

**STATE OF MINNESOTA
IN COURT OF APPEALS**

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

Appellant,

Case No.: A08-0534

v.

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,

Respondent.

**BRIEF OF RESPONDENTS CHEROLYN A. HINSHAW
AND PHH HOME LOANS, LLC**

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STATEMENT OF THE ISSUES

Issue 1. Under Minnesota’s recording statute, a “properly recorded” instrument gives constructive notice to purchasers of real property. The Scott County Recorder failed to record the MidCountry Mortgage as an encumbrance against the Hinshaw Property in official county recording indexes. Was the MidCountry Mortgage “properly recorded” such that it gave Hinshaw and PHH constructive notice?

Trial court holding: “The mortgage clearly was not properly recorded.” (AA 236.)¹

Apposite law:

Minn. Stat. § 507.32

Thorp v. Merrill, 21 Minn. 336 (Minn. 1875)

Issue 2. A conveyance of real estate is void as to good-faith purchasers whose instruments are first duly recorded. The MidCountry Mortgage was not “duly recorded” against the Hinshaw Property when purchased by Hinshaw because the mortgage did not appear to encumber that property in official county indexes. Does MidCountry have a valid mortgage against the Hinshaw Property that it may now foreclose?

Trial court holding: “Hinshaw and PHH took their interests in the Hinshaw Property without notice of the MidCountry Bank Mortgage, they are bona fide purchasers of the property, and the MidCountry Bank Mortgage is void as to their interests.” (AA 236–37.)

Apposite law:

Minn. Stat. § 507.34

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

¹ “AA” refers to Appellant’s Appendix, submitted by MidCountry Bank.

STATEMENT OF THE CASE

With this action, Plaintiff MidCountry Bank seeks to foreclose a mortgage (the “MidCountry Mortgage”), which it alleges encumbers two parcels owned by Defendants Frederick and Nancy Krueger and one parcel owned by Defendant Cherolyn Hinshaw. Hinshaw acquired her parcel from Kruegers in 2006 and gave a mortgage to Defendant PHH Home Loans. Hinshaw and PHH have defended against MidCountry’s attempts to foreclose on the Hinshaw Property because the MidCountry Mortgage was not properly recorded in official county indexes when she bought her property. Hinshaw and PHH thus had no actual or constructive notice of the mortgage. Frederick and Nancy Krueger have not answered MidCountry’s complaint or Hinshaw’s and PHH’s cross-claims.

Judge Rex D. Stacey of the Scott County District Court presided over this case at the trial court and issued the court’s Order and Memorandum and Judgment on January 30, 2008. On cross-motions by MidCountry and Hinshaw/PHH, the district court granted Hinshaw and PHH summary judgment.² The court held that “Hinshaw and PHH took their interests in the Hinshaw Property without notice of the MidCountry Bank Mortgage, they are bona fide purchasers of the property, and the MidCountry Bank Mortgage is void as to their interests.” (AA 236–37.)

² MidCountry implies that the district court improperly granted Hinshaw and PHH summary judgment because MidCountry was the only party to bring a formal summary-judgment motion. (App. Br. 4–5.) MidCountry fails to note, however, that during a pre-trial conference with the court, “Counsel agree[d] that there[were] no material facts in dispute and submit[ed] the matter on cross motions for summary judgment.” (AA 232.) The court accepted the briefs submitted by the parties on MidCountry’s summary-judgment motion as their submissions on the cross-motions for summary judgment.

STATEMENT OF THE FACTS

I. The parties and the Hinshaw Property.

The MidCountry Mortgage purports to encumber three parcels of real property in Scott County. Frederick and Nancy Krueger gave the MidCountry Mortgage in 2004, when they were still living on Parcel 1 and sought to build a new home on Parcels 2 and 3 with the loan proceeds. Kruegers sold Parcel 1—legally described as Lot 12, Rearrangement of Block 44, Borough of Belle Plaine (the “Hinshaw Property”)—to Hinshaw in May 2006, and Hinshaw mortgaged the property to PHH. Kruegers continue to own the other two parcels (the “Krueger Parcels”).³ MidCountry brought this action to foreclose on its mortgage after Kruegers stopped making the required payments.

