

*State of Minnesota
In Court of Appeals*

(Case No. A111456)

Thomas A. Graikowski

Appellant,

vs.

HSBC Mortgage Services, Inc.

Respondent,

and

KariAnn Kimberly Coleman, and
Atlantic Credit & Finance, Inc.,

Defendants.

Appellant's Brief and Addendum

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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. Minnesota Statute § 507.02 voids a conveyance of homestead property that is not signed by both spouses. Appellant's mortgage was unsigned by his spouse. The district court refused to apply Minnesota Statute § 507.02 to the undisputed facts.

Does Minnesota Statute § 507.02 void Appellant's mortgage?

The district court held in the negative.

Apposite Authority: *Dvorak v. Maring*, 285 N.W.2d 675 (Minn. 1979).

- II. The Minnesota Supreme Court has held that if statutory language is clear and free from ambiguity the court's role is to enforce the language of the statute. The district court refused to apply the plain language of Minnesota Statute § 507.02 and instead, relying on Minnesota Statute § 645.17(1), found the application of the statute would yield an absurd result not intended by the legislature.

Did the Court err in looking to legislative intent when Minn. Stat. § 507.02 is clear and unambiguous?

The district court did not decide the issue.

Apposite authority: *State v. Bluhm*, 676 N.W.2d 649 (Minn. 2004);
Premier Bank v. Becker Development, LLC, 785
N.W.2d 753,759 (Minn. 2010).

STATEMENT OF THE CASE

Thomas A. Graikowski executed a mortgage against his homestead without the prior knowledge, consent or signature of his then wife, KariAnn Kimberly Coleman (f/k/a KariAnn Kimberly Graikowski), as required by statute. On July 14, 2010, HSBC Mortgage Services, Inc. brought suit seeking a judgment of foreclosure on the mortgage against Mr. Graikowski. Mr. Graikowski sought to have the mortgage adjudged void by application of Minn. Stat. §507.02.

On April 27, 2011 the Honorable James T. Reuter granted summary judgment in favor of HSBC Mortgage Services, Inc. declaring the mortgage valid and entering a judgment of foreclosure against Mr. Graikowski's.

This appeal followed.

STATEMENT OF FACTS

Appellant Thomas A. Graikowski ("Graikowski") is the fee owner of Pine County real estate (the "Property") which has a common address of [REDACTED], and is legally described as follows:

The South Half of the Northwest Quarter (S ½ of the NW ¼) of Section Twenty (20), Township Thirty-nine (39), Range Twenty-two (22), lying east of the right-of-way of the railroad, Pine County, Minnesota.

(AA1, AA2- Finding of Facts 1). The Property was Graikowski's homestead residence. (AA2- Finding of Facts 3). On June 24, 2006, Graikowski was married to KariAnn Kimberly Coleman ("Coleman"). (AA2- Findings of Fact 6).

On or about June 26, 2006 Graikowski executed a promissory note ("Note") for \$170,100 for a loan and, to secure the loan, he granted a mortgage on the Property to Mortgage Electronic Registration Systems, Inc. as nominee for Accredited Home Lenders, Inc. (AA2- Findings of Fact 9). However, Graikowski's wife, Coleman, did not similarly sign or execute the mortgage as required by Minn. Stat. § 507.02. (AA3, AA10- Findings of Fact 12, Conclusions of Law 7). The mortgage was filed on July 12, 2006 at the Pine County Recorder's office as document # A 45669. *Id.* The mortgage was subsequently assigned to HSBC Mortgage Services, Inc. ("HSBC"). (AA3- Findings of Fact 10). Record of the assignment was filed on October 30, 2007 by the Pine County Recorder's Office as document # A 468519. *Id.*

Coleman did not sign the financing application, the promissory note or the mortgage. (AA3- Findings of Fact 12) Coleman testified that she was not

present at the June 26, 2006 loan closing and in fact was unaware of Graikowski's activities concerning the loan. (AA3-Findings of Fact 12-13). In Graikowski's March 2011 deposition, he stated that he did not notice that the mortgage document stated that he was an unmarried person and that if he had noticed he would have had it changed. (AA4, AA5- Findings of Fact 21). The loan officer, Nicholas Styles, who processed Graikowski's loan application provided deposition testimony stating Graikowski told him he was single when applying for the loan approximately 6 months prior to the loan closing. (AA3-Findings of Fact 14). This statement was true at the time it was made as Graikowski's marriage was not until June 24, 2006. (AA2- Findings of Fact 6). No evidence was introduced suggesting that Mr. Graikowski was ever asked directly at closing whether or not he was married. (*See generally* AA1-AA11). Graikowski and Coleman were divorced by a decree signed by the Honorable Krista K. Martin and entered as a judgment of the court on May 7, 2008. (AA2-Findings of Fact 4).

