

NO. A08-0908

State of Minnesota
In Court of Appeals

In Re Petition of Allan D. Hauge and Cecilia E. Hauge for
Cancellation of Certificate of Title No. 63785,

Appellants,

and

In Re Petition of Paul W. Howe and Stephanie Howe for
Cancellation of Certificate of Title No. 33535,

Respondents,

and

Mark Hillier Durfee and Mary Kay Durfee,

v.

Allan D. Hauge and Cecilia E. Hauge,

Appellants.

APPELLANTS' REPLY BRIEF

TIMOTHY PAUL BRAUSEN (#11022)
8301 Virginia Circle North
St. Louis Park, MN 55426
(952) 451-8492

CHRISTOPHER R. GROTE (#267995)
KARLA M. VEHRIS (#387086)
JAMES M. LOCKHART (#176476)
Lindquist & Vennum, P.L.L.P.
4200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 371-3211

Attorney for Appellants
Allan D. Hauge and Cecilia E. Hauge

Attorneys for Respondents

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APPELLANTS' REPLY BRIEF: ARGUMENTS

I. ORIGINAL LANDOWNERS LEE DID NOT OWN THE LAND IN DISPUTE AT THE TIME OF THE FILING OF REGISTERED LAND SURVEY NO. 62 (“RLS No. 62”) IN 1965, AS THIS LAND HAD BEEN CONVEYED TO ORIGINAL PURCHASERS MENALDINO IN 1963; AS SUCH, THIS LAND COULD NOT BE PART OF RLS NO. 62. RLS NO. 62 DOES NOT COMPLY WITH THE REQUIREMENTS OF MINNESOTA STATUTE SECTION 508.47 THAT A REGISTERED LAND SURVEY CORRECTLY SHOW THE LEGAL DESCRIPTION OF THE PROPERTY TO BE PLATTED.

A. Where a boundary line of a fractional government lot is the shore line of the lake, principles of riparian rights as to accretions and relictions provide that the boundary lines of adjoining lots abutting the lake, as to land beyond the meander line, are fixed by extending their side lines on a deflected course from their intersection with the meander line toward a point in the center of the lake. This was not done by RLS No. 62. As such, RLS No. 62 is incorrect on its face.

All of the property that is the subject of this dispute was originally registered in Washington County District Court Proceeding No. 446, in 1960, at which time Registered Land Survey No. 34 was filed. (AA-167-168.) On September 4, 1962, Original Landowners Ralph L. Lee and Ethel L. Lee, husband and wife, (“Original Landowners Lee”) conveyed to Edward Ermanno Menaldino and Dorothy Ruth Menaldino (“Original Purchasers Menaldino”) by Warranty Deed, the following described property:

Those tracts of land lying in Registered Land Survey No. 34, described as follows, to-wit:

A tract of land bounded as follows, to-wit: on the North by a line parallel with and distant 208 feet North from the North line of U.S. Govt. Lot 3, Sec. 17, Twp. 32 N., Range 21 W; on the East by the West line of the Forest Lake Township road; on the South by the said North line of said U.S. Govt. Lot 3; and on the West by the shore of Clear Lake.

Also a tract of land bounded as follows, to-wit: on the North by the above mentioned North line of said U.S. Govt. Lot 3; on the East by the West line of said Forest Lake Township road; on the South by a line parallel with and distant 50 feet South from said North line of said Govt. Lot 3; and on the West by the shore of said Clear Lake. (underlining added; AA-172-173.)

The Washington County Registrar of Titles then issued to Original Purchasers Menaldino Torrens Certificate of Title No. 11184, dated September 7, 1962, containing the above legal description. (AA-174-175.) At this time, the Original Landowners Lee no longer owned any of the land north of the defined (underlined) southern boundary of the property conveyed to the Menaldinos, as appears from the residual Certificate of Title No. 11185 issued that date to the Lees, which excepted the above-described property from the Lees new legal description. (AA-176-177.) This same exception is later incorporated in the legal description of land owned by the Lees after they sold another unrelated portion of their property, in Certificate of Title No. 11537, issued to the Lees April 19, 1963. (AA-178-179.)

