

Nos. A08-1494 and A08-1505

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, Brian Lind, Karen Hagan-Lind, Karen Deann,
Jonathan and Susan Fleck, Eugene and Shirley Ruchle, and
Robert and Barbara Carson, and James Simning,

Appellants (A08-1494),

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

Appellants (A08-1505).

RESPONDENTS' BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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LEGAL ISSUES

I. TO INVOKE THE POSSESSION EXCEPTION TO THE MARKETABLE TITLE ACT MUST POSSESSION OCCUR (1) NO LATER THAN THE EXPIRATION OF THE 40-YEAR PERIOD FOLLOWING THE CREATION OF THE ALLEGED PROPERTY INTEREST; AND (2) FROM THE END OF THE 40-YEAR PERIOD CONTINUOUSLY UNTIL THE COMMENCEMENT OF THE ACTION?

The trial court held that the claimant's possession must begin or have begun at the end of the 40-year period and must continue until action is commenced. (A-101.)

The Court of Appeals affirmed the trial court, holding that, "To demonstrate possession, appellants must show (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." (A-209.)

Apposite cases:

B.W. & Leo Harris Co. v. City of Hastings, 240 Minn. 44, 59 N.W.2d 813 (1953)

United Parking Stations, Inc. v. Calvary Temple, 257 Minn. 273, 101 N.W.2d 208
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Caroga Realty Company v. Tapper, 274 Minn. 164, 143 N.W.2d 215 (1966)

Township of Sterling v. Griffin, 309 Minn. 230, 244 N.W.2d 129 (1976)

II. DOES A PERSON ATTEMPTING TO INVOKE THE POSSESSION EXCEPTION TO THE MARKETABLE TITLE ACT HAVE THE BURDEN OF PROVING POSSESSION?

The trial court held that the appellants have the burden of proving possession that qualifies for the Subd. 6 exception to the Marketable Title Act ("MTA") and that the

statutory conclusive presumption of abandonment places the burden on appellants. (A-101.)

The Court of Appeals held that, “Minnesota caselaw clearly demonstrates that the burden of showing possession falls to the party who failed to comply with the MTA’s filing requirement and seeks to prevent the extinguishment of his or her interest.” *In the Matter of the Application of Sampair v. Birchwood et. al.*, A08-1494, A08-1505 at 10 (Minn. Ct. App. 2009)¹.

Apposite cases:

B.W. & Leo Harris Co., 240 Minn. 44, 59 N.W.2d 813 (1953)

Township of Sterling v. Griffin, 309 Minn. 230, 244 N.W.2d 129 (1976)

Foster v. Bergstrom, 515 N.W.2d 581 (Minn. Ct. 1994)

Apposite statute:

Minn. Stat. § 541.023

III. WHERE NON-EXCLUSIVE EASEMENTS ARE SEPARATELY DEEDED TO INDIVIDUAL LOT OWNERS IN DIFFERENT DOCUMENTS AT DIFFERENT TIMES, DOES EACH OF THE LOT OWNERS NEED TO PROVIDE EVIDENCE OF POSSESSION OF THEIR SPECIFIC EASEMENT TO AVOID THE CONCLUSIVE PRESUMPTION OF ABANDONMENT UNDER THE MTA?

The trial court did not discuss this issue as it found that none of the appellants provided sufficient evidence to create a material issue of fact regarding their alleged possession of the easement that could rebut the presumption of abandonment under the MTA. (A-98.)

¹ Appellants’ appendix omits page 10 of the Court of Appeals decision in this matter.

The Court of Appeals stated that, “To survive dismissal of their claims on a motion from summary judgment, appellants must show that use of their respective easements commenced by the end of the respective 40-year periods-dates which range from January 5, 1047 to August 30, 1949.” (A-210.)

Apposite statute:

Minn. Stat. § 541.023

IV. DID ANY APPELLANT PROVIDE EVIDENCE OF POSSESSION OF THE EASEMENTS FROM (1) THE END OF THE 40-YEAR PERIOD WHEN THE EASEMENTS WERE GRANTED AND (2) CONTINUOUSLY THROUGH TO THE COMMENCEMENT OF THIS ACTION, SUFFICIENT TO SURVIVE SUMMARY JUDGMENT?

The trial court found that none of the appellants, with the exception of Josephine Simes and James Simning, even alleged any admissible evidence to establish usage of the easement prior to the 1970’s. (A-102.) The trial court further found that Ms. Simes did not produce evidence that would create a material fact question as to whether she and her family were in continuous possession of the easement on and after August 30, 1949 and that James Simning did not produce any evidence that his predecessors in interest were in continuous possession of the easement prior to 1949 through commencement of this litigation. (A-102-103.)

The Court of Appeals held appellants failed to show use before the expiration of their respective 40-year periods. *In the Matter of the Application of Sampair v. Birchwood et. al.*, A08-1494, A08-1505 at 10 (Minn. Ct. App. 2009).

V. DOES MS. SIMES' AFFIDAVITS ALLEGING THAT SHE AND HER FAMILY USED THE EASEMENT CONTINUOUSLY OVER THE PAST SIXTY YEARS, CREATE A GENUINE ISSUE OF MATERIAL FACT WHERE THE FIRST AFFIDAVIT INCORPORATES AND ATTACHES EARLIER LETTERS FROM HER ATTORNEY DIRECTLY CONTRADICTING THOSE STATEMENTS AND CONCLUSIVELY STATING THAT THE SIMES FAMILY HAVE NOT EXERCISED THEIR RIGHT OF ENTRY OVER THE EASEMENT SINCE BEFORE THE SECOND WORLD WAR AND DO NOT EXPECT TO IN THE FORESEEABLE FUTURE?

The trial court concluded that Ms. Simes failed to produce evidence that would create a material fact question as to whether she and her family were in continuous possession of the easement on and after August 30, 1949, until this litigation was commenced. (A-102-03.)

The Court of Appeals held that Ms. Simes' statements in her affidavits that she and her family have used their easements every year since 1943 cannot be reconciled with the statements made by her attorney on her behalf that she and her family have used the dock-association property and lake-access point instead of Lot 1. Because Ms. Simes' affidavits do not clarify or explain the prior statements but attempt to negate them, the Court of Appeals concluded that Ms. Simes has not presented evidence creating a genuine issue of material fact. (A-211; *In the Matter of the Application of Sampair v. Birchwood et. al.*, A08-1494, A08-1505 at 10 (Minn. Ct. App. 2009).)

Apposite cases:

Augustine v. Arizant Inc., 751 N.W.2d 95 (Minn. 2008)

Wenner v. Gulf Oil Corporation, 264 N.W.2d 374 (Minn. 1978)

Risdall v. Brown-Wilbert, Inc., 759 N.W.2d 67 (Minn. Ct. App. 2009)

Barham v. Reliance Standard Life Ins. Co., 441 F.3d 581 (8th Cir. 2006)

STATEMENT OF FACTS

This dispute involves easements created approximately 100 years ago granting access to White Bear Lake though property now owned by respondents Anthony and Laurie Sampair.

The Sampairs are the current owners of property on White Bear Lake in Birchwood, Minnesota legally described as: Lots 1 and 2, Block 1, Lakewood Park Third Division, Washington County, Minnesota. (RA-1, ¶ 2; RA-3, ¶ 1; A-97, ¶ 3.) The appellants own nearby non-lakeshore lots and claim an interest over Lot 1 under separately deeded, non-exclusive, right-of-way easements granted to appellants' predecessors approximately 100 years ago. (RA-1, ¶ 3; A-97- 98, ¶ 4.) Ten separate easements are at issue in this matter, one for each of the ten parcels owned between the fifteen² appellants³. (A-205; RA-31.)

The Sampairs argue, and the district court and Court of Appeals have determined, that all of the appellants' easements have been extinguished through the operation of the Marketable Title Act. It is undisputed that no appellant or their predecessors filed any notice under the Marketable Title Act. (A-98, ¶ 5; A-100; Knaak Br. at 12⁴.) The

² The Court of Appeals states there are sixteen appellants, however, Barbara Carson is not a proper appellant or party to this matter as she is not named on the deed with her husband Robert Charles Carson (A-109) and has never served an Answer.

³ Josephine Simes and James Berg are joint owners of one parcel; Jonathon Fleck and Susan Fleck are joint owners of one parcel; Karen Hagen-Lind and Brian Lind are joint owners of one parcel; Douglas M. Krinke and Ursula Beate Krinke are joint owners of one parcel; and Eugene Ruehle and Shirley Wood-Ruehle are joint owners of one parcel.

