Court.

Statement of Facts

Amicus Curiae adopts and incorporates by reference the Statement of Facts set forth in Hawthorn Bank's substitute brief filed with this Court, and adds the following facts:

On May 13, 2008, Blue Springs Xtreme Powersports (hereinafter referred to as "BSXP") and Bob DeGeorge and Associates, Inc. (hereinafter referred to as "DeGeorge") entered into a Standard Form of Agreement between Owner and Design-Builder (hereinafter referred to as "the Agreement"), whereby DeGeorge agreed to remodel existing buildings located at 2501 South Outer Road, Blue Springs, MO 64015 (hereinafter referred to as "the Property") (L.F. 14 ¶ 14; 36 ¶ 17; 23-32; 296 ¶ 2; 348; 359). The Agreement was signed by Chad Franklin on behalf of BSXP and Robert DeGeorge, president of DeGeorge (L.F. 32). In the Agreement, BSXP is listed as the "Owner" with an address of 2501 South Outer Road, Blue Springs, MO 64015 (L.F. 23-32). The parties understood that the construction services provided by DeGeorge were being performed at BSXP's place of business (L.F. 43 ¶ 4; 51 ¶ 4).

On or about May 27, 2008, Bob DeGeorge called Jason Schwartz of Hawthorn Bank to request information concerning the bank's intent to loan money to BSXP (L.F. 395 ¶ 4). Jason Schwartz verified that Hawthorn Bank intended to loan money to BSXP to purchase the Property (L.F. 395-96 ¶ 5). Following the telephone conversation, Bob

DeGeorge sent an e-mail to Jason Schwartz that included his contact information (L.F. 396 ¶ 6; 398).

On June 4, 2008, BSXP executed a Promissory Note in the amount of \$2,512,500.00 in favor of Hawthorn Bank (L.F. 296 ¶ 4). All of the funds Hawthorn Bank loaned to BSXP were used to purchase the Property (L.F. 297 ¶ 6). The Promissory Note was secured by a purchase money Deed of Trust in favor of Hawthorn Bank and executed on June 4, 2008 (L.F. 297 ¶ 5). On November 19, 2008, Hawthorn Bank's purchase money Deed of Trust was recorded (L.F. 297 ¶ 5; 348; 359).

On June 4, 2008, Dennis and Connie ShROUT executed a General Warranty Deed conveying the Property to BSXP (L.F. 303-05). On November 19, 2008, said General Warranty Deed was recorded (L.F. 303-05).

On June 6, 2008, DeGeorge commenced construction on the project (L.F. 254 ¶ 3). BSXP failed to pay DeGeorge for the labor and materials it provided for the project (L.F. 254 ¶ 4). On November 18, 2008, DeGeorge filed a mechanic's lien on the Property (L.F. 254 ¶ 7).

DeGeorge and KD Christian Construction Co. (hereinafter referred to as "KD Christian") entered into an agreement whereby the latter served as a subcontractor on the project (L.F. 105 ¶ 14; 169 ¶ 14). KD Christian commenced work on the project on or about June 17, 2008 (L.F. 297 ¶ 10). KD Christian did not receive payment for the labor and materials it provided for the project (L.F. 105 ¶ 18). On January 29, 2009, KD Christian filed a mechanic's lien on the Property (L.F. 106 ¶ 21).

Point Relied On

The trial court erred in granting summary judgment to DeGeorge and KD Christian and erred in denying summary judgment to Hawthorn Bank because Hawthorn Bank's purchase money deed of trust takes priority over DeGeorge's and KD Christian's mechanic's liens under the well established doctrine that purchase money deeds of trust take priority over mechanic's liens.

Fredco Realty, Inc. v. Jones, 906 S.W.2d 818 (Mo. App. E.D. 1995)

Westinghouse Elec. Co. v. Vann Realty Co., 568 S.W.2d 777 (Mo. banc 1978)

Wilson v. Lubke, 75 S.W. 602 (Mo. 1903)

Restatement (Third) Property (Mortgages) §7.2 cmt. b (1997)

Argument

The trial court erred in granting summary judgment to DeGeorge and KD Christian and erred in denying summary judgment to Hawthorn Bank because Hawthorn Bank's purchase money deed of trust takes priority over DeGeorge's and KD Christian's mechanic's liens under the well established doctrine that purchase money deeds of trust take priority over mechanic's liens.

