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IN THE SUPREME COURT OF MISSOURI

BOB DEGEORGE ASSOCIATES, INC., KD CHRISTIAN CONSTRUCTION, CO., Respondents, v. HAWTHORN BANK, Appellant.	)))))))))))	Sup.Ct. No. SC91897

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

Amicus Curiae Brief of the American Subcontractors Association and Builders' Association in Support of Respondents Bob DeGeorge Associates, Inc. and KD Christian Construction, Co.

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INTEREST OF AMICUS CURIAE

The American Subcontractors Association ("ASA") is a national organization advocating and representing the interests of approximately five thousand (5,000) member firms of subcontractors, specialty contractors, and material suppliers before all branches and levels of government. ASA is affiliated with thirty seven (37) local chapters throughout the country, including the Kansas City Chapter of the ASA ("KCASA") which fosters, promotes, and advocates the interests of subcontractors and suppliers in the Kansas City metropolitan area and the ASA-Midwest Council which serves the interests of subcontractors and suppliers in the St. Louis metropolitan area in like fashion. Both the KCASA and the ASA-Midwest Council join in this brief. The Builders' Association is a Missouri not-for-profit trade association with deep roots in the Missouri construction industry since 1887. Nine hundred (900) member firms employ approximately twenty thousand 20,000 workers. The Association delivers training, distributes building plans, negotiates twenty eight (28) collective bargaining agreements, manages thirty one (31) fringe funds in conjunction with labor unions, and advocates on behalf of its members at the governmental and judicial levels.

This case involves the issue of whether a purchase money deed of trust that is not recorded until after construction work is commenced on a project and, therefore, after a mechanic's lien attaches, has priority over such mechanic's lien. Protection of mechanic's liens is of the utmost importance to these *Amicus Curiae*. Each of the above organizations work to protect the priority status granted to their members' mechanic's liens and to educate their members about protecting their construction lien rights. They

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routinely engage in public policy, legislative, and regulatory debates concerning issues affecting the construction industry. The members of the ASA and the Builder's Association will be uniquely, profoundly, and disproportionately affected by the Court of Appeals' decision. As two of the primary construction industry organizations active in the state of Missouri, these organizations are uniquely positioned to articulate the concerns and interests of the industry and the impact of the Western District's decision.

CONSENT OF THE PARTIES

Prior to the filing of this brief, *Amicus Curiae* has received the consent of all parties required pursuant to Missouri Supreme Court Rule 84.05(f)(2).

JURISDICTIONAL STATEMENT

Amicus Curiae adopts and incorporates by reference the Jurisdictional Statement set forth in Appellant's November 23, 2011 Substitute Brief.

STATEMENT OF THE FACTS

During the summer of 2008, Blue Springs XtremePowersports (Xtreme) developed plans to purchase three tracts of land and a building located in Blue Springs, Missouri ("the property") from Dennis and Connie Shrout and John and Vida Thompson ("Sellers"). (L.F. 14 ¶ 14). In pursuit of this plan, Xtreme entered into a contract with Bob DeGeorge Associates, Inc. ("DeGeorge") to hire DeGeorge as a general contractor to remodel said building. (L.F. 14 ¶ 14; 36 ¶ 17; 296). Thereafter, DeGeorge subcontracted with KD Christian Construction Co. ("KD Christian") on the project. (L.F. 105 ¶ 14). On June 4, 2008, Xtreme borrowed $2,512,500 from Appellant Hawthorn Bank ("Appellant"), (L.F. 296 ¶ 4), purchased the property, and executed a purchase money

deed of trust. Most importantly, Appellant failed to record this purchase money deed of trust on this date, waiting until nearly four months after the completion of construction to do so. (L.F. 303-05; 253).

On June 6, 2008, DeGeorge began work on the property. (L.F. 254 ¶ 3). On June 17, 2008, KD Christian began work. (L.F. 297 ¶ 10). Work on the project was completed by July 25, 2008. (L.F. 422 ¶ 2). DeGeorge never received the full promised payment under the contract and was thus unable to pay KD Christian. (L.F. 252; 105 ¶ 18).

