NO. SC91897

IN THE
SUPREME COURT OF MISSOURI

BOB DEGEORGE AND ASSOCIATES, INC.,
AND KD CHRISTIAN CONSTRUCTION CO.,

Respondents,

v.

HAWTHORN BANK,

Appellant.

Transferred Appeal from the Circuit Court of Jackson County, Missouri
Honorable John M. Torrence, Presiding

SUBSTITUTE BRIEF OF APPELLANT

John T. Coghlan (36361)
Brett J. Coppage (59821)
Clay Britton (63437)
LATHROP & GAGE LLP
2345 Grand Blvd.
Suite 2800
Kansas City, MO 64108
Telephone: (816) 292-2000
Facsimile: (816) 292-2001

Attorneys for Hawthorn Bank

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

JURISDICTIONAL STATEMENT

Hawthorn Bank appeals from a Summary Judgment entered by the Circuit Court of Jackson County on May 5, 2010, in favor of Respondents Bob DeGeorge and Associates, Inc. ("DeGeorge") and KD Christian Construction Co. ("KD Christian") (L.F. 422, 426).

Hawthorn Bank appealed the trial court's ruling. After the Court of Appeals for the Western District reversed the trial court and remanded for further proceedings, DeGeorge and KD Christian sought and obtained transfer to this Court. This appeal is within the general appellate jurisdiction of this Court under Article V, Section 3 of the Missouri Constitution.

STATEMENT OF FACTS

The Claims

The trial court action was for foreclosure of mechanic's liens brought by DeGeorge and KD Christian. DeGeorge filed this lawsuit on January 26, 2009 against Dennis and Connie Shrout (the "Shrouts"), John and Vida Thompson, and Blue Springs Xtreme Powersports ("BSXP"). (L.F. 11). On June 22, 2009, KD Christian intervened and filed an action for enforcement of its mechanic's lien. (L.F. 85, 101). In its Petition in Intervention, KD Christian named Hawthorn Bank as a Third-Party Defendant. (L.F. 102 ¶ 7).

On June 4, 2008, the Shrouts sold to BSXP a building and three tracts of real property ("the Property"). (L.F. 296 ¶¶ 3, 6; L.F. 347, 348; L.F. 358, 359). On the same day, Hawthorn Bank made a loan to BSXP in the amount of

$2,512,500.00 for the purchase of the Property. (L.F. 296 ¶¶ 4, 6; L.F. 347, 348; L.F. 358, 359; L.F. 422 ¶ 1). Simultaneously, BSXP signed a purchase money Deed of Trust granting Hawthorn Bank a lien on the Property to secure the loan. (L.F. 296 ¶ 5; L.F. 347, 348; L.F. 358, 359). On November 19, 2008, Hawthorn Bank recorded its purchase money Deed of Trust. (*Id.*; *see also* L.F. 422 ¶ 3).

On May 13, 2008, prior to its purchase of the Property, BSXP and DeGeorge entered into a Standard Form Agreement between Owner and Design-Builder, in which DeGeorge agreed to remodel buildings on the Property (the "Project"). (L.F. 296 ¶ 2; L.F. 347, 348; L.F. 358, 359). DeGeorge in turn entered into a subcontract with KD Christian, in which KD Christian agreed to perform certain work on the Project. (L.F. 103 ¶ 14).

On June 6, 2008, DeGeorge commenced work on the Project, completing its work on July 26, 2008. (L.F. 252, 254 ¶ 3; L.F. 422 ¶ 2). BSXP failed to pay DeGeorge $147,883.70 for labor and materials provided to the Project. (L.F. 252, 254 ¶ 4). On November 18, 2008, DeGeorge filed a mechanic's lien on the Property. (L.F. 252, 254 ¶ 7).

On June 17, 2008, KD Christian commenced work on the Project, completing its subcontract on July 21, 2008. (L.F. 103 ¶ 20; L.F. 296 ¶ 10; L.F. 358, 359). DeGeorge failed to pay KD Christian $17,532.83 for labor and materials that it provided to the Project. (L.F. 103 ¶¶ 16 - 18). On January 20, 2009, KD Christian filed a mechanic's lien on the Property. (L.F. 103 ¶ 23).

Hawthorn Bank contended that its purchase money Deed of Trust takes priority over the perspective mechanic's liens of DeGeorge and KD Christian. (L.F. 237, Affirmative Defenses ¶ 4). On that basis, Hawthorn Bank contested the enforcement of the mechanic's liens of DeGeorge and KD Christian. (L.F. 422 ¶ 4).