This Court reviews the trial court's granting of summary judgment *de novo*. *ITT Commercial Finance v. Mid-Am. Marine*, 854 S.W.2d 371, 376 (Mo.banc 1993). "The propriety of summary judgment is purely an issue of law." *Id.*

The trial court's judgment only considered the date of recording of Hawthorn Bank's purchase money Deed of Trust, without any reference to the nature of said deed of trust (L.F. 472-79). Applying the "first spade rule," the trial court found that the mechanic's liens of DeGeorge and KD Christian were in existence before Hawthorn Bank's Deed of Trust was recorded, thereby granting the liens priority over the purchase money Deed of Trust (L.F. 476-77). Long-standing Missouri law based on policies that are as applicable today as they were over 100 years ago support a finding that Hawthorn Bank's purchase money Deed of Trust has priority over the mechanic's liens of DeGeorge and KD Christian.

"Purchase money" is defined as "the actual money paid in cash or check initially for the property while the balance may be secured by a mortgage and note calling for periodic payments." Black's Law Dictionary 1235 (6th ed. 1990). The undisputed evidence is that the \$2,512,500.00 Hawthorn Bank loaned to BSXP was used to purchase

the Property. A “purchase money mortgage” is a “mortgage or security device taken back to secure the performance of an obligation incurred in the purchase of property.” *Id.* Hawthorn Bank’s Deed of Trust is such a security device that secures the repayment of the funds loaned to BSXP. Hawthorn Bank’s deed is a purchase money deed of trust.

“Mechanic’s liens do not take precedence over a purchase money deed of trust which secures repayment of funds used to purchase land upon which the improvements giving rise to the lien claims are erected.” *Westinghouse Elec. Co. v. Vann Realty Co.*, 568 S.W.2d 777, 781 (Mo. banc 1978). This was not a pronouncement of a new law, but the recognition of an established principle. “The great weight of authority in this State and elsewhere is that a mechanic’s lien for labor or material, furnished to a purchaser of land, is subordinate to a purchase money mortgage made by the purchaser when he obtains a conveyance of the title.” *Schroeter Bros. Hardware Co. v. Croatian “Sokol” Gymnastic Ass’n*, 58 S.W.2d 995, 1002 (Mo. 1933). In 1893, this Court held,

Where a mortgage on land is given to one who has advanced purchase money therefor, and executed at the same time with the deed which confers title on the mortgagor, . . . the seizin of the mortgagor is but an instantaneous one, to which prior incumbrances on his estate will not attach; but the mortgage to secure the purchase money will take precedence of all other liens or incumbrances.

Demeter v. Wilcox, 22 S.W. 613, 615 (Mo. 1893). Purchase money mortgages or deeds of trust have always enjoyed priority over other types of encumbrances, without regard to dates of perfection. The *Demeter* Court could have referenced recording of the mortgage,

but instead used the *giving* of the mortgage (deed of trust) and the *execution* of the deed conferring title of the real estate from the seller to the purchaser as the triggering events for the determination of priority.

The “long-established rule” mentioned in *Westinghouse* and *Wilcox* makes it unnecessary for a purchase money lender to examine preexisting judgments and other liens against the purchaser-mortgagor, thereby reducing title risk and encouraging purchase money financing. *Restatement (Third) Property (Mortgages)* § 7.2 cmt. b (1997). “Because third party lending is the dominant source of purchase money land financing in this country, a rule which facilitates such lending is especially beneficial to the national real estate economy. Applying the rule to benefit third party lenders is plainly fair.” *Id.* Lenders, such as Hawthorn Bank, only part with money that will be used to purchase real estate because the lenders expect to receive a security interest in that real estate that is superior to all other encumbrances. *Id.* Had Hawthorn Bank not advanced the purchase money, BSXP would not have acquired the Property and DeGeorge and KD Christian would not have the opportunity to satisfy their claims from such a convenient source. *Id.* A chilling effect on purchase money lending in this state would necessarily result from upholding the trial court’s determination denying priority to Hawthorn Bank’s purchase money Deed of Trust.

