

NO. A05-1178

State of Minnesota
 In Supreme Court

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, ADDENDUM, AND APPENDIX
 OF APPELLANT M&I BANK FSB

MACKALL, CROUNSE & MOORE, PLC
 Allen E. Christy, Jr. (#16858)
 Timothy J. Grande (#15040X)
 1400 AT&T Tower
 901 Marquette Avenue
 Minneapolis, MN 55402
 (612) 305-1400

Attorneys for Appellant M&I Bank FSB

A. D. WALSH & ASSOCIATES
 Arthur D. Walsh (#114121)
 6053 Hudson Road, Suite 190
 Woodbury, MN 55125
 (651) 501-1916

Attorneys for Respondent Wager

WESTRICK & MCDOWALL-NIX, PLLP
 John G. Westrick (#206581)
 Kirk M. Anderson (#338175)
 450 Degree of Honor Building
 325 Cedar Street
 St. Paul, MN 55101
 (651) 292-9603

Attorneys for Respondent Collier

HENNEPIN COUNTY EXAMINER
 OF TITLES
 Edward A. Bock, Jr. (#9246)
 A-701 Hennepin County Government Center
 300 South Sixth Street
 Minneapolis, MN 55487
 (612) 348-3191

Amicus Curiae

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ISSUE ON APPEAL

Section 508.25 of the Minnesota Statutes requires, as a condition precedent to its application to bar unregistered interests, that one purchases registered land “in good faith” and “for a valuable consideration”. Is the “good faith” required by the statute negated when one purchases with actual notice and actual knowledge of a prior mortgage and Sheriff’s Certificate of Sale innocently recorded but not “registered” by mistake or oversight, for unconscionably less than fair market value, so that the purchaser’s interests are subject to the mortgage?

The Minnesota State District Court, Second Judicial District, Ramsey County, Minnesota (the Honorable M. Michael Monahan) ruled that the “good faith” required by MINN. STAT. § 508.25 was negated in such an instance, so that the interests of the purchaser (i.e. Respondent Joshua Collier) were subject to the mortgage of Appellant M&I Bank FSB. The Minnesota Court of Appeals (the Honorable Judges Lansing, Schumaker, and Halbrooks) ruled that the actual notice and actual knowledge of the purchaser was (essentially) irrelevant, because the mortgage was not properly registered.

MINN. STAT. § 508.25

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

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

STATEMENT OF THE CASE

Respondent Joshua Collier acquired a deed to Torrens property located in Ramsey County, Minnesota, with actual notice and actual knowledge of a \$135,000.00 mortgage owned by Appellant M&I Bank FSB that was recorded in the office of the Ramsey County Recorder, but not the Ramsey County Registrar of Titles, for a total purchase price of \$5,000.00. This case was subsequently commenced on behalf of Respondent Collier by filing the Petition Subsequent to Initial Registration of Land in the Minnesota State District Court, Second Judicial District, Ramsey County, Minnesota, on November 4, 2003. The Petition seeks an order for declaratory relief that no person has any interests in the real property described in Certificate of Title No. 533700 in the office of the Ramsey County Registrar of Titles, except as shown or memorialized on the Certificate. Following issuance and filing of the Report of Examiner by the Ramsey County Examiner of Titles dated November 17, 2004, Appellant caused its Answer dated December 15, 2004, to be served and filed. The Answer controverts many of the averments in the Petition, and requests that the mortgage owned by the Appellant be adjudicated a first lien on the real property as intended, and that all interests reflected or memorialized on the Certificate of Title be adjudicated junior thereto.

During the Fall of 2004, all parties moved for summary judgment. Respondent Collier sought to eliminate the mortgage lien claimed or asserted

by the Appellant, the Appellant sought to establish the interests of the Respondents as junior to its mortgage lien, and Respondent Wager sought to establish the priority of a mortgage granted him by Respondent Conley over the claimed or asserted mortgage lien of Appellant M&I Bank. The district court, the Honorable M. Michael Monahan presiding, executed and entered the Interlocutory Order dated and filed December 22, 2004, granting the motion of Appellant M&I Bank FSB as to Respondent Collier, ruling his interests subject to the Appellant's mortgage lien, denying Respondent Collier's motion, denying the Appellant's motion as to Respondent Wager, and denying Respondent Wager's motion. The district court ruled that:

Joshua S. Collier is not a good faith purchaser for value within the meaning of, and as contemplated by, Minn. Stat. § 508.25, and his interest, if any, in the real property described in Certificate of Title No. 533700 was at all times, and remains, subject to and junior to the interests of M&I Bank FSB.

Interlocutory Order dated December 22, 2004, at ¶ 3 [A-176 at -176].

By stipulation dated March 7, 2005, the Appellant and Respondent Wager settled the claims between them. Thereafter, the district court entered its final judgment on May 9, 2005, and Respondent Collier appealed from this judgment on June 13, 2005. The court of appeals reversed the district court by issuing its Opinion herein dated April 4, 2006, ruling:

A mortgage does not become an encumbrance, for purposes of the Torrens statute, until it is registered. Collier's knowledge of the bank's unregistered mortgage was not actual notice of an encumbrance or

interest that was inconsistent with his interest. Therefore, Collier is a good-faith purchaser, and his registered interest is superior to the bank's unregistered interest.

