

No. A06-1879

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State of Minnesota  
**In Supreme Court**

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St. Croix Development, LLC, and Montanari Homes, Inc.,

*Respondents,*

vs.

Mark David Gossman; Stephanie Rae Gossman;  
Commercial Equity Partners, Inc.; Tamhills Funding, LLC;  
Tamhills, LLC; Maple Leaf Holdings, LLC;  
Pointe West Holdings, LLC; Pointe West Holdings One, LLC;  
Centura Development, Inc.; Office Condos, Inc.;  
XXX Corporation; John Doe; and Mary Row,

*Appellants.*

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**APPELLANTS' BRIEF**

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## STATEMENT OF LEGAL ISSUES

*1. Is an order denying an application to discharge a lis pendens immediately appealable under any of the provisions of Minn. R. App. Proc. 103.03 or pursuant to the collateral order doctrine?*

Court of Appeals: The Court of Appeals dismissed Appellants timely-filed appeal on the grounds that the appeal was taken from a nonappealable order.

### Apposite Authority:

No Minnesota case addresses this issue.

*Hill v. Dep't of Air Force*, 884 F.2d 321 (10<sup>th</sup> Cir. 1989)

*H & S Plumbing Supplies, Inc. v. Bank Am. Comm. Corp.*, 830 F.2d 4 (2<sup>nd</sup> Cir. 1987)

## STATEMENT OF THE CASE

This appeal involves the issue of whether the trial court order denying Appellants' application to discharge a *lis pendens* on Appellants Mark Gossman and Stephanie Gossman's home is appealable.

On August 18, 2006, Appellants filed an application to discharge the *lis pendens* on their residence. (Appendix (hereinafter "A") 222). The trial court denied Appellants' application on September 18, 2006. (A. 238). Appellants' filed a Notice of Appeal on October 5, 2006. (A. 242).

On October 17, 2006, the Court of Appeals directed the parties to file informal memoranda addressing appellate jurisdiction. (A. 5). Specifically, the Court of Appeals ordered the parties to address the following:

(a) Does the September 18 order denying the motion to discharge notice of *lis pendens* involve an important issue or substantial right in a proceeding that is independent of the underlying action? Compare *Hill v. Dep't of Air Force*, 884 F.2d 321, 322 (10<sup>th</sup> Cir. 1989) (holding that an order denying an application to quash a notice of *lis pendens* is appealable) with *He&S Plumbing Supplies, Inc. v. Bank Am. Commercial Corp.*, 830 F.2d 4, 6 (2<sup>nd</sup> Cir. 1987) (holding that an order vacating a notice of pendency is immediately appealable due to the possibility that the property would be sold before conclusion of the lawsuit, but holding that an order denying vacation of the notice of pendency is not immediately appealable).

(b) If the answer to (a) is no, is there a jurisdictional basis for an appeal of the September 18 order under Minn. R. Civ. App. P. 103.03?

(c) If the answer to (b) is no, should this appeal be dismissed? See Minn. R. Civ. App. P. 103.03 1983 cmt. (stating that review of any order not specifically enumerated in rule 103.03 is discretionary only, and permission to appeal must be sought pursuant to rule 105).

Appellants' filed their memorandum on October 30, 2006 (A. 9) and on December 5, 2006 the Court of Appeals dismissed the appeal. (A. 1). In its ruling, the Court of Appeals recognized that an order discharging a notice of *lis pendens* is appealable, but acknowledged that the appealability of the denial of an application to discharge was an issue of first impression. (A. 1-2). It then held that such an order was not appealable under Minn. R. Civ. App. P. 103.03 (g) or (j). (A. 3-4). On January 2, 2007, Appellants petitioned this Court for further review. On February 20, 2007, this Court granted the petition for review. (A. 250)

The trial court's order denying discharge of *lis pendens* is reviewable under both Minn. R. Civ. App. P. 103.03 (g) and the collateral order doctrine. The order is immediately appealable under Minn. R. Civ. App. P. 103.03 (g) because it is a final resolution in a "special proceeding" that affects a substantial right—the ability, or lack thereof, to freely dispose of real property. Further, the order is appealable under the collateral order doctrine because it (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment. Logically, the order should also be appealable just as analogous orders granting or refusing injunctions or attachments are. Appeal should be granted under Minnesota case law as well, which allows review of an order **granting** discharge of *lis pendens*, premised on what is now Rules 103.03 (b) and (c) allowing appeal from orders **granting or refusing** injunction or attachment.