Proceedings Below

The parties agreed to submit the case to the trial court for disposition on the parties' competing motions for summary judgment. (L.F. 426). On May 5, 2010, the trial court granted summary judgment to DeGeorge and KD Christian finding that the mechanic's liens of DeGeorge and KD Christian were each "first and prior encumbrances on the subject property so that Hawthorn's interest in the property, as established by its Deed of Trust, is subordinate to the liens of KD Christian and BDA." (L.F. 423). On that finding, the trial court entered judgment in favor of DeGeorge and KD Christian granting each the right to foreclose on its respective mechanic's liens. (L.F. 426). The trial court also awarded DeGeorge prejudgment interest at the rate of 9% per annum from July 25, 2008 to the date of judgment. *Id.* Correspondingly, the trial court awarded KD Christian prejudgment interest at the rate of 9% per annum from August 28, 2008 to the date of judgment. *Id.* Hawthorn Bank timely filed its Notice of Appeal on June 25, 2010. (L.F. 467).

The Court of Appeals for the Western District relied on this Court's opinion in *Westinghouse Elec. Co. v. Vann Realty Co.*, 568 S.W.2d 777, 781 (Mo. banc 1978), and reversed the trial court holding that the trial court erred because

"[m]echanic'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." *See Bob DeGeorge Assoc., Inc. v. Hawthorn Bank*, No. WD 72651, 2011 WL 1988416, at *2 (Mo. Ct. App. W.D. May 24, 2011). The opinion below concluded with a discussion of R.S.Mo. § 429.050, under which a mechanic's lien takes priority over all other liens—including purchase money deeds of trust—with respect to "buildings, erections or improvements," but not with respect to the land itself. *DeGeorge*, 2011 WL 1988416, at *4-5. In light of that statute, the Court of Appeals remanded the case back to the trial court to consider whether DeGeorge's or KD Christian's liens qualified for first position priority on "buildings, erections or improvements." *DeGeorge*, 2011 WL 1988416, at *5.

This Court granted DeGeorge's and KD Christian's joint application for transfer on October 4, 2011.

POINTS RELIED ON

I. 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.

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

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

Allied Pools, Inc. v. Sowash, 735 S.W.2d 421 (Mo. Ct. App. W.D. 1987).

ARGUMENT

I. 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.

On appeal from summary judgment, the Court's review is "essentially de novo." *Huber v. Wells Fargo Home Mtg., Inc.*, 248 S.W.3d 611, 613 (Mo. 2008). The Court reviews questions of law de novo. *Carmack v. Missouri Dep't of Agric.,* 31 S.W.3d 40, 45 (Mo. Ct. App. W.D. 2000). When the parties have stipulated to the facts at the trial court level, the only question before the appellate court is '"whether the trial court drew the proper legal conclusion from the facts."' *Quaker Oats Co. v. Stanton*, 96 S.W.3d 133, 136-137 (Mo. Ct. App. W.D. 2003)

(describing the standard of review following the granting of summary judgment where no facts were disputed).

In the present matter, the trial court misapplied the law. It is undisputed that Hawthorn Bank holds a purchase money deed of trust on the Property. (L.F. 296, 297 ¶ 6; L.F. 347, 348; L.F. 358, 359). The trial court failed to apprehend the legal significance of this dispositive fact and erred in concluding that "[u]nder well established law, properly and timely filed mechanic's liens take priority over subsequently recorded mortgages." (L.F. 423 ¶ 1). The first priority of a purchase money deed of trust is a long-settled common law rule, both in Missouri and elsewhere. As the Court of Appeals acknowledged, the trial court misread the recording and mechanic's lien statutes and ignored the well-established rule that even unrecorded purchase money deeds of trust take priority over mechanic's liens. Accordingly, the trial court's judgment must be reversed.

a. Missouri common law is clear—purchase money deeds of trust enjoy priority over mechanics liens, even if the purchase money deed of trust was executed after construction commenced.

"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. 1978) (citations omitted); *see also Butler v. Coon's Creek, Inc.,* 999 S.W.2d 748, 750 (Mo. Ct. App. W.D. 1999) (same). Contrary to the trial court's conclusion, "this is true even if the deed of

trust was executed after construction [of the improvement]." *Allied Pools, Inc. v. Sowash,* 735 S.W.2d 421, 427 (Mo. Ct. App. W.D. 1987). Relying on this well-established common law rule, the Court of Appeals below reasoned that "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 but not recorded until after the work commences does not also have priority." *DeGeorge*, 2011 WL 1988416, at *4.

