

NO. A09-837

State of Minnesota
In Court of Appeals

National City Bank,

Appellant,

vs.

Judith M. Engler,

Respondent.

APPELLANT'S 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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STATEMENT OF LEGAL ISSUES

Issue 1: **Is a mortgage and loan application that is signed by both spouses, that defines both spouses as borrowers, and which uses the loan proceeds to pay the debts of both spouses, void under Minn. Stat. § 507.02 because of language located below wife's signature which repeats her waiver of homestead rights?**

District Court's Ruling: The District Court concluded that such a mortgage was void.

Relevant Authorities:

Minn. Stat. § 507.02

Lawver v. Slingerland, 11 Minn. 447 (Minn. 1866)

Sitterley v. Gray Co., Inc., 272 N.W. 387 (Minn. 1937)

Brown v. State Auto Ins. Ass'n, 12 N.W.2d 712 (Minn. 1944)

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Issue 2: **Was there evidence of mutual mistake to support reformation of the mortgage?**

District Court's Ruling: The District Court found that there was no evidence of mutual mistake to support the reformation of the mortgage.

Relevant Authorities:

Lebanon Sav. Bank v. Hallenbeck, 13 N.W. 145 (Minn. 1882)

Rogers v. Castle, 53 N.W. 651 (Minn. 1892)

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Nichols v. Shelard Nat'l Bank, 294 N.W.2d 730 (Minn. 1980)

Issue 3: **Was there evidence of unjust enrichment to impose a constructive trust?**

District Court's Ruling: The District Court found that there was no evidence of unjust enrichment to impose a constructive trust.

Relevant Authorities:

Knox v. Knox, 25 N.W.2d 225 (Minn. 1976)

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Henderson v. Murray, 121 N.W. 214 (Minn. 1909)

Issue 4: Does the doctrine of equitable subrogation apply under these facts?

District Court's Ruling: The District Court found that the doctrine of equitable subrogation does not apply under these facts.

Relevant Authorities:

First Nat'l Bank of Menahga v. Schunk, 276 N.W. 290 (Minn. 1937)

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STATEMENT OF THE CASE

In April 2004, Respondent Judith Engler and her late husband, Harold Engler, refinanced their existing mortgage indebtedness and other joint and individual liabilities on real property that they owned in Anoka County. The refinancing included a payoff of substantial Minnesota state tax liens that had been incurred by both Respondent and her husband. When they attended the closing on the refinancing, the couple, as husband and wife, signed a mortgage in favor of First Franklin Financial Corporation. This Mortgage, in the amount of \$268,000.00, was later assigned to Appellant National City Bank.

Before signing the last page of the Mortgage, Respondent reviewed and personally initialed every page of the Mortgage, including the page which states at paragraph 13 of the Mortgage that she was co-signing, “to mortgage, grant and convey the co-signer’s interest in the Property.” She also signed the settlement statement as a borrower, indicating that the loan proceed payments—some of which were being used to satisfy her own tax liabilities—were being made on her behalf and with her consent. The Mortgage that she signed defined her as a “co-borrower.”

At the time she signed, Respondent was not new to mortgages. Indeed, she was an experienced borrower who had had two previous mortgages on homes that she and her husband had owned in the past. Respondent also was aware of the danger of losing her home if she did not make payments; she testified that she knew that if she took out a mortgage but did not pay, that she was in danger of losing her home.

Respondent and her husband subsequently defaulted on the Mortgage. Appellant

exercised its rights under the Mortgage's acceleration clause and declared the total principal and interest due and payable. Appellant then initiated the foreclosure by action which is the subject of this appeal. Respondent was no stranger to the foreclosure process, as she and her husband had been foreclosed on for other property prior to the initiation of this case.

In a bench trial before the Hon. Tammi A. Fredrickson in Anoka County District court, Respondent claimed that the Mortgage which she signed could not be enforced because language contained below her signature on the Mortgage reiterated her homestead waiver. Respondent argued that this language limited her signature to a homestead waiver. Appellant argued that the Mortgage was valid and enforceable and therefore the foreclosure action could proceed. Alternatively, Appellant argued that the Mortgage should be reformed to accurately reflect the parties' intent. Finally, Appellant argued that a constructive trust should be imposed and that it was entitled to equitable subrogation. The District court rejected Appellant's arguments and entered judgment in favor of Respondent, thus allowing her to retain the full benefit of the \$268,000 received without recourse. This appeal follows.

STATEMENT OF THE FACTS

Respondent Judith M. Engler and her husband, Harold Engler, were joint tenant owners of real property located at 14022 Yellow Pine Street NW in the City of Andover, Minnesota (the "Property"). (Trial Transcript, p. 15.) In early 2004, the Englers wished to refinance their existing mortgage indebtedness on the Property. (Tr. Trans. p. 15:19-21.) They also desired to refinance certain other liabilities that one or the other held, including substantial Minnesota state income tax liens. (Tr. Trans. pp. 32-33, 35.) Some of those tax

liens had been imposed against Respondent individually, while others had been imposed individually against her husband. (Tr. Trans. pp. 60-62.) Accordingly, in March 2004, the couple jointly applied for a loan in the approximate sum of \$268,000 to First Franklin Financial Corporation. (Tr. Trans. pp. 21-23; Trial Exhibit 1/Appendix A-1.) The loan application shows Respondent as a borrower or co-borrower on the loan. (Tr. Trans. pp. 21-23; Tr. Ex. 1/App. A-1.)