Torrens Certificate of Title No. 11184 issued to Original Purchasers Menaldino defines the north property line with reference to the North line of U.S. Government Lot 3, Section 17, Township 32 North, Range 21; then describes the East boundary line as “the West line of said Forest Lake Township road”; the South property line as “... on the South by a line parallel with and distant Fifty (50) feet from said North line of said U.S. Government Lot 3”; and finally “... on the West by the shore of said Clear Lake.” (AA-174.) This metes and bounds description of the Original Purchasers Menaldinos’ property designates the shore line of Clear Lake as the western boundary of the property. Yet the Court in this matter has directed that the western boundary of the Appellant Hauges’ property, which they purchased from the Menaldinos in 1986 (Appellant Hauges’ Certificate of Title No. 33535, AA-184) be revised to terminate east of the shoreline of Clear Lake and then travel northward to a point it describes, across from the point of land in dispute. (Supplemental Order for Summary Judgment, AA-409-411, page 410.)

At the time of the conveyance from Original Landowners Lee to Original Purchasers Menaldino, RLS No. 34, filed in 1960, was the most recent land survey of record. (AA-167.) RLS No. 34 did not show the existence of a point of land in front of either the Menaldino property or the

property to the south of what was conveyed to Menaldinos, which was retained by the Lees. This is in accord with the original U.S. Government Survey of Township No. 32 North, Range No. 21 West, 4th Meridian, which was filed in 1847 (AA-166) and shows a meander line as the eastern shore of Clear Lake. It's unclear if this point was clearly defined at the time of conveyance to the Menaldinos in 1962, as no new registered land survey was filed at this time. "When a government lot abuts upon a lake, the shifting water line, and not the meander line, is the boundary of the lot." *Sherwin v. Bitzer*, 97 Minn. 252, 106 N.W. 1046 (Minn. 1906.) "The transfer of such a lot by number according to a government survey, without words of restriction, conveys all the land which has become a part of the lot by the recession of the lake." *Sherwin v. Bitzer*, supra. The Warranty Deed conveying the property to the Menaldinos does not contain any words of restriction or reservation of the riparian rights in front of the Menaldino property to the Lees. As such, the deed conveyed to the Menaldinos the land up to the shore line of Clear Lake.

Since the western boundary line of the Original Purchaser Menaldinos' property was the shoreline of Clear Lake, if the shoreline moved to the west, or otherwise accreted or relicted, the established law of riparian rights governs. *Hanson v. Rice*, 88 Minn. 273, 92 N.W. 982 (Minn.

1903) clearly lays out the rules for determining the boundary line of abutting lots on a lake as the lake recedes and more property accretes to the adjoining land owners by the right of accretions and relictions:

Where the meander line of an inland, meandered, navigable lake is not a boundary line of the fractional lots or tracts of land abutting thereon, the title of the contiguous owners extends to all land between such line and the shore of the lake, precisely as though it were the results of accretions or relictions; and the boundaries of adjoining tracts, as to land beyond the meander line, are fixed by extending their side lines on a deflected course from their intersection with the meander line toward a point in the center of the lake. (underlining added.)

This principle has been consistently applied by Minnesota courts [*Scheifert v. Briegel*, 90 Minn. 125, 96 N.W. 44 (Minn. 1903); *Lamprey v. Metcalf*, 52 Minn. 181, 53 N.W. 1139 (Minn. 1893)], including the case of *Webber v. Axtell*, 94 Minn. 375, 102 N.W. 915 (Minn. 1905) where the original patentee of lakefront property successfully claimed title to sand bars and an island in front of his land that had later become connected to his land, over the claims of others who had platted the island, the Court finding that the rights of accretion were an incident to all riparian ownership.

Extending the side lines of the southern boundary of the Original Purchaser Menaldinos' property, which is also the northern boundary of the property then owned by Original Landowners Lee ("a line parallel with and distant 50 feet South from said North line of said U.S. Government Lot 3") toward a point in the center of the lake, would encompass the land that is the

subject of this dispute as part of the Menaldinos' (later Appellants Hauges') property. Yet the Lees, in filing Registered Land Survey No. 62 in 1965 did not follow this well-established principle of riparian rights. Instead, RLS No. 62, fails to carry the boundary line description to "the shore of Clear Lake," as had been the case on Lees Certificate of Title No. 11185 and 11537, toward the center of the lake, and instead describes the boundary in its grant "as shown", and then contains the drawn depiction of Tract K of RLS No. 62 as moving north of the described line and claiming the point of land that is directly in front of the Menaldinos property! Assuming that this land was an accretion to the existing shoreline, this claim of Lees in RLS No. 62 is directly contrary to the way accretions and relictions are to be handled. RLS No. 62 clearly violates the applicable law of accretions and relictions, and deprives the Menaldinos (now Appellants Hauge) of their riparian rights to Clear Lake.