⁴ Appellants Josephine Simes, James Berg, Firma Bender, Douglas Krinke and Ursula Beate Krinke are represented by Frederic Knaak. All references to these appellants or

appellants argue that their use and possession of the easements provide an exception to filing a notice otherwise required by the Marketable Title Act to preserve their easements.

The language in each of the deeds creating the easements granted, "...a 'Right of Way' (in common with other persons to whom similar rights may be granted) over the following described land to wit: Lot 1 of Block 1 of 'Lakewood Park, Third Division', said 'Right of Way' being granted for the purpose of giving said grantee access to the shore of White Bear Lake for the purposes of boating and bathing...", or contained similar language. (A-49; A-52; A-71.)

In 2006, the Sampairs' predecessors in title, the Krizaks, filed and served an application to register their lakefront property under Minnesota Statute Chapter 508. While the registration was still pending, the Sampairs purchased the property from the Krizaks. (A-161-62, ¶¶ 2, 5.) At the time of purchase, the Sampairs were aware of the Krizaks' application to register the property. (A-162, ¶ 5.) Prior to the Sampairs' purchase they had looked into the registration and learned that no notices continuing the vitality of the historic easements had been filed under the Marketable Title Act. *Id.* Further, before purchasing the property, the Sampairs physically inspected it to determine if there were any signs of use of an easement over the property. The Sampairs concluded that there were no physical signs of an easement. (A-161-62, ¶¶ 3, 4; A-160, ¶ 4.) Instead, there was a large house, woodpiles, an old fence, an old shack and numerous trees and shrubs on Lot 1, where the appellants claim to have easement rights. (RA-4, ¶¶ 6, 7; A-

their brief will be to the Knaak appellants or the Knaak brief. References to the remaining appellants or their brief will be to the Holstad appellants or the Holstad brief.

162, ¶ 4.) Upon even further investigation, the Sampairs were advised that no one had used or asserted any historical easement rights over the property for decades. (A-159-60; A-162, ¶ 6; A-163; A-164-65.)

To the west of Sampairs' Lot 1, there is a vacated street that provides public access to White Bear Lake. (A-159, ¶ 2; RA-12, ¶ 11.) Thomas J. Watkins, a previous owner of the Sampair property from 1974 to 1979, and Donald R. Madore and Kathleen E. Madore, previous owners from 1981 through 1999, attested that while they observed members of the public using this public access to White Bear Lake, none of them ever observed any person using, attempting to use, or claiming they have used any part of Lot 1 as a route or right-of-way for access to or from White Bear Lake. (A-163, ¶ 4; A-164, ¶ 4.) The Sampairs' neighbor, James P. Greeley, who has owned and occupied the property just west of the public access since 1982, never observed any person using any part of Lot 1 to access White Bear Lake. (A-159-60.)

With the exception of Josephine Simes, Firma Bender, and James Berg, (collectively, "Simes/Berg"), none of the appellants allege that they or their predecessors in title were in possession at a point 40 years after the grant of their easements, or continuously thereafter through the commencement of this action. (A-22-84; A-105-143; A-102; A-210.)

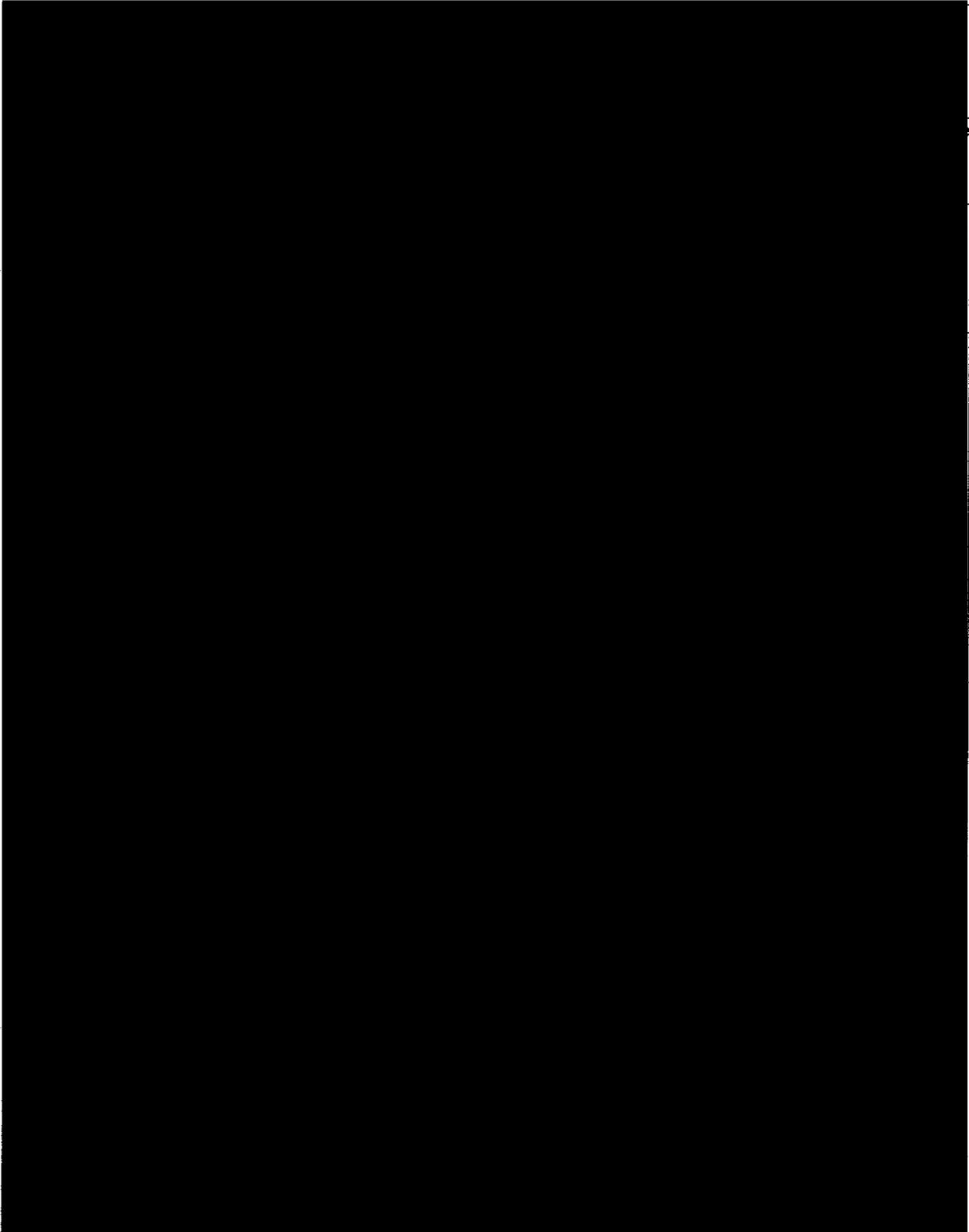
The earliest any of the appellants allege possession of their easements (other than Simes/Berg) is 1986. (A-22-84; A-105-143.) Accordingly, (except as to Simes/Berg), the affidavits of Watkins, Madores and Greeley, attesting that there was no usage at least before 1986, remain uncontroverted.

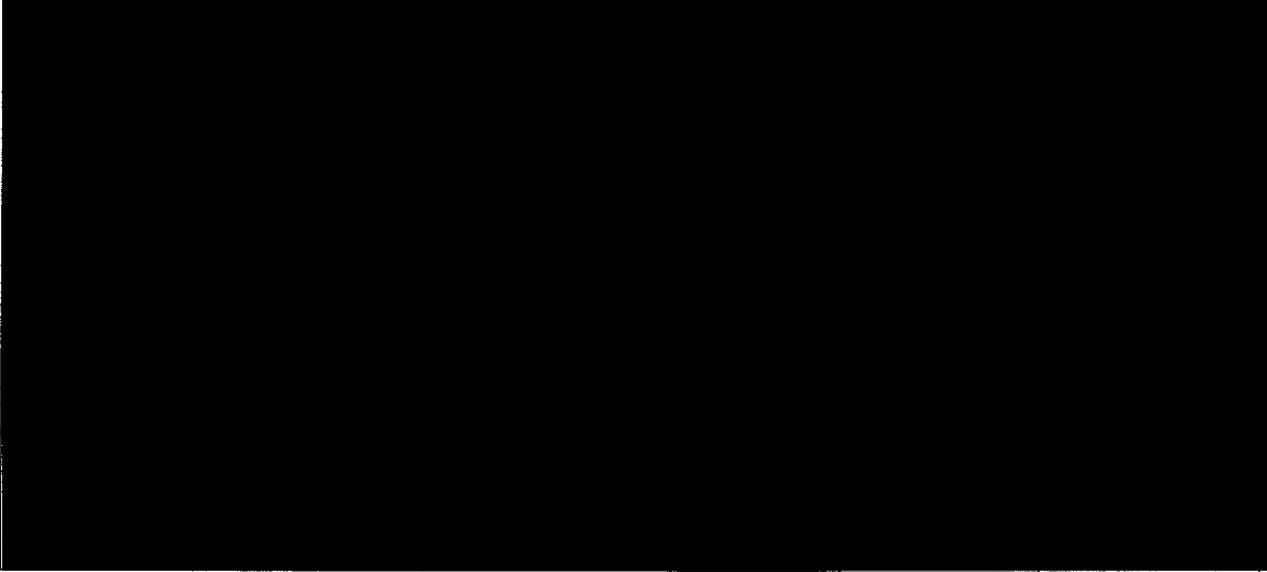
While James Berg offered an affidavit purporting to attest to historical use and possession by the Simes/Berg family occurring before 1951, at the time of his affidavit he was only 47 years old. (A-137, ¶ 3.)

