

Appellate Court Case No. A05-1450  
Trial Court Case No. 09-C4-03-001406

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**STATE OF MINNESOTA  
IN COURT OF APPEALS**

Darrell T. Peterson,

Plaintiff-Respondent,

v.

Arthur B. Johnson and  
Mary Ann Johnson,

Defendants-Appellants.

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**BRIEF AND APPENDIX FOR RESPONDENT  
DARRELL T. PETERSON**

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## PROCEDURAL HISTORY

Appellants Arthur B. Johnson and Mary Ann Johnson are appealing from a Judgment entered in Carlton County District Court on May 25, 2005, which determined that the district court's prior Order of November 1, 2004 constituted the final judgment of that Court. The district court's Order of November 1, 2004 and accompanying Memorandum determined that: (a) the Agreement between the appellants Johnson and the respondent Darrel T. Peterson of October 1, 1986 and the conveyance of property of September 4, 1986 constituted an equitable mortgage; (b) foreclosure by action was the only recourse available to the Johnsons for Peterson's failure to perform according to the terms of the Agreement; (c) Minnesota Statutes § 541.03 was the appropriate statute of limitations for determining the fifteen year limit on the Johnson's right to foreclose the equitable mortgage and Peterson's accompanying right to redeem; (d) it would be unjust to void the entire Agreement between the parties and require the Johnsons to deliver a quit claim deed to Peterson for the subject property, based upon usurious interest that was never paid; (e) the fifteen year statute of limitations specified in Minnesota Statutes § 559.18 and 559.19 was inapplicable in this case because the parties were not in a mortgagor/mortgagee relationship prior to the conveyance and Agreement at issue; (f) it was not necessary to address the timeliness or merits of Peterson's claim for unjust enrichment. Respondent Peterson requests this court to affirm the district court's determinations, remand this matter to district court for a determination of the remaining balance due and owing upon the equitable mortgage, or in the alternative remand this matter to the district court for a determination on the issues of unjust enrichment and usury.

**LEGAL ISSUES**

**A. DID THE CONVEYANCE TO THE JOHNSONS CONSTITUTE AN ABSOLUTE CONVEYANCE OF TITLE OR AN EQUITABLE MORTGAGE?**

The district court properly found that the loan Agreement and deed between the parties constituted an equitable mortgage.

**B. DID THE DISTRICT COURT APPLY THE CORRECT STATUTE OF LIMITATIONS IN THIS ACTION?**

The district court properly determined that Johnsons' only recourse for Peterson's failure to perform under the Agreement was a foreclosure action, which must be brought within 15 years of the maturity date of the debt (applying Minn. Stat. § 541.03). The district court further determined that Minnesota Statutes § 559.18 and 559.19 were inapplicable in this case, because no mortgagor/mortgagee relationship had existed prior to the conveyance and Agreement at issue

**C. DID GENUINE ISSUES OF MATERIAL FACT PRECLUDE THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT?**

The district court properly found that the "written memorials of the transaction" and the "surrounding facts and circumstances" are used to determine the intent of the parties, not self serving statements made years later.

**D. DID THE DISTRICT COURT PROPERLY DENY PETERSON'S MOTION TO VOID THE AGREEMENT BETWEEN THE PARTIES AS USURIOUS?**

The district court erred by failing to address Peterson's alternative request for "an order invalidating any claim of Peterson to a lien or ownership interest in the subject property in exchange for payment to them of the remaining principal due and owing under the original Agreement signed by the parties in 1986."

**E. DID THE DISTRICT COURT PROPERLY DISMISS PETERSON'S CLAIM FOR UNJUST ENRICHMENT?**

Should this court reverse the district court with regard to either the issue of equitable mortgage or the issue of the applicable statute of limitations, this court must then necessarily reverse the district court with regard to Peterson's claim for unjust enrichment, so as to prevent a financial windfall to the Johnsons.

**F. DID THE DISTRICT COURT FAIL TO PROPERLY ADDRESS PETERSON'S REQUEST TO DETERMINE THE REMAINING BALANCE DUE AND OWING UPON THE EQUITABLE MORTGAGE?**

The district court failed to address Peterson's request to determine the remaining balance due and owing upon the equitable mortgage as prayed for in the complaint and needs to completely resolve all remaining issues between the parties.

## STATEMENT OF FACTS

In 1986, Respondent Darrell T. Peterson (hereinafter referred to as "Peterson") and his ex-wife, Kathlene Peterson approached Appellants, Darrell's uncle, Arthur B. Johnson and his wife Mary Ann Johnson (hereinafter referred to as "Johnsons"), for a loan. Peterson was in need of the money to pay up an overdue contract for deed payment and to pay delinquent real estate taxes on their farm homestead property (A.A.3, 10). By letter of August 25, 1986 (A.A.10), Johnson proposed the terms of an agreement (hereinafter referred to as the "Agreement") whereby Johnson would borrow Petersons the sum of \$9,200 to pay their debts and requiring 320 acres of the Peterson farm homestead property to be put up as security for the loan (A.A.10). The \$9,200.00 amount was to be repaid with interest over time, and the loan was to be secured by a deed given by Peterson to Johnson for the 320 acre parcel of land, which deed would be held by Johnson's attorney but not recorded (A.A.10).

A loan agreement (A.A.3) and deed (A.A.1) were drafted by Johnson's Attorney, Stanford Dodge and further reviewed by the parties (A.A.7, 11). Communications between the parties were a bit slow because Peterson was working in Alaska at the time to try and supplement his family's farm income (R.A.2, A.A.1).

The Deed was sent to Alaska in September where Peterson signed the Deed on September 23, 1986 in the County of Fairbanks (A.A.1, R.A.2). Peterson returned the Deed to Minnesota where it was signed by his wife, Kathlene, on September 29, 1986 in the County of Carlton (A.A.2), and acknowledged before Johnsons' Attorney, Mr. Dodge (A.A.2). Two days later, by letter dated October 1, 1986 (A.A.11), Mr. Dodge notified Johnsons that the Agreement of the parties, also dated October 1, 1986, was prepared in draft

form, and to review it for corrections so that it could be executed by the parties (A.A.11). Mr. Dodge's letter also stated that he had paid Peterson's debts (A.A.11), which are the same debts Johnsons had agreed to give money to pay if Peterson gave them a deed to guarantee repayment (A.A.10). In the same letter, Mr. Dodge also notified Johnsons that the loan interest rate used in the Agreement was 11% (A.A.11).

