

State of Minnesota

## In Supreme Court

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

Respondent,

v.

Case No.: A08-0534

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

Appellants.

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

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## STATEMENT OF THE ISSUES

### **Issue 1:**

Minnesota Statutes Chapter 386 provides that grantor's and grantee's reception indexes and tract indexes must both state where the land affected by an instrument is situated. Here, the Scott County Recorder failed to identify the Hinshaw Property as encumbered by MidCountry's Mortgage in either index. Was the MidCountry Mortgage "properly recorded"?

#### *District court holding:*

"[Scott] County failed to properly record or index the MidCountry Mortgage when it was offered for recording on May 19, 2004. . . . The mortgage clearly was not properly recorded." (Addendum ("Add.") 6.)

#### *Court of Appeals holding:*

"The MidCountry mortgage bore the recording certificate and information required by Minn. Stat. § 386.41. The certificate of recording is presumptive proof that the document was properly recorded." *MidCountry Bank v. Krueger*, 762 N.W.2d 278, 284 (Minn. Ct. App. 2009).<sup>1</sup>

#### *Apposite law:*

Minn. Stat. §§ 386.03, 386.04, 386.05

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

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<sup>1</sup> The Court of Appeals' decision below, along with the district court's decision and all apposite statutes, are reproduced in Appellants' Addendum.

**Issue 2:**

Under Minnesota's Recording Act, an instrument that is not "properly recorded" affords no constructive notice to subsequent bona fide purchasers and is void as to their interests. Due to a county recorder's error, the MidCountry Mortgage was not properly recorded as an encumbrance against the Hinshaw Property in either the grantor's and grantee's reception index or the tract index when Hinshaw purchased the property and mortgaged it to PHH. Did Hinshaw and PHH therefore lack constructive notice of the MidCountry Mortgage such that the mortgage may not be foreclosed against the Hinshaw Property?

*District court holding:*

"Hinshaw and PHH took their interests in the Hinshaw Property without notice of the [MidCountry] Mortgage, they are bona fide purchasers of the property, and the MidCountry Bank Mortgage is void as to their interests." (Add. 6-7.)

*Court of Appeals holding:*

"The Scott County Recorder's error in indexing MidCountry's mortgage did not prevent Hinshaw from being charged with constructive notice." *MidCountry Bank v. Krueger*, 762 N.W.2d 278, 286 (Minn. Ct. App. 2009).

*Apposite law:*

Minn. Stat. §§ 507.32, 507.34

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

## STATEMENT OF THE CASE

Plaintiff and Respondent MidCountry Bank (“MidCountry”) commenced this lawsuit in October 2006 to foreclose a mortgage that it alleges encumbers three parcels of property in Belle Plaine, Minnesota: two parcels owned by Defendants Frederick and Nancy Krueger, and another formerly owned by Kruegers but purchased by Defendant Cherolyn Hinshaw (the “Hinshaw Property”) on May 12, 2006 and mortgaged to Defendant PHH Home Loans (“PHH”) the same day. Hinshaw and PHH oppose MidCountry’s attempts to foreclose because the MidCountry Mortgage at issue was not “properly recorded” against the Hinshaw Property, as required by Minn. Stat. § 507.32, when they acquired and recorded their interests in the property. As a result, Hinshaw and PHH had no notice of the MidCountry Mortgage.

On January 30, 2008, the Scott County District Court, Judge Rex Stacey, granted MidCountry default judgment against Kruegers and granted Hinshaw and PHH summary judgment against MidCountry. The district court cited the testimony of various abstracters who examined title to the Hinshaw Property—both before Hinshaw’s purchase and after MidCountry’s commencement of this lawsuit—that none of Scott County’s unified electronic property records showed the MidCountry Mortgage as an encumbrance against the Hinshaw Property when Hinshaw and PHH took their respective interests in the property. (Add. 3–5.) The court additionally recounted the testimony of Scott County Recorder Patricia Boeckman, that “the County failed to properly record or index the MidCountry Mortgage when it was offered for recording on May 19, 2004, [and that] it was not posted as an encumbrance against the Hinshaw Property until they

corrected their error some time after October 31, 2006.” (Add. 6.) As a result, the court concluded 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.” (Add. 6–7.)

MidCountry appealed the decision of the district court. On March 10, 2009, the Court of Appeals reversed the district court. The Court of Appeals’ decision asserted—incorrectly, as discussed below—that “[t]he MidCountry mortgage was indexed in the Scott County grantor-grantee index in association with the Kruegers’ names as an encumbrance against [the Krueger parcels] and the Hinshaw property.” *MidCountry Bank v. Krueger*, 762 N.W.2d 278, 281 (Minn. Ct. App. 2009). The court also found that, regardless of the recording error acknowledged by the Scott County Recorder, the date-and-time stamp placed on the MidCountry Mortgage when left for recording constituted “presumptive proof that the document was properly recorded.” *Id.* at 284. Accordingly, the court held that “MidCountry’s mortgage was properly recorded first, and therefore its interest is not void as against a subsequent purchaser, respondent Hinshaw.” *Id.* at 286.<sup>2</sup>

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<sup>2</sup> The Court of Appeals additionally misstated the holding of the district court, asserting that “[t]he district court found that MidCountry’s prior mortgage was not properly recorded because the tract index searches did not reveal that it encumbered the Hinshaw property.” 762 N.W.2d 278, 281–82 (Minn. Ct. App. 2009). Rather, after recounting the testimony of the Scott County Recorder and a variety of title searches performed by legal description, document number, *and* grantor name, the district court concluded more appropriately that “[t]he mortgage clearly was not properly recorded.” (Add. 6.)

## STATEMENT OF THE FACTS

### **I. Scott County's unified electronic recording system.**

Scott County employs a unified electronic system—called the TriMin system—for recording instruments affecting real property. The TriMin system constitutes the official property records for Scott County. (A11 at 41:4–41:6.) Because the TriMin is a unified system, Scott County does not keep separate and independent recording indexes. Instead, it maintains the TriMin and its underlying database, which are searchable by, among other things, grantor, grantee, tract (legal description), and document number. (A11 at 44:15 – A12 at 46:2.) And because the TriMin system draws from a single database, all TriMin searches—by grantor, grantee, tract, or otherwise—are similarly affected if the county recorder makes an error when inputting document information during the initial recording process.