In the Matter of the Petition of Joshua S. Collier, 711 N.W.2d 826, 831 (Minn. Ct. App. 2006) [A-186 at -191].

This appeal by Appellant M&I Bank FSB followed. The Appellant timely served and filed its Petition for Review dated May 3, 2006, and the Petition was granted by the Order of the Minnesota Supreme Court dated June 20, 2006 [A-192].

STATEMENT OF FACTS

On September 25, 2000, Great Northern Mortgage Corporation loaned Joseph Conley \$135,000, creating indebtedness evidenced by Mr. Conley's note of even date.¹ Repayment of the indebtedness and the note was secured by a mortgage executed by Mr. Conley, dated September 25, 2000, encumbering the real property described in the mortgage as Lot 2, Stipe's Rearrangement, in St. Paul, Minnesota.² The same day (i.e. September 25, 2000), Great Northern Mortgage Corporation negotiated the note, and by the written assignment assigned all its rights in the indebtedness and the mortgage to Appellant M&I Bank FSB.³

On November 20, 2000, the title company recorded the mortgage and the assignment as document numbers 3357407 and 3357408, respectively, in the office of the county recorder in and for Ramsey County, Minnesota.⁴ However, the property title⁵ is registered pursuant to MINN. STAT. ch. 508 (the "Torrens Act"), and thus the mortgage and its assignment should have been filed in the office of the registrar of titles.

¹ See Affidavit of Katheryn A. Gettman dated June 18, 2004, on file herein (hereinafter the "Gettman Aff."), at ¶ 5 and Ex. D [A-55 at -56, -111].

² See *id.*

³ See *id.* at ¶ 6 and Ex. E [A-55 at -56, -120].

⁴ See *id.* at ¶ 5 and Ex. D, and ¶ 6 and Ex. E [A-55 at -56, -111, and -56, -120].

⁵ See *id.* at ¶ 9 and Ex. H [A-55 at -56, -132].

In 2002, Conley defaulted on the mortgage. On December 4, 2002, to commence foreclosure the Appellant filed a Power of Attorney to Foreclose the mortgage.⁶ The Appellant scheduled a mortgage foreclosure sale for March 11, 2003, and published the Notice of Mortgage Foreclosure Sale the first time on December 23, 2002.⁷ Conley was served notice of the foreclosure personally on January 9, 2003.⁸ On March 11, 2003, the Ramsey County Sheriff foreclosed the mortgage and sold the property to the Appellant for \$118,000, subject to redemption by Mr. Conley (or his successors or assigns) within six months following the date of the sale.⁹ However, because of the title company's earlier mistake in filing the mortgage and assignment in the county recorder's office, the Appellant also filed the Power of Attorney to Foreclose the Mortgage and the Sheriff's Certificate of Sale the county recorder's office rather than the county registrar's office.¹⁰

Monthly, Respondent Joshua Collier obtained from the Ramsey County Sheriff's office notices of mortgage foreclosures and supporting documentation.¹¹

⁶ *See id.* at ¶ 7 and Ex. F [A-55 at -56, -123].

⁷ *See id.*, at ¶ 8 and Ex. G [A-55 at -56, -125].

⁸ *See id.*

⁹ *See id.*

¹⁰ *See id.*, at ¶ 7 and Ex. F, and ¶ 8 and Ex. G [A-55 at -56, -123, and -56, -125].

¹¹ *See* Deposition of Joshua Collier dated May 10, 2004 (hereinafter "Collier Depo."), at p. 16, attached as Ex. A to the Gettman Aff., and Answers to First Set of Interrogatories and Requests for Documents dated April 16, 2004 (hereinafter "Collier Interrogatory Answers"), at Answer to no. 13, attached as Exhibit M to the Gettman Aff. [A-55 at -55, -61, and -57, -146].

Through this process, on April 1, 2003, Respondent Collier first learned of the sheriff's sale of the property.¹² He obtained copies of the notice of sale and sale by advertisement of the property from the sheriff's department and contacted the Appellant.¹³ From these documents and contacts, he learned of the Appellant's interest in the property, its mortgage, and the prior foreclosure. Respondent Collier contacted M&I Bank, offering to purchase Mr. Conley's indebtedness and the Appellant's position in the property on behalf of Blue Heron, Inc. ("Blue Heron"), a real estate investment company.¹⁴ Respondent Collier contacted the Appellant two or three times during mid-April, 2003, and discussed the amount the Appellant was owed, and attempted to negotiate a discount and a purchase of the Respondent's interest in the property.¹⁵

When the Appellant rejected Blue Heron's offer, the Respondent conducted a title search of the property and learned the sheriff's certificate and the mortgage were recorded but not registered.¹⁶ Notwithstanding the actual knowledge acquired by the Respondent through his conversations with and materials received from the Ramsey

¹² Gettman Aff., at ¶ 14 and Ex. M (Collier Interrogatory Answers, at Answer to no. 13) [A-55 at -57, -146].