Similarly, while Josephine Simes provided affidavits alleging her family's use of the easement for over 60 years (A-128-136), in letters incorporated by her into her affidavit, she denies any use by her or her family since before the Second World War and acknowledges instead, that she and her family used an adjacent dock association's access to White Bear Lake (A-132-33).

Below is a table summarizing the property owned by each appellant upon which they base their claim of right to an easement, the date when they acquired their property, the date the historical easement was granted to their property, the date the easement was first recorded for that property, the date the Marketable Title Act required a notice to have been recorded absent possession at that time, and the earliest possible claimed use of possession offered by that appellant.⁵

⁵ The information summarized on the table is based upon the appellants' deeds (RA-15-31) and the appellants' affidavits and exhibits (A-22-84; A-105-143).





Three motions for summary judgment were filed: one by respondents, one by a group of five appellants, and one by a group of fifteen appellants. (A-206.) The appellants sought summary judgment seeking acknowledgment that their historical easements were still valid. Respondents sought summary judgment under the Marketable Title Act to extinguish appellants' claimed easements. The trial court concluded that none of the appellants "provided sufficient evidence to create a material issue of fact regarding their alleged possession of the easement that could rebut the presumption of abandonment under [the MTA]." (A-98.) Accordingly, the trial court denied appellants' motions for summary judgment, granted respondents' motion for summary judgment, and adjudged that appellants' claimed easements over Lot 1 of the Sampair Property had been extinguished. (A-98-99.)

The Knaak and Holstad appellants separately appealed the trial court's judgment. Their appeals were consolidated by the Court of Appeals. The City of Birchwood

Village filed an amicus brief in support of respondents. The Court of Appeals affirmed the trial court in an unpublished opinion filed on June 9, 2009. (A-203-12.)

STANDARD OF REVIEW

On appeal from summary judgment, this Court reviews de novo whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *STAR Ctrs., Inc. v. Faegre & Benson, LLP*, 644 N.W.2d 72, 76-77 (Minn. 2002). No genuine issues of material fact exists “[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (alteration in original) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986)).

On appeal, the evidence is viewed in the light most favorable to the party against whom summary judgment was granted. *Louis v. Louis*, 636 N.W.2d 314, 318 (Minn. 2001). However, “when the nonmoving party bears the burden of proof on an element essential to the nonmoving party’s case, the nonmoving party must make a showing sufficient to establish that essential element.” *DLH, Inc.*, 566 N.W.2d at 71.

ARGUMENT

I. **TO AVOID THE CONCLUSIVE PRESUMPTION OF ABANDONMENT IMPOSED BY THE MTA, A CLAIMANT’S POSSESSION MUST HAVE BEGUN AT THE END OF THE 40-YEAR PERIOD AND CONTINUE UNTIL ACTION IS COMMENCED.**

This Court has held that to avoid the conclusive presumption of abandonment under the Marketable Title Act through the possession exception, “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). The purpose of the MTA supports this holding.

A. The purpose of the Marketable Title Act is to prevent ancient records from fettering the marketability of real estate.

The Minnesota Marketable Title Act is set forth in Minn. Stat. § 541.023. The MTA provides in relevant part:

Subdivision 1. **Commencement.** 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 sworn to by the claimant or the claimant’s agent or attorney setting forth the name of the claimant, a description of the real estate affected and of the instrument, event or transaction on which such claim is founded, and stating whether the right, claim, interest, incumbrance, or lien is mature or immature...

Minn. Stat. § 541.023, Subd. 1 (2008).

The MTA is a 40-year statute of limitations enacted to prevent ancient title claims from fettering the marketability of real estate. Minn. Stat. § 541.023, Subd. 5 (“...it being hereby declared as the policy of the state of Minnesota that, except as herein provided, ancient records shall not fetter the marketability of real estate.”); *Wichelman v. Messner*, 250 Minn. 88, 99, 106-07, 83 N.W.2d 800, 812, 816 (1957). Unless falling within an exception of the MTA, the MTA prevents persons from asserting adverse claims against persons having a source of title that has been of record at least 40 years. Minn. Stat. § 541.023, Subd. 1; *Padrnos v. City of Nisswa*, 409 N.W.2d 36, 38 (Minn. Ct. App. 1987).

One exception is where a person has timely filed a required notice under Minn. Stat. § 541.023, Subd. 1. The purpose of requiring this notice is to confirm the continuation of an interest in property and to eliminate stale claims that clutter the title. *Wichelman*, 250 Minn. at 98, 83 N.W.2d at 812. If the required notice preserving a claimant's right is not timely filed, it is conclusively presumed that the right has been abandoned. Minn. Stat. § 541.023, Subds. 1, 5; *United Parking Stations, Inc. v. Calvary Temple*, 257 Minn. 273, 275, 101 N.W.2d 208, 210 (1960). In the matter at hand, it is undisputed that none of the appellants have filed a notice of an easement over the Sampairs' property as required under the MTA. (A-98, ¶ 5; A-100; Knaak Br. at 12.) However, the MTA provides additional exceptions to the filing notice requirement including that the MTA shall not "bar the rights of any person... in possession of real estate." Minn. Stat. § 541.023, Subd. 6. It is under this possession exception that appellants are seeking to escape the grasp of the MTA's statute of limitations.

B. To overcome the MTA's conclusive presumption of abandonment, a person must be in possession at the end of the 40-year period and must continue possession until an action is commenced.

Appellants attempt to overturn the long-standing precedents of this Court which require that to overcome the MTA's conclusive presumption of abandonment, a claimant must be in possession at the end of the 40-year period after the instrument, event, or transaction granting the interest was executed or occurred and that such possession must continue until action is commenced. *See B.W. & Leo Harris Co.*, 240 Minn. at 49, 59 N.W.2d at 816. Appellants argue, instead, that the relevant time period to consider a claimants' possession is the most recent forty years, not forty years from the date of the

conveyance (Holstad Br. at 4) or that there is no critical period for possession (Knaak Br. at 17). These interpretations sought by the appellants are in direct conflict with the MTA's purpose of preventing ancient records from fettering marketability. Under appellants' analysis, claimants can go decades without possessing the real estate and then simply revive a claim by possessing the property immediately before commencement of an action. This is exactly what the MTA seeks to forbid and is contrary to established case law. This Court has specifically held that if at any time possession ends, a claimant cannot revive his right by going into possession again. *B.W. & Leo Harris Co.*, 240 Minn. at 49, 59 N.W.2d at 816; *United Parking Stations, Inc.*, 257 Minn. at 276, 101 N.W.2d at 210.

1. In 1953, this Court, in *B.W. & Leo Harris Co. v. City of Hastings*, held that possession under the MTA must have begun at the end of the 40-year period and continue until action is commenced.

The interplay between the necessity of filing a notice and the timing and duration of the possession sufficient to negate the need to have filed such a notice is discussed in *B.W. & Leo Harris Co.*:

If a claimant subject to the provisions of the [MTA] 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., 240 Minn. at 49, 59 N.W.2d at 816.

Since *B.W. & Leo Harris Co.*, Minnesota courts have continued to hold that to qualify for the possession exception of the MTA, there must be possession 40 years after the grant of the property right and continuously thereafter. Specifically, this Court has upheld the timing standard set forth in *B.W. & Leo Harris Co. in United Parking Stations, Inc. v. Calvary Temple*, 257 Minn. 273, 101 N.W.2d 208 (1960), *Caroga Realty Company v. Tapper*, 274 Minn. 164, 143 N.W.2d 215 (1966), and *Township of Sterling v. Griffin*, 309 Minn. 230, 244 N.W.2d 129 (1976). The Minnesota Court of Appeals has also applied the timing standard in *Lindberg v. Fasching*, 667 N.W.2d 481 (Minn. Ct. App. 2003).

