

NO. A11-1456

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State of Minnesota  
In Court of Appeals

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Thomas A. Graikowski,

*Appellant,*

v.

HSBC Mortgage Services, Inc.,

*Respondent,*

and

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

*Defendants.*

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RESPONDENT HSBC MORTGAGE SERVICES, INC.'S BRIEF

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## LEGAL ISSUES PRESENTED

- I. IS A MORTGAGE VALID AND ENFORCEABLE UNDER THE PLAIN LANGUAGE OF MINN. STAT. § 507.02 AGAINST A MARRIED BORROWER WHO DID NOT DISCLOSE HIS MARRIAGE TO THE LENDER, WHERE THE NONSIGNING SPOUSE DIVORCED THE SIGNING SPOUSE, RETAINING NO INTEREST IN THE MORTGAGED HOMESTEAD, AND THUS IS NOT PROTECTED BY AND DOES NOT BENEFIT FROM AVOIDANCE OF THE MORTGAGE?**

In cross motions for summary judgment, the parties sought a declaratory judgment regarding the validity of a mortgage missing the signature of a now-divorced wife under Minn. Stat. § 507.02. The district court properly granted summary judgment in Respondent's favor on undisputed facts, finding that the plain language of Minn. Stat. § 507.02 did not void the mortgage, that the legislative intent would not be served by avoiding a mortgage where the mortgagor was divorced from the nonsigning spouse at the time of enforcement, and the nonsigning spouse did not retain any interest in the mortgaged homestead property, irrevocably releasing all interest in a stipulation for entry of a divorce decree.

### Apposite Cases and Statutes:

Minn. Stat. § 507.02 (2010)

Minn. Stat. § 645.16 (2010)

*Lennartz v. Montgomery*, 138 Minn. 170, 164 N.W. 899 (1917)

- II. IS A MARRIED MORTGAGOR ESTOPPED FROM AVOIDING A MORTGAGE UNDER MINN. STAT. § 507.02 WHERE THE MORTGAGOR SIGNED DOCUMENTS AT CLOSING WHICH FALSELY REPRESENTED TO THE LENDER THAT HE WAS SINGLE AND WHERE THE UNDISCLOSED SPOUSE, WHO DID NOT SIGN THE MORTGAGE, DIVORCES THE SIGNING SPOUSE AND IS DIVESTED OF ALL INTEREST IN THE MORTGAGED PROPERTY?**

Respondent also moved for summary judgment arguing that Appellant was barred by estoppel from avoiding the mortgage he admittedly signed which falsely recited his marital status as "unmarried." Appellant opposed the motion, arguing that Respondent must prove he intended to defraud the lender and also prove estoppel against the nonsigning spouse, now divorced. The district court did not rule on this issue, having resolved the dispute by deciding that the mortgage was enforceable under Minn. Stat. § 507.02.

**Apposite Cases and Statutes:**

*Bozich v First State Bank of Buhl*, 150 Minn. 241, 184 N.W. 1021 (1921)

Minn. Stat. § 507.02 (2010)

## STATEMENT OF THE CASE

This case involves a dispute between a lender and borrower over the enforceability of a mortgage recorded against homestead property. The lender, Respondent HSBC Mortgage Services, Inc. (“HSBC”), commenced this action in Pine County District Court seeking a declaration that its mortgage was valid, and seeking an order for judicial foreclosure upon the borrower’s default. The borrower, Appellant Thomas A. Graikowski (“Graikowski”); opposed the complaint, claiming that the mortgage was void under Minn. Stat. § 507.02 (2010) because it was not signed by his then-spouse, KariAnn Kimberly Coleman (“Coleman”). Graikowski undisputedly signed the mortgage which recites his marital status as “single.” He is now divorced from Coleman and is the sole owner of the mortgaged property. The divorce decree was entered upon a stipulation signed by both spouses, in which both Graikowski and Coleman stipulated that the homestead property should be awarded to Graikowski.

Graikowski and HSBC filed cross motions for summary judgment. Graikowski consented to the voluntary dismissal of all of his cross claims at the summary judgment hearing on April 27, 2011. The Honorable James T. Reuter filed an order for Judgment on July 7, 2011, denying Graikowski’s motion for summary judgment and granting HSBC’s motion, and ordering a foreclosure sale of the subject property. Graikowski appealed the July 1, 2011 judgment.

## STATEMENT OF THE FACTS

The salient facts of this case are not disputed. In approximately September 1998, Graikowski acquired title to real property commonly known as [REDACTED], legally described as

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

(the “Property”). The parties do not dispute Graikowski’s title to the property,<sup>1</sup> nor that the Property contained Graikowski’s homestead.

Prior to this time, on or about June 26, 2006, Graikowski received a \$170,100 loan from Accredited Home Lenders, Inc., for which he pledged a mortgage in the Property as collateral. R. App. 1-19. The mortgage was ultimately assigned to HSBC. R. App. 41. At the time Graikowski applied for a loan he truthfully told the loan officer, Nicholas Styles (“Styles”), that he was single. R. App. 22 (Styles Tr. at 12:11-13). On June 24, 2006, only two days before the loan closing, Graikowski married Coleman. R. App. 26. Coleman did not know about the loan, did not attend the closing and did not sign the mortgage. AA18 (Coleman Tr. at 18:7-23)).