¹³ Gettman Aff., at ¶ 2 and Ex. A (Collier Depo. at p. 16), and Ex M (Collier Interrogatory Answers, at Answers to no. 13 [A-55 at -55, -61, and -57, -146].

¹⁴ *Id.* at ¶ 14 and Ex. M (Collier Interrogatory Answers, at Answers to nos. 8 & 13) [A-55 at -57, -145, -146].

¹⁵ *See id.* at ¶ 2 and Ex. A (Collier Depo. at pp. 46 & 49-50), and ¶ 14 and Ex. M (Collier Interrogatory Answers, at Answers to nos. 8 & 13) [A-55 at -55, -69, -70, and -57, -145, -146].

¹⁶ *Id.* at ¶ 14 and Ex. M (Collier Interrogatory Answers, at Answer to no. 8) [A-55 at -57, -145].

County Sheriff's office, his conversations with the Appellant, and the documentation obtained from the land title records, the Respondent told the owner of Blue Heron, Mark Ervajec, the Respondent 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.

Gettman Aff., at ¶ 2 and Ex. A (Collier Depo., at pp. 19-20) [A-55 at -55, -62]. Thus, the Respondent and Blue Heron had actual knowledge of the mortgage and interests asserted by the Appellant resulting from the foreclosure, the only debate between the Respondent and Blue Heron being about the effect of the filings in the office of the county recorder, as opposed to the office of the registrar of titles. Blue Heron elected not to purchase.

Respondent Collier proceeded, and signed a written agreement dated April 22, 2003, to purchase Conley's interest in the property for \$5,000.¹⁷ Collier knew when he signed the purchase agreement with Conley that the mortgage was not memorialized on the Certificate of Title, but he did not inform Mr. Conley of this discovery or share his opinions with Mr. Conley.¹⁸ A total of \$5,000 was paid for the property,¹⁹ and on April 24, 2003, Conley conveyed the property to Respondent Collier by warranty deed.²⁰ The same day, Respondent Collier obtained a loan in the amount of \$145,000 from Respondent Dennis Wager, repayment of which was secured by a mortgage encumbering the property.²¹ Both the deed from Conley to Respondent Collier and the mortgage from Respondent Collier to Wager were registered with the Ramsey County Registrar of Title's office on April 24, 2003.²² There is no evidence Respondent Collier paid anything further to either Conley or Blue Heron, or that Respondent Collier has repaid anything to Respondent Wager.

¹⁷ Gettman Aff., at ¶ 10 and Ex. I, and ¶ 2 and Ex. A (Collier Depo., at p. 22) [A-55 at -56, -133, and -55, -63].

¹⁸ *See id.*

¹⁹ Deposition of Joseph R. Conley dated May 13, 2004 (hereinafter "Conley Depo."), at p. 14, attached as Ex. C to the Gettman Aff. [A-55 at -55, -104].

²⁰ *See* Gettman Aff., at ¶ 11 and Ex. J [A-55 at -56, -134].

²¹ *See id.* at ¶ 12 and Ex. K [A-55 at -57, -137].

²² *See id.* at ¶ 11 and Ex. J, ¶ 12 and Ex. K, and ¶ 13 and Ex. L [A-55 at -56, -134, and -57, -137, and -57, -142].

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

ARGUMENT

Standard of Review

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. Ct. 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.*

In the present case, the parties do not dispute Respondent Collier knew of both Appellant'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 Respondent Collier's interest in the property was subject to the Appellant's mortgage. The district court's opinion is well supported by, and consistent with Minnesota law, interpreting the good faith embodied in MINN. STAT. § 508.25. Because Respondent Collier had actual notice and actual knowledge of the Appellant's recorded but unregistered mortgage at the time of his purchase, and paid

unconscionably less than market value for the property, he cannot later seek the protection of the Torrens statutes as one who purchased in "good faith". For this reason, the appellate court's decision must be reversed, and the district court's decision must be reinstated.

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

This action concerns registered or Torrens land. The issue presented is whether the interests of Respondent Collier, who purchased the land with actual notice and actual knowledge of the Appellant's interests under the recorded but unregistered mortgage and sheriff's certificate,²³ for unconscionably less than fair market value,²⁴ are subject to the mortgage. Section 508.25 of the Minnesota Statutes 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

²³ It is clear that Respondent Collier had actual knowledge of the Appellant's mortgage and the sheriff's certificate before he purchased. First, he had been advised by the Ramsey County Sheriff's office of the mortgage, and the fact the Appellant asserted its interests in the property pursuant to the mortgage to the fullest extent of foreclosing the mortgage. The Respondent had been advised of the Sheriff's Certificate of Sale, and knew the Appellant purchased at the sheriff's sale. Obviously he had knowledge of these facts, because he contacted the Appellant directly, negotiated, and attempted to purchase the Appellant's interests. During the Respondent's negotiations and discussions with the Appellant, they were negotiating over and discussing the interests being asserted by the Appellant, namely the mortgage encumbering the property, and the Appellant's interests as the purchaser at the mortgage foreclosure sale under the Sheriff's Certificate of Sale. These facts are not disputed.