In 2007, Graikowski fell behind on his mortgage payments. (AA5- Findings of Fact 22). On July, 14, 2010, HSBC commenced the instant litigation naming Graikowski and Coleman as defendants as well as Atlantic Credit and Finance, Inc. as the holder of judgment against Graikowski that had been entered and docketed on January 9, 2009. (*See generally* Complaint)

Appellant Graikowski filed a motion for partial summary judgment seeking solely to have the 2006 mortgage voided by application of Minn. Stat. § 507.02.

(AA5- Findings of Fact 25). Respondent HSBC also sought summary judgment on all counts and seeking to estop Graikowski from denying the validity of the mortgage. (AA1)

The district court, relying on Minn. Stat. § 645.17(1), found that the application of Minn. Stat. § 507.02, which requires the signature of both spouses to create a valid conveyance, would create an absurd result when applied to the facts in this case. (AA7- Conclusions of Law 10). The district court found further that Graikowski was not a spouse to be protected from alienation of the homestead and the application of Minn. Stat. § 507.02 would not provide a secure homestead for the non-signing spouse, therefore Graikowski lacked standing to seek enforcement of Minn. Stat. § 507.02. (AA7- Conclusions of Law 8, 11) Based on the foregoing, the district court concluded that mortgage was valid as a matter of law. (AA7, AA8- Conclusions of Law 12).

The district court also found that it was not clear that HSBC had demonstrated Graikowski knew that the documents he signed at the June 26, 2006 real estate closing indicated that on that day he was a single and unmarried person. (AA8- Conclusions of Law 14). Consequently, the district court did not validate the mortgage on the basis of equitable estoppel. (AA8- Conclusions of Law 13, 14).

The district court denied Graikowski's motion and granted HSBC's motion thereby adjudging the mortgage against the Property to be valid. (AA9- Order 1-

3). The district court ordered judgment of foreclosure against Graikowski for the foreclosure of the mortgage against the property. (AA9- Order 4).

ARGUMENT

The district court failed to apply an unambiguous statute to undisputed facts. The district court's tenuous justification that correctly applying the statute would lead to an absurd result runs counter to a requirement deeply engrained in Minnesota real estate law, going back at least 136 years. The district court erred and should be reversed and this Court should find the mortgage void under Minn. Stat. § 507.02.

I. STANDARD OF REVIEW

Interpretation of the law, including the construction of statutes, is reviewed de novo. *Eischen Cabinet Co. v. Hildebrandt*, 683 N.W.2d 813, 815 (Minn. 2004).

II. THE MORTGAGE IS VOID UNDER MINN. STAT. § 507.02 AND THE DISTRICT COURT'S REFUSAL TO APPLY § 507.02 TO THE UNDISPUTED FACTS WAS IN ERROR.

Under Minn. Stat. § 507.02, “[i]f the owner is married, no conveyance of the homestead, except a mortgage for purchase money under section 507.03 ... shall be valid without the signatures of both spouses.” Conveyance includes “every instrument in writing whereby any interest in real estate is created, aliened, mortgaged, or assigned or by which the title thereto may be affected in law or in equity...” Minn. Stat. § 507.01. A person's “homestead” is “the house

owned and occupied by a debtor as the debtor's dwelling place.” Minn. Stat. § 510.01.

The Minnesota Supreme Court has held these statutes to mean that without the signature of both spouses, a conveyance of homestead property is **not merely voidable but is void**, and the buyer acquires no rights whatsoever in the property. *Dvorak v. Maring*, 285 N.W.2d 675, 677 (Minn. 1979) (emphasis added). The purpose of Minn. Stat. § 507.02 is to ensure “a secure homestead for families” by “protecting the alienation of the homestead without the willing signature of both spouses.” *Wells Fargo Home Mortgage, Inc. v. Newton*, 646 N.W.2d 888, 895 (Minn. App. 2002) (quotations omitted), *review denied* (Minn. Sept. 25, 2002). This purpose is carried out by making all conveyances of the homestead that lack the signature of both spouses void ab initio as a matter of law. *Dvorak* 285 N.W.2d at 677.