At a closing held on April 26, 2004 (“the Closing”), Harold Engler executed a note in favor of First Franklin Financial Corporation in the amount of \$268,000.00 (“the Note”). (Tr. Ex. 2.) Only Respondent’s husband signed the Note. (Tr. Ex. 2.) At Closing, however, Respondent did sign the loan application, again as a borrower, as the proceeds were being used to pay certain of her own debts. (Tr. Trans. pp. 21-23; Tr. Ex. 1/App. A-3.) At the Closing, Respondent and Harold Engler, as husband and wife, also signed a mortgage in favor of First Franklin Financial Corporation in the amount of \$268,000.00, which was filed of record on May 12, 2004, in the office of the Anoka County Recorder as Document No. 1922096 (“the Mortgage”). (Tr. Ex. 3/App. A-6.) Before signing her name on the last page of the Mortgage, Respondent reviewed and personally initialed every page of the Mortgage. (Tr. Trans. p. 24:16-25; Tr. Ex 3/App. A-6.) The Mortgage pledged the Property as security for the debt and authorized foreclosure in the event of a default. (Tr. Ex. 3/App. A-6.) In addition, the Mortgage’s definition of “Borrower” specifically includes Respondent Judith Engler. (Tr. Ex. 3/App. A-7.)

In the Mortgage, both spouses waived all right of homestead protection. (Tr. Ex.

3/App. A-17.) A line located below Respondent's signature on the Mortgage states "signing solely for the purpose of waiving any and all homestead rights," reiterating that Respondent was not personally liable on the underlying note, but was subjecting her home to the Mortgage. (Tr. Ex. 3/App. A-18.) Importantly, Respondent specifically reviewed and personally initialed page 10 of the Mortgage, which states at paragraph 13 that she is granting and conveying her interest in the Property:

Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of the Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

(Tr. Ex. 3/App. A-14, para 13.) (Emphasis added).

Respondent also signed a Notice of Right to Cancel the Mortgage. (Tr. Ex. 32/App. A-5.) By signing this notice, Respondent agreed that she had the right to rescind the mortgage conveyance for three days following the closing. (Tr. Trans. pp. 63-65; Tr. Ex. 32/App. A-5.) Respondent ultimately elected not to cancel the Mortgage (Tr. Trans. pp. 63-65; Tr. Ex. 32/App. A-5.)

At the Closing, Respondent also signed the settlement statement as a borrower. (Tr. Ex. 4/App. A-23.) By doing so, Respondent indicated that the loan proceed payments were being made on her behalf and with her consent. (Tr. Trans. pp. 33-34:7-25, 1-9; Tr. Ex. 4/App. A-21.) Harold Engler and Respondent received \$1,143.77 cash from the loan

proceeds at the Closing. (Tr. Ex. 4/App. A-21.) The total amount paid out on behalf of Harold Engler and Respondent to satisfy outstanding obligations, together with the amount paid to them in cash, was \$256,340.89. (Tr. Ex. 4/App. A-21.) At the Closing, proceeds from the loan secured by the Mortgage were used to pay the following joint debts on behalf of Respondent and on behalf of her husband:

- a. \$180,825.56 payoff to Countrywide Homes,
- b. \$1,459.10 payoff to Rand Financial,
- c. \$4,056.41 payoff for Minnesota State Unemployment Tax Lien,
- d. \$60,325.05 payoff for Minnesota Department of Revenue Tax Liens,
- e. \$3,457.00 payoff to Bank of America,
- f. \$4,345.00 payoff to HFC-USA,
- g. \$124.00 payoff to Sears,
- h. \$392.00 payoff to Capital One, and
- i. \$213.00 payoff to Providian.

(Tr. Ex. 4/App. A-21.)

Respondent attended the closing on the loan expecting that she would give a Mortgage on her homestead. (Tr. Trans. pp. 31-32:19-25, 1.) Respondent was no stranger to mortgage loans, having had two previous mortgages on homes that she and her husband had owned in the past. (Tr. Trans. p. 17:8-10.) Nor was she a stranger to the foreclosure process, as she and her husband had been foreclosed on once before. (Tr. Trans. p. 18:2-3.) Respondent testified that she knew that if she took out a Mortgage with Appellant but did not pay off the debt, that she was in danger of losing her home and being forced to move out. (Tr. Trans. pp. 31-32:19-25, 1.)

Harold Engler, the co-borrower, died in February 2006, upon which time Respondent became the Property's sole owner. (Tr. Trans. p. 15.) First Franklin Financial Corporation

then assigned its interest in the Mortgage to Appellant National City Bank. (Tr. Ex. 34.) Respondent subsequently defaulted on the Mortgage, (Tr. Trans. pp. 35-36:22-25, 1-7), and Appellant declared the total of principal and interest due and payable pursuant to the Mortgage's acceleration clause.¹

Appellant then initiated the foreclosure by action which is the subject of this appeal. Respondent argued in the district court that the Mortgage which she signed cannot be enforced because language located below her signature on the Mortgage reiterates the language of her homestead waiver found in the body of the agreement. She made this argument despite the fact that (1) she signed and repeatedly initialed the Mortgage, including the page under which she specifically grants and conveys her interest in the Property; (2) simultaneously signed a Notice of Right to Cancel the mortgage, (3) she is listed as a co-borrower on the loan application, and (4) the proceeds from the loan were used to pay off her own individual debts. In response, Appellant argued that there would be no reason for Respondent to sign the Mortgage other than to mortgage her interest in the Property; and mortgage lenders do not take mortgages on only one party's interest in a property, especially where it is homestead property owned by a married couple as joint tenants.² Nor would there

¹ The total sum due on the Mortgage through July 16, 2008 was \$336,519.39. (Tr. Ex. 33.) For over three years, Respondent has been living on the Property for free; she has not made a single payment on the underlying promissory note and Mortgage since April 2006. Nor has Respondent paid the property taxes on the Property. Instead, she has relied upon Appellant to pay those property taxes.