At closing, Graikowski signed a mortgage and a loan application. RA10 and R. App. 14, 18. Both documents recited that Graikowski was “single” or “unmarried.” RA8, R. App. 2. The lender required that the borrower sign the

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<sup>1</sup> This Court can take judicial notice of documents numbered 374469, 374470, 374745, 436614, 436615 and 436616 filed with the Pine County Recorder. See Exhibits 1 through 4 to the Affidavit of Maret R. Olson In support of [Plaintiff HSBC’s] Motion for Summary Judgment filed March 29, 2011.

application at closing and affirm that all the information contained in the application was still true and correct. R. App. 22 (Styles Tr. at 11:21-12:3). The application consisted of only 5 pages, and included a paragraph above the signature line which stated in relevant part:

Each of the undersigned specifically represent to lender . . . that the information provided in this application is true and correct as of the date set forth . . . all statements made in this application are made for the purpose of obtaining a residential mortgage loan; . . . [and] the lender . . . may continuously rely on the information.

RA10. The mortgage identified Graikowski on the second page and, immediately following his name, described Graikowski as “unmarried.” R. App. 2.

Graikowski admits that he signed both the mortgage and loan application. RA2-3 (Graikowski Tr. at 20:19-21; 27:18-20). However, Graikowski claims that he did not read the documents at closing, did not realize that he was making a representation of fact regarding his marital status, and did not understand that his marital status was material nor that his wife needed to sign the mortgage. RA3 (Graikowski Tr: 25:11-27:1; 28:15-25). Graikowski claims that if he had been asked about his marital status, he would have declared that he was married, and that he had no intent to deceive the lender. RA3 (Graikowski Tr. 26:15-18; 28:24-25).

Graikowski claims he believed the lender had information regarding his marriage and assumed that the documents were correct. RA3 (Graikowski Tr. at 25:23-26:5). Styles, the loan officer, denies the allegations. Styles testified that he also attended the closing and that Graikowski declared he was planning to get married in the near future and needed the money for his upcoming honeymoon, not that he was already married. R.

App. 22 (Styles Tr. at 12:25-13:4; 16:17-22). Styles also testified that each of the documents was carefully reviewed with Graikowski at closing before Graikowski signed. R. App. 23 (Styles Tr. at 16:17-22). The written statements in the mortgage and loan application signed at closing are an unequivocal representation that Graikowski was unmarried, however, and were signed at closing, contradicting any prior statements he allegedly made.

The marriage between Graikowski and Coleman was short-lived. A Judgment and Decree for Marriage Dissolution was filed May 7, 2008 in Pine County District Court File No. 7A-08-96, dissolving the marriage. R. App. 25-40. The divorce decree granted Graikowski all rights to the mortgaged property. R. App. 39. Coleman stipulated to entry of judgment in the divorce decree which granted the homestead to Graikowski. R. App. 33. Coleman also was served in this action, but did not appear. R. App. 43. Finally, at her deposition in this action, Coleman testified that she did not claim any interest in the Property and did not contest a foreclosure of the mortgage. AA 17, 18 (Coleman Tr. at 16:7-11; 29:20-25).

In 2007 Graikowski fell behind in making payments on his mortgage. RA6 (Graikowski Tr. at 33:7-10). Graikowski admits that he has not made any mortgage payments in the past three years. RA7 (Graikowski Tr. at 51:8-12). He further admits that the past due principal and interest owed on the loan as the date of his deposition on March 15, 2011, was \$61,533.12. RA7 (Graikowski Tr. 52:8-11).

## STANDARD OF REVIEW

On appeal from summary judgment, the 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 Centers, Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). Statutory interpretation also presents a question of law subject to de novo review on appeal. *Ryan v. ITT Life Insurance Corp.*, 450 N.W.2d 126,128 (Minn. 1990).

## ARGUMENT

In this action, Graikowski seeks to invalidate a mortgage under Minn. Stat. § 507.02 (2010) that he admittedly signed by arguing that his former spouse did not sign the document. He admits that he signed the mortgage intending to grant a valid security interest in the Property, that the mortgage and a loan application he signed at closing *falsely* recites his marital status as “unmarried,” and that the spouse who failed to sign the mortgage is no longer his spouse and no longer holds any interest in the mortgaged property; thus the Property is no longer a marital homestead. The nonsigning spouse waived all rights in the homestead upon her divorce, knowingly defaulted in this action, and does not contest the foreclosure.

The statutory requirement that both spouses sign instruments conveying an interest in homestead land has existed for more than 100 years and has a well-established meaning in the caselaw of Minnesota. *Law v. Butler*, 44 Minn. 482, 47 N.W. 53 (1890), Gen. Stat. Ch. 68, § 2, (1878). The traditional analysis of the courts in interpreting this statute is a two-part inquiry. *Id.* at 485. First, the courts have analyzed whether the statute applies to the specific facts of the case and invalidates the mortgage. If the statute

applies, the second analysis is whether the lender is nonetheless entitled to enforce the instrument on equitable grounds, typically by establishing that the party seeking to avoid the mortgage is estopped from denying the validity of the mortgage.

