

NO. A05-1178

STATE OF MINNESOTA
IN COURT OF APPEALS

IN THE MATTER OF THE PETITION OF JOSHUA S. COLLIER,
IN RELATION TO PROPERTY REGISTERED IN
CERTIFICATE OF TITLE NO. 1596547 FOR AN
ORDER DIRECTING ENTRY OF A NEW CERTIFICATE
AND DECLARATORY RELIEF

BRIEF AND APPENDIX OF
RESPONDENT M & I BANK

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STATEMENT OF THE CASE

This case presents a straightforward issue on appeal: can someone with actual knowledge of an unrecorded interest in property, and who purchases that property for a fraction of its value, nevertheless be considered a good faith purchaser for value under Minn. Stat. § 508.25?

Appellant Joshua Collier holds a warranty deed from Joseph Conley to property described as Lot 2, Stipe's Rearrangement, in St. Paul, Minnesota. Conley purchased the property in September 2000, but lost it in foreclosure to M & I Bank. However, Conley's mortgage to the Bank on this Torrens property was mistakenly filed in the County Recorder's Office, rather than the County Registrar's Office. Collier was aware of the error and of the Bank's claim to the property when he purchased it from Conley for \$5,000. On the same day he purchased the property from Conley, Collier mortgaged the property to Respondent Dennis Wager for \$145,000.

Appellant Collier commenced this action in November 2003, seeking a determination as to the priority of various interests in the property. The Bank answered and cross-petitioned for an order making its mortgage a first lien on the property. In May 2004, the Bank was permitted to join Collier's mortgagee, Dennis Wager. In June 2004, the Bank was permitted to amend its cross-petition against Collier to add a claim of unjust enrichment.

On December 22, 2004, the Ramsey County District Court (Monahan, J.) issued an interlocutory order granting the Bank's motion for summary judgment and denying Collier's motion for summary judgment, holding that Collier was not a good faith purchaser for value. However, the district court denied the Bank's motion for summary judgment against Respondent Wager and denied Wager's motion for summary judgment against the Bank. By stipulation dated March 7, 2005, the Bank and Wager settled the claims between them. On April 13, 2005, Collier filed his first Notice of Appeal. However, because there was no final judgment in the case, the appeal was dismissed as premature by Order of this Court dated June 8, 2005. In the interim, the district court entered a final judgment on May 9, 2005; Collier appealed from this judgment on June 13, 2005.

ISSUE ON APPEAL

Under Minn. Stat. § 508.25, only those who purchase registered land in good faith and for valuable consideration hold the land free from encumbrances not noted on the certificate of title. Although the Bank's mortgage does not appear on the certificate of title because it was erroneously recorded in the County Recorder's Office, Appellant Collier had actual knowledge of the Bank's mortgage before purchasing the property, and purchased the property for far less than its value. Is Collier a good faith purchaser for value as contemplated by Minn. Stat. § 508.25 entitled to priority over the Bank's interest under either the Sheriff's Certificate of Sale or its mortgage?

Minn. Stat. § 508.25

In re Juran, 178 Minn. 55, 226 N. W. 201 (1929)

Finnegan v. Gunn, 207 Minn. 480, 292 N. W. 22 (1940)

STATEMENT OF FACTS

On September 25, 2000, Great Northern Mortgage Company loaned Joseph Conley \$135,000, secured by a mortgage on property described as Lot 2, Stipe's Rearrangement, in St. Paul, Minnesota. *Exhibit D to the Affidavit of Katheryn A. Gettman (June 18, 2004)*. Great Northern assigned its rights in the mortgage to Respondent M & I Bank. *Exhibit E to the Affidavit of Katheryn A. Gettman (June 18, 2004)*. On November 20, 2000, the title company recorded the mortgage and its assignment in the Ramsey County Recorder's Office as documents 3357407 and 3357408 respectively. *Exhibits D, E to the Affidavit of Katheryn A. Gettman (June 18, 2004)*. However, the property is Torrens, and thus the mortgage and its assignment should have been filed with the County Registrar's office.

