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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A09-882**

Dew Corporation,  
Respondent,

vs.

Mathwig Development Co., n/k/a Loop Calhoun, LLC, et al.,  
Defendants,

M & I Marshall & Ilsley Bank,  
Appellant,

and

Haldeman-Homme, Inc. d/b/a Anderson-Ladd, intervenor/defendant,  
Respondent,

Precision Wall Systems, Inc., et al.,  
Intervenors/Defendants

**Filed April 20, 2010  
Affirmed in part, reversed in part, and remanded.  
Stoneburner, Judge**

Hennepin County District Court  
File No. 27CV0714234

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Considered and decided by Peterson, Presiding Judge; Klaphake, Judge; and Stoneburner, Judge.

## UNPUBLISHED OPINION

**STONEBURNER**, Judge

In this mechanic's-lien-foreclosure action, appellant bank challenges judgment in favor of respondent general contractor, asserting that: (1) the district court erred by failing to conclude that respondent's lien was void for intentional, bad-faith overstatement of the amount due, in violation of Minn. Stat. § 514.74 (2008); (2) respondent's lien was contractually subordinate to appellant's mortgage; (3) the district court erred as a matter of law in calculating the amount of respondent's lien; (4) the district court improperly granted respondent a second lien for work done on other property; and (5) the district court abused its discretion in the award of attorney fees. We affirm in part, reverse in part, and remand.

### FACTS

In August 2005, respondent Dew Corporation (Dew) contracted with Mathwig Development Co. (the owner)<sup>1</sup> to be the general contractor for construction of the Loop Calhoun Condominiums (the project). The contract provided that the owner would pay Dew for the actual cost of work, plus a fee of 4.5% of the cost of work, plus general-condition expenses,<sup>2</sup> collectively subject to a maximum price, initially set at \$17,021,721

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<sup>1</sup> The owner later assigned its interests under the construction contract to Loop Calhoun LLC also referred to as "owner" in this opinion.

<sup>2</sup> "General conditions" are the costs that Dew paid directly, such as its construction trailer, fax machines, telephone lines, toilets, dumpsters, cleaning staff, flagmen,

that could be adjusted by written change orders. Visible work at the project site began on September 7, 2005.

Under the contract, the owner agreed to make progress payments based on applications for payment submitted to the architect by Dew and certificates of payment issued by the architect. Applications for payment were based on a schedule of values allocating the guaranteed maximum price among various portions of the work, plus Dew's fee, shown as a separate item.

On November 17, 2005, appellant M & I Marshall & Ilsley Bank (the bank) and the owner executed a \$32,490,000 construction loan secured by a mortgage, security agreement, and fixture-financing statement (mortgage).

In connection with and prior to execution of the construction loan, Dew executed a document titled "Consent to Assignment of Development Documents" (assignment agreement). The assignment agreement provides that Dew "hereby consents to the foregoing assignment" of the construction contract by the owner to the bank; agrees that in the event of a default, as defined in the loan agreement, the bank may use the construction contract as if it were the owner for the purpose of completing the project; and further agrees that should default occur, Dew will continue to perform on the bank's behalf all obligations it had previously agreed to perform for the owner, provided that Dew continues to be reimbursed in accordance with the construction contract for such services. The assignment agreement also provides that

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guardrails, and other items required for compliance with Occupational Safety and Health Administration requirements.

[Dew] further agrees that any and all liens, claims, rights, remedies and recourses that [Dew] may have or may otherwise be entitled to assert against all or any portion of the Project shall be and they are hereby made expressly subordinate, junior and inferior to the liens, claims, rights, remedies and recourses; as created by the Loan Documents. . . .

The bank's commercial-real-estate-group senior vice-president, Carl Brandt, testified that the assignment agreement is a standard form contract commonly used by the bank to secure priority of its mortgage before making a construction loan.

As the project progressed, the maximum price for the project increased through change orders to \$33,344,947. Change Order 5 increased the contract price by \$664,697.62, representing an amount owed to Dew by the owner for work on a different project (Summit project). The owner agreed to shift the Summit project debt to the Loop project to keep Dew from filing a lien in that amount on the Summit project property where the work occurred.

