

CASE NO. A09-187

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State of Minnesota  
**In Court of Appeals**

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MARTIN H. GORES AND MARY E. GORES,

*Respondents,*

vs.

JP MORGAN CHASE BANK,  
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,  
FIRST NATIONAL BANK OF ARIZONA,

*Appellants*

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**APPELLANTS' REPLY BRIEF AND SUPPLEMENTAL APPENDIX**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## ARGUMENT

### **I. MINN. STAT. §507.02.**

It is important to remember that in connection with Minn. Stat. §507.02, this appeal is limited in scope to Appellants' challenge of the Trial Court's denial of that statute's application solely on the basis of standing. Respondents did not file a Notice of Review, and therefore do not and cannot challenge any of the Trial Court's findings, and the bases therefore. In re: Estate of Barg, 752 N.W. 2d 52,74 (Minn. 2008). Appellants have standing and §507.02 is clearly applicable in this case.

#### **A. Appellants have standing to assert that the Gores' mortgage is void pursuant to Minn. Stat. §507.02.**

The decision of the Trial Court on Appellants' lack of standing is fundamentally wrong. A mortgage is a lien against property and when the mortgage is recorded, the mortgagee claims a right in the property as against any other person claiming a right in the same property. Based on the rules of standing, any party who claims a property right has standing to challenge the validity of any right, title, interest or lien filed or claimed by another against the same property.

As stated in Appellants' initial brief, Appellants clearly have standing to assert that the Gores mortgage is void. (Appellants' Brief, pp. 12-15). Respondents state that Appellants lack standing to seek relief pursuant to §507.02 and then engage in a lengthy argument regarding legislative intent, which argument does not even address the issue of standing. (Respondents' Brief, pp. 11-14).

Respondents' reliance on the tenets of contract law in support of their argument against standing is completely misplaced because the argument fails to address the rights being asserted in this case. Black's Law Dictionary defines the term "mortgage" in relevant part as:

A conveyance of title to property that is given as security for a payment of a debt or the performance of a duty . . .

and as:

A lien against property that is granted to secure an obligation (such as a debt) . . .

Black's Law Dictionary - 8<sup>th</sup> Addition (2004).

Not surprisingly, none of the contract law cases cited by Respondents in support of their argument against standing involve competing interests in real property. In short, Respondents' argument against standing based on contract law is irrelevant and there is no authority to support the application of the analysis to the property rights at issue in this case.

**B. There was ample evidence in the record that the subject property is the homestead of the Schultzes, and the Trial Court so found.**

Judge Theisen found that but for the issue of standing, Minn. Stat. §507.02 would apply. (Add. 22).<sup>1</sup> Implicit in that finding is the finding that the subject

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<sup>1</sup> Citations to Appellants' Addendum will be indicated by "Add. \_\_\_\_\_," citations to Appellants' Appendix will be indicated by "App. \_\_\_\_\_," citations to Respondents' Appendix will be indicated by "R. App. \_\_\_\_\_," and citations to Appellants' Supplemental Appendix will be indicated by "S. App. \_\_\_\_\_."

property was the Schultzes' homestead, and there is ample evidence in the record to support the fact that the subject property was the Schultzes' homestead.

Respondents argue on pages 9-10 of their brief that there was no finding made by the District Court that the property was the Schultzes' homestead, and then state that the lack of such finding is understandable since "Appellants submitted no evidence at trial upon which to make any such finding." Respondents' statements are directly contrary to the evidence.

Respondents rely upon a certificate of real estate value, Trial Ex. 22C, Ex. 16 from the deposition of Joshua Schultz, to support their claims. It is clear that the Certificate of Real Estate Value was signed by Michael Kielty, and not by either of the Schultzes. On page 165, Volume II of the Deposition of Joshua Schultz, which is trial exhibit 22B, Respondents' counsel cross-examined Mr. Schultz as follows regarding the very document Respondents rely upon in their brief:

Q Okay. And it says under – do you see paragraph eight, little "a" there?

A Yes.

Q It says, "will this property be the buyer's principal residence?" And it's checked no.

A Yes, I see that.

Q Do you remember who filled this out?

A No, I do not.

Q Would line 8a – that wouldn't be accurate, then, would it?

A No.

Q Because this was your principal residence. I think you testified that you guys had a place in Farmington, but you were renting that out or -

A Yeah, we rented -

Q Okay.

A -- it out.

Q So this is where you were living?

A Yes.

Q Just trying to get my hands around that.

