
NO. A08-0534

State of Minnesota
In Court of Appeals

MidCountry Bank, f/k/a
First Federal fsb,

Appellant,

vs.

Frederick C. Krueger and Nancy Krueger,
Cherolyn A. Hinshaw, PHH Home Loans, LLC,
d/b/a Burnet Home Loans, John Doe, Mary Rowe
and ABC Corporation,

Respondents.

APPELLANT'S BRIEF AND 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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STATEMENT OF ISSUES PRESENTED

- I. Where one party has submitted a mortgage to the County Recorder for recording and the Recorder records the mortgage in its grantor/grantee index, is a subsequent purchaser of the property identified in the mortgage charged with notice thereof?

Holding Below: The District Court denied Appellant's motion for summary judgment and held that the Respondents took their interest in the subject property without notice of Appellant's Mortgage.

Most Apposite Cases and Statutes:

Miller v. Hennen, 438 N.W.2d 366 (Minn. 1989).

Latourell v. Hobart, 135 Minn. 109, 160 N.W. 259 (1916).

Minn. Stat. § 386.03.

- II. Is a purchaser of property charged with notice of the information contained on the face of a recorded document, or may the purchaser rely solely upon the information contained in the tract index maintained by the County Recorder?

Holding Below: The District Court denied Appellant's motion for summary judgment and ruled Respondents were bona fide purchasers of the subject property and Appellant's Mortgage was void as to Respondents' interests.

Most Apposite Cases and Statutes:

Bailey et al. v. Galpin, 40 Minn. 319, 41 N.W. 1054 (1889).

Latourell v. Hobart, 135 Minn. 109, 160 N.W. 261 (1916).

- III. Did the District Court err when it denied Appellant's Motion for Summary Judgment and granted Respondents' Motion for Summary Judgment?

Holding Below: The District Court denied Appellant's Motion for Summary Judgment and granted Respondents' Motion for Summary Judgment.

Most Apposite Cases and Statutes:

Minn. R. Civ. P. 56.03.

Minn. R. Civ. P. 56.05.

DLH, Inc. v. Russ, 566 N.W.2d 60 (Minn. 1997).

STANDARD OF REVIEW

This case involves an appeal from summary judgment. On an appeal from the grant of summary judgment, the appellate court asks two questions: (1) whether there are any genuine issues of material fact; and (2) whether the district court erred in its application of the law. *Carlson v. Sala Architects, Inc.*, 732 N.W.2d 324, 327 (Minn. Ct. App. 2007)(citations omitted). In deciding a summary judgment motion, the district court may not weigh the evidence or make factual determinations, but is required to view the evidence in the light most favorable to the nonmoving party. *Id.*

Application of a statute to the undisputed facts of a case involves a question of law, and the district court's decision is not binding on the appellate court. *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996). When the district court grants summary judgment based on the application of a statute to undisputed facts, the result is a legal conclusion, reviewed *de novo* by the appellate court. *Lefto v. Hoggsbreath Enters., Inc.*, 581 N.W.2d 855, 856 (Minn. 1998).

STATEMENT OF THE CASE AND FACTS

STATEMENT OF THE CASE

The Honorable Rex D. Stacey of the District Court of Scott County, Minnesota presided over this matter at the district court level.

In 2004, Frederick C. Krueger and Nancy J. Krueger (collectively referred to as the "Krueger's") executed and delivered a mortgage to MidCountry Bank ("MidCountry") encumbering three separate parcels of land. At the time of the mortgage delivery, the Krueger's were using one of the parcels as their residence and were constructing a home on the other two parcels. The mortgage secured a construction loan MidCountry made to the Krueger's to construct their new home.

In 2006, The Krueger's sold their existing residence to Cheryl A. Hinshaw ("Hinshaw"). However, the mortgage in favor of MidCountry was not satisfied or released at the time the property was sold to Hinshaw and MidCountry did not consent to the sale. Hinshaw, to secure financing for her purchase of the parcel, executed and delivered a mortgage against the parcel in favor of PHH Home Loans, LLC, d/b/a Burnet Home Loans ("PHH").

The Krueger's defaulted on their loan obligations with MidCountry and MidCountry initiated a foreclosure action against the Krueger's, Hinshaw and PHH. MidCountry asserted that its mortgage interest in the parcel sold to Hinshaw was paramount to the interests of Hinshaw and PHH as the mortgage was recorded with the Scott County Recorder in 2004 and had not been satisfied or released.

Hinshaw and PHH argued that they qualified as bona fide purchasers of the parcel

and their interests were not subject to the mortgage interest held by MidCountry. Hinshaw and PHH's argument focused on the fact that at the time of recording, and through the date Hinshaw and PHH took their interests in the parcel, the mortgage interest held by MidCountry was not transcribed as an encumbrance against the parcel in the tract index maintained by the Scott County Recorder. The Scott County Recorder acknowledged at a deposition that the mortgage interest held by MidCountry was not transcribed into the tract index due to a mistake by the Scott County Recorder's office.