Hinshaw and PHH have defended against MidCountry’s attempt to foreclose on the Hinshaw Property because the MidCountry Mortgage did not appear in the Scott County property-record indexes as an encumbrance against the Hinshaw Property when Hinshaw purchased the property and PHH took a mortgage on it. To explain why the MidCountry Mortgage did not appear as an encumbrance against that property, Hinshaw and PHH will here describe: (1) the nature of Scott County’s electronic indexing system; (2) the errors made in the recording of the MidCountry Mortgage; and (3) the title searches that were conducted both before and after Hinshaw’s purchase of the Hinshaw Property.

³ The legal descriptions for these parcels are set forth at Appellant’s Brief at 5.

II. Scott County's recording system.

Scott County employs an electronic system, called the TriMin, for its official property-record indexes. (AA 171–72.) The TriMin, like its hard-copy predecessor, is intended to contain all pertinent information about each recorded document, including the date and time of recording, document number, document type, legal description, grantor and grantee names, references to related documents, tax liens, recording fees, posting date, and document images. (AA 170–72.) Information stored on the TriMin is accessible at the Scott County Recorder's Office through its AS400 mainframe computer (AA 175) or, for reference purposes, through the county recorder's website (AA 188).

Scott County's TriMin indexing system enables title searches by document number, legal description, grantor, or grantee. A legal-description search or "tract search," for example, yields a list, generally in order of recording date, of all the deeds, mortgages, liens, and other documents recorded against the specified legal description.⁴ The system then allows a user to view the details about any document on the list through a "document-number inquiry." (*See, e.g.*, AA 118.) Grantor/grantee searches involve the same two-step process of finding a document and then accessing details about it through a document-number inquiry. (*See, e.g.*, AA 81.) Thus, regardless of how a document number is found—whether through a tract search or a grantor/grantee search—a document-number inquiry is necessary for viewing details about the instrument such as

⁴ Legal descriptions are searchable in the TriMin using a five-digit number corresponding to the property's plat. The five-digit number is derived from the first five digits of a property identification number, generally assigned for property-tax purposes. (AA 186.)

the encumbered legal description(s). And from within a document-number inquiry, the F13 key also allows access to an image of the document. (AA 184, 189.)

The county recorder's office records approximately 120 documents each day. (AA 168.) To save time, the TriMin enables the "cloning" of information from one document to the next. According to Patricia Boeckman, the Scott County Recorder, if one document "refer[s] to another document number . . . we will clone a legal description, which means that we will copy the legal description from that first document into the second one so we don't have to rekey that information." (AA 170.) While the TriMin allows cloning of various fields, Scott County "usually just clone[s] the legal description." (AA 171.)

III. The recording of the MidCountry Mortgage.

The MidCountry Mortgage was presented to the Scott County Recorder's Office for recording on May 19, 2004. (AA 208.) Accompanying the mortgage was a warranty deed to Frederick and Nancy Krueger for the Krueger Parcels, their two newly acquired parcels on which they intended to build a home. (AA 196.) While the warranty deed only conveyed the Krueger Parcels, the mortgage purported to encumber the Hinshaw Property—Kruegers' then-current home—as well. (AA 210.) The Scott County Recorder's Office stamped the warranty deed to Kruegers as Document No. 657035. (AA 196.) And immediately behind it, the MidCountry Mortgage was stamped as Document No. 657036. (AA 208.)

In accordance with the order of recording, an employee of the recorder's office first entered all the information relating to Kruegers' warranty deed, including the

relevant legal descriptions, into the TriMin. (AA 176.) Then, because the documents appeared as part of the same transaction, that person simply cloned the legal description from the warranty deed into the TriMin's legal-description field for the MidCountry Mortgage. (AA 177.) The result was a TriMin record of the mortgage that was inconsistent with the face of the document: while the mortgage itself purported to encumber the Krueger Parcels *and* the Hinshaw Property, the TriMin indexing system showed it encumbering only the Krueger Parcels. (AA 119, 177, 255–56.)

The Hinshaw Property, on which Kruegers then lived, was conveyed to Hinshaw and mortgaged to PHH in May 2006. (AA 32.) Hinshaw's deed and PHH's mortgage were recorded on May 31, 2006 as Document Nos. 740490 and 740491. (AA 32–33.) MidCountry later initiated this foreclosure action and recorded a notice of lis pendens on October 18, 2006. (AA 178.) Because the county recorder cloned the TriMin's legal descriptions for the MidCountry Mortgage when recording the lis pendens, the indexing system again excluded the legal description of the Hinshaw Property from the list of properties affected by the notice of lis pendens. (AA 178, 257–58, 260–61.)