In deposition testimony, Scott County Recorder Patricia Boeckman explained Scott County's TriMin system and recording process. Upon receiving a document for recording, her staff collects the recording fees, deed tax, and conservation fee. (A6 at 24:17–24:23.) The person leaving the document then “get[s] a receipt of payment of fees.” (A7 at 25:6.)

The following day, the county recorder's office processes all of the documents—on average, approximately 120—received the previous day and enters them into the TriMin system. (A7 at 26:17–26:25, 28:4–28:5.) They then “affix the label to the document”—the Minn. Stat. § 386.41 certificate of record endorsement—that “indicates

the date and the time [of receipt and] a document number, [which] is generated automatically.” (A7 at 26:25–27:1, A8 at 29:7–29:10.)

After the creation of the date-and-time stamp, the county recorder’s office proceeds to “populate the index” with all the statutorily required fields.<sup>3</sup> (A9 at 33:3, A11 at 41:5.) This process begins with “the Grantor/Grantee name, any reference document numbers if it’s referencing [another document, and] a legal description.” (A9 at 33:15–33:17.) Boeckman explained that when “a set of documents like a deed, a mortgage, [and an] assignment” are brought in for recording together, the county recorder “clones” legal descriptions under “the assumption [that] the legal descriptions are the same.” (A10 at 38:17–38:20.) Cloning “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.” (A9 at 35:23–35:25.) Thus, when a deed and a mortgage are presented together for recording, the legal description on the deed is “cloned” and recorded as the legal description for the accompanying mortgage. (*Id.*) After the grantor-grantee information and legal description are entered, the county recorder “put[s] in a posting date” and “scan[s] the document into the computer [to make] an image of the document.” (A9 at 36:23, A10 at 37:4–37:5.) Boeckman concedes that errors do occur during this recording process. (A13 at 51:24–52:3.)

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<sup>3</sup> Chapter 386 of the Minnesota Statutes specifically requires that county recording indexes include, among other things, the date and time an instrument is received for recording, the type of instrument, the grantor and grantee names, and the legal description of the land encumbered by the instrument. Minn. Stat. §§ 386.03, 386.04, 386.05.

Once a document is recorded in Scott County's TriMin system, the public can access information about it through TriMin computers on site at the Scott County Recorder or remotely through a website. (A24 at 96:11–96:21.) Information contained in the TriMin is searchable and can be found by document number, by grantor or grantee name, or by legal description—corresponding to searches that prior to a unified electronic recording system could only be found by examining completely separate books with reception indexes, grantor-grantee indexes, and tract indexes. (See A11 at 44:15 – A12 at 46:2.) And by using certain designated keys on the computer terminals, users can drill down to screens containing more specific information. For example, a search by a grantor or grantee name generates a screen listing the document numbers of recorded instruments in which the subject is of record as a grantor or grantee. (A30–31.) Within that search-results list, a user can mark an “X” next to any document on the list (*id.*) to view a “Document Number Inquiry.” (A24 at 94:20–95:3; A32–33.) And from within a Document Number Inquiry, the “F2” key brings up additional information about the referenced document, the “F8” key brings up information about the affected legal description(s), and the “F13” key brings up an image of the selected document, if available. (A32–33; A23 at 91:21 – A24 at 95:7.) Importantly, only a Document Number Inquiry displays the legal description(s) encumbered by the referenced document number. (*Compare* A32–33 *with* A30.)

Thus, with the computer database underlying it, the TriMin generates consistent results responsive to any search or further inquiry by drawing from the same information

source regardless of the path taken to access it.<sup>4</sup> (*See* A12 at 45:5–46:2.) Accordingly, as discussed below, the various searches done to locate the MidCountry Mortgage confirm that, as a result of a single recording error—the omission of the Hinshaw Property’s legal description from the record of the MidCountry Mortgage—that legal description did not appear to be encumbered by the mortgage when Hinshaw and PHH acquired their interests in the property, regardless of whether one searched by legal description, grantor name, or document number.

## **II. Errors made in the attempted recording of the MidCountry Mortgage.**

Frederick and Nancy Krueger are the predecessors in title to Cherolyn Hinshaw and owned the Hinshaw Property before selling it to Hinshaw in May 2006. About two years earlier, on May 13, 2004, Kruegers received a loan from First Federal fsb (now MidCountry) and used that loan to purchase and to begin building a new home on two unrelated lots (the “Krueger Properties”). (A37–50.) The Krueger Properties are legally described as:

Lot 18, Block 5, City of Belle Plaine, Scott County, Minnesota; and

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. (A196.)

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<sup>4</sup> The Court of Appeals’ decision, however, misunderstood the nature of this system, asserting that “it is still possible that the indexer could, as here, err such that the document is indexed in only one of the statutorily-required indices.” 762 N.W.2d 278, 283 (Minn. Ct. App. 2009). Since all TriMin searches draw from the same data source, TriMin searches generate consistent results across all indexes.

As security for the loan from MidCountry, Kruegers gave MidCountry a mortgage, which on its third page purports to encumber both the Krueger Properties and the Hinshaw Property. (A52–63.) The Hinshaw Property is legally described as:

Lot 12, Rearrangement of Block 44, Borough of Belle Plaine, Scott County, Minnesota. (A54.)

On May 19, 2004, the deed to the Krueger Properties and the MidCountry Mortgage were taken to the Scott County Recorder’s Office to be recorded. (A51, 52.) The following day, to begin the recording process, the Krueger deed and the MidCountry Mortgage, respectively, received and were marked with document numbers A657035 and A657036. (*Id.*) Consistent with the standard practice of the county recorder’s office, the staff then entered the grantor and grantee names and the legal descriptions from the Krueger deed into the TriMin electronic recording system. (A15 at 60:22–60:25.)

After the details of the Krueger deed were entered into the TriMin, the county recorder staff proceeded to enter information about the MidCountry Mortgage that followed it. As is commonly done during this process, “the person inputting [the grantor and grantee names and the legal description] just cloned the legal [description] off of the Warranty Deed [to Kruegers].” (A16 at 61:10–61:13.) And consequently, because the accompanying deed referenced only the newly purchased Krueger Properties, the legal description of the Hinshaw Property was not entered into the TriMin recording system as a property encumbered by the MidCountry Mortgage. (A16 at 62:2–62:8; A32–33.)

Hinshaw purchased her property and gave a mortgage to PHH in May 2006. (A64.) The warranty deed from Kruegers to Hinshaw and the mortgage to PHH were

recorded on May 31, 2006 as document numbers 740490 and 740491, respectively. (A64–65.)