## STATEMENT OF FACTS

Respondents' complaint alleges Appellant Mark Gossman breached his employment contract and alleges other common law claims incident to the employment relationship. (A. 19). In conjunction with this suit, Respondents filed notices of *lis pendens* on Appellants' residence ("residential *lis pendens*") and on the corporate appellants' commercial real estate. (A. 132-139, 210). Although the 72-page Complaint is prolix and difficult to digest, Respondents' apparent basis for filing the *lis pendens* was not any claim of right, title or interest in the property, but rather their request for imposition of a constructive trust as a form of relief. (A. 86-89)

The notices of *lis pendens* filed on the commercial properties threatened to disrupt a number of pending closings and Appellants immediately filed an application to discharge them. The trial court granted that application, finding *lis pendens* improper because Respondents did not have a right, title or interest in the property to support a *lis pendens*. The residential *lis pendens*, which was not addressed in the first application, remained. (A.102-123 and A. 214-221).

Appellants thereafter filed a separate application to discharge the residential *lis pendens*, arguing that it was inappropriate because the Complaint did not provide a proper basis for a *lis pendens*, i.e., it did not allege facts showing Respondents had a right, title or interest in the property, but rather, was an attempt to recover money damages as additional payment for a completed real estate transaction made during Gossman's employment with Respondents, who are real estate developers. (A. 222). The trial court denied Appellants' application to discharge the residential *lis pendens*,

finding that Respondents had a sufficient interest in that property to support the *lis pendens* because they sought to recover lost profits from its sale that were allegedly supposed to be recouped from Gossman through his continued employment. (A.238-241). This appeal followed.

### STANDARD OF REVIEW

This Court applies a *de novo* standard of review to court of appeals' interpretations of the Rules of Civil Appellate Procedure. *In re GlaxoSmithKline PLC*, 699 N.W.2d 749, 753 (Minn. 2005) (citing *Kastner v. Star Trails Ass'n*, 646 N.W.2d 235, 238 (Minn. 2002) (construction of a procedural rule is a question of law reviewed *de novo*)); *see also Nichols v. Borst*, 439 N.W.2d 432, 433 (Minn. Ct. App. 1989).

### LEGAL ARGUMENT

#### **I. A BRIEF OVERVIEW OF LIS PENDENS.**

Before analyzing the reasons why the order denying *lis pendens* discharge is appealable, a brief discussion of how the *lis pendens* statute operates and the standards for determining the validity of a notice of *lis pendens* may be helpful to the court.

The stated purpose of the *lis pendens* statute is to provide notice to third parties that certain real property is the subject of litigation, and that any subsequent interest acquired in the property will be subject to the outcome of the litigation. *See Trask v. Bodson*, 169 N.W. 489, 490 (Minn. 1918) ("the sole function of the *lis pendens* is to give constructive notice to all the world of the pendency of the action" (citing *Joslyn v. Schwend*, 89 Minn.74, 93 N.W. 705 (Minn. 1903))); *Bly v. Gensmer*, 386 N.W. 2d 767, 769 (Minn. Ct. App. 1986) (*lis pendens* serves as warning that title to the property is in

litigation); *Marr v. Bradley*, 59 N.W.2d 331, 335 (Minn. 1953) (a subsequent purchaser takes the property subject to the resolution of the underlying suit.). Under Minnesota law, the notice of *lis pendens* may be filed at any time during the pendency of a suit so long as the title to, or any interest in or lien upon real property is an issue in the ongoing litigation:

In all actions in which the title to, or any interest in or lien upon, real property is involved or affected, or is brought in question by either party, any party thereto, at the time of filing the complaint, or at any time thereafter during the pendency of such action, may file for record with the county recorder of each county in which any part of the premises lies a notice of the pendency of the action, containing the names of the parties, the object of the action, and a description of the real property in such county involved, affected or brought in question thereby. From the time of the filing of such notice, and from such time only, the pendency of the action shall be notice to purchasers and encumbrancers of the rights and equities of the party filing the same to the premises.

