

NO. A08-0534

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State of Minnesota  
*In Supreme Court*

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

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,

*Appellants.*

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**BRIEF OF RESPONDENT MIDCOUNTRY BANK,  
F/K/A FIRST FEDERAL FSB**

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## STATEMENT OF THE ISSUES

**When a Mortgage is Properly Recorded and Indexed in One of the Statutorily Required Indices, Are Subsequent Purchasers of Encumbered Property Charged with Constructive Notice of the Mortgage?**

District Court Holding: The district court held that a document is not properly recorded—and thus does not give constructive notice of its contents— unless it is properly indexed in the tract index.

Court of Appeals Holding: The court of appeals reversed the district court and held that the county recorder's endorsement is presumptive proof of proper recording and that a party is charged with constructive notice of the contents of documents indexed in either the grantor-grantee index or the tract index.

Apposite Authorities:

Minn. Stat. § 386.41 (2008)

Minn. Stat. § 507.32 (2008)

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

## STATEMENT OF THE CASE

In October 2006, Respondent MidCountry Bank, f/k/a First Federal fsb (hereinafter "MidCountry"), commenced the present action in Scott County District Court seeking to foreclose a mortgage against three parcels of real property located in Belle Plaine, Minnesota. Appellants Cherolyn A. Hinshaw (hereinafter "Hinshaw") and PHH Home Loans, LLC, d/b/a Burnet Home Loans (hereinafter "PHH") appeared in the action and claimed that MidCountry's mortgage was void as against their interests in one of the parcels as they alleged they were *bona fide* purchasers in good faith and without knowledge of MidCountry's mortgage when they acquired their respective interests in the property.

MidCountry brought a motion for summary judgment in May 2007. In an Order filed in November 2007, the district court (the Honorable Rex Stacey) denied MidCountry's motion without any substantive memorandum and ordered the matter to proceed to trial.

At a subsequent pre-trial hearing, however, the district court acknowledged that it had not given careful consideration to MidCountry's motion, and both parties agreed that the matter should be submitted on cross motions for summary judgment because there were no issues of material fact. In an Order dated January 30, 2008, the district court concluded that MidCountry's

mortgage had not been properly recorded against the disputed parcel because it was not properly indexed in the tract index against that parcel. Accordingly, the court concluded that Hinshaw and PHH did not have actual, implied, or constructive notice of MidCountry's mortgage and thus were *bona fide* purchasers. The district court therefore concluded that MidCountry's mortgage is void as against Hinshaw and PHH's interests in the disputed parcel and granted summary judgment in favor of Hinshaw and PHH. (App. Add., at 6-7.<sup>1</sup>)

The Minnesota Court of Appeals reversed the district court's decision and held that MidCountry was entitled to judgment as a matter of law. *MidCountry Bank v. Krueger*, 762 N.W.2d 278, 286 (Minn. App. 2009).<sup>2</sup> The court concluded that "[a]bsent some evidence that the contents of the MidCountry mortgage did not include the Hinshaw property," the mortgage was properly recorded because it contained a certificate of recording and appeared in the grantor-grantee index. *Id.* at 284. The court also concluded that the record of a document includes not only the information contained in the grantor-grantee and tract indices, but also "the contents, including legal descriptions, of the instruments as recorded." *Id.* at 285. Because subsequent purchasers are charged with

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<sup>1</sup> Throughout this brief, "App. Add." refers to Appellants' Addendum, "App. Appx." refers to Appellants' Appendix, "App. Br." refers to Appellants' Brief, and "Resp. Add." refers to Respondent's Addendum.

<sup>2</sup> The court of appeals' decision is reprinted in Appellants' Addendum at pages 8 through 16.

subsequent notice of recorded documents identified in either the grantor-grantee index or the tract index, the court of appeals held that Hinshaw and PHH are not *bona fide* purchasers and that MidCountry's mortgage was valid as against their interests in the disputed property. *Id.* at 286.

By Order dated May 27, 2009, this Court granted Hinshaw and PHH's petition for further review. (App. Appx., at 136.).

## STATEMENT OF THE FACTS

### I. The MidCountry Mortgage.

In March 2000, Frederick and Nancy Krueger (hereinafter the "Kruegers") purchased and began to reside in a house located on a parcel of real property located in Belle Plaine, Minnesota, and legally described as follows:

Lot 12, Rearrangement of Block 44, Borough of Belle Plaine, according to the plat thereof on file and of record in the Office of the County Recorder, Scott County, Minnesota

(hereinafter the "Hinshaw Property"). The Warranty Deed conveying the Hinshaw Property to the Kruegers was recorded in the Office of the Scott County Recorder on June 7, 2000, as Document Number 476192. (Resp. Add., at 1.)

A few years later, the Kruegers decided to build a new house. On May 13, 2004, the Kruegers purchased two new parcels of real property located in Belle Plaine, Minnesota, which are legally described as follows:

PARCEL A: Lot 18, Block 5, City of Belle Plaine, Scott County, Minnesota

PARCEL B: Part of Outlot B, Wildlife View Addition lying South of the West extension of the North line of Alley in Block 5, City of Belle Plaine, Scott County, Minnesota

(hereinafter the "Krueger Properties"). (App. Appx., at 51.) On the same day, in order to finance the purchase of the Krueger Properties and the construction of a new house thereon, the Kruegers took out a construction loan from MidCountry<sup>3</sup> in the original principal amount of \$306,000.00. (App. Appx., at 37-50.) As security for this loan, the Kruegers executed and delivered a Mortgage to MidCountry encumbering the Hinshaw Property, where the Kruegers were then living, and the Krueger Properties, where they intended to build their new house (hereinafter the "MidCountry Mortgage"). (App. Appx., at 52-63.) There is no dispute that the MidCountry Mortgage includes and correctly describes both the Hinshaw Property and the Krueger Properties. (App. Appx., at 54.)

