

NO. A11-1521



**STATE OF MINNESOTA
IN COURT OF APPEALS**

Amos Graves,

Appellant,

vs.

Michael Wayman, et al., Respondents, REA Group, Inc., Respondent, C&M Real Estate Services, Inc., Respondent, Trademark Properties Group, LLC, Respondent, First Minnesota Bank, Respondent,

APPELLANT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF ISSUES PRESENTED

- I. Is the bona fide purchaser defense available to First Minnesota Bank when the District Court concluded the transaction had been canceled a month before First Minnesota Bank's purported interest in the Subject Property?

Holding Below: The District Court found Appellant delivered the deed, even though he had the power to revoke or recall the deed. It also found Appellant cancelled the transaction before First Minnesota Bank's purported mortgage. It nevertheless held First Minnesota Bank had an interest in the Subject Property that was subject to the bona fide purchaser defense. The District Court denied Appellant's motion to amend or, alternatively for a new trial.

Most Apposite Cases and Statutes:

Minn. Stat. § 325N.13(b)(2007)

Minn. Stat. § 325N.17(f)(2007)

Bowler v. TMG Partnership, 357 N.W.2d 109 (Minn. App. 1984)

New England Mut. Life Ins. Co. v. Mannheimer Realty Co., 188 Minn. 511, 247 N.W. 803 (1933)

Ingersoll v. Odendahl, 136 Minn. 428, 162 N.W. 525 (1917)

- II. Did the District Court err when it applied a legal standard that required Appellant *disprove* First Minnesota Bank's claim that it was a bona fide purchaser for value?

1. Holding Below: The District Court held Appellant was required to prove First Minnesota Bank's was not a bona fide purchaser for value in its Judgment dated and entered February 18, 2011. Despite Appellant's protest, the District Court applied this standard in its Amended Judgment on First Minnesota Bank's motion to amend or, alternatively, for a new trial under Minn. R. Civ. P. 52.02 and 59. In its June 15, 2011 Order, the District Court denied Appellant's motions to amend the foregoing judgments and for a new trial pursuant to Minn. R. Civ. P. 52.02 and 59. It also declared First Minnesota the fee titleholder in its Judgment dated

Most Apposite Cases and Statutes:

MidCountry Bank v. Krueger, 762 N.W.2d 278 (Minn. App. 2009)

Miller v. Hennen, 438 N.W.2d 366 (Minn. 1989).

Goette v. Howe, 232 Minn. 168, 44 N.W.2d 734 (1950)

Minn. Stat. § 507.34 (2007)

- III. Did the District Court err in failing to require Respondent First Minnesota Bank to provide conclusive evidence that it would not have learned of Appellant's fee title

interest in the Subject Property if it had made inquiry? If so, did the District Court err in its application of this rule when concluding First Minnesota Bank was a bona fide purchaser for value?

Holding Below: The District Court held First Minnesota Bank's was not a fide purchaser for value in its Judgment dated and entered February 18, 2011. On First Minnesota Bank's motion for to amend or, alternatively, for a new trial under Minn. R. Civ. P. 52.02 and 59, the District Court determined it was a bona fide purchaser for value. In its June 15, 2011 Order, the District Court denied Appellant's motions to amend the foregoing judgments and for a new trial pursuant to Minn. R. Civ. P. 52.02 and 59. It also declared First Minnesota the fee titleholder, subject to no interest of Appellant, in its Judgment entered June 21, 2011.

Most Apposite Cases and Statutes:

Teal v. Scandanavian-American Bank, 114 Minn. 435, 131 N.W. 486 (1911)

Flowers v. Germann, 211 Minn. 412, 1 N.W.2d 424 (1941)

Hauger v. J.P. Rodgers Land Co., 156 Minn. 45, 194 N.W. 95 (1923)

Ludowese v. Amidon, 124 Minn. 288, 144 N.W. 965 (1914)

- IV. If Appellant delivered title to REA Group, Inc. and C&M Real Estate Services, Inc. and delivery was not cancelled, did the district court err declining to reinstate its conclusion that Appellant had a superior vendor's lien?

