

*State of Minnesota*  
*In Supreme Court*

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In the Matter of Application of Anthony E. Sampair and  
Laurie K. Sampair to register the title to the following  
described real estate situated in Washington County,  
Minnesota, namely: Lots 1 and 2, Block 1,  
Lakewood Park Third Division,

*Respondents,*

vs.

Jeffrey Lutz, et. al.,

*Appellants, (A08-1494)*

Josephine Berg Simes, James Berg, Frima Bender,  
Douglas Krinke, and Ursula Beate Krinke.

*Appellants (A08-1505)*

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**BRIEF OF APPELLANTS JOSEPHINE BERG SIMES, JAMES BERG,  
FRIMA BENDER, DOUGLAS KRINKE AND URSULA BEATE KRINKE**

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## STATEMENT OF THE ISSUES

Issue I: Did Ms. Berg Simes contradict her own affidavit testimony by attaching a letter from her attorney even though she qualified the attorney's letter, with affidavit testimony detailing specific uses of the easement prior to 1940 and continuing to the present day?

The Court of Appeals changed the standard for contradictory testimony and stated that any person or entity can testify on the behalf of another individual, when that other person's testimony is not under oath and is pure hearsay. In making this radical departure from established case law the Court of Appeals ruled that Ms. Berg Simes contradicted her personal testimony with a letter drafted from her attorney.

*Griese v. Kamp*, 666 N.W.2d 404 (Minn. App. 2003).  
*Camfield Tires, Inc. v. Michelin Tire Corp.*, 719 F.2d 1361 (8th Cir. 1983).  
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Issue II: Did the Court of Appeals properly interpret the Marketable Title Act possession exception standard when the Court required those in possession to provide testimony from 40 years after the land access was granted and force them to prove a stringent possession standard?

The Court of Appeals held that the possession exception does not apply to parties in possession and stated Appellants must show their use of the easements commenced by the end of the 40 year period by firsthand knowledge of the use, even though the standard is more "flexible" than the standard for prescriptive easement.

*Lindberg v. Fasching*, 667 N.W.2d 481 (Minn. App. 2003).  
*Wichelman v. Messner* 83 N.W.2d 800 (Minn. 1957).  
*B.W. & Leo Harris v. City of Hastings*, 59 N.W.2d 813 (Minn. 1953).

## STATEMENT OF THE CASE

In February 2006, Mr. and Mrs. Krizak brought this action to register property in Washington County and to extinguish possessory easements held by a number of residents in the City of Birchwood, Minnesota. In July 2007, the Krizaks sold the property to the Respondents Mr. and Mrs. Sampair. On July 1, 2008 the Honorable Judge Richard T. Jessen granted summary judgment against the Appellants. On August 28, 2008 the Appellants appealed to the Minnesota Court of Appeals who affirmed the decision on June 9, 2009. The Minnesota Supreme Court accepted Appellants' petition and this timely brief followed.

## STATEMENT OF FACTS

In the early 1940s, when Josephine Berg Simes was a girl, her family bought a summer cabin on White Bear Lake in what is now the City of Birchwood Village. App. A-134. As was typical at the time, the property had deeded lake access across the street on a vacant lot. Literally dozens of other homes in the area shared the same easement. *See*, App. A-11-14.

Josephine Berg Simes recalled and testified the property was used for access every year since the time she first was on it as a child. App. A-134. The property and the deeded lake access have since been transferred in part, to her son's family, as well as her now deceased sister, Frima Bender, who passed away during the pendency of this case. *See*, App. A-137, 142. In all instances, the easement to the lake has passed of record with

each transfer of the property in the Berg/Simes/Bender family. *See*, App. A-137. It is undisputed the easement is of record and that the easement was not acquired through prescriptive or adverse possession.

The Krinkes purchased their property in 2001 and have used the easement on an annual basis for docking and launching their kayaks and for recreation use. App. A-114-127. When the Krinkes purchased their property it was listed by the previous owner as having deed lake shore access. App. A-127.