On November 18, 2008, DeGeorge filed a mechanic's lien on the property (L.F. 252). The amount of this lien has since been set at $147,883.70 through confessed judgment. (L.F. 250; 252). The following day, November 19, 2008, Appellant finally recorded the purchase money deed of trust on the property. (L.F. ¶ 253). Again, the recordation of the deed of trust was delayed until one day after DeGeorge's mechanic's lien was filed and nearly four months after completion of the project (L.F. 303-05; 253). On January 20, 2009, KD Construction filed its mechanic's lien for $17,532.83 (L.F. 106 ¶ 21).

On January 26, 2009, DeGeorge initiated suit against the sellers and Xtreme (L.F. 11). KD Christian intervened on June 22, 2009, naming Appellant as a third party defendant (L.F. 70; 85; 102 ¶ 7). DeGeorge thereafter filed a Petition against Appellant. (L.F. 167). Both suits against Appellant sought to establish priority status for the mechanic's liens. (L.F. 102 ¶ 7; 253).

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On January 15, 2010, DeGeorge filed a Motion for Summary Judgment. (L.F. 252-84). On May 5, 2010, Judge Torrence issued an order granting summary judgment in favor of DeGeorge and KD Christian finding that both mechanic's liens warranted priority status over the purchase money deed of trust. (L.F. 423-29). Appellant filed its Notice of Appeal on June 25, 2010 (L.F. 467). The Court of Appeals for the Western District reversed the trial court. *See Bob DeGeorge Assoc., Inc. v. Hawthorn Bank*, No. WD 72651, 2011 WL 1988416 (Mo. Ct. App. W.D. May 24, 2011). The reversal was based upon the Western District's position that under *Westinghouse Elec. Co. v. Vann Realty Co.*, 568 S.W.2d 777 (Mo. banc 1978), purchase money deeds of trust warrant priority over mechanic's liens even if the deed is recorded after the commencement of construction. *DeGeorge*, 2011 WL 1988416, at *2. The Western District thereby determined that as to the land, the mechanic's liens did not have priority but remanded the case back to the trial court to determine whether the liens had priority in "buildings, erections or improvements" on that land. *Id.* at *4-5.

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POINTS RELIED ON

I. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS BECAUSE UNDER § 442.380, R.S.MO. (2000), INTERESTS IN REAL PROPERTY ARE NOT VALID UNTIL RECORDED, IN THAT RESPONDENTS COULD NOT HAVE HAD NOTICE OF APPELLANT'S UNRECORDED PURCHASEMONEY DEED OF TRUST AT THE TIME THEY COMMENCED WORK AND THEIR MECHANIC'S LIEN RIGHTS ATTACHED.

R.S.Mo. § 442.380

R.S.Mo. §442.400

Russell v. Grant, 26 S.W. 958, 960-61 (Mo. 1894)

II. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS BECAUSE UNDER § 429.060, R.S.MO. (1992), MECHANIC'S LIENS ARE PREFERRED TO ALL OTHER ENCUMBRANCES SUBSEQUENT TO THE COMMENCEMENT OF WORK IN THAT THE APPELLANT'S ENCUMBRANCE ON THE PROPERTY DID NOT COME INTO BEING AS IT RELATES TO MECHANIC'S LIENHOLDERS AND OTHERS UNTIL AFTER RESPONDENTS COMMENCED WORK ON THE PROPERTY.

R.S.Mo. § 429.050

R.S.MO. § 429.060

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Butler Supply, Inc. v. Coon's Creek, Inc.,999 S.W.2d 748, (Mo. Ct. App. W.D. 1999)(App. W.D. 1999)

III. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OFRESPONDENTS BECAUSE UNDER MISSOURI COMMON LAW,PURCHASE MONEY FINANCING HAS BEEN GRANTED PRIORITY OVER MECHANIC'S LIENS IN ONLY LIMITED SITUATIONS FOR THE PURPOSE OF PROMOTING SUCH FINANCING, IN THAT REQUIRING RECORDATION TO INSURE PRIORITY DOES NOT OVER BURDEN LENDERS.