A. § 507.02 APPLIES TO THE UNDISPUTED FACTS IN THIS CASE AND GRAIKOWSKI HAS STANDING TO ENFORCE ITS APPLICATION.

The material facts in this case are clear. It is undisputed that Graikowski and Coleman were married at the time Graikowski mortgaged his home, it is undisputed that the home was Graikowski's and Coleman's homestead at the time it was mortgaged, and it is undisputed that Coleman never signed the mortgage. (AA2, AA3- Findings of Fact 3, 6, 9, 11, 12). Thus, by the application

of Minn. Stat. § 507.02, the mortgage in favor of HSBC Mortgage Services, Inc. is void.¹

Minnesota case law establishes that the identity of the party challenging a conveyance under Minn. Stat. § 507.02 does not affect its application. The Minnesota Supreme Court has held that parties other than the actual married homeowners may assert § 507.02. See *Marr v. Bradley*, 239 Minn. 503, 59 N.W.2d 331 (1953). In *Marr v. Bradley*, a prospective buyer challenged a competing purchase agreement as void from its inception under § 507.02 because the purchase agreement was signed only by the husband. *Id.* at 506–07, 59 N.W.2d at 333. The supreme court rejected the argument that the prospective buyer lacked standing. *Id.* at 507–09, 59 N.W.2d at 333–34. The court reasoned, after reviewing precedent construing precursors § 507.02, that:

It must follow that under our decisions the contract to convey a homestead executed by one spouse but not joined in by the other is **wholly void and that the buyer acquires no rights under it whatsoever**. Until it is adopted or confirmed by the spouse not signing, it has **no validity for any purpose**.

Id. at 509, 59 N.W.2d at 334 (emphasis added).

Thus, the party seeking the mortgage be adjudged void was not a married homeowner.

Furthermore, this Court has held that the plain text of Minn. Stat. § 507.02 does not suggest that it can only be asserted by the non-signing spouse. *Gores*

¹ Graikowski does not challenge the debt, and asserts only that the mortgage is void under Minn. Stat. § 507.02.

v. Schultz, 777 N.W.2d 522, 525 (Minn. App. 2009) (holding banks with mortgages against the homestead did not lack standing to challenge validity of lender's competing mortgage due to lack of signature by mortgagor's spouse on mortgage and loan documents).

In *Gores v. Schultz*, a husband signed his wife's name, with her consent, on mortgage documents which were then properly filed and recorded. In a subsequent transaction, the property was purchased by a new owner with financing from banks. The original mortgage, signed only by the husband, was not satisfied at closing and remained on the property. Eventually, all loans against the property were in default. The holders of the original mortgage brought suit. The banks sought to challenge the original mortgage as void under Minn. Stat. § 507.02. The district court dismissed the banks contention finding that banks cannot raise § 507.02 issue because it was a defense personal to the non-signing spouse. This Court reversed the district court, finding that the banks had standing to assert the mortgage was void under the statute. The court reasoned, that nothing in the language of the statute precludes a challenge by a party other than the non-signing spouse. *Id* at 525. The court reasoned further, that as a general rule, those with an interest in real estate have the ability to challenge the validity of competing interests. *Id* at 525 (citing *Banco Mortgage Co. v. E.G. Miller Enters., Inc.*, 264 N.W.2d 399, 400 (Minn.1978) (allowing a mortgagee and holders of mechanic's liens to challenge each other's interest in real property).

Finally, a subsequent divorce is immaterial and does not affect the application of Minn. Stat. § 507.02. The Minnesota Supreme Court has held that a subsequent divorce obtained by a non-signing spouse from the mortgagor is immaterial because a decree of divorce does not relate back, but takes effect only from the date of judgment. *Alt v. Banholzer*, 39 Minn. 511, 512, 40 N.W. 830 (Minn. 1888) (holding that a conveyance of a homestead without the signature of both spouses is absolutely void under Minnesota law).

In *Alt v. Banholzer*, a married man executed a mortgage upon the homestead without his wife's signature. *Id* at 511. The wife obtained a divorce and became the purchaser of the premises. *Id*. The wife brought suit against the mortgagee to have the mortgage adjudged void. *Id*. The supreme court found that the subsequent divorce does not have bearing on the legal signature requirement for the conveyance of a homestead, as a spouse has a legal right at the time of the conveyance and a divorce decree does not relate back. *Id* at 512.