Holding Below: The District Court held First Minnesota Bank's was not a fide purchaser for value in its Judgment dated and entered February 18, 2011. On First Minnesota Bank's motion for to amend or, alternatively, for a new trial under Minn. R. Civ. P. 52.02 and 59, the District Court determined it was a bona fide purchaser for value. In its June 15, 2011 Order, the District Court denied Appellant's motions to amend the foregoing judgments and for a new trial pursuant to Minn. R. Civ. P. 52.02 and 59. It also declared First Minnesota the fee titleholder, subject to no interest of Appellant, in its Judgment entered June 21, 2011.

Although the District Court originally agreed that Appellant held a vendor's lien for the unpaid purchase price, this holding was superseded by the District Court's amended judgment that determined First Minnesota Bank was a bona fide purchaser. The District Court did not disagree that Appellant was entitled to a vendor's lien, but held it would have been futile because the lien was subordinate to First Minnesota Bank. This determination was based on ints incorrect shift of

the burden of proof and bona fide purchaser precedent. Nevertheless, the District Court denied Appellant's motion to amend or, alternatively, for a new trial.

Most Apposite Cases and Statutes:

Brooks v. Thorne, 176 Minn. 188, 222 N.W. 916 (1929)

- V. Did the District Court err in denying Appellant's common law fraud claim by concluding Appellant did not "reasonably rely" on representations made by Respondents and that no fiduciary relationship existed?

Holding Below: The District Court concluded Appellant did not "reasonably rely" on Michael Wayman's representations because (a) Appellant did not show the existence of a fiduciary relationship and (b) because Appellant attempted to cancel the agreements the same day documents were signed. The District Court denied Appellant's motion to amend or, alternatively for a new trial.

Most Apposite Cases and Statutes:

Spiess v. Brandt, 230 Minn. 246, 41 N.W.2d 561 (1950)

Davis v. Re-Trac Mfg. Corp. 276 Minn. 116, 149 N.W.2d 37 (1977)

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STANDARD OF REVIEW

This case involves an appeal from the court's Findings of Fact, Conclusions of Law and Order for Judgment, Amended Findings of Fact, Conclusions of Law and Order for Judgment, and denial of Appellant's post-trial motions to amend or, alternatively, a new trial.

The questions on whether the District Court erred in requiring Appellant bear the burden of proof, applied the correct presumption, and whether First Minnesota Bank could assert the affirmative defense under the applicable findings are legal questions that are reviewed *de novo*. *In re Collier*, 726 N.W.2d 799, 803 (Minn. 2007).

The District Court's denial of a new trial rests largely within its discretion and will be reversed only for a clear abuse of discretion. *See Jack Frost, Inc. v. Engineered Bldg. Components Co.*, 304 N.W.2d 346, 352 (Minn.1981); *Gunhus, Grinnell v. Engelstad*, 413 N.W.2d 148, 153 (Minn.App.1987), *pet. for rev. denied* (Minn. Nov. 24, 1987).

STATEMENT OF THE CASE AND FACTS
STATEMENT OF THE CASE

The Honorable Dale B. Lindman of the Ramsey County District Court presided over the district court proceedings.

In 2007, Appellant held a significant equity position in his home during a redemption period. A-30-31; A-38. He was approached by Michael Wayman, who owned several alter ego entities operating as C&M Real Estate Services, Inc. ("C&M") and REA Group, Inc. ("REA"). A-30; A-40; A-41.

The Graves signed various documents, including a Quit Claim Deed. The Graves cancelled that evening. The following month, C&M/REA nevertheless recorded the Quit Claim Deed and redeemed the Subject Property. C&M took a mortgage for \$145,000 against the Subject Property, which was granted in favor of First Minnesota Bank ("FMB"). FMB never inquired about the Graves' interest in the Subject Property. The Graves lived in the Subject Property openly and actually at all material times.

The District Court held FMB was not a bona fide purchaser because Appellant had not met his burden. On FMB's motion to amend or, alternatively, for a new trial, it determined Appellant had not proven FMB was not a bona fide purchaser even though Appellant disputed the burden of proof. Appellant made a motion to amend or, alternatively, for a new trial. Appellant disputed the burden of proof on the bona fide purchaser issue. Appellant also maintained the transaction was cancelled long before FMB's purported interest. He also argued FMB had not provided conclusive evidence that it would not have learned of Appellant's interest had it inquired of the possessors. The District Court denied Appellant's motion. It also granted FMB's motion to "clarify," which effectively extinguished Appellant's interest in the Subject Property and eliminated his vendor's lien. This appeal follows.