In late 2006 or early 2007 changes were made in the TriMin system to the records for the MidCountry Mortgage and its notice of lis pendens. As a result of the changes, the legal description for the Hinshaw Property came to be added to the index records for the MidCountry Mortgage. (AA 183.) And Boeckman, the Scott County Recorder, recalls that she and deputy Janice From personally added the legal description for the Hinshaw Property to the record for MidCountry's notice of lis pendens on March 16, 2007. (AA 182–83.)

IV. Searches conducted for the MidCountry Mortgage.

Various abstractors confirmed that the MidCountry Mortgage did not appear of record as an encumbrance against the Hinshaw Property. Monica Meyer Javens, a licensed abstractor with Burnet Title, conducted numerous title searches on behalf of Hinshaw and PHH, both before Hinshaw purchased the property and after MidCountry brought this foreclosure action. (AA 239–43.) Consistent with the recording issues identified by Boeckman, Javens’ two searches of the Hinshaw Property on the TriMin prior to May 2006 revealed no evidence of the MidCountry Mortgage encumbering the property. (AA 239–40.)

After commencement of this foreclosure action, Javens again conducted various title searches to determine whether the MidCountry Mortgage encumbered the Hinshaw Property, as MidCountry asserted. A document-number inquiry via the county’s property-records website showed that the MidCountry Mortgage encumbered the Krueger Parcels, but not the Hinshaw Property (AA 241); an on-site document-number inquiry, accessed through a grantor/grantee search, again showed that the mortgage encumbered only the Krueger Parcels (AA 242); similar on-site searches on both October 20 and October 23, 2006 produced the same results (AA 242–43); and another on-site search on November 13, 2006 failed to show the Hinshaw Property as encumbered by the MidCountry Mortgage *or* MidCountry’s notice of lis pendens (AA 243).

Several title searches were also performed on behalf of MidCountry itself after this recording issue came to light. On October 24, 2006, Joanne Schutte of Land Title, Inc. searched the TriMin and found that the MidCountry Mortgage encumbered only the

Krueger Parcels. (AA 118–19.) On the second page of her search results, Schutte noted “Error on posting, missed 3rd legal.” (AA 119.) Rosalind Jennrich, also of Land Title, confirmed Schutte’s findings on November 21, 2006. (AA 104.) As Jennrich plainly summarized in her deposition regarding the mortgage, “[i]t was not there.” (AA 104.) Jennrich also sent a message to counsel for MidCountry within days of her search stating, “Scott County appears to have erroneously omitted to post the Mortgage to the above-described legal description.” (AA 120.) And when her final search on April 13, 2007 did show the MidCountry Mortgage as encumbering the Hinshaw Property but listed it uniquely outside the standard numerical order of documents, Jennrich concluded that “someone went to the County and told them that they misposted this.” (AA 110.)

SUMMARY OF ARGUMENT

A mortgage is void and may not be foreclosed against a subsequent good-faith purchaser who has no actual, implied, or constructive notice of the mortgage. Because the MidCountry Mortgage was misindexed and did not appear as an encumbrance against the Hinshaw Property when Hinshaw purchased it, she and her mortgagee, PHH, had no actual, implied, or constructive notice of it and did not take subject to it. MidCountry’s three arguments in support of constructive notice—relating to a date-and-time stamp, the mortgage’s “appearance” in the grantor/grantee index, and the existence of a scanned copy of the mortgage in the TriMin system—all fail because the mortgage was not “properly recorded,” as required for constructive notice. To hold otherwise would burden abstractors with the daunting task of assuming errors in every index record they view. Accordingly, the decision of the district court must be affirmed.

ARGUMENT

I. Standard of review.

“The standard of review applicable to a grant of summary judgment is whether there are any genuine issues of material fact and whether the district court erred in its application of the law.” *Hempel v. Creek House Trust*, 743 N.W.2d 305, 310 (Minn. Ct. App. 2007). “Summary judgment is appropriate [when] there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.” *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 672 (Minn. 2001). Accordingly, the Court must determine whether there were any genuine issues of material fact preventing summary judgment and whether Hinshaw and PHH were entitled to judgment as a matter of law. As noted by the district court, the parties stipulated below that there were no material factual disputes. (AA 232.) And this Court should now affirm the district court’s determination that Hinshaw and PHH are entitled to judgment as a matter of law.