In this case, the district court's refusal to apply § 507.02 ignored well established Minnesota real estate law. In refusing to apply the statute the district court stated:

Application here of Minn. Stat. § 507.02 to void the mortgage will not provide a secure homestead for the spouse who failed to sign the document. Defendant Graikowski is not seeking to protect any spouse or dependents.

(AA7- Conclusions of Law 8).

The district court stated further:

the non-signing former spouse waived any claim she had in the homestead when her marital relationship with her defaulting spouse was dissolved. Finally, she has failed to assert any claim to the real estate in the instant litigation.

(AA7- Conclusions of Law 9).

Both of these statements are premised on an incorrect assertion of law and are grossly in error when used to justify the court's refusal to correctly apply the statute.

First, as clearly demonstrated in *Marr* and *Gores*, the statute is not a defense personal to the non-signing spouse and may even be asserted by third-parties (prospective buyers and banks holding junior liens respectively). Second, the district court seems to imply a requirement that the invocation of § 507.02 be for the protection of a spouse. Once again, this proposition runs contrary to established case law allowing challenges by third-parties. Like the banks in *Gores* or the prospective buyers in *Marr*, Graikowski, as the holder of an interest in the real estate, has standing to assert the mortgage be adjudged void.

Additionally, viewing § 507.02 through the district court's perspective creates a skewed view of its operation. A conveyance made without the signature of both spouses is not valid until challenged, but rather is void from its inception as an operation of law. Minn. Stat. § 507.02; *Dvorak* 285 N.W.2d at 677. Therefore, the mortgage against Graikowski's property was void from the moment it was executed without the signature of Coleman. Thus, the identity of the party

challenging the Graikowski's mortgage of the homestead does not affect the application of Minn. Stat. § 507.02.

Moreover, the plain language of § 507.02 does not place any limitation on who has standing to assert its application because the design of the language voids the conveyance ab initio. The language of the statute is clear and the supreme court's holding in *Dvorak* controls this case. A conveyance of homestead property without the signature of both spouses is not merely voidable, it is void. *Dvorak v. Maring*, 285 N.W.2d 675, 677 (Minn. 1979). Therefore, only one conclusion can be drawn from the undisputed facts of this case: Graikowski's mortgage is void as a matter of law.²

B. THE DISTRICT COURT'S INTREPRETATION OF MINN. STAT. § 507.02 IS NOT SUPPORTED BY CASE LAW, CANONS OF CONSTRUCTION, OR STATUTE AND AMOUNTS TO AN IMPROPER BASIS FOR THE DECISION IN THIS CASE.

In Minn.Stat. ch. 645 (2008), the legislature has provided the judiciary with canons of construction that govern the interpretation of the statutes. See Minn.Stat. § 645.08. The goal of all statutory construction is to effectuate the intent of the legislature. Minn.Stat. § 645.16. However, Minn. Stat. § 645.16 provides that, “[w]hen the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be

² Whether Graikowski is estopped is addressed subsequently in this brief. However, the district court did not find estoppel in this case. Instead, the district court refused, incorrectly, to apply Minn. Stat. § 507.02 to the undisputed facts.

disregarded under the pretext of pursuing the spirit.” See *State v. Bluhm*, 676 N.W.2d 649 (Minn. 2004) (holding that when the legislature's intent is clear from plain and unambiguous statutory language, the court does not engage in any further construction and instead looks to the plain meaning of the statutory language). In construing the language of a statute, we give words and phrases their plain and ordinary meaning. Minn. Stat. § 645.08; *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn.1999).

The Minnesota Supreme Court has held that if the language of a statute is clear and free from ambiguity, the court's role is to enforce the language of the statute, and not explore the spirit or purpose of the law. *Premier Bank v. Becker Development, LLC*, 785 N.W.2d 753,759 (Minn. 2010). In construing statutes, the court cannot supply that which the legislature purposely omits or inadvertently overlooks. *Hutchinson Tech, Inc. v Comm'r of Revenue*, 698 N.W.2d 1,8 (Minn. 2005). Moreover, the legislature is at liberty to ignore logic and perpetrate injustice so long as it does not transgress constitutional limits. *State ex rel. Timo v. Juvenile Court of Wadena County*, 188 Minn. 125, 128-29, 246 N.W.2d 544, 546 (Minn. 1933).

i. The district court ignored the clear and unambiguous statutory language in refusing to apply Minn. Stat. § 507.02 to the undisputed facts.