2. In 1960, consistent with *B.W. & Leo Harris Co* this Court, in *United Parking Stations, Inc. v. Calvary Temple*, held that actual possession under the MTA must have existed on January 1, 1948.

In *United Parking Stations, Inc.*, an easement was granted by a 1901 deed. *United Parking Stations, Inc.*, 257 Minn. at 275, 101 N.W.2d at 210. Consistent with *B.W. & Leo Harris Co.*, this Court stated that, “actual possession, in order to save the easement to plaintiff, must have existed or have been a reality on January 1, 1948.” *Id.* at 276, 101 N.W.2d at 210. The Court looked to January 1, 1948, because when the MTA was enacted on March 24, 1947, it provided that, “...no action affecting the possession of title or of any real estate shall be commenced by a person, *** after January 1, 1948...” to enforce any right that occurred more than 40 years prior, unless within 40 years after the occurrence the required notice was recorded. Minn. Stat. § 541.023, Subd. 1 (1947). The Court then concluded that since no notice was filed and no possession of an easement

was proven at the time the MTA went into effect, the easement became discharged. *United Parking Stations, Inc.*, 257 Minn. at 276, 101 N.W.2d at 210. When discharged, the easement became non-existent, even though it was still of record. *Id.*

Neither the Knaak nor Holstad appellants cite or discuss *United Parking Stations, Inc.*

3. In 1966, this Court, in *Caroga Realty Company v. Tapper*, relying upon *B.W. & Leo Harris Co.*, concluded an easement was presumed abandoned under the MTA where the claimant was not in possession of the easement on January 1, 1948.

The right-of-way easement at issue in *Caroga Realty Company v. Tapper*, came into being in 1883 through the execution of a written instrument, recorded in the office of the register of deeds of Hennepin County. *Caroga*, 274 Minn. at 166, 143 N.W.2d at 218. The claim, therefore, was based on an instrument over 40 years old on January 1, 1948. The trial court entered judgment against the plaintiff claimants under the MTA finding that (1) no notice was filed under the MTA and, as such, the easement became forever barred by operation of the MTA unless it was being used or occupied by the plaintiffs on January 1, 1948 and (2) that the evidence failed to support plaintiffs were in possession of the easement on January 1, 1948. *Caroga*, 274 Minn. at 168, 143 N.W.2d at 219.

In affirming the trial court's judgment, this Court quoted *B.W. & Leo Harris Co.* at length including the quote contained herein above. This Court then concluded that neither plaintiff was in possession of the right-of-way when the Marketable Title Act went into effect and that by operation of Minn. Stat. § 541.023 the right-of-way was conclusively

presumed to have been abandoned and, therefore, barred. *Caroga*, 274 Minn. at 179-80, 143 N.W.2d at 226.

4. In 1976, this Court, in *Township of Sterling v. Griffin*, affirmed that a right-of-way was presumed abandoned under the MTA where the claimant failed to prove possession as of January 1, 1948 and up to the commencement of the action.

In *Township of Sterling v. Griffin*, this Court framed as its issue, “whether the evidence as a whole reasonably tends to support the finding of the trial court that appellant was not in possession, as we have defined possession, of the town road right-of-way as of January 1, 1948, and up to the commencement of this action.” 309 Minn. at 236-37, 244 N.W.2d at 133. The road at issue was established in 1889 by order of the town board, which remained a part of the official town records and a copy was filed with the county auditor. *Id.* at 231-32, 244 N.W.2d at 131. The trial court found that some witnesses had no evidence of use beyond 1940, other witnesses had no evidence of use before the 1950s, and there were periods of years in which the evidence failed to show any use whatever. *Id.* at 237-38, 244 N.W.2d at 134. The trial court determined that the evidence of use therefore did not establish the continuous possession required by Minn. Stat. § 541.023 to avoid the conclusive presumption of abandonment. *Id.* This Court affirmed holding that:

...the record supports the finding of the trial court that appellant's possession of the town road was not sufficient to put a prudent person on inquiry and therefore its interest in the respondents' property is barred.

Id.

5. In 2003, the Minnesota Court of Appeals, in *Lindberg v. Fasching*, instructed that the critical timeframe for possession under the MTA was the end of the 40-year period.

The Minnesota Court of Appeals has also followed the timing standard set forth by this Court in *B.W. & Leo Harris Co.*. In *Lindberg v. Fasching*, the district court entered summary judgment in favor of the dominant estate owner determining that the owner met the possession exception of the MTA for the claimed easement and that there was no common law abandonment. *Lindberg*, 667 N.W.2d at 484. The easement at issue in *Lindberg* was created on October 14, 1950. *Id.* at 483. On review, the Minnesota Court of Appeals reversed and remanded holding that summary judgment was premature and improper because a factual determination was needed to determine whether the claimant's use of the easement would constitute adequate notice to put a prudent person on notice of his claim of possession. *Id.* at 487. However, before reversing, the Court of Appeals, consistent with *B.W. & Leo Harris Co.*, instructed that, "In evaluating possession and use, the critical timeframe is the end of the 40-year period." *Id.*

This Court together with the Court of Appeals has consistently held that in order to avoid the conclusive presumption of abandonment under the MTA through possession, the claimant's possession must begin or have begun at the end of the 40-year period and must continue until action is commenced and that if at any time possession ends, a claimant cannot revive his right by going into possession again.

C. Appellants' arguments regarding the timing standard of possession under the MTA fail to recognize this Court's unambiguous precedents.

1. The Holstad appellants' argument that the relevant time period for possession under the MTA is the most recent 40 years fails to recognize this Court's unambiguous precedents.

The Holstad appellants argue that the only relevant time period for possession is the most recent forty years. (Holstad. Br. at 4-9.) The Holstad appellants cite *Wichelman v. Messner* and Minnesota Title Standard No. 61, in support of their argument. It is not clear how *Wichelman* or Title Standard No. 61 are at odds with the *B.W. & Leo Harris Co.* case. In fact, *Wichelman* cites *B.W. & Leo Harris Co.* favorably for the nature of possession required under the MTA to avoid the conclusive presumption of abandonment. *Wichelman*, 250 Minn. at 116-117, 83 N.W.2d at 823.⁶

The Holstad appellants fail to adequately discuss where or how *Wichelman* specifically deviated from the timing standard set forth in *B.W. & Leo Harris Co.* They argue that the MTA is not directed at record owners of easements but only to more obscure interests. (Holstad Br. at 6.) They further argue that *B.W. & Leo Harris Co.* is not precedent, because in that case, the city attempted to obtain title by adverse possession more than 40 years prior to the lawsuit whereas, in the case at hand, appellants' easements are based upon recorded deeds. These arguments overlook the facts that: (1) in *B.W. & Leo Harris Co.*, the Court conceded the city's adverse possession had ripened before the start of the applicable 40-year time period under the MTA, *see*

⁶ The timing of the possession was not at issue in *Wichelman* because the plaintiff admitted that he and his grantors were not in actual possession of the premises prior to the commencement of the action. *Wichelman*, 250 Minn. at 116-117, 83 N.W.2d at 823.

Wichelman, 250 Minn. at 111-12, 83 N.W.2d at 820; (2) after *Wichelman* this Court continued to use the possession timing standard set forth in *B.W. & Leo Harris Co.* in the subsequent cases of *United Parking Stations, Inc.*, *Caroga Realty Company*, and *Township of Sterling*, and (3) in each of these three subsequent cases, the easements were of record.⁷

Further, the Holstad appellants assert that "... to require evidence of possession to within forty years of the conveyance renders Subd. 6 meaningless" and also that, "...[r]espondents have argued that the predecessors in title to the current parties in possession should have obtained a court order to avoid the filing requirements in Subd. 5". (Holstad Br. at 8.) Neither of these assertions is accurate. The appellants' predecessors merely could have filed the notice required by the MTA. It was not necessary for them to obtain a court order. If a claimant shows the requisite possession at the end of the 40-year period after the grant and continuously until an action is commenced he is exempt from the filing notice requirement and his right remains protected. *Wichelman*, 250 Minn. at 102, 83 N.W.2d at 814. As this Court aptly stated, "The recordation provisions of the act provide for a simple and easy method by which the owner of any existing old interest may preserve it. If he fails to take the step of filing the

⁷ In *United Parking Stations, Inc.*, the easement at issue was created in a warranty deed and had been of record since 1901. 257 Minn. at 275, 101 N.W.2d at 210. In *Caroga*, the easement at issue came into being in 1883 through a written instrument, recorded in the office of the register of deeds. 274 Minn. at 166, 143 N.W.2d at 218. In *Township of Sterling*, the road was established in 1889 by order of the town board and the order remained in the official town records and a copy was filed with the office of the county auditor, as required by statute. 309 Minn. at 231-32, 244 N.W.2d at 131.

notice as provided, he has only himself to blame if his interest is extinguished.”
Wichelman, 250 Minn. at 108, 83 N.W.2d at 817.

