

Nos. A08-1494 and A08-1505

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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),*

and

Josephine Berg Simes, et al.,

*Appellants (A08-1505).*

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**BRIEF OF AMICUS CURIAE, THE CITY OF BIRCHWOOD VILLAGE,  
IN SUPPORT OF RESPONDENTS' POSITION**

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## STATEMENT OF CASE<sup>1</sup>

*Amicus curiae* City of Birchwood hereby submits this brief in support of the position of Respondents Anthony and Laurie Sampair in this matter. Roughly 100 years ago, numerous easements were created for boating and bathing access to White Bear Lake over the parcel of property that Respondents now own and seek to have registered. Similar ancient easement interests for boating and bathing access were created over other parcels within the City of Birchwood, thus prompting the City to submit this *amicus* brief with the expectation that the Court's decision will aid in rendering additional certainty in these matters.

In this case, it is undisputed that the easement holders failed to record a sworn notice of their interest in the easements prior to the fortieth anniversary of their creation, as required by the Marketable Title Act, Minn. Stat. § 541.023 (the "MTA"), and the easements are conclusively presumed to be abandoned. Due to the failure to file notice of their easements, in order to sustain their easement rights, the Appellants must have proved open, continuous, and obvious possession of the easements for the time period starting after the 40<sup>th</sup> year and continuing to the commencement of this action. They have failed to demonstrate continued possession by any credible evidence. Thus the District Court properly granted summary judgment to Respondents, and the Court of Appeals properly affirmed that decision.

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<sup>1</sup> Pursuant to Minn. R. Civ. App. P. 129.03, *Amicus* City of Birchwood hereby certifies that no party to this matter has authored this *amicus* brief in whole or in part, nor has any person or entity besides *Amicus* City of Birchwood made a monetary contribution to the preparation or submission of the brief.

## STATEMENT OF FACTS

The briefs of Appellants and Respondents have duly laid out the factual scenario in this matter, and as such, the City of Birchwood will incorporate them by reference to avoid repetition. Birchwood notes that the table provided by Respondents is particularly useful to summarize the creation of the separate easement interests for each Appellant, their respective required dates for filing notice under the MTA, and their earliest proffered year of possession. (See Resp. Br. at 9-10.)

## ARGUMENT

### **I. STANDARD OF REVIEW ON APPEAL.**

On appeal, the courts review a grant of summary judgment de novo to determine: (1) if there are genuine issues of material fact, and (2) if the district court erred in its application of the law. K.R. v. Sanford, 605 N.W.2d 387, 389 (Minn. 2000). When summary judgment is granted based on application of the law to undisputed facts, the result is a legal conclusion that is reviewed de novo. Lefto v. Hoggbreath Enters., Inc., 581 N.W.2d 855, 856 (Minn. 1998); see also Morton Bldgs., Inc. v. Commissioner, 488 N.W.2d 254, 257 (Minn. 1992).

The summary judgment procedure is designed to “secure the just, speedy, and inexpensive determination of every action.” Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2555 (1986). Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that

either party is entitled to a judgment as a matter of law. Minn.R.Civ.P. 56.03. "A fact is material if its resolution will affect the outcome of the case." O'Malley v. Ulland Bros., 549 N.W.2d 889, 892 (Minn. 1996). In this case, the District Court properly granted summary judgment to Respondents, which was upheld by the Court of Appeals, and that decision should be affirmed by this Court.

**II. RESPONDENTS ACCURATELY ANALYZE THE STANDARD FOR THE POSSESSION EXCEPTION UNDER THE MARKETABLE TITLE ACT, NAMELY THAT APPELLANTS MUST PROVE OPEN, OBVIOUS, AND CONTINUOUS POSSESSION, COMMENCING FROM AND AFTER THE 40<sup>TH</sup> YEAR OF THE CREATION OF THEIR EASEMENT INTERESTS, WHICH THEY HAVE FAILED TO DO.**

***A. As a matter of sound statutory interpretation and public policy under the Marketable Title Act, claimants must be required to prove continuous possession from and after the 40<sup>th</sup> year after the creation of the property interest.***

It is undisputed that Appellants did not certify their easement interests within 40 years of their creation under Minn. Stat. § 541.023, subd. 1, and the only question at issue was whether Appellants had met their burden to prove the possession exception under § 541.023, subd. 6. Regarding the possession exception to Minn. Stat. § 541.023, this Court has aptly held that:

If a claimant subject to the provisions of the statute has not filed the required notice, the only way he can avoid the statute's conclusive presumption is by being in possession at the time it would otherwise take effect. If at any later time he abandons his possession, the bar falls and he cannot revive his right by again going into possession. Thus, to avoid the conclusive presumption of abandonment imposed by the statute, the claimant's possession must be continuous. If the claim is based upon an instrument, event, or transaction which was 40 years old on January 1, 1948, the claimant's possession must have begun at least by that date and

must continue until action is commenced; if it is based upon an instrument, event, or transaction which becomes or became 40 years old after January 1, 1948, the claimant's possession must begin or have begun at the end of the 40-year period and must continue until action is commenced.