In 2002, Conley defaulted on the mortgage. On December 4, 2002, the Bank filed a Power of Attorney to Foreclose the Mortgage in the County Recorder's Office. *Exhibit F to the Affidavit of Katheryn A. Gettman (June 18, 2004)*. The Bank scheduled the foreclosure sale for March 11, 2003, and published the Notice of Mortgage Foreclosure Sale on December 23, 2002. *Exhibit G to the Affidavit of Katheryn A. Gettman (June 18, 2004)*. Conley was served notice of the foreclosure on January 9, 2003. *Exhibit G to the Affidavit of Katheryn A. Gettman (June 18, 2004)*. On March 11, 2003, the Ramsey County Sheriff foreclosed the mortgage and sold the property to the Bank for

\$118,000. *Exhibit G to the Affidavit of Katheryn A. Gettman (June 18, 2004).*

However, because of the title company's earlier mistake, the Bank also filed the Sheriff's Certificate of Sale with the County Recorder's Office rather than the County Registrar's Office. *Exhibit G.*

Enter Appellant Joshua Collier. Collier receives monthly notices of foreclosed properties from the Ramsey County Sheriff's Department. *Answer to Interrogatory 6, M & I Bank's First Set of Interrogatories and Requests for Documents (April 15, 2004), attached as Exhibit M to the Affidavit of Katheryn A. Gettman (June 18, 2004).* Early in April 2003, Collier learned of the notice of sale and sale by advertisement of the property from the Sheriff's Department and contacted the Bank, offering to purchase the Bank's position in the property on behalf of Blue Heron, Inc., a real estate investment company. *Answers to Interrogatories 8, 13, M & I Bank's First Set of Interrogatories and Requests for Documents (April 15, 2004), attached as Exhibit M to the Affidavit of Katheryn A. Gettman (June 18, 2004).*

When the Bank rejected Blue Heron's offer, Collier conducted a title search of the property and learned the Sheriff's Certificate and the Bank's mortgage were recorded but not registered. *Answer to Interrogatory No. 8, M & I Bank's First Set of Interrogatories and Requests for Documents (April 15, 2004), attached as Exhibit M to the Affidavit of Katheryn A. Gettman (June 18, 2004).* Armed with this information, Collier signed a written agreement dated April 22, 2003, with Joseph Conley to purchase Conley's interest in the property for \$5,000.

Exhibit I to the Affidavit of Katheryn A. Gettman (June 18, 2004); Deposition of Joseph Collier (May 10, 2004), p. 22, attached as Exhibit A to the Affidavit of Katheryn A. Gettman (Collier knew when he signed the purchase agreement with Conley that the M & I mortgage was not on the certificate of title). Collier told the owner of Blue Heron, Mark Ervajec, he believed there was no mortgage filed against the title:

A: That I came to a different conclusion on the title than what [Ervajec] and Ryan [Long, another Blue Heron employee] had come to, and I'd like to take the property. I told him that I didn't feel there was a mortgage on the property.

Q: What was the conclusion they had come to with respect to whether or not there was a mortgage against the Conley property?

A: They could only take Mr. Conley's word and the sale records that the mortgage was against the property, that there was a mortgage against the property.

Q: Had Mr. Conley indicated to Blue Heron that there was a mortgage against the property?

A: Yes, he had.

Q: Was that the M & I mortgage?

A: Yes, it was.

Deposition of Joshua Collier (May 10, 2004), pp. 19-20, attached as Exhibit A to the Affidavit of Katheryn A. Gettman (June 18, 2004).

On April 24, 2003, Conley conveyed the property to Collier by warranty deed. *Exhibit J to the Affidavit of Katheryn A. Gettman (June 18, 2004).* The same day, Collier executed a mortgage in favor of Respondent Dennis Wager in the amount of \$145,000, with the property as security. *Exhibit K to the Affidavit of*

Katheryn A. Gettman (June 18, 2004). Both the deed from Conley to Collier and the mortgage from Collier to Wager were registered with the County Registrar's Office on April 24, 2003. *Exhibits J, K, L to the Affidavit of Katheryn A. Gettman (June 18, 2004)*. Blue Heron paid Conley \$1,000. *Deposition of Joseph R. Conley (May 13, 2004), p. 14*. A few weeks later, Blue Heron paid Conley another \$4,000, plus a \$500 bonus for vacating the property early. *Id.* There is no evidence Collier paid anything to either Conley or Blue Heron, or that Collier has repaid anything to Wager.