In this case the district court concluded that the mortgage was not void under the plain language of Minn. Stat. § 507.02 (2010), thus ending the inquiry at the first stage of the analysis. HSBC likewise argued before the district court, and maintains here, that even if the mortgage were deemed invalid under Minn. Stat. § 507.02 (2010), Graikowski would nonetheless be estopped from avoiding the mortgage based on his conduct under the facts of *Bozich v. First State Bank of Buhl*, 150 Minn. 241, 184 N.W. 1021 (1921). Graikowski erroneously claims that that the relevant inquiry as to his conduct under *Bozich* is whether he engaged in intentional fraud, not the lower standard applied for estoppel. Graikowski further claims that the lender must also prove that the divorced spouse's conduct justifies an estoppel against her, although she is no longer an interested party or a spouse.

Having disposed of the case by finding that the statute was inapplicable to the facts, the district court did not rule on HSBC's estoppel argument. Although the district court did not specifically decide the estoppel issue, the district court did state that the facts were unclear whether Graikowski knew he was making material misrepresentations of fact regarding his marital status when signing the mortgage and the loan application at closing. Whether Graikowski fully appreciated the materiality of the misrepresentation is immaterial, however, to the issue of estoppel. Graikowski was at least negligent in making a false statement regarding his marital status. He admits he signed the mortgage

and loan application at closing without reading them. The loan application and mortgage unequivocally state that Graikowski was single, and the statement was false. Graikowski admits he signed the documents for the purpose of obtaining a loan. Above the signature line on the loan application the lender included language stating that all of the statements were material and were intended for the purpose of inducing the lender to make the loan. Thus the undisputed facts amply support a finding of estoppel.

For these reasons, if this Court finds for Graikowski on the question whether the mortgage is void under the plain language of Minn. Stat. § 507.02, it must nonetheless find that Graikowski is estopped from denying the mortgage's validity under *Bozich* and allow the lender to foreclose that mortgage, affirming the judgment of the district court.

**I. THE DISTRICT COURT PROPERLY CONSTRUED THE UNAMBIGUOUS LANGUAGE OF MINN. STAT. § 507.02 TO AVOID AN ABSURD RESULT AND FOLLOWED BINDING PRECEDENT.**

At summary judgment, the district court ruled that a borrower is not entitled to use a statute designed to protect the homestead rights of innocent spouses as a sword to avoid a mortgage he willingly granted. Citing Minn. Stat. § 645.17(1) (2010), the court found that the statute was not to be interpreted in a manner that returns an absurd result – i.e., the continued protection of a person who is neither spouse nor an owner of the mortgaged property. The ruling is logical, well reasoned, and wholly consistent with the intent of the statute.

**A. The District Court properly interpreted the plain language of Minn. Stat. § 507.02 in a manner consistent with binding precedent.**

Section 507.02 of the Minnesota Statutes requires that conveyances of any interest in a homestead, including mortgages, be signed by both spouses in order to be valid, unless the mortgage is a purchase money mortgage. The statute states in relevant part as follows:

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.

Minn. Stat. § 507.02 (2010). Courts have generally held that instruments conveying homestead property that lacked the signatures of both spouses of homestead property are not merely voidable, but void, unless one of the statutory exceptions apply. *Dvorak v Maring*, 285 N.W.2d 675, 677 (Minn. 1979) (citing *Anderson v. First Nat'l Bank of Pine City*, 303 Minn. 408, 411, 228 N.W.2d 257, 259 (1975), *Marr v. Bradley*, 239 Minn. 503, 507, 59 N.W.2d 331, 33 (1953); see also *Barton v. Drake*, 21 Minn. 299, 301 (1875). HSBC does not claim that this mortgage is a purchase money mortgage under § 507.03.

Graikowski argues that a mortgage is void for all purposes unless it is signed by the spouse. However, nothing in the statutory language itself compels this result, nor do the cases interpreting this statute and its predecessors establish such a rigid rule of law. For example, in *Weitzner v. Thingstad*, 55 Minn. 244, 56 N.W. 817 (1893) the Court ruled that a contract for conveyance of homestead and other lands was unenforceable to convey the homestead, but *was enforceable* as to nonhomestead lands.

Likewise, in *Lennartz v. Montgomery*, 138 Minn. 170, 164 N.W. 899 (1917), the Minnesota Supreme Court ruled that where only one of two spouses selling land signed a purchase agreement, the purchaser had no right to avoid the contract and was compelled to perform when the nonsigning spouse adopted it and tendered performance by executing a contract for deed. In reaching its conclusion, the court stated

A contract to convey a homestead, executed by the husband alone, is not illegal in the sense of being prohibited as an offense. The illegality is not that which exists where the contract is in violation of public policy or of sound morals, or founded on an illegal consideration which would vitiate the whole instrument. *The sole object of the statute was to prevent the alienation of the homestead, without the wife's joining in the conveyance or contract.* The policy of the law extends no further than merely to defeat what it does not permit. It merely withholds from the husband [signing spouse] the power to alienate the homestead in that way.