The policy granting priority to purchase money deeds of trust is fair and equitable. The legislature endeavored to balance the equities when it created mechanics lien claims.

Section 429.050, RSMo 2000¹, provides that a mechanic's lien attaches to the buildings, erections, or improvements for which the work was furnished or done, in preference to any prior lien, encumbrance or mortgage upon the land. "The great weight of authority in Missouri" holds that this statute only applies to new construction. *Trout's Invest., Inc. v. Davis*, 482 S.W.2d 510, 515 (Mo. App. K.C. 1972). The rationale for this statutory interpretation is fairness. The construction of a new structure on vacant land enhances the value of the land. *Restatement (Third) Property (Mortgages)* § 7.2 cmt. b (1997). If mechanic's lien claimants were not granted priority as to the improvements then the purchase money mortgage holder would receive greater security than the security for which the lender originally bargained. *Id.* Furthermore, the statutes allow mechanic's lien claimants to remove the improvements, leaving the lender with only the security covered by its deed of trust. *Id.* However, with regard to improving or repairing an existing structure, "the mechanic's liens arising incident to such improvement or repair are given no priority." *Trout's*, 482 S.W.2d at 515. Because the trial court did not determine if DeGeorge and KD Christian repaired an existing structure or constructed a new structure, the appellate court remanded the case for further proceedings.

The rationale supporting a mechanic's lien claimant's priority as to new improvements also supports the priority that purchase money lenders have on the ground. Mechanic's lien claimants would obtain a windfall if they were able to collect against not

¹ All statutory references are to the Revised Statutes of Missouri, 2000, unless otherwise noted.

only the value of the improvements but also the value of the land. The law attempts to balance the interests of purchase money lenders and contractors and materialmen by granting each party the benefit of their respective bargains, no more and no less.

It is very likely that focusing solely on the date when a purchase money deed of trust is recorded and the date when a mechanic's lien attaches to real estate could create inequitable results. The facts of this case, in part, illustrate the point. Hawthorn Bank's purchase money Deed of Trust was executed on June 4, 2008. DeGeorge commenced work on June 6, 2008. If, for example, the purchase money Deed of Trust was recorded on June 7, 2008, under the arguments espoused by DeGeorge and KD Christian, the mechanic's liens would have priority over the purchase money Deed of Trust. Certainly, recording a deed of trust within 3 days of execution is reasonable, yet Appellants advocate for an unreasonable result that has never been and should never be the law in this State.

The argument of DeGeorge and KD Christian that mechanic's liens should be considered in conjunction with the recording statutes would create inequities where none currently exist. The equitable considerations promoting the priority of purchase money mortgages over other encumbrances makes recording dates irrelevant. As the Court of Appeals, Eastern District, recently stated, "[A] mortgage or deed of trust *given* to secure the purchase price of land, and *executed* simultaneously with the deed to the purchaser, takes precedence and priority over liens created by the grantee prior to his acquisition of title." *Sutton Funding v. Forrest Muekker*, 278 S.W.3d 702, 704 (Mo. App. E.D. 2009)

(quoting *Ellsbury v. Duval-Percival Trust Co.*, 282 S.W. 1054, 1055 (Mo. App. 1926))
(emphasis added).

Even if this Court were to determine that, in order to enjoy a superior security interest, a purchase money lender must have a lien against real estate that pre-dates the attachment of a mechanic's lien, the record establishes that Hawthorn Bank did possess such a lien. "The determination of priority of liens has always been a matter of equitable jurisdiction but is expressly made so in an equitable mechanic's lien suit by the statute." *Schroeter Bros. Hardware Co. v. Croatian "Sokol" Gymnastic Ass'n*, 58 S.W.2d 995, 1001 (Mo. 1933). "An equitable lien may attach to property for the purpose of securing payment of an existing obligation and is ancillary to and separate from the debt." *Fredco Realty, Inc. v. Jones*, 906 S.W.2d 818, 822 (Mo. App. E.D. 1995). "The necessary requirements for an equitable lien are: (1) a duty or obligation owed by one person to another; (2) a res to which the obligation fastens and which can be identified; and (3) an intent, express or implied, that the property serve as security for the payment of the debt or obligation." *Id.* By executing the Promissory Note and Deed of Trust, BSXP owed a duty to Hawthorn Bank to repay the purchase money loan. The Property is identified in the Deed of Trust, which expresses a specific intent by BSXP that the Property secures the payment of the Promissory Note. On June 4, 2008, BSXP executed the Promissory Note and purchase money Deed of Trust, thereby granting Hawthorn Bank an equitable lien against the Property as of the date the note and deed of trust were executed. The equitable lien pre-dates the mechanic's liens of DeGeorge and KD Christian, which attached on June 6, 2008, at the earliest.