**II. The MidCountry Mortgage Is Recorded in the Office of the Scott County Recorder.**

On May 19, 2004, a few days after the Kruegers' acquisition of the Krueger Properties and delivery of the MidCountry Mortgage, the Warranty Deed for the Krueger Properties and the MidCountry Mortgage were delivered to and recorded in the Office of the Scott County Recorder. At the time of recording, an

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<sup>3</sup> At the time the loan documents were executed, MidCountry was known as First Federal fsb.

employee of the recorder's office affixed a label to the Warranty Deed stating as follows:

Doc. No. A657035

Office of the County Recorder  
Scott County, Minnesota

Certified Filed and/or Recorded on  
05-19-2004 at 2:15 Receipt: 380641

Pat Boeckman, County Recorder

(App. Appx., at 51.) A nearly identical label indicating Document Number 657036 was affixed to the MidCountry Mortgage by an employee of the recorder's office. (App. Appx., at 52.) Patricia Boeckman—the Scott County Recorder—testified during her deposition that these stamps indicate that the Warranty Deed and MidCountry Mortgage were recorded as of May 19, 2004.<sup>4</sup> (App. Appx., at 27 (Boeckman Depo., at 107:19-108:23).)

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<sup>4</sup> Hinshaw and PHH claim that Ms. Boeckman “determined that the MidCountry Mortgage was not recorded as an encumbrance against the Hinshaw Property as of late October 2006” and “conceded . . . the mortgage was not properly recorded in May 2006 when Hinshaw and PHH acquired their interests in the Hinshaw Property.” (App. Br., at 15, 18.) But Ms. Boeckman merely acknowledged errors in the tract index information and never testified that the MidCountry Mortgage was not properly recorded as of May 19, 2004. To the contrary, the deposition testimony cited above unequivocally states Ms. Boeckman's conclusion that the MidCountry Mortgage was recorded on May 19, 2004, when the recorder's endorsement was affixed to the document.

**III. The Scott County Recorder's Office Correctly Indexes the MidCountry Mortgage in the Grantor-Grantee Index But Fails to Index the Mortgage under the Hinshaw Property in the Tract Index.**

The Scott County Recorder's Office utilizes an electronic records program known as TriMin that stores the information required for the reception book, more commonly known as the grantor-grantee index, and tract index—along with an electronic copy of the document itself—in a single database that may be searched by document number, grantor or grantee, or tract. In her deposition, Ms. Boeckman explained that an employee of her office enters information about a recorded document into the TriMin program the day after the document is delivered for recording. (App. Appx., at 7 (Boeckman Depo., at 26:19-27:4).) During the first step of this process, the employee enters basic information about the document (e.g., document type, date and time of recording, and recording fees paid). (App. Appx., at 11 (Boeckman Depo., at 42:25-43:19).) The TriMin program then assigns a document number and prints the certification label that gets affixed to the recorded document. (App. Appx., at 7-8 (Boeckman Depo., at 26:19-27:4, 28:21-29:13).) After the label is printed and affixed to the document, the employee enters the information to populate the various indices, including the names of the grantors and grantees, the date of the recorded document, and the legal description of the property affected by the document. (App. Appx., at 9, 11 (Boeckman Depo., at 33:2-33:18, 35:2-35:20, 43:20-43:25).) The employee also

scans an electronic copy of the recorded document and enters it into the TriMin program. (App. Appx., at 10 (Boeckman Depo., at 37:3-37:21).)

When an employee is entering information into the TriMin program, the program allows the employee to “clone” or copy the information entered for a previous document into certain portions of the database for the new document. According to Ms. Boeckman, her office generally clones the legal descriptions for documents that are recorded together or that reference a previously recorded document. (App. Appx., at 9-10 (Boeckman Depo., at 35:20-35:25, 38:10-38:20).)

In this case, the Warranty Deed conveying the Krueger Properties to the Kruegers and the MidCountry Mortgage were recorded at the same time. Accordingly, when portions of information associated with the MidCountry Mortgage was entered into the TriMin program, the Scott County Recorder’s Office cloned the legal descriptions for the Krueger Properties that were included in the Warranty Deed. As a result of this cloning, the Hinshaw Property that was also included in the MidCountry Mortgage was omitted from the tract index information for the MidCountry Mortgage in the TriMin program. (App. Appx., at 15-16 (Boeckman Depo., at 59:8-59:15, 61:8-62:8).)

Because of the cloning error by the Scott County Recorder’s Office, the MidCountry Mortgage did not appear under the Hinshaw Property in the tract index. But the grantor-grantee index did list the MidCountry Mortgage (Doc. No.

657036) under both Frederick C. Krueger and Nancy J. Krueger and indicated a recording date of May 19, 2004, and the location of the affected property as "Belle Plaine." Through the grantor-grantee index search, a user of the TriMin program could access a separate "Document Number Inquiry" that summarized recording information, grantors, and grantees, but not the legal descriptions, associated with the MidCountry Mortgage. To view the legal descriptions of the mortgaged property, the user had the choice of accessing the tract index information or viewing the document itself, which included the correct legal descriptions of both the Krueger Properties and the Hinshaw Property.<sup>5</sup> (App. Appx., at 30-32, *see also* App. Appx., at 24, 28 (Boeckman Depo., at 93:8-93:16, 94:5-95:7, 110:4-111:16).)