B.W. & Leo Harris Co. v. City of Hastings, 240 Minn. 44, 49, 59 N.W.2d 813, 816 (1953). Appellants seem to conclude that this statement of the law was somehow overturned by Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800 (1957), and/or the Minnesota Title Standards.

A careful reading of Wichelman discloses no such intent to overturn the foregoing holding from B.W. & Leo Harris Co. Appellants generally cite to Wichelman, but Wichelman in fact did not deal with the issue of when proof of possession would need to commence, as it should be noted that date of possession was not even at issue in Wichelman, because that case dealt with the elimination of a condition subsequent in a deed, and a condition subsequent necessarily cannot be "possessed." See id., 250 Minn. at 95-96; 83 N.W.2d 810. Although Appellants are correct when they state that the Marketable Title Act was meant to eliminate defects in title more than 40 years old, that does not mean that the possession exception need only be proved dating back for 40 years.

The Knaak appellants suggest that "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 the easement." (Knaak Br. at 13.) They later cite to the Minnesota Title Standards. (Id. at 16.) Although the Title Standards do not lay out a specific possession

timeline like that of B.W. & Leo Harris, in any event, the Minnesota Title Standards do not constitute binding precedent upon this Court, and to the extent they misstate the law, this Court should disregard them. See Cornell v. Walik's Heirs, 306 Minn. 189, 193-94, 235 N.W.2d 828, 830-31 (1975) (disregarding appellant's attempted reliance upon the Minnesota Title Standard No. 52 regarding joint tenancy, and noting: "The Title Standards were probably not intended to be a comprehensive treatise on Minnesota joint tenancy law but rather a set of guidelines to alert attorneys examining titles to items which affect the marketability of the title and call for some remedial action.") In this case, the Minnesota Title Standards should not be viewed as binding precedent regarding the interpretation of the Marketable Title Act, and in fact, should be disregarded to the extent they do not accurately reflect the timing requirements of the possession exception and the appropriate interpretation of Minn. Stat. § 541.023, subd. 6.

The Marketable Title Act's possession exception requires that possession be proved commencing before the 40<sup>th</sup> anniversary of the creation of the property interest, and remain in continuous possession to the start of the action. B.W. & Leo Harris Co. v. City of Hastings, 240 Minn. 44, 50, 59 N.W.2d 813, 817 (1953); United Parking Stations, Inc. v. Cavalry Temple, 257 Minn. 273, 101 N.W.2d 208 (1960); Caroga Realty Co. v. Tapper, 274 Minn. 164, 143 N.W.2d 215 (1966); Sterling Township v. Griffin, 309 Minn. 230, 244 N.W.2d 129 (1976). Appellants must prove ongoing possession starting before the 40<sup>th</sup> year, and if they drop out of possession for a period of time, the "bar falls" and they cannot later revive their rights by recommencing possession of the easement. B.W. & Leo Harris Co., 240 Minn. at 49, 59 N.W.2d at 816.

The Court in B.W. & Leo Harris Co. has concisely and accurately suggested the reason why Appellants' arguments must fail and be rejected. If Appellants' arguments are accepted, it would allow persons to revive ancient property rights by merely going back into possession after some lengthy period of time during which such persons or their predecessors had gone out of possession and thereby conclusively abandoned their rights. To accept Appellant's positions would create vast uncertainty in the property records, as ancient encumbrances in the title that otherwise were eliminated by operation of the statute could be revived at later times if and when a party went back into possession, which would defeat the legislature's purpose, policy, and intent behind the enactment of Minn. Stat. § 541.023. As a practical matter, this Court should hold that a party who alleges himself to be in possession of a property interest subject to abandonment under the Marketable Title Act must prove continuous possession commencing from and after the 40<sup>th</sup> year after that property interest was created, pursuant to Minn. Stat. § 541.023.

At the time of the enactment of Minn. Stat. § 541.023, the statute was meant to confer a sweeping and important reform in the area of real estate law. Wichelman, 250 Minn. at 109, 83 N.W.2d 818 People with interests subject to the act were given a period of nine months to record the notices of their interests as required by the new statute. Id. Notably, the Appellants in this case and their predecessors in title failed to record their interests, thus adding to the conclusion that they were indifferent about preserving their rights. Appellants' arguments for leniency under the Marketable Title Act are unpersuasive, and Appellants should be held to a strict standard of proof of possession from and after the 40<sup>th</sup> year of the creation of their easements.