² No payment has been made on the Note and Mortgage since April 2006. (Tr. Ex. 33.) Principal in the sum of \$261,098.20 is outstanding. (Tr. Ex. 33.) Interest in the sum of \$61,644.49 is accrued through July 16, 2008. (Tr. Ex. 33.) Interest accrues thereafter at a daily rate of \$71.39. (Tr. Ex. 33.) Appellant has advanced payments for real estate taxes for

be a reason for Respondent to sign a right to cancel the Mortgage had she not entered into a mortgage in the first place. The district court held that the Mortgage was invalid under Minn. Stat. § 507.02. (Appellant's Addendum p. 1).

ARGUMENT

I. A Mortgage that is Signed by Both Spouses, that Defines Both Spouses as Borrowers, and which Uses the Loan Proceeds to Pay off Both Spouses' Debts Is Valid under Minn. Stat. § 507.02.

A reviewing Court is not bound by and need not give deference to a trial court's decision on a purely legal issue. *Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984).

Under Minn. Stat. § 507.02, a mortgage is valid if it has been signed by both spouses. Here, the district court held that the mortgage was void under section 507.02 because Respondent did not sign the mortgage. (Appellant's Addendum p. 1). The district court's decision must be reversed because it is undisputed that not only did Respondent attend the Closing and sign the Mortgage, but she was also fully aware of the note signed by her husband, the amount of the note, and the date that the note matured. Respondent also did sign the loan application, again as a borrower, as the proceeds were being used to pay certain of her own debts. Finally, the district court's decision relies on language that is not part of

the Property in the sum of \$6,038.72. (Tr. Ex. 33.) Appellant has advanced payments for insurance for the Property in the sum of \$4,081.57. (Tr. Ex. 33.) Total escrow advances are \$10,120.29. (Tr. Ex. 33.) After credit for an existing cash balance in escrow of \$859.04 plus earned interest of \$16.39, the total advances or "negative escrow balance" equals \$9,244.86. (Tr. Ex. 33.) Unpaid late charges total \$3,081.84. Recoverable advances equal \$1,440.00. (Tr. Ex. 33.) The total sum due on the Mortgage through July 16, 2008 was \$336,519.39 which is now due upon the Mortgage. (Tr. Ex. 33.)

the contract and renders provisions in the agreement meaningless.

A. The Mortgage Contains the Signatures of Both Spouses

Minnesota Statute Section §507.02 states in relevant part:

507.02. Conveyances by spouses; powers of attorney

If the owner is married, no conveyance of the homestead, except a mortgage for purchase money under section 507.03, a conveyance between spouses pursuant to section 500.19, subdivision 4, or a severance of a joint tenancy pursuant to section 500.19, subdivision 5, shall be valid without the signatures of both spouses. A spouse's signature may be made by the spouse's duly appointed attorney-in-fact.

(Emphasis added). It is undisputed that the Mortgage at issue here contains the signatures of both spouses.

In *Lawver v. Slingerland*, 11 Minn. 447 (Minn. 1866), which is one of the earliest cases interpreting the spousal signature requirement on homestead property, the Minnesota Supreme Court held that the spousal signature requirement was satisfied by the mere signature of the spouse, and that the spouse need not even understand what was being signed. In *Lawver*, Mr. Lawver delivered a mortgage to Mr. Slingerland with his spouse's signature. *Id.* Mr. Slingerland then proceeded, upon default by Mr. Lawver, to foreclose the Mortgage by advertisement. *Id.* Mr. Lawver brought suit to establish that the mortgage was void and unenforceable, because his wife's signature was unattested and she did not understand what she was signing. *Id.* The Court disagreed with Mr. Lawver and allowed the foreclosure of the Mortgage to take place stating:

The owner of real property in fee simple having the right to mortgage the same at his pleasure, by virtue of his absolute ownership, may do so by conforming his conveyance to the ordinary requirements of statute. If there be any

exception in the case of a homestead, it must be found in the statute to which the homestead right owes its existence. This, as we have already seen, provides that “a mortgage * * * of such land by the *owner* thereof, if a married man, shall not be valid without the *signature* of the wife to the same.” The signature alone of the wife is required.

Id. (italics in original, underlining added). Regarding Mrs. Lawver’s understanding as to what she signed the Court stated:

No point appears to be made in behalf of the respondents as to the facts alleged in the complaint with regard to the ignorance of Mrs. Lawver respecting the contents of the mortgage. There is no allegation of any attempt to conceal its contents from her, or to mislead her with regard to the object or purpose of the mortgage, or of any other fraudulent practice upon her. If she signed it in ignorance of its contents, it would seem that she must attribute the consequences to her own neglect and carelessness.