After Kruegers became delinquent in their loan payments, MidCountry began this lawsuit to foreclose its Mortgage. Thus, on October 18, 2006, MidCountry attempted to record a notice of lis pendens to alert third parties to the pendency of this action. (A17.) But “[w]hen the lis pendens came in, [the county recorder’s office] cloned the document number referencing the mortgage, which also brought forward on the lis pendens the [Krueger Properties’] legal description[s].” (A17 at 66:21–66:24.) As a result, “the lis [pendens] input also failed to show the Hinshaw Property as a referenced property.” (A17 at 68:13–68:16; A87–88.)

### **III. Title examinations of county records performed before Hinshaw’s purchase of her property and after the commencement of this lawsuit.**

#### **A. Burnet Title examinations on behalf of Hinshaw and PHH.**

Before Hinshaw purchased her property in May 2006, a licensed abstractor from Burnet Title, Inc., Monica Meyer Javens, carried out two title examinations on behalf of Hinshaw and PHH. On November 29, 2005, Javens went to the Scott County Recorder’s Office and searched the TriMin for all documents recorded against the Hinshaw Property. (A69–70.) While there, Javens transcribed onto a title worksheet the document numbers of all records posted to the property since July 15, 1992. (A70, 75.) The MidCountry Mortgage—document number A657036—did not appear when Javens performed her search. (*Id.*)

On April 4, 2006, Javens performed a second search for any documents recorded against the Hinshaw Property since November 4, 2005, the date through which her earlier search results were verified. That search revealed two additional documents, but again did not show the MidCountry Mortgage. (A70.) Javens again noted her findings on a title worksheet. (A78.) As part of her April 4, 2006 title examination, Javens also performed a search using ORBIT, a separate, proprietary land-records system maintained by Old Republic Title. Javens' findings on ORBIT were consistent with the findings from her TriMin search, and she incorporated the printed ORBIT search results into her title worksheet. (A70, 77.) Hinshaw and PHH closed on the property in May 2006. (A64–65.)

On about October 6, 2006, Hinshaw went to Burnet Title with the summons and complaint she had just received relating to this lawsuit. (A71.) Based on the complaint, Javens proceeded to carry out additional title searches of the Hinshaw Property. She began with two online ORBIT searches: a search for “Lot 12, Block 44, Belle Plaine a.k.a. Borough of Belle Plaine” still did not reveal the MidCountry Mortgage (A71, 80–81); a search for “Lot 12, Block \_\_\_, Rearrangement of Block 44, Belle Plaine,” however, did reveal the mortgage (A71, 82–83).<sup>5</sup> Having found the document number of the

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<sup>5</sup> Scott County's TriMin system does not recognize a plat for “Rearrangement of Block 44,” which is part of the Hinshaw Property's legal description. (A69.) Instead, TriMin searches according to legal description require use of a five-digit plat number, which is derived from the first five digits of the property tax identification number. (*Id.*) In the case of the Hinshaw Property, this number is 20001, which the TriMin identifies as “Belle Plaine Borough.” (*Id.*) Accordingly, the TriMin does not allow searches with the alternative “Rearrangement of Block 44” plat. (A25 at 97:10–97:25.)

MidCountry Mortgage—A657036—through ORBIT, Javens searched Scott County’s TriMin online for that document number. The TriMin Document Number Inquiry search results indicated that the mortgage encumbered the Krueger Properties, but not the Hinshaw Property. (A71.) Javens then went to the Scott County Recorder’s Office and searched the TriMin on site for Frederick Krueger in the grantor-grantee field. The search results list did include the document number of the MidCountry Mortgage. They did not, however, identify the Hinshaw Property as encumbered by it. (A72.)

Two weeks later, on October 20, 2006, Javens conducted another TriMin search from the Scott County Recorder’s Office. Javens’ supervisors instructed her to “[p]lease check to see if mortgage doc #A657036 has been posted to the [Hinshaw] legal description.” (A84.) Javens made a note on the same page: “Mtg Doc #657036 not posted against our legal description as of 12:45 p.m. 10/20/06.” (*Id.*)

Javens performed her next searches three days later, on October 23, 2006. Using Scott County’s online TriMin access, Javens located the MidCountry Mortgage through a grantor search and again found that it encumbered only the Krueger Properties. (A72, 85–86.) Javens also searched specifically for document number 754355—the notice of lis pendens filed by MidCountry on October 18, 2006—and found that it, too, was recorded as encumbering only the Krueger Properties. (A72, 87–88.) She returned to the Scott County Recorder’s Office and searched the TriMin using the legal description of the Hinshaw Property and then using the names of Frederick and Nancy Krueger in the grantor-grantee fields. When the MidCountry Mortgage again did not appear as an

encumbrance against the Hinshaw Property, Javens noted: “Mtg #657036 not posted against our legal description as of 2:15 p.m. 10/23/06.” (A73, 89.)

Finally, on November 13, 2006, Javens returned to Scott County and located the records of both the MidCountry Mortgage and MidCountry’s notice of lis pendens by document number. Document Number Inquiries for both documents still failed to show that they encumbered the Hinshaw Property. (A73, 90–91.)

**B. Land Title examinations on behalf of MidCountry.**

In connection with its commencement of this lawsuit, MidCountry requested that Land Title, Inc. (“Land Title”) examine the title to the Hinshaw Property. (A106 at 59:4 – A107 at 63:12.) On October 24, 2006, a Land Title abstracter, Joanne Schutte, accessed Scott County’s TriMin system remotely from Land Title and searched for the MidCountry Mortgage, document number A657036. Schutte’s search, like those conducted by Javens, found the MidCountry Mortgage to be recorded against only the Krueger Properties. (A110 at 74:1–76:19.) On her Document Number Inquiry search results, Schutte wrote, “error on posting, missed 3<sup>rd</sup> legal.” (A33.)

Then on November 21, 2006, Rosalind Jennrich, supervisor of Land Title’s Abstract Department, searched for the MidCountry Mortgage by document number using the Scott County property-records website. (A113 at 86:12–86:20.) Asked whether the Hinshaw Property’s legal description appeared in the list of properties encumbered by the MidCountry Mortgage, Jennrich stated simply, “[i]t was not there.” (A111 at 80:9.) Approximately one week later, Jennrich sent an e-mail to counsel for MidCountry that

described the problem and said, “Scott County appears to have erroneously omitted to post the Mortgage to the above-described [Hinshaw] legal description.” (A123.)