2. The Knaak appellants’ argument that there is not a critical time period for possession also fails to recognize this Court’s unambiguous precedents.

The Knaak appellants assert there is no critical time period in which possession must be shown but that there should be an overall factual determination. Like the Holstad appellants, the Knaak appellants also argue that the timing standard set forth in *B.W. & Leo Harris Co.* is inapplicable. However, they claim it is inapplicable because, in *B.W. & Leo Harris Co.*, the city claimed the easement by adverse possession rather than by a recorded easement. (Knaak Br. at 17-19.) This distinction is without merit. As discussed *supra*, this Court has applied the timing standard set forth in *B.W. Leo Harris Co.* in subsequent cases involving recorded easements.

The Knaak appellants further assert that *Township of Sterling* does not support the 40-year look-back period in *B.W. & Leo Harris Co.* They are mistaken as *Township of Sterling* frames one of the issues of the case as, “whether the evidence as a whole reasonably tends to support the finding of the trial court that appellant was not in possession, as we have defined possession, of the town road right-of-way as of January 1, 1948, and up to the commencement of this action.” *Township of Sterling*, 309 Minn. at 236-37, 244 N.W.2d at 133. The *Township of Sterling* Court then affirmed the trial court’s finding that there was no possession under the MTA where there were periods of years in which the evidence failed to show any use whatever.

Precedent of this Court is clear that for possession to be relevant under the MTA, it must begin or have begun within 40-years from when the property interest was created and must continue until an action is commenced.

II. THE PARTY ATTEMPTING TO INVOKE THE POSSESSION EXCEPTION OF THE MTA HAS THE BURDEN OF PROVING POSSESSION.

To achieve its purpose of preventing ancient records from fettering the marketability of real estate, the MTA provides that any claimant under any instrument barred under the MTA shall be conclusively presumed to have abandoned all right based upon that instrument. Minn. Stat. § 541.023, Subd. 5. Minnesota case law provides that a party wishing to overcome the MTA's conclusive presumption of abandonment has the burden of proving possession at the end of the 40-year period and continuously through the commencement of an action. *See Foster v. Bergstrom*, 515 N.W.2d 581, 587 (Minn. Ct. App. 1994); *Township of Sterling*, 309 Minn. at 235, 244 N.W.2d at 133; *B.W. & Leo Harris Co.*, 240 Minn. at 50, 59 N.W.2d at 817.

In *Foster*, the Court not only states that a party seeking to avoid the MTA through the possession exception has the burden of proving possession, but that a strong showing of possession is required:

Since a successful Marketable Title Act defense by the Bergstroms extinguishes a property interest which might otherwise be held by Pine City, the Act is invoked against the city. Pine City has never recorded an interest in the disputed extension of Third Avenue. There is therefore a presumption that the city abandoned this road. Minn. Stat. § 541.023, subd. 5 (1990). The presumption of abandonment could be overcome by a showing of possession by the city. * * *

A strong showing of possession is required to overcome the presumption of abandonment.

Foster, 515 N.W.2d at 587.

The *Township of Sterling v. Griffin* Court also places the burden of proof on the person seeking to invoke the possession exception to the MTA:

Appellant's interest in the Griffin property was not registered as required by the act. Thus, if it is to escape the act's bar, appellant must establish its possession of the town road to bring it within the exception of subd. 6.

Township of Sterling, 309 Minn. at 235, 244 N.W.2d at 133.

Likewise, this Court in *B.W. & Leo Harris Co.* stated:

If a claimant subject to the provisions of the [MTA] 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.

* * *

To take advantage of adverse possession occurring before January 1, 1908, defendant must show that it had continuous possession of the required nature from January 1, 1948, to January 25, 1950, the date this action was commenced.

B.W. & Leo Harris Co., 240 Minn. at 50, 59 N.W.2d at 817.

Here, because appellants have never filed the required notice by the MTA, there is a conclusive presumption of abandonment. Minn. Stat. § 541.023, Subds. 1, 5. To avoid the conclusive presumption of abandonment, the appellants must establish the requisite possession to bring them within the possession exception of the MTA. *See Foster*, 515

N.W.2d at 587; *Township of Sterling*, 309 Minn. at 235, 244 N.W.2d at 133; *B.W. & Leo Harris Co.*, 240 Minn. at 50, 59 N.W.2d at 817.

The appellants ignore this case law and assert that under *Wichelman*, the respondents must prove conclusive abandonment rather the appellants having to prove possession. (Holstad Br. at 6-7, 11; Knaak Br. at 14.) To support their argument, they point to the following language in *Wichelman*:

For s 541.023 to operate in a particular case to extinguish any interest, two basic requirements are necessary. 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,' (i.e., a recorded fee simple title). Secondly, 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 (subd. 5).

Wichelman, 250 Minn. at 111, 83 N.W.2d at 819.

Wichelman never asserts, nor can the above language be construed to assert, that a person invoking the MTA must prove the opposing party failed to fall into any of the exceptions of Subd. 6. This Court has never interpreted *Wichelman* to create this burden. Rather, even after *Wichelman*, this Court has specifically stated that if a party claiming possession wishes to escape the MTA's bar, the party must establish its possession to bring him within the exception of subd. 6. *Township of Sterling*, 309 Minn. at 235, 244 N.W.2d at 133.

Appellants disregard the case law and the statutory presumption of abandonment and instead assert that the respondents must prove conclusive abandonment of the easement. (Holstad Br. at 11-12; Knaak Br. at 20-21.) By doing so, appellants confuse the difference between the presumption of abandonment under the MTA and common

law abandonment. Appellants cite *Richards Asphalt Co. v. Bunge Corp.*, 399 N.W. 2d 188 (Minn. Ct. App. 1987) to support their argument (Knaak Br. at 20-21) however, *Richards Asphalt Co.* specifically relates to common law abandonment and does not discuss the MTA. Common law abandonment is a separate legal theory not applicable to an invocation of the MTA. See *United Parking Stations, Inc.*, 257 Minn. 273, 101 N.W.2d 208 (discussing the MTA and common law abandonment as two separate and distinct claims).

In the case at hand, all of the appellants have been conclusively presumed to have abandoned their easements as none of them filed the required notice under the MTA. To overcome the presumption of abandonment, the appellants must each show they satisfied the requisite possession. Any other interpretation is contrary to established case law and would turn the MTA on its head requiring a party with a claim of title based upon a source of title to prove a negative, *i.e.*, that there was no possession.

“[W]hen the nonmoving party bears the burden of proof on an element essential to the nonmoving party’s case, the nonmoving party must make a showing sufficient to establish that essential element” to avoid summary judgment. *DLH, Inc.*, 566 N.W.2d at 71. In the current case, appellants each have the duty to provide sufficient evidence of possession to overcome the MTA’s presumption that they abandoned their easement interests.

III. APPELLANTS MUST EACH INDIVIDUALLY PROVE POSSESSION OF THEIR RESPECTIVE EASEMENTS.

As stated by the Court of Appeals, “To survive dismissal of their claims on a motion from summary judgment, appellants must show that use of their respective easements commenced by the end of the respective 40-year periods - dates which range from January 5, 1947 to August 30, 1949.” (A-210.) (emphasis added). To meet the possession standard, in addition to the timing requirement of the MTA discussed by the Court of Appeals, appellants use must be sufficiently obvious so that a prudent person would be put on inquiry regarding the existence of the easement.⁸ *Lindberg*, 667 N.W.2d at 487.