On November 4, 2003, Collier filed this action, seeking a determination as to the priority of the various interests claimed in the property.

ARGUMENT

Standard of Review

This action presents this Court with a question of first impression: whether a subsequent purchaser with actual knowledge of a prior unregistered interest in Torrens property is a good faith purchaser for value under Minn. Stat. § 508.25. The district court decided this matter on the parties' cross motions for summary judgment. On an appeal from summary judgment, this Court asks only two questions: (1) whether there are any genuine issues of material fact; and (2) whether the lower court erred in its application of the law to the undisputed facts. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). Where, as here, the parties agree on the facts, review is limited to determining merely whether the district court erred in its application of law. *Hubred v. Control Data Corp.*, 442 N.W.2d 308, 310 (Minn. 1989).

Questions of statutory interpretation are also reviewed *de novo*. *Timeline, LLC v. Williams Holdings #3, LLC*, 698 N.W.2d 181, 184 (Minn. App. 2005); *see also Wiegel v. City of St. Paul*, 639 N.W.2d 378, 381 (Minn. 2002). When the statute's language is clear, as it is here, this court must rely on its plain meaning. *See id.*

Here, the parties do not dispute Appellant Collier knew of both Respondent's mortgage and the subsequent foreclosure of that mortgage before he purchased the property which is the subject of this action. The

district court concluded, correctly, that Collier's interest in the property was subject to the Bank's mortgage. The district court's opinion is well supported by, and consistent with, Minnesota law, interpreting the good faith requirement under Minn. Stat. § 508.25. Because Collier had actual knowledge of the Bank's recorded but unregistered mortgage at the time of his purchase, he cannot later seek the protection of the Torrens statutes as a good faith purchaser. For this reason, the Court's decision must be affirmed.

I. The Torrens system of registration eliminates the doctrine of constructive notice, but not the effect of actual notice, of unregistered interests in land.

This action concerns registered, or Torrens, land. The Bank's mortgage, assignment of mortgage, and Sheriff's Certificate were all erroneously recorded with the Ramsey County Recorder's Office, instead of being registered with the Ramsey County Registrar's office. Thus, neither of the Bank's interests appeared on the Certificate of Title when Collier purchased the property. This fact alone, Collier claims, entitles him to a reversal of the district court's order. Collier further argues his interest is subject only to those encumbrances listed on the Certificate of Title.

This analysis simply ignores Minn. Stat. § 508.25, which provides:

Every person receiving a certificate of title pursuant to a decree of registration and every subsequent purchaser of registered land who receives a certificate of title in good faith and for a valuable consideration shall hold it free from all encumbrances and adverse claims, excepting only the estates, mortgages, liens,

charges, and interests as may be noted in the last certificate of title in the office of the registrar . . . (emphasis added)

It is well settled in Minnesota that a person, like Collier, with actual knowledge of another's prior interest in land does not take his interest in good faith and thus does not have priority. This principle applies regardless of whether the property is abstract or Torrens. See Minn. Stat. §§ 507.34 (abstract), 508.25 (Torrens); see also *In re Juran*, 178 Minn. 55, 226 N. W. 201 (1929); *Cook v. Luettich*, 191 Minn. 6, 252 N. W. 649 (1934); *Andrews v. Benson*, 476 N.W.2d 194, 198 (Minn. App. 1991); *In re Alchemedes/Brookwood Ltd P'ship*, 546 N.W.2d 41, 42 (Minn. App. 1996); *In re Petition of Willmus*, No. C0-95-1136, 1996 WL 33095 (Minn. App. Jan. 30, 1996).

The distinction between abstract and Torrens property can be described this way. For properties recorded in abstract, a purchaser is charged with "notice of the rights of one in possession." *In re Juran*, 178 Minn. at 55, 226 N. W. at 202. So, for example, a purchaser of abstract property has constructive notice of anything which would be apparent to one in possession of the property, such as encroachment by a neighbor or use constituting an easement. This is not the case with Torrens property. Typically, a subsequent purchaser of Torrens property takes the property subject only to those encumbrances actually listed on the certificate of title. See Minn. Stat. § 508.25. Thus, the Torrens system dispenses with the concept of "constructive notice" except as

to matters listed on the certificate of title. *In re Juran*, 178 Minn. at 55, 226 N. W. at 202; *Andrews*, 476 N.W.2d at 198 (respondents had constructive notice of perpetual existence of covenants entered on the certificate of title).