In this case, the district court disregarded its role to enforce the language of Minn. Stat. § 507.02, which is clear and free from ambiguity. Instead, the district court concluded that:

Allowing a person to void an otherwise valid mortgage by noting the failure of that person to clearly assert his own marriage is not appropriate. This assertion becomes absurd when further acknowledging that the person seeking to void the mortgage is no longer married, the former spouse has no lawful claim to the realty secured by the mortgage, and there are no dependents who might be protected by voiding the mortgage.

(AA7- Conclusions of Law 10).

The district court based its creative reasoning on Minn. Stat. § 645.17(1), which provides that the courts in their interpretation of legislative intent may be guided by a presumption that the statute is not to be interpreted in a manner that returns an absurd result. In so doing, the district court effectively re-wrote the language of the statute to include restrictions and language which were not included by the legislature. The letter of the statute, as written by the legislature, places no restriction on who may challenge a mortgage under the statute because a mortgage that lacks the signature of both spouses is not merely voidable but void. Minn. Stat. § 507.02; *Dvorak* 285 N.W.2d 677.

Further, the district court is not at liberty to re-write Minnesota Statutes or refuse to enforce unambiguous statutory language. *Premier Bank* 785 N.W.2d at 759. Even if the district court feels that the statute at issue is illogical or will perpetrate injustice, the recourse lies in the chambers of the Capital, not the district courthouse. See *State ex rel. Timo v. Juvenile Court of Wadena County*, 188 Minn. 125, 128-29, 246 N.W.2d 544, 546 (Minn. 1933). The fact remains, under Minnesota law, a mortgage without the signature of both spouses is void

from its inception, meaning that no action is required on behalf of any party to void the mortgage as it is a nullity. Minn. Stat. § 507.02; *Dvorak* 285 N.W.2d 677.

In refusing to apply the statute or utilize the correct equitable remedy³, the district court choose to ignore over a century of Minnesota real estate law. Time and again the Minnesota Supreme Court upheld the “plain meaning” of the statute and voided conveyances that lacked the signature of both spouses, even at the expense of innocent parties.

In *Barton v. Drake*, 21 Minn. 299, 304 (1875), the Supreme Court held that “[t]he **plain meaning of the section** is that a mortgage or other alienation of the homestead by the husband without the wife's signature, is wholly void [citations to other states omitted].” (emphasis added).

In *Weitzner v. Thingstad*, 55 Minn. 244, 56 N.W. 817 (1893) the Supreme Court, referring back to prior cases, held:

This court has repeatedly said that conveyances and contracts to convey the homestead, executed by the husband without his wife joining therein, are not merely voidable, but wholly void.

Id at 247.

In 1906, the Supreme Court held that “an attempted conveyance by deed, mortgage, or otherwise, of his homestead by a married man without his wife's signature is void, although at the time she may have abandoned him and her home, and may be living an adulterous life.” *Murphy v. Renner* 99 Minn. 358, 109 N.W. 593 (1906). In *Murphy*, John and Bridget Murphy were married and

³ Equitable estoppel as it relates to § 507.02 will be discussed in subsection II of this brief, *infra*.

bought land in 1884. Mrs. Murphy then “abandoned her home, her husband, and their five minor children, then living on the land, without any just cause. She went to Duluth and other places without any intention of ever returning to her husband's home. In 1889 she went through the form of a marriage ceremony with another man ...” *Id* at 349. In 1893, Mr. Murphy attempted to convey the homestead property without his wife's signature. In different deeds attempting to convey the property Mr. Murphy described himself as a widower and as a single man. Nonetheless, the Supreme Court held that upon principle and authority the conveyance without his wife's signature was void. *Id*.

In 1919, Supreme Court held that a deed conveying homestead property without the signature of both spouses is a nullity even if the spouses were living in separate states and the non-signing spouse had never set foot on the property. See *Rux v. Adam*, 143 Minn. 35, 172 N.W. 912 (1919). In *Rux*, the husband and wife sold their farm in Indiana and divided the funds. The wife stayed in Indiana; the husband, John Rux, moved to Minnesota. In Minnesota Mr. Rux acquired property which he and Wilhelmina Adam lived together as husband and wife, having six children together. Mrs. Rux never saw her husband again. Mr. Rux died in 1909.