MidCountry argued that Hinshaw and PHH were not bona fide purchasers as MidCountry's mortgage interest, while not appearing as an encumbrance in the tract index, was recorded as evidenced by the official stamp of the Scott County Recorder; and, more importantly, the mortgage interest did appear as an encumbrance in the grantor/grantee index and Minnesota law holds a purchaser is held to have constructive notice of the information contained in both indices.

There is not any dispute that Hinshaw and PHH did not check the Scott County Grantor/Grantee Index at the time or prior to taking their respective interests in the Krueger parcel. However, they argued that the failure by the Scott County Recorder to transcribe the encumbrance into the Tract Index qualified them as bona fide purchasers.

MidCountry brought motions for summary judgment and default judgment, which were heard by the district court in May 2006. The summary judgment motion was brought on the issue as to whether Hinshaw and PHH took their interests subject to the MidCountry mortgage interest. Subsequent to the hearing, the Krueger's filed for bankruptcy protection and MidCountry received a relief from the automatic bankruptcy stay to proceed in the

foreclosure action. In November 2007, the district court denied MidCountry's motion for summary judgment and ordered the matter to proceed to trial without any memorandum of substance attached. At a subsequent pre-trial hearing, the district court acknowledged that it ordered the matter to trial as a date had been set and that it had not given careful consideration to the motion. The district court took the matter under advisement again.

By order dated January 30, 2008, the district court denied MidCountry's motion for summary judgment and ordered summary judgment in favor of Hinshaw and PHH; holding that their interests were not subject to the MidCountry mortgage interest as Hinshaw and PHH were bona fide purchasers of the parcel from the Krueger's. Final judgment was entered on February 7, 2008 and this appeal follows.

STATEMENT OF THE FACTS

Background

The Krueger's owned three parcels of real property located in Scott County, Minnesota legally described as:

- (a) Lot 18, Block 5, City of Belle Plaine, Scott County, Minnesota;
- (b) Part of Outlot B, Wildlife View Addition lying South of the West extension of the North line of Alley in Block 5, City of Belle Plaine, Scott County, Minnesota;

and

- (c) Lot 12, Rearrangement of Block 44, Borough of Belle Plaine, County of Scott, which has the address of: 222 South Elk Street, Belle Plain, Minnesota 56011.

("Parcel 1", "Parcel 2", and "Parcel 3", respectively). A-49 – A-50.

The Krueger's took title to Parcel 3 by warranty deed dated March 21, 2000 and

recorded on June 7, 2000 in the office of the Scott County Recorder as Document No. 476192. A-81; A-84. Subsequently, the Krueger's purchased Parcel 1 and Parcel 2 on May 13, 2004. A-81.

The Krueger's owned Parcel 3 as of 2000 and in 2004 determined to purchase Parcels 1 and 2 and build a house thereon. To facilitate this, the Krueger's executed and delivered a Note dated May 13, 2004, to MidCountry in the original principal amount of \$306,000.00 (the "Note") as well as a Construction Loan Agreement and a Building Services Agreement (the Note, Construction Loan Agreement, and Building Services Agreement may be collectively referred to as the "Loan Documents"). A-52 – A-65.

To secure repayment of the indebtedness evidenced by the Note, and to induce MidCountry into providing the loan thereunder, the Krueger's simultaneously executed and delivered to MidCountry a Mortgage encumbering Parcel 1, Parcel 2 and Parcel 3 (the "Mortgage"). A-50; A-66 – A-79. It is clear and undisputed the Mortgage contained the proper legal description of all three parcels. A-68; A-189.

After the Krueger's executed the Mortgage, it was delivered to the Scott County Recorder for recording. A-66. The Scott County Recorder duly recorded the Mortgage and transcribed it as an encumbrance in the Scott County Grantor/Grantee Index. A-188 – A-189. As part of the recording process, the Recorder then captured an image of the entire Mortgage. A-171. The Recorder made the image of the Mortgage available for public viewing as part of the records maintained in the Recorder's office. A-189. The Recorder then forwarded the original Mortgage to MidCountry bearing the official stamp of the Scott County Recorder indicating the date and time of recording ("5-19-2004"), the

receipt number ("380641"), the name of the Scott County Recorder, Pat Boeckman, and the document number assigned to the recorded Mortgage ("Doc. No. A 657036"). A-66; A-188.

At the time of recording, the Mortgage was not transcribed into the Scott County Tract Index as an encumbrance against Parcel 3. A-178. Ms. Boeckman acknowledged this was a mistake on the part of the Scott County Recorder's Office and it was not corrected until October 2006. *Id.* The Mortgage was, however, transcribed into the Grantor/Grantee Index and Ms. Boeckman provided the following testimony regarding the recording of the Mortgage:

Q. Do you have any reason to believe that the MidCountry Bank mortgage did not appear in the Grantor/Grantee index as of May, 2006?

A. I believe it did appear in the Grantor/Grantee index, yes.

A-189.

* * * *

Q. On Exhibit 4, this MidCountry mortgage, so it would be the second page, the certification or the label in the upper right-hand corner, can you tell me in your opinion what the significance of that is, that label?