In addition, people in the Birchwood neighborhood have associated together every year for the purpose of constructing a common dock on the adjoining road easement. App. A-138. This associated, common use and community effort has also been in continuous existence, directly next to the subservient property, for decades. *Id.* The Bergs, the Simes, Benders, and Krinke's continuously have been active in the association, and regular and enthusiastic users of the lake, for many decades in continuation to the present.

Anthony Sampair and Laurie Sampair (hereinafter "Respondents") are the fee owners of the serviant lakeshore property Lot 1 Block 1 in Birchwood, Minnesota, and have attempted to register the title to their property in accordance with Minn. Stat. §508. This registration of title proceeding began with the filing of an Application by the Respondents' predecessors in title, James T. Krizak and Christina R. Palme-Krizak, who owned the subject property from July 2004 to July 2007. A.1-6, Amended Cross-Application to Register Title by Krizaks. Prior to the Krizaks, the property was owned

by Wayne R. and Gigi G. Godfrey, from March 1999 to July 2004, and before them, Donald R. and Kathleen E. Madore from March 1981 to March 1999.

The Appellants Jeffrey Lutz, Karen Deann, Jonathan and Susan Fleck, Brian Lind, Karen Hagan-Lind, Robert and Barbara Carson, Eugene and Shirley Ruehle, Josephine Simes, James Berg, Douglas and Ursula Krinke, and James Simning (hereinafter "Appellants"), all own lots either across Lake Avenue from the lot owned by the Respondents or across Tighe-Schmitz Park, a small public park managed by the City of Birchwood. The Appellants claim access to the lakeshore of White Bear Lake by a pathway across the westerly edge of the Respondents' lot. *See*, App. A-22, 114, 128, 134, 137. Since early in the twentieth century, the Respondents' lot has been encumbered by a recorded easement which was granted to the predecessors in title to the Appellants' lots for the purpose of allowing owners of those lots and easement to obtain access to White Bear Lake for purposes of "boating and bathing." App. A-9. All of the Appellants claim current ownership of the access easement. The Respondents dispute the claim of Appellants to an easement. This litigation began after a Report of Examiner prepared by the Washington County Examiner of Titles disclosed the easements as an objection to the Respondents' request for a Certificate of Title without memorializing the Appellants' easements on the Certificate. (A.9, Report and Certificate In Re Title by Examiner of Titles).

The Appellants' claim is two-fold. First, the recorded grant of easements to each of the Appellants provide constructive notice to the Sampairs and their predecessors in title of the Appellants' interest over Lot 1, Block 1, Lakewood Park Third Division.

Second, the easement has been in continuous usage since at least the 1940's, which provides both actual notice of the rights of the easement across Lot 1 and falls under the possession exception to the filing requirements of Minnesota's Marketable Title Act (hereinafter the "MTA"), Minn. Stat. § 541.023, Subd. 6 (2008).

### STANDARD OF REVIEW

This appeal addresses issues that were originally decided by the District Court in its July 1, 2008 Summary Judgment Order. On an appeal relating to issues decided on summary judgment, a reviewing court determines (1) whether there are any genuine issues of material fact and (2) whether the lower court erred in its application of law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). Deference need not be given to a trial court's decision on a purely legal issue. *Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984). "Summary Judgment is properly rendered only where there is no genuine issue of material fact in dispute and where a determination of the applicable law will resolve the controversy." *Gaspord v. Washington County Planning Comm'n*, 252 N.W.2d 590 (Minn. 1977). The facts are viewed in the light most favourable to appellant, the party against whom Summary Judgment was granted. The Appellants argue that the District Court decision based on *B. W. Leo Harris Co. v. City of Hastings*, 240 Minn. 44, 59 N.W.2d 813 (Minn. 1953) is a misunderstanding of the law.

## SUMMARY OF THE ARGUMENT

Appellants face a dichotomy from the Court of Appeals decision. On the one hand, case law makes it clear that the MTA possession standard is “more flexible” and relaxed than an easement by prescription (open, adverse and continuous use over a statutory period). *Lindberg v. Fasching*, 667 N.W.2d 481, 486-487 (Minn. App. 2003). On the other, in order to prove MTA possession Appellants have been asked by the lower courts to show nearly the same standards going back 40 years after the source of title was granted, a look-back of almost 60 years. App. A-203; *Sampair v. Village of Birchwood, et al.*, 2009 WL 1587166 \*3 (Minn. App. June 2009).