The bank agreed to the increase in the price of the Loop project for Change Order 5 but required Dew to sign a separate subordination agreement specifically referencing this amount as subordinate to the bank's mortgage (subordination agreement). The agreement provided that Dew would not commence any action to collect the subordinated amount, "including, without limitation, the filing of a mechanic's lien statement against the [Loop project] Land or any other action to prevent the release of units from the Mortgage."

Dew became concerned that the increased price of the project exceeded funds available. After some of its pay applications were reduced by the owner in January 2007,

Dew invoked a contract provision requiring the owner to furnish evidence that there was sufficient financing for the project. Initially, Dew continued to work despite the lack of evidence of sufficient financing. After further deductions from pay applications in February and March 2007, Dew again requested evidence of sufficient financing. This request was unanswered, and Dew stopped work on the project on May 24, 2007.

Although the owner was in default under its contract with the bank, rather than declaring a default and taking over as the owner under the assignment agreement and having Dew complete the project, the bank agreed to let the owner terminate Dew and finish the project with another general contractor (Paramount). Most of the subcontractors that had previously been working under Dew continued to work on the project under Paramount.

Dew was terminated from the project on or about June 1, 2007, after which it submitted pay applications for retainage<sup>3</sup> and amounts it claimed were earned through the date of termination. Dew's claimed project billings totaled \$27,689,528.02 through the date of termination. Dew had been paid \$19,467,607.08 before it was terminated from the project, leaving a claim for the unpaid balance in the amount of \$8,221,920.94. On June 20, 2007, Dew served the owner with a mechanic's-lien statement in the amount of \$8,863,958.74. The mechanic's lien was recorded on June 21, 2007, and Dew started this foreclosure action on July 11, 2007.

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<sup>3</sup> "Retainage" is a percentage of the construction contract price that is withheld from a contractor until the project is satisfactorily completed and all mechanic's liens are released or expired. Bryan Garner, *A Dictionary of Modern Legal Usage*, 767 (2d ed. 1995).

Other parties who had liens against the property joined the action. Dew and the owner were ordered to arbitration under their contract, but the district court retained jurisdiction over other matters, including priority of Dew's lien over the bank's mortgage.

The bank moved for summary judgment in the lien-foreclosure action, asserting that the subordination clause of the assignment agreement made its mortgage superior to Dew's lien. The district court denied summary judgment, concluding that the assignment agreement did not subordinate Dew's lien to the bank's mortgage.

In February 2008, the bank declared the owner in default, foreclosed on the unsold units by advertisement and was the successful bidder at the April 24, 2008 sheriff's sale. The redemption period had not expired at the time of trial on Dew's mechanic's-lien-foreclosure action, but had expired without redemption by the time of oral arguments on appeal.

In July 2008, Dew and the owner settled the arbitration matter and executed a settlement agreement stating that Dew had a valid lien in a principal amount of \$4.8 million. The owner withdrew all of its defenses and objections to the Dew lien and agreed that under the mechanic's-lien statutes, Dew was entitled to costs, attorney fees, and interest.

In October 2008, the mechanic's-lien action was tried in district court on the issues of (1) the priority of Dew's lien;<sup>4</sup> (2) the amount of Dew's lien; and (3) the bank's affirmative defense that Dew's lien was void for intentional overstatement. Immediately

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<sup>4</sup> The bank acknowledged that all of Dew's subcontractors' liens were superior to its mortgage.

before trial began, the bank notified Dew and the district court that it had settled with all but one of the subcontractors who had joined the action. The district court, by unreported telephone conference call, confirmed that there had been settlements and that those parties would not be appearing in the trial. At the beginning of trial, the only remaining party-subcontractor moved for summary judgment without objection. The motion was granted and the parties agreed that Dew's lien would be reduced by \$588,361.11; the amount of the judgment for that subcontractor.

At trial, Dew conceded that its lien should be reduced by (1) \$664,697.62 that was specifically subordinated to the bank's mortgage; (2) \$23,710 erroneously included for countertops unrelated to the project; (3) \$24,000 in permit costs that had been refunded by the city; (4) \$90,000 for parking fees that had been double-billed; and (5) \$31,139 overbilled for a subcontractor. Dew's senior project manager, Rusty Williams, testified at trial that Dew's lien should also be reduced by the amount of subcontractor liens settled before trial.