²⁴ It is clear Conley was paid only \$5,000 for the property, when Respondent Collier knew the Appellant's mortgage was initially in the amount of \$135,000.00, and the Appellant purchased at the foreclosure sale for \$118,000. These facts are not disputed.

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)

The question presented is whether a purchaser of registered land with actual notice and actual knowledge of the prior interests, paying far less than the market value of the property, receives the certificate of title “in good faith”.

Both the Recording Act (MINN. STAT. ch. 507) and the Torrens Act (MINN. STAT. ch. 508) provide protections to purchasers of real property only if they purchase “in good faith” and “for a valuable consideration”. Compare MINN. STAT. § 507.34, *with* MINN. STAT. § 508.25. Notice or knowledge of an existing or prior interest in the land, of one sort or another, deprives purchasers of “good faith” and the protections otherwise provided.

Purchasers of abstract property have their “good faith” negated and lose the protections of the Recording Act unless they “give valuable consideration without actual, implied, or constructive notice of inconsistent outstanding rights of others.” See *Miller v Hennen*, 438 N.W.2d 366, 369 (Minn. 1989). On the other hand, generally purchasers of Torrens property do not have their “good faith” negated and do not lose the protections of the Torrens Act as a result of constructive notice of contrary interests in the land.²⁵ *In re Juran*, 178 Minn. 55, 55, 226 N.W. 201, 202 (1929);

²⁵ The only constructive notice negating the “good faith” of purchasers of abstract property and purchasers of Torrens property alike is that furnished by a properly recorded document. Compare *Latonnell v Hobart*, 135 Minn. 109, 113, 160 N.W. 259, 260 (1916) (abstract property), *with* Minn. Stat.

Andrews v Benson, 476 N.W.2d 194, 198 (Minn. Ct. App. 1991). Constructive notice is a creature of the law, imputing notice to a purchaser even though the purchaser has no actual notice or actual knowledge. See *Anderson v Graham Investment Co.*, 263 N.W.2d 382, 384 (Minn. 1978). Quite typically, purchasers of Torrens property take the property subject only to those matters set forth on the certificate of title. See MINN. STAT. § 508.25. Thus, possession constituting constructive notice does not negate the “good faith” of purchasers of Torrens property and render them subject to the interests of the parties in possession (see *Moore v Herricksen*, 282 Minn. 509, 520, 165 N.W.2d 209, 218 (1969); *Abrahamson v Sundman*, 174 Minn. 22, 218 N.W. 246 (1928)), as it does the “good faith” of purchasers of abstract property (see *Johnson v Mugg*, 261 Minn. 451, 454, 113 N.W.2d 1, 3 (1962)). This is a significant difference between abstract property and the Recording Act, and Torrens property and the Torrens Act.

In contrast, actual notice or actual knowledge has similar consequence to purchasers of abstract property and purchasers of Torrens property. It is well settled in Minnesota that a person, like Respondent 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

§ 508.25 (Torrens property). 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. 55, 55, 226 N.W. 210, 202 (1929); *Andrews v Benson*, 476 N.W.2d 194, 198 (Minn. Ct. App. 1991) (respondents had constructive notice of perpetual existence of covenants entered on the certificate of title).

or Torrens. See MINN. STAT. §§ 507.34 (abstract), 508.25 (Torrens); see also *Republic Nat. Life Ins. Co. v Marquette Bank & Trust Co. of Rochester*, 312 Minn. 162, 166-67, 251 N.W.2d 120, 123 (1977) (Recording Act); *Cook v Luettich*, 191 Minn. 6, 252 N.W. 649 (1934) (Torrens Act); *In re Juran*, 178 Minn. 55, 226 N.W. 201 (1929) (Torrens Act); *Scott v Marquette Nat. Bank*, 173 Minn. 225, 229, 217 N.W. 136, 138 (1927) (Recording Act); *Andrews v Benson*, 476 N.W.2d 194, 198 (Minn. Ct. App. 1991) (Torrens Act); *In re Alchimedēs/Brookwood Ltd P'ship*, 546 N.W.2d 41, 42 (Minn. Ct. App. 1996) (Torrens Act); *In re Petition of Willmus*, No. CO-95-1136, 1996 WL 33095 (Minn. Ct. App. Jan. 30, 1996) (Torrens Act). Distinguishing between constructive notice and actual notice or actual knowledge while referencing the impact of the Torrens Act on the law as it otherwise exists, this Court has written, and it has become well established law in this jurisdiction, that:

[The Torrens] act 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.²⁶

In re Juran, 178 Minn. 55, 60, 226 N.W. 201, 202 (1929); see *Cook v Luettich*, 191 Minn. 6, 8, 252 N.W. 649, 650 (1934) (the Torrens act has not eliminated the effect to be given actual notice of unregistered conveyances). Accordingly, purchasers of Torrens property must take their interest in good faith and for valuable consideration in order