Minn. Stat. § 557.02 (2006). The statute makes no reference to the progress of the underlying action, nor does it dictate discharge occurs as a consequence of any event in the underlying action.

Although the statute's stated purpose is to provide notice of a pending suit, its practical effects are far greater. A party filing notice of a *lis pendens* preserves his rights in the property if he is successful on the merits of the underlying or related suit. *See, e.g., Janice Gregg Levy, Lis Pendens and Procedural Due Process: A Closer Look After Connecticut v. Doebr*, 51 Md. L. Rev. 1054 (1992) (discussing the effects of *lis pendens*). Simultaneously, the *lis pendens* curtails the marketability of any affected title and is therefore a detriment to the current owner. *See Bly*, 386 N.W. 2d at, 769 (*lis pendens* impedes property owner's right to free alienability of real estate). In this sense,

although a *lis pendens* is not technically a prejudgment remedy, it is similar to the prejudgment remedies of attachment or appointment of a receiver, both of which restrict the use and alienability of property during litigation. *See* Minn. Stat. Ch. 570 and 576. The party filing a notice of *lis pendens* is seeking a form of prejudgment relief—protection of his priority interest in the property—based on specific statutory criteria that must be met.

The statute is clear that a court may discharge a *lis pendens* if it is filed without a proper basis, but it does not articulate the standard a trial court should use in doing so:

Any party claiming any title or interest in or to the real property involved or affected may on such notice as the court shall in each case prescribe, make application to the district court in the county in which the action is pending or in which the real property involved or affected is situated, for an order discharging the *lis pendens* of record

Minn. Stat. § 557.02 (emphasis added).

Caselaw, however, is clear that in making a determination of whether to discharge a *lis pendens* a court need not evaluate the strength of the substantive allegations. Rather, the decision is based upon whether the *lis pendens* was filed in an action within the authorized class of actions that sufficiently implicate “the title to, or any interest in or lien upon” real property. *See, e.g., Construction General, Inc. v. Richard Schwarz/Neil Weber, Inc.*, 354 N.W.2d 877 (Minn. Ct. App. 1984) (citing *Estate of Mansur v. Eden Prairie Real Estate Inv. Corp.*, 384 N.W.2d 236, 238 (Minn. Ct. App. 1986) (a court may cancel a *lis pendens* “when filed in an action not of the authorized class)); *Painter v. Gunderson*, 143 N.W. 911 (Minn. 1913) (court must determine whether plaintiff had “a claim within the class of actions sufficient to support a notice of lis

pendens”). Put differently, the trial court reviews the pleadings in a manner akin to determining whether a complaint is subject to dismissal under Minn. R. Civ P. 12 in evaluating whether the allegations support the relief sought. *See, e.g., Grace Development Co., Inc. v. Houston*, 306 Minn. 334, 337, 237 N.W.2d 73, 75 (Minn. 1975) (looking to allegations in plaintiff's complaint to determine whether *lis pendens* was filed wrongfully); *Rehnberg v. Minnesota Homes*, 52 N.W.2d 454, 456, 236 Minn. 230, 234 (Minn. 1952) (*lis pendens* inappropriate where complaint did not provide proper basis); *Bly*, 386 N.W. 2d 767 (analyzing justification for *lis pendens* based on allegations as pled in the complaint).

## II. CASE LAW REGARDING APPEALABILITY OF *LIS PENDENS*.

Where a trial court **grants** an order discharging *lis pendens*, Minnesota caselaw holds it is immediately appealable. *See Rehnberg v. Minnesota Homes, Inc.*, 235 Minn. 558, 558, 49 N.W.2d 196, 197 (1951); *see also Grace Development*, 306 Minn. 334, 237 N.W.2d 73. None of the caselaw identifies, however, the precise provision of Minn. R. Civ. App. P. 103.03 upon which the immediate appealability of the discharge of a *lis pendens* is premised.