The Original Landowners Lee, in their conveyance to the Original Purchasers Menaldino, did not retain the riparian rights of the Menaldino property. If there was any basis for their claiming such accretion as a portion of the property south of the two properties' common boundary line, this deprivation of the Menaldinos' rights to the accretions immediately in front of their property should have been noted on their Certificate of Title

No. 11184 at the time of filing RLS No. 62. However, there is no such interest noted on Certificate of Title No. 11184. As such, applicable Torrens law provides that the Original Purchasers Menaldinos, and their successors the Appellants Hauges', registered property is not subject to the claimed interest of the Lees, now the Respondents' Howe.

The purpose of the Torrens system of land registration system is to ensure that a person dealing with registered property "need look no further than the certificate of title for any transactions that might affect the land." *Mill City Heating & Air Cond. V. Nelson*, 351 N.W.2d 362, 364-65 (Minn. 1984). The Torrens Act provides a registered land ownership system where a "purchaser may accept [a certificate of title to registered land] as truly stating the title and may disregard any claim not so appearing." *Kane v. State*, 237 Minn. 261, 268-69, 55 N.W.2d 333, 338. *Petition of Willmus in Relation to Tract B, Registered Land Survey No. 189*, 568 N.W. 2d 722, 725 (Minn. App. 1997.)

Appellant Hauges' Certificate of Title, issued to them in 1986, which shows no such limitation of their riparian rights, should control.

This is clear evidence that RLS No. 62 is incorrect. RLS No. 62 cannot claim more land than the Lees owned at the time they created it. Yet this erroneous RLS created "Tract K, RLS No. 62" under which depiction the Respondents Howe claim the disputed land under their Certificate of Title No. 63785 (AA-111.) As noted in the Appellants' Brief, "(a)n erroneous COT [certificate of title] cannot create an interest in land."

Minnesota Office Plaza, LLC v. Target Stores, Inc., (Minn.App. 2007, WL

23638875); *Estate of Koester v. Hale*, 297 Minn. 387, 393, 211 N.W. 2d 778, 782 (Minn. 1973.)

The Affidavit of Michael J. Welling, the current Washington County Surveyor, notes this same discrepancy, that the Appellants Hauge own the property north of the described boundary line, including the point currently in dispute, as the reason this RLS would not be accepted for filing due to the ambiguity of ownership it creates. (AA-268-282.) The Affidavit of Richard S. Little, an experienced Examiner of Titles, notes the same facts, that RLS No. 62 claimed more property than the Lees owned. (AA-283-306.) Respondents Howe should not be allowed to rely upon this erroneous RLS to deprive Appellants Hauge of the property they own.

B. Substantial additional evidence exists that RLS No. 62 was incorrect at the time of filing in 1965. RLS No. 62 should be corrected.

As noted previously in Appellants' Brief, there exists substantial evidence that RLS No. 62 as filed by Original Landowners Lee on December 4, 1965, is incorrect. It does not take its legal description from Certificate of Title No. 11537, which describes the north boundary line of the property, instead claiming by its drawing land that is north of the line that is properly described in said Certificate No. 11537 as "... parallel with and distant Fifty

(50) South from said North line of said U.S. Government Lot 3...” (AA-178.) Though it purports to include land that is clearly north of that line, it is not joined in by the Original Purchasers Menaldino, who had purchased that property north of the line in 1962.

In the files of the surveyor who had filed RLS No. 62, Don C. Hult, there are many drawings and depictions that show the land owned by the Original Landowners Lee as being south of the boundary line with Original Purchasers Menaldino (see AA-219, AA-227, AA-229, AA-233, AA-235-237, AA-240-242, AA-244, AA-245, and AA-247.) The Certificate of Survey signed by Don C. Hult dated December 21, 1963 (AA-240) shows the peninsula of land in dispute, and the line 50 feet south of the North line of U.S. Government Lot 3 runs right to the southern most point of the bay (yet not all the way to the shore line of Clear Lake.) This same Certificate of Survey is later signed by Don C. Hult and dated December 14 (or 17), 1965, with a line drawn through the December 21, 1963 (AA-219.) This Certificate of Survey was dated just two weeks or less after Don Hult signed off on RLS No. 62, yet its depiction of the “bay” does not comport with that contained in RLS No. 62. This is more evidence that RLS No. 62 was incorrect.