II. Hinshaw and PHH are good-faith purchasers with no constructive notice of the MidCountry Mortgage.⁵

Hinshaw and PHH acquired their interests in the Hinshaw Property in good faith and not subject to the MidCountry Mortgage because the mortgage was “so mis-recorded as to be, in effect, not recorded at all.” *Thorp v. Merrill*, 21 Minn. 336 (1875). Under Minnesota law, a good-faith purchaser is one “who paid value for the interest without actual, implied, or constructive notice of inconsistent outstanding rights of others.”

⁵ MidCountry does not argue or present evidence that Hinshaw or PHH had actual or implied notice of the MidCountry Mortgage. Hinshaw and PHH therefore only address the issue of constructive notice.

Chergosky v. Crosstown Bell, Inc., 463 N.W.2d 522, 524 (Minn. 1990). “[A] misindexed or unindexed document is virtually worthless to a searcher, since the indexes are essential to the search process; it is, in effect, a needle in a haystack. . . . The modern trend is to treat such instruments as if they were unrecorded, and hence as giving no constructive notice.” 3 Baxter Dunaway, *L. Distressed Real Est.* § 40:14. And absent notice, a conveyance of real estate is “void as against any subsequent purchaser in good faith and for a valuable consideration . . . whose conveyance is first duly recorded.” Minn. Stat. § 507.34. The MidCountry Mortgage is therefore void as to the Hinshaw Property.

As MidCountry correctly cites, “[c]onstructive notice . . . imputes notice to all purchasers of any *properly recorded* instrument even though the purchaser has no actual notice of the record.” *Miller v. Hennen*, 438 N.W.2d 366, 369–70 (Minn. 1989) (emphasis added); accord Minn. Stat. § 507.32. But by any measure, the MidCountry Mortgage was not “properly recorded” when Hinshaw and PHH took their interests in the property. Title searches conducted before and after Hinshaw’s May 2006 purchase indicate—and the Scott County Recorder confirms with her testimony—that human error caused the mortgage to appear in all county indexes, at all relevant times, as an encumbrance against only the Krueger Parcels, not the Hinshaw Property.

For purposes of the Hinshaw Property, then, the MidCountry Mortgage was the misindexed “needle in a haystack.” And because a county recorder must ensure that recording indexes correctly identify “where the [encumbered] land is situated,” Hinshaw and PHH were entitled to rely on the contents of those indexes and thus had no constructive notice of the MidCountry Mortgage. Minn. Stat. § 386.04; see also Minn.

Stat. §§ 386.03, 386.05; *Miller*, 438 N.W.2d at 370 (citing obligation of county to make accurate and appropriate index entries); *accord In re Hojnoski*, 335 B.R. 282, 289 (Bankr. W.D.N.Y. 2006) (“any error in indexing . . . takes a recorded document outside the chain of title and is constructive notice to a prospective purchaser only from the time the error is corrected and the document is properly indexed”); *Manchester Fund, Ltd. v. First Am. Title Ins. Co.*, 753 A.2d 740, 745 (N.J. Super. Ct. Law Div. 1999) (holding that a misindexed document was insufficient to provide constructive notice); *Hanson v. Zoller*, 187 N.W.2d 47, 56 (N.D. 1971) (“a prospective purchaser cannot be deemed to have constructive notice of instruments that are not indexed in the tract index under the specific tract of real estate to which they pertain.”). Because Hinshaw and PHH had no notice of the MidCountry Mortgage, constructive or otherwise, this Court must affirm the holding below that the mortgage is void as to their interests and that MidCountry may not foreclose its mortgage against them.

III. MidCountry’s arguments in favor of constructive notice are irrelevant to the issue of whether its mortgage was “properly” recorded.

MidCountry makes three arguments in an attempt to establish that its mortgage was “properly recorded” and thus provided constructive notice: (1) that its mortgage bears a date-and-time stamp from the county recorder’s office; (2) that its mortgage appeared in the grantor/grantee index in May 2006; and (3) that the mortgage itself contains the legal description of the Hinshaw Property. But as explained below, these arguments fail. They erroneously focus on elements of the recording process peripheral to the true issue in this case. Moreover, they fail to address the fact that the county

recorder's office did not "properly record" the MidCountry Mortgage because it critically omitted one of the mortgage's three legal descriptions.