Despite 19 years of separation, despite the fact that the wife never set foot on the property during her husband's life; despite the fact that the husband and Ms. Adam had six children and were living together as husband and wife; and

despite the fact that the husband signed a deed to Ms. Adam for the entire property in 1908, the Supreme Court held:

When Rux executed the deed to the defendant [Ms. Adam] he occupied the house upon the premises conveyed, hence some portion thereof constituted his homestead as defined by G.S. 1913, § 6957; *Kelly v. Baker*, 10 Minn. 124 (154); *Ferguson v. Kumler*, 27 Minn. 156, 6 N.W. 618. As to the homestead, the **deed was void because his wife did not join in its execution**. The fact that she was not living with him is of no consequence. Without her signature his deed to his homestead was a nullity. *Murphy v. Renner*, 99 Minn. 348, 109 N.W 593.

Id. (emphasis added).

In the 1923 case of *St. Denis v. Mullen*, 157 Minn. 266, 196 N.W. 258 (1923), Gabriel St. Denis and Mary St. Denis were married in 1862; the parties separated in 1875 when Mrs. St. Denis “took her children and returned to the home of her father in New York. In 1876, and again in 1881, St. Denis visited his wife and requested her to return with him to Minnesota. She refused.”

In 1884 St. Denis obtained a marriage license and went through the form of a marriage ceremony with Bridget Mullen, a widow, with whom he lived until his death on April 6, 1913. ... in 1902 [he] took title to an 80 acre farm in Rice county. From then on until his death it was his homestead occupied by himself and the woman he assumed to marry in 1884. Two weeks prior to his death he made a deed of it to her through a third person.

Id.

Despite the 38 year separation, despite the fact that his wife never set foot on the Rice County property, despite the fact the husband “assumed to marry” another woman with whom he lived for 29 years, despite the deed, the Supreme Court held: “[t]he farm was the homestead of [Mr.] St. Denis. His deed through another to Bridget St. Denis, his wife not joining, was void.” *Id.*

The cases supra, in addition to cases cited in previous sections, clearly establish that the spousal signature requirement of Minn. Stat. § 507.02 is deeply woven into the fabric of Minnesota real estate law. Minn. Stat. § 507.02 creates a clear, unambiguous statutory mandate. The district court's interpretation was blatantly erroneous and exceeded the bounds of its authority. As such, the district court's decision must be reversed and the mortgage must be declared void.

ii. The application of Minn. Stat. § 507.02 to the undisputed facts would not produce an absurd result.

Even accepting for the moment that the presumption of Minn. Stat. § 645.17(1) could be applicable in this case, applying § 507.02 would not produce an absurd result. The district court's rationale runs counter precedent and a requirement deeply engrained in Minnesota real estate law. The district court's rationale is two-fold: 1) allowing a person to void an otherwise valid mortgage by noting the failure of that person to clearly assert his own marriage is not appropriate⁴; and 2) the non-signing spouse has no lawful claim to the realty secured by the mortgage and there are no dependents who might be protected. (AA7- Conclusions of Law 10).

As to the first rationale, the district court confuses the purpose of the statute with its operation. The purpose of the statute is indeed to ensure “a

⁴ A mortgage that lacks the signature of both spouses is void from the beginning under § 507.02, therefore the assumption that the court is “allowing” a person to void the mortgage is incorrect as a matter of law.

secure homestead for families” by “protecting the alienation of the homestead without the willing signature of both spouses.” *Wells Fargo Home Mortgage, Inc. v. Newton*, 646 N.W.2d 888, 895 (Minn. App. 2002) (quotations omitted), *review denied* (Minn. Sept. 25, 2002). However, that purpose is carried out by making all conveyances of the homestead that lack the signature of both spouses void ab initio as a matter of law. Minn. Stat. § 507.02; *Dvorak* 285 N.W.2d at 677. Minnesota Statute § 507.02 does not, as the district court seems to suggest, grant the court an equitable power which the court may choose to apply under certain factual circumstances. To the contrary, § 507.02 voids the transaction *unless* certain factual circumstances apply. *Id.*