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<sup>5</sup> Hinshaw and PHH claim that because the Hinshaw Property was not included in the tract index information for the MidCountry Mortgage, the Hinshaw Property "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." (App. Br., at 8.) This claim, however, is simply not correct. As described above, a grantor search for either of the Kruegers would have identified the MidCountry Mortgage as an encumbrance on property located in Belle Plaine. By selecting the MidCountry Mortgage from these search results, a user could access a "Document Number Inquiry" screen and view an electronic copy of the MidCountry Mortgage, which identified the Hinshaw Property as one of the encumbered properties (App. Appx., at 30-32.)

**IV. The Kruegers Convey the Hinshaw Property to Hinshaw Without Satisfying the MidCountry Mortgage.**

Two years later, after they had finished building their new house on the Krueger Properties, the Kruegers sold the Hinshaw Property to Hinshaw. The Warranty Deed conveying the Hinshaw Property from the Kruegers to Hinshaw was executed on May 12, 2006. On the same day, Hinshaw executed and delivered a Mortgage to PHH<sup>6</sup> encumbering the Hinshaw Property. Both documents were recorded in the Office of the Scott County Recorder on May 31, 2006, as Document Numbers 740490 and 740491, respectively. When the Kruegers conveyed the Hinshaw Property to Hinshaw, they apparently failed to (i) disclose the existence of the MidCountry Mortgage; (ii) failed to repay the outstanding indebtedness secured by the MidCountry Mortgage; and (iii) failed to obtain a satisfaction or release of the MidCountry Mortgage, or obtain MidCountry's consent to the conveyance of the Hinshaw Property. (App. Appx., at 64-67.)

Before Hinshaw purchased the Hinshaw Property, two title examinations were performed by Monica Meyer Javens (hereinafter "Javens"), a licensed abstractor. Although she claims to have searched the Scott County TriMin program during both examinations, Javens acknowledges that both examinations

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<sup>6</sup> According to the mortgage document, Hinshaw actually granted a mortgage in favor of Burnet Home Loans, but PHH apparently does business under this assumed name.

were limited to tract index searches and that she did not check the grantor-grantee index. (App. Appx., at 68-70; Resp. Add., at 8 (Javens Depo., at 14:10-14:20).)

**V. MidCountry Commences Foreclosure Proceedings Against the Krueger Properties and the Hinshaw Property.**

Shortly after conveying the Hinshaw Property to Hinshaw, the Kruegers defaulted under the terms of their loan with MidCountry. These defaults included (i) failing to make the required monthly payments beginning in June 2006 (the next month following conveyance of the Hinshaw Property); (ii) failing to occupy the Krueger Properties as a primary residence; (iii) failing to maintain the Krueger Properties; and (iv) conveying the Hinshaw Property without MidCountry's consent. (Resp. Add., at 11.) Based upon the Kruegers' defaults, MidCountry commenced the present proceedings in October 2006 to foreclose its mortgage against the Krueger Properties and the Hinshaw Property.

At some point after the commencement of this action, the Scott County Recorder's Office learned of its tract indexing error and updated the tract index to include the MidCountry Mortgage as an encumbrance against the Hinshaw Property. (App. Appx., at 17-18 (Boeckman Depo., at 67:5-67:11, 68:24-69:6).)

## ARGUMENT

### I. Standard of Review

On appeal from summary judgment, this Court must “review the record to determine whether there is any genuine issue of material fact, and whether the district court erred in its application of the law.” *McIntosh County Bank v. Dorsey & Whitney, LLP*, 745 N.W.2d 538, 544-45 (Minn. 2008). In cases decided on cross-motions for summary judgment where there are no genuine issues of material fact, this Court reviews the lower courts’ application of the law to the undisputed facts de novo. *Minnesota Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683, 688 (Minn. 2009).

In this case, both parties agree that there are no genuine issues of material fact. Therefore, the district court’s order is subject to de novo review.

### II. The MidCountry Mortgage Is Effective As Against Hinshaw and PHH Because They Had Constructive Notice of the Mortgage Based on Its Recording and Indexing in the Grantor-Grantee Index.

The Minnesota Recording Act provides that every conveyance of real estate that is not recorded in the office of the county recorder “shall be void as against any subsequent purchaser in good faith and for a valuable consideration . . . whose conveyance is first duly recorded.” Minn. Stat. § 507.34 (2008). This Court has defined a purchaser in good faith as “one who gives consideration in good faith without actual, implied, or constructive notice of inconsistent

outstanding rights of others.” *Anderson v. Graham Inv. Co.*, 263 N.W.2d 382, 384 (Minn. 1978); *accord Miller v. Hennen*, 438 N.W.2d 366, 369 (Minn. 1989). The Recording Act deems a subsequent purchaser to have constructive notice of “[t]he record . . . of any instrument properly recorded.” Minn. Stat. § 507.32 (2008); *accord Miller*, 438 N.W.2d at 369-70 (“Constructive notice is a creature of statute and, as a matter of law, imputes notice to all purchasers of any properly recorded instrument even though the purchaser has no actual notice of the record.”).