R.S.Mo. §442.400

R.S.MO. § 429.060

Russell v. Grant, 122 Mo. 161 (1894)

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

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ARGUMENT

This Court reviews appeals from summary judgment "essentially de novo." *State ex rel. Koster v. Olive*, 282 S.W.3d 842, 846 (Mo. banc 2009) (citing *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993).

The Court of Appeals' holding that a purchase money deed of trust has priority over a previously-filed mechanic's lien unjustly favors one of three competing public policies at issue in this case: promoting purchase money financing. The Western District's holding does so at the cost of negating Missouri's strong policies of protecting mechanic's lien holders and requiring recordation of real property instruments. Each of these three policies and the law that has been created to protect them is addressed in the three points that follow.

Instead of requiring that the priority of encumbrances upon land should be established by recording, the Court of Appeals has apparently added a "first pen rule" to Missouri's recording act to contrast with the "first spade rule" governing attachment of mechanics' liens. The opinion below allows all purchase money deeds of trust to retain the priority date of their execution upon subsequent recordation, even if that recording happens later than the attachment of a mechanics' lien. The creation of this rule is against the public policy inherent in Missouri's recording act and is fundamentally unfair to otherwise innocent laborers and suppliers who are protected by mechanics' liens. The decision is a significant change in the law and contradicts the plain meaning of Missouri statutes as they have been understood and applied by the construction industry (and the

banking industry as well) for decades. To permit a "first pen rule" to prevail unfairly and unnecessarily exposes members of the construction industry to new risks, fosters uncertainty, undermines sound financial planning and estimating for construction projects, and increases the cost of doing business in Missouri.

Most importantly, it is ultimately unnecessary to sacrifice Missouri's statutory structure for mechanic's liens and recording in the name of purchase money financing. Rather, this court can insure the furtherance of each of these public policies. A holding that purchase money deeds of trust gain priority only upon recording is not overly burdensome on lenders, encourages giving notice to the public, and protects otherwise innocent contractors, suppliers, and laborers from the fruits of their labor becoming mere and unjust additional security for lenders.

I. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS BECAUSE UNDER § 442.380, R.S.MO. (2000), INTERESTS IN REAL PROPERTY ARE NOT VALID UNTIL RECORDED, IN THAT RESPONDENTS COULD NOT HAVE HAD NOTICE OF APPELLANT'S UNRECORDED PURCHASE MONEY DEED OF TRUST AT THE TIME THEY COMMENCED WORK AND THEIR MECHANIC'S LIEN RIGHTS ATTACHED.

Missouri has an interest in ensuring that the public is aware of real property encumbrances. Under § 442.380, R.S.Mo. (2000), "[e]very instrument in writing that conveys any real estate . . . shall be recorded in the office of the recorder of the county in which such real estate is situated." For over two-hundred years, Missouri has held that

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such an interest is not valid against innocent third parties until it is recorded. § 442.400, R.S.Mo. (2000); Act Oct. 1, 1804, 1 Terr. Laws, p. 47. The common sense policy behind Missouri's recording act is the dissemination of truthful information to the public, so that the public may be notified of a property's status and thereby order their affairs related to that property accordingly. *See, e.g.*, *Bremen Bank and Trust Co. of St. Louis v. Muskopf*, 817 S.W.2d 602 (Mo. Ct. App. E.D. 1991).

The Appellant and *Amicus Curiae* Missouri Bankers Association essentially argue that where a mechanic's lien holder provides labor or materials for property subject to an "*existing"* purchase money deed of trust, the lien is superior only as to improvements on the property. This argument is largely based on this Court's holding in *Westinghouse Elec. Co. v. Vann Realty Co.*, 568 S.W.2d 777 (Mo. Banc 1978). While the *Westinghouse* opinion will be addressed in *Section III*, it is more pressing and relevant to point out that in adopting this position, Appellant's wholly dismiss the application of Missouri statutes relevant to this case. Not only is reliance on *Westinghouse* misplaced, it is unnecessary. "It is a basic rule of statutory construction that words should be given their plain and ordinary meaning whenever possible. Courts look elsewhere for interpretation only when the meaning is ambiguous or would lead to an illogical result defeating the purpose of the legislature." *Spradlin v. City of Fulton*, 982 S.W.2d 255, 258 (Mo. 1998). There is no ambiguity within the recording act. The phrase "every instrument" in R.S.Mo. § 442.380 clearly includes purchase money deeds of trust.