In *Rehnberg*, the court based its decision that an order canceling a notice of *lis pendens* was appealable on Minn. Stat. § 605.09(2) (now 103.03 (b) and (c)), providing for appeal from an order granting or refusing a provisional remedy, granting or refusing, dissolving or refusing to dissolve an injunction, or vacating or sustaining an attachment. This finding was upheld even after Minn. Stat. §605.09 (2) was replaced by Minn. R. Civ. App. P. 103.03 (b) and (c). *Nelson v. Nelson*, 415 N.W.2d 694, 696

(Minn. Ct. App. 1987) (finding *lis pendens* discharge appealable under *Rehnberg*, even though the words “granting or refusing a provisional remedy” were excluded from Minn. R. Civ. App. P. 103.03(b) and (c) which replaced section 605.09(2)).

Minnesota caselaw has not addressed, however, whether an order **denying** discharge of *lis pendens* is immediately appealable. Two Federal appellate courts, the Second and the Tenth Circuits, have addressed the appealability of an order denying discharge of a *lis pendens*. The Tenth Circuit held that such an order is appealable under the collateral order doctrine. *Hill*, 884 F.2d at 1322 (“we conclude that we do have jurisdiction to consider this appeal. The district court's order is a collateral order appealable under the principles set forth in *Cohen v. Beneficial Industrial Loan Corp.*, and *Coopers & Lybrand v. Livesay*” (citations omitted)) (A.257-258); *but see H&S Plumbing Supplies, Inc. v. Bank Am. Comm. Corp.*, 830 F.2d 4 (2<sup>nd</sup> Cir. 1987) (denial of discharge of *lis pendens* is not a collateral order). (A.259-261). Contrary to the Tenth, the Second Circuit held that an order **denying discharge** of a *lis pendens* was not immediately appealable, but suggested that an order **granting discharge** of a *lis pendens* would be immediately appealable. *H & S Plumbing*, 830 F.2d at 6.

In this case, the court of appeals based its decision to dismiss the appeal on the Second Circuit's holding. The court of appeals' reliance on *H & S Plumbing* is misplaced. The Second Circuit's decision in *H & S Plumbing* was premised on New York common law regarding the appealability of orders granting prejudgment attachment, which is different than Minnesota law. Under New York law, an order denying prejudgment attachment is appealable, while an order granting prejudgment

attachment is not. *See id.* (“In the context of prejudgment orders concerning attachments, we have permitted appeals from orders denying such remedies and disallowed appeals from orders granting or continuing such remedies.” (internal citations omitted)). In contrast to New York, Minnesota law provides that an appeal may be taken from “an order vacating or sustaining an attachment.” Minn. R. Civ. App. P. 103.03(c) (emphasis added). *H & S Plumbing* expressly analogized a *lis pendens* to a form of attachment. Applying the *H & S Plumbing*’s attachment rationale in the context of Minnesota law then, the Court would be compelled to permit immediate appeal of an order discharging a *lis pendens*, as well as one refusing to discharge a *lis pendens*, just as it would an order regarding attachment.

This reasoning is also consistent with *Rehnberg*, which allowed appeal of a discharge of *lis pendens* under the reasoning that orders *granting or refusing* a provisional remedy, injunction, or attachment were appealable. *See also* Minn. R. App. P. 103.03 (b) and (c) (showing that Minnesota does not determine the appealability of orders regarding attachment or injunction based on the outcome of the court’s decision). The same principle applied to these prejudgment remedies should be applied equally to orders regarding *lis pendens*.

In addition to the logic of allowing appeal based on *Rehnberg* and analogous prejudgment remedies, appeal should also be allowed under Minn. R. App. P. 103.03 (g) and the collateral order doctrine, discussed below.

### III. AN ORDER DENYING DISCHARGE OF *LIS PENDENS* IS APPEALABLE UNDER MINN. R. CIV. APP. P. 103.03 (g).

Minnesota Rule of Civil Appellate Procedure 103.03 (g) provides that appeal may be taken “from a final order, decision or judgment affecting a substantial right made in an administrative or other special proceeding.” An appeal from an order denying discharge of a *lis pendens* meets the three criteria of Rule 103.03 (g) *viz.* it is final, it affects a substantial right, and is rendered in a special proceeding.