But, even under the Torrens Act, to prevail over an earlier unregistered interest, subsequent purchasers must take their interest in good faith and for valuable consideration. Minn. Stat. § 508.25; see *Henry v. White*, 123 Minn. 182, 183, 143 N. W. 324, 325 (1913) (holding that a purchaser who relies on the registration proceedings and has no notice or knowledge that there is a mortgage on the property has priority over the prior unregistered mortgage if he is the first to register his interest).

In describing the effect of the Torrens statute, the Minnesota Supreme Court has stated:

The Torrens system abrogates the doctrine of *constructive* notice, except as to those matters noted on the certificate of title, but not the effect to be given to *actual* notice of unregistered conveyances.

Cook v. Luettich, 191 Minn. at 6, 252 N.W. at 649 (emphasis added), citing *In re Juran*, 178 Minn. at 55, 226 N.W. at 202 “[The Torrens statute] abrogates the doctrine of constructive notice except as to matters noted on the certificate of title. We think, however, that it does not do away with the effect of actual notice, although it undoubtedly imposes the burden of proving such notice upon the one asserting it.”).

Thus, although Collier argues Minnesota is a pure “race” state, in reality Minnesota is a “race-notice” state. According to Collier, the only thing that matters is whether encumbrances are (or are not) filed of record.

Actual notice of the property interest does not mesh with the scheme of the Torrens Act, it collides with it. If actual knowledge were sufficient notice of an interest that is required by the Torrens Act to be recorded, it would eviscerate the statutory requirement and the Torrens scheme.

Appellant’s Brief at pp. 6-7. In reality, as this Court has explained,

Minnesota is a race-notice state, which means that a purchaser who has actual, implied, or constructive notice of inconsistent outstanding rights of others is not a bona fide purchaser entitled to protection under Minnesota’s Recording Act. Thus . . . there is no need for parties to race to the Registrar of Titles because mortgage priority as established by a filing order is defeated by actual notice or knowledge of a superior mortgage or encumbrance.

In re Ocwen Financial Services, Inc., 649 N.W.2d 854, 857 (Minn. App. 2002).

In Torrens proceedings, actual notice requires “actual knowledge” that the unregistered interest in the land exists. *See In re Alchemedes/Brookwood Ltd. P’ship*, 546 N.W.2d at 42; *In re Petition of Willmus*, 568 N.W.2d 722, 726 (Minn. App. 1997) *citing Alchemedes/Brookwood Ltd. P’ship*, 546 N.W.2d at 42 and *Kirkwood Constr. Co. v. M.G.A. Constr., Inc.*, 513 N.W.2d 241, 244 (Minn. 1994). Appellant Collier readily concedes he had such actual knowledge of the Bank’s interests in the property.

Minnesota courts have consistently refused to give subsequent purchasers like Appellant, who have actual knowledge of prior unregistered interests, the protection of the Torrens statute. For example, in *Nolan v. Stuebner*, 429 N.W.2d 918 (Minn. App. 1988), the Stuebners purchased property on Lake Minnetonka by warranty deed, which deed did not mention any easement creating lake access for the benefit of their neighbors, the Nolans. The Stuebners' certificate of title indicated the existence of an easement, but over property which had previously been partially conveyed to a third party. Significantly, before purchasing the property, the Stuebners had the title examined by an attorney, who told them the property was subject to the easement.

Some six years after purchasing the property, the Stuebners took down the Nolans' dock. The Nolans responded with a declaratory judgment action, seeking confirmation of their pedestrian easement across the Stuebners' property. The trial court reformed the certificate of title to indicate the existence of an easement in favor of the Nolans' land.

On appeal, the Stuebners contended they had no notice of the easement because it was not accurately described on their original certificate of title. This Court disagreed:

Appellants cannot claim that they had no notice of an easement across their land. Their certificate of title specifically cites two deed documents, one of which created an easement and the other

which defined the placement of the easement. Even though the easement may be ambiguous as stated in their original certificate of title, the Stuebners were on notice that such registered documents pertaining to their title existed. Additionally, the Stuebners were on record notice, and actual notice through their attorney's title opinion, that their certificate of title was clouded due to a 1969 deed by a predecessor in title, granting an easement on property partially not owned by the grantors.