Here, the mortgage on Graikowski's property is not an “otherwise valid mortgage” as the district court assumes, but rather it is void as a matter of law unless adopted or confirmed by the non-signing spouse or equitable estoppel is applied. *Marr*, 239 Minn. 503, 509; See also *Karnitz v. Wells Fargo Bank, N.A.*, 572 F.3d 572, 575 (8th Cir. 2009). It is undisputed Coleman did not adopt or confirm the mortgage, in fact she had no knowledge of it at all. (AA3- Findings of Fact 12, 13). Moreover, the district court did not apply equitable estoppel in this case but rather premised its decision on a canon of construction, the presumption against “absurd” results. (AA7- Conclusions of Law 10, 11, 12, 13, 14) Consequently, the district court's first rationale, that the application of Minn. Stat. § 507.02 would produce an absurd result, is inaccurate and misunderstands the nature and operation of the statute.

Likewise, the district court's second rationale is similarly flawed. A subsequent divorce has no bearing on the application of Minn. Stat. § 507.02. *Alt* 39 Minn. at 512. Like the wife in *Alt*, Coleman's divorce decree does not relate back to the mortgage, and therefore, she had a statutorily protected interest at the time the mortgage was executed. The district court's fixation on the non-signing spouse's present interest in the property is misplaced in light of the statute at issue. Furthermore, the district court's examination of dependents who may be in need of statutory protection was manufactured from whole cloth, finding no basis in the statutory language or case law. Minnesota courts have found mortgages void when neither spouses nor dependents have been protected at the time the mortgage was adjudged void. See *Gores v. Schultz*, 777 N.W.2d 522, 525 (Minn. App. 2009); *Marr v. Bradley*, 239 Minn. 503, 59 N.W.2d 331 (1953).

In light of the district court's fundamental misunderstanding of the nature and operation of the statute and the misplaced focus of its analysis, the district court's interpretation of Minn. Stat. § 507.02 is in error and the findings premised on that interpretation should be reversed.

III. THE FACTS OF THIS CASE DO NOT SUPPORT A FINDING OF EQUITABLE ESTOPPLE.⁵

In order to establish an estoppel claim relating to § 507.02, three elements must be shown: (1) the **non-signing spouse consents to and has prior knowledge** of the transaction, (2) the non-signing spouse retains the benefits of the transaction, and (3) the party seeking to invoke estoppel has sufficiently changed its position to invoke the equities of estoppel. *Karnitz v. Wells Fargo Bank, N.A.*, 572 F.3d 572, 575 (8th Cir. 2009)(citing *Dvorak v. Maring*, 285 N.W.2d 675, 677-678 (Minn. 1979) (emphasis added). “All three factors must be present.” *Id.* The *Karnitz* Court read *Dvorak* as “definitive authority” on the factors necessary to apply equitable estoppel under Minnesota law to preclude a party from relying on § 507.02 to avoid a conveyance. *Id.* at 575.

In the *Karnitz* case, “[wife] did not sign the Wells Fargo loan documents or the new mortgage because Wells Fargo never asked her to sign any of the documents. [wife] testified in her deposition that she **knew** [husband] was seeking a loan and mortgage from Wells Fargo to pay off the Centennial construction loan; that she **knew** the loan would result in a mortgage in favor of Wells Fargo; that she **approved** of [husband] obtaining the loan and granting the mortgage to Wells Fargo; and that she wanted to obtain the loan in exchange for the mortgage.” *Karnitz*, 572 F.3d 572, 573 (8th Cir. 2009) (emphasis added).

⁵ The district court found the evidence to be insufficient to support a finding of estoppel. (AA8-Conclusions of Law 14)

In this case, the undisputed facts establish the non-signing spouse, Coleman, had no prior knowledge of the transaction and did not consent. In Coleman's deposition⁶ she unequivocally denied any knowledge or consent:

Q: All right. Did you know, when you got married, whether or not Mr. Graikowski was taking on any loans secured by some property in Pine County?

A: No.

(AA16- Affidavit of Maret Olson at Ex. 8, pg 4, lines 4-7)

Q: Okay. The Monday after you got married, what did you do?

A: I think I worked.

Q: You worked? Okay. And did you see Mr. Graikowski during the day?

A: No.

Q: Did you know what he was going to be doing that day?

A: No.

Q: Okay. Did you talk to him at any time during the day and say, "hi, honey, what did you do today?" or--

A: Not that I remember.