(S. App. 2). Furthermore, Ex. 12 to the Deposition of Joshua Schultz, introduced as a portion of Trial Exhibit 22C, which is an Affidavit Regarding Sellers signed by Joshua and Cody Schultz, contains the statement that during the year prior to the signature on the document, the Schultzes resided at 15239 Fairbanks Trail Northeast, Prior Lake, MN, the property to Gores mortgage attempts to encumber. (App. 155)<sup>2</sup> It is abundantly clear that sufficient evidence was presented at trial that the property at 15239 Fairbanks Trail NE in Prior Lake was in fact the homestead of

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<sup>2</sup> In addition to the above evidence that the subject property was the Schultzes' homestead, it is evident from Trial Ex. 22A, Volume One of the Deposition of Joshua Schultz, p. 61, line 23 - p. 62, line 6; p. 76, line 11-19; and p. 78, line 16-17 that the subject property was the Schultzes' homestead at all times relevant herein.

Joshua and Cody Schultz, which supports the Trial Court's finding that Minn. Stat. §507.02 would apply in this case.

Respondents' citation to Minn. Stat. § 272.115, Subd. 4 is simply a red herring. That subdivision merely indicates that in order to be eligible for homestead status for tax purposes, a certificate of real estate value must have been filed with the county auditor, which was done in this case. Section 272.115 Subd. 3 notes that upon transfer of title to real property, homestead status will be removed unless the grantee files a homestead application and qualifies for homestead status. It is clear that the apparent error in the certificate of real estate value signed by Michael Keilty was of no effect in determining the homestead status of the property for tax purposes. Homestead classification for tax purposes has no bearing upon whether the property was the Schultzes' homestead for purposes of §507.02.

**C. The conduct of Mr. Schultz does not prevent the application of Minn. Stat. §507.02.**

As cited in Appellants' brief, under longstanding Minnesota law, if the spouse did not sign a mortgage encumbering the homestead, the mortgage is void. (Appellants Brief, p. 10). The circumstances which resulted in the failure of the spouse to execute the mortgage are irrelevant. There is no authority whereby the interests of the innocent spouse are balanced against the lender's interest. The reason for this is clear: a mortgage violating §507.02 is void. **VOID is VOID!** As cited on page 12 of Appellants' brief, there are two prongs when analyzing the claims of a purported mortgagee. The first prong is whether both the husband and

wife signed. If both did not, one need not move to the second prong. Mattice v. Minnesota Property Insurance Placement, 655 N.W. 2d 336, 345 (Minn. App. 2002).

**D. The trial record does not contain any evidence that Mrs. Schultz consented to or ratified the Gores' mortgage.**

The trial record is void of any evidence from Cody Schultz regarding the Gores mortgage. Respondents claim on page 16 of their brief that "Appellants asserted their Minn. Stat. §507.02 defense for the first time in post-trial motions." That statement is made to justify the improper introduction for the first time on appeal of one page of deposition testimony from Cody Schultz. Appellants dispute that permission was granted by Mrs. Schultz to her husband to sign her name to the mortgage. The Trial Court stated:

The Gores allege that in Mrs. Schultzes' Deposition, she admitted to giving Mr. Schultz permission to sign documents on her behalf. However, the Court did not receive Mrs. Schultzes' Deposition as evidence at the trial and therefore cannot make any conclusions related to her deposition.

(Add. 22).

The Trial Court's record is conclusive on appeal and the Appellate Court is limited to reviewing questions presented to and decided by the lower court and to the Trial Court's record. Loth v. Loth, 227 Minn. 387, 399, 35 N.W. 2d 542, 550 (1949). Respondents failed to file a notice of review to challenge any findings of the District Court. In failing to so file, Respondents waived the ability to challenge any adverse ruling by the District Court. In re: Estate of Barg, 752 N.W. 2d 52, 74 (Minn. 2008). Judge Theisen did not consider matters Respondents attempted to raise

outside of the trial court record, and this Court should not consider those matters either.

Appellants did not raise for the first time in post trial submissions defenses to the mortgage based upon the lack of Mrs. Schultzes' signature. Appellants' Amended Answer to the Amended Complaint asserted the affirmative defense of failure to state a claim which was based in part upon the fact that the mortgage which is attached as an exhibit to the Amended Complaint did not contain the signature of Mrs. Schultz (App. 30). Thus, according to Minnesota law the mortgage is void and therefore the Complaint fails to state a claim of foreclosure upon which relief can be granted. Respondents did not conduct any discovery regarding the affirmative defenses asserted by Appellants. (TT p. 12, l 4-5, R. App. 012). Furthermore, the affirmative defenses to be presented at trial were raised in opening statements to the Court. (TT pp. 11-12, 19-22, R. App. 011-012, 019-022). Both Appellants and Respondents submitted post-trial briefs on the same date. Respondents' brief addressed the merits of the defenses raised by Appellants regarding the failure of Mrs. Schultz to sign the mortgage, so obviously they had notice prior to the time they allege. (Plaintiffs' Post-Trial Brief and Memorandum of Law in Support of Motion for Attorney's Fees dated October 10, 2008, pp. 15-16, App. 119-120). Respondents did not at any time before trial, during trial or afterward object to the assertion by Appellants that Respondents' mortgage was void for failure to obtain the signature of Mrs. Schultz. Judge Theisen considered the defense, and found that

it had merit, but that Appellants lacked standing to assert it. Any claim that the assertion of the defense was untimely is unwarranted, and in any event has been waived. In re: Estate of Barg, 752 N.W. 2d 52, 74 (Minn. 2008).