Id. (emphasis added); *see also Borgstrom v. Haverty*, 128 N.W. 824 (Minn. 1910) (holding that, “[h]er signature to the lease, without formal acknowledgment, was all that was necessary to bar her homestead right.”).

Here, it is undisputed that Respondent signed the Mortgage. Furthermore, unlike in *Lawver*, Respondent understood what she was signing. The Mortgage defined her as a borrower. She benefitted from the proceeds of the loan, she had executed mortgages in the past, and she had even been foreclosed upon in the past. Importantly, Respondent also reviewed and personally initialed every page of the Mortgage, including page 10, which states at paragraph 13 that she is co-signing “to mortgage, grant and convey the co-signer’s interest in the Property.” The district court’s decision does not explain how language found below a party’s signature can be used to contradict the express terms of the agreement found above her signature in paragraph 13. And, as discussed below, the decision is contrary to

Minnesota law holding such language as extraneous.

Respondent also signed a Notice of Right to Cancel the Mortgage. This document gave her the right to rescind the mortgage conveyance for three days following the closing. Respondent elected not to cancel. Obviously, if she did not sign or intend to sign a Mortgage, there would be absolutely no reason for Respondent to sign a Notice of Right to Cancel that “non-existent” mortgage, since it didn’t exist in the first place. The district court’s decision, however, ignores this fact and again leaves open the question of why Respondent would have signed this document if she had not granted a mortgage in her interest.

In addition, Respondent signed a settlement statement and agreed that the funds from the transaction were being used to pay Respondent’s direct debts. Under these facts, the district court erred by declaring the Mortgage void under § 507.02.

B. The District Court’s decision relies on language that is not part of the contract and results in a meaningless provision.

The district court held that despite the fact that Respondent had signed the Mortgage and Notice of Right to Cancel the Mortgage, the Mortgage is invalid because language located below her signature repeats that she is waiving her homestead rights. There are two problems with this holding. First, this decision is contrary to Minnesota law which holds that that contractual language located below a party’s signature and not referenced in the body of the agreement is not part of the contract. Second, even if this language was included in the agreement, the district court’s decision does not make sense as it does not explain what the purpose of this language was if it did not simply repeat Respondent’s waiver of her

homestead rights that is found in the body of the Mortgage.

1. The language below Respondent's signature is not part of the contract.

Minnesota contract law holds that terms appearing below a party's signature are not enforceable unless they are specifically referenced in the body of the contract. Here, the district court's decision to void the Mortgage signed by Respondent due to language found below Respondent's signature was erroneous as a matter of law since such language is not an enforceable term of a contract.

In *Sitterley v. Gray Co., Inc.*, 272 N.W. 387 (Minn. 1937), the Minnesota Supreme Court held that language contained to the left of the defendant's signature on a contract was not a part of the agreement where it was not made a part of the agreement by reference. In *Sitterley*, the appellant sought to rely upon contractual language that was located, "to the left of defendant's signature, inclosed [sic] in a parallelogram." *Id.* at 387. There was no reference in the body of the agreement that provisions contained elsewhere—including those contained immediately to the left of the party's signature block—were part of the agreement. Hence, the Minnesota Supreme Court held that the language was not part of the agreement because it was not referenced "above defendant's signature." The Court stated:

There is no reference in what is printed above defendant's signature either to the printing in the parallelogram [to the left of the signature] or to the back or reverse side of the letter. Neither the one nor the other ought properly be considered as part of the contract.

Id. at 388 (emphasis added). The court made this holding despite the fact that the language at issue was, like in this case, located right next to the party's signature.

Likewise, in *Brown v. State Auto Ins. Ass'n*, 12 N.W.2d 712, 716 (Minn. 1944), the Minnesota Supreme Court again held that:

Where the signature is at the end of the instrument, it is generally plain that it authenticates everything above it. Where, however, written or printed matter appears below the signature. . . a signature authenticates only the matter intended by the parties to be included as a part of the instrument. The intention must be manifested either by express reference or by internal evidence in the writings involved.

(citing *Quinn-Shepherdson Co. v. Triumph Farmers' Elev. Co.*, 182 N.W. 710 (Minn. 1921); *Olson v. Sharpless*, 55 N.W. 125 (Minn. 1893); Annotation, 112 A.L.R. 937) (emphasis added). In *Brown*, the court referenced *Sitterly* and stated that, “printed matter not above the signature is no part of a contract [where] there was no reference in the body of the contract...to the printed matter not above the signature.” *Id.* at 717 (emphasis added).

Likewise, in the 2001 unpublished opinion of *Huebsch Laundry Co. v. DeLuxe Diecutting, Inc.*, 2001 WL 138996 * 1 (Minn. Ct. App. 2001), this court relied upon both *Sitterly* and *Brown* for the requirement that terms appearing below a signature are not a part of a contract. (Copy contained in Appellant’s Appendix).