Contrary to the mis-statement contained in the Appellant's Appendix, the Agreement was dated October 1, 1986, though it was not formally executed by Peterson and his wife until December 5, 1986 (A.A.5), following Peterson's return from Alaska (R.A.2), and was executed by the Johnsons' ten days later on December 15, 1986 (A.A.6). The written Agreement, signed and acknowledged by all of the parties, clearly states that the deed was given according to its terms (A.A.3). The fact that the Agreement was for a loan and was not a sale of land was always understood by the parties (R.A.2, 3). The Johnsons gave their specific assurance that they had no interest in owning the land at issue (R.A.2, 3).

The final written Agreement provided that 360 acres of land would be given by deed "as security and surety for the pay off of the loan of said \$9,500.00." (A.A.3). The Agreement further provided that the loan amount was to be repaid over a period of five years with interest at the usurious rate of eleven percent (11%) per annum (A.A.3). Under the Agreement Peterson agreed to repay the loan and Johnsons agreed not to record the deed (A.A.3).

During this period of time, Peterson refinanced his existing mortgages upon the subject property by taking out a series of new mortgages in favor of the local Credit Union (R.A.6). The Peterson mortgages to the Credit Union include a \$57,000.00 mortgage given

in January of 1990, an \$86,000.00 mortgage given to the Credit Union in April of 1994 and a mortgage in the amount of \$10,000.00 given to the Credit Union in February of 1996 (R.A.6). Peterson did subsequently pay off the \$57,000.00 and the \$10,00.00 mortgages in full (R.A.6). To this day, Peterson continues to make regular monthly payments to the Credit Union upon the \$86,000.00 mortgage (R.A.6, 29).

The only payment made by Peterson to Johnsons under the terms of their \$9,500.00 loan Agreement was a single payment of \$3,200.00 paid to Johnsons in October 1991 (Appellants' Brief p.2; R.A.6), which payment was made one month before the five year term of the Agreement was up (A.A.3). On January 5, 1994 Johnsons' attorney sent Peterson a collection letter (R.A.9) seeking to collect the remaining balance due on the "indebtedness evidenced by the 1986 Agreement" and assuring Peterson that the Johnsons "wish only to receive payment of the monies that were loaned to you pursuant to the Agreement" (R.A.9).

The Johnsons recorded the deed from Peterson in November and December of 1996 (Appellant's Brief p.2) through their attorney (A.A.8, 12, 13), without Peterson's knowledge or consent (R.A.7, 13, 20). Upon discovering that Johnsons had recorded the deed, Peterson wrote Johnsons requesting an explanation and the return of the title to his land. The Johnsons, by letter dated December 28, 2002 (R.A.10), informed Peterson that they would no longer allow Peterson to redeem his land for repayment of the loan plus interest, but would now require him to pay the current full market value of the land which was then conservatively valued at \$360,000.00. Shortly thereafter this litigation ensued (R.A.11).

## LEGAL ANALYSIS AND ARGUMENT

### A. DID THE CONVEYANCE TO THE JOHNSONS CONSTITUTE AN ABSOLUTE CONVEYANCE OF TITLE OR AN EQUITABLE MORTGAGE?

Fundamentally, a pledge of real property for the payment of a debt, in whatever form the transaction is clothed, is a mortgage, and the right of the owner to redeem cannot be extinguished by an agreement made at the time. Albright v. Henry, 174 N.W.2d 106, 111 (Minn.1970). Where one conveys land by deed absolute to secure a debt, and the grantee executes a defeasance (in this instance the Agreement), which is not recorded, though the deed is, the transaction constitutes a mortgage and not the sale of real estate. Marston v. Williams, 47 N.W. 644 (Minn. 1890); *see also* First Nat'l Bank of St. Paul v. Ramier, 311 N.W.2d 502, 503 (Minn.1981); Gagne v. Hoban, 159 N.W.2d 896 (Minn. 1968); Redmond v. McClelland, 2000 WL 1015774, 5 (Minn.App.)(R.A.37).

Equitable mortgages are established through the operation of law rather than upon an agreement of the parties. Hatlestad v. Mutual Trust Life Ins. Co., 268 N.W. 665, 668 (Minn. 1936). “An equitable mortgage is created when the parties to the transaction intended it to be essentially a security transaction.” Fraser v. Fraser, 702 N.W.2d 283, 287 (Minn.App. 2005) *citing* First Nat'l Bank of St. Paul v. Ramier, 311 N.W.2d 502, 503 (Minn.1981). The relevant intent is that of the parties at the time of the conveyance. Ministers Life & Cas. Union v. Franklin Park Towers Corp., 239 N.W.2d 207, 210 (Minn. 1976).

“[I]ntention is to be ascertained by the written memorials of the transaction and the attendant facts and circumstances.” Fraser v. Fraser, 702 N.W.2d 283, 288 (Minn.App. 2005), *citing*, Westberg v. Wilson, 241 N.W. 315, 316 (Minn. 1932). The written memorials

of the transaction are to be given the same effect whether embodied in a single instrument or in several instruments. Citizens' Bank of Morris v. Meyer, 182 N.W. 913, 914 (Minn. 1921). The documents make a prima facie case for what they purport to be. Nitkey v. Ward, 271 N.W. 873, 877 (Minn. 1937). The object of construction (of contracts) is to ascertain and give effect to the intention of the parties as expressed in the language used. (The secret, unexpressed intention of the parties is not sought.) Froysland v. Leef Bros., Inc., 197 N.W.2d 656, 660 (Minn. 1972), *citing*, Grimes v. Toensing, 277 N.W. 236, 238 (Minn. 1938) (emphasis supplied). While not determinative of the issue, when considering whether an equitable mortgage was intended, "[a district] court could take into consideration the fact that the value of the property was greater than the consideration given for the deed." Fraser v. Fraser, 702 N.W.2d 283, 291 (Minn.App. 2005), *citing* Gagne v. Hoban, 159 N.W.2d 896, 900 (Minn. 1968).