In the case of *Jenni v. E.R.B. Land, Inc.*, the appellate court was asked to determine the priority of interests between an unrecorded purchase money deed of trust and a subsequently recorded deed of trust. 602 S.W.2d 696 (Mo. App. E.D. 1980). The Jennis sold real estate to the Gamels and took back a note and deed of trust on said property. *Id.* at 697-98. The deed of trust was never recorded. *Id.* at 698. The Gamels then sold the real estate to E.R.B. Land, Inc., who recorded quit-claim deeds. *Id.* at 698-99. E.R.B. Land, Inc. refused to recognize the interest of the Jennis in the real estate. *Id.* at 699. The Court held that all of the elements of an equitable lien were present, and “E.R.B. purchased the real estate in question from the Gamels and is the owner of the property subject to the lien that was created by the unrecorded deed of trust.” *Id.* at 701. “The establishment of the equitable lien in this case is the appropriate remedy for the protection of [the Jenni’s] interest in the farm.” *Id.* Just as in *Jenni*, the appropriate remedy is to find that Hawthorn Bank has an equitable lien on the Property as of June 4, 2008, the date the purchase money was loaned to BSXP and Hawthorn Bank received the purchase money Deed of Trust against the Property.

DeGeorge and KD Christian contend that their mechanic’s liens attached on June 6, 2008, thus making Hawthorn Bank’s purchase money Deed of Trust, recorded on November 19, 2008, an encumbrance subsequent to the commencement of improvements and inferior to the lien claimants’ rights. DeGeorge and KD Christian allege that a ruling to the contrary creates an exception to Missouri’s recording statutes. There is no case law that states the failure to record creates an exception to the purchase money mortgage priority. Furthermore, as previously shown with the law on equitable liens, an interest in

property can be created without recording said interest. Assuming, without admitting, that recording is necessary for Hawthorn Bank to create an interest in the Property, DeGeorge and KD Christian overlook a third date which is fatal to their argument and dispositive of the issues.

If Hawthorn Bank's interest in the Property can only be established by the recording of the purchase money Deed of Trust, then BSXP's interest in the Property can only be established by the recording of the General Warranty Deed executed by the Shrouts. The General Warranty Deed from Dennis and Connie ShROUT conveying the Property to BSXP was not recorded until November 19, 2008 (L.F. 303).

“A mechanic's lien must have for its foundation a contract made by the owners of the land, not necessarily the absolute owner in fee, but the owner of the estate to be charged with the lien. Until one is such owner, he can make no contract that will impose a burden on the land. He may, in contemplation of becoming the owner, make a contract that will affect the land as soon as it becomes his property, but such contract can not relate back beyond the date of his purchase so as to impair the rights of the former owner.”

Wilson v. Lubke, 75 S.W. 602, 603 (Mo. 1903) (citation omitted). Mechanic's liens can only attach to land if the work is performed for the owner of the land. Where a party requests the services of a contractor or materialman, the mechanic's lien cannot attach until the party acquires title to the Property.

There is no evidence in the record that Dennis and Connie ShROUT contracted for the repairs undertaken by DeGeorge and KD Christian. The Standard Form of Agreement between Owner and Designer-Builder was executed by DeGeorge and BSXP, which is designated as the "Owner" of the Property (L.F. 23-32). The parties understood that the construction services provided by DeGeorge were being performed at BSXP's place of business (L.F. 43 ¶ 4; 51 ¶ 4). In executing the Agreement on May 13, 2008, BSXP and DeGeorge made a contract affecting land that BSXP did not own. As the ShROUTs had no connection to the Agreement, the mechanic's liens of DeGeorge and KD Christian could not impose a burden on the Property until BSXP became the owner.

