
State of Minnesota
In Supreme Court

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)

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

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INTRODUCTION

This brief is submitted for the limited purpose of replying to the Respondent's brief and the Amicus Curiae brief in the above-entitled matter. To the extent that any arguments set forth in those briefs are not specifically addressed in this reply brief, such omission should not be considered in agreement with or concession of the validity of said arguments, but rather as only reflecting Appellant's position that the argument is dealt with adequately in Appellant's original brief.

ARGUMENT

- I. **The Respondent and Amicus counsel continue to erroneously rely on the disparate holding of *B.W. & Leo Harris v. City of Hastings*.**
 - a. **The confusion between *B.W. & Leo Harris*, *Wichelman*, and the MTA has led to courts misapplying possession standards.**

The question presented in this case is whether a party in possession is exempt from the recording requirements of the Marketable Title Act (hereinafter the "MTA"). The Respondent and Amicus briefs have not addressed this question and have attempted to dissuade this Court from following the precedent in *Wichelman v. Messner*.¹ They instead ask this Court to follow the disparate holding from *B.W. & Leo Harris*. Yet, *B.W. & Leo Harris* does not address the applicability of the MTA to the case at hand because it focuses on an adverse possession standard. *B.W. & Leo Harris v. City of Hastings*, 59 N.W.2d 813, 813(Minn. 1953). The Respondent and Amicus allege *Wichelman* does not

¹ Ironically, the amicus brief from the City of Birchwood Village argues in support of diminishing the property values of the 15 resident Appellants by taking away a valuable lakeshore easement in favor of the Respondent resident's property.

apply because the case dealt with a condition subsequent; however *Wichelman* went further than its specific facts to address the applicability of the MTA when a party is in possession, and specifically addressed possession of a right-of-way easement.

Wichelman v. Messner, 83 N.W.2d 800, 814 (Minn.1957). *Wichelman's* requirements for showing possession are actual use or occupancy which is consistent with the nature of the easement. *Id.*

The language of the statute and its interpretation has lent itself to the confusion as well. The easement clearly falls under the statute because it is a claim of title which is more than 40 years old and has not submitted the statute's notice requirement.

Simultaneously, the Appellants fall under the statute's exception, Minn. Stat. 541.023

Subd. 6:

Limitations; certain titles not affected: This section shall not affect any rights of the federal government; nor increase the effect as notice, actual or constructive, of any instrument now of record; nor bar the rights of any person, partnership, or corporation in possession of real estate. *Emphasis added.*

The statute does not detail when or where possession is to take place, leaving the specific interpretation to be litigated in future cases. The court should remember that when the MTA was passed the Respondents' easements were already in place and their owners were in possession.

The Respondent and the Amicus counsel want this court to follow *B.W. & Leo Harris* because there the court followed a strict possession standard of showing possession 40 years after the easement was granted. However, *B.W. & Leo Harris* is a

false lead because it dealt with an adverse possession claim and was not a recorded interested in land. This misunderstanding summarizes the difficulty of the current case because over time the pathway has become confused. Subsequent cases that interpret the MTA misapplied the statute, often with the adverse possession standard from *B.W. & Leo Harris*. In conclusion, the court should return to the statutory language of the MTA and *Wichelman v. Messner* for instruction.

b. *Wichelman v. Messner* prevails over *B.W. & Leo Harris v. City of Hastings*.

i. *Wichelman* and the MTA agree that easement holders in possession are exempt from the recording requirements and do not have to show possession at the end of 40 years.

In *Wichelman*, the court explicitly addressed a number of “serious questions” the counsel amici curiae for the plaintiff raised regarding the “relative rights of parties on all instrument of record more than 40 years and...certain continuing interests in real estate.”² *Wichelman* 83 N.W.2d at 813. The numerous amici curiae there were worried about the floodgates opening and destroying any instrument of record older than 40 years. The court observed that “although the language of the statute is general” the statute is limited in its effect on certain cases.³ *Id.* The court goes on to identify specific examples of where the affect of the MTA is limited: mineral rights, mortgages, leases, remainder

² Regarding the statutory construction, the court goes on to state “[it] must continue to keep in mind that the statute should be given a reasonable construction in light of its stated purpose that ‘ancient records shall not fetter the marketability of real estate.’” *Id.* at 813-814 *emphasis added*.