*Id.* at 173, 900 (emphasis added).

Thus, the general statement that a mortgage or other instrument missing a spousal signature is void, set forth in *Dvorak v Maring*, 285 N.W.2d 675 (Minn. 1979), *Anderson v First National Bank of Pine City*, 303 Minn. 408, 411, 228 N.W.2d 257, 259 (1975), and *Marr v Bradley*, 239 Minn. 503, 507, 59 N.W.2d 331, 333 (1953), is not absolute. Each of the cases adjudicate the rights of a nonsigning spouses regarding conveyances of homestead land. None expressly overrule *Lennartz* or *Thingstad*. Instead, each decides whether the conduct of the nonsigning spouses justifies granting the lender equitable relief under the doctrines of estoppel or ratification

The statute, as interpreted in *Lennartz* and *Thingstad*, only voids the contract as it pertains to homestead property and only to the extent necessary to protect the spouse. It

is not, as Graikowski contends, void for all purposes. Thus, the District Court's ruling must be affirmed.

**B. The standing of third parties to enforce conveyances properly executed under Minn. Stat. § 507.02 against other third parties claiming rights through improperly executed contracts has no bearing on this case.**

Next Graikowski appears to argue that holdings relating to the standing of third parties under Minn. Stat. § 507.02 justify his claim that the mortgage is void. Graikowski argues that if a lender or purchaser of a marital homestead can challenge the validity of other conveyances under Minn. Stat. § 507.02, so can the signing spouse. His argument misses the mark however. To the extent Graikowski seeks to establish his own standing in this action, the argument is unnecessary. HSBC does not challenge that Graikowski has standing to contest the validity of his mortgage. HSBC's position is that Graikowski is not the proper party entitled to statutory protection under Minn. Stat. § 507.02 (2010), and further that Graikowski is estopped by his own conduct from denying the validity of the mortgage.

Graikowski relies on *Marr v. Bradley*, 239 Minn. 503, 59 N.W.2d 311 (1953) as authority for the position that the rule set forth in *Lennartz* has been abrogated. It has not, and Graikowski's reliance on *Marr* is misplaced. *Marr* addresses the rights of competing purchasers to property. In *Marr*, Marr entered into a purchase agreement with both husband and wife to purchase their homestead for \$6,200. *Id.* at 504, 332. Two days before the closing the sellers received and accepted a better offer of \$6,500 from the Bradleys. *Id.* at 505, 332. Only the husband signed the purchase agreement to convey land to the Bradleys. The husband and wife then repudiated the prior purchase agreement

with Marr. Marr filed a notice of lis pendens seeking specific performance and commenced suit. After Marr commenced suit and recorded a notice of lis pendens both sellers conveyed title to the Bradleys. The Bradleys were unaware of the notice of lis pendens when they took title, but conceded that it was of record. *Id.* at 506, 332. Marr prevailed in his action against the husband and wife. He then successfully defeated the interests of the Bradleys.

In the action against the Bradleys, Marr argued that the Bradley purchase agreement was invalid under Minn. Stat. § 507.02. In reviewing the validity of the Bradleys' purchase agreement under Minn. Stat. § 507.02, the Court limited the context of its review, stating that “[t]he determination of whether the Bradleys had constructive notice of the interest of the plaintiff when they purchased the property depends upon the validity of the original agreement which they executed with Sheffs [sellers].” *Marr*, at 507, 333. The Court then held that the Bradleys had notice that their purchase agreement with the sellers was invalid under Minn. Stat. § 507.02 because title was held in the name of the wife who had not signed the purchase agreement.

The *Marr* court did not overrule *Lennartz*. It merely distinguished the facts. The *Lennartz* court recognized the nonsigning spouse's continuing right to avoid contracts under the statute. The *Marr* court did not state that an improperly executed instrument was void for all purposes, thus allowing a purchaser under a defective instrument to benefit from the statutory protection granted to spouses. Instead, it establishes that a purchaser taking title *with notice of the absence of a spouse's signature* is vulnerable to attack not only from the nonsigning spouse, but also from those who have enforceable

contracts with the nonsigning spouse. *Id.*, at 333 (record title held by nonsigning spouse). However, of equal or perhaps greater importance to the court's decision in *Marr* was the fact that the Bradleys had constructive notice of the claims of Marr prior to closing on the purchase agreement through Marr's recording of the notice of lis pendens. *Id.*, at 335.

*Gores v. Schulz*, 777 N.W.2d 522 (Minn. Ct. App. 2009) addressed the competing rights of lenders who take an interest in a marital homestead. The rule set forth in *Gores v. Schulz*, that lenders who claim rights in homestead property through properly executed instruments can challenge the validity of the claims of others who seek to enforce improperly executed instruments,<sup>2</sup> is irrelevant to the question whether the *signing spouse* can defeat a mortgage against his lender under Minn. Stat. § 507.02, particularly where both the legal marriage and the nonsigning spouse's interest in the property has ended.