The trial court correctly found that the Stuebners were not bona fide purchasers for value because of the actual and constructive notice of the claimed existence of the easements. Therefore, we believe the Stuebners' certificate of title could be altered since they were aware that some type of easement existed across their property.

429 N.W.2d at 923 (emphasis added).

Similarly, in *In Petition of Willmus*, No. C0-95-1136 (Minn. App. Jan. 30, 1996), *available at* 1996 WL 33095, Willmus sought an order requiring the Ramsey County Registrar of Titles to memorialize an easement on the certificate of title of his neighbors, the Doughertys. The district court initially ruled an easement was not binding on the Doughertys because, although the Doughertys' certificate of title referenced a registered land survey describing an easement, the easement did not explicitly appear on the Doughertys' certificate of title. This Court reversed the district court's summary judgment, noting first:

Persons who purchase registered land in good faith and for valuable consideration hold the land free from encumbrances not listed on the certificate of title and not listed by statute. Regarding good faith, while torrens law abrogates the doctrine of constructive notice of unregistered interests in land, it does not

‘do away with the effect of actual notice, although it imposes the burden of proving such notice upon the one asserting it.’ Therefore, to avoid summary judgment, Willmus must show a genuine issue of material fact regarding whether Doughertys had actual knowledge of the easement.

1996 WL 33095 at * 3, *quoting In re Juran*, 178 Minn. at 55, 226 N. W. at 202.

This Court then noted the evidence presented by Willmus as to the Doughertys’ knowledge of the easement, including a letter from the Doughertys to Willmus which referred to the easement, reversed the grant of summary judgment, and remanded the matter for an evidentiary hearing on the question of whether the Doughertys had actual knowledge of the easement. *Id.*¹ See also, *Hynek v. Sedgwick*, No. C1-92-1177 (Minn. App. Oct. 20, 1992), available at 1992 WL 295133 (buyer had actual knowledge of easement, and therefore took subject to it, where buyer’s deed referred to easement and easement was visible from the property); *Mill City Heating & Air Conditioning v. Nelson*, 351 N.W.2d 362, 364-65 (Minn. 1984) (holding that a material lien holder with actual notice of an ownership interest under an unregistered purchase agreement must give pre-lien notice to the holder of that interest to protect its mechanic’s lien rights).

¹ On remand, Willmus was unable to prove the Doughertys had actual knowledge of the easement before they purchased their property. *In re Petition of Willmus*, 568 N.W.2d 722, 726 (Minn. App. 1997). Here, Appellant Collier does not dispute he had actual knowledge of the Bank’s mortgage before purchasing the property.

Just last year, this Court recognized in *5th Street Ventures, LLC v. Frattalone's Hardware Stores, Inc.*, A03-2036 (Minn. App. Aug. 24, 2004), available at 2004 WL 1878822, a buyer with knowledge at the time of purchase of an unrecorded lease cannot be a good faith purchaser. *Id.* In 1995 Frattalone's Hardware Stores leased commercial space in the Marina Shopping Center under a ten-year lease. Shortly after the lease was signed, the property manager wrote a letter to Frattalone's confirming their "agreement" to allow Frattalone to fence in an area in front of the leased space. Frattalone constructed the fence and used the fenced space for the next seven years; its lease was never registered, even though the shopping center was Torrens property.

In 2002, the shopping center was sold to 5th Street Ventures, which assumed Frattalone's lease. 5th Street Ventures objected to Frattalone's use of the fenced-in area, arguing it had no notice of a lease covering that area. However, 5th Street Ventures conceded it knew when it purchased the property the Frattalone lease was not recorded and that Frattalone was using the fenced area. The district court made no findings regarding the extent of 5th Street Ventures' actual notice and, on appeal, this Court remanded for such findings, observing: "If appellant had actual knowledge of an unrecorded lease at the time of purchase, it cannot later seek the protection of the Torrens statute as a good-faith purchaser with no notice." *Id.*