***B. The Marketable Title Act applies with equal force to recorded easement interests, contrary to Appellants' suggestions.***

Appellants' briefs suggest that the "[p]ublic 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." (Knaak Br. at 11.) To the contrary, this Court has expressly noted that Minn. Stat. § 500.20 was enacted to eliminate nominal covenants, conditions, and restrictions in deeds, and by way of contrast, Minn. Stat. § 541.023 applies to such nominal interests as well as more substantial property interests. Wichelman v. Messner, 250 Minn. 88, 117, 83 N.W.2d 800, 823 (1957); see also Minn. Stat § 500.20. Thus Appellants' argument that the Marketable Title Act does not or should not apply to Appellants' recorded easement interests is unavailing.

***C. Appellants inappropriately attempt to shift the burden of proof upon Respondents to prove abandonment, when instead it is Appellants' burden to prove the continuous possession exception.***

The Holstad Appellant's brief suggests that it is Respondent's burden to prove abandonment under the statute. (See Holstad Br. at 9-12.) In fact, they suggest that Respondents "must prove 'conclusive abandonment'" under Wichelman. (Id. at 11.) Appellant's are incorrect and misinterpret the law. As noted by Respondents, Minnesota Statute § 541.023 *conclusively presumes* that a property interest is abandoned if the factual scenario falls within the bounds of the statute, namely that the interest was created more than 40 years before commencement of the action, and a written notice required to preserve the interest has not been filed before the 40<sup>th</sup> year. The law does not require

Respondents to prove abandonment. Rather, the law requires only that Respondents demonstrate that Appellants fall within the bounds of Minn. Stat. § 541.023's operation, and thereafter, the law conclusively presumes that Appellants have abandoned their rights.

Appellants suggest that the common-law standard, requiring Respondents to prove abandonment, continues to apply. Appellants inappropriately attempt to shift and alter the burden of proof. Appellants fail to appreciate that one of the very purposes of enacting the Marketable Title Act was to alter that common law burden of proof and create a statutory conclusive presumption of abandonment. It is undisputed in this case that Appellants' easement interests fall within the operation of Minn. Stat. § 541.023, because they were created roughly 100 years before the commencement of the action, and no written notice was recorded on or before the 40<sup>th</sup> year to preserve their interests. Thus Respondents met their prima facie burden under the statute, and the law therefore conclusively presumes that Appellants' interests have been abandoned unless Appellants meet their burden to prove continuous, actual, open, and exclusive possession from roughly 1948 to the present. Appellants fail to meet their burden as a matter of law, and the grant of summary judgment against Appellants was appropriate.

***D. The Marketable Title Act's possession exception requires clear and unequivocal proof of actual, open, and exclusive possession, contrary to Appellants' suggestions.***

As already noted above, public policy demands that Appellants make a strong and unequivocal showing of possession starting from and after the 40<sup>th</sup> year their easements were created. Moreover, the level of possession to be proved by Appellants is well

established to be actual, open, and obvious. Appellants suggest that a more lax possession standard should apply to their interests, otherwise old interests will be eliminated for lack of evidence of possession due to death or unavailability of witnesses.

Appellants argue for a more lax standard of possession largely as mere speculation, as they have not proffered any proof that they attempted and were unable to collect proof of possession dating back to 1949. Nothing appears in the record that Appellants even attempted to locate their predecessors in title. Rather, they chose to proffer evidence dating back only to their own dates of acquisition of their properties, and then demand that the Court accept such evidence as sufficient. This is an entirely unworkable and inconsistent standard that cannot be condoned. Appellants do not cite to any pertinent authority to support their claimed relaxation of the possession standards sufficient to save their claims or defeat summary judgment.

The pertinent Minnesota case law under the MTA is clear that the “possession” exception of § 541.023, subd. 6 requires present, actual, open, and exclusive possession by the claimant such that it provides ample inquiry notice of the claimed interest to the fee simple owner. B.W. & Leo Harris Co. v. City of Hastings, 240 Minn. 44, 50, 59 N.W.2d 813, 817 (1953); Sterling Township v. Griffin, 309 Minn. 230, 236, 244 N.W.2d 129, 133 (1976); Foster v. Bergstrom, 515 N.W.2d 581, 586-87 (Minn. App. 1994); Sackett v. Storm, 480 N.W.2d 377, 381 (Minn. App. 1992). A strong showing of possession is required. Foster, 515 N.W.2d at 587.

In this case, each Appellant must prove actual use and possession of the easement from 1949 to the commencement of the registration action in 2006. It must be a strong

showing of possession, and must have placed Respondents and their predecessors in title on inquiry notice as to the easement rights.