These cases addressing the standing and relative property rights of third parties claiming rights in homestead property are inapplicable to the facts of this case and should be disregarded. This Court should affirm the district court's ruling accordingly.

**C. The District Court's ruling prevents an absurd result and is consistent with the well established purpose of the statute.**

The well established 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." *Dvorak v Maring*, 285 N.W.2d. at 677-78; *see also*

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<sup>2</sup> In *Schulz*, the court invalidated a first mortgage, in which the signature of the spouse was forged, finding it invalid under Minn. Stat. § 507.02. The Court noted that the record was at least disputed as to whether or not the mortgagee, a real estate agent, actually witnessed the forging of the wife's signature, and thus had knowledge of her mortgage's invalidity under Minn. Stat. § 507.02. *Schulz*, 777 N.W.2d at 527.

*National City Bank v Engler*, 777 N.W.2d 762, 765 (Minn. Ct. App. 2010); *Wells Fargo Home Mortgage, Inc. v. Newton*, 646 N.W.2d 888, 895 (Minn. Ct. App. 2002) review denied (Minn. Sept. 25, 2002); *Larson v. Wells Fargo Bank, N.A.*, Slip Op. 09-3720, \_\_\_ F. Supp. 2d \_\_\_ (D. Minn. June 30, 2011).

Graikowski cites a litany of historic cases in support of the notion that Minn. Stat. § 645.08 compels courts to strictly enforce unambiguous statutory language to void a mortgage despite the absurdity of the results achieved. The cases cited generally enforce the statutory homestead rights of a legal spouse where the legal marriage survived despite the apparent alienation of affection and separation of the spouses. *See Murphy v. Renner*, 99 Minn. 348, 109 N.W. 593 (1906) (affirming rights of nonsigning wife who abandoned her homestead, husband and children and lived with another man); *Rux v Adam*, 143 Minn. 35, 172 N.W. 912 (1919) (affirming right of estranged wife separated from husband for 19 years who had never resided on the homestead, and whose husband lived with another woman in the homestead).

These decisions may seem absurd by modern standards. Today, marriage is generally entered into more because of affection than for economic purposes and is easily terminated without cause. However, when construed in their historical context, the

results likely were not absurd to the deciding courts at all.<sup>3</sup> From a legal standpoint, however, there is no absurdity or inconsistency in the results. Notably, in each of the cited cases, despite an apparent loss of affection, the *legal marriage relationship* continued to exist. It is immaterial whether an outsider might view the marriage as a “good” marriage or a “bad” marriage. More significantly, in each of the cited cases, the *nonsigning* spouse rather than the signing spouse sought to avoid the conveyance under the statute. Thus the holdings have little bearing on the facts or ruling in this case. In this case, the “absurdity” that the district court noted is the protection of nonexistent homestead rights in a nonexistent spouse. The statute provides no reason to protect a *signing* spouse from his own transfer of the homestead.

The plain language of the statute does not compel that a conveyance of homestead property be declared void for all purposes; merely that the conveyance of a homestead to the detriment of the nonsigning spouse must be decided. Thus, this Court should affirm the ruling of the district court.

## **II. GRAIKOWSKI IS BARRED BY ESTOPPEL FROM AVOIDING THE MORTGAGE HE SIGNED UNDER MINN. STAT. § 507.02**

Even where a conveyance is barred by Minn. Stat. § 507.02, over the past 100 years the Minnesota Supreme Court has clearly carved out exceptions for estoppel or

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<sup>3</sup> Divorce statutes in effect as late as 1976 still required that a spouse seeking a divorce prove the existence of statutory grounds for divorce. Minn. Stat. § 518.06 (1976). A woman’s independent right to hold property and pursue claims in court did not appear in the Minnesota statutes until 1905. See Revised Laws of Minnesota, Ch. 72 (1905). In 1894, the divorce statutes provided that upon divorce, the Court may restore to the wife the value of the estate *that became the husband’s* upon the marriage. See Gen. Stat. Sec. 4795 (1894) (emphasis added).

ratification. Both the signing spouse and the nonsigning spouse may be barred from disavowing the mortgage on estoppel grounds. *Bozich v. First State Bank*, 184 N.W. 1021, 1022 (Minn. 1921) (spouse who signed mortgage barred on estoppel grounds from avoiding mortgage after death of nonsigning spouse); *Fuller v. Johnson*, 139 Minn. 110, 165 N.W. 874, 875 (1917) (wife who did not sign mortgage, but retained benefits of sale with knowledge of facts, could not avoid conveyance); *Karnitz v. Wells Fargo Bank, N.A.*, 572 F.3d 572, 574 (8<sup>th</sup> Cir. 2009) (citing *Dvorak v Maring*, 285 N.W.2d 675, 677 (Minn. 1979) (void conveyance cannot be ratified, but nonsigning spouse may be estopped from denying the conveyance even if statutory requirements are not met); *c.f. Wells Fargo Home Mortgage, Inc. v. Chojnacki*, 668, N.W.2d 1 (Minn. Ct. App. 2003) (application of an equitable remedy should not allow lender to knowingly circumvent statutory requirement). As the Eighth Circuit Court stated in *Karnitz*, “[i]n certain circumstances when the purpose of the statute is not at risk, the Minnesota courts have applied estoppel to prevent a party from challenging the validity of a conveyance of a homestead.” *Karnitz*, 572 F3d at 574.