In *Huebsch*, the agreement was numbered sequentially with terms 1-6 appearing above the parties’ signatures, and terms 7-13 located below the signatures on the back. *Id.* at *1-2. The appellant argued that district court erred in refusing to include the terms located below the signatures as part of the contract. *Id.* In rejecting the appeal, this court stated, “[w]hen terms appear below the signature, or on the back of the instrument, * * * a signature authenticates only the matter intended by the parties to be included as part of the instrument.” *Id.* (quoting *Brown*, 12 N.W.2d 712, 716). That intent, this court held, must be evidenced by

either express reference “above the signature” or by internal evidence in the contract showing such intent. *Id.* Because there was no such evidence in *Huebsch*, this court rejected that appeal. In doing so this court cited *Sitterly* and wrote in a parenthetical to the citation: “finding no contract where there was no reference above the signature to matter printed below the signature on the reverse side of the agreement.” *Id.*

Thus, to include information that is below a party’s signature, there must be a manifestation of intent to do so by an express reference above the signature stating that the contract incorporates additional terms located below or even to the left of the signature. Here, of course, there is absolutely no such reference in the body of the Mortgage stating that the language located below Respondent’s signature is part of the contract.³ That language is therefore not part of the agreement and the district court erred by relying upon such extraneous language to hold that the Mortgage that had been signed by Respondent was void.

2. The district court’s decision results in a meaningless provision.

Even assuming the language contained below Respondent’s signature had been referenced in the body of the Mortgage and above her signature, the district court’s decision lacks logic as it fails to explain what the purpose of the added language was if it was not simply there to repeat that Respondent could not invoke the Property’s status as her homestead to prohibit any foreclosure. Ironically, however, the district court’s decision actually brings out the opposite result: Appellant’s attempt to foreclose was rejected. Hence,

³ For instance, a contract would include a statement stating that certain attachments to the agreement are “hereby incorporated” or that the terms and conditions found on the reverse side of an agreement—and below a signature—are “hereby incorporated.”

the district court's holding does not withstand close scrutiny as there is no credible alternate explanation for the court's decision.

More specifically, an owner of a homestead may waive her homestead rights by an act which evidences her unequivocal intention to do so. *Argonaut Ins. Co. v. Cooper*, 261 N.W.2d 743, 744 (Minn. 1978). To the extent an individual waives her homestead rights, the protections afforded under Minn. Stat. § 507.02 would not apply. Here, either Appellant: (1) signed the Mortgage as required under section 507.02, or (2) she waived her rights by virtue of the language which states that she was signing "for the purpose of waiving any and all homestead rights", thus making section 507.02 irrelevant. Either way, however, the district court erred by applying section 507.02 to void the mortgage due to Respondent's homestead rights. *See Dolly v. Nicholas*, 386 N.W.2d 261, 263 (Minn. Ct. App. 1986) ("A party may waive [her] homestead rights").

Any interpretation of a contract should not create more ambiguity, it should resolve ambiguity. In fact, there is only one reasonable interpretation of the Mortgage. The court's finding that the document means something contrary to the plain language is not supported by the literal terms of the document or by common sense. Because the district court's reading does not provide a reasonable interpretation of the language at the end of the mortgage, it must be rejected.

General canons of construction of contracts require that courts avoid an interpretation that renders a provision meaningless. *Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 526 (Minn. 1990). In addition, courts must try to reconcile, harmonize and give effect to all

provisions if they can reasonably do so. *Telex Corporation v. Data Products Corporation*, 135 N.W.2d 681, 684-85 (Minn. 1965). In other words, the resulting interpretation must have some reasonable meaning.

Here, the Mortgage signed by Respondent and the evidence offered at trial undisputedly demonstrate that Respondent intended to convey a mortgage interest to Appellant, or at a minimum to waive her homestead rights under section 507.02: (1) Respondent signed the loan application forms as a co-borrower; (2) the Mortgage itself defined Respondent as a borrower; (3) Respondent initialed every page of the Mortgage document; (4) Respondent signed the last page of the Mortgage; (5) Respondent was given a right to rescind the mortgage conveyance for three days following the closing, but testified that she elected not to cancel this mortgage; (6) Respondent entered into the closing thinking that she was going to mortgage her interest in the Property; (7) Respondent testified that she had previously granted mortgages on her property; and (8) Respondent testified that she had been foreclosed upon in the past. Hence, the clear and overwhelming evidence shows that Respondent intended and did grant a mortgage to Appellant's predecessor in interest, First Franklin. If she did not grant a mortgage, then why would she have signed a document granting her the right to rescind the mortgage?

The district court's decision ignores these facts and does not attempt to explain what purpose Respondent's signature served if it didn't grant a mortgage under these facts. It must be reversed. The language at the end of the Mortgage where Respondent signed and waived her homestead rights can only be read to reiterate her release of her homestead rights to allow

Appellant (or its predecessor in interest) to foreclose in confirmation of Minn. Stat. § 507.02.

Appellant presented to the district court a reasonable harmonization and interpretation of the terms of the Mortgage—that the signature block simply reinforces that Respondent (who was not a signatory on the promissory note) would not use the homestead designation on the Property to prevent the foreclosure of the Property should the note come into default.

Ironically, Respondent is actually trying to use the homestead designation of the Property to prevent the foreclosure of the Property. The only common sense reading of this provision under these facts is that the parties intended for the mortgage to be signed by both spouses—as required under section 507.02—in order for the spouse’s homestead rights to be waived. Waiver of the constitutional homestead protection is required for foreclosure of the homestead. That was accomplished by Respondent’s signature.