The holdings of *Westinghouse, Butler,* and *Allied Pools, Inc.*, as well as the Court of Appeals' holding below, are in line with long-standing Missouri common law. *See Russell v. Grant*, 26 S.W. 958 (Mo. 1894); *Schroeter Bros. Hardware Co. v. Croatian "Sokol" Gymnastic Ass'n,* 58 S.W.2d 995 (Mo. 1932); *Joplin Cement Co. v. Green County Bldg. & Loan Ass'n*, 74 S.W.2d 250 (Mo. Ct. App. 1934). Accordingly, affirming the trial court would overturn decades' worth of established case law. To upset settled law, Respondents must show more than simply an alternative point of view. *See Sw. Bell Yellow Pages, Inc. v. Dir. of Revenue,* 94 S.W.3d 388, 390 (Mo. banc 2002) ("Under the doctrine of stare decisis, a decision of this court should not be lightly overruled, particularly where, as here, the opinion has remained unchanged for many years."). Instead, this Court should hold that under well-established Missouri common law, Hawthorn Bank's purchase money deed of trust takes priority over Respondents' mechanic's liens.

b. *Westinghouse* and its progeny promote public policy and the fair expectations of the parties.

Missouri's common law rule favoring purchase money deeds of trust over other liens appropriately protects lenders who typically bear the largest risk in any real estate transaction. And Missouri is not alone; numerous jurisdictions similarly have given priority to purchase money deeds of trust over mechanic's liens, even where the deed of trust is executed after the improvements are made. *See* 72 A.L.R. 1516 (1931) (discussing pre-1931 cases from Connecticut, Florida, Illinois, Iowa, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New York, North Dakota, Pennsylvania, Tennessee, and Wisconsin); *see also* 73 A.L.R. 1407 (1960) (generally discussing the priority of purchase money deeds of trust in various jurisdictions).

Such a rule makes sense because the lender provides the capital that actually gives the mortgagor the ability to purchase the property. *See* RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 7.2 cmt. B (1997). The lender's risk is most significant at the outset of a transaction when the funds and title are transferred and the debt the mortgagor owes is greatest. Conversely, the mechanic's lien claimant's risk increases incrementally with the amount of time, resources, and labor provided to the property, thereby allowing opportunities for the claimant to protect itself before incurring significant risk and expense. To protect the lender over the mechanic's lien claimant when purchase money is involved simply makes sense.

It also makes good economic sense to grant first priority to purchase money lenders because doing so strengthens confidence in real estate transactions and encourages the kind of financing on which most real estate buyers rely: "this long-established rule makes it unnecessary for a purchase money lender to examine for preexisting judgments and other liens against the purchaser-mortgagor, it reduces title risk in connection with such transactions and thus encourages purchase money financing by vendors." RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 7.2 cmt. B (1997). While purchase money priority often arises in the vendor financing context, it has equal application and justification where a third party finances the transaction. *Id.* ("The policy reasons for [the priority of third party purchase money deeds of trust] are much the same and are equally as strong as in the vendor context."). Indeed, the Restatement acknowledges that "third party lending is the dominant source of purchase money land financing in this country, [and] a rule which facilitates such lending is especially beneficial to the national real estate economy." *Id.*

Not only does such a rule benefit the real estate market, it also upholds principles of fairness. Third-party lenders—though they do not part with the real estate itself—"nevertheless part with money with the expectation that they will have security in that real estate . . . [and affording priority in such situations] seeks to avoid conferring a windfall on [other creditors]." *Id.* As the Western District correctly noted, "priority for purchase money mortgages is generally based upon a theory of fundamental fairness: absent the value given by the purchase money

mortgage, the mortgagor would never have held title to the property encumbered by the [mechanic's lien]. *DeGeorge*, 2011 WL 1988416, at *7 (citing 5 Richard R. Powell, Powell on Real Property § 38.16[2] at 38-122 (Michael Allan Wolf, ed. 2000)).