Rather than looking to § 442.400 for the validity of the instrument, *Amicus Curiae* Missouri Banker's Association cites *Demeter v. Wilcox*, 22 S.W. 613, 615 (Mo. 1893) for

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the proposition that purchase money deeds of trust gain super priority as soon as they are "*given*." To state that a purchase money deed of trust is "existing" and, therefore, worthy of priority without recordation flies in the face of § 442.400. Under § 442.400, no instrument conveying real property "shall be valid, except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the recorder for record." There is nothing ambiguous or confusing about this statute. It simply means that a purchase money deed of trust is only "*existing*" to the parties to that deed unless it is recorded. Otherwise, as Appellant states in its brief, such an unrecorded purchase money deed of trust is not enforceable. Put simply, as to all non-parties, including mechanic's lien holders, an unrecorded purchase money deed of trust does not exist.

Appellant's and *Amicus Curiae* Missouri Banker's Association cite only to distinguishable case law to demonstrate special priority considerations granted to purchase money deeds of trust. Importantly, nowhere within the Missouri's recording acts are purchase money deeds of trust excused from recording. To the extent that it was the intent of the *Westinghouse* Court to do so, such a holding remains in defiance of § 442.400. Setting a priority date prior to perfection through recording is contrary to Missouri law. A mortgage is perfected on the date it is recorded. R.S.Mo. § 442.380 (2000). Any priority relates back to this date. *Id.*; 18 MOPRAC § 13:6, *Real Estate Law – Transact & Disputes* (3d ed.) ("As is true in the case of other grants, a mortgagee must record his mortgage pursuant to V.A.M.S. §§ 442.380-442.410"); *Russell v. Grant*, 26 S.W. 958, 960-61 (Mo. 1894) ("a mechanic's lien is wholly unlike a [purchase money

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deed of trust] . . . the [purchase money deed of trust] binds upon being delivered and recorded . . . It dates from its registry . . .”).

If, as argued by Appellants, the date of validity is the date executed or “given,” the recording statute is futile. If purchase money deeds of trust are to be granted priority upon being “given,” Appellant could have recorded its deed of trust the day prior to this appeal to maintain its priority. Appellant and the Western District would have this Court hold that such a deed of trust could be deemed to be “existing” against all other encumbrances at all times after being “given” on June 4, 2008.

The facts of this case clearly show that Appellant waited months prior to complying with § 442.380. In *Kuhn v. American Nat. Bank*, 117 Kan. 717 (1925), a comprehensive analysis of recordation priority case law showed that the weight of authority holds that a purchase-money mortgage has priority over another:

> which is not defeated by the mere circumstance of the other reaching the register first, where the purchase-money mortgage is recorded without any unnecessary delay after its delivery, but that if, on the other hand, the holder of the purchase money mortgage voluntarily withholds it, from record, and in the meantime money is lent to one having no notice of it upon another mortgage, the mortgage first recorded has priority in accordance with the ordinary rules with regard to the recording of instruments affecting title to real estate.

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To hold otherwise would allow a purchase money mortgagee to wait as long as it likes to record, well aware that contractors and subcontractors are making improvements on the land in which it retains an interest. Here, both DeGeorge and KD Christian worked on the property for approximately five months. During this time, Appellant was aware of the construction as it loaned additional monies for such improvements. Appellant's failure to timely record its purchase money deed of trust is, therefore, not likely to a mere "foot fault" but a more grievous misstep having potentially material consequences to those taking on various roles entailing risk on the construction project at issue.

As stated above, the public policy behind Missouri's recording acts is notice and the certainty that comes with notice. The Western District's holding has rendered otherwise innocent mechanic's lien holders unable to obtain notice of what encumbrances exist on any real property they contract to improve. Unlike purchase money lenders which have the opportunity and ability to inspect property and insure no construction has commenced prior to extending credit, contractors, subcontractors, suppliers, and their lenders and sureties can diligently search the records office for the status of the real property that is to be improved but may be unable to determine if a purchase money deed of trust exists. Therefore, they will be unable to determine if their mechanics' lien is sufficient security for the improvements to the property will be unable to properly order their business and assess risk.