C. Dvorak and Overman do Not Apply Under these Facts

In determining that Respondent did not “sign” the Mortgage as required under section 507.02, the District Court cites *Dvorak v. Maring*, 285 N.W.2d 675 (Minn. 1979). The case is distinguishable. In *Dvorak*, Harold Dvorak entered into a sales contract to purchase the Maring homestead. *Id.* at 676. The only signature on the sales contract was between Mr. Dvorak and Mr. Maring. *Id.* Mrs. Maring did not sign the sales agreement because she was reluctant to sign it. *Id.* She only endorsed the earnest money check. *Id.* The court found, rightfully, that when there was no signature of Mrs. Maring anywhere in the sales contract the contract was void pursuant to Minn. Stat. §507.02. *Id.* at 677.

Obviously here, the facts are completely different. First, Respondent did actually sign

the Mortgage here. That is undisputed. Second, Respondent wanted—and clearly benefited from—the refinancing transaction to go through in this case. Mrs. Maring, on the other hand, was reluctant for the sale to occur in the *Dvorak* case. Here, many of Respondent’s debts were paid off, including her tax liens, credit card debts and her previous mortgage. Here, the issue is Respondent’s intent when she signed the mortgage, not whether she signed it at all. The *Dvorak* case is inapplicable to the current case.

It is anticipated that Respondent will cite the unpublished opinion of *Overman v. Minnwest Bank South*, 2008 WL 2574461 (Minn. Ct. App. 2008), in support. The problem in the *Overman* case stems from a conflict in the language of the mortgage. The *Overman* mortgage states that Mrs. Overman was mortgaging her interest in the property and that it secured all present and future indebtedness, specifically including a \$185,000.00 note maturing on March 30, 2020. *Id.* at *1. Mr. Overman, however, signed a note that matured on January 5, 2002, which is eighteen years before the note referenced in the mortgage signed by Mrs. Overman. *Id.* In deciding the case, the *Overman* court held that the 18-year discrepancy between the two documents’ terms was, on its face, sufficiently material that Mrs. Overman’s signature could not reasonably be construed as granting a mortgage to secure the actual note. *Id.* at *2.

Overman is distinguishable from the facts in this case. Here, Respondent was fully aware of the note signed by her husband, the amount of the note, and the date that the note matured. There is no claim by Respondent that she was somehow fooled as to the terms of the note signed by her husband, the length of the note signed by her husband, and for what

the proceeds of the note were being used. Indeed, many of the funds were being used to pay off the debts of Respondent herself. The *Overman* case is inapplicable here.

Thus, Respondent's claim that as a matter of law, her signature cannot act as a conveyance of her homestead is not advanced by either of these cases. The district court's holding that Respondent's signature waiving her homestead rights somehow does not act to convey her homestead does not make any sense. It is not advanced by any caselaw. The only sensible interpretation of the Respondent's signature on the Mortgage is that Respondent was confirming Appellant's right to foreclose on the Property without Respondent invoking her homestead rights as a bar to foreclosure. The district court's decision to the contrary must be reversed.⁴

II. The Mortgage Should Be Reformed Because There Is Evidence of Mutual Mistake.

The granting of equitable relief is within the trial court's sound discretion, which may be reversed upon an abuse of that discretion. *Nadeau v. County of Ramsey*, 277 N.W.2d 520, 524 (Minn. 1979). As an alternative to foreclosure of the Mortgage, Appellant sought

⁴If the Court finds that Respondent did not convey any of her own interest in the property to Appellant, then reversal is still warranted for it does not result in the entire Mortgage being void; simply that the only interest conveyed to Appellant, with Respondent's acquiescence, was Mr. Engler's undivided ½ interest in the Property. This is because the section 507.02 signature requirement is at a minimum met regarding Mr. Engler's undivided ½ interest in the Property and meets the signature requirements of conveying his interest to Appellant or its predecessor in interest. The district court's decision that the whole mortgage is void is unjustified, as Respondent signed the mortgage relative to Mr. Engler's undivided ½ interest and at a minimum Appellant maintains this ½ interest in the property. At a minimum Appellant received a valid undivided ½ interest in the property from Mr. Engler and that interest survives any determination of the Court that Respondent did not consent to the foreclosure of her property upon default of the note.

reformation of the Mortgage to include Respondent's interest in the Mortgage. The district court rejected this argument on the basis that there was no evidence of mutual mistake. The District court's decision must be reversed.

Minnesota Courts have long held that courts should use their equitable powers to reform a document in order to evidence the parties' intent:

Upon the principle that equity looks upon things as done which ought to be done, it is clear that [the court] would supply the defective execution of this instrument, and reform and enforce it as a valid mortgage as against defendants Hallenbeck, who undertook to execute it, and Morse, who agreed to assume it, and who took the land charged with it, and would in like manner bind the conscience of all subsequent lienholders who are chargeable with notice of plaintiff's equities in the premises.

Lebanon Sav. Bank v. Hallenbeck, 13 N.W. 145, 146 (Minn. 1882). Likewise, in *Rogers v.*

Castle, 53 N.W. 651 (Minn. 1892), the court held:

The delivery of the deed, and the fact that it took effect as a conveyance, do not stand in the way of a reformation. Nor was it necessary that the grantee should reconvey the land, or return the deed, or repudiate it as a conveyance and in to, to enable him to assert this equitable defense to the enforcement of this alleged obligation.