The common law's preference for purchase money deeds of trust over mechanic's and other liens arose over time for good reason. Fairness requires that the lender whose financing enables the transaction that gives the mortgagor title to the land have the security of first priority position. But beyond the equitable concerns at issue in any individual case, favoring purchase money financing with first priority—regardless of recordation—promotes the largest source of real estate financing in this country, which strengthens and encourages an active real estate market. Especially in these trying economic times, purchase money deed of trust priority and the positive effect it has on the real estate market should be safeguarded under Missouri law and left unaltered.

c. A district split does not exist.

Respondents argue in their Application for Transfer that the Western District's opinion below creates a district split with the Eastern and Southern Districts. This is completely false. A careful reading of the case law reveals a consistent approach by all of the appellate courts.

Respondents cite *Dave Kolb Grading, Inc. v. Lieberman*, 837 S.W.2d 924 (Mo. Ct. App. E.D. 1992), asserting that "the Missouri Court of Appeals for the Eastern District created an incongruity [sic] when it declared that 'absent waiver,

Bank's lien under deed of trust, if it was perfected prior to the commencement of any construction work, enjoys priority under § 429.060 with respect to the ground itself." Application at 6 (emphasis omitted). What goes unremarked is that the quoted statement from *Dave Kolb* is dicta. The *Dave Kolb* court did not rest its decision on priority, but on waiver:

> In view of our holding that Bank waived the priority of its deed of trust, *we need not address whether Bank's replacement of the deed of trust. . . preserved Bank's priority*.

837 S.W.2d at 935 (emphasis added). What is more, unlike the present case, in *Dave Kolb* it's unclear if the underlying loan was actually a purchase money mortgage or a construction loan. *Id*. at 927-28. Also, the *Dave Kolb* court even failed to address *Westinghouse*, *Butler Supply*, or *Allied Pools*.

Perhaps most damaging to Respondent's district split theory though, is the Eastern District's subsequent holding that a purchase money deed of trust takes priority over pre-existing liens. *Sutton Funding, LLC v. Mueller*, 278 S.W.3d 702, 706 (Mo. Ct. App. E.D. 2009) (citing the Restatement (Third) Property (Mortgages) § 7.2(b) for the rule that "[a] purchase money mortgage, whether or not recorded, has priority over any mortgage, lien, or other claim that attaches to the real estate but is created by or arises against the purchaser-mortgagor prior to the purchaser-mortgagor's acquisition of title to the real estate"). The Eastern District is in accord with *Westinghouse* and the long-standing common law of Missouri.

For the other side of their district split theory, Respondents rely on the Southern District Court of Appeals' decision in *Glenstone Block Co. v. Pebworth*, 264 S.W.3d 703, 715-16 (Mo. Ct. App. S.D. 2008). Respondents' citation to *Glenstone* is misleading. *Glenstone* actually cites with approval and follows *Westinghouse*. *Glenstone*, 264 S.W.3d at 715-16. While it is true that *Glenstone* provides that "…mechanic's liens do take precedence over *secured* loans made after the start of construction," Respondents conveniently omit, via ellipsis, the dispositive portion of text immediately before this quotation. Application at 3 (emphasis added). More fully, *Glenstone* provides:

> Subject to certain exceptions, the general rule is that *[m]echanic's liens do not take precedence over a purchase money deed of trust which secures repayment of funds used to purchase lands upon which the improvements giving rise to the claim are erected.* However, mechanic's liens do take precedence over secured loans made after the start of construction.

Glenstone, 264 S.W.3d at 715-16 (internal citations omitted) (emphasis added). As *Glenstone* illustrates, there is a significant difference between merely a "secured loan" and a "purchase money deed of trust." In fact, the court in *Glenstone* remanded the matter specifically to determine this operative fact, *see id.* at 716, because, as has been echoed time and time again, "a mechanic's lien[] do[es] not take precedence over a purchase money deed of trust," *id.* (quoting *Westinghouse,*

568 S.W.2d at 781). As a result, there is no split in the Eastern and Southern Districts or the state of Missouri.

d. Missouri's recording statutes are not in conflict with the Western District's Opinion in this matter.

The recording statutes do not speak to the *priority* of a purchase money deed of trust in relation to a mechanic's lien. Instead, the recording statutes are merely a precondition to *enforceability*. *See* R.S.Mo. §§ 442.380 & 442.400 (2011). Accordingly, despite Respondent's argument to the contrary, the Western District's opinion does not contradict the recording statutes.