Appellants appear to argue that their alleged collective use of claimed possession will sustain their individual easements. (Holstad Br. at 10; Knaak Br. at 21.) However, it was not a single easement that was granted to appellants’ predecessors but, rather, a number of separately deeded, non-exclusive, easements to individual lot owners. (A-97-98, ¶ 4; A-22-84; A-105-143; RA-15-31.) The separately deeded easements were granted to separate grantees, on separate dates, making the critical dates under the MTA different

⁸ The possession standard is a distinct issue from the timing standard of possession at issue in this appeal. The timing standard is the time period within which a person must show possession occurred under the MTA. The possession standard is the type and frequency of use that must be shown to establish possession. In evaluating the type and frequency of and use of easements under the MTA, the Court of Appeals has presented two questions: “First, what was the scope or nature of the easement? Second, giving due regard to the nature of the easement, was the use sufficient to provide notice of the owner of the servient tract of the existence of the easement?” *Lindberg*, 667 N.W.2d at 487. Because appellants failed to show any use before the expiration of their respective 40-year periods, neither the trial court nor Court of Appeals discussed whether the type and frequency of appellants’ alleged use could even establish possession.

for each deeded easement. Each appellant, therefore, has a separate burden to prove that their particular easement has not been abandoned under the MTA. None of the appellants can rely on any use alleged by the other appellant property owners to establish possession of their particular easement rights.⁹

The MTA requires that each claimant record a sworn notice setting forth the name of the claimant, a description of the real estate affected and the instrument, event or transaction on which such claim is founded. Minn. Stat. § 541.023, Subd. 1. Because the easement rights over the Sampairs' property were granted at different times in different instruments to appellants' predecessors, each of the separate property owners would have had to file a notice under the MTA to preserve their easements. An individual easement owner cannot rely on a filed notice of another.¹⁰ Permitting that type of reliance would defeat the purpose of the MTA. Likewise, evidence of use of an easement by one of the appellants does not establish possession by all of the appellants.

Any claimed use by one of the appellants or their predecessors in title could only put an owner of the Sampair property on notice as the existence of an easement to that particular appellant's property, not to all of the appellants. Since none of the appellants have provided sufficient evidence of possession under the timing standard to create a genuine issue of material fact, the lower courts did not specifically discuss the issue of

⁹ Respondents acknowledge, however, that where two or more appellants are owners of one parcel, the use asserted by those appellants would be considered collectively as they are claiming one easement under one deed.

¹⁰ The MTA requires that a notice must be "sworn to by the claimant or the claimant's agent or attorney setting forth the name of the claimant, a description of the real estate affected and the instrument, event or transaction on which such claim is founded..." Minn. Stat. § 541.023, Subd. 1.

appellants' reliance on their collective use. However, in reviewing this matter, this Court must look at each individual appellant's allegations of possession and make an individual determination as to the use by that appellant, rather than to simply look at the allegations of use by all appellants collectively.

IV. NO APPELLANT HAS PROVIDED EVIDENCE OF POSSESSION OF THEIR EASEMENT ON THE FORTIETH ANNIVERSARY OF THE GRANTING OF THEIR EASEMENT OR CONTINUOUSLY THROUGH THE COMMENCEMENT OF THIS ACTION.

With the exception of Simes/Berg, the appellants rely solely on their own alleged recent use of their easements over the Sampairs' property as evidence of sufficient possession under the MTA. The appellants' reliance is misplaced because none of the appellants owned their property within the 40-year period after the granting of their respective easements. In fact, the earliest any of the appellants even owned their property was the Reuhles in 1971 – over sixty years after the easements were granted and over twenty years after the end of the MTA's 40-year period. (A-22-84; A-105-143; RA-15-31.)

Each easement over the Sampairs' property was granted separately to appellants' predecessors in title from January 5, 1907 through August 30, 1909. (RA-14-31.) Therefore, the MTA's 40-year period expired between January 5, 1947 and August 30, 1949 depending on the date of the grant. (RA-31.) Without proof of possession by each appellant's respective predecessors by at least 1949, their respective easements were discharged and became non-existent. *See United Parking Stations, Inc.*, 257 Minn. at 277, 101 N.W.2d at 211-12.

As determined by the trial court and the Court of Appeals, the only evidence in the record relating to use within and at the end of the relevant 40-year period involves the easements claimed by Simes and Berg. (A-102; A-210.)

A. The Ruehles do not claim to have ever used the easement.

The oldest easement granted over the Sampairs' property was the easement to the Ruehles' predecessors granted on January 5, 1907. (RA-14-31.) The Ruehles would, therefore, have to prove actual possession of the easement as of January 1, 1948, the critical date when the MTA was enacted. *See United Parking Stations, Inc.*, 257 Minn. at 276, 101 N.W.2d at 210-11. Not only do the Ruehles fail to provide any evidence that their predecessors used the easement as of January 1, 1948, they do not make any claim that they have ever used the easement. (A-105.) Any easement claimed by the Ruehles was, therefore, lost as of January 1, 1948, when the Ruehles predecessors failed to file the notice necessary to preserve it. The consequence of that failure is that the Ruehles' claim to an easement is conclusively presumed to have been abandoned. Minn. Stat. § 541.023.

B. The Carsons, Flecks, Linds, Krinkes, Karen Dean, Jeffrey Lutz and James Simning fail to present any evidence of possession of the easement at the end of the 40-year period after their easements were granted.

The Carsons, Flecks, Linds, Krinkes, Karen Deann, Jeffrey Lutz and James Simning (collective referred to as the "**Carson appellants**") all rely on their own use of the easements - granted to their predecessors in 1908 and 1909 - in an attempt to invoke the possession exception to the MTA. These appellants did not acquire their properties until the following dates:

<u>Appellant</u>	<u>Acquisition Date</u>
Robert Charles Carson	October 28, 1988
Karen Deann	July 19, 2000
Jonathan and Susan Fleck	April 28, 2006
Karen Hagan-Lind	June 30, 1989
Douglas and Ursula Krinke	June 4, 2001
Brian Lind	April 2, 1999
Jeffrey Lutz	January 18, 2005
James Simning	December 1, 1986

(A-22-79; A-107-127; RA-16-31.)

Again, because none of the Carson appellants acquired his or her property within the 40-year period after their easement was granted, they cannot rely exclusively on their own use to establish possession under the MTA. They must, in fact, show continuous possession since 1948 or 1949 when their easements became 40 years old. They have not done so. (See Jeffrey Lutz Aff. (A-22-47.); Karen Hagan Lind Aff. (A. 48-57); Brian Lind Aff. (A-58-63); James Simning Aff. (A-64-65); Karen K. Deann Aff. (A-66-79); Jonathan and Susan Fleck Aff. (A-80-84); Eugene Ruehle and Shirley Ruehle Aff. (A-105-106); Robert Carson and Barbara Carson Aff. (A-107-108); Ursula Beate Krinke (A-114-115); Douglas M. Krinke Aff. (A-120-121)).

Because the Carson appellants failed to present evidence of possession 40-years after their easements were created, their easements were discharged at the end of the 40-year period. See *United Parking Stations, Inc.*, 257 Minn. at 276, 101 N.W.2d at 210. Any evidence of use after their easements were discharged is irrelevant. See *B.W. & Leo Harris Co.*, 240 Minn. at 49, 59 N.W.2d at 816 (“If at any later time he abandons his possession, the bar falls and he cannot revive his right by again going into possession.”).

C. The evidence presented by the Sampairs that no one used the easements is undisputed between the years of 1974 and 1986 as to the Ruehles and Carson appellants.

The Sampairs have provided undisputed evidence that from at least 1974 through 1986, neither the Ruehles nor the Carson appellants, nor any other members of the general public, have used the easements over the Sampairs' property. (A-159-60; A-164-65.) The Ruehles were the first appellants to acquire their property in 1971 and they never claim to have used the easement. (A-105-06; RA-14-31.) The first use alleged by any of the Carson appellants is by James Simning, who did not acquire the lot containing the easement until 1986. (RA-14-31; A-64-65.) Accordingly, the affidavits of James Greeley and Thomas Watkins, attesting that they never observed any person using, attempting to use, or claiming the right to use the easement and that there was no visible sign or indication that anyone had used the easement for access to White Bear Lake, remain uncontroverted by the Ruehles and Carson appellants as to what occurred from 1974 through 1988. (A-159-60; A-164-65.) Because there is uncontroverted evidence that there was no possession of the easement by the Ruehles or the Carson appellants or their predecessors for at least those 12 years, these appellants failed to meet their burden of proof showing continuous possession.

D. The affidavit of James Berg fails to create a genuine issue of material fact regarding possession as his claims of possession during the 40-year period are not based upon personal knowledge.

The recorded easement to the Simes/Berg predecessors was granted on August 30, 1909. (A-115, ¶ 3; A-131.) While James Berg offers an affidavit purporting to attest to historical use and possession of his easement before 1951, he was only 47 years old at the

time of his affidavit. (A-137, ¶ 3.) Because he cannot have any personal knowledge of use prior to 1951, any statements made by James Berg claiming possession of the easement prior to 1951 do not create a genuine issue of material fact. *See* Minn. R. Civ. P. 56.05 (requiring that affidavits be made on personal knowledge).