Id. at 653. Appellant is therefore entitled to reformation of the Mortgage to enforce the parties' intent:

It is, of course, not necessary, as a prerequisite to the reformation of an instrument to conform to the intention of the parties, that the instrument be ambiguous. *Rosen v. Westinghouse Elec. Supply Co.*, 240 F.2d 488 (8th Cir. 1957). It is, however, necessary for the party seeking reformation to establish by clear and convincing evidence that a mistake has been made in reducing the agreement to writing and to show, with like clarity, the precise form and import the instrument should be made to assume in order to express and effectuate the real intention of the parties. The standard of proof in the trial court and the limitation of appellate review was stated in *Golden Valley*

Shopping Center, Inc. v. Super Valu Realty, Inc., 256 Minn. 324, 329, 98 N.W.2d 55, 58 (1959):

* * * Evidence relied upon to reform a written instrument because of mutual mistake must be clear, unequivocal, and convincing. *Gartner v. Gartner*, 246 Minn. 319, 74 N.W.2d 809 (1956). This does not mean that a party is required to establish such mistake beyond reasonable doubt. *Gartner v. Gartner*, *Supra*. The degree of certainty essential to support a finding of reformation ordinarily rests in the judgment of the trier of fact, and the latter's determination therein will not be disturbed on appeal unless it is manifestly contrary to the evidence.

Metro Office Parks Co. v. Control Data Corp., 205 N.W.2d 121, 124 (Minn. 1973).

An older decision allows reformation simply to enforce the parties' true agreement if they used language which mistakenly created a different meaning:

In short, if a written instrument fails to express the intention which the parties had in making the contract which it purports to contain, equity will grant its relief, affirmative or defensive, although the failure may have resulted from a mistake as to the legal meaning and operation of the terms or language employed in the writing.

Wall v. Meilke, 94 N.W. 688, 691 (Minn. 1903); *see also Lindell v. Peters*, 152 N. W. 648 (holding that a conveyance of the homestead executed by both husband and wife as required by statute may be reformed by correcting a mistake in the description of the property intended to be conveyed thereby); *Ziegenhagen v. Hartwing*, 185 N.W. 382 (Minn. 1921) (allowing for reformation of a conveyance of the homestead, so long as conveyance signed by both spouses).

Some more recent decisions focus on the presence of a mistake, mutual or unilateral. A court may reform a written instrument—in this case the mortgage—if three elements are present:

(1) [T]here was a valid agreement between the parties expressing their real intentions; (2) the written instrument failed to express the real intentions of the parties; and (3) this failure was due to a mutual mistake of the parties, or a unilateral mistake accompanied by fraud or inequitable conduct by the other party.

Nichols v. Shelard Nat'l Bank, 294 N.W.2d 730, 734 (Minn. 1980) (citations omitted). “The evidence supporting reformation of a written instrument, including a deed, must be consistent, clear, unequivocal, and convincing.” *Kleis v. Johnson*, 354 N.W.2d 609, 611 (Minn. Ct. App. 1984) (citation omitted).⁵

Here, the district court’s finding that there is no evidence of a mutual mistake is manifestly contrary to the evidence. It must be reversed. First, Respondent testified that she walked into the closing with the intent of signing the promissory note and granting a mortgage on her property - - that was the parties’ real intentions. Second, the district court’s decision that the written instrument does not grant a mortgage interest is contrary to Respondent’s and her husband’s intent. Third, it is clear that this mistake was mutual. Appellant’s predecessor in interest, Respondent, and Respondent’s husband all believed that Respondent and her husband were granting a mortgage when the Closing occurred. In fact, both loan applications so provided. Because the evidence supports a finding of mutual mistake, and the district court’s finding that there was no such evidence is manifestly contrary to that evidence, the district court abused its discretion by failing to grant reformation.

⁵“Reformation is generally allowed against the *original* parties to an instrument and those in privity with the original parties.” *Manderfeld v. Krovitz*, 539 N.W.2d 802, 805 (Minn. Ct. App. 1995), *review denied* (Minn. Jan. 25, 1996).

III. There is Evidence that Respondent was Unjustly Enriched to Support Imposition of a Constructive Trust.

The District court also rejected Appellant's request for a constructive trust over the Property. A constructive trust is "a creation of equity designed to provide a remedy for the prevention of unjust enrichment where a person holding property is under a duty to convey it to another to whom it justly belongs." *Knox v. Knox*, N.W.2d 225, 228 (Minn. 1976). A court may impose a constructive trust when there is clear and convincing evidence that such imposition is justified to prevent unjust enrichment. *Mjolsness v. Mjolsness*, 363 N.W.2d 839, 841 (Minn. Ct. App. 1985) (citing *In Re Estate of Eriksen*, 337 N.W.2d 671, 674 (Minn. 1983)). This unjust enrichment may arise if property is acquired by fraud, duress, undue influence, or mistake, or if there exists a confidential or fiduciary relationship that was breached. *Henderson v. Murray*, 121 N.W. 214, 216 (Minn. 1909).

Here, the only rationale provided by the district court in rejecting Appellant's request for a constructive trust is that, "there is no evidence that [Respondent]...was unjustly enriched." The district court's finding that there is no evidence is manifestly contrary to the evidence at trial, and constitutes an abuse of discretion.