Q: Not that you remember. Did he ever tell you that he had closed on a loan that day?

A: No.

Q: Okay. And did you know that he was planning to close on a loan?

A: No.

⁶ Neither Mr. Graikowski nor his attorney were present at this deposition.

(AA18- Affidavit of Maret Olson at Ex. 8, pg 18, lines -23).

At argument for summary judgment, Respondent, relied heavily on the 1921 case of *Bozich v. First State Bank of Buhl*, 150 Minn. 241, 184 N.W. 1021 (Minn. 1921) to support a finding of estoppel. However, *Bozich* is easily distinguishable and does not support a finding of estoppel in the present case. In *Bozich*, a husband, Mr. Bozich, represented to the bank that he was a single man, when in fact he was married, on in his application for a loan and in response to a direct question. *Bozich* 150 Minn. 241, 242. Mr. Bozich, purposefully and with knowledge that his wife should sign, executed a mortgage against the homestead property reciting his misrepresentation. *Id.* The Supreme Court found that Mr. Bozich had “unquestionably perpetrated a fraud on the [bank].” *Id.* Though the Supreme Court recognized that a mortgage by the owner of the homestead without the joinder of the other spouse is void, the court estopped Mr. Bozich from asserting its invalidity holding:

We hold that where, as here, the mortgagor, a married man, procures a loan on his homestead by **fraudulently representing that he is unmarried**, and afterwards his wife dies, ownership remaining in the meantime unchanged, the situation then being that a mortgage executed by himself alone is valid, he will not be heard to say in a court of equity that the mortgage which he made when his wife was living was void and will be held estopped to assert its invalidity.

Id at 243-44.

Here, there is nothing in the record which can give rise to the slightest inference that Graikowski knew his wife needed to sign the mortgage for it to be

valid or sought to perpetrate any fraud. The district court recognized this fact stating:

It is not clear to the Court that Plaintiff [Respondent] has demonstrated that Defendant Graikowski knew that the documents he signed at the June 26, 2006 real estate closing indicated that day he was a single and unmarried person.

(AA8- Findings of Fact 14).

Furthermore, unlike Mr. Bozich, Graikowski did not represent himself to be single in response to a direct question nor did he execute a mortgage with knowledge that his wife needed to sign for it to be valid. At all relevant times Graikowski acted in good faith and no evidence in the record suggests otherwise. Absent any fraudulent misrepresentation on the part of Graikowski, the holding in *Bozich* has no bearing on the outcome of this case.

Instead, the court must apply the estoppel test laid out in *Karnitz*. As conclusively demonstrated by the undisputed facts, Respondent cannot meet all three prongs of the test. The non-signing spouse must consent to and have prior knowledge of the transaction in order for estoppel to apply. *Karnitz* 572 F.3d 575. Coleman had no prior knowledge and did not consent to the June 26, 2006 mortgage, therefore estoppel does not apply and the mortgage is void under Minn. Stat. § 507.02.

CONCLUSION

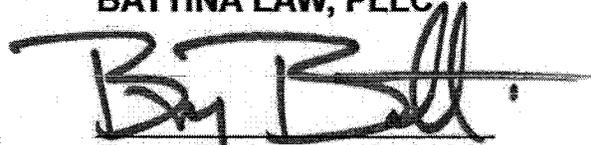
The facts of this case are simple and undisputed: the property was the homestead of Thomas Graikowsk; Thomas Graikowski and KariAnn Coleman were married at the time the homestead was mortgaged; and KariAnn Coleman did not sign the mortgage. These simple facts lead to a simple conclusion. The mortgage is void and was void from its inception by application of Minn. Stat. § 507.02. Furthermore, KariAnn Coleman had no prior knowledge of the transaction and did not consent, therefore equitable estoppel cannot be applied.

The statutory mandate is clear and over a century of Minnesota case law interpreting it leaves little doubt. This Court should not uphold an exception created by the district court to rescue Respondent HSBC Mortgage Services, Inc. from the clear direction of the Minn. Stat. § 507.02. The mortgage against Graikowski's homestead must be voided and Graikowski concedes that he remains liable on promissory note.

Respectfully submitted,

Date: September 12, 2011

BATTINA LAW, PLLC

A handwritten signature in black ink, appearing to read 'B. Battina', with a horizontal line extending to the right from the end of the signature.

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