The files of the surveyor Don C. Hult are the foundation of his RLS No. 62. The surveyor was the agent of Original Landowners Lee in filing the registered land survey. As such, they are admissible under the rules of evidence, as either admissions of a party-opponent (Minnesota Rules of Evidence 801(d)(2)(D)) or hearsay exceptions as records of regularly conducted business activity (Minnesota Rules of Evidence 803(6)).

Respondents Howe have argued that the act of the public officials in approving RLS No. 62 make it presumptively valid, as “public officers are presumed to have performed their official duties.” *Alvin v. Johnson*, 62 N.W. 2d 22, 26 (Minn. 1954.) The cases cited by Respondents all involved cases where there was no evidence that they had not correctly performed their duties.

In this case, there is significant evidence that RLS No. 62 was incorrect on its face, in its failure to properly give the legal description for the land owned by Original Landowners Lee as described on Certificate of Title No. 11537. The depiction of the land did not comply with applicable principles of riparian rights. The files of the surveyor Don C. Hult indicate that the drawing on RLS No. 62 did not accurately portray the contours of the bay, as shown by surveys signed by Don Hult and dated both before (December 21, 1963) and after (December 14 or 17, 1965) the filing of RLS

No. 62 on December 4, 1965. (AA-240 and AA-219.) And the Washington County Surveyor at the time, James F. Simonet, acknowledges that “(n)o field check was made on this Register Land Survey.” (AA-252.) This alone is proof that the public officials charged with reviewing the accuracy of RLS No. 62 did not fulfill their official duties.

While the law presumes that public officials properly perform their official acts in connection with their duties, yet such presumption may be rebutted by competent proof. *State v. Allyn*, 150 Minn. 123, 184 N.W. 787 (Minn. 1921.)

Later aerial photographs of the area in both 1969 (AA-265) and 2005 (AA-266) show the bay described in RLS as covered with growth and trees, which is inconsistent with the depiction of this land as underwater on December 4, 1965 when RLS No. 62 was filed. And the current Survey done by Respondents’ surveyor, Sunde Land Surveying LLC in 2005 (showing mature trees on the land purportedly underwater in the Lake in 1965), presents additional evidence that RLS No. 62 did not “correctly” depict the land to be platted by that RLS. The only time that the area is shown as underwater is at the exact moment on December 4, 1965, when RLS No. 62 was filed. It’s as if the Original Landowners Lee waited until the singular moment in time when the “bay” was filled with water, and ran in and filed the RLS on that date. According to the Certificate of Survey

dated December 14 (or 17), 1965, by Don C. Hult, the contour of the land and water was already different (as it had been by another of his surveys in December 21, 1963.) Given the working drawings in the Hult file, it is very likely that the water in the bay never extended south of the property line with Original Purchasers Menaldino.

Appellants have presented substantial evidence that RLS No. 62 is incorrect on its face. When summary judgment is granted, as here, “the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted.” *Fabio v. Bellomo*, 504 N.W 2d 758, 761 (Minn. 1993). Viewing all of the evidence as most favorable to Appellants Hauge, it is clear that a jury could find that RLS No. 62 was incorrect at the time that it was filed.

II. APPELLANTS’ CLAIMS ARE NOT TIME-BARRED.

Respondents Howe argue that Appellants Hauges’ challenge to Registered Land Survey No. 62 is time-barred by Minnesota Statute Section 508.28. Respondents have consistently misstated that the original registration of their property occurred with the filing of RLS No. 62 in 1965. This is incorrect, as the original registration proceeding occurred in 1960, as stated on both the Respondents’ Certificate of Title No. 63785 and Appellants’ Certificate No. 33535. (AA-184 and AA-188.) Appellants’ Brief, Argument II addresses this contention that the filing of a registered land survey cannot be

challenged more than 6 months after its recording. The relief that Appellants Hauge seek, revision of RLS No. 62 to exclude the land they own, is clearly authorized by Minnesota Statute Section 508.71. *Estate of Koester v. Hale*, *supra*, states that this statute gives the Court:

... the express authority to order cancellation of Mrs. Hale's certificate of title and the issuance of a new certificate from which the erroneously included land is deleted. Such relief does not offend the prohibition against opening 'the original decree of registration.' With respect to the disputed tract, the registration proceeding must be regarded as a nullity. *Estate of Koester v. Hale*, *supra*, at 782, 394.