Much of the testimony on the first day of trial involved the efforts of the parties to establish what amount of money Dew continued to owe subcontractors. At the district court's request, the parties' representatives, consisting of Dew's expert witness, Whitley Forehand, Dew's senior project manager, Rusty Williams, and the bank's retained civil engineer, Christopher Beirise, worked through the night to resolve the issues of what amount Dew owed subcontractors, the amount of general conditions, and Dew's fee.

On the second day of trial, Dew's attorney stated on the record that in order to achieve fact-finding about Dew's remaining contractual damages for payments to

subcontractors and general conditions, the owner's expert and the bank's proposed expert, Beirise, would be called to testify that Dew was owed \$714,000 in remaining accounts payable to subcontractors and \$600,000 for general conditions, and then the trial would resume on other issues. Beirise testified that he, Williams, and Forehand, after reviewing relevant documents, agreed that Dew's remaining accounts payable to subcontractors totaled \$714,000 and that the amount of general conditions *and profit* totaled \$600,000. Forehand agreed with the amounts but characterized the \$600,000 as a "compromised figure." Forehand referred to that amount as for general conditions but did not specifically contradict Beirise's testimony that the figure included Dew's profit. Beirise returned to the witness stand later in the trial to explain more fully what documents were reviewed in reaching the agreement. He testified that review included the amounts for overhead and profit in pay applications 19, 20, and 21. Relying on its understanding that the parties had reached an agreement on the amount of Dew's lien as of the time of trial, including amounts still owed to subcontractors, general conditions, and profit, the bank did not present any additional evidence on these amounts. Dew, through Forehand, presented lengthy testimony on how Dew calculated its lien.

In its posttrial written argument to the district court, Dew argued that the stipulation placed on the record was not helpful to the district court in calculating Dew's lien and urged the district court to rely on Forehand's explanation of how the lien should be calculated. Dew acknowledged that the amount of the lien should be reduced by the amount of liens asserted by subcontractors who had settled with the bank before trial if the settlements released Dew "of its contract obligations to all of these subcontractors."

In its posttrial written argument, the bank asserted that the amount of Dew's lien was the amount stipulated to at trial:  $\$714,000 + \$600,000 = \$1,314,000$ .

The district court issued its findings of fact, conclusions of law, and order for judgment, holding that the assignment agreement did not subordinate Dew's lien to the bank's mortgage; the bank's separate subordination agreement pertaining to Change Order 5 was valid but Dew was, nonetheless, entitled to an equitable lien against the Loop project property for the amount involved; the bank failed to meet its burden to prove that Dew intentionally, or in bad faith, overstated the lien amount; and the amount of Dew's lien is  $\$5,150,593.21$ . The district court declined to reduce Dew's lien by the amount of claims settled by the bank before trial, citing the bank's failure to introduce evidence of the amount by which claims against Dew were settled or evidence that the settlement fully released Dew. The district court agreed with Dew that the parties' stipulation was not helpful to the court in determining the amount of Dew's lien.

The district court calculated the amount of the lien by first finding that the project was 75–85% complete when Dew left the project and that the presumptive starting point for the value of Dew's work when it left the project was  $\$27,689,528.02$  as reported on Dew's final pay application, plus the amount of owner-requested changes not included in pay applications as well as interest for late payments.<sup>5</sup>

The district court deducted from its starting figure the amount of the lien awarded to the subcontractor who obtained summary judgment against the bank at the beginning

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<sup>5</sup> The district court adopted Forehand's interest calculation but held that contract interest would not be enforceable against the bank. Because the redemption period expired without redemption by anyone, contractual interest is no longer an issue in this appeal.

of the trial, the amounts Dew had conceded should be subtracted from the lien, and amounts that Forehand had opined were paid to Dew's subcontractors through February 2008.

The bank moved for amended findings or a new trial. The bank submitted an affidavit of counsel for Stewart Title Insurance Company (Stewart) and attached a copy of a full assignment of liens against Dew to Stewart from each of the nine settling subcontractors and a copy of Stewart's release of "any and all such claims" against Dew. The bank argued that these documents were not available at the time of trial, but conclusively supported the settlements and release of Dew from all claims by the nine subcontractors. The district court denied the bank's posttrial motions, rejecting the bank's posttrial submissions for multiple reasons, including that the evidence did not show that the settlement was for work done under Dew and did not prove that the subcontractors had fully released Dew from liability.