Respondents did not argue to the Trial Court that Cody Schultz ratified her husband's conduct, and it is not proper to do so for the first time on appeal. AAMCO Indus., Inc. v. DeWolf, 312 Minn. 95, 100-101, 250 N.W. 2d 835, 839 (Minn. 1977). Bache & Co. v. Wahlgren, 306 Minn. 238, 243, 235 N.W. 2d 839, 842 (1975). There is no evidence in the Trial Court record that Mrs. Schultz ratified her husband's conduct in signing her name to the Gores mortgage.

Furthermore, Respondents' reference in their brief to "the fraud of the Schultzes" (Respondents Brief, p. 17) is not supported by the record, in that there is absolutely no evidence of any improper conduct by Cody Schultz.

**E. The Gores Mortgage does not fall within the §507.02 exception for purchase money mortgages under Minn. Stat. §507.03.**

Respondents contend that that the Gores' mortgage is a purchase money mortgage under Minn. Stat. §507.03, and that therefore §507.02 does not require the signature of both spouses. However, the plain language of §507.03 demonstrates that Respondents are incorrect.

Minn Stat. §507.03 states in relevant part as follows:

When a **married individual** purchases real property during marriage and mortgages real property to secure the payment of the purchase price or any portion of it, the other spouse shall not be entitled to any **inchoate, contingent, or marital property right or interest** in the real property as

against the mortgagee or those claiming under the mortgagee even though the other spouse did not join in the mortgage. (Emphasis added).

In this case it is clear that a married individual did not purchase the property. Rather a married couple, Josh and Cody Schultz, purchased the property. The contract for deed, which was introduced as Exhibit 10 at trial, indicates that the Schultzes are purchasing the property as joint tenants. (S. App. 3). Section 507.03 simply indicates that in connection with a purchase money mortgage, a non-signing, non-owning, spouse shall not be entitled to assert any “inchoate, contingent, or marital property right or interest” against the mortgagee; it clearly addresses a situation where one spouse is the sole owner of the property. Given that both of the Schultzes were contract vendees purchasing the property as joint tenants, Cody Schultz’ right in the property is that of a fee contract purchaser as joint tenant, not an inchoate right. §507.03 does not apply.

Wells Fargo Home Mortgage, Inc. v. Newton, 646 N.W. 2d 888 (Minn. App. 2002), upon which Respondents rely, is distinguishable. In Newton, only one spouse owned the subject property, and therefore §507.03 was applicable to protect the non-signing spouse’s inchoate rights.

## **II. THE TRIAL COURT’S DISMISSAL OF APPELLANTS’ EQUITABLE SUBROGATION CLAIM, ON SUMMARY JUDGMENT, WAS IMPROPER.**

The equitable subrogation claim need only be considered if the Court rejects Appellants’ claims that they have standing and that the Gores mortgage is void. Respondents continue to misconstrue and misstate Appellants’ argument regarding

equitable subrogation. Obviously Appellants concede that Respondents' mortgage was recorded prior in time to Appellants' mortgages. There would be no reason for the claim if that were not the case. Generally, every equitable subrogation claim will involve a prior recorded interest in real property.

The reason the facts of this case require the application of equitable principles is that even though Respondents recorded their mortgage on October 27, 2005, it was simply not available for Appellants to discover, and therefore it would be inequitable to charge Appellants with constructive notice under the recording act.

The requirements to maintain an equitable subrogation claim are set forth in Ripley v. Piehl, 700 N.W. 2d 540, 545 (Minn. App. 2005) as noted on pages 15-16 of Appellants' brief. Respondents argue on page 23 of their brief that "Appellants must establish that they 'stepped into the shoes' of the Norlings' lenders." There is no requirement in Minnesota law regarding stepping into the shoes of another party in order to maintain an equitable subrogation claim. The requirements are simply as stated in Ripley v. Piehl that one party has provided funds used to discharge another's obligations. In fact, the Trial Court found that "the proceeds of the loan from the Bank Defendants were used to pay off encumbrances against the Property," and then proceeded to list the encumbrances paid in the amount of \$657,533.94 to Aurora Loan Services, \$127,931.06 to First Tennessee Bank and \$58,791.00 to the Norlings to satisfy the contract for deed. (Add. 3-4).