³ The court in *Wichelman* reaches this point through an analysis of Am. Jur. on Statutes which states that “such general words and phrases must be construed as limited to the immediate objects of the act, however wide and comprehensive they may be in their literal sense. These rules are particularly applicable where they are necessary to prevent absurd or futile results.” *Id.* at 814.

interests, party-wall agreements and right-of-way easements. *Id.* at 813-816. In addressing the right-of-way easements (which are also grouped with party-wall agreements and utility easements) the court discussed the possession exception to the MTA. Specifically, right-of-way easements which are “manifested by actual use or ‘occupancy’ (consistent with the nature of the easement created) are protected even if the requirement of filing notice is not met.” *Id.* at 814. Additionally, there is no mention of a critical time period in which possession must be established. *Id.*

Later in *Wichelman*, the court describes what is necessary to extinguish any interest in property using the MTA. Two basic requirements are necessary: the party desiring to invoke the statute for his own benefit must have a recorded fee simple title which source has been of record for at least 40 years and 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.* at 819. In addition, there are three classes of persons against which the act cannot be invoked, which include persons in possession. *Id.*

On the other hand, *B.W. & Leo Harris* examines the MTA with regard to a claim of adverse possession on the subject property. In that case, where there was no recorded interested in title, the court mandated that the parties establish possession from the end of the forty year period to the commencement of the legal action. *B.W. & Leo Harris* 59 N.W.2d at 814-815. Furthermore, in *B.W. & Leo Harris* neither party was in possession of the land. *Wichelman* 83 N.W.2d at 820. The court held the Harris Company was entitled to the protection of the act because the city was neither in possession nor had it filed notice under the act. *Id.*

In summary, while *Wichelman* may not clearly overrule *B.W. & Leo Harris*, *Wichelman* noticeably builds on the previous case and differentiates itself from the pattern followed in *B.W. & Leo Harris*.

ii. *Wichelman* specifically applies to the situation at hand.

This court can apply the standards set out in *Wichelman* to the Birchwood easement even though the *Wichelman* case dealt with a conditional subsequent because the court also addressed other concerns such as easements within the meaning of the MTA. First, the Appellants meet the possession and notice requirements as outlined in *Wichelman*. *Wichelman* 83 N.W.2d at 814. The Appellants have numerous affidavits which detail their use of the easement during the summer and winter months. These affidavits give Appellants the basis for a question of fact. Furthermore, Appellants' use has been consistent with the nature of the easement by using it for lakeshore enjoyment. *Id.*; See *Lindberg v. Fasching*, 667 N.W.2d 481, 486-487 (Minn. App. 2003) for further discussion on use consistent with the nature of the easement.

Second, the Appellants do not fall under the description of how to extinguish Appellants' recorded easement in property under the MTA as defined by *Wichelman*. *Wichelman* 83 N.W.2d at 819. Although the Respondent does have a recorded fee simple which has been of record at least 40 years, the Appellants have not conclusively abandoned all right, claim and interest in the property. *Id.*; Minn. Stat. 541.023 Subd. 5 (2008). The phrase "conclusively presumed to abandoned all right, claim and interest" is discussed in *Richards Asphalt Co. v. Bunge Corp.* and is defined as nonuse "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). Again, this leads to a question of fact which is addressed by Appellants’ numerous affidavits on use of the easement. To summarize, Appellants have not abandoned the easement and have at the very least presented facts to show the continued use of the easement.

iii. Public policy demands the court apply the *Wichelman* standard under the MTA.