A. It identifies the document number, whether it's abstract or Torrens. It also identifies that date that it was brought in for recording and the time, the receipt number, and the filing fee for that document.

Q. And in the middle it states, Certified Filed and/or Recorded.

A. Correct.

Q. And it will tell you the date that it was recorded on?

A. Yes.

Q. As the Scott County Recorder looking at this document then, can you tell me if this document was in fact recorded, the MidCountry Bank mortgage, if it was in fact recorded with Scott County?

Mr. Grote: Objection calls for a legal conclusion.

A. Yes

Q. How can you tell that?

A. Because it has my stamp in the upper right-hand corner with my name on there.

A-188.

* * * *

A. * * * that's our scanning process where we physically scan the document into the computer and it makes an image of the document.

Q. And that's into the TriMin system?

A. Yes, it is.

* * *

Q. You've been scanning documents in since 1991?

A. I believe it's about that date.

Q. Okay. And do you scan all documents that are presented for recording?

A. Yes. Can I clarify that? All real estate documents.

A-170 – A-171.

* * * *

Q. Okay. F13 is a function key for Image. Can you tell me what that key does?

A. That will actually bring up the image or an actual copy of the document.

Q. An actual picture of the document?

A. Yes, an actual picture of the document.

Q. Now, if we went to the TriMin system today and we pulled up the document reference and hit the document reference to the MidCountry mortgage and hit F13, would we get a picture of the document?

A. Yes.

Q. On May 12th of 2006, when Ms. Hinshaw purchased this property, I'm just using that as a date, if I would have gone in on May 12, 2006 and got on the TriMin and got this exact same screen for the MidCountry Mortgage and hit F13, would I have seen a picture of the mortgage?

A. On May 12th?

Q. Of 2006.

A. No, because that mortgage wasn't filed until the 19th – oh, I'm sorry, '06, yes.

Q. So how long has this function key been active?

A. I think it was in '91.

Q. Of images of mortgages?

A. All documents.

Q. Of all documents?

A. Real estate documents.

A-84 – A-185.

Parcel 3 Is Conveyed to Hinshaw

The Krueger's conveyed Parcel 3 to Hinshaw by virtue of a Warranty Deed dated May 12, 2006, which was recorded with the Scott County Recorder on May 31, 2006, as Document No. A 740490. A-32. In order to secure financing to purchase Parcel 3 from the Kruegers, Hinshaw granted a mortgage, dated May 12, 2006 and encumbering Parcel 3 to PHH. A-33 – A-35. PHH recorded this mortgage with the Scott County Recorder on May 31, 2006, as Document No. A 740491. *Id.*

At no time prior to, or after, Hinshaw and PHH took their interests in Parcel 3 was the MidCountry Mortgage satisfied or released as an encumbrance from Parcel 3. A-51.

Javens's "Title Examination"

Prior to purchasing Parcel 3, in approximately November 2005, Hinshaw and PHH hired Burnet Title, Inc. ("Burnet Title") to examine the title to Parcel 3. A-39 – A-40. Monica Meyer Javens ("Javens"), a licensed abstractor employed by Burnet Title, conducted the title examination. A-39.

Javens examined the Scott County Tract Index utilizing the Scott County Recorder's on-site electronic system called AS/400. A-45. Javens did not note the Mortgage as an encumbrance against Parcel 3 in the Scott County Tract Index during this search. A-48. During her title examination; however, Javens admittedly never checked the Scott County Grantor/Grantee Index by using either the AS/400 or the Index book.

A-45.

On or about April 4, 2006, Javens conducted another examination of the title to Parcel 3, conducting two separate searches as part of this examination. A-240. Javens categorized this second search as a “double tract” search; however, the search merely involved conducting two additional Scott County Tract Index searches. *Id.*

The first search Javens conducted on April 4, 2006 was through a non-Scott County vendor using a system called ORBIT. *Id.* Through the ORBIT search, Javens looked for documents subsequently posted in the Scott County Tract Index to “Lot 12, Block 44, Belle Plain AKA Borough of Belle Plaine” since the verified date of her prior search on the Scott County AS/400 system. *Id.* Again, Javens did not note the Mortgage as an encumbrance against Parcel 3 in the Scott County Tract Index. *Id.*

The second search Javens conducted on April 4, 2006 was identical to the search she conducted in November 2005. A-238; A-240. Specifically, Javens searched the Scott County Tract Index through the AS/400; again, using the property tax identification number instead of the actual plat listed in the legal description for Parcel 3. A-240. This search did not yield finding the Mortgage posted against Parcel 3 in the Scott County Tract Index. *Id.*

But, during this “double tract” search, conducted on April 4, 2006, Javens did not examine the Scott County Grantor/Grantee Index by using either the AS/400 or the actual Grantor/Grantee Index book maintained by the Scott County Recorder. *Id.*

On or about October 6, 2006, after initiation of the underlying lawsuit, Ms. Javens conducted another search utilizing ORBIT. A-240 – A-241. This search disclosed the

MidCountry Mortgage as encumbering Parcel 3, with a recorded Document No. 657036. *Id.* In light of the information from ORBIT, indicating the MidCountry Mortgage encumbered Parcel 3, Javens searched the Scott County AS/400 Grantor/Grantee Index and noticed the Mortgage with the same document number as indicated on ORBIT. A-241.