Dew moved for attorney fees, costs, and interest under Minn. Stat. § 514.14 (2008). The district court appointed a special master and subsequently confirmed the special master's recommendation of \$615,865 in attorney fees and \$150,596.72 in costs and disbursements. The district court also awarded Dew attorney fees incurred after it made its submission to the special master.

This appeal followed.

## **D E C I S I O N**

- I. The district court did not clearly err in finding that the bank failed to prove intentional fraud or bad faith overstatement of Dew's lien.**

Under Minn. Stat. § 514.74 (2008), a lien is void if the claimant knowingly demands in the lien statement more than is justly due. “To deprive the [lien] claimant of [the] right to a lien under [the] statute, there must be a showing of fraud, bad faith or an intentional demand for an amount in excess of that due.” *Witcher Constr. v. Estes II Ltd. P’ship*, 465 N.W.2d 404, 407 (Minn. App. 1991) (citing *Delyea v. Turner*, 264 Minn. 169, 175, 118 N.W.2d 436, 440 (1962)), *review denied* (Minn. Mar. 15, 1991). “Whether a claimant has intentionally overstated a lien claim is a fact question for the [district] court and the [district] court’s determination will not be overturned unless clearly erroneous.” *Id.* (citing *Cox v. First Nat’l Bank of Aitkin*, 415 N.W.2d 385, 388 (Minn. App. 1987), *review denied* (Minn. Jan. 20, 1988)).

Whether a party acts in good faith is essentially a credibility question. *Tonka Tours, Inc. v. Chadima*, 372 N.W. 2d 723, 728 (Minn. 1985). And questions of credibility are questions on which appellate courts defer to the district court. *See Sefkow v. Sefkow*, 427 N.W. 2d 203, 210 (Minn. 1988) (stating that appellate courts defer to district court credibility determinations. Here, it is undisputed that Dew’s lien was significantly overstated. Nonetheless, given the difficulty of both parties in establishing the amount of Dew’s lien, even at the trial stage, we cannot conclude that the district court’s determination that the bank failed to establish fraud, bad faith, or an intentional overstatement in its initial claim is clearly erroneous. We therefore affirm the district court’s denial of the bank’s affirmative defense that the lien was void for intentional overstatement.

**II. The district court erred in concluding that the assignment agreement was ambiguous and in denying priority to the bank's mortgage.**

The district court rejected the bank's argument that the assignment agreement plainly subordinated Dew's lien to the bank's mortgage, based on its conclusion that the assignment agreement is ambiguous and that Dew did not intend by the agreement to subordinate its mechanic's lien to the bank's mortgage. "Whether a contract is ambiguous is a question of law that we review de novo." *Carlson v. Allstate Ins. Co.*, 749 N.W.2d 41, 45 (Minn. 2008).

"A writing is ambiguous if, judged by its language alone and without resort to parol evidence, it is reasonably susceptible of more than one meaning." *Metro Office Parks Co. v. Control Data. Corp.*, 295 Minn. 348, 351, 205 N.W.2d 121, 123 (1973). Parol evidence cannot be used to create an ambiguity. *Instrumentation Servs., Inc. v. Gen. Res. Corp.*, 283 N.W.2d 902, 908 (Minn. 1979).

Dew argued to the district court that references to default in the consent agreement makes notice of default a condition precedent to any subordination of Dew's lien to the bank's mortgage. The district court found the assignment agreement ambiguous on the issue of lien subordination because: (1) the title of the document does not contain a reference to subordination; (2) subordination is not necessary to accomplish assignment of documents; and (3) subordination is a substantial concession which would be unusual absent significant consideration, but no consideration is mentioned in the document.

The bank argues that (1) the construction loan is plainly the consideration for the assignment agreement because the bank would not have made the loan without the

agreement; (2) the references to an event of default do not apply to the subordination clause of the assignment agreement; and (3) the title of the document and necessity of subordination to assignment of the construction contract are irrelevant to a determination of whether the assignment agreement is ambiguous. We agree.