Jennrich examined the property records for the Hinshaw Property a final time on April 13, 2007 using the Scott County property-records website. This time, the MidCountry Mortgage did appear as an encumbrance against the Hinshaw Property, but its document number appeared out of order, *after* Hinshaw’s deed and PHH’s mortgage and immediately before MidCountry’s notice of lis pendens.<sup>6</sup> (A117 at 103:19–104:2; A118 at 105:3–105:18.) Jennrich stated, “this tells me someone went to the County and told them that they misposted this.” (A117 at 104:7–104:8.)

#### **IV. Scott County’s correction of the MidCountry Mortgage and notice of lis pendens recording errors after commencement of this lawsuit.**

In her deposition testimony, Scott County Recorder Patricia Boeckman confirms that some time after this lawsuit was filed, Scott County’s TriMin system was altered to add the Hinshaw Property’s legal description to the records of both the MidCountry Mortgage and its notice of lis pendens. While the recorder’s office does not keep records of such changes, Boeckman does recall changing the record for MidCountry’s notice of lis pendens on March 16, 2007 to include the Hinshaw Property’s legal description. (A17 at 67:5–68:18.) Boeckman and her deputy carried out this change after conversations with someone from the offices of MidCountry’s counsel. (*Id.*)

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<sup>6</sup> County recorders are required to index documents in numerical order “as to time in which the instruments are received.” Minn. Stat. §§ 386.03, 386.05.

As to the MidCountry Mortgage, the recording error was corrected and the legal description of the Hinshaw Property was added to the TriMin record of the mortgage at some time between late October 2006 and February 1, 2007. According to Boeckman, when MidCountry filed its notice of lis pendens on October 18, 2006, Boeckman's office used the TriMin's cloning tool to copy the legal descriptions directly from the TriMin record of the MidCountry Mortgage. (A17 at 66:21–66:25; 68:8–68:18.) The result was that the Hinshaw Property's legal description also did not appear in the record of the notice of lis pendens. (*Id.*; A90–91.) In light of this, Boeckman determined that the MidCountry Mortgage was not recorded as an encumbrance against the Hinshaw Property as of late October 2006. (*Id.*) Then on November 13 and November 21, 2006, respectively, abstracters Monica Meyer Javens of Burnet Title and Rosalind Jennrich of Land Title both searched Scott County land records and determined that the MidCountry Mortgage still did not appear as an encumbrance against the Hinshaw Property. (*See* discussion *supra* at 13.) Boeckman believes that someone brought the error in the MidCountry Mortgage record to the attention of her office, prompting someone to add the Hinshaw Property to the record of the mortgage. (A23 at 89:20–90:3.) The first documented confirmation that the record of the MidCountry Mortgage was indeed changed to add the Hinshaw Property's legal description is a TriMin search dated February 1, 2007. (A124.)

## ARGUMENT

### **I. Standard of review.**

“On appeal from summary judgment, [the Supreme Court] determine[s] whether there are any genuine issues of material fact and whether a party is entitled to judgment as a matter of law.” *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 630 (Minn. 2007). As the district court noted in its January 30, 2008 order, “Counsel agree that there are no material facts in dispute and submit the matter on cross motions for summary judgment.” (Add. 2.) “When the material facts are not in dispute, [the Supreme Court] review[s] the lower court’s application of the law de novo.” *Wensmann*, 734 N.W.2d at 630.

### **II. Because the MidCountry Mortgage was not “properly recorded,” Hinshaw and PHH are bona fide purchasers without notice of the mortgage, and the mortgage is void as to their interests.**

#### **A. Subsequent purchasers of real property have constructive notice of “properly recorded” instruments.**

The Minnesota Recording Act provides that “[e]very conveyance of real estate shall be recorded in the office of the county recorder . . . ; and every such conveyance not so recorded shall be void as against any subsequent purchaser in good faith and for a valuable consideration . . . whose conveyance is first duly recorded.”<sup>7</sup> Minn. Stat. § 507.34. A good-faith purchaser is defined as “one who gives consideration in good faith without actual, implied, or constructive notice of inconsistent outstanding rights of

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<sup>7</sup> A mortgage is a conveyance of real estate within the meaning of § 507.34. *Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 524–25 (Minn. 1990).

others.” *Anderson v. Graham Inv. Co.*, 263 N.W.2d 382, 384 (Minn. 1978). “A purchaser who has either actual, implied, or constructive notice of such outstanding rights is not a bona fide purchaser entitled to the protection of the Recording Act.” *Id.* Section 507.34 serves “as a shield to protect parties against claims to the real estate of which they had no prior notice.” *Wash. Mut. Bank v. Elfelt*, 756 N.W.2d 501, 506 (Minn. Ct. App. 2008).

Under the Recording Act, “[t]he record . . . of any instrument **properly recorded** shall be taken and deemed notice to parties.” Minn. Stat. § 507.32 (emphasis added). This Court has defined the constructive notice afforded by a properly recorded instrument as “a creature of statute [that], 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 v. Hennen*, 438 N.W.2d 366, 369–70 (Minn. 1989). Consequently, the determination of whether a document was “properly recorded” and able to provide notice is not dependent on the steps taken by a purchaser to verify title—or whether a purchaser took *any* steps to verify title. *Bailey v. Galpin*, 41 N.W. 1054, 1056 (Minn. 1889). Instead, the statute asks objectively whether an instrument was “properly recorded.” If so, a subsequent purchaser is regarded as having notice; the scope of title examinations conducted on Hinshaw’s behalf is therefore irrelevant to whether the record of the

MidCountry Mortgage provided constructive notice.<sup>8</sup> As a matter of law—and as conceded by the Scott County Recorder—the mortgage was not properly recorded in May 2006 when Hinshaw and PHH acquired their interests in the Hinshaw Property. Consequently, Hinshaw and PHH had no constructive notice of the MidCountry Mortgage and are bona fide purchasers under the Recording Act.<sup>9</sup>

**B. Minn. Stat. §§ 386.03 through 386.05 establish the requirements for proper recording.**

Purchasers are entitled to rely on the property records maintained by county recorders. *Miller v. Hennen*, 438 N.W.2d 366, 370 (Minn. 1989) (holding that counties are “required by law to make accurate and appropriate [index] entries”); *Wash. Mut. Bank v. Elfelt*, 756 N.W.2d 501, 506 (Minn. Ct. App. 2008). Chapter 386 of the Minnesota Statutes identifies the indexes and records that a county recorder is required to keep and makes plain that Scott County’s property indexes were required to identify all the properties affected by the MidCountry Mortgage. Minn. Stat. §§ 386.03, 386.04, 386.05.