At no time prior to October 2006 did Javens examine the captured image of the Mortgage. A-48.

The Kruegers Default

The Krueger's defaulted under the terms of the Loan Documents, which defaults included, without limitation, failing to make the required monthly payments for the months of June, 2006 through the date of initiation of the suit, failing to occupy Parcel 1 and Parcel 2 as the Kruegers' primary residence, failing to preserve or maintain Parcel 1 and Parcel 2, and transferring the Kruegers' interest in Parcel 3, without MidCountry's written consent, to Hinshaw. A-51. MidCountry initiated foreclosure proceedings against Parcels 1, 2 and 3, as encumbered by the Mortgage. A-1 – A-2. MidCountry named Hinshaw and PHH in the foreclosure action as the MidCountry Mortgage had not been satisfied or released from Parcel 3. *Id.*

MidCountry filed a motion for summary judgment with the district court. However, the district court denied MidCountry's motion and instead granted summary judgment to Hinshaw and PHH by Order dated January 30, 2008. A-231 - 238. This appeal follows the judgment entered by the district court on February 7, 2008. *Id.*

ARGUMENT

I. THE SCOTT COUNTY RECORDER RECORDED THE MIDCOUNTRY MORTGAGE AND INDEXED IT IN THE OFFICIAL SCOTT COUNTY GRANTOR/GRANTEE INDEX, CHARGING HINSHAW AND PHH WITH CONSTRUCTIVE NOTICE OF THE MORTGAGE.

The MidCountry Mortgage was recorded and indexed in the official Scott County Grantor/Grantee Index on May 19, 2004. A-189. Well-settled law in Minnesota holds a party is not only charged with notice of information contained in both indices, but furthermore is bound by the contents of the recorded documents themselves.

Javens's undisputed, sworn testimony establishes that neither Hinshaw, PHH, nor any employee or agent of either, searched the Scott County Grantor/Grantee Index prior to Hinshaw and PHH acquiring their respective interests in Parcel 3. Because a party is charged not only with the information contained in a County's tract index, but also the information contained in the grantor/grantee index, Hinshaw and PHH were charged with knowledge of the MidCountry Mortgage encumbering Parcel 3 as it appeared in Scott County's Grantor/Grantee Index since May 19, 2004. Consequently, because they are charged with knowledge of the information contained in both Indices, Hinshaw and PHH may not rely solely upon the information contained in the Scott County Tract Index and any such reliance by Javens was done so at her own peril as well as that of Hinshaw and PHH.

A. Minnesota's Recording and Indexing System.

Every county recorder is required to keep an index denominated as the grantor and grantee's reception index, which shall contain the following information: date of

reception, year, month, day, hour and minute, grantor and grantee, where situated, to whom delivered after recording, fees received, instrument number, and kind of instrument. *See* Minn. Stat. § 386.03. As soon as documents are received by the county recorder, it shall enter this information concerning that document into the grantor and grantee index. *Id.*

As part of its records, a county also maintains a tract index so as to allow information to be arranged or retrieved by the description of each section of land or sectional lot, and town or city lot and block arranged in numerical order, give appropriate initial or abbreviation for the type of instrument, and recite the book and page number by which every record affecting the title to the whole or any part thereof may be found. *See* Minn. Stat. § 386.05.

B. Recording of the MidCountry Mortgage.

When a document is received and recorded, every county recorder shall then endorse upon each instrument so recorded, over the recorder's official signature, "OFFICE OF THE COUNTY RECORDER, ... COUNTY, MINNESOTA, CERTIFIED, FILED, AND/OR RECORDED ON", the date and time when it was recorded and the document number and/or book and page in which it was recorded; and "every instrument shall be considered as recorded at the time so noted." *See* Minn. Stat. § 386.41 (emphasis added). Where an endorsement on a document purports to be a certificate of registration, signed by the registrar of deeds of that county, certifying that the deed was recorded in his office, it is sufficient evidence that the deed was so recorded. *See Thomas et. al. v. Hanson et. al.*, 59 Minn. 274, 61 N.W. 135 (1894) (emphasis added).

Ms. Boeckman's testimony establishes that the MidCountry Mortgage was recorded in the Scott County Grantor/Grantee Index. A-189. In addition to her testimony, the endorsement on the upper-right corner of the MidCountry Mortgage reflects the recording. The district court erroneously held that the MidCountry Mortgage was not properly recorded; however, this is contrary to Minn. Stat. § 386.41.

When MidCountry received the Mortgage back with the official endorsement of the Scott County Recorder, indicating the Mortgage has been properly recorded, MidCountry is afforded the right to rely on that official endorsement without having to take any additional steps. Further, that official endorsement is sufficient evidence that the deed was so recorded. *Thomas et. al. v. Hanson et. al.*, 61 N.W. at 135. Even Ms. Boeckman, the Scott County Recorder, states that the endorsement means the Mortgage was recorded. A-188.