Additional security, such as bonds, could replace mechanics' liens as security but would come at an increasing cost to Missouri's construction industry, owners, and lenders alike. But, the decision of the Western District has even broader repercussions.

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While issuance of bonds is helpful to lower tiered subcontractors and suppliers, a proliferation of bonds will be of limited utility to the construction industry in that such bonds provide no benefit to a general contractor, in whose name such bonds are issued. If the property owner defaults on its payment obligations to the general contractor, the general contractor has no recourse other than a breach of contract claim. Nor will the bonding company receive any benefit in that such surety will be unable to determine the true status of the property and the financial condition and obligations of the property owner. Sureties underwriting a bond risk will be unable to accurately determine the financial risks associated with the contract between the property owner and the prime contractor. If bonds are issued at all under such conditions, the premiums charged for such bonds will necessarily increase given the uncertain conditions of risk.

The Court of Appeals' opinion also creates inherent problems in the scheme of priority. For example, Missouri has consistently held that an unrecorded purchase money deed of trust is junior to a subsequent recorded deed of trust taken in good faith without notice. *See Woodard v. Householder*, 315 Mo. 1155 (1926). Yet, §429.060, provides that a mechanics' lien holder who commences work prior to such a recorded deed of trust retains priority over that recorded trust. The Court of Appeals holding would give an unrecorded purchase money deed of trust priority over mechanic's liens.

Applied to the current law in the Western District, what results is a scenario built on irrational fallacies whereby no interested party can ever establish a true priority: where a property acquires an unrecorded purchase money deed of trust, then is improved by a mechanic's lien holder, and then is further encumbered by a deed of trust that is

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immediately recorded, it becomes impossible to determine priority. An affirmation of the Western District's extension of *Westinghouse* will only serve to create more unforeseen problems and litigation.

II. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS BECAUSE UNDER § 429.060, R.S.MO. (1992), MECHANIC'S LIENS ARE PREFERRED TO ALL OTHER ENCUMBRANCES SUBSEQUENT TO THE COMMENCEMENT OF WORK IN THAT THE APPELLANT'S ENCUMBRANCE ON THE PROPERTY DID NOT COME INTO BEING AS IT RELATES TO MECHANIC'S LIENHOLDERS AND OTHERS UNTIL AFTER RESPONDENTS COMMENCED WORK ON THE PROPERTY.

The Missouri legislature has expressed a strong State interest in protecting materialmen and laborers who improve real property. Under § 429.060, R.S.Mo. (1992), "[t]he lien for work and materials as aforesaid shall be preferred to all other encumbrances which may be attached to or upon such buildings, bridges or other improvements, or the ground, or either of them, subsequent to the commencement of such buildings or improvements." The policy behind Missouri's decision to grant priority in land and improvements to contractors and materialmen is that such improvements put lenders on notice that these constructors exist and expect to be paid. *See Butler Supply, Inc. v. Coon's Creek, Inc.*, 999 S.W.2d 748 (App. W.D. 1999). Additionally, Missouri's mechanic's lien structure seeks to protect those who perform work and improve real property. Under the "first spade rule", a properly filed mechanic's lien relates back to the

start of work on the project. *Id.* at 750; *H.B. Deal Constr. Co. v. Labor Disc. Ctr., Inc.*, 418 S.W.2d 940 (Mo. 1967). There is no corresponding observable protection for investigating purchase money deeds of trust. Contractors and materialmen can be apprised of such encumbrances in only one way: by checking at a local recorder's office. Just as with the recording acts, the Missouri legislature carved out no special exceptions to § 429.060 for purchase money deeds of trust. The plain language of the statute must control and mechanic's liens must be given priority to "all other encumbrances." It has been frequently stated that the mechanic's lien statutes are remedial in nature and must be construed liberally in favor of the lien claimant. *See, e.g., Shamrock Bldg. Supply, Inc. v. St. Louis Inv. Props., Inc.*, 842 S.W.2d 556, 558 (Mo. Ct. App. E.D. 1992). A liberal interpretation of §§ 429.050 & 429.060, demands priority for mechanic's liens over "all other encumbrances," including an invalid, unrecorded and, therefore, nonexistent purchase money deed of trust.