In Redmond v. McClelland, 2000 WL 1015774 (Minn.App.) (R.A.37), which is analogous to the case at hand, the plaintiff (Wagner), who owned 643 acres of farmland, was in default upon a contract for deed and on his mortgage. Id. at 1. In that case, the defendant (McClelland), in 1993 agreed to loan Wagner \$38,449.00 to pay up the debts, but required Wagner to transfer title to all of his property to McClelland as security. Id. Wagner gave deeds to all of his farmland to McClelland; there was no written agreement other than the deeds. Id. In early 1996, when Wagner requested a payoff amount on the loan, McClelland informed him that the payoff amount would be \$120,746.69. Wagner was unable to pay at the time. Id. at 2. By February of 1997, McClelland stated the payoff had grown to

\$518,419.38. Id. The special conservator for Wagner (Redmond), then brought an action to have the deeds cancelled. Id.

The District Court concluded that the funds advanced to Wagner were a loan and therefore the deeds were given as security for indebtedness and constituted an equitable mortgage. Id. at 2. McClelland appealed, claiming the transaction was a conveyance with an option to repurchase. Id. at 2 & 4. The Appellate Court affirmed the District Court stating that although there was no written loan agreement, there was clear and convincing evidence that both parties intended a loan transaction with the deed as security only. Id. at 4. Significantly, the Appellate Court noted that Wagner had approached McClelland for a loan, the sole purpose of which was to avoid losing his farm property through foreclosure and cancellation of a contract for deed (Id. at 3), that McClelland had made statements to the bank in terms of a loan (Id.), and that McClelland's requirement that Wagner pay interest indicated McClelland considered the transaction to be a loan. Id. at 4.

In the present case, Peterson approached the Johnsons for a loan (R.A.2, 5). The specific and sole purpose for the loan was for Peterson to avoid losing his farm property through nonpayment of real estate taxes and/or by cancellation of a contract for deed (A.A.3). In addition, there is a deed (A.A.1) given as security for a debt, and with a requirement that Peterson pay interest on the loan. However, in this case **there is a written loan agreement** (emphasis supplied)(A.A.3) in which both parties joined, which provides the specific terms of a loan agreement. There is also the January 5, 1994 debt collection letter from Johnson's attorney (R.A.9), which sought to collect the balance due on the loan, which referred to the "indebtedness evidenced by the 1986 Agreement". That letter clearly stated that the "Deed

was to be held as security for faithful performance” and that the Johnsons’ “wish only to receive the payment of the monies that were loaned to you pursuant to the Agreement.” (R.A.9). In this case, and upon these undisputed facts, the district court properly found that the intent of the parties and the plain meaning of all of the documents executed at the time of the conveyance clearly created an equitable mortgage.

Appellants Johnsons claim that Peterson’s action should be characterized as an action to determine adverse claims to real estate under Minn. Stat. § 559.01 (Appellant’s Brief p.4), but presents no authority that it *must* be brought under § 559.01. Peterson has, in fact, brought this claim under chapter 559 - Adverse Claims to Real Estate, under the more specific § 559.17 which applies to adverse claims involving mortgages, and which provides that a mortgage to real estate is not to be deemed a conveyance, and must be foreclosed by action.

Appellants Johnsons are now attempting to argue that a sale of real estate took place in 1986 and that all Peterson retained was an “option” to repurchase the land at issue. Such an argument is absurd given the insignificant size of the loan extended (\$9,500.00) in comparison to the value of the 360 acre parcel of property given as security (\$360,000.00, or more). Furthermore, such an allegation flies in the face of the fact that **nowhere** (emphasis supplied) in the Agreement (A.A.3) drafted by Attorney Stanford Dodge is the word option even mentioned or contemplated. Both of Johnsons’ Attorneys (Dodge and Warp) clearly recognized the agreement to be that of a loan, with the deed given as security. The only mention of the word “option” is in the letter of January 5, 1994 from Johnsons’ Attorney John Warp (R.A.9), which states that Johnsons “appear” to have the **option**

(emphasis supplied) of recording the Deed, after a default in the Agreement.” This letter also specifically states that the Johnsons “have no desire to acquire this real estate, but only wish to receive payment of the monies that were loaned to you (the Petersons) pursuant to this Agreement.” (R.A.9).

The District Court properly found that the loan Agreement and deed constituted an equitable mortgage, and specifically found the 1986 Agreement between the parties to be “plainly encumbering” the subject real estate (R.A.27), and as such, that Johnsons’ only recourse for Peterson’s failure to perform under the Agreement is limited to a foreclosure action. *See, Albright v. Henry*, 174 N.W.2d 106, 112 (Minn.1970)(an equitable mortgage must be foreclosed by action); Minn. Stat. § 559.17(Mortgage not a conveyance; mortgagee cannot possess “without a foreclosure”).

**B. DID THE DISTRICT COURT APPLY THE CORRECT STATUTE OF LIMITATIONS IN THIS ACTION?**

After first determining that Agreement and conveyance between the parties constituted an equitable mortgage and that a mortgage foreclosure proceeding by action was the only divestiture tool available to the Appellants Johnson, the district court then found that Minnesota Statutes §541.03 was the appropriate statute of limitations for determining that a fifteen year limitation existed upon the Appellant Johnson’s right to foreclosure the equitable mortgage and Respondent Peterson’s accompanying right to redeem. That statute provides in-part as follows:

**541.03. Foreclosure of real estate mortgage.**

Subdivision 1. **Limitation.** No action or proceeding to foreclose a real estate mortgage, whether by action or advertisement or otherwise, shall be

maintained unless commenced within 15 years from the maturity of the whole of the debt secured by the mortgage . . .

**Subd. 2. When time begins to run; commencement of proceedings.** The time within which any such action or proceeding may be commenced shall begin to run from the date of such mortgage, unless the time of the maturity of the debt or obligation secured by such mortgage shall be clearly stated in such mortgage. . . .