**A. Graikowski’s negligent execution of documents which falsely declared his marital status as single sustains a finding of estoppel.**

It has long been the rule in Minnesota that a borrower who knowingly conceals the existence of a spouse from the lender is estopped from avoiding the mortgage for the absence of the signature of his spouse. *See Bozich v. First State Bank*, 184 N.W. 1021, 1022 (Minn. 1921). In *Bozich*, the borrower and mortgagor, Stanley Bozich, procured a mortgage on a homestead approximately one month after his marriage to his wife Helda.

He failed to disclose to his lender that he was married and his wife did not sign the mortgage. The wife passed away on January 7, 1919. Thereafter, Bozich sought to avoid payment of the mortgage by declaring it void for the absence of his wife's signature. The Minnesota Supreme Court rejected Bozich's argument and held unequivocally that:

[W]here, 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 estopped to assert its invalidity.

*Bozich*, 184 N.W.2d at 1022. *Bozich* is on point and dispositive of the issue. The effect of Graikowski's divorce divested the nonsigning spouse of any and all interest in the homestead by her own stipulation, and terminated her status as a spouse, thus obviating the need for any statutory protection as effectively as the death of Helda in 1919. Just as with Bozich, Graikowski should not be allowed to use the statute to his own benefit when he misrepresented his marital status in obtaining the loan.

A party seeking equitable relief cannot *knowingly* accept a defective instrument. In *Wells Fargo Home Mortgage, Inc. v. Chojnacki*, 668, N.W.2d 1 (Minn. Ct. App. 2003), the lender accepted a mortgage signed by only one spouse which correctly recited the borrower's marital status as "married." *Id.* at 3. The nonsigning spouse subsequently stepped forward and sought a declaratory judgment that the mortgage was invalid. This court ruled that the lender was barred from invoking the equitable remedies of estoppel or equitable subrogation where it had *knowingly* accepted a mortgage in disregard of the statutory requirement for a spousal signature. *Id.* at 5 (emphasis added). Here, however,

the record reflects that HSBC duly asked Graikowski to confirm the contents of his loan application at closing, and Graikowski signed the application without verifying that the statements contained in it were still correct. HSBC, therefore, unlike in *Chojnacki*, did not “knowingly” accept a defective instrument. To the contrary, HSBC was misled by Graikowski’s false representation.

Graikowski states in his brief as a relevant fact, “[n]o evidence was introduced suggesting that Mr. Graikowski was ever asked directly at closing whether or not he was married.” Appellant’s Brief at 4. First and foremost, this statement is false. HSBC asked Graikowski to sign the loan application at closing which recited his marital status as single. RA6-12. Graikowski has not alleged that any misrepresentations were made to him about its contents – he simply didn’t read it. More importantly, the loan officer for HSBC testified in deposition that he was present at the closing, that all documents were reviewed, and that the borrower told the loan officer he was planning *to get married in the near future*, not that he already was married. R. App. 22-23 (Styles Tr. at 12:25-13:4; 16:17-22).

Graikowski’s claim, however, is irrelevant. Graikowski suggests that the lender has a burden to prove not only that the borrower signed a document at closing containing a false statement, but also that the lender has a duty to confirm that the borrower understood the legal implications of misstatements in the document. No legal justification exists for imposing this extraordinary new duty upon lenders. This court does not excuse a party from knowing the contents of a document he signed without reading it in the absence of fraud. *See Gartner v. Eikill*, 319 N.W.2d 397, 398 (Minn.

1982) (“in the absence of fraud or misrepresentation, a person who signs a contract may not avoid it on the ground that he did not read it or thought its terms to be different”). Likewise, “[i]t is a deeply rooted concept of our jurisprudence that ignorance of the law is no excuse.” *State v. King*, 257 N.W.2d 693, 697-698 (Minn. 1977) (citing *State v. Armington*, 25 Minn. 29 (1878); 4 W. Blackstone, Commentaries (Jones ed.)). “All members of an ordered society are presumed either to know the law or, at least, to have acquainted themselves with those laws that are likely to affect their usual activities.” *State v. King*, 257 N.W.2d at 698. Upon execution of a loan application delivered to the lender, the burden shifts to Graikowski to prove that he contradicted the statements made in the application, whereby the lender cannot rely upon the application or contract. It is Graikowski who failed to introduce evidence on this point, not the lender.