The assignment agreement unambiguously requires Dew to consent to two immediate actions: (1) assignment of the construction contract by the owner to the bank and (2) subordination of all of Dew's existing and future liens, rights, remedies, and recourses against the project to the bank's mortgage. Specifically, the assignment agreement provides:

[Dew] . . . hereby consents to the foregoing assignment [of the construction contract] by [the owner] to [the bank]. . . . [Dew] further agrees that any and all liens, claims, rights, remedies and recourses that [Dew] may have or may otherwise be entitled to assert against all or any portion of the [project] *shall be and they are hereby made expressly subordinate, junior and inferior to the liens, claims, rights, remedies, and recourses; as created by the Loan Documents . . . .*

(Emphasis added.) Language in the assignment agreement further requires Dew's consent to certain actions by the bank under the assigned construction contract in the event of the owner's default, but the references to default do not apply to the subordination language, which is stated in the present tense and plainly provides that Dew's liens are "hereby made expressly subordinate" to the bank's mortgage. The district court erred by holding that the assignment agreement was ambiguous and by holding that Dew's lien was superior to the bank's mortgage. Because the bank's mortgage had priority, we reverse the judgment entered by the district court holding that

Dew's lien had priority and remand for judgment consistent with the bank's mortgage having priority over Dew's lien.

**III. The district court abused its discretion by denying the bank's motion for a new trial on the issue of the amount of Dew's lien.**

A new trial may be granted for an irregularity in the proceedings of the court whereby the moving party was deprived of a fair trial and for newly discovered material evidence not available at the time of trial. Minn. R. Civ. P. 59.01(a), (d). Because the district court has the discretion to grant a new trial, we will not disturb the decision absent a clear abuse of discretion. *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990).

In this case, because the bank was not aware until the judgment was issued that the district court was rejecting as useless the parties' stipulation to the amount of Dew's lien based on what it owed subcontractors at the time of trial and the compromised amount of Dew's general conditions and profit, we conclude that the bank was deprived of a fair trial under Rule 59.01(a) and is entitled to a new trial. The record is replete with statements from both parties that Dew's lien should be reduced by the amounts that Dew no longer owes to its subcontractors. And the parties agreed that, under the construction contract, Dew was to be compensated for cost, plus general conditions, plus its fee. For this reason, the parties' agreement that, at the time of trial, Dew's only remaining obligation to subcontractors totaled \$714,000 and that general-condition costs and profit were compromised at \$600,000 was of major significance. Reliance on the stipulation resulted in the bank's failure to introduce additional evidence on the issue of the amount

of Dew's lien at the time of trial. The bank had no reason to conclude that Dew would later argue that this stipulation was meaningless or that the district court would agree with such an argument. The district court itself, citing *Delyea v. Turner*, 264 Minn. 169, 118 N.W. 2d 436 (1962), stated at paragraph 84 of its judgment that Dew "may only lien for the amount of unpaid work under the contract."

"Ordinarily, where the parties stipulate as to what the facts are, all parties to the stipulation, as well as the courts, are bound by the stipulation until it is abandoned. In such cases, the stipulation takes the place of evidence . . . ." *Zontelli & Sons, Inc. v. Fabyanske, Svoboda & Westra, P.A.*, 394 N.W.2d 526, 529 (Minn. App. 1986) (quotation omitted).

Unless stipulations are enforced, they are apt to prove a trap for even the most wary and circumspect . . . . Because such a stipulation excludes consideration of other evidence, other evidence may not be considered even though it may find its way into the record, except where it clearly appears that the parties have abandoned the stipulation.

*Lappinen v. Union Ore Co.*, 224 Minn. 395, 407–08, 29 N.W.2d 8, 17 (1947). Here, there is no evidence that either Dew or the bank withdrew from the stipulation prior to the close of the trial, and the bank relied on the stipulation in deciding what evidence to produce at trial. Because post trial the district court released Dew from the stipulation, it should have granted a new trial to permit the bank to present evidence that the bank failed to present in reliance on the stipulation.

Having rejected the stipulation—which took into account the bank's settlement with subcontractors just prior to trial—the district court also abused its discretion by

failing to either deduct the amount of liens of settling subcontractors from Dew's lien or reopen the record to establish some factual basis for rejecting the settlements.