Minn. Stat. § 541.03 provides for a fifteen year statute of limitation for purposes of foreclosing a mortgage; whether it pertains to a written mortgage held by a mortgagor or an equitable mortgage under operation of law. See Albright v. Henry, 174 N.W.2d 106, 111 (Minn. 1970).

Subdivision 2 of § 541.03 provides that the commencement of proceedings to foreclose a mortgage by action begins to run at the time the debt on the obligation secured by the mortgage matures. The Agreement is clear that all payments had to be made by November 1, 1991 (A.A.4), a fact which Johnsons do not dispute (Appellant's Brief p.2). The district court accordingly found that any foreclosure action on Johnsons' equitable mortgage must be initiated by November 1, 2006. It is also clear under Minnesota law that the limitation upon the equitable right to redeem property is the same fifteen year statutory limitation on foreclosure by action. Browning v. Browning, 76 N.W.2d 100, 106 (Minn. 1956). However, that time does not begin to run until the mortgagee goes into possession. Id. Even if Peterson's right to redeem runs from the maturity date of the debt, as ordered by the district court (R.A.28), Peterson's equitable right to redeem would not yet be barred by § 541.03.

The district court agreed with the legal argument put forth by Respondent Peterson that Minnesota Statutes § 559.18 and 559.19 did not apply in the case at hand as “there was no evidence to indicate that the parties were in a mortgagor/mortgagee relationship prior to the conveyance and agreement at issue.” (R.A.26) Those statutes provide as follows:

**559.18 Conveyance by Mortgagor to Mortgagee.** No conveyance absolute in form between parties sustaining the relation of mortgagor and mortgagee, whereby the mortgagor or the mortgagor's successor in interest conveys any right, title or interest in real property theretofore mortgaged, shall be presumed to have been given as further security, or as a new form of security, for the payment of any existing mortgage indebtedness, or any other indebtedness, or as security for any purpose.

**559.19 Action to declare mortgage; limitation.** No action to declare any such conveyance a mortgage shall be maintained unless commenced within 15 years from the time of execution thereof.

The conveyances described in § 559.19, and to which the 15 year limitation period applies, are, according to § 559.18, only those conveyances absolute in form “between parties **sustaining** (emphasis supplied) the relation of mortgagor and mortgagee” and “whereby the mortgagor . . . conveys any right, title or interest in real property theretofore mortgaged.”

Minnesota Statutes §§ 559.18 and 559.19 do not apply to the facts in this case, where there was no pre-existing mortgagor/mortgagee relationship between the parties, and where the property conveyed was not subject to a pre-existing mortgage (R.A.5, 6). The granting of the conveyance by Peterson to the Johnsons under the Agreement created their mortgage relationship **at that time** (emphasis supplied). By the same token, the property which was the subject of the conveyance was not “theretofore mortgaged,” but became mortgaged by the conveyance under the Agreement.

The History of §§ 559.18, 559.19 & 559.20 demonstrate that these sections are only intended to apply where there is a pre-existing mortgagor/mortgagee relationship. These three statutes were originally passed as a single act, chapter 209, laws 1913, H.F. No. 175 (A.A.15), gen. St. 1913, §§ 8078-8080 (A.A.18), renumbered in 1923 as Gen. St. §§ 9573-9575 (A.A.21), published in 1927 as Gen St. §§ 9573-9575 (A.A.23), are essentially identical to their original counterparts, and were intended to change the common law presumption that a subsequent deed from a mortgagor to a mortgagee was given as further security for the pre-existing debt.

The courts have clearly understood these statutes as applying to transfers from a mortgagor to a mortgagee. “There is no longer in this state a presumption that a transfer **by a mortgagor to his mortgagee** is given as further security or as a new form of security or additional security. G. S. 1923 (2 Mason, 1927) §§ 9573-9575.” McKinley v. State, 247 N.W. 389, 390 (Minn. 1933)(emphasis supplied). “This statute [Gen. St. 1923, § 9573] was intended to change the rule that a deed **from mortgagor to mortgagee** is presumed but a new security for the old debt.” Roehrs v. Thompson, 228 N.W. 340 (Minn. 1929)(emphasis supplied). The rule was changed so that now **a mortgagor**, after the mortgage has been executed and delivered, though not before nor as a part of the mortgage transaction, may convey directly **to the mortgagee** and eliminate his title. McKinley v. State, 247 N.W. 389, 390 (Minn. 1933)(emphasis supplied). However, the change in presumption does not allow a mortgage to be made, which at the time of its making is terminable otherwise than upon foreclosure. Id; *see also*, Jentzen v. Pruter, 180 N. W. 1004, 1005 (Minn. 1921).

The requirement of a pre-existing mortgagor/mortgagee relationship before these statutes will apply was again made clear in the case of Craig v. Baumgartner, where the same statute of limitations (prior to its present renumbering) was advanced by the defendants as a bar to the plaintiff's claim that a deed absolute on its face was in fact an equitable mortgage, which had been given in exchange for a contract for deed more than 15 years earlier. The Court, held for the plaintiff on other grounds, but stated that the statute to declare a deed an equitable mortgage would not have applied, stating,

Defendants' claim that plaintiff is barred under 2 Mason's Minn. St. 1927, §§ 9573, 9574, we need not consider. The same would only become material if we were to hold the second (1916) contract to be a mortgage, but has no bearing since we do not so hold. Even if the second contract were a mortgage, it is doubtful whether this case would fall within that statute of limitations, **for under any theory, at the time of the 1916 contract the parties did not sustain the relationship of mortgagee and mortgagor.** (emphasis supplied).

Craig v. Baumgartner, 254 N.W. 440, 442-443 (Minn. 1934).

Minnesota Statutes §§ 559.18 and 559.19 do not supplant the general rule, codified in Minnesota Statutes § 541.03, regarding the mortgagee's right to foreclose and the mortgagor's reciprocal right to redeem, *see* Browning v. Browning, 76 N.W.2d 100, 106 (Minn. 1956); *see also* Jentzen v. Pruter, 180 N. W. 1004, 1006 (Minn. 1921). Minnesota Statute Sections 559.18 and 559.19 **only** (emphasis supplied) control when their specific elements are met, which is not the case here. The limitations period on an action to declare a conveyance, which does not fall within the ambit of §§ 559.18 and 559.19, to be an equitable mortgage runs, pursuant to Minnesota Statutes § 541.03, from the time of the maturity of the obligation, which in this case would be, at the earliest, fifteen years from November 1, 1991.