The undisputed evidence more than amply supports a finding of estoppel against Graikowski. Graikowski signed both a loan application and mortgage at closing that recited his marital status as “single” or “unmarried.” The loan application is only a 5-page document, and includes a statement above the signature that the borrower “acknowledges that . . . the information provided in this application is true and correct as of the date set forth below . . . all of the statements made in this application are made for the purpose of obtaining a residential mortgage loan . . . [and] the lender, its successors and assigns may continuously rely on the information contained in the application.” RA10. Graikowski knew of his recent marriage when he closed the loan, knew that he was receiving a loan, and knew that he was pledging a mortgage to secure that loan. Graikowski testified in deposition as a defense only that he did not know that the

signature of his wife was required, but that he nonetheless intended to grant a valid mortgage. RA3 (Graikowski Tr. at 26:19 - 27:5). These admissions, together with his signed loan application, justify a finding sufficient for equitable estoppel against Graikowski. Because the undisputed evidence amply demonstrates a finding of estoppel against Graikowski, the district court's order must be affirmed.

**B. The lender is not required to prove that the signing borrower intended to perpetrate a fraud as an element of estoppel.**

Graikowski also challenges what must be proved in order to preclude him from avoiding the mortgage. Graikowski claims that the bar set by *Bozich* is high. Graikowski asks this Court to impose a more stringent standard – fraud – for the borrower who knowingly signs the mortgage than is applied against nonsigning spouses under the existing law. In order to find estoppel, Graikowski contends that the lender must prove not only the elements of estoppel, but must also show that the borrower “purposefully *and with knowledge that his wife should sign*, executed a mortgage against the homestead property reciting his misrepresentation.” Appellant's Brief at 23. In short, Graikowski seeks a ruling that (1) estoppel against a signing borrower applies only where the borrower engaged in *fraud* against the lender, and (2) the lender must show not only that the borrower made a misrepresentation regarding his marital status, but must understand the materiality of the misrepresentation in order to find fraud. No case law supports such a stringent burden.

In order to avoid the effects of Minn. Stat. § 507.02 against a *nonsigning* spouse, the courts have only required that a lender prove the elements of an estoppel, not fraud.

To prove an estoppel, the lender must show

- (1) the nonsigning spouse consents to and has prior knowledge of the transaction,
- (2) the nonsigning 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, 574-575 (8<sup>th</sup> Cir. 2009) (*citing Dvorak v Maring*, 285 N.W.2d 675, 677-678 (Minn. 1979)). The court in *Karnitz* noted that although the doctrine of equitable estoppel “generally involves some type of misrepresentation or at least negligent culpability on the part of the person against whom it is claimed,” that in the context of a missing spousal signature, the “culpability” requirement is satisfied by evidence of “the nonsigning spouse’s prior knowledge and agreement of the conveyance coupled with the retention of the benefits of the conveyance.” *Id.* at 576. The *Karnitz* court then carefully analyzed two Minnesota estoppel cases and concluded “[t]he Minnesota Supreme Court applied estoppel . . . despite the absence of any type of misrepresentation or inducement.” *Id.* at 577 (*citing Seitz v Sitze*, 215 Minn. 452, 10 N.W.2d 426 (1943) (heirs of deceased parent estopped from avoiding parent’s deed conveying homestead to one son, without the requisite spouse’s signature, after son provided years of services caring for ailing parent in reliance on the conveyance); *Bullock v. Miley*, 133 Minn. 261, 158 N.W. 244 (1916) (nonsigning spouse estopped from denying sale of homestead where nonsigning spouse allowed

purchaser to take possession of homestead for four years and make improvements to the property in reliance on the conveyance).

Likewise, other cases have found nonsigning spouses to be barred from avoiding a conveyance of homestead property on estoppel grounds for conduct substantially less significant than what Graikowski would have his lender prove against him. *See Karnitz*, 572 F.3d at 577-78, (acceptance of \$130,000 in loan proceeds and four years of acquiescence in the mortgage prior to default with no effort to avoid the mortgage was sufficient to bar nonsigning wife from avoiding mortgage for estoppel); *St. Denis v. Mullen*, 157 Minn. 266, 196 N.W. 258 (1923) (estranged wife, who knew only that a second marriage of her husband had been announced in a newspaper, and that the husband had died, was estopped from challenging title to his homestead after his apparent second wife claimed title and conveyed the land to a bona fide purchaser).

Most importantly, as the Court noted in *Karnitz*, the purpose of Minn. Stat. § 507.02 is not served by avoiding the enforcement of the mortgage under such circumstances.

Strict compliance with the statute in these circumstances does not further the policy behind the statute; rather, it flaunts it by converting what the Legislature intended as a shield into a sword.

*Karnitz v. Wells Fargo Bank, N.A.*, 572 F.3d at 575. If the purpose of the statute is not served by avoiding the mortgage where a *nonsigning spouse* merely accepts the benefits of a loan with knowledge of its existence, it certainly is not served by allowing a borrower who knowingly *signs* the mortgage *intending to grant a valid mortgage* to

avoid its effects. Thus Graikowski's claim that *Bozich* places a higher burden on the lender – to demonstrate fraudulent intent – must be rejected.