A. *The date-and-time stamp on the MidCountry Mortgage is indicative only of the time of receipt, not of "proper" recording.*

MidCountry first argues that "the official endorsement of the Scott County Recorder" signals a "proper recording," and that it was "afforded the right to rely on that official endorsement without having to take any additional steps." (App. Br. 15.) But as the Minnesota Supreme Court has stated, the county recorder's endorsement "goes no farther, at most, than to make the certificate . . . conclusive as to the time of the receipt and record of an instrument recorded." *Thorp v. Merrill*, 21 Minn. 336 (1875). Crucially, MidCountry ignores the distinction between a mere stamp and "proper recording" and overlooks the multiple steps necessary for "proper recording."⁶

Minnesota law requires the county recorder to endorse each instrument delivered for recording by placing on the instrument the county recorder's identifying information, along with the date and time of receipt. Minn. Stat. § 386.41. "Proper recording," MidCountry implies, is achieved simply when a document is delivered for recording and receives the county recorder's date-and-time stamp. But after an instrument has been delivered and has received an endorsement, the county recorder must take further steps to

⁶ MidCountry also fails to distinguish between mere "recording" and "proper recording" in its claim that the court below made improper fact findings. (App. Br. 22–25.) While MidCountry itself quotes the district court's opinion regarding "proper recording," MidCountry attempts to create a factual issue by arguing that its mortgage was "recorded" and "appeared." For the reasons set forth herein at 12–17, no such factual issue exists, and the district court correctly resolved the legal issues of this case by juxtaposing "recording"—merely stamping a document—and "proper recording."

ensure that it becomes “properly recorded.” See, e.g., *Badger v. Benfield*, 337 S.E.2d 596, 598 (N.C. 1985) (“An instrument shall not be deemed registered until it has been properly indexed.”). Indeed, in *Thorp*—where the plaintiff’s mortgage was similarly endorsed by the recorder but ultimately indexed with the wrong legal description—the Supreme Court stated, “[i]t may well be doubted whether this provision of the statute has any application to an instrument which has been *so mis-recorded as to be, in effect, not recorded at all.*” 21 Minn. at 336 (emphasis added). The reasons for this conclusion are obvious: without the county recorder’s proper indexing, a “recorded” document might never be uncovered through a search and could never give notice of the interests it represents, essentially failing of all the purposes that “proper recording” is intended to fulfill.

The holding of *Thorp v. Merrill* must, therefore, be applied in this case as well: MidCountry’s simple act of “recording”—delivering its mortgage to the county recorder and receiving a stamped endorsement—did not amount to “proper recording” because of an indexing error that occurred during the next step in the recording process. In other words, as to the Hinshaw Property, the MidCountry Mortgage was “so mis-recorded as to be . . . not recorded at all.” *Thorp*, 21 Minn. at 336. While the stamp on the MidCountry Mortgage evidences the date and time it was received for recording, the stamp says nothing about whether the mortgage was “properly recorded” for purposes of providing constructive notice to Hinshaw and PHH.

B. *While the grantor and grantee were correctly indexed for the MidCountry Mortgage, the legal description was not.*

MidCountry next argues that Hinshaw and PHH had constructive notice because the mortgage “appeared” in the Scott County grantor/grantee index when they took their interests in the Hinshaw Property. (App. Br. 18–20.) But this argument ignores the fact that this “appearance”—regardless of the search or index used—was of a mortgage encumbering only the Krueger Parcels and not the Hinshaw Property. While the mortgaged may have “appeared,” it was indexed with a significant error and thus not “properly recorded.” MidCountry’s argument is therefore inapposite and must fail.

County recorders in Minnesota are authorized to combine their grantor/grantee indexes and their consecutive indexes (containing recorded documents in the order in which received) “for use with electronic media.” Minn. Stat. § 386.04. They are also authorized to maintain their tract indexes electronically to reference the relevant document number and “every record affecting the title to the whole or any part thereof.” Minn. Stat. § 386.05. With the TriMin, Scott County has opted for an electronic recording system that combines all of these previously separate indexes into one database. (AA 172.) The result is that the county recorder’s office enters data into its system only once through a series of screens for stamp information, grantor and grantee, legal description, tax liens, posting date, etc. (AA 170–71.) The information retrieved through a TriMin search, then, is the same regardless of whether accessed via legal description, grantor’s or grantee’s name, or document number.