Based on the undisputed facts and Minnesota law, the Mortgage was recorded as part of the Scott County Recorder's records.

C. Minnesota is a Race-Notice State that Imposes Constructive Notice on a Purchaser of Any Recorded Document.

Minnesota is a race-notice state, which means that a purchaser who has actual, implied or constructive notice of inconsistent outstanding rights of others is not a bona fide purchaser entitled to protection under Minnesota's Recording Act. *See Minn. Cent. R.R. Co. v. MCI Telecomms. Corp.*, 595 N.W.2d 533, 537 (Minn. Ct. App. 1999), review denied (Minn. Sept. 14, 1999). The goal of the Minnesota Recording Act is to protect persons who buy real estate in reliance on the record. *Strong v. Lynn*, 38 Minn. 315, 317,

37 N.W. 448, 449 (1888). The Act allows for a subsequent purchaser in good faith who records title first to obtain rights to the property as against any prior purchaser who fails to record his interest. *Miller v. Hennen*, 438 N.W.2d 366, 369 (Minn. 1989). The burden is on the party resisting the prior unrecorded title to prove that he purchased or acquired such title in good faith. *Fifield v. Norton*, 79 Minn. 264, 266, 82 N.W. 581, 581 (1900).

A bona fide purchaser is one who in good faith pays value for an interest in property without actual, implied, or constructive notice of inconsistent outstanding rights of others. *Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 524 (Minn. 1990). The Minnesota Recording Act, however, "does not protect a purchaser who has actual or constructive notice of outstanding rights in another, as the purchaser is then not a bona fide purchaser." *In re Inv. Sales Diversified*, 38 B.R. 446, 453 (Bankr.D.Minn. 1984) (citing *Anderson v. Graham Inv. Co.*, 263 N.W.2d 382 (Minn. 1978)).

Actual or implied notice occurs where one has "actual *knowledge* of facts which would put one on further inquiry." *Anderson v. Graham Inv. Co.*, 263 N.W.2d 382, 384 (Minn. 1978)(emphasis in original). Inquiry notice is distinguished from actual notice, which requires conveying knowledge of a signed, enforceable agreement. *See Levine v. Bradley Real Estate Trust*, 457 N.W.2d 237, 240 (Minn. Ct. App. 1990) pet. for rev. denied (Minn. Aug. 7, 1990). Inquiry notice requires actual, open possession and use of property which puts a subsequent purchaser on inquiry notice of the possessor's rights in the property. *Miller v. Hennen*, 438 N.W.2d 366, n. 4 (Minn. 1989)

"Pursuant to Minn. Stat. § 507.32, a purchaser is charged as a matter of law with

constructive notice of any properly recorded instrument." *Howard, McRoberts & Murray v. Starry*, 382 N.W.2d 293, 296 (Minn. Ct. App. 1986). The Supreme Court has defined constructive notice as "a creature of statute and, as a matter of law, imputes notice to all purchasers of any properly recorded instrument even though the purchaser has no actual notice of the record." *Miller*, 438 N.W.2d at 369-70 ("A purchaser in good faith is one who gives valuable consideration without actual, implied or constructive notice of inconsistent outstanding rights of others.")(emphasis added); *see also Latourell v. Hobart*, 135 Minn. 109, 113-14, 160 N.W. 259, 260-61 (1916). Constructive notice of the contents of a mortgage arises as a presumption of law from the existence of the record. *Bailey et al. v. Galpin*, 40 Minn. 319, 321, 41 N.W. 1054, 1055-56 (1889). Constructive notice is equivalent to actual notice of what appears upon the face of the record to the party whom the law requires to search the record, regardless of whether the party has actual notice. *Id.*

Regardless of whether Hinshaw and PHH did not have actual knowledge of the MidCountry Mortgage, they are both still charged with constructive notice of recorded documents. The burden is on Hinshaw and PHH to demonstrate that they are bona fide purchasers of Parcel 3 with respect to the MidCountry Mortgage; a burden they have not met. *See Fifield*, 79 Minn. at 266, 82 N.W. at 581.

The MidCountry Mortgage was recorded, as established by Ms. Boeckman's testimony and the official stamp in the upper-right corner of the Mortgage; Parcel 3 was correctly identified as a parcel the Mortgage was encumbering; and Ms. Boeckman testified that the Mortgage appeared as an encumbrance prior to May 2006 in the Scott

County Grantor/Grantee Index. A-188 – A-189.

Applying Minnesota's Recording Act to this set of facts the district court erred when it held Hinshaw and PHH were bona fide purchasers of Parcel 3 and did not have constructive notice of the Mortgage.

D. Purchasers are Charged with Notice of the Information Contained in Both the Grantor/Grantee and Tract Indices.

Hinshaw and PHH argue, and the district court held, that they are not charged with constructive notice of the Mortgage and are bona fide purchasers as the Mortgage did not appear as an encumbrance against Parcel 3 in the Scott County Tract Index at the time they took their interests in Parcel 3. This ignores, however, Minnesota law which charges a party with knowledge of not only the tract index, but also with the information set forth in the grantor/grantee index. It is undisputed that the Mortgage appeared in the Scott County Grantor/Grantee Index prior to Hinshaw and PHH taking their interests in Parcel 3.