This strict standard is a misapplication of law from an adverse possession claim under the MTA. See *B.W. & Leo Harris v. City of Hastings*, 59 N.W.2d 813 (Minn. 1953). Instead, the rights of parties in possession pursuant to recorded easements are an exception to the MTA. *Wichelman v. Messner* 83 N.W.2d 800, 814 (Minn. 1957); Minn. Stat. § 541.023 subd. 6 (2008). Lastly, the Court of Appeals tried to end the possession question by finding abandonment in a letter from one of the Appellant’s attorneys. The letter was not understood by any party to be a waiver and does not qualify to knock out the affidavit to which it was attached. *Griese v. Kamp*, 666 N.W.2d 404, 408 (Minn. App. 2003).

## ARGUMENT

The Appellants James Berg, Josphine Berg Simes, Frima Bender and Douglas and Ursula Krinke join in the brief of the other Appellants in Appellate Court File No.

A08-1494, and incorporate their entire brief and argument herein by reference. In addition to the arguments raised in Supreme Court File No. A08-1494 these Appellants state and argue as follows:

**I. An affidavit or other prior testimony may be excluded when a later testimony or affidavit contradicts or creates a self-serving issue. By contrast, a letter written by an attorney does not qualify as an affidavit or testimony and is not contradictory or self-serving.**

The attorney letter does not qualify as testimony in the affidavit, but merely as an exhibit to the affidavit. *See*, App. A-132-133. The Court of Appeals in its decision stated that an attorney's letter can be used to contradict the testimony of Appellant Ms. Berg Simes' firsthand knowledge stated in her affidavit. Minn. R. Civ. P. 56.05 requires an affidavit to be made on personal knowledge, and the letter was included in her affidavit to show a continued assortment to the easement. Furthermore, there is no history of using third party documents or letters to contradict an affidavit on grounds for exclusion. A strong history of case law shows that a court will exclude an affidavit or testimony only when it is contradicted by the same individual's prior affidavit or testimony. In *Griese v. Kamp*, 666 N.W.2d 404, 408 (Minn. App. 2003), there were two sets of affidavits. The second set contradicted the first set and the Minnesota Court of Appeals held "a party cannot eliminate the damage done in prior evidence by providing later, contradictory evidence." *Id.* Additionally, in *Risdall v. Brown-Wilvert*, 759 N.W.2d 67 (Minn. App. 2009) the Court denied the Defendants' use of a self-serving affidavit that contradicted other testimony which was not sufficient to create a genuine issue of material fact.

*Risdall* at 72; citing, *Banbury v Omnitrition Int'l, Inc.*, 533 N.W.2d 876, 881 (Minn. App. 1995).

Finally, in *Banbury* the Court of Appeals again asserts that “a self-serving affidavit that contradicts earlier damaging deposition testimony is not sufficient to create a genuine issue of material fact.” *Banbury* 533 N.W.2d at 881, *emphasis added*; citing *Camfield Tires, Inc. v. Michelin Tire Corp.*, 719 F.2d 1361, 1365 (8th Cir. 1983). In *Camfield Tires* the Eighth Circuit offered the following rationale for its position: “If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own earlier testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.” *Id.*

By contrast, in this case it was an attorney’s letter, written on hearsay and meant only to assert actual notice of the easement to the previous owners of Lot 1, the Krizaks, which was used to disqualify Petitioner Simes’ first hand knowledge of the events. Petitioner Simes’ affidavit and the alleged contradictory statement are clearly in a letter from her attorney. The first part of the letter clearly indicates its intent to “put you [Krizaks] on actual notice of the existence of an easement,” and that “the easement has existed for decades.” App. A-132-133. The Court of Appeal’s extreme misapplication of the contradictory affidavit standard effectively cut off Petitioners’ case and a proper solution to this case.