Any assessment of whether the party seeking a *lis pendens* has met the statutory criteria contained in Minn. Stat. § 557.02 is the subject of a separate, collateral proceeding, distinct from the merits of the underlying action. The trial court’s decision regarding the *lis pendens* has no effect on the course of the underlying action or a decision on the merits. Once a court determines that the statutory requirements are satisfied, it has no reason to revisit the issue and the decision is therefore final.

#### A. The Order Is A Final Order.

The trial court’s order is a final determination of whether the *lis pendens* will continue to encumber the Appellants’ property for the duration of the litigation and possible appeal, limiting the Appellants’ right to free use and alienability of the property. There are virtually no circumstances under which the trial court would have reason to revisit the *lis pendens* issue. Therefore the order “is final as to the matter which it determines” and “ends the matter or proceeding so far as the court making it is concerned.” *In re Enger’s Will*, 225 Minn. 229, 231, 30 N.W.2d 694, 700 (1948); *see*

also *GlaxoSmithKline*, 699 N.W.2d at 754 (a final order as one that “finally determines some positive legal right of the appellant relating to the action.”).

**B. The Order Affects a Substantial Right.**

Although the purpose and intent of the *lis pendens* is to protect unidentified third parties by giving constructive notice to the public of the pendency of an action, it has the practical effect of clouding title to the property at issue, affecting the owner’s right to free use and alienability of the property. See e.g., *Bly*, 386 N.W. 2d 767. The ability to own and control property free from encumbrance is clearly a “substantial right” for purposes of Rule 103.03 (g). See *GlaxoSmithKline*, 699 N.W.2d at 754 (citing with approval Douglas D. McFarland & William J. Keppel, *Minnesota Civil Practice* § 2719 (3d ed. 1999) (observing that “the appellate court will rarely find an order in a special proceeding nonappealable on the ground that it does not affect a substantial right ”)).

In other situations affecting property, Minnesota courts have recognized that restriction of property rights during the course of litigation affects a substantial right. Appointment of a receiver has been held to affect the substantial right “to possess and manage” one’s property during litigation. See *Brown v. Muetzel*, 358 N.W.2d 725, 727 (Minn. Ct. App. 1984). Similarly, in *Rock v. Hennepin Broad. Assocs., Inc.*, the court of appeals held that imposition of a constructive trust abrogated a party’s “right to freely use and manage during litigation the proceeds from the sale of its stock and assets,” a right it deemed substantial for the purposes of 103.03(g). 359 N.W.2d 735, 738 (Minn.

Ct. App. 1984). *A fortiori*, a *lis pendens* based upon a constructive trust, as in the instant case, must also affect a substantial right.

Furthermore, the Supreme Court recognized the significance of the right to hold property free from encumbrance, stating that “even temporary or partial impairments to property rights...are sufficient to merit due process protection.”

*Connecticut v. Doebr*, 501 U.S. 1, 11, 111 S. Ct. 2105, 2113 (1991) (addressing the legality of a Connecticut prejudgment attachment statute). In *Doebr* the Court identified a multitude of significant property interests that attachment affected. These same rights are affected equally by the imposition of a *lis pendens*, which like attachment,

ordinarily clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; [and] reduces the chance of obtaining a home equity loan or additional mortgage...

*Id.*; see also *Bly*, 386 N.W. 2d at 769 (*lis pendens* affects alienability of property).

**C. *Lis Pendens* Proceedings are “Special Proceedings.”**

Finally, *lis pendens* proceedings constitute “special proceedings” under Minn. R. Civ. App. P. 103.03 (g). “Special proceeding” is not defined by the Rule. Instead, this Court has “preferred an interpretation that preserves the parties’ rights to appeal where appropriate.” *GlaxoSmithKline PLC*, 699 N.W.2d at 754. The precise definition of a special proceeding has varied and several respected Minnesota appellate advocates and authorities recognize that the determination of whether a “ruling in a special proceeding” falls within the scope of Minn. R. Civ. App. P. 103.03 (g) is the source of considerable confusion. See 3 Eric J. Magnuson, David F. Herr, *Minn. Prac. Series: App.*

*Rules Annotated* § 103.12 65 (2006 ed.) (citing G. Alan Cunningham, *Appealable Orders in Minnesota*, 37 Minn. L. Rev. 309, 353 (1953)).