Respondents' Brief mischaracterizes the facts in *Koester*, claiming that "due to an obvious error by both the buyers' attorney and the examiner of titles, the registration decree and certificate of title included some land not conveyed to them ... no one was aware of the mistake for until years later..." (Respondents' Brief pages 11- 22.) Yet if this mistake was "obvious" why was no one aware of it?

Respondents Brief then goes on to misstate the facts that the peninsula here has plainly been part of Tract K since 1965 and that prior owners of both parties' property have always operated under that knowledge. It was not plain on either the Original Purchasers Menaldinos Certificate of Title No. 11184, nor the Appellants Hagues' Certificate of Title No. 33535. There are no facts in evidence that the Original Purchasers Menaldino operated any specific way with respect to the peninsula nor did Original Owners Lee or any of their successors in interest exercise any dominion or control over this peninsula until the instant litigation, save the naked assertions of Respondents and their counsel. Similarly the statements that Appellants Hauge "knew that the Tract K peninsula was not part of their property" belies the direct testimony of Allan D. Hauge and Appellants

claims herein (AA-307-324, and Answer and Counterclaims AA-11-15, Petition of Allan D. Hauge and Cecelia E. Hauge for Cancellation of Certificate of Title No. 63785, Case File No AA-49-61.)

Further, this argument that the Respondents Howes' Certificate of Title and Torrens title is beyond challenge based upon Minnesota Statute Section 508.28 is inconsistent with the relief that the Respondents Howe themselves sought in this matter: to revise and change the legal description contained in Appellant Hagues' Certificate of Title No. 33535. The legal description of the southern part of the Hauge property as "That part of Registered Land Survey No. 34 ... and of the North 50 feet of Government Lot 3, lying westerly of the west line of Forest Road North..." has been the Hauge legal description on their Certificate of Title since it was issued in 1986. Yet the Respondents have petitioned for and received a Supplemental Order for Summary Judgment from the Court (AA-393-397) directing the revision of this legal description in 2008, 22 years after the Certificate was issued to the Appellants Hauge. Minnesota Statutes Section 508.25 states that the Hagues, who received this certificate of title in good faith and for valuable consideration, shall hold it free of encumbrances and adverse claims that are not noted on the certificate. RLS No. 62 was not noted on either Certificate of Title 11184 (Original Landowners Menaldinos' Certificate of Title) or Appellants Hagues' Certificate of Title No. 33535.

Torrens registration provides a means to determine the state of title through the inspection of a single document, the certificate of title, except for seven specified statutory exceptions. *Hersh Properties, LLC v. McDonald's Corp.*, 588 N.W. 2d 728, (Minn. S. Ct. 1999.) How can the Respondents Howe challenge and dispute this certificate of title held by Appellants Hauge 20 years after its issuance? Don't the provisions of Minnesota Statute Section 508.28 prohibit this challenge, as the Respondents' argue?

Appellants Hauge do not challenge the validity of the original registration proceeding for the Lee property; indeed it is the source of their registered title to their own property. However, as stated before they do challenge the accuracy of RLS No. 62. And the holding in *Estate of Koester v. Hale*, 297 Minn. 387, 211 N.W. 2d 778 (1973) clearly establishes that filing of an erroneous Certificate of Title cannot be used to deprive an adjoining landowner of their property. The filing of RLS No. 62 does not give its proponents land that they did not own, the erroneous depiction of this property to the contrary.

The Respondents' argument that the Appellants Hauges' actions herein are barred by the doctrine of laches is wrong. Minnesota Statute Section 508.02 provides that "... (n)o title to registered land in derogation of that of the registered owner shall be acquired by prescription or by adverse

possession.” The Torrens law abrogates the doctrine of constructive notice, except as to those matters on the certificate of title. *In re Juran*, 178 Minn. 55, 226 N.W. 201 (Minn. 1929.) The purpose of the Torrens law is to establish indefeasible title which is immune from adverse claims not registered with the registrar of titles and to assure that property can become encumbered only with registered rights and claims. *Petition of McGinnis*, 536 N.W. 2d 33 (Minn Ct. of App. 1995; review denied.) Thus, whether the Hagues had constructive notice of possible claims of the owners of Tract K to their land is immaterial, as these claims were not noted on either Certificate of Title No. 11184 or 33535.