In an attempt to show that Ms. Berg Simes in fact provided the owners of Lot 1, Block 1 with notice of the easement she attached several letters sent to the property

owners by her attorneys over the last 50 years. Specifically, Ms. Berg Simes attached one letter from her attorney in 1955, one from her attorney in 2004, and finally another letter from her attorney in 2005. *See*, App. A-131-133. The letters were sent to remind the subservient land owners about her family's easement use and her family's intent to continually use the easement over Lot 1. The letters were not sent to extinguish her family's easement rights.

In a dramatic turn the Court of Appeals declared that the letters sent by Ms. Berg Simes's attorney was contradictory testimony. *See, Risdall v Brown-Wilbert, Inc.*, 759 N.W.2d 67, 72, (Minn. App. 2009) Even though Ms. Berg Simes provided continuous specific uses of the property since 1943, the Court of Appeals stated that her attorney's letter, which she attached as support, contradicted her own testimony. The use of another person's letter to contradict your personal testimony goes beyond the case law and reasoning of this Court's holdings. *Id.* Generally, contradictory testimony is created only when a person testifies, and then through a self serving affidavit contradicts previous testimony in an attempt to create a genuine issue of material fact. *Id.* The problem with the Court of Appeals holding is that Ms. Berg Simes never previously testified about the contradiction, and as such, could not contradict herself. Moreover, a plain reading of the letter does not lead to the conclusion reached by the Trial Court or the Court of Appeals. The three attorney letters when read together with Ms. Berg Simes' affidavits clearly show a pattern of use over 60 years.

Finally, the letter was never intended, nor understood by any of the parties, as a waiver of any rights regarding the easement. In fact, during oral argument at the Court of

Appeals Attorney for Respondents Mr. Greene stated that he understood the letter was not a waiver, nor was it understood to be a waiver of any rights.

**II. The Minnesota Court of Appeals administered a new standard for the Marketable Title Act which requires those in possession to provide testimony from 40 years after the source of title was recorded in order to continue possessing the easement.**

**a. The Marketable Title Act was created to remove cluttersome encumbrances for purposes of clearing title for sale and not for offensive litigation.**

The lake access easements at issue were granted around a hundred years ago and have been used continuously by the property owners since. However, by applying the Court of Appeals decision most of the persons who could testify as to the use of the property within forty years of the conveyance, and thus keep the easement, are now dead. In effect, in making this interpretation of the MTA the court has unilaterally and completely extinguished all possessory easements of this type, regardless of their history of use and possession. There has never been a practice or understanding requiring the filing of a notice under Minn. Stat. § 541.023 (2008) and title examiners in Minnesota have never considered the statute applied to parties in possession until this decision.

Generally, properties with lake access have been routinely conveyed with the understanding that the lake access right continued. Now, the purchaser of deeded lake access easement no longer may have right to use and entry because there is no one left to testify in a quiet title action that the property was used within forty years of the prior conveyance. In the alterative, if such testimony still exists, people throughout the state

should immediately be required to commence a quiet title action to preserve the right of access before the witness' death, or their interests will forever be extinguished.

Public policy goal behind the MTA was to clarify old covenants. The MTA was never meant to act as a relinquishment procedure for easements, hence the parties in possession standard. Appellants' source of title predates the MTA and the Appellants were told they were exempt from proving they were in possession at the end of 40 years because they were already in possession when the MTA was passed. The MTA was passed by the Minnesota legislature in 1947, almost 37 years after the easements over Lot 1 Block 1 were given to the Appellants' properties in this case. At that time the easement holders were parties in possession and because they qualified under subdivision 6 of the MTA they did not have to worry about giving notice under the same statute. Minn. Stat. § 541.023 subd. 6 (2008). As such, retroactive legislation will generally not be allowed to impair rights which are vested and which constitute property rights. *Seese v. Bethlehem Steel Co.*, 74 F. Supp. 412, 417, (D.Md 1947), aff'd 4 Cir., 168 F.2d 58; *Fuller v. Mohawk Fire Ins. Co.*, 245 N.W. 617, 618 (Minn. 1932).