In this case the test for imposition of a constructive trust was and is met. First, Appellant's predecessor in interest, First Franklin, paid off a significant number of liens on Respondent's Property with the intent of obtaining a mortgage from Respondent and her husband. This is unjust enrichment. Second, under the district court's decision, there is plainly a mistake present in that the instrument (as interpreted by the district court) provides something different from both parties' intention. This mistake mandates imposition of a

constructive trust as Respondent would otherwise receive a plain windfall; ownership of the home and Property free of the lien of the bank which loaned the money to pay off and satisfy a first mortgage, tax liens and other encumbrances.

IV. The Doctrine of Equitable Subrogation Applies Under these Facts.

Minnesota has long recognized the doctrine of equitable subrogation. *See, e.g., Emmert v. Thompson*, 52 N.W.31 (1892). Under the doctrine, “when a person having an interest in real estate has paid money to satisfy a mortgage or lien to protect his interests, he is entitled, when justice requires, to be substituted in place of a prior encumbrancer and treated as an equitable assignee of the lien.” *First Nat’l Bank of Menahga v. Schunk*, 276 N.W. 290, 292-93 (Minn. 1937); *Wells Fargo Home Mortg., Inc. v. Chojnacki*, 668 N.W.2d 1, 5 (Minn. Ct. App. 2003). Stated differently, “[i]f a junior mortgagee. . . pay[s] a prior incumbrance [sic] in order to protect his own interest in the incumbered [sic] estate, he will, as a general rule, be subrogated to all the rights of the senior incumbrancer. [sic]” *Schunk*, 276 N.W. at 293.

The doctrine is applied in the interest of substantial justice when “one party has provided funds used to discharge another’s obligations if (a) the party seeking subrogation has acted under a justifiable or excusable mistake of fact and (b) injury to innocent parties will otherwise result.” *Carl H. Peterson Co. v. Zero Estates*, 261 N.W.2d 346, 348 (Minn. 1977). Ultimately the doctrine of equitable subrogation is a creature of the court’s unique powers of equity. The court should follow the equitable maxim that no one shall be allowed to unjustly enrich himself at the expense of another. *Sheasgreen Holding Co. v. Dworsky*,

231 N.W. 395 (Minn. 1930).

Here, the district court held that the doctrine of equitable subrogation did not apply because Appellant “failed to present evidence of a justifiable mistake in fact.” It is undisputed that proceeds from this loan were used to pay off, among other things, Respondent’s and her husband’s first mortgage on the Property as well as several tax liens on the Property. At least one of the tax liens was solely in the name of Respondent herself - - demonstrating the direct financial benefit she herself directly and independently received from these funds.

While subrogation is not available in all instances, it is available where a superior debt has been paid and where there is no harm to Respondent, as she would be getting exactly what she bargained for:

Although legal subrogation is a highly favored doctrine, it is not an absolute right, but rather, one that depends on the equities and attending facts and circumstances of each case. *See, e.g., Compania Anonima Venezolana de Navegacion v. A.J. Perez Export Co.*, 303 F.2d 692, 697 (5th Cir.1962). In general, the equity of the party seeking subrogation must be clear and substantial, and superior to that of other claimants. Finally, subrogation cannot be invoked where it would work an injustice, violate sound public policy, or result in harm to innocent third persons.

Universal Title Ins. Co. v. United States, 942 F.2d 1311, 1315 (8th Cir. 1991).

Respondent admitted and agreed that the Mortgage loan gave her a “huge benefit” by lowering her monthly mortgage payments by \$3,000, and she was fully aware that Appellant’s predecessor in interest, First Franklin, was paying off a significant amount of her debts in connection with the transaction. She also received a lower interest rate. Respondent agreed that the Mortgage paid her prior debt of \$254,973. She also paid off significant tax

liens to the Minnesota Department of Revenue, paid off liens regarding unemployment taxes, and paid off credit card debts. All of these payments total \$254,973.00. The payments directly benefitted Respondent.

Respondent was also familiar with borrowing against her home. She specifically knew that she could lose the home through a foreclosure and might have to move out if the mortgage debt was not paid. Respondent had actually been foreclosed on in 1994, so she knew she could be foreclosed on when she borrowed against a home. This is not a case of an unsophisticated borrower not knowing the impact of the transaction. The result of the district court's decision is that Respondent received all of these payments for nothing. That she does not have to make any payment on the debts that were paid off on her behalf and gets her house free and clear, without paying homeowners insurance of three years, without paying property taxes for three years, is inequitable. It must be reversed.

In sum, Appellant contends that the Mortgage is proper and enforceable. Nevertheless, should the court find it is defective then Appellant should be entitled to recover under equitable subrogation. The doctrine should apply here as the actions of Appellant or its predecessor in interest paying off the first mortgage and Respondent's personal tax liens were justifiable and made in reliance upon receiving a valid first mortgage on the Property. Respondent would receive an undeserved windfall in the alternative.

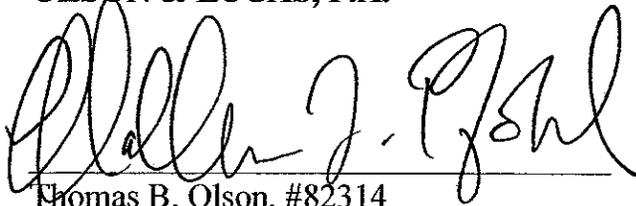
CONCLUSION

Based upon the foregoing arguments and authorities, Appellant respectfully requests that this Court reverse the decision of the district court, and remand for further proceedings.

Respectfully submitted this 24 th day of June, 2009.

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