The Minnesota Supreme Court has made it clear that the official record of any county recorder is the grantor/grantee index. *Miller*, 438 N.W.2d at 370. The “tract index is part of the record of which a purchaser is charged constructive notice.” *Id.* (emphasis added); quoting *Howard McRoberts & Murray v. Starry*, 382 N.W.2d 293, 297 (Minn. Ct. App. 1986); *see also* Minn. Stat. § 386.05. The other part of the record, as indicated above, includes the reception index (also known as the grantor/grantee index), which is required to be kept by the county recorder pursuant to Minn. Stat. § 386.03.

“The record book and the index book are not to be considered as detached and

independent books, but related and connected ones, and a party ... is, where the index makes the requisite reference, affected with notice of any facts which either book contains with respect to the title of his proposed grantor.” *Latourell*, 160 N.W. at 261 (emphasis added). A purchaser “is presumed to have examined the whole record, and he is charged with such knowledge as the proper index entries afford, as well as with notice of the facts derived from the transcript of the deed itself.” *Id.* (emphasis added).

In this case, the Scott County Recorder properly recorded the MidCountry Mortgage in the Scott County Recorder’s Grantor/Grantee Index as of May 19, 2004. A-188 – A-189. Furthermore, the Scott County Recorder captured the image of the Mortgage as of May 19, 2004 and maintains that image as part of the official record, as has been that office’s practice since approximately 1991. A-184 – A-185. In May 2006, the Mortgage appeared in the Scott County Grantor/Grantee Index and an image was available for viewing by any member of the public. *Id.*

The undisputed fact is Javens, Hinshaw and PHH did not search the Scott County Grantor/Grantee Index or look at the image of the MidCountry Mortgage prior to Hinshaw and PHH acquiring their interest in Parcel 3. The search was strictly limited to the Scott County Tract Index.

Minnesota law is clear that any purchaser conducting a search utilizing only the tract index and not reviewing the documents does so at his or her own peril as each purchaser is charged with the information set forth in the grantor/grantee index and on the face of the documents themselves. *See Latourell*, 160 N.W. at 261.

The district court erroneously held the Scott County Recorder failed to record the

Mortgage. This holding ignores the fact that the Scott County Recorder, Ms. Boeckman, unequivocally testified the Mortgage appeared in the official index of Scott County, the Grantor/Grantee Index, when Hinshaw and PHH took their interest in Parcel 3. Further, the district court's holding is contrary to the undisputed fact, through Ms. Boeckman's sworn testimony, that not only was the MidCountry Mortgage recorded in the Scott County Grantor/Grantee Index, but the image of the Mortgage was captured and maintained on the Scott County TriMin system. Under well-established Minnesota law, the district court committed reversible error.

E. Hinshaw and PHH are Charged with Constructive Notice of the the Information on the Face of the Mortgage.

Ms. Boeckman provided testimony that in May 2006, any member of the public could have viewed the contents of the Mortgage by pressing "F13" on the keyboard in front of them. A-184 – A-185. At no time prior to taking their interests in Parcel 3, did Hinshaw or PHH (either by themselves or through Javens) review the actual contents of the Mortgage. A-48.

In Minnesota, purchasers and searchers of the real estate records are bound by the contents within the recorded documents themselves. *See Bailey*, 41 N.W. at 1055 (constructive notice to that which is set forth on the face of a mortgage); *see also, Latourell*, 160 N.W. at 261 (a purchaser "is charged with such knowledge ... of the facts derived from the transcript of the deed itself.") (emphasis added).

Constructive notice of the contents of a mortgage arises as a presumption of law from the existence of the record. *Bailey*, 41 N.W. at 1055-56. It is equivalent to actual

notice of what appears upon the face of the record to the party whom the law requires to search the record, regardless of whether the party has actual notice. *Id.*

Ms. Boeckman's testimony establishes that the entire Mortgage was scanned and available for public viewing prior to May 2006. A-184 – A-185. There has not been any dispute that Parcel 3 is identified in the Mortgage as encumbered real estate. As cited above, Minnesota law charges Hinshaw and PHH with notice of the Mortgage's encumbrance against Parcel 3 due to the fact that it was recorded and Parcel 3 was properly identified as encumbered real estate.

MidCountry did everything it was required to do under Minnesota law. It properly described Parcel 3 as real estate that the Mortgage encumbered. It delivered the Mortgage to the Scott County Recorder's Office and received the original Mortgage back with the official endorsement of the Scott County Recorder's Office; which, the Scott County Recorder, Ms. Boeckman, states is proof to her that the document was recorded.