The three property-record indexes provided for by statute are:

- a **grantor’s and grantee’s reception index**, which must include the date and time an instrument was received to be recorded, the grantor and grantee, where the land is situated, to whom the instrument should be returned after recording, fees

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<sup>8</sup> Thus, the Court of Appeals was wrong to place any emphasis on the pre-purchase title examination conducted by Hinshaw, such as when the court states that Hinshaw’s abstractor “unfortunately” examined only the tract index or Hinshaw’s abstractor conducted an “abbreviated” search. 762 N.W.2d at 284. Furthermore, MidCountry’s own abstracters determined that the MidCountry Mortgage was not recorded as encumbering the Hinshaw Property. (See discussion *supra* at 13 et seq.)

<sup>9</sup> MidCountry has never argued that Hinshaw or PHH had actual or implied notice of the mortgage. The only issue in this action, therefore, is whether Hinshaw and PHH had constructive notice of the MidCountry Mortgage as a matter of law.

received, instrument number, and the type of instrument, Minn. Stat. § 386.03;

- a **consecutive index**, which must include the document number of the instrument, the type of instrument, the time of receipt for recording, and where the document is recorded, Minn. Stat. § 386.32; and
- a **tract index**, which must include the legal description of the affected land, the type of instrument, and information about the book and page or the document number by which the corresponding document may be found, Minn. Stat. § 386.05.

Scott County and other Minnesota counties, however, are “authorized to combine the reception index required by section 386.03 and the consecutive index required by section 386.32” for use with electronic media. Minn. Stat. § 386.04. According to statute:

- a **combined numerical register and reception index** must include the date and time of receipt for recording, the instrument’s number, grantor, grantee, where the affected land is situated, to whom the instrument should be delivered after recording, where the instrument is recorded, the type of instrument, and the fees received. Minn. Stat. § 386.04.

As a result, the scope of index records that a county recorder must maintain is defined by §§ 386.03, 386.04, and 386.05.<sup>10</sup> Significantly, each of these statutes require recording and indexing of “where the land is situated,” or the legal descriptions, affected by an instrument such as a mortgage. Minn. Stat. §§ 386.03, 386.04, 386.05. Despite these statutes, however, Scott County’s unified indexing system—regardless of whether searched by grantor-grantee or by legal description (tract)—failed to identify the

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<sup>10</sup> The Court of Appeals repeatedly refers to the § 386.03 grantor-grantee index as “historically primary.” 762 N.W.2d at 280, 283. Scott County, however, has also long maintained a tract index “as one of the records in the office of the county recorder,” and the maintenance of a tract index is mandatory. Minn. Stat. § 386.05. Thus, neither index may be considered “primary.” Additionally, whether any index is “historically primary” is irrelevant because *none* of Scott County’s indexes, including the grantor-grantee index, contained the legal description of the Hinshaw Property in May 2006.

Hinshaw Property as encumbered by the MidCountry Mortgage. (A72–73.) Accordingly, the mortgage was not “properly recorded” and did not constitute constructive notice to Hinshaw and PHH under Minn. Stat. § 507.32.

**C. Hinshaw and PHH had no constructive notice of the MidCountry Mortgage.**

**1. *The MidCountry Mortgage was not properly recorded in May 2006.***

By operation of §§ 386.03, 386.04, and 386.05, the Hinshaw Property’s legal description was required to be—but through a recording error, was not—a part of any county property-records index. Thus, a TriMin search using grantor Frederick or Nancy Krueger’s name—identified by MidCountry and regarded by the Court of Appeals as the § 386.03 grantor’s and grantee’s reception index—was required to reveal the legal description of the Hinshaw Property, but did not. (A72, 85–86, 89.) Moreover, even a Document Number Inquiry—the screen accessed by marking an “X” next to a document found through a grantor’s and grantee’s reception-index search—failed to identify the Hinshaw Property as encumbered by the MidCountry Mortgage. (A32–33.) Similarly, a TriMin search using the legal description of the Hinshaw Property—a § 386.05 tract-index search—was also required to reveal the MidCountry Mortgage, but did not. (A69–70, 126–28; *see also* discussion *supra* at 10 et seq.)

Taken together, these facts confirm that the Court of Appeals plainly erred when it found that “[t]he MidCountry mortgage was indexed in the Scott County grantor-grantee index in association with the Kruegers’ names *as an encumbrance against parcels 1, 2, and the Hinshaw property.*” 762 N.W.2d 278, 281 (Minn. Ct. App. 2009) (emphasis

added).<sup>11</sup> The § 386.03 grantor's and grantee's reception index—one containing the results of a TriMin search by grantor name—simply did not contain the “where situated” information required by § 386.03. (A30–31.) The same was true even when examining the details of the MidCountry Mortgage through a Document Number Inquiry. (A32–33.) Because the TriMin index, *however viewed*, did not contain the “where situated” information required by Minn. Stat. §§ 386.03, 386.04, and 386.05, the MidCountry Mortgage was not “properly recorded” and was not constructive notice to Hinshaw and PHH.

This conclusion is consistent with the holding of this Court in *Thorp v. Merrill*, 21 Minn. 336 (1875), which closely parallels the facts at issue here. In *Thorp*, a mortgage document purported to encumber “the west half of the *southeast* quarter of section fourteen.” *Id.* (emphasis added). When delivered for recording, the document was given “the usual certificate of the register of deeds, stating that the mortgage was filed for record on a day named, and ‘was duly recorded in book F,’ etc.” *Id.* But when the mortgage was entered into the county records, “the mortgaged premises [were] described as ‘the west half of the *northeast* quarter of section fourteen.’”<sup>12</sup> *Id.* (emphasis added).

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<sup>11</sup> The comments to Minnesota Title Standard No. 37, cited by the Court of Appeals actually support Hinshaw's and PHH's position: “a person is charged with constructive notice of the information indexed in both indices.” Here, the MidCountry Mortgage was not recorded as an encumbrance against the Hinshaw Property in *either* index.

<sup>12</sup> The Court of Appeals misstated the material facts in *Thorp*. The court asserted that “[i]n *Thorp*, the subject instrument contained an erroneous legal description of the property to which the mortgage applied.” 762 N.W.2d 278, 285 (Minn. Ct. App. 2009). A plain reading of *Thorp*, however, demonstrates that the error in fact occurred in the *recording* of the mortgage, not in the mortgage document itself. 21 Minn. 336 (1875).