The affidavits submitted by Appellants do not create a disputed issue of fact such that a reasonable jury could conclude that any of the Appellants or their respective predecessors in title have continuously and openly used the easements since before 1949. Appellants have failed to meet the required “strong showing” of possession to overcome the MTA’s conclusive presumption of abandonment, and as such, the district court properly granted summary judgment to Respondents.

**III. THE BURDEN OF PROOF AND PUBLIC POLICY DEMAND THAT EACH ONE OF APPELLANTS BE REQUIRED TO MAKE A STRONG AND UNEQUIVOCAL SHOWING OF CONTINUOUS POSSESSION, WHICH APPELLANTS HAVE NOT DONE.**

As noted above, Appellants must prove continuous use of the easement starting at the 40<sup>th</sup> year of their creation and continuing to the present. Only a single affiant alleges or even attempts to allege use dating back that far- Ms. Josephine Berg Simes.<sup>2</sup> The Appellants, a significantly large group of people owning multiple separate parcels, rest upon the alleged use by a single family – via the affidavit of Ms. Berg Simes—to support the claims of all of Appellants that they have continuously used the easement from 1949 to the present. Appellants’ claims relate to multiple benefited parcels. Ms. Berg Simes affidavit and her alleged use relate to only one of the benefited parcels. The multiple

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<sup>2</sup> Although James Berg attempts to allege use of his easement dating back roughly to the 40<sup>th</sup> year after its creation, Mr. Berg was not even born at that time and in fact was not born until approximately 12 years after his critical date of commencing possession, as duly noted by Respondents.

Appellants and their multiple benefited parcels cannot be permitted to rest upon the self-contradicting affidavit of Josephine Berg Simes to defeat summary judgment. At the very least, all of the claims except Ms. Simes were appropriately dismissed for lack of evidence and the content of their affidavits do not even warrant discussion.

The substantive content of Ms. Simes' affidavit is the only one warranting discussion, as she attempts to allege use dating back to before 1948, as required by the statute. However, even the substantive content of Ms. Simes' affidavit is unable to create a disputed issue of fact, due to its self contradictory content. Although Appellants have vigorously attempted to downplay the significance of the attorney letters attached to her affidavit, they cannot be ignored. Ms. Simes attached the letters to her affidavit, and thereby incorporated them into her affidavit and made them part and parcel of her testimony. Ms. Simes affidavit incorporates letters that are directly contradictory *on the single most critical point in this case*, namely whether she and her family were in possession of the easement. The attorney's letters expressly state, without equivocation, that her family *had not been using the easement since before WWII*. Ms. Simes cannot be permitted to attach a letter from her attorney that is directly contradictory on the most material and critical issue in her testimony (possession of the easement) without even attempting explain away the contradiction, and expect that such an affidavit will allow her to defeat summary judgment.

By attaching the letters to the affidavit, they became part of Ms. Simes' testimony. Although Respondents provide an interesting and useful analysis about how and why an attorney's representations might fall outside the hearsay rules and be admissible as a

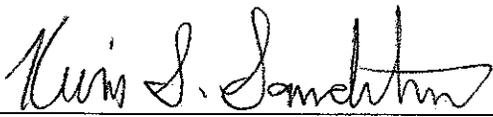
declaration against interest of a client, such an analysis is probably not necessary in this case, since the letter itself is incorporated into the client's affidavit. Since Ms. Simes makes no effort whatsoever to explain away the contradictions between the attached letters and the testimonial content of her own affidavit, the contradictory assertions of her affidavit relating to whether or not she was in possession of the easement must be disregarded. As such, there is simply no proof of possession by Ms. Simes dating back to 1948, and the grant of summary judgment against her was proper.

### CONCLUSION

*Amicus Curiae*, The City of Birchwood Village, contends that the District Court properly dismissed Appellants' claims on summary judgment, and that the Court of Appeals properly upheld the summary judgment ruling. Appellants did not provide credible evidence showing possession from before 1949 and continuing to the present, such that it would be sufficient to create a genuine issue of fact for trial. Given the vast consequences of allowing a case to proceed to trial on such a weak and self-contradictory showing of possession, the District Court's decision should be affirmed.

**ECKBERG, LAMMERS, BRIGGS, WOLFF  
& VIERLING, P.L.L.P.**

Dated: 11/2/09

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**WORD COUNT CERTIFICATION**

The undersigned hereby certifies pursuant to Minn. R. Civ. App. P. 132.01, subd. 3(c), that the word count of the foregoing brief of the City of Birchwood Village, including footnotes, but exclusive of pages containing the Table of Contents and the Table of Authorities, is **3,379 words**. The Brief complies with the typeface requirements of the rules and was prepared, and the word count was made, using Microsoft Word.

**ECKBERG, LAMMERS, BRIGGS, WOLFF  
& VIERLING, P.L.L.P.**

Dated: 11/2/09

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