If, under the recording statutes, BSXP did not acquire title to the Property until November 19, 2008, then the mechanic's liens of DeGeorge and KD Christian could not attach until November 19, 2008. Although a mechanic's lien may technically pre-date the acquisition of title, said lien attaches "simultaneously with the acquisition of title by the mortgagor," and the lien of the purchase money lender "can not be displaced or postponed by a mechanic's lien." *Russell v. Grant*, 26 S.W. 958, 961 (Mo. 1894). Under the recording statutes, Hawthorn Bank's purchase money Deed of Trust has priority over the mechanic's liens. The alternative is that if BSXP held equitable title to the Property on June 4, 2008, then Hawthorn Bank certainly possessed an equitable lien against the Property as of the same date, which is still prior to the mechanic's liens.

The facts of this case are similar to *Joplin Cement Co. v. Greene County Bldg & Loan Ass'n*, where a purchaser took immediate possession of real estate and began the construction of improvements prior to receiving a deed to the property. 74 S.W.2d 250,

251 (Mo. App. 1934). Concerning the money advanced to pay the purchase price for the real estate, there was “no doubt” that the purchase money lender “had the better and superior lien.” *Id.* The Court noted that the purchaser and seller only had a contract for the land and the construction was commenced on the premises without the knowledge or consent of the seller. *Id.* The money advanced by the lender was, in part, for the deed from the seller, which constituted a part of the loan secured by the lender’s deed of trust against the property. *Id.* While the purchaser had equitable title to the property sufficient to lay a foundation for the mechanic’s liens, “such liens would not be superior to a purchase money mortgage, for the purchase of the lot itself upon which the improvements were erected, although such mortgage was given after the improvements were commenced.” *Id.* The Shrouts did not contract with DeGeorge and KD Christian and did not consent to the construction on the Property. The funds advanced to BSXP were, in part, to secure the General Warranty Deed conveying the Property from the Shrouts. Despite the fact that the purchase money Deed of Trust was recorded after the construction performed by DeGeorge and KD Christian commenced, Hawthorn Bank’s deed is superior to the mechanic’s liens.

The law regarding after-acquired title helps explain the decision in *Allied Pools, Inc. v. Sowash*, which dealt with the construction of a swimming pool that commenced prior to the recording of a deed of trust by the purchasers of the real estate. 735 S.W.2d 421 (Mo. App. W.D. 1987). The Court stated,

[t]o the extent that First National holds a purchase money deed of trust to secure the repayment of funds used to purchase the land upon which the

pool was constructed, however, the deed of trust has priority over Allied's mechanic's lien. This is true even if the deed of trust was executed after construction of the pool was commenced.

Id. at 427 (citations omitted). The mechanic's lien attached simultaneously with the acquisition of title by the purchaser but was inferior to the purchase money deed of trust. As the Court of Appeals in this case succinctly stated, "if a deed of trust not even executed until after the work commences has priority as to the realty, it cannot be said that a deed of trust executed [prior to] but not recorded until after the work commences does not also have priority." *Bob DeGeorge Assoc., Inc. v. Hawthorn Bank*, No. WD 72651, 2011 Mo. App. LEXIS 709, at *13 (Mo. App. W.D. May 24, 2011).

In the Application for Transfer, DeGeorge and KD Christian allege that if a purchase money deed of trust can be recorded at any time and take priority over a mechanic's lien, "the contractor is prevented from evaluating the financial risks of a construction job and his prospects for recovery if he is not paid." The assumptions that contractors and materialmen will conduct title searches prior to undertaking a job and will not undertake a job if their liens are not prior to other encumbrances are not assumptions based in reality. "Mechanic's liens are legislatively created claims that give a security interest to mechanics and materialmen for labor and materials furnished in the improvement of property, *property that often is already encumbered by a mortgage, deed of trust, or similar.*" *Glenstone Block Co. v. Pebworth*, 330 S.W.3d 98, 101 (Mo. App. S.D. 2010) (emphasis added). The more realistic assumption is that contractors and

materialmen presume that their mechanic's liens will be inferior to a mortgage or deed of trust.