Although Missouri is typically referred to as a "notice jurisdiction" when it comes to the priority of instruments effecting property,[1] purchase money mortgages are excepted from this general rule under the common law, even prior to enactment of Missouri's current recording acts. *See, e.g., Schroeter Bros. Hardware Co. v. Croatian "Sokol" Gymnastic Ass'n,* 58 S.W.2d 995, 1002 (Mo. 1932) ("The great weight of authority in this state and elsewhere is that a mechanic's lien for labor and material, furnished to a purchaser of land, is subordinate to a purchase-money mortgage made by the purchaser when he obtains a conveyance of title"); *Russell v. Grant,* 26 S.W. 958, 961 (Mo. 1894) ("If

[1] *See Henson v. Wagner*, 642 S.W.2d 357, 360 (Mo. Ct. App. S.D. 1982) (explaining that Missouri is generally not a "race to the courthouse" state, but instead a notice state).

he purchase [sic] property, and give a mortgage for the purchase money, the deed which he receives, and the mortgage which he gives constitute but one transaction, and the lien of the mortgage for the purchase money cannot be displaced or postponed by a mechanic's lien which attached simultaneously with the acquisition of title by the mortgagor.").

Where, as here, the legislature fails to expressly or impliedly change the common law, the Court "must presume that the legislature was aware of the state of the law at the time of its enactment," yet intended to not alter the law. *Suffian v. Usher,* 19 S.W.3d 130, 133 (Mo. banc 2000) (quoting *Matter of Nocita,* 914 S.W.2d 358, 359 (Mo. banc 1996)). What is more, Missouri courts "strictly construe a statute when existing common law rights are affected, and if a close question exists, [courts] weigh [their] decision in favor of retaining the common law." *In re Estate of Parker*, 25 S.W.3d 611, 614-615 (Mo. Ct. App. W.D. 2000) (citing *Overcast v. Billings Mut. Ins. Co.*, 11 S.W.3d 62, 69 (Mo. banc 2000)); *see also State ex rel. Brown v. III Invs., Inc.,* 80 S.W.3d 855, 860 (Mo. Ct. App. W.D. 2002) ("Unless a statute clearly abrogates the common law either expressly or by necessary implication, the common law rule remains valid.").

The recording statutes do not alter the common law purchase money rule. This conclusion of statutory construction is supported not just by the language of R.S.Mo. §§ 442.400, and 442.380, which fail to mention purchase money deeds of trust, but also by case law following 1939—the year these statutes were last amended. The legislature's failure to amend Sections 442.400, and 442.380 to

specifically address purchase money deeds of trust following *Westinghouse* evinces a continued intent to maintain the common law rule.

e. Missouri's mechanic's lien statutes are not in conflict with the Western District's Opinion in this matter.

Likewise, the Missouri statutory scheme regarding mechanic's liens does nothing to alter the common law purchase money mortgage rule. *See e.g. Butler Supply,* 999 S.W.2d at 749-50 (citing the purchase money mortgage rule and construing it alongside R.S.Mo. §§ 429.050 and 429.060); *Glenstone*, 264 S.W.3d at 715-16 (same). To the contrary, Sections 429.050 and 429.060 actually suggest the legislature was aware of the purchase money mortgage rule, yet created a separate remedy for mechanic's lien claimants with respect to "improvements" to which a purchase money mortgage does not relate. *See* R.S.Mo. § 429.050 (mechanic's liens "shall attach to the *buildings, erections, or improvements* for which they were furnished…) (emphasis added). *See also Allied Pools*, 735 S.W.2d at 427 (if a deed of trust was a purchase money deed of trust, even though construction began before the deed was executed, the mechanic's lien would be "inferior" as to "the real property"); *Joplin Cement*, 74 S.W.2d at 251 (mechanic's lien not superior to purchase money mortgage given after the commencement of construction "for the purchase of the lot itself"). Like the recording statutes at issue, the applicable mechanic's lien statutes have not been amended since 1939. *See* R.S.Mo. §§ 429.050 & 429.060. Significantly, the legislature modified other

portions of the mechanic's lien statutes as recently as 2007, yet failed to change the rule for purchase money deeds of trust. *See e.g.* R.S.Mo. § 429.010.

The Western District's opinion noted the legislature's intent to keep the purchase money mortgage rule intact, yet afford mechanic's lien priority with respect to buildings and improvements:

> While protection for the purchase money mortgagee is based on fundamental fairness because the mortgagee has given value, in the context of new construction, the mechanic has given value beyond that relied on by the purchase money mortgagee. To balance this inequity, [the legislature, through] section 429.050[,] grants mechanic's lien claimants priority in the improvements contributed.