Throughout the trial, both parties referred to the settlements. The parties and the district court agreed that Dew's lien should be reduced by the full amount of any obligations of which Dew was relieved through settlements. The parties and the district court were aware that settlement documents had not been drafted at the time of the trial. The posttrial documents supplied to the district court appear to plainly establish that Dew has been relieved of further obligation to subcontractors through assignment of the liens to Stewart and Stewart's full release of Dew from any and all claims against Dew for the assigned liens. Dew did not submit any evidence that the document does not extinguish any obligation it may have had to the settling subcontractors for the work they performed under Dew. If the district court wanted the record more developed on this issue, it should have reopened the record. Rejection of the stipulation deprived the bank of a fair trial. We therefore reverse the district court's determination of the amount of the lien and associated costs and fees and remand for a new trial in which the bank has a full opportunity to present evidence on the amount of the lien.

Because the matter is being remanded for determination of Dew's lien, we will address the bank's argument that the district court erroneously applied Minn. Stat. § 514.03, subd. 1(a) (2008) in determining the amount of Dew's lien. *See C.O. v. Doe*, 757 N.W.2d 343, 352 (Minn. 2008) (addressing a question to provide "guidance on remand"). Section 514.03, subdivision 1(a), applies to determination of mechanic's liens only if the contract is for an agreed price, for all other contracts, the lien amount is the

reasonable value of the work done. Minn. Stat. § 514.03, subd. 1(a). The district court rejected the argument that it applied the wrong standard, noting that although its decision referred to section 514.03, subdivision 1(a), the court actually calculated the loan based on the reasonable value of work completed under Dew. Plainly, the parties and the district court agreed that, under the construction contract, the reasonable value of Dew's work is the sum of what it owed the subcontractors for their work, the agreed-on fee, and the amount of the general conditions. But the district court adopted Dew's calculation of "contract completed to date" submitted on pay application 25 as a starting point for its calculation of the lien. Dew calculated this amount by multiplying the maximum contract price by the percentage of work completed when it left the project, thereby treating the contract as a contract for a fixed price. Dew and the district court also relied on amounts submitted in pay applications, but those amounts, under the formula for pay applications set out in the construction contract, also relied on the maximum price, and the final accounting, contemplated in the contract, never took place. On remand, the amount of Dew's lien should be calculated without regard to the maximum price except as a cap on the amount of Dew's total payment.

**IV. The district court abused its discretion by granting Dew a lien on the project for Change Order 5.**

The district court concluded that the subordination agreement associated with Change Order 5 effectively subordinated the \$664,697.62 increase in the project cost to the bank's mortgage. The district court nonetheless sua sponte granted Dew a lien on the project in that amount. We first note that the grant of this lien appears to be beyond the

scope of the issues tried to the district court. Dew did not request such a lien, and the bank had no opportunity to oppose the imposition of such a lien. Furthermore, the plain terms of the subordination agreement precluded Dew from seeking such a lien.

The district court asserted its discretion to grant equitable relief, citing *Fredin v. Farmers State Bank*, 384 N.W.2d 532, 535 (Minn. App. 1986) for the proposition that “[a]n equitable lien arises in an equity proceeding when a person is allowed to reach the property of another and hold it as security for a claim on the ground that otherwise the latter would be unjustly enriched.” But this was not an equity proceeding, and there is no evidence that the bank would be unjustly enriched absent such a lien. The debt involved in Change Order 5 was from Mathwig to Dew and did not involve the bank or the project. We conclude that the district court abused its discretion by granting a lien that was specifically precluded by contract and was not equitable under the circumstances of this case. We reverse the award of the lien to Dew for the amount of Change Order 5.

#### **V. Attorney fees.**

The district court has discretion to award reasonable attorney fees in actions to foreclose a mechanic’s lien under Minn. Stat. § 514.14 (2008). *Obraske v. Woody*, 294 Minn. 105, 108, 199 N.W.2d 429, 431 (1972). But attorney fees are not awarded to nonprevailing parties because “considerations of public policy militate against awarding [them] attorney fees.” *Jadwin v. Kasal*, 318 N.W.2d 844, 848 (Minn. 1982). Because we

reverse the district court's determination that Dew's lien has priority, we also reverse the district court's award of attorney fees.

**Affirmed in part, reversed in part, and remanded.**