To the contrary, through May 12, 2006, Hinshaw and PHH (through Javens), did not do everything which is required. Javens did not search the Scott County Grantor/Grantee Index; despite Ms. Boeckman's testimony establishing the Mortgage was recorded in that index since May 2004 and Minnesota law charging Javens with knowledge of the Grantor/Grantee Index's contents. Javens did not view the the actual Mortgage; despite the fact that it was available simply by pressing "F13." Javens took short-cuts when searching the Scott County property records when she only searched the Tract Index; however, she did so at the peril of Hinshaw and PHH, the parties she was conducting the search for.

Affirming the district court's decision would require an unprecedented reversal of established Minnesota law.

II. THE DISTRICT COURT COMMITTED ERROR WHEN IT IMPROPERLY WEIGHED FACTS AND MADE FACTUAL INFERENCES WHEN APPLYING THE LAW.

If summary judgment cannot be granted in MidCountry's favor, then a trial is required so that a trier of fact can resolve any factual issues. However, the district court overstepped its authority on MidCountry's motion for summary judgment when it improperly weighed facts and made factual inferences when applying the law.

The district court's function on a motion for summary judgment is not to decide issues of fact, but solely to determine whether genuine factual issues exist. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997)(citing *Nord v. Herreid*, 305 N.W.2d 337, 339 (Minn. 1981)(emphasis added)). The district court must resolve all factual inferences in favor of the non-moving party. *Wagner v. Schwegmann's So. Town Liquor, Inc.*, 485 N.W.2d 730, 733 (Minn. Ct. App. 1992), *review denied* (Minn. July 16, 1992). However, the court must not weigh the evidence on a motion for summary judgment. *Id.* (citing *Murphy v. Country House, Inc.*, 240 N.W.2d 507, 512 (Minn. 1976)). Finally, cross-motions for summary judgment will not obviate the need for a trial if genuine issues of material fact exist. *St. Paul Fire & Marine Ins. Co. v. Nat'l Computers Sys., Inc.*, 490 N.W.2d 626, 630 (Minn. Ct. App. 1992).

In its Memorandum the district court stated, "Patricia Boeckman from the Scott County Recorder's Office testified in a sworn deposition that the County failed to properly record or index the MidCountry Mortgage when it was offered for recording on

May 19, 2004.” A-236. Both holdings are a direct contradiction of the actual sworn testimony of Patricia Boeckman from the Scott County Recorder’s Office.

Ms. Boeckman, when reviewing the MidCountry Mortgage during her deposition, testified that the stamp on the upper-right corner indicates to her that the Mortgage was recorded on May 19, 2004. *See* A-188. Further, Ms. Boeckman testified that the MidCountry Mortgage was indexed into the Grantor/Grantee Index prior to May 2006. *See* A-189.

The only way the district court could have reached the conclusions it did regarding Ms. Boeckman’s testimony is by inferring facts from portions of Ms. Boeckman’s testimony; or, making a factual determination that Ms. Boeckman’s testimony is not credible. Either way, it is reversible error for the district court to engage in this function when considering a motion for summary judgment.

The district court further misstates MidCountry’s argument regarding the Scott County Recorder’s recording of the Mortgage in the Scott County Grantor/Grantee Index. In its Order, the district court holds MidCountry “never asserts that the mortgage was properly recorded at the time that Hinshaw and PHH took their interests in the property in May 2006.” A-235. On the contrary, this has been MidCountry’s argument since the outset. MidCountry has stated on numerous occasions that the Mortgage was recorded; not only in May 2006, but on May 19, 2004.

The district court also erroneously holds “MidCountry Bank does not challenge the testimony of Ms. Boeckman, Ms. Javen [sic], and Ms. Jennrich that the MidCountry Mortgage did not appear of record in the Scott County Recorder’s Office as an

encumbrance against the Hinshaw Property at the time Hinshaw and PHH took their interests in the property.” A-236. There is nothing in the record wherein Ms. Boeckman summarily asserted that the Mortgage did not appear of record in the Scott County Recorder’s Office. Indeed, Ms. Boeckman testified, unequivocally, that the Mortgage was recorded in May 2004 and that it appeared of record, in the Grantor/Grantee Index, since that time. A-189. MidCountry’s reliance on Ms. Boeckman’s testimony in this regard points to MidCountry’s challenge of the testimony from Javens and Ms. Jennrich.

The district court draws another improper inference from the fact that MidCountry offered a certified copy of the Scott County Grantor/Grantee Index dated February 1, 2007. The district court implies that MidCountry did this out of some attempt to mislead the court or because MidCountry is unable to show the recording took place on May 19, 2004. A-235 – A-236. On the contrary, MidCountry submitted this certified copy simply because this was the approximately the time Hinshaw and PHH’s argument surfaced that the Mortgage was not “properly” recorded.

In addition, it was submitted to demonstrate, as this Court can observe, the Scott County Grantor/Grantee Index lists recorded documents chronologically. A-81. The MidCountry Mortgage appears as Document No. 657036, recorded on May 19, 2004. *Id.* It is immediately preceded by Document No. 657035, recorded on May 19, 2004 and is immediately followed by Document No. 717782, recorded on October 25, 2005. *Id.* These recordings would appear the same whether MidCountry provided a certified copy dated October 26, 2005, November 4, 2006, or April 15, 2008. The district court drew an improper inference from the date of the certified copy and in so doing has not only

prejudiced MidCountry, but has committed reversible error.