**A. The Court of Appeals Correctly Held that the County Recorder’s Endorsement on the MidCountry Mortgage Establishes that the Document Was Properly Recorded on May 19, 2004.**

Minnesota Statutes § 386.41 (2008) requires the county recorder to “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.” According to the statute, “every instrument shall be considered as recorded at the time so noted.” *Id.* (emphasis added). In this case, there is no dispute that a label containing the endorsement required by Section 386.41 was attached to the MidCountry Mortgage on May 19, 2004, when it was delivered to the Scott County Recorder’s Office for recording.

Hinshaw and PHH argue that the requirements for proper recording are established by Minn. Stat. §§ 386.03-386.05 (2008). (App. Br., at 18-20.) In doing so, however, Hinshaw and PHH fail to distinguish between the separate processes of recording a document and indexing a recorded document.

Chapter 386 requires county recorders to maintain several books and indices of recorded documents. In order to record a document, county recorders are required to maintain “suitable word for word records . . . of all instruments delivered to the recorder for record keeping” in either record books or electronic media. Minn. Stat. § 386.19 (2008). Additionally, county recorders are required to maintain certain indices to allow people to locate recorded documents in the various record books or electronic media. These indices include the following:

- A “grantor’s and grantee’s reception index” that contains the “date of reception, year, month, day, hour and minute, grantor and grantee, where situated, to whom delivered after recording, fees received, instrument number, and kind of instrument,” Minn. Stat. § 386.03;
- A “consecutive index” that lists “the number of the instrument consecutively, the kind, the time of its reception, and where the same is recorded,” Minn. Stat. § 386.32 (2008);<sup>7</sup> and
- A “tract index” that lists recorded documents by legal description and includes the type of instrument, book and page number of the recorded

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<sup>7</sup> The grantor-grantee index and the consecutive index may be combined into a single “Numerical Register and Reception Index.” Minn. Stat. § 386.04.

document, and the date and time the instrument was recorded, Minn. Stat. § 386.05.<sup>8</sup>

But although the statutes require recorded documents to be indexed in these various indices, the statutory language does not make the “proper recording” of a document contingent on proper indexing.

Hinshaw and PHH’s argument that the county recorder’s endorsement on a document is not sufficient to establish proper recording is inconsistent with this Court’s precedent. In *Thomas v. Hanson*, this Court considered whether a deed bearing a recording endorsement from the Office of the Register of Deeds for Toombs County was properly recorded on that date so as to provide constructive notice to subsequent purchasers. 59 Minn. 274, 278, 61 N.W. 135, 136 (1894).<sup>9</sup> There was no evidence of the county record of the deed as a fire had destroyed all of the records maintained by the purported register of deeds for Toombs

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<sup>8</sup> Prior to 2005, county recorders were permitted—but not required—to maintain a tract index. Act of Mar. 7, 2005, ch. 4, § 75, 2005 Minn. Laws 10, 40. In this case, there is no dispute that the Scott County Recorder’s Office maintained a tract index at all times relevant to these proceedings.

<sup>9</sup> Hinshaw and PHH attempt to avoid application of *Thomas* by claiming that the sole issue in that case was whether Toombs County was organized when the deed was recorded and that this Court “in no way addressed the question of whether or not a county recorder’s stamp was sufficient to effect ‘proper recording.’ ” (App. Br., at 28-29.) But *Thomas* expressly addresses two issues, including the question of whether the deed was recorded. 59 Minn. at 278, 61 N.W. at 136. This is confirmed by this Court’s syllabus for the *Thomas* opinion, which unequivocally states that the county recorder’s endorsement is “sufficient evidence that the deed was so recorded.” *Id.* at 274, 61 N.W. at 135.

County. *Id.* at 279, 61 N.W. at 136. Thus, there was no evidence that the deed was correctly transcribed in the records book or properly indexed, and there were no means for the public to actually review the record and discover the deed. Nonetheless, this Court held that the endorsement of the purported county recorder on the original deed was itself sufficient to establish that the deed was properly recorded and provided constructive notice of its existence. *Id.* at 279-80, 61 N.W. at 136-37.

Hinshaw and PHH instead attempt to rely on *Thorp v. Merrill*, 21 Minn. 336, 1875 WL 3780 (1875). In *Thorp*, the record of the mortgage itself contained an error in the legal description of the mortgaged property. *Id.* at \*1. This Court held that the effect of this error in the record was to render the mortgage not recorded. *Id.* Addressing the argument that the recorder's endorsement was sufficient under state statute to establish recording, this Court expressed its doubt that the statute "has any application to an instrument which is so mis-recorded as to be, in effect, not recorded at all" and stated its opinion that the endorsement to such a document merely establishes the time of receipt of the instrument by the recorder. *Id.* at \*2.

But Hinshaw and PHH's reliance on *Thorp* is misplaced for two reasons. First, *Thorp* is factually distinguishable from the facts of this case because the record of the mortgage itself in *Thorp* contained the wrong legal description. In

this case, the record of the MidCountry Mortgage was an electronic copy of the document that included the correct legal descriptions for both the Krueger Properties and the Hinshaw Property. Instead, the error in this case was merely in the indexing of the MidCountry Mortgage in the tract index. *Thorp* does not address indexing errors. Additionally, *Thorp* was decided in 1875—19 years before *Hanson*. Thus, to the extent that *Thorp* is construed to hold that the recorder's endorsement is not sufficient to establish proper recording, *Thorp* was clarified by *Hanson* and is thus not controlling of the issue.

Under Minn. Stat. § 386.41 and the controlling precedent of this Court, a county recorder's endorsement on a document is sufficient evidence to establish that the document was properly recorded. The MidCountry Mortgage in this case contains the required endorsement and is thus properly recorded under Minnesota law.