In *Chapman v. Dorsey*, the Court defined special proceeding as

a generic term for any civil remedy in a court of justice which is not of itself an ordinary action and which, if incidental to an ordinary action, independently of the progress and course of procedure in such action, terminates in an order which, to be appealable ... must adjudicate a substantial right with decisive finality separate and apart from any final judgment entered or to be entered in such action on the merits.

230 Minn. 279, 283, 41 N.W.2d 438, 440-41 (1950); *see also In re Janeczek*, 610 N.W.2d 638, 642 (Minn. 2000) (stating that a special proceeding is a “generic term for a remedy that is not part of the underlying action and that is brought by motion or petition, upon notice, for action by the court independent of the merits of the underlying action”). The definition was modified slightly in *Willeck v. Willeck*:

A special proceeding...may be commenced independently of a pending action by petition or motion, upon notice, in order to obtain special relief. Its existence is not dependent upon the existence of any other action and it therefore is not an integral part of the original action but is separate and apart. It adjudicates by final order a substantial right distinct from any judgment entered upon the merits of the original action.

286 Minn. 553, 554 n.1, 176 N.W.2d 558, 559 n.1 (1970).

*Lis pendens* proceedings fit squarely within either definition of a special proceeding. The filing of *lis pendens* is not an essential component of the lawsuit, which will progress independently from, and regardless of, whether a *lis pendens* has been filed. As previously discussed, whether an order discharges or refuses to discharge a *lis pendens* has no bearing on the course of the underlying litigation or its outcome. It is a proceeding defined by statute, akin to other prejudgment remedies,

that adjudicates whether property will be encumbered during the course of the underlying action. An aggrieved party may commence a proceeding to discharge a *lis pendens* at his discretion, but need not do so, because discharge of *lis pendens* is not an integral part of the original action. Finally, the party seeking discharge of a notice of *lis pendens* can choose the county in which to venue an application to discharge: the county in which the action is pending or the county where the property affected is located. *See* Minn. Stat. § 557.02. This last characteristic underscores the separate and special nature of any such proceeding.

#### **IV. AN ORDER DENYING DISCHARGE OF THE LIS PENDENS IS APPEALABLE UNDER THE COLLATERAL ORDER DOCTRINE.**

The collateral order doctrine that this Court adopted in *Kastner v. Star Trails Ass'n.*, 646 N.W.2d 235, provides an additional basis for jurisdiction. Much like the criteria for appealability under 103.03 (g), an order is subject to immediate appellate review under the collateral order doctrine if it (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment. *Id.* at 240; *see also* *Coopers & Lybrand*, 437 U.S. at 468. Contrary to the Court of Appeals' analysis, the trial court's Order denying discharge of the *lis pendens* satisfies all of these criteria. *See Hill v. Department of Air Force*, 884 F.2d 1321 (10<sup>th</sup> Cir. 1989) (order denying discharge of *lis pendens* is appealable under collateral order doctrine). (A.257-258).

In adopting the collateral order doctrine, this Court recognized that although Minn. R. Civ. App. P. 103.03 provides a list of appealable judgments and orders, the list is not exhaustive. *Id.* at 239 n.7. Other orders are also immediately appealable

where the trial court's order does not "make any step toward final disposition of the merits of the case and will not be merged in final judgment." *Cohen*, 337 U.S. at 546 (citations omitted). In these circumstances, appeal following final judgment "will be too late...and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably." *Id.* This holds true for an order denying discharge of a *lis pendens*.

**A. The Order Conclusively Determines the Disputed Question.**

The district court's denial of Appellants' application conclusively determines whether a right, title or interest in a piece of real property is at issue, and confirms that a *lis pendens* will remain on the property for the duration of the litigation. The trial court made a final determination of the *lis pendens* issue before this appeal was taken and there are no foreseeable circumstances under which the court would address the *lis pendens* during the course of the litigation. *See Cohen*, 337 U.S. at 546 (order conclusively determined issue where trial court's "action upon this application was concluded and closed and its decision final in that sense before the appeal was taken."); *see also Carr v. Am. Red Cross*, 17 F.3d 671, 675 (3d Cir.1994) (collateral order is conclusive where court "can perceive of no circumstances under which the district court would revisit the legal question that the Appellant now appeals to this court." (internal quotations omitted)); *cf. Coopers & Lybrand*, 437 U.S. at 468 (recognizing a class of decisions that are immediately appealable because they conclusively determine a discrete issue although they do not resolve the case in its entirety).