Although 5th Street Ventures' knowledge of the unregistered lease was disputed in *Frattalone*, Collier's knowledge of the Bank's unregistered interests is not disputed here. Collier has testified, or otherwise admitted, that before purchasing the property, he received notice of the foreclosure sale, contacted the Bank and offered to buy out its interest under the mortgage and Sheriff's Certificate, conducted a title search, and learned that the Bank's mortgage and Sheriff's Certificate were recorded, but not registered. Collier also admits Conley told him the Bank claimed a mortgage on the property. *See Answers 8 and 16 to M&I's Request for Interrogatories, attached as Exhibit M to the Affidavit of Kathryn A. Gettman (June 18, 2004); Deposition of Joshua Collier, pp. 15:3-17, 19:7 – 20:18, 22:13-16, 46:11-22, attached as Exhibit A to the Affidavit of Kathryn A. Gettman.* As a result of his actual knowledge of the Bank's interests, Collier cannot now say that he acquired his interest in good faith as required by MINN. STAT. §508.25 and, thus, attain priority over the Bank's interests.

Collier also cites *Mill City Heating & Air Conditioning Co., supra*, for the proposition that, under the Torrens system, a person dealing with registered property need look no further than the certificate of title to know the state of that title. However, as the *Mill City* court held, a supplier with actual knowledge of an ownership interest of a purchaser of registered land under an unregistered purchase agreement must give that purchaser prelien notice under MINN. STAT. §514.011. *See* 351 N.W.2d at 365. In doing so, the Minnesota

Supreme Court cited MINN. STAT. §508.47 (noting that registration is the operative act to convey or affect the land), and reasoned:

We see no reason, however, when a subcontractor-materialman knows that a person has a purchaser's interest in land, that the subcontractor should not be required to give that person a prelien notice. In such an instance, it would be unfair and unreasonable for the law to allow the subcontractor to wear blinders and look only to the certificate of title.

See id. (emphasis added).

For that same reason, it would be unfair and unreasonable to allow Collier to cover his eyes and look only to the certificate of title when he knew, before purchasing the property, that the Bank claimed an interest under an unregistered mortgage and the unregistered Sheriff's Certificate. But this is precisely what Collier asked of the district court and what he is asking of this Court.

Indeed, Collier's construction of MINN. STAT. § 508.25 is contrary to the principles of statutory construction set forth in Minn. Stat. Chap. 645. Again, MINN. STAT. § 508.25 provides:

Every person receiving a certificate of title pursuant to a decree of registration and every subsequent purchaser of registered land who receives a certificate of title in good faith and for a valuable consideration shall hold it free from all encumbrances and adverse claims, excepting only the estates, mortgages, liens, charges, and interests as may be noted in the last certificate of title in the office of the registrar . . . (emphasis added)

Under MINN. STAT. § 645.17, this Court must presume the legislature intends all of § 508.25 “to be effective and certain.” *See also, Schaeffer v. Newberry*, 235 Minn. 282, 50 N.W.2d 477 (1951) (every term of a statute should be given meaning when possible). Yet, Collier’s construction of § 508.25 reads out of the statute the requirement that subsequent purchasers receive a certificate of title “in good faith and for a valuable consideration.” In Collier’s world, the certificate of title is sufficient, regardless of the circumstances under which it was obtained.

Collier’s interpretation is simply wrong. A purchaser with actual notice of an unregistered interest in land is not a good faith purchaser under Minnesota law.

II. Collier is deemed to have actual notice of the Bank’s mortgage, even if it is not enforceable against the land.

Even as Collier admits having actual knowledge of the Bank’s mortgage, he argues actual notice requires knowledge of an enforceable agreement. Because the Bank’s mortgage was not registered, Collier argues, it is by definition not enforceable, and therefore he can have no actual notice of it.

For this, Collier relies on *Comstock & Davis, Inc. v. G. D. S. & Associates*, 481 N.W.2d 82 (Minn. App. 1992), a case adjudicating the concept of “actual notice” in a different context. *Comstock*, a surveyor, foreclosed a mechanics’ lien. First Trust claimed its mortgage was prior to any mechanics’ lien. First

Trust's mortgage was dated November 25, 1986, but was not recorded until December 18, 1986. The first visible and actual improvements on the property—namely, Comstock's survey stakes—occurred in the interim, on December 3, 1986.