MidCountry's argument about the "appearance" of its mortgage in the grantor/grantee index is therefore misleading. Through accurate data entry, the TriMin did correctly identify the grantors and the grantee of the MidCountry Mortgage. A search for "Frederick Krueger" or "Nancy Krueger" would therefore have shown that they were the grantors of a mortgage to MidCountry, Document No. 657036. But through human error in using the "cloning" tool, the TriMin showed only two of the three legal descriptions purportedly encumbered by the mortgage. This critical flaw was the same regardless of whether found through a grantor/grantee search or a tract-index search: both led to the same document-number inquiry for the MidCountry Mortgage, and that inquiry showed it as encumbering only the Krueger Parcels and not the Hinshaw Property.⁷ (AA 118–19; 156–58; 239–43; 255–56.) Consequently, the mere "appearance" of the MidCountry Mortgage in the TriMin is irrelevant to the outcome of this case. Because the mortgage was not "properly recorded" as an encumbrance against the Hinshaw Property, it did not afford Hinshaw and PHH constructive notice.

⁷ MidCountry also asserts that Hinshaw and PHH bear the risk of loss because their agent did not search the grantor/grantee index. This question is irrelevant because constructive notice concerns only whether a document was properly recorded, not what was actually done to search for it. *Miller v. Hennen*, 438 N.W.2d 366, 369–70 (Minn. 1989). Additionally, as explained *supra*, a grantor/grantee search would have led to the same document-number inquiry and the same result—a mortgage appearing not to encumber the Hinshaw Property. Even if this were not the case, however, the well-established modern practice "is to use the tract index rather than by the old means of the grantor-grantee indexes. Although the register of deeds still has to keep all the indexes, the grantor-grantee index is actually a carry over from the old system, and is only an additional tool available to title searchers for other purposes." *Hanson v. Zoller*, 187 N.W.2d 47, 56 (N.D. 1971).

C. *The existence of the Hinshaw legal description in the mortgage itself is irrelevant because a grantee has no obligation to verify the accuracy of a county recorder's indexing.*

Finally, MidCountry argues that Hinshaw and PHH had constructive notice of the mortgage because they “could have viewed the contents of the Mortgage by pressing ‘F13’ on the keyboard in front of them.” (App. Br. 20.) This argument, however, fails for the same reason that its previous two arguments fail: because the MidCountry Mortgage was misindexed, it was not properly recorded. And thus, regardless of the appearance of Hinshaw’s legal description on the third page of the original MidCountry Mortgage, Hinshaw and PHH are not charged with constructive notice thereof.

A county recorder has an obligation to maintain accurate recording indexes. *See* Minn. Stat. §§ 386.03, 386.04, 386.05; *Miller v. Hennen*, 438 N.W.2d 366, 370 (Minn. 1989). Potential grantees are therefore entitled to rely on a county recorder’s indexing and need not individually examine every document on record. *See Thorp v. Merrill*, 21 Minn. 336 (1875). As the Minnesota Supreme Court has held, a purchaser assumes “constructive notice of a *properly recorded* interest.” *Miller*, 438 N.W.2d at 370. Thus, where an indexing error results in an instrument being improperly recorded, a purchaser may not be charged with constructive notice of that instrument. *See, e.g., Hanson v. Zoller*, 187 N.W.2d 47, 56 (N.D. 1971) (“there must be substantial compliance with those sections of the recording laws that pertain to the matter of notice in order to give constructive notice.”). Accordingly, Hinshaw and PHH had no constructive notice of MidCountry’s improperly recorded mortgage. As the North Dakota Supreme Court has aptly stated, “[i]t would certainly be a travesty of justice to hold that prospective

purchasers are bound by the record, if for all practical purposes the record cannot be located.” *Id.*

IV. MidCountry may not foreclose its mortgage against the Hinshaw Property.

Minnesota law provides that a conveyance “shall be void as against any subsequent purchaser in good faith and for valuable consideration . . . whose conveyance is *first duly recorded*.” Minn. Stat. § 507.34 (emphasis added). As explained above, Hinshaw’s deed and PHH’s mortgage were “duly recorded” months before the county recorder finally corrected its indexing of the MidCountry Mortgage and finally posted it as an encumbrance against the Hinshaw Property. (*See, e.g.*, AA 156–58.) As a result, MidCountry may not foreclose its mortgage against Hinshaw and PHH.