**B. The MidCountry Mortgage Was Properly Indexed in the Scott County Grantor-Grantee Index on May 19, 2004.**

Despite the fact that the MidCountry Mortgage was plainly included in grantor-grantee index under both Frederick and Nancy Krueger (App. Appx., at 30-31), Hinshaw and PHH argue that the MidCountry Mortgage was not properly indexed in the grantor-grantee index because the index did not properly indicate where the property was situated. (App. Br., at 20-21, 24, 26-27.) Minnesota Statutes § 386.03 requires that the grantor-grantee index include

various information about a recorded document, including where the affected property is situated. In this case, the grantor-grantee index for the MidCountry Mortgage did not include a full legal description for either the Krueger Properties or the Hinshaw Property, but the index did state "Belle Plaine" under the heading "Legal" in the entry for the MidCountry Mortgage. (App. Appx., at 30-31.)

Hinshaw and PHH's argument that the grantor-grantee index entry for the MidCountry Mortgage did not sufficiently state where the Hinshaw Property was situated fails for two reasons. First, Hinshaw and PHH did not raise this issue in either the district court or the court of appeals and are therefore precluded from raising the issue on review to this Court. But even if the Court reaches this issue, both this Court's precedents construing the grantor-grantee index requirements and the underlying purpose of the index indicate that a full legal description is not required in the grantor-grantee index.

1. Hinshaw and PHH Waived the Issue of Whether the Indexing of the MidCountry Mortgage in the Grantor-Grantee Index Satisfied the "Where Situated" Requirement of the Statute.

An appellate court generally may "consider 'only those issues that the record shows were presented and considered by the trial court in deciding the matter before it.' " *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (quoting *Thayer v. Am. Fin. Advisers, Inc.*, 322 N.W.2d 599, 604 (Minn. 1982)). Parties are

also prohibited from “obtain[ing] review by raising the same general issue litigated below under a different theory.” *Id.*; accord *Security Bank of Pine Island v. Holst*, 298 Minn. 563, 564, 215 N.W.2d 61, 62 (Minn. 1974) (“ ‘It is elementary that on appeal a case will be considered in accordance with the theory on which it was pleaded and tried, and a party cannot for the first time on appeal shift his position.’ ” (quoting *Urban v. Continental Convention & Show Management, Inc.*, 244 Minn. 44, 47, 68 N.W.2d 633, 635 (1955))). Moreover, parties may waive alternative theories by failing to present them on appeal to the Court of Appeals. *Thiele*, 425 N.W.2d at 582; *Mattson v. Underwriters at Lloyds of London*, 414 N.W.2d 717, 721-22 (Minn. 1987).

In this case, Hinshaw and PHH now claim that the entry of the MidCountry Mortgage in the grantor-grantee index violated Minn. Stat. § 386.03 because the index did not sufficiently state where the Hinshaw Property is situated. Although Hinshaw and PHH have consistently argued that they did not have constructive notice of the MidCountry Mortgage because of the Scott County Recorder’s error in failing to list the Hinshaw Property in the tract index, they did not argue to the court of appeals that the MidCountry Mortgage was not properly indexed in the grantor-grantee index because the index failed to state where the Hinshaw Property is located. (*See Br. of Resps. Hinshaw and PHH to Ct. of App.*, at 11-17.) Under Minnesota law, Hinshaw and PHH are precluded

from shifting their theory in this manner and may not raise this issue on review to this Court.

2. The Indexing of the MidCountry Mortgage in the Grantor-Grantee Index Was Sufficient to Satisfy the “Where Situated” Requirement of the Statute.

As noted above, the entry in the grantor-grantee index for the MidCountry Mortgage included the words “Belle Plaine” under the heading “Legal.” (App. Appx., at 30-31.) Hinshaw and PHH argue that this entry is not sufficient because it did not include the legal description of the Hinshaw Property.

But this Court has never construed the “where situated” requirement of the grantor-grantee index to require that the full legal description of affected property be included in the index. *See Gaston v. Merriam*, 33 Minn. 271, 276, 22 N.W. 614, 617 (1885) (“Under the head of “Where Situated,” or “Description,” as it was more accurately called in this case, it was his duty to enter a description of the land conveyed. Whether this description should be in full, in the exact words of the deed, or whether it might be abbreviated, it is unnecessary to consider.” (internal citation omitted)). In fact, this Court held in *Whitacre v. Martin* that an entry of “See record” under the heading “Description of Property” in the grantor-grantee index was sufficient. 51 Minn. 421, 426, 53 N.W. 806, 807 (1892). Based on this precedent, the statement in the grantor-grantee index that the

MidCountry Mortgage encumbers property in “Belle Plaine” satisfies the “where situated” requirement of Minn. Stat. § 386.03.

Additionally, the Iowa Supreme Court has considered a similar question in *Barney v. Little*, 15 Iowa 527, 1864 WL 220 (1864). The Iowa statute at issue in *Barney*, like the Minnesota statute at issue in this case, required the Recorder of Deeds to maintain an index of recorded documents identifying (1) the grantor; (2) the grantees; (3) the time of filing; (4) the date of the document; (5) the nature of the document; (6) the book and page where the document is recorded; and (7) the description of the affected property. *Id.* at \*3. Despite this statutory requirement, the index entry for the document at issue in *Barney* failed to list the time of filing, date of the document, or description of the affected property. *Id.* Citing prior decisions providing that an index entry is sufficient if it does not mislead “by giving a totally wrong description of the lands” and “points to the record with reasonable certainty, the Iowa Supreme Court held as follows:

“If the grantor’s and grantee’s names are given in the index, with the book and page where the instrument is recorded, and if the instrument is there really recorded, we believe that this, so far as the object of the recording act is concerned is a substantial, though it may not be in all respects, as to the index book, a literal compliance with the law. For the record book and the index book are not to be considered as detached and independent books, but related and connected ones, and a party (assuming it to be an instrument with the law authorizes and requires to be recorded) 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 \*5, quoted with approval by *Latourell v. Hobart*, 135 Minn. 109, 114, 160 N.W. 259, 261 (1916).