²⁶ Although *In re Juran* references “actual notice” as defeating good faith, and “actual notice” has been interpreted as requiring “actual knowledge” (see *In re Petition of Willmus*, 568 N.W.2d 722, 726 (Minn. Ct. App. 1997), citing *Kirkwood Constr. Co. v M.G.A. Constr., Inc.*, 513 N.W.2d 241, 244 (Minn. 1994)). It is intuitively logical that “actual notice” and “actual knowledge” are equivalent to each other. See *In re Alchimedēs/Brookwood Ltd P'ship*, 546 N.W.2d 41, 42 (Minn. Ct. App. 1996);

to prevail over an existing contrary interest, meaning they must do so without notice or knowledge of the contrary interest. 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 instances involving actual notice or actual knowledge, the similarities between the Recording Act and the Torrens Act have been noted. *See In re Oxxen Financial Services, Inc.*, 649 N.W.2d 854, 857 (Minn. Ct. App. 2002) (noting the Recording Act is “race-notice” in a case involving Torrens property, and stating “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”).

Minnesota courts have consistently refused to give subsequent purchasers like Respondent Collier, who have actual knowledge of prior unregistered interests, the protection of the Torrens Act. For example, in *Nolan v Stuebner*, 429 N.W.2d 918 (Minn. Ct. 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. 429 N.W.2d at 921. The Stuebners’ certificate of title indicated the existence of an easement, but over property which was partially conveyed to a third party previously. 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. The court of appeals 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. CO-95-1136 (Minn. Ct. 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. The court of appeals 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 Juman*, 178 Minn. at 55, 226 N.W. at 202. The court of appeals 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.*²⁷ See also, *Hynek v Sedgwick*, No. C1-92-1177

²⁷ 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. Ct. App. 1997). Here, Appellant Collier does not dispute he had actual knowledge of the Appellant's mortgage and Sheriff's Certificate of Sale before purchasing the property.

(Minn. Ct. 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 mechanics 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 mechanics lien rights).

In *5th Street Ventures, LLC v Frattalone's Hardware Stores, Inc.*, A03-2036 (Minn. Ct. App. Aug. 24, 2004), *available at* 2004 WL 1878822, a buyer of Torrens property with knowledge at the time of purchase of an unrecorded lease was denied good faith purchaser status. 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, the court of appeals 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*, Respondent Collier's knowledge of the Appellant's unregistered interests is not disputed here. Respondent Collier testified, and otherwise admitted, that before purchasing the property he received notice of the mortgage and the foreclosure sale, contacted the Appellant and negotiated to purchase its interest under the mortgage and Sheriff's Certificate, conducted a title search, and learned that the Appellant's mortgage and Sheriff's Certificate were recorded, but not registered. Respondent Collier also admits Conley told him the Appellant claimed a mortgage on the property.²⁸ As a result of his actual knowledge of the Appellant's interests, Respondent 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 Appellant's interests.

The court of appeals in this case reversed the district court, based on its interpretation that the "good faith" requirement of MINN. STAT. § 508.25 is negated by actual notice or actual knowledge only of an "encumbrance", technically requiring

²⁸ See Gettman Aff., at ¶ 2 and Ex. A. (Collier Depo. at pp. 15, 19-20, 22 & 46), and ¶ 14 and Ex. M (Collier Interrogatory Answers, at Answer to nos. 8 & 16) [A-55 at-55, -61 to -63, -69, and -57, -145, -146].

registration. 711 N.W.2d at 831 [A-186 at -191]. The court of appeals interpretation is not correct.

The court of appeals interpretation of MINN. STAT. § 508.25 is contrary to the principles of statutory construction set forth in MINN. STAT. ch. 645. Again, Section 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)

Section 645.17 of the Minnesota Statutes requires that we presume the legislature intended all of Section 508.25 “to be effective and certain.” *See also, Schaeffer v Neuberry*, 235 Minn. 282, 50 N.W.2d 477 (1951) (every term of a statute should be given meaning when possible). To construe “in good faith” as negated exclusively by actual notice or actual knowledge of matters properly registered and set forth on the certificate of title, renders the phrase “in good faith” a nullity and entirely superfluous. This follows because these are precisely the interests the purchaser is subject to by the language set forth in the statute itself following the phrase “in good faith”. *See* MINN. STAT. § 508.25. Further, this construction also renders the phrase “in good faith” a nullity and superfluous because long standing Minnesota case law provides that a purchaser of Torrens property is subject to matters set forth on the certificates of title. *See, e.g., In re Juran*, 178 Minn. 55, 55, 226 N.W. 210, 202 (1929). Applying the

court of appeals construction to the requirement that one receiving a certificate of title “in good faith” in order in order to bar unregistered interests of which he has actual knowledge, and leave him subject only to those matters on the last certificate of title, renders the phrase irrelevant. This was the concern of the Ramsey County Examiner of Titles, as he observed in his letter to the district court dated October 21, 2004:

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 [A-162 at -162].