On this basis, the Court concluded that “[t]he effect of the error in the record is that the mortgage is not recorded.” *Id.* Thus, the mortgage was not constructive notice to third parties, and the mortgagee was not entitled to foreclose. *Id.* The outcome in this case should be no different.

2. *The case of Latourell v. Hobart leads to the same result as Thorp v. Merrill.*

In an attempt to avoid the consequences of the improper recording of its mortgage, MidCountry relies on language from *Latourell v. Hobart* stating that “[a] subsequent 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.” 160 N.W. 259, 260–61 (Minn. 1916). Thus, MidCountry claims that Hinshaw and PHH had constructive notice of the MidCountry Mortgage because (1) the document number of the mortgage appeared in the grantor’s and grantee’s reception index under Frederick Krueger’s name, and (2) the mortgage itself—on its third page—included the legal description of the Hinshaw Property. For the reasons identified below, however, *Latourell* does not stand for the proposition MidCountry claims and instead supports the result reached by the district court.

In *Latourell*, the original owner of the property at issue, Skinner, conveyed property in Pine County to Hayward in 1856, on the same day on which he gave Hayward eleven other deeds to different properties. *Id.* at 259. The Supreme Court deduced several facts relating to the deed and its recording: the deed at issue (which had since been lost), as well as all eleven other deeds, correctly described the land as located

in range 22. *Id.* When the deed was delivered for recording, it was correctly noted in the reception index (now the § 386.03 “grantor’s and grantee’s reception index”) as located in range 22. *Id.* at 259–60. But when later transcribed into the full-text record (the predecessor to present-day photocopies or electronic document images), the record of the instrument erroneously indicated that it was located in range 19, rather than 22, even though “[t]here is no section 32, town 39, range 19, in Pine county, or anywhere in Minnesota.” *Id.* at 259. Then in 1902, another individual, Greeley, “apparently cognizant of this condition of the record,” obtained quitclaim deeds to the property from Skinner’s heirs. *Id.*

The *Latourell* Court was called upon to decide whether the chain of title flowing from Hayward’s 1856 deed or from Greeley’s 1902 quitclaim deeds was superior and sufficient to convey title. Reversing the trial court, this Court held that the successor to Hayward “proved title to his land, [and] that [Greeley and his successors] were charged with notice both of the entries in the reception book and of the full record.” *Id.* at 261. Those two records, the Court held, “together furnished ample information as to the deed . . . and of appellant’s title to the land.” *Id.*

For several significant reasons, *Latourell* does not lead to the result that MidCountry urges in this case. First, unlike Hinshaw and PHH, Greeley had *actual notice* of Skinner’s prior conveyance to Hayward. *Id.* at 259 (noting that Greeley was “cognizant of this condition of the record”). Second, even if Greeley had not had actual notice, he nonetheless had *constructive notice* because the reception index contained the correct legal description. *Id.* Furthermore, upon following the entry in the reception

index to the transcript of the actual deed, it would have been apparent, based on a variety of facts, that the legal description appearing there was not a valid legal description at all and was transcribed in error. *Id.* And finally, *Latourell* involved the reverse and vastly simpler error than that involved in this case: a correct index entry but an obviously incorrect handwritten transcript of the deed itself. Here, on the other hand, there was no index entry at all that would have reasonably led a person examining title to look at the transcript (now the electronic image) of the instrument at issue. This Court in fact noted the significance of the distinction: “The record book [transcript or image] and the index book [reception index] 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.” *Id.* at 261 (quoting *Barney v. Little*, 15 Iowa 527, 535 (1864)) (emphasis added).

In *Latourell*, the index made the requisite reference, identifying where the encumbered land was situated. In this case, the index did not. The grantor’s and grantee’s reception-index searches for Frederick or Nancy Krueger did not disclose that the MidCountry Mortgage encumbered the Hinshaw Property, as required by the “where situated” clause of § 386.03. (A30–31.) Similarly, the tract index search results for the Hinshaw Property’s legal description did not disclose that the MidCountry Mortgage encumbered the Hinshaw Property, as required by Minn. Stat. § 386.05. (A69–70, 73, 75.) Because neither the grantor’s and grantee’s reception index nor the tract index made

the “requisite reference” to the Hinshaw Property, the mortgage was not “properly recorded” under § 507.32 and was not constructive notice to Hinshaw or PHH.

3. ***Other jurisdictions and the modern trend support the result compelled by Thorp and Latourell that the MidCountry Mortgage was not properly recorded and did not provide constructive notice.***

Cases from other jurisdictions and the commentaries of legal treatises support the result flowing from *Thorp* and *Latourell* that the MidCountry Mortgage was not properly recorded so as to afford constructive notice to Hinshaw and PHH. In *Howard Savings Bank v. Brunson*, 582 A.2d 1305 (N.J. Super. Ct. Ch. Div. 1990), the owner of the property at issue gave a mortgage to Howard Savings Bank. *Id.* at 1306. The mortgage was soon recorded, but was not properly indexed until nearly two years later. *Id.* And like here, the owner conveyed the property to a subsequent purchaser without actual knowledge of that mortgage before it was properly indexed. *Id.* The New Jersey court was called upon to decide “whether the requisite notice is achieved through the mere recordation of a mortgage or whether notice is achieved only if the mortgage is also properly indexed.” *Id.* at 1307. Citing the New Jersey statutes—which closely parallel the relevant Minnesota statutes—the court held that without proper indexing, no notice is afforded to third parties. *Id.* at 1308–09. “[T]he recording and indexing statutes must be read *in pari materia* such that they are construed together as a unitary and harmonious whole in order that each may be fully effective.” *Id.* at 1309 (internal citations omitted). The court stated, “the object of the recording statutes is to prevent imposition upon subsequent bona fide purchasers and mortgagees; for without an index, searching for a

mortgage in the public records would be like looking for the proverbial needle in a haystack.” *Id.* at 1308 (internal citations omitted).

Similarly, the Iowa Supreme Court addressed facts almost identical to this case in *Noyes v. Horr*, 13 Iowa 570 (1862). There, the plaintiff’s mortgage covered two distinct tracts of land, but the register “omitted in the index or entry-book to give any description whatever of the last of these two tracts while he did describe . . . the first.” *Id.* The court held that the mortgage, as indexed and recorded, was insufficient to impart constructive notice to subsequent purchasers or encumbrancers of the second tract: the subsequent purchasers found “one tract of land duly described in the general index, [and] nothing to indicate that there was a second tract included in the same mortgage, [and] no other note or memorandum that would put a reasonably cautious person upon inquiry.” *Id.*

Courts in other states surrounding Minnesota have reached the same conclusion. *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. Failure to index an instrument in the tract index does not constitute such compliance.”). As aptly stated in one treatise, “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. . . . [T]he 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.