V. **MS. SIMES' AFFIDAVITS FAIL TO CREATE A GENUINE ISSUE OF MATERIAL FACT AS HER CLAIMS OF POSSESSION ARE CONTRADICTORY.**

Josephine Simes is the only appellant who makes any assertions that she and her family and predecessors in interest used their claimed easements before their 40-year period expired on August 30, 1949. Ms. Simes submitted two affidavits in this matter. (A-128-36.) She makes five statements directly relating to use of the easement. *Id.*

Specifically, Ms. Simes alleges that:

...she does not remember a year in which the Easement was not used by member of the Berg family or their guests for purposes of accessing White Bear Lake. (A-129, ¶ 7.)

During the summer, after I graduated from high school my sister Frima and myself would use the easement as much as we could. My sister and I would walk along the shore and play in the water. (A-135, ¶ 5.)

I have seen my sister use the lakeshore easement continually over the past sixty years. (A-135, ¶ 2.)

In 1947 my husband and I moved into a cottage by the lake. The first purchase we made after being married was to purchase a boat. The boat we purchased was stored at the easement. (A-135, ¶ 12.)

In the early 1970's my then teenage children, including James Berg who is also a defendant in this action, stored a boat on the easement. (A-135, ¶ 13.)

The Court of Appeals noted that, at first blush, the evidence contained in Ms. Berg's affidavits appears sufficient for Simes and Berg to defeat respondents' summary

judgment motion. (A-210.) However, her assertions of use are directly and unambiguously contradicted by letters from Ms. Simes' attorney to the then owners of the Sampair property, which Ms. Simes attached to and incorporated into her first affidavit. (A-132-33.) These letters, dated January 6, 2005 and May 14, 2004, categorically refute that she, or her family, has used the easement since the 1940s. (A-132-33.) Instead, these letters expressly acknowledge that the Simes/Berg families have been using the dock association property¹¹, next to the Sampair property, to access the lake and have not used the easement on the Sampair property since before the Second World War.¹²

Specifically in the January 6, 2005 Ms. Simes' attorney unequivocally states the Simes family has not entered the easement since before the Second World War:

As a practical matter, Ms. Simes and her family have been members of the dock association next to [the Sampair] property since before the Second World War and have had no reason to exercise their right of entry. Nor is there any reason for you to expect that they would want to do so in the foreseeable future, given their ease of access over the Dock Association's dock and access point.

(A-132.)

The May 14, 2004 letter similarly states:

¹¹ The public has access to White Bear Lake via a vacated roadway easement adjacent to Lot 1 that has been dedicated as a boat launch. The launch area includes a village dock association boat dock and boat lifts. *In the Matter of the Application of Sampair v. Birchwood et. al.*, A08-1494, A08-1505 at 10 (Minn. Ct. App. 2009). James Greeley discusses the public access located between his property and the Sampair property. (A-159, ¶ 2; A-160, ¶ 5.)

¹² Mrs. Simes also claims in her affidavit that an earlier attorney wrote a letter to one of Sampairs' predecessors in 1955, on behalf of her family discussing the easement, however, the attorney in the letter states that he is representing the "Park Beach Club". (A-131.)

As you know, [the Simes/Berg family] have been using the Dock Association access to the lake next to your property for many years, notwithstanding the existence of deeded access to the lake over the easterly portion of your property.

(A-133.)

The Knaak appellants contend that the purpose of attaching the letters from her attorneys to Ms. Simes' first affidavit was, "an attempt to show that Ms. Berg Simes in fact provided the owners of Lot 1, Block 1 with notice of the easement..." (Knaak Br. at 8.) The Knaak appellants further contend that, "[t]he letters were sent to remind the subservient land owners about her family's easement use..." (Knaak Br. at 9), notwithstanding that the letters specifically state that the family did not use the easement.

(A-132-33.)

The contents of these letters directly contradict the portions of Ms. Simes affidavits wherein she claimed that she and her family members had used the easement before the expiration of the applicable MTA period and continuously thereafter.

A. The statements of Ms. Simes' attorney that she incorporated into her affidavit are admissions against her interest.

The Knaak appellants complain that the trial court and Court of Appeals erred by attributing the statements in Ms. Simes' attorneys' letters to her: "The use of another person's letter to contradict your personal testimony goes beyond the case law and reasoning of this Court's holdings." (Knaak Br. at 9, citing *See Risdall v. Brown-Wilbert, Inc.*, 759 N.W.2d 67, 72 (Minn. Ct. App. 2009)¹³). This statement is inaccurate. This Court has specifically addressed the issue of whether an attorney's statement can be used as an

¹³ It is difficult to understand how this statement of the Knaak appellants can be inferred from the *Risdall* case to support the proposition they advance by the statement.

admission against the interest of the client and has ultimately determined that where the attorney's statement is in writing and authorized by the client, the statements are admissible as statements against the client's interest.

In *Carroll v. Pratt*, 247 Minn. 198, 76 N.W.2d 693 (Minn. 1956), this Court determined that an out-of-court statement by the defendant's attorney was properly excluded as hearsay, stating that:

The cases are almost unanimous that out-of-court admissions of fact by an attorney, whether written or oral, which have not been made for the specific judicial purpose of dispensing with proof or for influencing the procedure in the case, are inadmissible in evidence against his client unless it appears that (aside from his mere employment in connection with pending or prospective litigation) the attorney had some special authority to act for his client and that such admission properly related to such special authorization. The mere existence of the relationship of attorney and client does not of itself supply the attorney with authorization to make extrajudicial admissions in behalf of his client, and whether he has been vested with such power to act for his client is to be measured by the same tests of express or implied authority as would be applied to other agents. (footnotes omitted.)

Pratt, 247 Minn. At 204, 76 N.W.2d at 698.

This Court next visited the issue in *Pow-Bel Const. Corp. v. Gondek*, 291 Minn. 386, 192 N.W. 2d 812 (Minn. 1972), where this Court, citing the above language from *Pratt*, held that the testimony of appellant's attorney about statements made by respondent's attorney should have been excluded. *Gondek*, 291 Minn. at 389, 192 N.W. 2d at 814-15.

In *Wenner v. Gulf Oil Corporation*, 264 N.W.2d 374 (Minn. 1978), this Court dealt directly with whether a statement made by a plaintiff's attorney in a letter sent to defendant was admissible as an admission against the interest of the plaintiff. In *Wenner*,

the plaintiff was a farmer who sued a herbicide manufacturer when he experienced a reduced crop yield after applying the manufacturer's herbicide. Prior to the commencement of litigation, plaintiff's attorney wrote to defendant outlining the factual basis for plaintiff's claim and demanding recompense to avoid litigation. In characterizing the letter, the Court said "[t]he information disclosed by this letter contained only the basic facts of what had occurred Plaintiff clearly expected these facts to be communicated to defendant." *Id.* at 378.

Distinguishing *Gondek* and *Pratt* from *Wenner*, the *Wenner* Court stated:

In both *Gondek* and *Pratt*, this court held that the alleged admissions made by the parties' attorneys were not admissible into evidence. The facts of those cases show that the attorneys' admissions were oral and made under informal circumstances to the other party. Furthermore, in both cases there was no showing of special authority or authorization given to the attorneys by their clients. The facts in this case are clearly distinguishable from either *Gondek* or *Pratt*.

Id. at 379.

The *Wenner* Court then acknowledged that many cases recognize an exception to excluding an attorney's statements:

* * * As a general rule, if an attorney has authority to negotiate with reference to a particular matter or to present and collect a claim out of court, the admissions of fact made by him in reference to the subject of his agency and in the course of the discharge of his duty with respect thereto are competent evidence against his client. Admissions of fact made in collection letters written by an attorney in reference to a claim in his hands are competent evidence against his client if the attorney was authorized to present the claim out of court.

Id. at 379 (*citing See, 7 Am. Jur. 2d, Attorneys at Law, § 122, p. 123*).

Further the *Wenner* Court, stated:

* * * according to the prevailing rule [an attorney] may, if authorized to present the claim and try to make collection out of court, state to the opposite party what the claim is, and his admissions, constituting a part of such statement, may be received in evidence against his client in subsequent litigation.

Id. at 380 (citing Annotation, 97 A.L.R. 374, 398).

Finally, in concluding that it was error to have excluded the attorney's letter, this

Court held in *Wenner*:

Under the circumstances in this case, it seems that sufficient authority was present, as shown by the letter and plaintiff's own testimony which acknowledged his attorney's broad authority to present and collect his claim. Furthermore, the admission made by plaintiff's attorney was neither oral nor made in the course of casual conversation with defendant. Rather, the statement was written in a letter to defendant, notifying it of plaintiff's claim.