Appellant and *Amicus Curiae* Missouri Banker's Association argue that Missouri's mechanic's lien structure adequately protects contractors, subcontractors and materialmen by granting them priority in improvements on land and providing them with the ability remove the improvements under R.S.Mo. § 429.050. It is hardly a comfort to know that those contractors similarly situated to the Respondents have the heavily limited option to tear down what has been built and attempt to sell the used debris. "[T]he right provided by § 429.050 to sell and remove an improvement often is of little utility –other than settlement leverage – because removal may well diminish the value of the improvement." Mo. Construction Law § 9.95 (MoBarCLE 2nd ed. 2004). Appellant

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describes granting mechanic's lien claimants any interest in the land itself in addition to the recently torn down improvement (i.e., little more than rubble and debris) as a "windfall." Such a statement demonstrates a lack of sincerity towards an equally valid State interest. In this context, the remedy provided for by §429.050 is an inequitable and impractical solution for the construction industry.

Yet Appellant and *Amicus Curiae* Missouri Banker's Association argue that any holding based on record date priority creates inequitable results *in favor of* contractors and materialmen. The Banker's Association suggests that if recording occurs within a reasonable time after execution but not before the start of construction, it is unfair and unreasonable to award mechanic's lien claimants priority. As outlined in *Section III*, this position ignores the level of control lenders retain throughout the course of any potential transaction. Unlike the contractor who cannot find an unrecorded purchase money deed of trust, a lender can inspect property to learn its status and can contractually limit construction prior to recording. Additionally, lenders do not customarily loan money for the purchase of property without relying on the existence of a title insurance policy insuring the good and marketable title of the subject property free and clear of all liens. Lenders are commonly named as "additional insureds" by endorsement on such title insurance policies. Unlike contractors, lenders have the ability to narrow and limit their losses should a competing mechanic's lien or other encumbrance become known after the loan is made. It is hardly inequitable to hold a title insurance company or agent accountable for error or omission in failing to find the prior lien or encumbrance or failing to file a purchase money deed of trust in a timely and immediate manner when

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that is precisely what they are charged and paid to do. Ultimately, the risk of insuring the priority of a purchase money deed of trust should be properly placed on those who are in the very business of assessing and assuming such risk. Creation of some rule which ultimately acts to relieve such risk-takers from the very risk they insure against is the very definition of a "windfall" that simply does not mirror the customs and practices of the commercial lending community.

Without the priority protection afforded to mechanic's liens before the Western District's decision, the lending community, including the title insurers and agents upon whom they rely, would receive an undeserved boon. The burden would fall squarely on contractors, subcontractors, and suppliers to require additional security, such as bonds, before the commencement of any construction to guard against unknown liens and encumbrances which could result in the loss of valuable protections afforded by the mechanic's lien statutes. Unlike lenders, contractors, subcontractors, and suppliers, in general, do not routinely obtain title information before undertaking construction and should not be held to such a standard. The only way a subcontractor or supplier can protect itself is to insist on the additional security of a bond, which will increase the cost of construction state wide and undercut the policies behind Missouri's mechanic's lien statute and Missouri's recording act: notice and certainty. As addressed above, a bond is inadequate protection. In large part, the purpose of Missouri's mechanic's lien statutes is to provide a fast and effective means for the construction industry to insure payment. The statutory scheme is, in essence, the only "insurance" available to those lower tiered subcontractors and suppliers in the construction industry to get paid on projects.