**b. The Marketable Title Act subdivision 1 Commencement and subdivision 2 Application apply to this case.**

The claims of title on servient Lot 1, Block 1 fall under the Marketable Title Act, which provides in part:

As against a claim of title based upon a source of title, which source has then been of record at least 40 years, no action affecting the possession or title of any real estate shall be commenced...to enforce any right, claim interest, incumbrance or lien founded upon any instrument event or transaction which was executed or occurred more than 40 years prior to the commencement of such action, unless within 40 years after such execution or occurrence there has been recorded...a

notice...setting forth [the basis for the claim]. Minn. Stat. § 541.023, subd. 1 (2008).

Under a plain reading of subdivision 1 of the Act, any claim of title that is 40 years or older must be registered within 40 years of the execution of the claim of title. This applies to “every right, claim, interest, incumbrance, or lien found by any instrument, event, or transaction that is at least 40 years old.” *Id.* at subd. 2. The purpose of this notice in the Marketable Title Act is to confirm the continuation of an interest in property and to eliminate stale claims that clutter the title, thus continuing the legislature’s goal with the MTA of clear and unfettered title. *Wichelman v. Messner*, 83 N.W.2d 800, 812 (Minn. 1957).

In this case, the Berg-Simes easement was granted in 1910, the Krinke easement was granted in 1909. According to subdivision 1 of the MTA then, notice under the MTA should have been filed by 1950 and 1949 respectively. Appellants admit that no notice was filed under the MTA. However, the easement was of record in the Appellants’ chain of title. App. A-12. As a practical matter, there has never been a practice or understanding requiring the filing of a notice under the MTA and title examiners in Minnesota have never considered the MTA to apply to parties in possession. Minn. Title Standards No. 61 (*stating owners of adverse rights that are in possession are exempt from the filing requirements*). In summary, the MTA subdivisions 1 and 2 both apply to Appellants because they are using a claim of title which is more than 40 years old and have not submitted the notice requirement per the statute.

**c. However, the Marketable Title Act subdivision 6 is an exception to the required notice under the Marketable Title Act by allowing parties in possession to avoid an extinguishment of their easement rights.**

**i. Persons in possession under Minn. Stat. § 541.023 are exempt from the filing requirement.**

In construing the Marketable Title Act, the Supreme Court in *Wichelman v. Messner* was required to keep in mind that the Legislature does not intend a result that is absurd, impossible of execution, or unreasonable, and that the Legislature intends to favor the public interest as against any private interest. Minn. Stat. §§ 541.023, 645.17 (2008); *Wichelman* 83 N.W.2d at 811. Traditionally, title examiners in Minnesota have accepted easements over 40 years old when the parties are in possession of the easement and the use was sufficiently obvious so that a prudent person would be put on notice regarding the existence of an easement. Lower courts have subsequently confused the possession exception and its requirements (possession and notice) with the requirements for overcoming the abandonment under the MTA and those for acquiring adverse possession under the MTA.

*Wichelman* summarizes both the class of persons that the MTA cannot be used against and which requirements are necessary to extinguish an interest. *Wichelman* 83 N.W.2d at 819-820. The type of people for whom the Act cannot be invoked are: 1) persons who seek to enforce any right, claim, interest founded on any instrument, event, or transaction which was executed or occurred within 40 years prior to the commencement of the action; 2) persons who seek to enforce a claim founded on any such instrument or event which was executed or occurred over 40 years prior to the

commencement of the action if they have filed proper notice within 40 years of the execution upon which it is founded; and 3) those excepted by subdivision 6 of the act, which includes persons in possession. *Id.* The third exception, that those in possession cannot have the Act invoked against them, clearly applies in this case. The Appellants are in possession of the easement and can show a continued use of the easement. *See generally affidavits in Appendix.* Again, there is no mention of a critical time frame of possession. Even if the court does not find the Appellants fall into one of the above categories the requirements to extinguish an easement will still not be met.