The assumptions posited by DeGeorge and KD Christian are not even supported by the record in this case. It is quite apparent that DeGeorge did not conduct a title search prior to executing the contract with BSXP. If such a title search was conducted, DeGeorge would have discovered that BSXP was not the owner of the Property at the time of the contract.

According to § 442.400, the failure to record a written instrument affecting real estate has no effect as to the parties to the instrument or such other parties that have actual notice thereof. DeGeorge and KD Christian had actual and constructive knowledge of facts sufficient to put them on notice of Hawthorn Bank's rights and the purchase money Deed of Trust. On or about May 17, 2008, Bob DeGeorge, president of DeGeorge, called Jason Schwartz of Hawthorn Bank to request information concerning the bank's intent to loan money to BSXP (L.F. 395 ¶ 4). Jason Schwartz verified that Hawthorn Bank intended to loan money to BSXP to purchase the Property (L.F. 395-96 ¶ 5). DeGeorge knew that BSXP was not the owner of the Property at the time that the contract for services was executed on May 13, 2008. Prior to commencing work on the project, DeGeorge knew that Hawthorn Bank was loaning money to BSXP to purchase the Property. Hawthorn Bank's purchase money Deed of Trust has priority over the mechanic's liens.

The contention by DeGeorge and KD Christian that there is a conflict in Missouri law concerning the issue of priority between purchase money deeds of trust and

mechanic's liens is simply untrue. Appellants point to *Dave Kolb Grading, Inc. v. Lieberman*, 837 S.W.2d 924 (Mo. App. E.D. 1992) and *Glenstone Block Co. v. Pebworth*, 264 S.W.3d 703 (Mo. App. S.D. 2008) as being in conflict with the holdings of *Westinghouse, Allied Pools and Butler Supply, Inc. v. Coon's Creek, Inc.*, 999 S.W.2d 748 (Mo. App. W.D. 1999).

Appellants pull one sentence from a lengthy opinion in the *Dave Kolb* case and ask this Court to overturn over 100 years of precedent. The one sentence is, of course, dicta, as the Court determined that the lender waived priority due to the lender's involvement with and expectation that construction would take place on the real estate. *Dave Kolb*, 837 S.W.2d at 934-35. The record establishes that Hawthorn Bank loaned the purchase money and had nothing to do with the construction that took place on the Property. To the extent this Court finds the language in *Dave Kolb* to be in conflict with other opinions, *Dave Kolb* should no longer be followed.

One does not have to look beyond *Glenstone Block Co. v. Pebworth*, 330 S.W.3d 98 (Mo. App. S.D. 2010) (hereinafter referred to as "*Glenstone II*") in order to interpret and distinguish *Glenstone Block Co. v. Pebworth*, 264 S.W.3d 703 (Mo. App. S.D. 2008) (hereinafter referred to as "*Glenstone I*") from this case. Appellants cite *Glenstone I* for the proposition that mechanic's liens take precedence over secured loans made after the start of construction. *Glenstone II* points out that the issue in *Glenstone I* was whether "the loan secured by the deed of trust was a construction loan." *Glenstone II*, 330 S.W.3d at 100. On the second appeal, the Court found the loans to be construction loans, thereby waiving priority of the lender's deed of trust as to the mechanic's liens. *Id.* at 102-03.

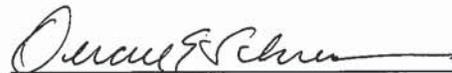
Hawthorn Bank's loan to BSXP was not a construction loan. Neither *Glenstone I* nor *Glenstone II* have any bearing on this case.

Conclusion

For the foregoing reasons, the Missouri Bankers Association respectfully requests that this Court reverse the Judgment of the Circuit Court of Jackson County and enter judgment for Hawthorn Bank.

Respectfully submitted,

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Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on this 23rd day of November, 2011, a true and correct copy of the foregoing brief was served through the Missouri Supreme Court electronic filing system upon:

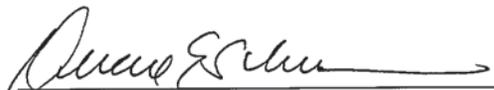
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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b) and that the brief contains 5,224 words.


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