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The process for filing and perfecting mechanic's liens under Chapter 429 has been a successful means of advancing Missouri's interest in protecting the construction industry. "The traditional statutory mechanic's lien has been dubbed the greatest collection tool since the deed of trust." Mo. Construction Law § 9.1 (MoBarCLE 2nd ed. 2004). The *statutes* related to both liens and deeds are important in that they allow our citizenry the ability to order their affairs. Here, proper recordation would have allowed Respondents to request additional security before contracting to perform work. Contractors, subcontractors and materialmen must be afforded the same statutory certainty as lenders. Surely, the Appellant lender in this case has the ability to seek redress from the title agent which failed to protect its interests by timely filing the purchase money deed of trust or from the title insurer which insured good and marketable title to the property free and clear of competing liens and encumbrances. If Appellant failed to protect itself in that regard despite the commercial practicalities involved, Respondents should not bear the brunt of Appellant's decision-making.

As to lenders, §442.400 clearly requires the recording of deeds prior to be being effective against non-parties. As to lien claimants, §429.060 clearly ensures priority against all subsequent encumbrances. Because it strays so far from these statutes, the Western District's holding is not clear, is not accessible, and is contrary to industry actors' statutorily based expectations.

III. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS BECAUSE UNDER MISSOURI COMMON LAW, PURCHASE MONEY FINANCING HAS BEEN

GRANTED PRIORITY OVER MECHANIC'S LIENS IN ONLY LIMITED SITUATIONS FOR THE PURPOSE OF PROMOTING SUCH FINANCING, IN THAT REQUIRING RECORDATION TO INSURE PRIORITY DOES NOT OVER BURDEN LENDERS.

Finally, this Court has expressed an interest in protecting purchase money deeds of trust from subsequent mechanic's liens in *Westinghouse Elec. Co. v. Vann Realty Co.*, 568 S.W.2d 777 (Mo. Banc 1978). As explained by the Court of Appeals, certain purchase money mortgages have been given priority over prior mechanics' liens in order to "avoid conferring a windfall on lien claimants, as well as to encourage purchase money financing." *Bob DeGeorge Associates, Inc.,* *2 (citing RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 7.2 cmt. B (1997)). The policy behind this protection is the promotion of purchase money financing that thereby triggers construction and improvements on real property.

By holding that an unrecorded purchase money deed of trust has priority over a filed mechanic's lien for which a lien has attached for over five months, the Court of Appeals has gone overboard in protecting the legitimate public policy associated with purchase money deeds of trust. It has also taken a step beyond the opinion in *Westinghouse* at the unreasonable cost of violating the equally legitimate public policy interests associated with Missouri's recording act and mechanic's lien structure.

The Court of Appeals' reliance on *Westinghouse,* while relevant to a discussion of the policies at issue, is misplaced due to the distinguishing characteristics of that case. In *Westinghouse*, this court gave priority to a purchase money deed of trust that was

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recorded *prior to* commencement of construction on the property and the filing of a mechanics' lien. 568 S.W.2d at 781 (explaining that "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").

Upon the facts in *Westinghouse*, it is perfectly reasonable to understand that the balance of competing policy interests tips in favor of the lender. The subsequent contractors could have discovered the recorded encumbrance and negotiated additional security. To hold otherwise would have been a hindrance to purchase money lenders who had diligently given notice of their interest to the world.

However, the Court of Appeals holding went further than this Court's holding in *Westinghouse*. The Western District held that the *Westinghouse* priority structure applies even where the purchase money lender fails to record until *after* commencement of the construction. Here, the balance of competing interests tilts more heavily in favor of mechanic's lien holders for two reasons. First, it is less likely that requiring recordation to establish priority will be a burden to lenders that would hinder purchase money financing. Lenders can determine whether to extend credit based on, among other things, whether construction has already commenced on the property which will serve as collateral. Second, as outlined in Point II, without recordation mechanic's lien holders are substantially less able to protect their interests.