The fact is, Ms. Boeckman's testimony establishes that the Mortgage appeared in the Scott County Grantor/Grantee Index as of May 19, 2004 and everyday thereafter. *See* A-189.

The district court erroneously determined the MidCountry Mortgage was not properly recorded in the Scott County Recorder's Grantor/Grantee Index. Further, the district court erred by failing to apply clearly established Minnesota law holding a purchaser of property to have constructive knowledge of information contained in the grantor/grantee index as well as the tract index and all of the information appearing on the face of a recorded instrument. Finally, the district court erred by granting Hinshaw and PHH summary judgment and in doing so, necessarily improperly weighed evidence or made factual inferences.

The district court's Order should be reversed and if this Court determines that the undisputed facts do not demonstrate summary judgment in favor of MidCountry, then the matter should be remanded for a trial on any factual disputes.

III. EQUITY FAVORS MIDCOUNTRY.

Equitable relief may be granted in an action to determine adverse claims to real property, upon such terms and conditions as may be necessary to do justice. *Engel v. Swenson*, 191 Minn. 324, 326, 254 N.W.2d 2, 3 (1934). The equitable claims of MidCountry rate higher than that of Hinshaw and PHH.

Affirming the district court would create a new burden not found in Minnesota's Recording Act. When a party such as MidCountry receives a document back from a

recorder's office with the official endorsement showing it has been recorded, the district court's holding would require that party to travel to the recorder's office to ensure the document was indexed correctly in both indices. This would create a significant administrative and financial burden that is contrary to the Minnesota Recording Act and Minn. Stat. § 386.41.

A reversal of the district court would simply maintain the status quo for parties similarly situated to Hinshaw and PHH; meaning, they would be charged with notice of the contents of the grantor and grantee index, the tract index and the contents of the actual recorded documents themselves. This creates no administrative or financial burdens as those requirements have been Minnesota law for over a century.

Hinshaw and PHH were in the best position to avoid the situation they now find themselves in – they only needed to review the Scott County Grantor/Grantee Index and the contents of the MidCountry Mortgage.

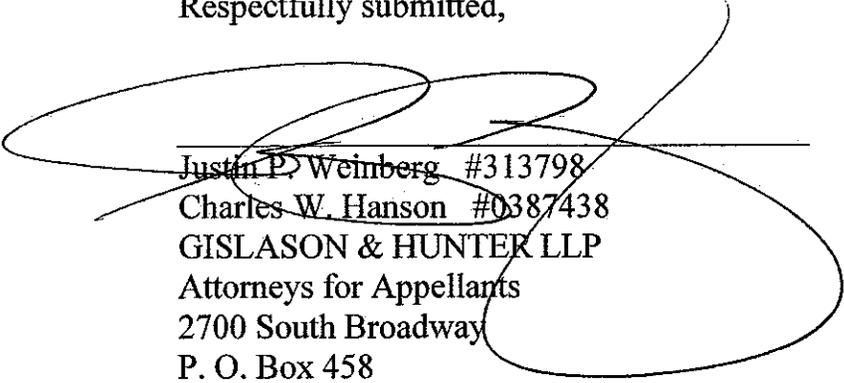
Short-cuts may have their benefits, however, they also have their perils and Minnesota law is clear that peril lies with Hinshaw and PHH; not MidCountry.

CONCLUSION

For all of the reasons set forth above, MidCountry Bank respectfully requests that this Court reverse the judgment of the district court and remand for entry of judgment in favor of MidCountry Bank, in an amount to be determined, and a decree of foreclosure of the Mortgage against Parcel 1, Parcel 2 and Parcel 3, to include the interests of Hinshaw and PHH. Alternatively, this Court should reverse and remand for trial on the merits.

Dated this 20th day of May, 2008.

Respectfully submitted,

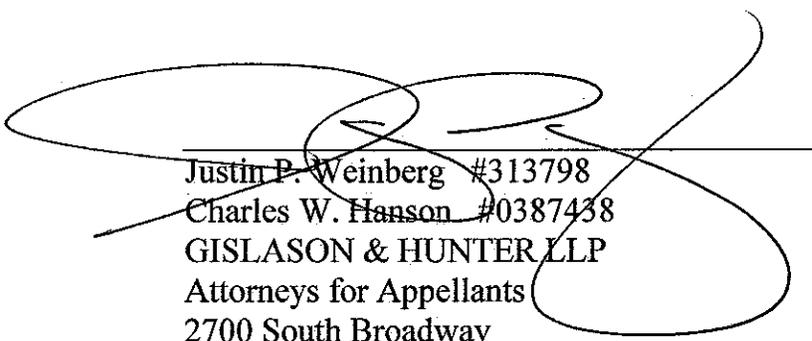


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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Minn. R. App. Pro. 132.01, subds. 1 and 3, contains 6,690 words and was prepared using Microsoft Word 2003.

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