The question on appeal was whether Comstock had actual notice, sufficient to satisfy Minn. Stat. § 514.05,² of the First Trust mortgage. The trial court found actual notice based strictly on circumstantial evidence. Specifically, the trial court found Comstock's years of experience as a surveyor "must have imputed knowledge of some financing arrangement, since such arrangements are commonplace in projects of this size." 481 N.W.2d at 84. This Court rejected the trial court's determination. As this Court observed, "generalized knowledge of non-specific financing to be arranged at some point in the future is insufficient to satisfy the actual notice standard." This Court noted "the record contains no evidence showing actual knowledge by [Comstock] of a signed enforceable mortgage agreement before the field staking on December 3, 1986." 481 N.W.2d at 85.

² MINN. STAT. § 514.05 provides:

All such liens, as against the owner of the land, shall attach and take effect from the time the first item of material or labor is furnished upon the premises for the beginning of the improvement, and shall be preferred to any mortgage or other encumbrance not then of record, unless the lienholder had actual notice thereof.

Collier contends Comstock prevailed over First Trust because First Trust's unregistered mortgage was not enforceable. That is, Collier argues Comstock's mechanics' lien was superior to First Trust's mortgage simply because First Trust's mortgage was unregistered (and therefore "unenforceable")—regardless of the state of Comstock's knowledge:

[I]f actual notice requires knowledge of an enforceable agreement, Appellant's knowledge of the existence of the purported mortgage, as well as his knowledge it was unregistered, and his knowledge that the law requires registration to render a mortgage 'effective' would mean Appellant has no 'actual knowledge.'

Appellant's Brief at p. 6, citing Comstock v. Davis. In fact, this Court ruled for Comstock because First Trust had failed to prove Comstock had "actual notice" of its mortgage: "generalized knowledge of non-specific financing to be arranged at some point in the future is insufficient to satisfy the actual notice standard." 481 N.W.2d at 84.

If Collier is correct, and actual knowledge requires knowledge that the mortgage is on the certificate of title and therefore "enforceable," actual knowledge is still irrelevant: the purchaser never has actual knowledge of anything which is not on the certificate of title. Put another way, Collier is arguing there can never be "actual knowledge" of any interest which is not on the certificate of title, since by definition such interests are not "enforceable" and "actual knowledge" is limited to "enforceable" interests. But this circular reasoning again renders the good faith limitation in Minn. Stat. § 508.25

irrelevant. The legislature cannot have intended such a result, as the Examiner of Titles observed in an October 21, 2004, letter to the district court:

The difficulty seems to arise in defining exactly what constitutes actual notice and of what the holder of a certificate must have notice.

The most restrictive interpretation of the actual notice requirement would be to require actual knowledge of a document properly filed on the certificate of title. This would seem to make the good faith requirement superfluous, in that a purchaser of Torrens property is, pursuant to the Torrens act, already subject to the properly filed interests, because they appear upon the face of the certificate of title. When interpreting statutes, every word must be given meaning. Therefore, the most restrictive interpretation cannot be correct.

October 21, 2004, letter from Wayne D. Anderson, Deputy Examiner of Titles, to The Honorable M. Michael Monahan, included in Respondent's Appendix.

Nor, contrary to Collier's position, does *Fingerhut Corp. v. Suburban National Bank*, 460 N.W.2d 63 (Minn. App. 1990), render Minn. Stat. § 508.25 irrelevant. In *Fingerhut*, Connelly defrauded Fingerhut of a large amount of money, some of which was used to purchase and improve a home in Carver County. While Fingerhut's investigation was proceeding, on August 25, 1986, Suburban National Bank agreed to loan Connelly \$50,000, to be secured by a mortgage on the Carver County property. Three days later, on August 28, Fingerhut filed suit against Connelly. On August 29, 1986, Fingerhut filed a lis pendens against the Carver County home at the same time Connelly was signing the mortgage and Suburban was disbursing the \$50,000 proceeds.

Suburban's mortgage was registered on September 2. Significantly, Fingerhut did not know the Connellys had given a mortgage to Suburban, nor did Suburban know about Fingerhut's claim to the property. 460 N.W.2d at 65. Fingerhut eventually traced \$141,000 of its funds directly to the property, and a federal district court ordered legal title to the property be vested in Fingerhut as of no later than August 29, 1986.