Johnsons' now admit that Minn. Stat. §§ 559.18 and 559.19 are not clearly applicable to the facts presented here (Appellant's Brief p.7), however, Johnsons claim that this is due to ambiguity in the statute and instruct the court to look to the legislative history of these predecessor statutes from 1913, 1923 and 1927 where Johnsons find alleged support for their application to this case (Appellant's Brief p.7). However, the courts have previously interpreted these statutes as applying to conveyances from a **mortgagor to a mortgagee**, as the statute clearly states, and have no application where there is no pre-existing mortgagor/mortgagee relationship at the time of the conveyance (emphasis supplied). In fact, every predecessor statute provided by Johnsons is entitled "**Conveyance by mortgagor to mortgagee**" (A.A.15, 18, 21, 23). There is no ambiguity in Minn. Stat. §§ 559.18 and 559.19, which clearly have no application to the facts presented here.

Johnsons' state that the applicable statute of limitation in this case should be the six year limitation period for adverse claims to real estate arising from a liability created by Minnesota Statutes § 541.05 (Appellant's Brief p.4). This Court has stated, with regard to Minnesota Statutes § 541.05, Subd. 1(2), that "[t]he six year limitation period applied to liabilities imposed by **statute** (emphasis supplied) which did not exist at common law." Snesrud v. Instant Web, Inc., 484 N.W.2d 423, 427 (Minn.App. 1992), *citing* McDaniel v. United Hardware Distributing Co., 469 N.W.2d 84, 85 (Minn. 1991). Adverse claims to real estate, which originated as common law actions, are not subject to Minn. Stat. § 541.05. A detailed review of Minn. Stat. § 541.05, as proposed by Johnsons, reveals no instance where that statute or any of its subdivisions has been directly applied in an action to determine an

equitable mortgage involving real estate, or in any action to determine adverse claims to real estate, and such a proposal should be soundly rejected by this Court.

Without citing any legal basis for their request, Johnsons are asking this Court to assume that the recorded deed makes them fee owners, even though Johnsons have actual knowledge of, and were a party to, the unrecorded loan Agreement under which they agreed **not** (emphasis supplied) to record the deed which was given as security for the loan. Under Minnesota law, a mortgage does not, without foreclosure, mature into any possessory right, and where time has passed and the rights of action to foreclose and to redeem have become barred by the statute of limitations, the rights of either party are no greater than under the original transaction. Meighen v. King, 16 N.W. 702 (Minn. 1883). The passage of time will not transform this defective deed into fee ownership for the Johnsons unless it goes unchallenged and otherwise qualifies under the 40 year limitation period found in Minn. Stat. § 541.023, otherwise known as the Marketable Title Act.

The Johnsons contend, again without any legal basis, that even if Peterson could have initially brought a claim of equitable mortgage, that Johnsons' recording of the deed somehow cut that claim off, stating "[b]ut even if the Johnsons had not recorded the warranty deed to the property in 1996, and Peterson still had a viable claim to have the transaction determined to be an equitable mortgage, . . ." (Appellant's Brief p.6). Johnsons appear to believe that an equitable mortgage claim can only be brought while the mortgagee is still holding the **unrecorded** deed (emphasis supplied) and may be defeated by the recording of a security deed, even in violation of the terms of a loan Agreement. Johnson confirms this notion, stating that "if the Johnsons had not already recorded the warranty deed conveying

the property, and a determination of whether the transaction constituted an equitable mortgage was appropriate) . . .”, (Appellant’s Brief p.8).

It is the recording of the deed in 1996 that allowed Peterson’s cause of action to accrue, as Johnsons also agree (Appellant’s Brief p.5).

**C. DID GENUINE ISSUES OF MATERIAL FACT PRECLUDE THE DISTRICT COURT’S GRANT OF SUMMARY JUDGMENT?**

While the moving party carries the burdens of proof and persuasion to establish that no material fact exists, Johnson v. Winthrop Labs., Div. of Sterling Drug, Inc., 190 N.W.2d 77 (Minn. 1971), recent decisions of the United States Supreme Court have placed a far greater burden upon the non-moving party in summary judgment motions to present facts sufficient to require trial, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

The Minnesota Appellate Courts, including the Minnesota Supreme Court, have also embraced the concept of granting summary judgment more freely. Thiele v. Stitch, 425 N.W.2d 580 (Minn. 1988); Carlisle v. City of Minneapolis, 437 N.W.2d 712 (Minn.App.1989); Dietrich v. Canadian Pacific, Ltd., 536 N.W.2d 319, 326 (Minn. 1995).

A party opposing a motion for summary judgment must produce concrete facts demonstrating that there is a genuine issue of fact for trial or summary judgment will be granted. Buford vs. Tremayne, 747 F.2d 445, 447 (8th Cir. 1984); Meleen v. Hazelden Found., 740 F.Supp. 687 (D.Minn.1990).

The determination of whether a contract is ambiguous is a question of law. Bank

Midwest, Minnesota, Iowa, N.A. v. Lipetzky, 674 N.W.2d 176, 179 (Minn. 2004). Where terms of a contract are at issue, and those terms are unambiguous, and may be given their plain and ordinary meaning, construction of the contract is a matter for the court and summary judgment may be appropriate. Id. If a contract is unambiguous, then the language **must** (emphasis supplied) be given its plain and ordinary meaning. Id.

In this case, the district court properly found that the parties intent could be determined from “the written documents of the transaction and the surrounding facts and circumstances.” *citing* Westberg v. Wilson, 241 N.W. 315 (Minn. 1932). As has repeatedly been argued by the Johnsons, “the Agreement speaks for itself,” (See Defendants’ Answer at paragraphs 5, 6, 7 & 9) (R.A.18, 19).