Additionally, the same laches argument that Respondents make is applicable to prior owners of the Respondents’ property. Appellants Hauge have owned the property that is the subject of this dispute for over 20 years, since Certificate of Title No. 33535 was issued to them. The owners of the property to the south of them had notice that the Appellants Hauge claimed title to this land by the Appellants’ use of the peninsula of land. (Affidavit of prior owner Linda Carlson, AA-141-143 and Affidavit of Allan D. Hauge, AA-307-324.) Yet, these parties brought no action to cancel or reform the Appellants’ Certificate of Title No. 33535 until these proceedings. Prior owner of the Respondents’ property, Linda Carlson, in her Affidavit stated

that the Hauges placed a dock on this property and utilized it (AA-142); yet she made no effort to stop the Hauges from this use and did not commence any type of litigation to remove the Hauges from this property despite her presumed claim to the property under RLS No. 62. Wouldn't this failure to protect her claimed rights in this property bar her, and subsequent owners, from now claiming that the Appellants do not own this property under a doctrine of laches? Why would Appellants Hauge be prohibited from asserting their rights to this property by laches, but not the Respondents?

III. APPELLANTS' EXPERT WITNESSES SHOULD BE HEARD. RESPONDENTS' ARGUMENTS WITH RESPECT TO ADMISSIBILITY OF EVIDENCE ARE WITHOUT MERIT.

A. Appellants' experts.

Appellants have offered the Affidavits of Michael J. Welling, the Washington County Surveyor, and Richard S. Little, an experienced Examiner of Titles, on the issue of the validity of RLS No. 62. (AA-268-282 and AA-283-306.) Mr. Welling is a licensed surveyor employed by Washington County with an express responsibility to review registered land surveys for compliance with statutory requirements prior to recording. His testimony is based upon review of the documents of public record establishing the titles of Original Landowners Lee, Original Purchasers

Menaldino, Appellants Hauge and Respondents Howe, and the business records of Don C. Hult, the surveyor and agent for Original Landowners Lee when they submitted RLS No. 62, including other surveys in Mr. Hult's file, plus aerial photographs produced for and maintained by the office of the Washington County Surveyor's Office. These documents are the basis of Mr. Welling's opinion as to the validity of RLS No. 62 (which he states is incorrect.) Mr. Welling is qualified to render an opinion and his opinion is based upon facts properly in evidence. Parties are allowed to present expert witnesses and testimony.

(I)f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify in the form of an opinion or otherwise.
Minnesota Rules of Evidence 702.

All of the facts that Mr. Welling based his opinion on are admissible in evidence, as required by *Minnesota Rules of Evidence 703.*

Land surveying and measurements as to elevation in the engineering field is a matter of specialized skill and of science. It involves, among other things, principles of mathematics, and no one doubts that mathematics is a science. *Johnson v. Agerbeck*, 247 Minn. 432, 77 N.W. 2d 539, 546 (Minn. 1956.)

Clearly the trier of fact will be assisted by expert testimony on surveying, and registered land surveys. "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an

ultimate issue to be decided by the trier of fact. *Minnesota Rules of Evidence 704.*

Similarly, Mr. Little is an expert on Torrens law, including registered land surveys, with 30 plus years practice experience as a Deputy Examiner of Titles in Hennepin, Ramsey, Anoka and St. Louis Counties. (AA-283-284.) His testimony and opinions are also based upon admissible evidence from public records, and the files of Don C. Hult, the surveyor for Original Landowners Lee (AA-284-285.) He is imminently qualified to testify about Torrens law and procedures, including the filing of registered land surveys under Minnesota Statute Section 508.47. Torrens law is a small and unique area of real property law, which few practitioners can claim to have fully mastered. His testimony will assist the trier of facts to determine the validity of RLS No. 62 and should be admissible.

Respondents' Brief cites cases where expert testimony is not required, claiming that "each courtroom is equipped with a 'legal expert,' called a judge..." *State v. Moore*, 669 N.W. 2d 733, 740 (Minn. 2005). However,

(t)he opinion of an expert witness is intended to be used only where, because of some superior learning or experience, the witness is more capable of formulating a correct opinion on the subject matter involved than are members of the jury." *Aho v. Carmody*, 251 Minn. 19, 86 N.W. 2d 692 (Minn. 1957.)