Here, there is no legitimate dispute that the MidCountry Mortgage was not recorded as required by the “where situated” clauses of §§ 386.03, 386.04, and 386.05.

This effectively rendered the MidCountry Mortgage an unrecorded “needle in the haystack.” The Court should therefore reverse the Court of Appeals and hold that Hinshaw and PHH had no constructive notice of the mortgage.

**D. The date-and-time stamp on the MidCountry Mortgage is evidence only of the date and time Scott County received the instrument.**

MidCountry has argued throughout this case—and the Court of Appeals incorrectly held—that the date-and-time stamp placed on its mortgage after it was delivered to the Scott County Recorder’s Office is conclusive proof that the mortgage was “properly recorded.” (*See* A52.) MidCountry and the Court of Appeals’ base their conclusion on Minn. Stat. § 386.41, which provides:

Every county recorder shall endorse upon each instrument 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.<sup>13</sup>

Contrary to MidCountry’s assertions, however, the stamp placed on a document by virtue of § 386.41 has no bearing on whether it is “properly recorded” for purposes of providing notice to subsequent purchasers. This Court addressed precisely this argument in *Thorp v. Merrill*, where the mortgagee claimed “that this certificate is to be regarded as *conclusive* upon the point of a valid record at the date of the certificate.” 21 Minn. 336

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<sup>13</sup> The Court of Appeals’ decision cites § 386.41 for the incorrect proposition, asserting that it “provides that an instrument is *properly recorded* if the document bears the certificate of the county recorder.” 762 N.W.2d 278, 283 (emphasis added). The language of the statute itself, however, does not address “proper” recording. Minn. Stat. § 386.41.

(1875) (emphasis in original). Rejecting that argument, this Court held: “[i]t may well be doubted whether this provision of the statute has any application to an instrument which is so mis-recorded as to be, in effect, not recorded at all. . . . [T]he provision goes no farther, at most, than to make the certificate . . . conclusive *as to the time of the receipt and record* of an instrument recorded.” *Id.* (emphasis added). Under *Thorp* and Chapter 386, therefore, “proper recording” requires more than merely affixing the recorder’s stamp to the document. As the testimony of the Scott County recorder shows, the placement of a stamp with the recorder’s endorsement is merely the first step in a multi-step recording and indexing process. (See discussion *supra* at 5 et seq.)

The flaws in MidCountry’s argument and in the Court of Appeals’ holding on this issue are further apparent from the single case that both rely on. MidCountry and the Court of Appeals cite the case of *Thomas v. Hanson* for the notion that an official endorsement from a county recorder means that a document was properly recorded. *MidCountry Bank v. Krueger*, 762 N.W.2d 278, 284 (Minn. Ct. App. 2009). The *Thomas* case, however, in no way addressed the question of whether or not a county recorder’s stamp was sufficient to effect “proper recording.” *Thomas v. Hanson*, 61 N.W. 135 (Minn. 1894). Instead, that case analyzed the effect of a document purportedly recorded in 1862 in Toombs County, Minnesota, as to which the trial court had found “no evidence . . . that said county of Toombs was ever organized, or that [the purported county

recorder] was ever appointed to said office.”<sup>14</sup> *Id.* at 136. The Supreme Court held that Toombs County was established and organized in 1858, that the persons serving as public officials of the county, while apparently never appointed by the governor, could indeed be considered public officers because they acted as such, and that documents recorded in Toombs County continued to be constructive notice to purchasers after its mergers and name changes. *Id.* Contrary to MidCountry’s arguments, the *Thomas* decision is of no greater import than this and says nothing as to whether a stamp is conclusive proof of “proper recording” for purposes of Minn. Stat. § 507.32.

As in *Thorp*, the date-and-time stamp on the MidCountry Mortgage is conclusive only as to the date and time the Scott County Recorder’s Office received the mortgage to be recorded. And as to the Hinshaw Property, the MidCountry Mortgage was “so mis-recorded as to be, in effect, not recorded at all.” *Thorp v. Merrill*, 21 Minn. 336 (1875). Consequently, the stamp is irrelevant to whether Hinshaw and PHH had constructive notice of the mortgage.

**E. Because Hinshaw and PHH did not have constructive notice that the MidCountry Mortgage encumbered the Hinshaw Property, they constitute bona fide purchasers under Minn. Stat. § 507.34.**

The Minnesota Recording Act provides that a conveyance of real estate “shall be void as against any subsequent purchaser in good faith and for a valuable consideration of

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<sup>14</sup> According to *Thomas*, “the name of Toombs county was changed to Andy Johnson county [and] was attached to Stearns county for judicial and recording purposes [in 1864].” 61 N.W. at 136. In 1867, “Andy Johnson county was attached for judicial and recording purposes to Douglas county; and [in 1868] its name was changed to Wilkin county.” *Id.* at 137.

the same real estate, or any part thereof, whose conveyance is first duly recorded.” Minn. Stat. § 507.34. As discussed above, Hinshaw and PHH were “good faith purchasers” of the Hinshaw Property: it is undisputed that they provided valuable consideration for their interests in the property and that their deed and mortgage were “duly recorded” on May 31, 2006. (A64–65.) The MidCountry Mortgage, on the other hand, was not “properly recorded” on May 31, 2006, and the county did not correct the recording errors until sometime later, between late October 2006 and February 1, 2007. (See discussion *supra* at 14 et seq.) As a result, the MidCountry Mortgage is void as to Hinshaw and PHH, and MidCountry may not foreclose its mortgage against the Hinshaw Property.

### **III. The decision of the Court of Appeals will have serious negative effects on real estate transactions in Minnesota.**

The Court of Appeals concluded that Hinshaw “was obligated to read the entire record, which included MidCountry’s Mortgage.” 762 N.W.2d at 875. Thus, according to the court, subsequent purchasers cannot rely on the recording and indexing performed by county recorders. Rather, they must *assume* that the recording indexes maintained by the county are not accurate and must read the full text of every document referenced in any index in order to confirm whether each document was indeed “properly recorded.” In this case, MidCountry argued, and the Court of Appeals agreed, that Hinshaw and PHH were charged with constructive notice of every word and provision contained in the actual text of every document listed in the grantor’s and grantee’s reception index search for grantors Frederick or Nancy Krueger. *Id.* Nothing in the indexes themselves, however, indicated that the MidCountry Mortgage or any other document had been

erroneously recorded or indexed. As stated in *Noyes v. Horr*, there was simply nothing in the indexes “to indicate there was a [third] tract included in the same mortgage.” 13 Iowa 570 (1872).