The Appellants in this case have held their easements for a variety of years. However, all can show a chain of title which includes the easement dating back to the granting of the easement. The problem arises if the court follows the strict standard of possession and orders the Appellants to show possession back to 40 years after the easement was granted. In most cases the easements were granted in the early 1900s and the property is no longer in the original owners’ possession; they have sold the property and moved on or died⁴. If the court chooses to follow this harsh standard they will deprive not only the Respondents of their easements but many other property owners in Minnesota who believe they have easements across lakeshore property. The possession requirement of finding the elderly or deceased owners in order to establish easement possession in the 1940s creates an absurd result which the legislature did not intend.

⁴ This is especially true in the case of Ms. Bender who regrettably passed away after a long fight with Alzheimer’s during the pendency of this case.

Unfortunately, the Minnesota Legislature created this illogical animal. The MTA includes the exception that those in possession did not have to file notice. Thus, those in possession did not file notice and continued to use their easement. If they sold their property the owners most likely passed on the valuable easement, with the buyers paying monetary consideration for the easement. Many lakeshore easements were granted in the early 1900s and so this process has continued for over 100 years. Now, 100 years later property owners are being asked to show possession dating back to the 1940s. The damage to the easement holders is a taking of property rights and enjoyment of the lakeshore. The damage to the servient property owners is occasional use of their property for the typical lakeshore use of boating and swimming.

II. The personal testimony of two witnesses was not contradicted when their attorney mailed a letter to the owners of the servient estate.

The attorney letter does not qualify as testimony in the affidavit, but merely as an exhibit to the affidavit. *See*, App. A-132-133. As a rule this court has stated that admissions by attorneys for their clients must be strictly limited. *Pow-Bel Construction Corp. v. Gondek*, 192 N.W.2d 812, 814 (Minn. 1972). This Court stated in *Carroll v. Pratt* that an attorney's out of court statement is inadmissible in evidence to impeach a client unless the attorney had special authorization to make an admission. 76 N.W.2d 693, 698 (Minn. 1956). In *Banbury* the Minnesota Court of Appeals asserted 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).

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).

Ms. Berg Simes and Mr. Berg never gave Mr. Knaak authority to say that the property had not been used prior to World War II. *See*, App. A-140-141. Furthermore, the purpose of the letter was to put the property owners on notice that the Bergs were asserting their right to use the property. The only authority granted to Mr. Knaak was to inform the owners of Lot 1, Block 1 of the existence of an easement over their property.

Ms. Simes in her affidavit testified that she has used the property and easement countless times over the past 60 years. App. A-135. Ms. Simes gave specific examples

of how she, her sister, and her children have used the property. App. A-135. Nothing in Ms. Simes affidavit suggests that she has not used the property since World War II. Furthermore, the affidavit of James Berg shows that he has used the property on an annual basis and that at one point he actually stored a boat lift on the property. App. A-138.

Mr. Knaak's statements are contradictory to the personal recollection of Ms. Simes and Mr. Berg. It is not Ms. Simes' and Mr. Berg's testimony that should be discredited but rather the statement in Mr. Knaak's letter that should be discredited and ignored.

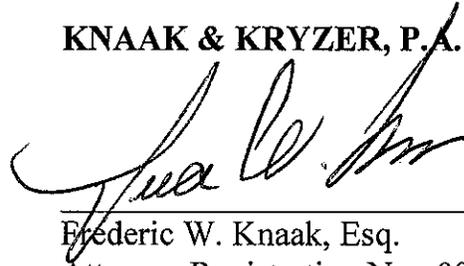
Finally, the letter was never intended, nor understood by any of the parties, as a waiver of any rights regarding the easement. In fact, during oral argument at the Court of Appeals attorney for Respondents Mr. Greene stated that he understood the letter was not a waiver, nor was it understood to be a waiver of any rights.

CONCLUSION

For the forgoing reasons the appellants respectfully requests that the District Court's summary judgment order be reversed and remanded for further proceedings.

Respectfully Submitted,

KNAAK & KRYZER, P.A.



DATED: November 16, 2009

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CERTIFICATE OF COMPLIANCE

The undersigned, Frederic W. Knaak, 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 2,355 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: November 16, 2009

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