Fingerhut brought a quiet title action against Suburban. The trial court found that because the property was Torrens and Fingerhut's notice of lis pendens was registered before the Suburban mortgage, Fingerhut's interest in the property was superior. On appeal, this Court agreed. However, as indicated above, the question of notice was never before the Court: it was undisputed neither Fingerhut nor Suburban had notice of the claims of the other. Rather, *Fingerhut* addressed the priority of two registered interests.

Nor can Collier characterize this appeal as one involving constructive notice. Collier did not have constructive notice of the Bank's interest and thus, constructive notice and any analysis thereof is irrelevant. Collier had actual knowledge. The Torrens Act does not do away with the effect of actual notice, and the cases Collier cites support that position. *See Kane v. State*, 55 N.W.2d 333, 338 (Minn. 1952) (buyer of registered property not charged with actual notice of a restrictive covenant shown only on the reverse side of subdivision plat and not on the certificate of title); *Mill City Heating & Air Conditioning, supra*,

(holding that material lien holders with actual notice of an ownership interest under an unregistered purchase agreement must give pre-lien notice to the holder of that interest to protect its mechanic's lien rights); *In re Juran*, 226 N.W. at 202 (Torrens Act "does not do away with the effect of actual notice.").

Similarly, there is no support for Collier's position that Minn. Stat. § 508.54 invalidates the Bank's claimed interest in the property vis-à-vis Collier. *Appellant's Brief at p. 5* ("*Appellant's actual notice of the existence of the M & I mortgage is irrelevant. It is irrelevant because, by specific statute, it is the act of registration that renders the mortgage 'effective.'*"). In *Finnegan v. Gunn*, 207 Minn. 480, 292 N. W. 22 (1940), the Minnesota Supreme Court, considering the predecessor to MINN. STAT. §508.54, noted that persons like Collier, who are not bona fide purchasers of legal title, are not in a position to assert superior claims to title. Finnegan gave a mortgage to one Daniel Gunn without telling his own wife. The mortgage was never registered, and Mrs. Finnegan did not know about the mortgage until after her husband's death. Eventually both Gunn and Finnegan died. Upon Mr. Finnegan's death, Mrs. Finnegan argued she took the mortgaged property free and clear of Gunn's mortgage. The trial court disagreed, and ordered the mortgage registered.

Mrs. Finnegan appealed, but the Minnesota Supreme Court upheld the validity of the unregistered mortgage. The Court first observed:

Nothing in the Torrens system indicates that the ancient concepts of equity are not applicable under such circumstances. In equity, although Finnegan had legal title, he nevertheless held it for the benefit of Gunn to the extent of the security. This conclusion does not create a lien by judicial decision contrary to statute. Rather it is the recognition of the simplest notions of justice and good faith.

292 N. W. at 482-483. The Court then turned to Finnegan's widow:

Appellant, as devisee, is not in a position to assert a superior claim. She is not in the position of a bona fide purchaser of the legal title. She did not acquire her interest on the faith of the registered title. Instead, she merely succeeded to the rights of her husband and attached to them were the duties. . . . Respondent, on the other hand, succeeded to the rights of one who in all justice was entitled to obtain the security which the land was intended to afford. In view of this, the trial court correctly ordered the mortgage to be registered as a lien . . .

292 N. W. at 23.

Like Finnegan's widow, Collier did not acquire his interest in the property on the faith of the certificate of title; in fact, Collier admits he knew the certificate of title was wrong. Nothing in the Torrens system requires Collier be given the benefit of something he knew to be wrong.

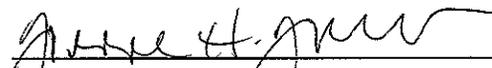
CONCLUSION

Minnesota courts have made their position with respect to this issue clear: the Torrens Act abrogates constructive notice only, it does not do away with the effect of actual notice. Thus, a person having actual notice or knowledge of a prior unregistered interest in Torrens property does not have

priority over the unregistered interest. For the foregoing reasons, the judgment of the district court must be affirmed.

Dated: August 8, 2005

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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) (with amendments effective July 1, 2007).