The court of appeals ruled that the act of registration is the only factor of significance when determining whether actual knowledge or actual notice of a contrary interest in Torrens property negates the “good faith” requirement of MINN. STAT. § 508.25. While other sections within the Torrens Act contain language dealing with the act of registration, none of them define the subject matter of which a purchaser must have actual notice or actual knowledge to negate the “good faith”

requirement of MINN. STAT. § 508.25, and all of them may be given full effect consistent with the construction given MINN. STAT. § 508.25 by the district court.

The court of appeals Opinion infers the existence of some sort of tension with Section 508.47, subd. 1, which provides that voluntary instruments of conveyance purporting to convey or affect registered land operate only as contracts between the parties, and that the act of registration is the operative act to convey or affect the land, and Section 508.54 which provides that mortgages take effect *upon the title* only from the time of registration. 711 N.W.2d at 829 [A-186 at -189 to -190]. However, there is no plausible reason why a purchaser's good faith cannot be defeated by actual notice or actual knowledge of such interests, while such interests otherwise remain unenforceable²⁹ until registered. See, e.g., MINN. STAT. § 580.02 (3) (cannot foreclose a

²⁹ Counsel for the Appellant has not located any Minnesota appellate authority ruling determining "actual notice" or "actual knowledge" for purposes of defeating the "good faith" requirement of MINN. STAT. § 508.25 is limited to actual notice or actual knowledge of "enforceable" interests. However, the lack of registration cannot be the required basis upon which one is exonerated from his actual notice or actual knowledge. After all, if registered, there would be no issues, or there would be quite different issues. In *Mill City Heating & Air Conditioning*, 351 N.W.2d 362, 365 (Minn. 1984), the court held actual notice or actual knowledge of an unregistered purchase agreement on Torrens property (hence, not "enforceable" under MINN. STAT. § 508.47, subd. 1) would be sufficient to require a prelien notice to the purchasers to protect its mechanic's lien rights). In other contexts, see, e.g., *Comstock & Davis, Inc. v G.D.S. & Associates*, 481 N.W.2d 82, 85 (Minn. Ct. App. 1992) (for purposes of "actual notice" under MINN. STAT. § 514.05 the 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 . . ." and 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."); *Levine v Bradley Real Estate Trust*, 457 N.W.2d 237, 240 (Minn. Ct. App. 1990) (for purposes of MINN. STAT. § 507.34 ". . . conversation only put Respondent on notice that a document concerning parking privileges might be signed, not that an executed parking easement actually existed. Because the phone conversation did not convey knowledge of a signed, enforceable easement, the trial court correctly concluded respondent did not have actual notice of the 1979 easement.").

mortgage on Torrens property until the mortgage and all assignments are registered). Requiring that an interest be “enforceable” before actual notice or actual knowledge of it becomes significant, is tantamount to a requirement that the interest first be adjudicated “enforceable” in a binding proceeding before actual notice or actual knowledge of it may negate a purchaser’s “good faith”. This would ignore the fact that many interests may be disputed or contested, yet nonetheless “enforceable” and very real even though not sanctioned in a binding court proceeding. Instead, purchasers under these circumstances are subject to the interests of which they have actual notice or actual knowledge, subject to later judicial negation or confirmation and the binding determination of enforceability. The court of appeals also referenced Section 508.48, which clarifies that conveyances affect title to registered land if registered and constitute notice to all persons from the time of registration. 711 N.W.2d at 829. However, this provision does not purport to deny significance to unregistered interests, and makes purchasers subject to constructive notice of registered interests. There is simply no significant erosion of the many benefits bestowed by the Torrens Act that results from purchasers like Respondent Collier being subject to unregistered interest of which he had actual notice and actual knowledge, especially when he received his certificate of title paying unconscionably less than fair market value for the property. *See Finley v Finley*, 43 Wash. 2d 755, 762, 264 P.2d 246, 251 (1953), citing R.G. Patton, *The Torrens System of Land Title Registration*, 19 Minn. L. Rev. 519, 534 (1935).

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 Respondent Collier who are not bona fide purchasers of legal title, are not in a position to assert superior claims to title. Without telling his own wife, Finnegan gave a mortgage to Daniel Gunn. 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. 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, and 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. This establishes that a mortgage need not be registered on a certificate of title in order to be “enforceable” under MINN. STAT. § 508.54 and burden the interests of one receiving a subsequent certificate.

In *Mill City Heating & Air Conditioning v Nelson*, 351 N.W.2d 362 (Minn. 1984), the registered owner of Torrens property sold the property on an unregistered purchase agreement to the Nelsons. Thereafter, mechanics lien claimants began furnishing materials and labors for the improvement of the property at the request of the registered owner/seller. 351 N.W.2d at 363. When the lien claimants later sought foreclosure of their liens, the district court granted summary judgment against them because they had not served pre-lien notices required by Minn. Stat. § 514.011, subd. 2, upon the Nelsons, holding them to be “owners” for purposes of Minn. Stat. § 514.011, subd. 2. *See id.* at 364.