Moreover, the sufficiency of a general description of the property location is consistent with the purpose of the index. The grantor-grantee index is not intended to provide all necessary information about a recorded document; rather, it is merely intended to assist users in locating the actual record of the document. Consistent with this purpose, this Court has held that both “ [t]he entries required by law to be made in the [grantor-grantee] reception books, and the transcribing of the instrument into the record book, constitute the full record’ of [a document]” and that each book “supplies defects in the other in giving constructive notice.” *Latourell*, 135 Minn. at 113, 160 N.W. at 260 (quoting *Whitacre*, 51 Minn. at 427, 53 N.W. at 807). Thus, while the index discloses the existence and location of the record of a recorded document to users attempting to trace a chain of title, the actual record of the document conveys the particular information—including the full legal description of the affected property—necessary to determine title to a property. Because a general description of the property location is sufficient to allow users to focus their search on potentially relevant documents while limiting the information in the index to a manageable amount, a general description of property affected by a recorded document serves the underlying purpose of the index.

Because it identified the location of the affected property in “Belle Plaine,” the entry for the MidCountry Mortgage in the grantor-grantee index satisfied the “where situated” requirement of Minn. Stat. § 386.03. The MidCountry Mortgage was therefore properly indexed in the grantor-grantee index.

**C. Because the MidCountry Mortgage Was Properly Recorded and Properly Indexed in the Grantor-Grantee Index Since May 19, 2004, the Court of Appeals Correctly Held that Hinshaw and PHH Had Constructive Notice of the MidCountry Mortgage When They Acquired Their Interest in the Hinshaw Property.**

The Minnesota Recording Act deems a subsequent purchaser to have constructive notice of “[t]he record . . . of any instrument properly recorded.” Minn. Stat. § 507.32; *accord Miller v. Hennen*, 438 N.W.2d 366, 369-70 (Minn. 1989). This Court has held that this constructive notice extends to “ ‘the facts appearing on the face of the record.’ ” *Miller*, 438 N.W.2d at 370 (quoting *Anderson v. Graham Inv. Co.*, 263 N.W.2d 382, 385 (Minn. 1978)). The record constituting constructive notice includes both “[t]he entries required by law to be made in the reception books” (the grantor-grantee index) and “the transcribing of the instrument into the record book.” *Latourell*, 135 Minn. at 113, 160 N.W. at 260. Where a county also maintains a tract index, that index “is part of the record of which a purchaser is charged constructive notice.” *Miller*, 438 N.W.2d at 370 (emphasis added); *see also Minnesota Title Standards for Examination of Title*, Standard No. 37 comm. cmt (2008) (stating that “[t]he amendment recognizes

that counties are now required to maintain a tract index as part of their official records" (emphasis added)). Each part of the record "supplies defects in the other[s]," and a purchaser "is presumed to have examined" and "is charged with such knowledge" as afforded by any of the required index entries or the actual record of the recorded document. *Latourell*, 135 Minn. at 113-14, 160 N.W. at 260-61.

In this case, it is undisputed that through no fault of MidCountry's, the MidCountry Mortgage was not indexed under the Hinshaw Property in the tract index. But the tract index is only one portion of the record of the MidCountry Mortgage. The MidCountry Mortgage was properly indexed in the grantor-grantee index as a mortgage granted by the Kruegers against property in "Belle Plaine." (App. Appx., at 30-31.) In tracing the chain of title of the Hinshaw Property, a proper title examination would have discovered this entry in the grantor-grantee index and inspected the actual record of the document (in this case, the electronic copy of the MidCountry Mortgage stored in the TriMin program). From this inspection, the title examiner would have discovered the encumbrance against the Hinshaw Property, which is apparent from the face of the MidCountry Mortgage. (App. Appx., at 54.)

Minnesota law charges subsequent purchasers with constructive notice of the entire record of a recorded document. Although the document at issue in

this case was not properly indexed by the Scott County Recorder against the Hinshaw Property in the tract index, it was indexed in the grantor-grantee index, and the face of the document disclosed the encumbrance against the Hinshaw Property. Because the full record of the MidCountry Mortgage thus disclosed the encumbrance against the Hinshaw Property, Hinshaw and PHH had constructive notice of the encumbrance at the time they acquired their interests in the Hinshaw Property.

**D. The Court of Appeals' Holding that Hinshaw and PHH Had Constructive Notice of the MidCountry Mortgage Is Not Inconsistent with the Decisions of Courts in Other States.**

Hinshaw and PHH assert that the "modern trend" of decisions from other jurisdictions supports their assertion that the improper indexing of the MidCountry Mortgage in the tract index does not afford constructive notice of the MidCountry Mortgage as against the Hinshaw Property. (App. Br., at 25-26.) But the cases cited by Hinshaw and PHH are distinguishable from the present case. Moreover, courts in other states have held that indexing errors do not preclude constructive notice of recorded documents.