**C. The law does not require a showing of estoppel against the nonsigning spouse under the facts of this case.**

Finally, Graikowski seeks to confuse the issue by arguing that the doctrine of estoppel must be proved not only against his conduct, but likewise against his former wife, Coleman. This argument, however, is rejected under *Bozich*.

In *Bozich*, this Court ignored whether the deceased spouse was estopped from enforcing the mortgage because she no longer required any protection. Instead, the Court focused solely on the conduct of the signing husband. In the present case, the district court found that the conduct of Coleman was just as irrelevant because she irrevocably waived any homestead rights in stipulated divorce decree<sup>4</sup> and defaulted in the present action. Following her divorce and divestiture of the homestead, she was no longer a spouse with a protected interest in the mortgaged property. *Bozich* settles the issue before this Court.

Graikowski attempts to distinguish *Bozich* by relying on *Alt v. Banholzer*, 39 Minn. 511, 40 N.W. 830 (1888). Once again, however, Graikowski's logic is fatally

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<sup>4</sup> The Minnesota Supreme Court has ruled that “when a judgment and decree is entered based upon a stipulation, we hold that the stipulation is merged into the judgment and decree and the stipulation cannot thereafter be the target of attack by a party seeking relief from the judgment and decree. The sole relief from the judgment and decree lies in meeting the requirements of Minn. Stat. § 518.145, subd. 2.” *Shirk v. Shirk*, 561 N.W.2d 519, 522 (Minn. 1997). Under Minn. Stat. § 518.145, subd. 2, a party must challenge a judgment within one year of its entry. The judgment and decree dissolving the marriage between Graikowski and Coleman was entered May 7, 2008.

flawed. *Banholzer* is distinguishable from *Bozich* and of no help to Graikowski's position. In *Banholzer*, a husband granted a mortgage in the homestead without his wife's signature. *Id.*, 40 N.W. at 830. The nonsigning wife subsequently obtained a divorce *and became sole owner of the homestead*. She then sought to avoid the mortgage which she had not signed. *Id.* The Court found that the mortgage was invalid against the homestead.<sup>5</sup> *Id.* at 830-831.

The decision in *Banholzer* is wholly consistent with the decision of the district court in this case. The underlying purpose of the statute would not be served by validating the mortgage upon the divorce in *Banholzer* because the *nonsigning spouse* continued to own the marital homestead after the divorce. If the mere divorce of the parties terminated the requirements of Minn. Stat. § 507.02, one could imagine a parade of horrors where unscrupulous spouses would transfer homestead property to a friend, family member, or lover before filing for divorce, thus depriving the court of jurisdiction to make an equitable distribution of marital property by taking the homestead out of the marital estate.

The underlying rationale of the statute does not extend, however, to cases where the divorce has already occurred and the nonsigning spouse has already relinquished or

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<sup>5</sup> Likewise, the homestead rights of the nonsigning spouse should and do survive the death of the nonsigning spouse. *Murphy v. Renner*, 99 Minn. 348, 109 N.W. 593 (1906). Homestead rights also survived as to the entire parcel where the homestead included 45 1/2 acres at the time of conveyance and was within the 80-acre limit for homesteads in rural areas, although the permissible size for homestead was reduced after the conveyance due to statutory changes or the annexation of the parcel to the City of St. Paul. *See Barton v Drake*, 21 Minn. 299 (1875).

lost title to the homestead as is the case here. No purpose is served by compelling the mortgagee to prove estoppel by the nonsigning spouse under such circumstances.

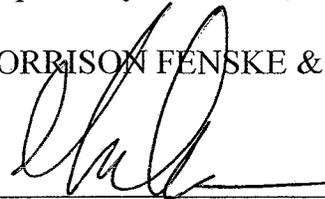
Here, as in *Bozich*, it is the signing spouse rather than the innocent nonsigning spouse who seeks to avoid the mortgage. Likewise, it is the signing spouse who retains sole title to the property after the termination of the marriage. Because Coleman neither claims continuing homestead rights as a legal spouse nor claims an interest in the property, it is irrelevant whether or not she is estopped from avoiding the mortgage and the district court's ruling should be affirmed.

#### CONCLUSION

Based on the foregoing, Respondent HSBC Mortgage Service, Inc. respectfully requests that the Minnesota Court of Appeals affirm the district court's decision.

Respectfully submitted,

MORRISON FENSKE & SUND, P.L.L.C.



Dated: October 13, 2011

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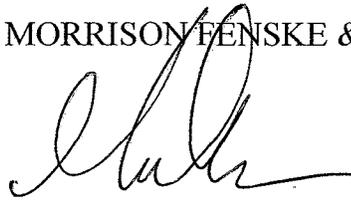
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## CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that that Respondent's Brief complies with the word limitations set forth in Minn. R. Civ. App. P. 132.01, subd. 3(a). This brief was prepared using Microsoft Office Word, Version 2007, Times New Roman 13-point font and this word processing program has been applied specifically to all text, including headings, footnotes and quotations in the following word count. Microsoft Office Word's word count reports that the brief contains 6,749 words.

Respectfully submitted,

MORRISON FENSKE & SUND, P.L.L.C.



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