Ultimately, the Court of Appeals’ decision also amounts to a public-policy determination that, when a county recorder makes an error in the recording process such that an instrument cannot be located through ordinary search methods, the subsequent purchaser without knowledge of the instrument bears the risk of loss flowing from the recording error. Substantial public-policy considerations, however, counsel in favor of placing the risk instead on the party attempting to record its instrument. “As 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 *Patton & Palomar on Land Titles* § 64 (2003). In other words, the party recording an instrument is the only one with knowledge of the instrument, the ability to check for and identify recording errors, and the standing to have errors corrected.

Subsequent purchasers, on the other hand, can only guess as to the nature of potential errors, and the list of conceivable recording errors is long. The problem in this case was a missed legal description. It is not difficult to imagine, however, that recording errors could also include a legal description with the correct lot but the wrong block, a grantor or grantee name using an incorrect spelling, or any number of other defects. As with the error that occurred in this case, the party seeking to have an instrument recorded—and thus seeking the benefits and protections of “constructive notice” afforded

by the Recording Act—is typically the only party with knowledge sufficient to spot the problem. As a matter of public policy, the Court of Appeals’ decision should be reversed in order to most efficiently allocate the economic costs and risks arising from errors in the recording of instruments affecting real estate.

The negative implications of the Court of Appeals’ decision are even more apparent when considered in the context of today’s home-building and home-buying economy. While the number of documents that a search for “Frederick Krueger” reveals may be limited, it is a different matter when—as is often the case—the seller of a property is a large home builder or a major bank selling property obtained through foreclosure. The Washington County grantor index references more than 10,000 recorded instruments each for home builders Centex Homes and Pulte Homes, for example. Similarly, the Hennepin County grantor index for Wells Fargo Bank also references more than 10,000 documents.<sup>15</sup> As a result of the decision of the Court of Appeals, one purchasing from Centex, Pulte, or Wells Fargo is now charged with constructive notice of—and must review—every one of the thousands of documents identified on these indexes. As the New Jersey court stated in *Howard*, “[i]t would be *unreasonable* to saddle a purchaser with the obligation of thumbing through every page of every record book in the county register’s office . . . in order to overcome the risk of improper indexing, given the enormous number of real estate transactions which occur

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<sup>15</sup> As matters of public record, the Court may take judicial notice of these facts. Minn. R. Evid. 201.

and are recorded daily.” *Howard Savings Bank v. Brunson*, 582 A.2d 1305, 1309 (N.J. Super. Ct. Ch. Div. 1990).

The decision below may also exacerbate the crises in the current real estate market. If the decision of the Court of Appeals stands, title examinations will be more burdensome, real estate closings will be more expensive, and more people will be precluded from buying property. The New Jersey court in *Howard* expressed the same concern:

lengthy title searches would cost more and would cause unreasonably long closings; potential purchasers, mortgagors and lenders would hesitate to be involved in commercial transactions where they could not be confident that a reasonable search of the record would reveal prior interests or where they feared being held liable for a clerk’s misindexing error; and the cost of title insurance would increase.

*Howard Savings Bank*, 582 A.2d at 1309. Additionally, because the Court of Appeals’ decision entails greater uncertainty and risk for purchasers, those purchasers may not be willing to pay as much for property as they otherwise would, depressing property values. Therefore, by placing the risk of loss on the recording party, not only would the comparative cost of avoiding that risk for each individual transaction go down, but the cost to the entire market and to society would go down as well.

Moreover, the better policy decision—placing the risk of loss from a recording error on the recording party such as *MidCountry*—is consistent with existing Minnesota case law and statutes. See *Thorp v. Merrill*, 21 Minn. 336 (1875); Minn. Stat. §§ 386.03, 386.04, 386.05, 507.32. As this Court has stated previously, “one who seeks a benefit from the recording laws must incur all the risks of the failure to have his papers spread

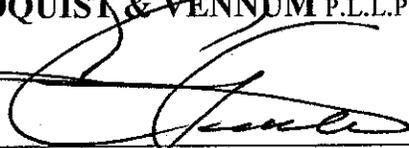
upon the record in proper form.” *Bailey v. Galpin*, 41 N.W. 1054, 1056 (Minn. 1889). Directly contradicting *Bailey*, the Court of Appeals has placed the risk of recording errors on subsequent purchasers, not on the parties seeking the benefit of the Recording Act. Thus, as a matter of both law and policy, the decision of the Court of Appeals must be reversed.

### CONCLUSION

Appellants Cherolyn Hinshaw and PHH Home Loans had no constructive notice of the MidCountry Mortgage in May 2006 when they acquired their interests in the Hinshaw Property because that mortgage was “so mis-recorded as to be, in effect, not recorded at all.” *Thorp v. Merrill*, 21 Minn. 336 (1875). Accordingly, the MidCountry Mortgage is void as to Hinshaw and PHH and may not be foreclosed against the Hinshaw Property. Minn. Stat. § 507.34. This Court should therefore reverse the holding of the Court of Appeals.

DATED: June 26, 2009

**LINDQUIST & VENNUM P.L.L.P.**

By 

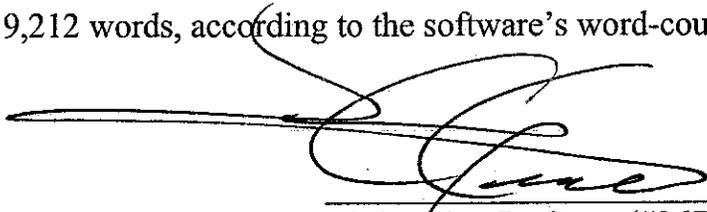
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**CERTIFICATE OF WORD COUNT COMPLIANCE**

I, Christopher R. Grote, hereby certify that this brief complies with the requirements of Minn. R. Civ. App. P. 132.01. This brief was prepared using Microsoft Word 2003 and contains 9,212 words, according to the software's word-count function.

  
Christopher R. Grote (#267995)