Contrary to Respondents' assertion, Appellants are not suggesting at all that the Court of Appeals should rewrite the Minnesota Recording Act. The purpose of equitable subrogation is to reverse priority set by the Recording Act in the interest of substantial justice. While Appellants believe the facts of this case clearly demonstrate the interest of substantial justice requiring application of equitable subrogation, at a minimum, there are genuine issues of material fact in dispute that preclude the granting of summary judgment in favor of Respondents dismissing Appellants' equitable subrogation claim.

Furthermore, the Pat Boeckman Affidavit submitted by Appellants does not indicate that a telephone call or appearance in person may have provided Appellants with actual notice on the day of closing. The Affidavit is silent on that topic. Even if it did, whether a call "may" have revealed the mortgage is not enough to dismiss Appellants' claim. Clearly a trial on the merits of this claim would be necessary to determine whether there were any reasonable bases upon which to discover the mortgage. However, it is absolutely clear that the Gores mortgage was not verified in the tract index as of the date of the October 28, 2005 closing on Appellants' mortgages. It is simply bad public policy to require any member of the public, including a professional lender, to discover a mortgage prior to verification by county officials. Appellants urge this Court to find that it is unreasonable to require them to discover any mortgage or intervening lien that has not been verified in the county tract index.

The title commitment (App. 142-144), which was prepared prior to closing, properly indicated that the Norlings were fee simple owners of the property, and identified the encumbrances the Norlings had placed against the property. Since the contract for deed from the Norlings to the Schultzes had not been filed against the subject property, which Mary Gores knew, the title commitment would not mention the Schultzes. On page 26 of their brief, Respondents suggest a lack of diligence and negligence against Appellants. As set forth in pages 21-24 of Appellants' brief, the facts of the case demonstrate that Appellants were not in any way negligent, that the ownership interest of the Schultzes was established of record prior to disbursing any loan funds, and that a complete investigation was conducted in an attempt to identify any outstanding mortgages or liens. Clearly Appellants acted under a justifiable or excusable mistake of fact.

Respondents claim that there is no evidence in the record that Appellants ever rechecked title to the property after September 15, 2005, and therefore the application of equitable subrogation should be denied. Any rechecking of title to the property prior to the closing in this matter would not have revealed the Gores mortgage, and therefore this allegation by Respondents provides no basis to deny equitable subrogation.

Finally, applying the doctrine of equitable subrogation would put the Gores in the position they expected, behind the prior encumbrances. (App. 149 - 150).

## CONCLUSION

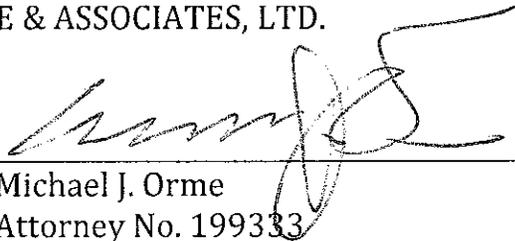
Based upon the arguments set forth in Appellants' brief and in this reply, Appellants respectfully request that this Court declare Respondents' mortgage to be void pursuant to Minn. Stat. §507.02 and that judgment be entered in favor of Appellants. In the alternative, this matter should be remanded for a trial on the issue of Appellants' equitable subrogation claim.

Respectfully Submitted,

Dated: June 5, 2009.

ORME & ASSOCIATES, LTD.

By



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**CERTIFICATION OF BRIEF LENGTH**

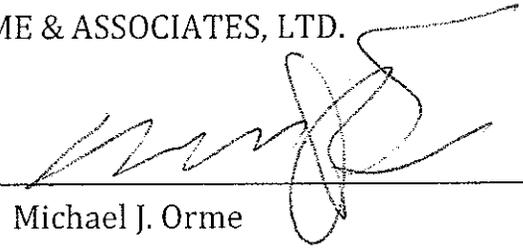
I hereby certify that the Appellants Brief conformed to the requirements of Minn. R. Civ. App. P. 132.01, Subd. 1 and 3, for a brief produced with a proportional font. The length of the Appellants Brief was 5,916 words, and the font size was 13 point. The Appellants Brief was prepared using Microsoft Office Word 2007 software.

I further certify that this Reply Brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, Subd. 1 and 3, for a brief produced with a proportional font. The length of the Reply Brief is 3,074 words, and the font size is 13 point. This brief was prepared using Microsoft Office Word 2007 software.

Dated: June 5, 2009.

ORME & ASSOCIATES, LTD.

By

A handwritten signature in black ink, appearing to be "M. Orme", written over a horizontal line. The signature is stylized and somewhat cursive.

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