DeGeorge, 2011 WL 1988416, at *4-5 (internal citations omitted). Accordingly, if Degeorge and KD Christian are deemed to have a superior and enforceable lien with regard to an "improvement"—subject to Hawthorn's purchase money interest in the property and structures—then a purchaser at the foreclosure sale "only has the right to remove the improvement." II Mo. Construction Law § 9.95 (MoBar 2nd ed. 2004) (citing *Union Elec. Co. v. Clayton Ctr. Ltd.*, 634 S.W.2d 261 (Mo. Ct. App. E.D. 1982)). However, "this right of removal is limited to cases when the improvement was newly constructed." *Id.* A purchaser cannot remove improvements when the lien claimant provided only renovation or repairs to an existing structure. *See Trout's Invs., Inc. v. Davis*, 482 S.W.2d 510 (Mo. Ct. App. W.D. 1972). For that reason, the Western District remanded this case to determine

whether the work done by Degeorge and KD Christian constituted improvements to a newly constructed *res* or "repairs." *DeGeorge*, 2011 WL 1988416, at *4-5.[2]

Following *Westinghouse*, the Missouri legislature's failure to amend Section 429.060 as well as Sections 442.400, and 442.380 to specifically address purchase money deeds of trust evinces a continued intent to maintain the common law and statutory rules regarding purchase money deeds of trust.

In this case, Respondents ask this Court to add a term to Missouri's recording statutes and mechanic's lien statutes negating the long-standing common law rules of priority for purchase money mortgages. This is not within the power of this Court. As this Court has wisely noted:

> It would be all but too easy for this Court to legislate under the guise of deciding cases and controversies if we allowed ourselves to take up every matter the legislature has not yet acted upon. The result of

---

[2] The record is clear that the construction at issue was a "remodel" to an existing structure. (L.F. 296 ¶ 2; L.F. 347, 348; L.F. 358, 359). The existing structure as well as the underlying land was obtained *via* a purchase money mortgage. As such, Hawthorn Bank has priority with respect to the land and the buildings thereon. Hawthorn Bank, while agreeing with much of the Western District's Opinion, disagrees that remand is necessary because the record is clear that the construction "improvements" at issue were a "remodel" of existing structures obtained *via* a purchase money mortgage.

> such unrestrained and ill-advised judicial activism would be a hodgepodge of common law rules and statutory enactments….

Rowe v. Farmers Ins. Co., Inc., 699 S.W.2d 423, 439 (Mo. banc. 1985).

CONCLUSION

The first priority of purchase money deeds of trust is a stable, consistent rule under Missouri common law and there is no reason—statutory or otherwise—to upset it now. To do so would throw purchase money lending practices into an unproductive state of uncertainty. That result would not only hurt lenders, but would also hurt builders and subcontractors themselves, as well as the state's broader economy. For the foregoing reasons, the Court should reverse the Judgment of the Circuit Court of Jackson County and enter judgment for Hawthorn Bank.

Respectfully submitted,

LATHROP & GAGE LLP

By: /s/ John T. Coghlan
John T. Coghlan (36361)
Brett J. Coppage (59821)
Clay Britton (63437)
2345 Grand Blvd.
Suite 2800
Kansas City, MO 64108
Telephone: (816) 292-2000
Facsimile: (816) 292-2001

Attorneys for Hawthorn Bank

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Rule 84.06(b) of the Missouri Rules of Civil Procedure and Special Rule XLI that the foregoing Brief of Appellant contains 4,966 words, excluding the cover, Certificate of Service, this certificate, and the signature block, as determined by the Microsoft Word word-counting system.

/s/ John T. Coghlan
John T. Coghlan

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the above document by electronic delivery on all persons received notification through the Supreme Court's electronic filing system, including the counsel listed below, on the 23rd day of November, 2011.

G. Steven Ruprecht
David A. Meyers
Brown & Ruprecht, P.C.
911 Main Street, Suite 2300
Kansas City, MO 64105
Attorneys for KD Christian Construction Company

Danne W. Webb
Amy J. Tillery
Horn Alyward & Bandy, LLC
2600 Grand Blvd., Suite 1100
Kansas City, MO 64108
Attorneys for Bob DeGeorge Associates, Inc.

/s/ John T. Coghlan

John T. Coghlan