“Transactions will be classified according to the intent of the parties. Intent may be discerned most especially by reference to documents used for the conveyance.” Mittiness v. Dahl, 351 N.W.2d 685, 687 (Minn.App. 1984); *see* First Nat’l. Bank of St. Paul v. Ramier, 311 N.W. 2d 502, 503-504 (Minn. 1981). A close examination of the 1986 loan Agreement leads one to the inescapable conclusion that the clear intent of the Agreement was that the Petersons convey real estate to the Johnsons as security for the loan of \$9,500.00.

The recitals in the Agreement (A.A.3) include that the Petersons “owe[d] a balance on a Contract for Deed and delinquent taxes in a total of approximately \$9,500.00”, and that the Johnsons “wish to advance sufficient funds to payoff” said debts of the Petersons. Paragraph 1 of the loan Agreement then provides in unambiguous terms the following language (emphasis added):

The said parties of the first part hereby **agree to convey** to the said parties of the second part **as security and surety for the pay off of the loan** of said \$9,500.00 to them, **property being described as follows: . . .**

Said parties of the first part **agree to pay said \$9500.00 back** to the parties of the second part . . . **with interest** on the unpaid balance . . . at the rate of eleven percent (11%) per annum, . . .

The Agreement further provides that “the deed from the Petersons to the Johnsons shall not be recorded at this time.” The Agreement finally provides that any portion of the property sold by the Petersons would be released by the Johnsons. There is no ambiguity in the Agreement, it is clearly an agreement to give a deed as security for a loan. Under Minnesota law, this type of arrangement is a classic example of an equitable mortgage. *See, Redmond v. McClelland*, 2000 WL 1015774 (Minn.App.)(R.A.37).

In the present case, Peterson approached Johnsons for a loan. The specific and sole purpose for the loan was for the Peterson to avoid losing his farm property through nonpayment of real estate taxes and/or by cancellation of a contract for deed. Like *Redmond, supra*, there was no written agreement memorializing a “conveyance with an option to repurchase.” However, in this case **there is a written loan agreement** (emphasis supplied), which both parties joined, that sets forth the specific terms of a loan Agreement. In addition, there is a deed given as security for the debt, with a requirement that Peterson pay interest on the loan. The January 5, 1994 debt collection letter from Johnson’s attorney, which sought to collect the balance due on the loan, referred to the “indebtedness evidenced by the 1986 Agreement” (R.A.9). That letter clearly stated that the “Deed was to be held as security for faithful performance” and that the Johnsons’ “wish only to receive the payment of the monies that were loaned to you pursuant to the Agreement.” (R.A.9).

Where there is a clear and unambiguous agreement, such as the loan Agreement between Peterson and Johnsons, then construction of the contract is a matter for the court to determine. Bank Midwest, Minnesota, Iowa, N.A. v. Lipetzky, 674 N.W.2d 176, 179 (Minn. 2004). In the present case, the Defendants admit in their pleadings that the Agreement is unambiguous and “speaks for itself” (R.A.18, 19); accordingly, the Court need look no further.

Contract language should never be interpreted in isolation, but rather in the **context** of the entire agreement. Hydra-Mac, Inc. v. Onan Corp., 450 N.W.2d 913, 916 (Minn.1990) (emphasis supplied). The object of contract construction is to ascertain and give effect to the intention of the parties, As expressed in the language used. **The secret, unexpressed intention of the parties is not sought.** Froysland v. Leef Bros., Inc., 197 N.W.2d 656, 660 (Minn. 1972), *citing*, Grimes v. Toensing, 277 N.W. 236, 238 (Minn. 1938) (emphasis supplied).

After previously arguing that the “Agreement speaks for itself,” the Johnsons now claim that the Agreement is somehow ambiguous and that the intent of the Johnsons was not understood by the district court. To show an alleged ambiguity, Johnsons point to the term “reconvey” (Appellant’s Brief p.11) as demonstrating that the Agreement intended that the original conveyance be absolute, and requiring a reconveyance.

A mortgage of realty is a conveyance of realty intended as security for the payment of money. Land O'Lakes Dairy Co. v. Wadena County, 39 N.W.2d 164, 169- 70 (Minn. 1949). In this case, the original conveyance according to the Agreement was given “as security and surety for the payoff of the loan”, and it then follows that once the loan is repaid,

there must necessarily be a reconveyance of the security deed. There is no ambiguity when the term is read in the context of the loan Agreement. To read the term “recovery” as requiring the original conveyance to be absolute even though it is given “as security for a loan” is absurd and totally without merit.

Johnsons have provided no specific, viable facts showing the Agreement to be for a purchase and sale of land, but have only made bald claims that the deed was an absolute conveyance, and Johnsons’ contention of a factual issue is therefore without merit.

The plain language of the written loan agreement and all of the other documentation executed in 1986, as well as the collection letter of January 5, 1994, make it abundantly clear that a loan, not a sale, was intended. As aptly pointed out by Judge Wolf in his Order of November 1, 2004, “The relevant intent is that of the parties at the time of the conveyance.” *citing Ministers Life Cas. Union v. Franklin Park Towers Corp., 239 N.W.2d 207, 211 (Minn. 1976) (R.A.27)*. Self-serving statements made years later by the Johnsons do not transform a loan into a sale.

Johnsons state that there is no indication of what burden of proof the district court applied, and then assume that the court must have applied the wrong burden because the court used the word “indicate” in its November 1, 2004 Order (R.A.27) granting summary judgment. Johnsons believe that the word “indicate” is not strong enough to meet a clear and convincing burden of proof, however, Johnsons necessarily take that single statement out of the context in the Court’s Order to try and make their case. By simply reading the next two sentences of the Court Order of 11/01/04 (R.A.27), it becomes clear that the district court granted Peterson’s motion on a clear and convincing standard. The district court, after first

determining that the terms of the Agreement “indicate a loan with the conveyance as security,” then states “Even if the dates suggested by Defendant characterized the timeline of events, **no explanation** is offered of why Defendant would consider an Agreement **plainly encumbering** a conveyance made more than two months earlier if a sale, rather than security for a loan, was contemplated by Defendant.” (emphasis supplied) (R.A.27).