**B. The Order Resolves an Important Issue Completely Separate From the Merits of the Underlying Action.**

**1. *Lis Pendens* Proceedings are Completely Separate From the Underlying Action**

An order regarding the discharge of a *lis pendens* “decide[s] a question substantially separate from the basic issue raised in the complaint. Nothing further in the underlying action can affect the validity of the notice.” *Keith v. Bratton*, 738 F.2d 314 (8th Cir. 1984) (citing *Suess v. Stapp*, 407 F.2d 662, 663 (7th Cir. 1969)); *see also S.B. McLaughlin & Co. Ltd. v. Tudor Oaks Condominium Project*, 877 F.2d 707 (8th Cir. 1989) (decided under Minnesota law). *Lis pendens* proceedings are special proceedings created and defined by statute. Minn. Stat. § 557.02. A party may choose to commence discharge proceedings at any point and in a different county and district court in the litigation, or may choose not to do so at all. *Id.* For this reason, *lis pendens* proceedings are distinct from, and collateral to, the underlying action.

**2. Imposition of a *Lis Pendens* is an Important Issue**

Contrary to the court of appeals’ determination, denial of discharge of a *lis pendens* is an issue “too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.” *Cohen*, 337 U.S. at 546. The right to own and control one’s real property is recognized as an important right in both the United States and Minnesota constitutions. *See, e.g.*, Minn. Const., Art. I, § 7 (due process); § 12 (limiting property seizure in satisfaction of debts); § 13 (government takings); U.S. Const., amend. V (due process, government takings); *see also U.S. v. James Daniel Good Real Property*, 510 U.S.

43, 61 (1993) (“Individual freedom finds tangible expression in property rights.”).

Obviously then, abrogation of property rights is also an important issue. The Supreme Court has acknowledged that even temporary deprivation of property rights during litigation is significant enough to require due process protection. *See Doebr*, 501 U.S. at 11. These rights also merit immediate appellate review.

**C. The Order Denying Discharge of the *Lis Pendens* is Effectively Unreviewable on Appeal From Final Judgment.**

A *lis pendens* serves as an ongoing cloud on the title of the subject property. The notice of *lis pendens*, by its very nature and purpose, encumbers the property until the conclusion of the litigation, including appeal, and ends when the litigation ends. *Carl v. De Toffol*, 223 Minn. 24, 25 N.W.2d 479, 482-83 (1946) (a party who purchases property before conclusion of appeal risks that judgment may be reversed, divesting purchaser of any property interest). Such a cloud affects the alienability of the property as well as its value. The damage done by a *lis pendens* is virtually impossible to quantify and can include such intangibles as the inability to procure a mortgage, or a lower credit rating. Appellate review following final judgment is ineffectual and meaningless—discharge of the *lis pendens* at the conclusion of the litigation cannot remedy the cloud on title that existed during the litigation. The damage has already been done. Any relief that could be granted in a post-judgment appeal would therefore be stale and futile. *See Shingara v. Skiles*, 420 F.3d 301, 305 (3d Cir. 2005) (appeal is futile where controversy will be moot or available relief will be stale). (A. 251-256).

## CONCLUSION

The trial court's order denying discharge of *lis pendens* is immediately appealable under Minn. R. Civ. App. P. 103.03 (g) because it is a final resolution in a "special proceeding" that affects a substantial right—the ability, or lack thereof, to freely dispose of real property. It is also appealable as a collateral order that conclusively determines an important issue completely separate from the merits of the action, and that is effectively unreviewable on appeal from a final judgment. Further, the order is also be appealable just as analogous orders granting or refusing injunctions or attachments are; and under Minnesota case law, which allows review of an order granting discharge of *lis pendens*, premised on what is now Rules 103.03 (b) and (c) allowing appeal from orders granting or refusing injunction or attachment.

Respectfully submitted,  
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Dated: March 22, 2007

  
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