*Wichaelman* describes that for the MTA to extinguish any interest, two basic requirements are necessary. *Wichaelman* 83 N.W.2d at 819. First, the party desiring to invoke the statute for his own benefit must have a requisite claim of title based upon a source of title, which source has then been of record at least 40 years. *Id.* at 819-820. This step has been met because the Sampairs have a claim of title; in this case it is a recorded fee simple title to the property on which the easement sits. The second basic requirement is that the person against whom the Act is invoked must be one who is conclusively presumed to have abandoned all right, claim, interest...in the property. *Id.*; Minn. Stat. § 541.023 subd. 5 (2008). The second requirement has not been met; the Appellants (Bergs, Simes, Krinkes) and their predecessors have continually used the property and most definitely have not abandoned it. The Appellants have shown actual possession of the property and as such are not presumed to have abandoned the property. Minn. Stat. § 541.023 subd. 6 (2008).

In summary, the MTA cannot be invoked against persons in possession and their

interest cannot be extinguished because the Appellants have not abandoned it, however, if the court finds we are not parties in possession and have abandoned the property then Appellants are prepared to make a strong showing to overcome abandonment.

**ii. Possession is present, open, actual and exclusive, and must be of the character which would put a prudent person on inquiry.**

Following subdivision 1 Commencement and subdivision 2 Application section of the MTA is subdivision 6, Limitations and Certain Titles Not Affected. Minn. Stat. § 541.023 subd. 6 (2008). According to subdivision 6, the statute's provisions do not apply to "bar the rights of any person...in possession of real estate." *Id.*, *emphasis added*. The statute does not list a critical time in which possession must occur. *Id.*

This court has defined possession under the MTA as "use that is sufficient to provide notice of the possessor's interest in the property." *Lindberg v. Fasching*, 667 N.W.2d 481, 486 (Minn. App. 2003), *review denied* Nov. 18, 2003; *Sterling v. Griffin*, 244 N.W.2d 129, 133 (Minn. 1976). This standard has evolved from a strict adverse possession standard to a more relaxed approach in which the degree of possession required takes into consideration the nature of the easement. *Lindberg* 667 N.W.2d at 486; *see also, Caroga Realty Co. v. Tapper*, 143 N.W.2d 215 (Minn. 1966). *Farmers' State Bank* elaborated that "the extent and character of the property, and the uses to which it may be put, are obviously matters of considerable importance in determining whether or not the occupancy of it is sufficient to put a purchaser upon inquiry." *Farmers' State Bank v. Cunningham*, 234 N.W. 320, 321 (Minn. 1931). Finally, after a thorough analysis of the standard's evolution, *Lindberg* summarizes the possession standard for

easements as a “more flexible possession standard” and one which “the use must be sufficiently obvious so that a prudent person would be put on inquiry regarding the existence of the easement.” *Lindberg* 667 N.W.2d at 486-487. *Lindberg* also notes that this approach is consistent with the Minnesota Title Standards, which state that “for purposes of the MTA possession of an easement occurs when actual use or occupancy of the easement is consistent with the nature of the easement.” *Id.* at 487; Minn. State Bar Ass’n, *Minnesota Standards for Title Examinations* Standard No. 61 n. 2 (12th ed. 2003).

In the affidavit submitted by Josephine Berg Simes on June 3, 2008 she detailed her use of the lake easement since 1943. *See*, Aff. Simes (June 3, 2008). Ms. Berg Simes testified she used to take the streetcar to White Bear Lake for the purpose of enjoying the easement with her sister Frima Bender. Aff. Simes ¶ 5 (June 20, 2008). Ms. Berg Simes also testified under oath she has used the easement on countless occasions with her sister (1940-1947), then her husband (1947-1970’s), her children (1970’s-2008), and now finally her grandchildren. Aff. Simes ¶ 5, 7-8, 12-13 (June 20, 2008). In addition, starting in 1947 she and her husband stored a boat on the lake. Aff. Simes ¶ 12 (June 20, 2008). Finally, Ms. Berg Simes stated under oath she still has no intention of abandoning her lake access. Aff. Simes ¶ 15 (June 20, 2008). The Krinkes used the area for walking down the shoreline and launching their kayaks. App. A-121, 123. Additionally, the property was listed with deeded access to White Bear Lake, and the Krinkes recorded notice stating that they have not abandoned the easement in their permanent land record. App. A-125, 127.