The court’s finding, that the Agreement “plainly encumber[ed] the conveyance”, rises to the level of a clear and convincing standard of proof, and where “no explanation [was] offered” by Johnsons to dispute the court’s interpretation of the Agreement, the court properly granted summary judgment in favor of Peterson after applying the proper standard of proof.

**D. DID THE DISTRICT COURT PROPERLY DENY PETERSON’S MOTION TO VOID THE AGREEMENT BETWEEN THE PARTIES AS USURIOUS?**

The district court erred in denying Peterson’s motion for summary judgment on the issue of usurious interest by failing to address Peterson’s request asking for “an order invalidating any claim of the Johnsons to a lien or ownership interest in the subject property in exchange for payment to them of the remaining principal due and owing under the original Agreement signed by the parties in 1986.” (Peterson’s Summary Judgment Memorandum, Page 17). The district court acknowledged that the Agreement was usurious, when it stated that “Minn. Stat. § 334.01 limits interest on loan agreements to 8%.” (R.A.28). The district court went on to say “However, because [Peterson] has only made one payment of \$3,200.00 on the loan, it would be unjust to void the entire agreement based on interest that was never paid to the [Johnsons].” (R.A.28).

Usury is defined as the taking or receiving of more interest or profit on a loan or forbearance than the law allows. Barton v. Moore, 558 N.W.2d 746, 750 (Minn.1997). Minnesota Statute § 334.01 specifically provides that the interest rate on any indebtedness shall not exceed six percent per year, unless the parties contract in writing for a different rate, not to exceed eight percent per year, *see* Redmond v. McClelland, 2000 WL 1015774 (Minn.App.). “Since 1877, the Minnesota usury statute has provided two remedies for victims of usury: recovery of all interest paid pursuant to Minnesota Statutes § 334.02; and a declaration that the usurious contract is canceled as void pursuant to §§ 334.03 and 334.05.” Fogie v. THORN Americas, Inc., 190 F.3d 889, 900 (8<sup>th</sup> Cir. 1999) *citing*, Barton v. Moore, 558 N.W.2d 746, 750-51 (Minn.1997).

Johnsons’ have previously acknowledged that the Agreement speaks for itself (R.A.18, 19). Where terms of a contract are at issue, and those terms are unambiguous, and may be given their plain and ordinary meaning, construction of the contract is a matter for the court and summary judgment may be appropriate. Bank Midwest, Minnesota, Iowa, N.A. v. Lipetzky, 674 N.W.2d 176, 179 (Minn. 2004). By its very terms, the 1986 loan Agreement provided for a usurious rate of interest.

In this case, the parties had their oral agreement reduced to writing by Johnsons’ attorney, Stanford Dodge (A.A.7). However, Johnsons’ letter of August 25, 1986 (A.A.10), makes clear that it was the Johnsons idea and intention that the loan would “be charged at the local rate of interest on a monthly basis as per bank terms.” (A.A.10). It was the Johnsons who had their attorney prepare the loan Agreement (A.A.7). The letter from Mr. Dodge dated October 1, 1996 (A.A.11), simply confirms that he followed Johnsons instructions to

find out what the bank interest rate would be, stating “I have checked with the bank and they stated that the loan on this would come to 11% which I have used in the Contract.” (A.A.11).

In determining whether there is a good-faith exception to a claim of usury, “[t]he use of a qualified third party in creating loan documents does **not** satisfy the requirements of the good-faith exception if that party merely acts as scrivener.” Olson v. Froslee, 2000 WL 1052007, 3 (Minn.App.)(R.A.42)(emphasis supplied), *citing*, In Re Sunde, 149 B.R. 552, 556 n. 2 (Bankr.D.Minn.1992). It is not apparent that Mr. Dodge advised the parties at the time the agreement was reduced to writing that the agreement that they were signing provided for a usurious rate of interest. However, “[t]o be guilty of violating the usury law, a lender need only intend to charge a rate that is in fact usurious. It matters not whether the lender knows he is violating the usury law.” Miller v. Colortyme, Inc., 518 N.W.2d 544, 550 (Minn.1994).

In the present case the Johnsons determined to use the current bank interest rate and instructed their attorney to prepare the Agreement under those terms. It is clear that their attorney was simply acting as a scrivener with regard to the interest rate, thus a usurious interest rate was imposed upon the Petersons by the Johnsons. However, Peterson concedes that if the Court finds that it would be inequitable to void the entire transaction as usurious, Peterson is willing to tender the remaining principal due the Johnsons.

There is also no applicable Statute of Limitation with regard to the enforcement of Minn. Stat. §§ 334.03 and 334.05. As explained by the court in In re Donnay, 184 B.R. 767, 784-785 (Bkrtcy.D.Minn. 1995), if contracts are deemed usurious, they in essence never existed and a statute of limitations defense **cannot** (emphasis supplied) be raised.

If this Court should overturn the decision of the district court on either the equitable mortgage or statute of limitations issue, Peterson would request this Court to reverse the determination of the district court on the issue of usury, allowing Peterson to recover fee title to his property and to extinguishing Johnson's equitable mortgage upon the subject property, by declaring the Agreement and conveyance void as usurious. In the alternative, Peterson asks this Court for an order declaring that no interest is due and owing on the Agreement.

**E. DID THE DISTRICT COURT PROPERLY DISMISS PETERSON'S CLAIM FOR UNJUST ENRICHMENT?**

Because the district court granted Peterson's motion to determine that an equitable mortgage existed and did apply Minnesota Statutes § 541.03 as the statute of limitations in this matter, the district court did properly dismiss Peterson's claim for unjust enrichment since another remedy was already available. However, should this court reverse the district court with regard to either the issue of equitable mortgage or the issue of the applicable statute of limitations, thus taking away Peterson's remedy at law, this court must then necessarily reverse the district court with regard to Peterson's claim for unjust enrichment.