The Minnesota Supreme Court noted that “[t]he issue, then, is whether a purchaser under an unrecorded purchase agreement for registered land is an “owner” within the terms of MINN. STAT. § 514.011 (1984), the prelien notice statute, and thereby entitled to a prelien notice.” *Id.* The court, relying on MINN. STAT. §§ 508.47, subd. 1, and 508.25, as well as *In re Juran*, 178 Minn. 55, 58, 226 N.W.201, 202 (1929), determined “that a purchaser of registered land under an unrecorded purchase agreement who is not in possession is not an “owner” for the purposes of the prelien notice under the mechanics lien statute.” *Id.* Determining otherwise, the court noted,

would create an eighth exception to the indefeasibility of a certificate of title in addition to the seven referenced in Minn. Stat. § 508.25. *See id.* at 365.

However, the *Mill City* court reversed the district court and remanded the matter for trial to determine whether the lien claimants had actual knowledge of the interests of the Nelsons. *Id.* The court wrote in support of its holding:

We see no reason, however, when a subcontractor-materialman knows that a person has a purchaser's interest in registered 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. Here we believe the important purpose of the prelien notice-to protect the owner from hidden liens-deserves recognition and may be enforced without doing violence to Torrens law. . . . We hold, therefore, that if the subcontractor-materialman knows of the ownership interest of a purchaser of registered land under an unrecorded purchase agreement, even though the purchaser is not in possession, the purchaser qualifies as an "owner" to whom the subcontractor-materialman must give a prelien notice.

Id. Thus, the purchase agreement of the Nelsons for Torrens property, even though not registered and they were not in possession, was given significance dependant on the lien claimants having had actual knowledge of the Nelsons' interests when their liens arose.

Like Finnegan's widow in the *Finnegan* case, the certificate of title to the property received by Respondent Collier must be subject to the Appellant's mortgage if justice and equity are to be done. Collier admits he knew the last certificate of title in Conley's name was wrong. Like the lien claimants in the *Mill City* case, the interests of Respondent Collier must be subject to the Appellant's mortgage, as a result of his

actual notice or actual knowledge. Nothing in the Torrens Act requires Respondent Collier be given the benefit of something he knew to be wrong (i.e. the certificate of title), denying interests of which he had actual notice and knowledge, where justice and equity can be done without violence to the Torrens Act. This construction of the Torrens Act is supported by the majority of other jurisdictions in the United States where Torrens acts are currently enacted.

Currently, there are Torrens acts or land title registration acts in ten jurisdictions within the United States.³⁰ They are Colorado (COLO. REV. STAT. ANN. §§ 38-36-101 to -199 (West 2006)), Georgia (GA. CODE ANN. §§ 44-2-40 to -244 (West 2006)), Hawaii (HAW. REV. STAT. ANN. §§ 501-1 to -248 (LexisNexis 2005)), Massachusetts (MASS. GEN. LAWS ANN. ch. 185, §§ 1-118 (West 2006)), Minnesota (MINN. STAT. ANN. §§ 508.1-84 (West 2006)), New York (N.Y. Property §§ 370-436 (McKinney 2006)), North Carolina (N.C. GEN. STAT. ANN. §§ 43-1 to -64 (West 2006)), Ohio (OHIO REV. CODE ANN. §§ 5309.1-98 (West 2006)), Washington (WASH. REV. CODE ANN. §§ 65.12.005-800 (West 2006)), and Virginia (VA. CODE ANN. § 55-112 (West 2006)). The legislation in nine of these jurisdictions have provisions protecting registered owners against unregistered interests if they receive certificates in

³⁰ Other jurisdictions have had Torrens acts, like California which has repealed its Torrens act, and Illinois which has provided for a gradual elimination of Torrens titles.

good faith, for valuable consideration, similar to that of MINN. STAT. § 508.25.³¹ Further, of the five jurisdictions in which appellate courts based decisions upon the extent or degree of notice or knowledge sufficient to negate a purchaser's good faith and render the purchaser's interest subject to an unregistered contrary interest, three of them (i.e. the majority) support the position of the Minnesota courts. *See One-O-Six Realty, Inc v Quirm*, 66 Mass. App. Ct. 149, 845 N.E.2d 1182 (App. Ct. 2006) (requiring subsequent purchasers with actual knowledge of an easement to take the certificate of title subject to the easement); *Hermitage Club Co v Powers*, 107 Ohio App. 3d 321, 668 N.E.2d 955, 958 (1995) (explaining that notice is not a factor in determining whether a purchase is bona fide, but that when a purchaser has "knowledge of extraneous facts relating to an outstanding equity imports bad faith he takes title subject to the equity"); *Finley v Finley*, 43 Wash. 2d 755, 264 P.2d 246 (1953) (noting that the language of the Torrens act in Washington and other states with similar statutes, including Minnesota, support the view that protection under the Torrens act will be denied to purchasers with knowledge of an adverse claim); *Dorsey v Abernathy*, 30 Misc. 2d 707, 217 N.Y.S.2d 718 (Sup. Ct. 1961) (contrary); *Waikiki Malia Hotel, Inc v Kinkai Props. Lt. P'ship*, 75 Haw. 370, 862 P.2d 1048 (1993)