**iii. There is not a critical period for possession but rather there should be an overall factual determination of possession.**

If the court continues to follow the 40 year “look-back” provision it will extinguish easements across Minnesota. The Court of Appeals decision in this case demanded Appellants demonstrate possession by showing “1) use of their respective easements no later than the expiration of the 40-year periods following the creation of their easements and 2) use from the end of the 40-year period until the commencement of the action,” citing three cases: *Twp. of Sterling v. Griffin*, 244 N.W.2d 129 (Minn. 1976), *B.W. & Leo Harris v. City of Hastings*, 59 N.W.2d 813 (Minn. 1953), and *Lindberg v. Fasching*, 667 N.W.2d 481 (Minn. App. 2003). App. A-203, *Sampair v. Village of Birchwood, et al.*, 2009 WL 1587166 \*3 (Minn. App. June 2009). The 40 year look-back provision stemmed from the *B.W. & Leo Harris v. City of Hastings*, a 1953 case in which an easement was claimed on the basis of adverse possession. Unfortunately, this 40 year look-back period was picked up in evaluating the possession and use of the easement in *Lindberg v. Fasching* and describes the critical timeframe as “the end of the 40-year period” but fails to cite any case law or particular provision in the MTA. *Lindberg*, 667 N.W.2d at 487.

In *B.W. & Leo Harris v. City of Hastings*, the court was asked to determine the relationship of the MTA to an adverse possession claim going back over 40 years. The adverse possession claim under the MTA can be analogized to the possession standard under the MTA as discussed above. The parties in possession standard for the MTA is based off of an adverse possession standard (a nonpermissive use of the land that is

continuous, exclusive, hostile, open, and notorious) but under the MTA that standard is loosened to take into account the nature of the easement and the need to only put a prudent person on notice. *Lindberg* 667 N.W.2d at 486-487; *Sterling* 244 N.W.2d at 133. Similarly, in *B.W. & Leo Harris*, the City of Hastings wanted to claim the easement under adverse possession and the court required a higher threshold of continuous possession making the City of Hastings show they were in possession both at the expiration of 40 years and continuously since. In this case, the standard required for adverse possession does not apply because all of the land owners in Birchwood have recorded easements, and thus the Sampairs have been put on notice that persons in Birchwood have an easement over their vacant lot. Conversely, forcing the Appellants to prove a high standard of adverse possession under the MTA would cause undue hardship to the Appellants.

*Lindberg v. Fasching* did not involve a claim of adverse possession under the MTA and yet the court mistakenly applied the adverse possession standard under the MTA. However, its outcome did not cause undue harm to the easement holder. *Lindberg* can be differentiated because the source of recorded title was 1950, with the end of the 40 year period being 1990. *Lindberg* 667 N.W.2d at 483-484. Lindberg was fortunate enough to both use the property himself before the 40 year expiration period and have his predecessor in title available to testify he also used easement before the end of the 40 year period and thus the case ended with a just result. *Id.* Thus, under a mistaken application of law Lindberg only had to show possession going back 13 years. In the present case, the Appellants are being asked to show a 40 year look-back period going

back to around the 1950s, making it necessary to show possession for almost 60 years. This standard is nearly impossible to prove and would require Appellants to produce testimony regarding use and possession from people who are deceased, no longer living at the property or in the area, and that are unable to testify. In forcing the Appellants to make this strong showing at the end 40 years the lower courts have disregarded the parties in possession exception of the MTA subdivision 6 and heightened the “flexible” and lower standard normally required in these cases by instead applying the adverse possession standard of the MTA. *See, Lindberg v. Fasching*, 667 N.W.2d 281 (Minn. App. 2003); *B.W. & Leo Harris v. City of Hasting*, 59 N.W.2d 813 (Minn. 1953).

The third case that the Court of Appeals cited was *Township of Sterling v. Griffin*, 244 N.W.2d 129 (Minn. 1976). In *Sterling*, the court did not discuss the 40 year look-back period, but only discusses the standard of possession. To that end, the court cites *B.W. & Leo Harris*’ definition of possession “it must be present, actual, open, and must be inconsistent with the title of the person who is protected by this section. It cannot be equivocal or ambiguous,” 59 N.W.2d 813, 816, and that the possession contemplated by subdivision 6 “must be of a character which would put a prudent purpose on inquiry.” *Caroga Realty Co. v. Tapper*, 143 N.W.2d 215, 225 (Minn.1966); *Wichelman* 83 N.W.2d at 800. The case goes on to suggest that when determining the possession of an easement “due regard must be given to the nature of the easement.” *Sterling* 244 N.W.2d at 133.