The Johnsons do not dispute that they were parties to the 1986 loan Agreement which provided that Petersons would convey 360 acres of their farm homestead property, valued at approximately \$360,00.00, by deed as "security and surety" for a loan in the amount of \$9,500.00. Likewise, the Johnsons do not dispute that the sum of \$3,200.00 was paid to them by Peterson under the terms of the Agreement. Finally, the Johnsons do not dispute that they recorded the deed given as security under the terms of the 1986 loan Agreement without Peterson's knowledge or consent. Johnsons' letter of August 25, 1986 states that the deed

would not be recorded and that “the arrangement be held in confidence between you and me.” The Johnsons also do not dispute that the agreement was prepared by their attorney at their suggestion, while the Petersons were not represented.

A constructive trust may be imposed where the plaintiff shows the existence of a fiduciary relation and the abuse by defendant of confidence and trust bestowed under it to plaintiff's harm. Dietz v. Dietz, 70 N.W.2d 281, 285 (Minn. 1955). However, a fiduciary relationship in a strict sense is not a prerequisite, and any relationship giving rise to justifiable reliance or confidence is sufficient. Id. A constructive trust is appropriate where the defendant was unjustly enriched as a result of his abuse of this confidential relationship. Id. A constructive trust may arise in favor of a person equitably entitled to property when legal title to the property is obtained through fraud, oppression, duress, undue influence, force, crime, or similar means, or by taking improper advantage of a confidential or fiduciary relationship. Fredin v. Farmers State Bank, 384 N.W.2d 532, 535 (Minn.App.1986).

It is Peterson's position that the 1986 loan Agreement created such a confidential and fiduciary relationship between the Johnsons (Petersons Uncle and Aunt) and Peterson whereby Johnsons held Peterson's deed to the Premises in confidence, as security for the loan while agreeing that the deed “shall not be recorded”. The recording of the deed without a foreclosure by action was a breach of Johnsons' confidential and fiduciary duty to Peterson. Minnesota courts have consistently held that unjust enrichment will lie in situations such as this and that the amount of the recovery is based upon what the person unjustly enriched has received. Klass v. Twin City Fed Sav & Loan Ass'n, 291 Minn. 68, 190 N.W.2d 493 (1971); Cady v. Bush, 283 Minn. 105, 166 N.W.2d 358 (1969); Spiess's Estate v. Schumm, 448

N.W.2d 106 (Minn. Ct. App. 1989); Timmer v. Gray, 395 N.W.2d 477 (Minn. Ct. App. 1986). The Johnsons, by their unilateral recording of the deed, given “as security and surety” (A.A.3), are now in title to approximately 360 acres of Peterson’s land, which has an estimated value of \$360,000.00 or more, for a net cost to them of \$6,300.00.

In the event that Peterson’s present remedy of equitable mortgage becomes unavailable by action of this Court, Peterson would ask this Court to reverse the district court with regard to dismissal of Peterson’s claim for unjust enrichment, and grant summary judgment in favor of Peterson, by finding upon the undisputed facts presented in this case, that a constructive trust in favor of Peterson should be imposed upon the premises, to prevent the unjust enrichment of Johnsons at Peterson's expense. In the alternative, Peterson would ask this Court to reverse the district court with regard to dismissal of Peterson’s claim for unjust enrichment, and remand this case to the district court for further proceedings to address this issue.

**F. DID THE DISTRICT COURT FAIL TO PROPERLY ADDRESS PETERSON’S REQUEST TO DETERMINE THE REMAINING BALANCE DUE AND OWING UPON THE EQUITABLE MORTGAGE?**

The District Court erred in failing to address Peterson’s request to determine the remaining balance due and owing upon the equitable mortgage, by failing to declare whether the interest owing on the Agreement was void as usurious, or whether either of the statutory 6% or 8% rates would apply.

Peterson requested at Summary Judgment that an equitable mortgage be found, and that the Agreement be found to carry a usurious rate of interest and is therefore void or to be

repaid without interest. The court found an equitable mortgage, and stated with regard to usury that it would be unjust to void the entire Agreement based on interest that was never paid. The court was silent on the alternative request to void only the interest still owed on the Agreement. Peterson's requests, both for a finding of an equitable mortgage, and for a finding of usurious interest, although poorly made, were intended to illicit a determination from the court of the remaining balance due and owing under the Agreement.

A determination that there is an equitable mortgage, by implication, means there must be a mortgage balance due, and a determination of usurious interest, by implication, means that either the Agreement is void or the interest is void, unless there is another legal rate of interest pronounced by the court which will now apply. Peterson is ready, willing and able to payoff the balance due on his equitable mortgage, if the court will only tell the parties what interest rate applies, or that the interest is void, so that a payoff can be calculated.

On appeal from a judgment, an appellate court may review any order involving the merits of the case or affecting the judgment or **any other matter as the interest of justice may require.** Midway Nat. Bank of St. Paul v. Estate of Bollmeier, 504 N.W.2d 59, 64 (Minn.App. 1993)(emphasis supplied), *citing* Minn.R.Civ.App.P. 103.04. Even if the order is not independently appealable, **in the interests of judicial economy** an appellate court may consider an appeal to avoid further delay in the resolution of a case. Id. (emphasis supplied).

In the interest of judicial economy, Peterson asks this court to make a legal or equitable determination as to the interest rate which applies, or to remand to the district court so that the remaining balance due and owing upon the equitable mortgage may be calculated and paid by Peterson thereby releasing Johnsons' security interest in the subject property.

CONCLUSION

The district court properly determined that there were no genuine issues of material fact and then properly applied the law to rightfully determine that the agreement and the conveyance between the Petersons and the Johnsons constituted an equitable mortgage and that the Johnsons only remedy for Peterson's failure to perform according to the Agreement was a mortgage foreclosure by action. The district court also properly applied Minn. Stat. § 541.03 to conclude that Peterson's claim was not time barred. The district court did not however specifically determine the remaining balance due and owing from Peterson to Johnson upon the equitable mortgage by determining what legal rate of interest, if any, applies on the usurious contract. Peterson stands ready, willing, and able to make any payment that the Court may adjudge to be due to the Johnsons under the Agreement, thereby releasing Johnsons' security interest in the subject property, and respectfully requests that this matter be determined by this Court, or in the alternative be remanded to the district court on that issue.

Respectfully submitted,

Dated: 10/14/05

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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) (with amendments effective July 1, 2007).