Hinshaw and PHH first cite *Howard Savings Bank v. Brunson*, a New Jersey Superior Court decision. 582 A.2d 1305 (N.J. Sup. Ct. 1990). In that case, a mortgage was not properly indexed for 2 years after the mortgage was properly recorded. *Id.* at 1305-06. During the intervening period, several additional

mortgages were granted against the mortgaged property and the property was conveyed to a new owner. *Id.* at 1306. The New Jersey court concluded that the subsequent purchasers and mortgagors did not have constructive notice of the unindexed mortgage. *See id.* at 1310. But the mortgage at issue in *Howard Savings Bank* was not entered in any index and was thus, as the court recognized, “the proverbial needle in a haystack.” *Id.* at 1308 (internal quotation marks omitted). By contrast, in this case the MidCountry Mortgage was properly indexed in the grantor-grantee index and therefore could be found through a reasonable examination of the record.

The Iowa Supreme Court’s decision in *Noyes v. Horr*, 13 Iowa 570, 1862 WL 225 (1862), is also factually distinguishable from the present case. In *Noyes*, the plaintiff granted a mortgage on two separate parcels of real property. *Id.* at \*1. When indexing this mortgage, however, the county recorder listed the legal description of one of the parcels but not the other. *Id.* The Iowa Supreme Court concluded that subsequent purchasers of the mis-indexed property did not have constructive notice of the mortgage, reasoning that a person finding one tract identified in the index would not have any reason to suspect that the mortgage also covered a second property. *Id.* In this case, although the tract index information for the MidCountry Mortgage listed the legal descriptions of the Krueger Properties but not the Hinshaw Property, the grantor-grantee index

generally identified the location of the mortgaged property as "Belle Plaine." Because this description was true of both the Krueger Properties and the Hinshaw Property, the grantor-grantee index entry did not exclude the Hinshaw Property in the same way a complete legal description would exclude other properties. Thus, a reasonable title examiner seeing the MidCountry Mortgage in the grantor-grantee index would examine the document to determine the precise property encumbered.

Hinshaw and PHH also cite the North Dakota Supreme Court's decision in *Hanson v. Zoller*, 187 N.W.2d 47 (N.D. 1971). In that case, however, the evidence demonstrated that the tract index, the grantor-grantee index, and the record copy of the mortgage in the reception book incorrectly described the encumbered property. *Id.* at 52. Thus, *Hanson v. Zoller* is factually distinguishable from the present case, where the record copy of the MidCountry Mortgage included the Hinshaw Property and the document was properly indexed in the grantor-grantee index. Additionally, in holding that prospective purchasers "cannot be deemed to have constructive notice of instruments that are not indexed in the tract index under the specific tract of real property to which they pertain," the North Dakota court relied on the historical primacy of the tract index under North Dakota's recording acts. *Id.* at 55-56. In contrast, Minnesota law did not even require county recorders to maintain a tract index until 2005. *See* Act of

Mar. 7, 2005, ch. 4, § 75, 2005 Minn. Laws 10, 40. Because the grantor-grantee index has thus been historically the primary index under Minnesota law, the North Dakota court's analysis is not analogous in this case.

Finally, Hinshaw and PHH ignore recent decisions from other states holding that recorded documents provide constructive notice even if they are not properly indexed. See *Miller v. Simonson*, 92 P.3d 537, 541 (Idaho 2004); *First Citizens Nat'l Bank v. Sherwood*, 879 A.2d 178, 181 (Penn. 2005). Although these cases, like the cases cited by Hinshaw and PHH, are obviously dependent upon the unique statutes and precedents controlling in each state, they refute the existence of a "modern trend" requiring proper indexing in both the grantor-grantee index and the tract index in order for a recorded document to provide constructive notice.

**E. The Court of Appeals Correctly Held that Hinshaw and PHH Were Not *Bona Fide* Purchasers of the Hinshaw Property Because They Had Constructive Notice of the MidCountry Mortgage.**

The Minnesota Recording Act provides that an unrecorded conveyance is void as against a subsequent purchaser without actual, implied, or constructive notice. Minn. Stat. § 507.34; *Miller v. Hennen*, 438 N.W.2d 366, 369 (Minn. 1989); *Anderson v. Graham Inv. Co.*, 263 N.W.2d 382, 384 (Minn. 1978). As outlined above, Hinshaw and PHH had constructive notice of MidCountry's Mortgage against the Hinshaw Property because it was properly recorded and indexed in

the grantor-grantee index. Therefore, the court of appeals correctly concluded that Hinshaw and PHH were not *bona fide* purchasers and that the MidCountry Mortgage is a valid and enforceable encumbrance against the Hinshaw Property.

**III. Public Policy Considerations Do Not Require this Court to Change Minnesota Law and Excuse Abstractors from Examining the Entire Record.**

Hinshaw and PHH also attempt to attack the court of appeals' decision on public policy grounds. First, they assert that "the Court of Appeals' decision . . . 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." (App. Br., at 31.) This statement, however, misstates the court of appeals' holding in this case. The court of appeals merely held that subsequent purchasers are presumed to have reviewed the entire record—including both the grantor-grantee index and the tract index—and are charged with constructive notice of the contents of the documents cited in either index. *MidCountry Bank v. Krueger*, 762 N.W.2d 278, 285 (Minn. Ct. App. 2009) ("Thus, while Hinshaw was under no duty to search beyond the record itself, she was obligated to read the entire record, which included MidCountry's mortgage, referred to by document number A657036, in the grantor-grantee index."). Thus, the court of appeals'

merely held that subsequent purchasers are responsible for encumbrances that would have been discovered by a proper examination of the real estate records.