In summary, *Sterling* does not support the 40 year look-back period, *Lindberg* mistakenly followed the look-back period but reach a just result and *B.W. & Leo Harris* created the look-back period to be used in an adverse possession cases. Clearly the 40

year look-back period does not apply in Appellants' case because it does not involve an adverse possession claim and would produce an unjust result.

**d. If Appellants are not a party in possession under subdivision 6 then Appellants are presumed to abandon the property under subdivision 5 and a strong showing must be made to overcome abandonment.**

Besides laying out the commencement, application and limitations of the Act, the MTA also describes "presumed abandonment." The Marketable Title Act states that "[a]ny claimant...barred by the provisions of this section shall be conclusively presumed to have abandoned" all interests created. Minn. Stat. § 541.023 subd. 5 (2008). As discussed above, the Appellants would fall under this provision if they do not fall under the parties in possession exception. *Id.* at subd. 6 (2008). A presumption of abandonment arises under Marketable Title Act if a party against whom the Act is invoked has failed to record its interest within 40 years of the date that interest is established and the party is not in possession. *Foster v. Bergstrom*, 515 N.W.2d 581, 586-587 (Minn. App. 1994).

To overcome the abandonment presumption a strong showing of possession is required. *Id.* To establish open and exclusive possession under the MTA one must show present, actual, open, and exclusive possession that provides notice of possessor's interest in property and cannot be equivocal or ambiguous. *Sackett v. Storm*, 480 N.W.2d 377, 381 (Minn. App. 1992) *review denied* March 26, 1992. Other cases elaborate further and describe that "abandonment can be upheld only where nonuse is accompanied by affirmative and unequivocal acts indicative of an intent to abandon and is inconsistent

with the continued use of the easement. *Richards Asphalt Co. v. Bunge Corp.*, 399 N.W.2d 188, 192 (Minn. App. 1987).

In this case, there has not been any showing of abandonment from the Appellants or Respondents. To that end, numerous affidavits have been submitted to the court showing continual recreational use from the Appellants throughout all seasons of the year. App. A-114, 120, 128, 134, 137. The easement use has continued for as long as the Appellants have had their property in the Village of Birchwood. *Id.* Notice of the easements has been provided through both recorded title and Sampairs admitted visual observation of the easement use. App. A-166. Appellants use has been open; boats have been stored on the easement, as well as a woodshed structure erected. App. A-114, 120, 128, 134, 137. Finally, Ms. Berg-Simes letter from her attorney clearly puts the previous owners, the Krizaks, on notice of the easement. App. A-131-133. In summary, even if Appellants fall under the abandonment presumption they can overcome it by demonstrating their open, present, actual, and exclusive possession of the easement, that notice of their interest in property has been given and Appellants' acts have not been equivocal or ambiguous.

## CONCLUSION

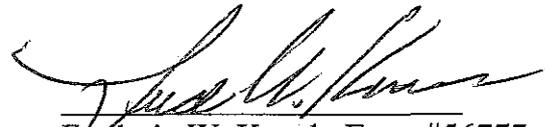
For the forgoing reasons Appellants respectfully request that the Minnesota Supreme Court reverse the finding of the District Court and remand this matter for further proceedings. Additionally, the Appellants request this court to apply the possession

exception standard and find that they are exempt from the recording requirement of the MTA.

DATED: 9/25/09

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

The undersigned, Jessica A. Johnson, hereby certifies pursuant to Minn. R. Civ. App. P. 132.01, Subd. 3(a), that the word count of the attached Brief of Appellants, exclusive of pages containing the Table of Contents and the Table of Authorities, is 5,995 words. The Brief complies with the typeface requirements of the rule and was prepared, and the word count was made, using Microsoft Word 2000.

Dated: 9/25/09

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