Clearly, the expert testimony of Mr. Welling and Mr. Little is founded in their superior learning or experience and will assist the trier of fact. In fact, the testimony of Michael J. Welling was the only expert testimony by a surveyor in this proceeding, as Respondents Howe rely upon a singular document, RLS No. 62, to substantiate all of their claims for property Appellants claim they own. The testimony of Mr. Welling and that of Mr. Little is the only testimony as to whether RLS No. 62 is correct, as required by Minnesota Statute Section 508.47 and applicable law. It is unrebutted. Yet the Court, in considering this evidence, stated “Why would I care? I don’t care.” (Transcript of Proceedings, Motion Hearing, AA-373.) The Court placed its singular reliance upon the approval of local officials in 1965, ignoring any and all evidence that indicated that RLS No. 62 was incorrect, as he felt that this inquiry into the validity of RLS No. 62 was untimely. The Court did not view this evidence in the light most favorable to the non-moving party, as required by the rules for summary judgment.

B. Other evidence and claims.

Respondents Howe have made unsubstantiated statements as to the extent of the Appellants Hauges’ knowledge of the claims of the Respondents.

First they claim that Original Purchasers Menaldino had actual knowledge of

RLS No. 62 because "... Menaldinos, received and kept in their file a copy of RLS 62, which outlined in red the Hauge Property and labeled it 'Menaldino.' That outline does not include the Tract K peninsula."

(Respondents' Appendix RA-1, as asserted in Respondents' Brief page 5.)

However there is no evidence as to the knowledge of the Original Purchasers Menaldino, these statements notwithstanding. The Menaldinos never submitted an affidavit or a deposition with this statement; this statement was made by Respondents' counsel, Christopher R. Grote, in his argument before the Court on the Motion for Temporary Injunction in August 2007

(Transcript of Proceedings, AA-88) with the document submitted attached to Court as an Exhibit to the Complaint and now again with the Respondents' Brief (RA-001.) This document has no foundation nor is it self-authenticated; it should be disregarded as hearsay (Minnesota Rules of Evidence 802.)

Respondents have similarly submitted to the Court other documents without foundation or authentication, including an alleged unsigned Menaldino Boundary Survey (RA-002) and a letter dated July 1, 1986 from Franzen & Associates to Rev. and Mrs. Edward E. Menaldino (RA-018 and Exhibit 27 to Durfee Certified Petition.) These documents are inadmissible without foundation or authentication. And even if admissible they do not

establish the Appellants' knowledge of their contents previously, the claims of Respondents' Brief to the contrary.

This mischaracterization or misrepresentation of evidence has been almost systematic by Respondents, in an attempt to make Appellants' good faith claim to the land described in their Certificate of Title No. 33535 seem sinister and malicious. Respondents' Brief mischaracterizes other evidence purporting to show Appellants presumed knowledge of RLS No. 62, by calling a "Drainage and Erosion Control Plan" prepared for Greg Knack in 1986 a "survey" when it only purports to be a plan for a portion of the property owned by the Appellants Hauge (Transcript of Proceedings, A-366.) Throughout the proceedings (Memorandum of Law in Support of Howes Motion for Summary Judgment AA-151) and now in their Respondents' Brief (page 6) allegations are made that the Appellants Hauge have been intentionally and systematically filling in the bay over a 20 year period with the intention to connect the land peninsula to the mainland, even though there was submitted the Affidavit of Travis Germundson, Area Hydrologist, Minnesota Department of Natural Resources, that states that in his inspections of the subject property he "saw no evidence of a systematic effort to fill in the bay area." (AA-325-336, at AA-327.) The basis of this claim appears to be the hearsay letter of Franzen mentioned above and the

allegations of prior owner Linda Carlson (Affidavit of Linda Carlson, AA-141-143), both of which Appellants have disputed under oath (Affidavit of Allan D. Hauge, AA-307-324, and Respondents' Appendix, RA-16.)

As stated before, the evidence should view "the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, supra.

CONCLUSION

The Appellants Hauge are entitled to have the evidence viewed in the light most favorable to them. There is credible and substantial evidence that RLS No. 62 was not correct at the time it was filed in 1965. The Appellants are entitled to the disputed property under the principles of riparian rights and by accretion to their property. The judgment of the District Court should be reversed.

Respectfully submitted,



TIMOTHY PAUL BRAUSEN

Attorney for Appellants

Allan D. Hauge and Cecelia E. Hauge

8301 Virginia Circle North

St. Louis Park, MN 55426

Telephone 952-451-8492

Attorney ID No. 11022

Dated: October 14, 2008