Moreover, the court of appeals decision does not reflect a change in the requirements of title examinations in Minnesota. As outlined above, for more than 90 years this Court has held that purchasers are presumed to have read and charged with constructive notice of the entire record, including both the indices and the recorded document. *Latourell v. Hobart*, 135 Minn. 109, 113-14, 160 N.W. 259, 260-61 (1916). Additionally, Standard No. 37 of the *Minnesota Title Standards for Examination of Title* provides as follows:

“An instrument necessary to the chain of title or affecting a title, but recorded at a point in time prior to the date of the recorded instrument creating a source of title, so as not to be within the scope of an examination of the county recorder’s grantor reception book and grantee reception book, does not constitute constructive notice of the contents of such instrument, and such instrument should be re-recorded unless it has been of record for at least 5 years or appears in the tract index.”

The committee comments associated with this standard also caution that “[t]o the extent the county recorder maintains a tract index examination must be made of the tract index” and further states that the tract index is *part* of the official record. Thus, the Minnesota Title Standards have long required examination of both indices.

Hinshaw and PHH also baldly assert that the Court of Appeals’ decision may result in dire economic effects that may exacerbate the current real estate

crisis.<sup>10</sup> (App. Br., at 32-33.) But as noted above, the Court of Appeals' decision does not impose any new requirements on title examinations – it merely enforces the existing requirements. Moreover, Hinshaw and PHH ignore the additional expenses that would be incurred by grantees and mortgagees who would be forced to perform additional title examinations to ensure that their real estate documents are properly indexed. Thus, the only winner under the rule proposed by Hinshaw and PHH are title examiners, who are both relieved of the burden of checking the entire record and ensured of a new stream of business.

Policy, and equity, favor MidCountry. It was MidCountry that performed every required act under Minnesota law – MidCountry included the correct legal description of the Hinshaw Property as an encumbrance under the MidCountry Mortgage, and MidCountry received the MidCountry Mortgage back from the Scott County Recorder with the label affixed to the first page stating that the MidCountry Mortgage had been recorded on May 19, 2004. Based upon Minnesota law, as cited throughout this brief, MidCountry was not required to

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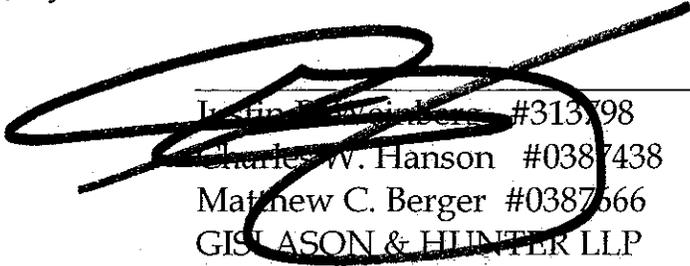
<sup>10</sup> In support of this argument, Hinshaw and PHH cite the number of grantor index references for certain entities in Washington and Hennepin Counties. Although these facts are not supported by the record on this appeal, Hinshaw and PHH claim that this Court may take judicial notice of these facts as matters of public record. (App. Br., at 32.) But this Court does not take judicial notice of property records recorded in the office of a county recorder. *Williams v. Langevin*, 40 Minn. 180, 181, 41 N.W. 936, 936 (1889) (“The court cannot take judicial notice of the existence or absence of records in the register’s office, or of surveys and plats of lots and blocks in towns and cities.”). Therefore, these facts are not properly in the record on this appeal.

take any further action with respect to the recording of the MidCountry Mortgage and ensuring that it would provide constructive notice as an encumbrance against the Hinshaw Property under the Minnesota Recording Act. To the contrary, Hinshaw and PHH relied on a partial title examination by Ms. Javens. Hinshaw and PHH, through Ms. Javens, were in the best position to avoid this situation if they had performed a title examination of the entire record.

### CONCLUSION

Under Minnesota law, Hinshaw and PHH were required to examine the entire record—including both the grantor-grantee index and the tract index—and are charged with constructive notice of the contents of documents identified in either index. Because the MidCountry Mortgage correctly identifies both the Krueger Properties and the Hinshaw Property, was properly recorded in the Office of the Scott County Recorder, and was identified in the grantor-grantee index, MidCountry respectfully requests that this Court affirm the holding of the Court of Appeals that MidCountry is entitled to judgment as a matter of law on its claim that Hinshaw and PHH acquired their interests in the Hinshaw Property subject to the MidCountry Mortgage.

Dated this 24<sup>th</sup> day of July, 2009.



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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.

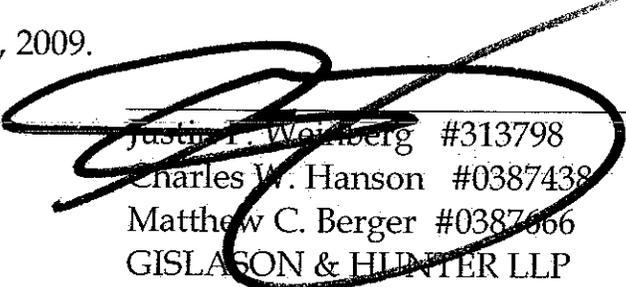
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CERTIFICATE OF BRIEF LENGTH

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I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a 13 point font. The length of this brief is 7,657 words. This brief was prepared using Microsoft Word 2003.

Dated this 24<sup>th</sup> day of July, 2009.



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