V. Public policy supports the conclusion that Hinshaw and PHH took their interests in the property free from the MidCountry Mortgage.

A. *Minnesota’s indexing system would be meaningless if purchasers had to review every recorded document for indexing errors.*

The outcome MidCountry urges would have grave policy implications for Minnesota’s recording statutes. Despite the long-standing requirement that county recorders index documents according to numerous criteria—and do so accurately—MidCountry would have this Court create a new rule undermining the entire recording and indexing system. Minn. Stat. §§ 386.03, 386.04, 386.05. Specifically, MidCountry’s rule would force abstractors to *assume* that the indexes contain errors and to examine every document on file in the county to determine whether one might contain the legal description in question and have been misindexed.

Furthermore, the logical extension of MidCountry's rule would leave abstractors and prospective purchasers of real estate wondering how far their obligation to assume recording errors extends. In this case, for example, an error occurred when one encumbered legal description was omitted from the indexes. But why not also assume, then, that a grantor's or grantee's name was misspelled? *See, e.g., Howe v. Thayer*, 49 Iowa 154 (1878). Must an abstractor imagine variations on each name and search for them? Or assume that block or lot numbers could have been inverted and search every variation on them? Because abstractors and prospective purchasers simply cannot predict what errors might have all occurred during recording and indexing, the burden cannot be placed on them to set the record straight. If recording indexes are to have any meaning, the public must be allowed to rely on them.

B. *The risk of loss must fall to the party with the ability to verify proper recording and prevent a loss.*

Finally, one party must ultimately bear the risk of loss resulting from a recording error, and the Minnesota Supreme Court has allocated that risk to the recording party. As the Court has stated, "one who seeks a benefit from the recording laws must incur all the risks of failure to have his papers spread upon the record in proper form." *Bailey v. Galpin*, 41 N.W. 1054, 1056 (Minn. 1889). This rule is logical in light of the parties' relative efficiencies in verifying the accuracy of the record: "[a]s between an instrument's owner and subsequent purchasers, the former is the 'cheapest cost-avoider'—the only one who knows to check the record for the entry of her instrument and has the power to correct errors." 1 Joyce Palomar, *Patton and Palomar on Land*

Titles § 64 (3d ed. 2003). Consequently, “[b]etter practice may now dictate that shortly after presentation of the document the title company (or filer) run an additional search as of the date of recordation to establish proper indexing.” *Fed. Nat’l Mortgage Ass’n v. Levine-Rodriguez*, 579 N.Y.S.2d 975, 981 (N.Y. Sup. Ct. 1991). To hold otherwise would leave grantees in the perilous position of not knowing what they don’t know.

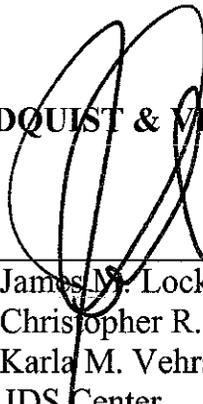
This conclusion is further reflected in the decisions of courts around the United States that have considered the question. *See, e.g., In re Duffy-Irvine Assoc.*, 39 B.R. 525, 530 (Bankr. E.D. Pa. 1984) (“It is the duty of a person offering an instrument for record to see that it is both properly recorded and properly indexed.”); *Compiano v. Jones*, 269 N.W.2d 459, 462 (Iowa 1978) (“the person filing an instrument must suffer the consequences of improper indexing as he is usually the only one who can make certain it is done right.”); *Greenpoint Mortgage Funding, Inc. v. Schlossberg*, 888 A.2d 297, 311 (Md. 2005) (“Indexing mistakes should be at the risk of the person who had the ability to insure that the document was indexed correctly—the filer.”). Accordingly, the risk of loss from the county recorder’s indexing error must be allocated to MidCountry.

CONCLUSION

Under Minnesota’s recording statute, MidCountry may not foreclose its mortgage against a subsequent good-faith purchaser without notice of its mortgage. Hinshaw and PHH had no notice—constructive or otherwise—of the MidCountry Mortgage because it was not properly recorded in the official property-record indexes of Scott County. Respondents Cheryl Hinshaw and PHH Home Loans, LLC therefore respectfully request that the Court affirm the trial court’s grant of summary judgment.

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