Appellant and *Amicus Curiae* Missouri Banker's Association rely heavily on *Westinghouse's* statement that "[m]echanic's liens do not take precedence over a

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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." 568 S.W.2d at 781 (citing *Joplin Cement Co. v. Greene County Bldg. & Loan Ass'n*, 74 S.W.2d 250 (Springfield Ct. App. 1934); Comment, 42 Mo.L.Rev. 53, 66-69 (1977). A review of the *Joplin Cement* case indicates that the Southern District Court of Appeals cited *Schroeter Bros. Hardware Company v. Coratian "Sokol" Gymnastic Ass'n et al.*, 58 S.W.2d 995, 1002 (Mo. 1932), for the proposition that mechanic's 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." 74 S.W.2d at 251. In *Schroeter*, the court held that "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." 58 S.W.2d 995 at 1002. Despite a supposed "great weight", those cases cited by the *Schroeter* Court hardly reinforce this statement. *Id.* (citing *Wilson v. Lubke*, 176 Mo. 210 (1903) (holding that because purchasers did not own land at the time contractor began work, his mechanic's lien was not valid against a purchase money deed of trust); *Russell v. Grant*, 122 Mo. 161 (1894) (holding that under former Mo. Rev. Stat. 6706 (1889), mechanic's lien claimants only retain an interest "to the extent and only to the extent of all the right, title and interest owned therein by the owner" a mechanic's lien for lumber delivered simultaneous to the recordation of a purchase money deed could not be granted priority; *Bridwell v. Clark*, 39 Mo. 170 (1866) (holding that a deed of trust executed and recorded

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prior to commencement of construction had priority over mechanic's lien); *Steininger v. Raeman*, 28 Mo.App. 594 (Stl. Ct. App. 1888) (holding that a deed of trust executed and recorded prior to construction contract had priority); *Stumbaugh v. Hall*, 30 S.W.2d 160 (KC Ct. App. 1930)).

None of the cases cited by the *Schroeter* Court involve a situation similar to the present facts, where recordation of a purchase money deed of trust did not occur until months after the initiation and completion of all construction. Nor do any of the cases address or resolve any conflict between purchase money deed priority under the common law compared to by statute. Needless to say, the source material for the common law proposition relied on by Appellant is suspect and does not take into account the current statutory scheme.

Likewise, Appellant and *Amicus Curiae* Missouri Banker's Association rely heavily on *Allied Pools, Inc. v. Sowash,* 735 S.W.2d 421 (Mo. App. 1987). Not only does *Allied Pools* have a similarly distinguishable timeline, it relies on the same suspect case law as *Westinghouse,* namely the *Joplin Cement* line. More recent case law recognizes that outside of the *Westinghouse* holding for purchase money deeds of trust, other encumbrances are not allowed to circumvent § 442.380, R.S.Mo. (2000). *See Dave Kolb Grading, Inc. v. Lieberman Corp*., 837 S.W.2d 924, 934 (Mo. Ct. App. 1992) (holding that secured loans made after the start of construction remain junior to mechanic's liens). Outside of the public policy behind the promotion of purchase money financing, there nothing so different or special about purchase money loans that would warrant special treatment.

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While Appellant and *Amicus Curiae* Missouri Banker's Association are correct that often lenders bear the largest risk in real estate transactions, they also stand in a superior position to control such transactions. Lenders, whether through purchase money deeds of trust, remain in the best position to insure their own priority and financial interest by simply inspecting the property and insuring that no construction has commenced before extending credit and recording deeds or, as discussed above, assuring that title insurance is in place to protect its priority position. Lenders and/or the title companies on which they rely, have always been in a superior position to control and historically have controlled the risk that the lenders' liens are subordinated to mechanic's liens by restricting construction on collateralized properties until after purchase money liens are recorded or conducting such other investigation as is necessary to properly underwrite the risk. The Western District's decision creates a windfall for lenders and, ultimately, title companies, upon whom lenders frequently rely, which fail to publicly record purchase money security interests in a diligent manner or fail to properly underwrite the risk of subordination to prior liens or encumbrances.

CONCLUSION

Amicus Curiae ASA and the Builder's Association simply ask that this court recognize what the Western District failed to: that the promotion of all three policies can remain intact with a requirement that a purchase money deed of trust be recorded in order to preserve priority and that mechanic's liens which attach before such recording are prior and superior. For the foregoing reasons, the ASA and the Builders' Association

respectfully request that this Court affirm the Judgment of the Circuit Court of Jackson County.

Respectfully Submitted,

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By *_/s/ Lee B. Brumitt_*

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing was served via electronic filing with the Missouri Supreme Court, this 13th day of December, 2011 on the following:

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