³¹ *See* COLO. REV. STAT. ANN. § 38-36-133 (West 2006); GA. CODE ANN. § 44-2-137 (West 2006); HAW. REV. STAT. ANN. § 501-82 (LexisNexis 2005); MASS. GEN. LAWS ANN. ch. 185, § 46 (West 2006); MINN. STAT. ANN. § 508.25 (West 2006); N.Y. Property § 400 (McKinney 2006); N.C. GEN. STAT. ANN. § 43-18 (West 2006); OHIO REV. CODE ANN. § 5309.34 (West 2006); WASH. REV. CODE ANN. § 65.12.195 (West 2006). No position is taken with regard to Virginia, for which counsel for the Appellant has only been able to locate VA. CODE ANN. § 55-112 (West 2006) stating the original Torrens Act, Code 1919, § 5225, continues in force.

(contrary). The support for the better reasoned approach has been well articulated by the Massachusetts appellate courts.

In *One-O-Six Realty, Inc. v Quim*, 66 Mass. App. Ct. 149, 845 N.E.2d 1182 (App. Ct. 2006), an owner conveyed various parcels of unregistered lands, together with an easement for access over adjacent Torrens property. *See* 66 Mass App. Ct. at 150, 845 N.E.2d at 1183-1184. The deed was not registered, as it conveyed unregistered property, and no reference to it or the easement over the adjacent Torrens property was registered or appeared on the Torrens certificate of title for the Torrens property. *See id.* at 153, 845 N.E.2d at 1186.

After the plaintiff acquired title to the unregistered parcels, he sought to impose the unregistered easement upon the certificate of title of the original owner's successor in interest. The trial court held that the certificate of title was not subject to the easement, and on appeal the appellate court reversed. The appellate court explained that the defendant had an attorney examine title to the Torrens property, and as a result of the examination the attorney advised the defendant of the deed granting the easement. *See id.* at 154, 845 N.E.2d at 1186. Although the attorney mistakenly advised that the deed did not affect the Torrens property, the defendant thereby acquired actual knowledge of the conveyancing document and therefore the unregistered interests:

There is no question that prior to his purchase of the registered parcel, the defendant was advised of the existence of the Tremblay deed by his counsel. The Tremblay deed purported to (and, as found by the judge-correctly in our

view-did) create an easement from the plaintiff's land "over and in other land of the grantors [Sullivan] to Maple Street." The land affected by that grant included the registered parcel. The defendant knew of the Tremblay deed, and of its provision concerning the easement grant. Thus, the defendant had the requisite notice of the prior unregistered interest.

See id. Thus, not only does this case support the construction of the district court in this case, it also supports the proposition that Respondent Collier's mistaken interpretation of Minnesota's Torrens Act does not relieve him of the effect of his knowledge. This is consistent with prior holdings and rationale of the Massachusetts Supreme Court that:

For nearly fifty years the rule has been that, if a purchaser of registered land takes with actual notice of an encumbrance that burdens his estate, he takes subject to the encumbrance. This rule, as history guides, has not served to cast a cloud over registered land titles. Rather, limited by the requirement of actual notice, the . . . rule has served to integrate fairness and justice into a system designed to promote certainty of title at the expense, in some instances, of equity.

Wild v Constantini, 415 Mass. 663, 668-69, 615 N.E.2d 557, 561 (1993).

This rationale and reasoning results, in the present case, in a fair and equitable outcome. Respondent Collier will have the registered title he purchased for \$5,000, subject to the mortgage lien and the interests of the Appellant which he knew existed, as they were actually asserted by the Appellant during their negotiations. Respondent Collier is only deprived of the windfall he seeks to capture through trickery and deceit. Surely such a result should not be a surprise to Respondent Collier, given that Blue Heron decided not to proceed with the purchase of the property precisely for these reasons. Finally, this outcome is most consistent with the language embodied in

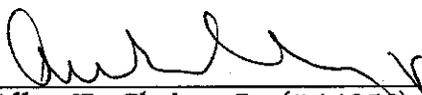
MINN. STAT. § 508.25, and neither emasculates the Torrens Act, or significantly diminishes the benefits bestowed by it. See *Finley v Finley*, 43 Wash. 2d 755, 762, 264 P.2d 246, 251 (1953), (citing R.G. Patton, *The Torrens System of Land Title Registration*, 19 Minn. L. Rev. 519, 534 (1935)).

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 decision of the court of appeals must be reversed, and the judgment of the district court must be affirmed.

Dated: July 19, 2006.

MACKALL, CROUNSE & MOORE, PLC

By 
Allen E. Christy, Jr. (# 16858)
Timothy J. Grande (# 15040X)

1400 AT&T Tower
901 Marquette Avenue
Minneapolis, MN 55402
Telephone: (612) 305-1400

ATTORNEYS FOR APPELLANT
M&I BANK FSB

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).