Id.

The circumstances of the instant case merit the same result as *Wenner*. Here, like in *Wenner*, the admissions were written and not oral. They were made under formal circumstances to the then owners of Lot 1 to alert those owners of the Simes family's claim of an easement so as to "avoid any misunderstandings". (A-132.) The ostensible need for the formal letters was due to the fact, as stated in the letters, that neither Ms. Simes' nor her family had used the easement since before the Second World War.¹⁴

Further, the letters themselves, like the letter in *Wenner*, express the authority and authorization given by Ms. Simes to her attorneys to make the statements contained therein, in that in each of these letters her attorney clearly identifies himself as

¹⁴ If Ms. Simes and her family had been using the easement, and using it in a manner that would have put the owners of Lot 1 on notice, the letters would not have been necessary.

representing Josephine Simes and her family, and then identifies that the subject of his communication was to advise the owners of Lot 1 that the Simes family claimed an easement over Lot 1 notwithstanding that neither Ms. Simes nor her family had used the easement since before the Second World War. (A-132-33.) As such, these statements were made in the course of the discharge of her attorney's duty and with respect thereto. That Ms. Simes authorized and adopted these statements is evident by the fact that, at least as to the January 6, 2005, letter, she received a carbon copy and has never, even to the date of these proceedings, disavowed its contents. In fact, nowhere in her affidavits does she specifically denounce, clarify, correct or challenge the statements in her attorney's letter. To the contrary, she adopts them as part of her testimony by specifically incorporating them into her affidavit (A-128-33.)

Accordingly, under *Wenner*, the letters from Ms. Simes attorneys may be construed as statements against her interest, and when so construed result in inherent contradictions with the remainder of her affidavits.

B. Minnesota has adopted the "sham affidavit doctrine".

This Court and the Minnesota Court of Appeals have applied what is sometimes referred to in other jurisdictions as the "sham affidavit doctrine". In essence, the sham affidavit doctrine states that, "a party may not create a material issue of fact to defeat summary judgment by filing an affidavit disputing his or her own sworn testimony without demonstrating a plausible explanation for the conflict." *Jiminez v. All American Rathskeller, Inc.*, 503 F.3d. 247, 251 (3rd Cir. 2007) (discussing history of sham affidavit doctrine).

Although not calling it the sham affidavit doctrine, this Court has invoked the principal, stating, “Although affidavits that contradict earlier deposition testimony generally may not be used to create a genuine issue of fact, there are exceptions to this rule” such as where an affidavit explains and clarifies the deposition statements rather than simply contradicting them. *Hoover v. Norwest Private Mort. Banking*, 632 N.W.2d 534, 541 (Minn. 2001). This Court later affirmed this doctrine saying, “We do not retreat from our prior statement that ‘affidavits that contradict earlier deposition testimony generally may not be used to create a genuine issue of fact.’” *Augustine v. Arizant Inc.*, 751 N.W.2d 95, 101 (Minn. 2008) (citing *Hoover*, 632 N.W.2d at 541). Similarly, the Minnesota Court of Appeals has applied the sham affidavit doctrine stating, “A self-serving affidavit that contradicts other testimony is not sufficient to create a genuine issue of material fact.” *Risdall v. Brown-Wilbert, Inc.*, 759 N.W.2d 67, 72 (Minn. Ct. App. 2009), *review denied* (Minn. Mar. 17, 2009) (citing *Banbury v. Omnitrition Int’l Inc.*, 533 N.W.2d 876, 881 (Minn. Ct. App. 1995)).

C. In her affidavits Ms. Simes fails to explain or clarify the contradictory statements.

Here, the 2004 and 2005 letters from Ms. Simes’ attorney state unequivocally that the Simes’ family has not used the easement since before the Second World War and do not plan to use it in the foreseeable future. Ms. Simes adopts the letters as part of her sworn testimony when she specifically attaches and incorporates the statements into her first affidavit. (A-129, ¶ 9; A-132-33.) The statements in these letters from her attorney - that the Simes family has not used, and does not plan to use the easement – directly

contradict the statements in Ms. Simes' self-serving affidavits that she or her family have used the easement since the 1940s.

Ms. Simes attached and incorporated the letters into her first affidavit dated June 3, 2008. (A-130-32.) She does not explain or clarify the contradictory statements anywhere in her first affidavit. Seventeen days later, on June 20, 2008, Ms. Simes executed a second affidavit. Again, Ms. Simes failed to explain or clarify the contradictory statements.

D. Ms. Simes' adopted the contents of the letters as part her testimony when she attached and incorporated the letters into her affidavit.

The Knaak appellants assert that the sham affidavit doctrine does not apply because the attorney letters do not qualify as testimony and are merely exhibits. (Knaak Br. at 8-9.) However, this argument fails under the reasoning in *Wenner, supra*, because Ms. Simes specifically attaches and incorporates the letters into her sworn affidavit, thereby adopting and ratifying the content of the letters as part of her testimony. (A-129, ¶ 9.) For the same reasons, the appellant's argument that the doctrine does not apply because the letters are based upon hearsay must fail.

E. The sham affidavit doctrine is applicable to Ms. Simes affidavits.

The situation with Ms. Simes' affidavits is somewhat unique because the contradictory statements are contained within the same affidavit; and again are contradicted by a second affidavit. However, this does not negate the rationale of the sham affidavit doctrine. If a party could raise an issue of fact simply by submitting an affidavit contradicting her own testimony, it would greatly diminish the utility of

summary judgment as a procedure for screening out sham issues of fact. *Banbury*, 533 N.W.2d at 881.

Contrary to the Knaak appellants' argument, courts have not limited the doctrine to affidavits contradicting earlier deposition testimony. The 8th Circuit has applied the sham affidavit doctrine to contradictory affidavits submitted by the same party, holding it is inappropriate to consider the inherently contradictory affidavits in summary judgment proceedings unless the party explains the inconsistency. *Barham v. Reliance Standard Life Ins. Co.*, 441 F.3d 581, 585 (8th Cir. 2006) (citing *Camfield Tires, inc. v. Michelin Tire Corp.*, 719 F.2d 1361, 1364-65 (8th Cir. 1983)).

In the current case, Ms. Simes' affidavits contain only contradictory, self-serving assertions, unsubstantiated by sufficient probative evidence. In fact, the only probative evidence provided by Ms. Simes are the 2004 and 2005 letters by her attorney stating that the Simes family has not used the easement since before the Second World War. (A-132-33.) These letters, incorporated into Ms. Simes sworn affidavit, state that Ms. Simes and her family were not in possession of the easement so as to be able to invoke the possession exception under the MTA. Ms. Simes' bare assertions to the contrary in her affidavits submitted to defeat summary judgment fail to raise any genuine issue of material fact. The Simes/Berg appellants have, therefore, failed to provide sufficient evidence of possession on the fortieth year after their easement was created, and have failed to provide sufficient evidence of continuous use thereafter.¹⁵ "A self serving

¹⁵ Even if this Court were to determine that Ms. Simes' affidavits create a genuine issue of material fact, it only creates a fact issue as to the Simes/Berg appellants. Accordingly, if

affidavit that contradicts other testimony is not sufficient to create a genuine issue of material fact.” *Risdall*, 759 N.W.2d at 72 .

CONCLUSION

Under the Marketable Title Act, Minn. Stat. §541.023, a presumption of abandonment of a property right arises if the party against whom the MTA is invoked has failed to record a notice of its interest in the property within 40 years from the date that interest is created or established. None of the appellants or their predecessors in title filed the required notice.

Notwithstanding, the MTA does not bar the rights of a person in possession of real property. To avoid the presumption of abandonment under the MTA through the possession exception, appellants must each prove their possession began at the end of their respective 40-year periods and must continue until action is commenced. None of the appellants have provided evidence creating any material issue of fact regarding possession on the fortieth anniversary from the creation of their historical easements and continuously thereafter. Accordingly, they have failed to rebut the conclusive

this Court determines that there is an issue of fact as to Ms. Simes the trial court and Court of Appeals must be affirmed as to all the other appellants and reversed and remanded only with respect to the Simes/Berg appellants, to proceed to trial on the issue of whether their use and the use of their predecessors is sufficient to invoke the possession exception under the MTA.

presumption of abandonment under the MTA. The Sampairs respectfully request that this Court affirm the district court's judgment and the decision of the Court of Appeals.

Respectfully submitted,

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Dated: 10/24/07



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