STATEMENT OF THE FACTS

Background

In 2007, Appellant held a significant equity position in his single family residence and was in the redemption period. A-30-31; A-38. He was approached by numerous persons during the redemption period who presented offers. A-31. One of these was Defendant Michael Wayman, who owned several alter ego entities operating as C&M Real Estate Services, Inc. ("C&M") and REA Group, Inc. ("REA"). A-30; A-40; A-41. Prior to that, he was approached by an employee of Mr. Wayman. A-31.

The Transaction

Mr. Wayman represented: (a) that he was a licensed real estate agent; (b) that he and his companies had successfully helped numerous other families in the same foreclosure situation as the Graves; (c) that he and his companies would "save the property" from a completed foreclosure by redeeming for the Graves; (d) that the Graves would have a right to cancel the transaction within three business days and could do so by telephone or mail; (e) that he and his companies would take care of everything, including the documents, to ensure the transaction was successful and the Graves would not need to worry about losing the Property; (f) that the transaction would not involve a sale; (g) that the contemplated transaction was a mortgage and that the Graves would make a mortgage payment of \$1,302 per month, which would include principal, interest, taxes and insurance; and (h) that the Graves could continue possessing the Subject Property after the transaction. A-31; A-33-34.

In reliance on Mr. Wayman's representations, Appellant and his late wife, who had never owned any other property, signed the requested documents believing they could cancel as Mr. Wayman represented. A-33. These included a Quit Claim Deed; Rent Back Agreement, and a Purchase Agreement. Id.; APP-102-104; APP-108.

The Purchase Agreement required C&M/REA to pay \$182,000 for the Subject Property. The Rent-Back Agreement allowed the Graves to occupy the Subject Property with an option to re-purchase. APP-103. It referred to the Graves as “owners” and represented in bold letters that “C&M or anyone working for him or her CANNOT: (1) Take any money from you or ask for money until C&M Real Estate Services Inc., has completely finished doing everything he or she agreed to do or (2) Ask you to sign or have you sign any lien, mortgage or deed.” *Id.* It also represented the Graves, as the “owner[s], may cancel this transaction at any time prior to midnight of the 3rd business day after this transaction” and they should “[s]ee that [sic] attached notice of cancellation form.” *Id.*

All of the documents were taken by Mr. Wayman, except a Notice of Contract Cancellation, which confirmed the Graves had three days to cancel without obligation. A-33-34 APP-104. It also stated a three-business day cancellation period applied to reconveyance transactions, whereas a five-day cancellation period applied to purchases. [Ex. 22] The Subject Property was worth \$182,000. *Id.* Later that evening, however, the Graves decided to cancel the transaction. A-34; App. 104. To do so, they called Mr. Wayman, leaving a voicemail as instructed, and mailed a signed Notice of Contract Cancellation to Mr. Wayman the following day. A-34; APP-104.

C&M’s Subsequent Mortgage to Respondent First Minnesota Bank

Several days after cancellation, Mr. Graves signed the Purchase Agreement and Rent Back Agreement despite the cancellation. A-33; APP-103.

On September 5, 2007, despite the cancellation, the Quit Claim Deed was recorded in the Ramsey County Recorder’s Office. APP-78. On September 11, 2007, a \$100 mortgage was given by REA to C&M, signed by Mr. Wayman as CEO of REA. APP-79-80. It was “clear that the only purpose of the \$100.00 mortgage was to create a mortgage so that C&M could redeem

the subject property as a junior creditor.” A-35. The \$100 mortgage was recorded on September 11, 2007 as Document No. 4054087. The same day, a Notice of Intention to Redeem was recorded sequentially as Document No. 4054088. APP-81. Mr. Wayman signed CEO of C&M and represented the redemption was based upon his status as a junior creditor. A-35; APP-79-81. The Purchase Agreement, Rent Back Agreement, the \$100 Mortgage with REA, the Notice of Intent to Redeem, and Mortgage were each signed by Mr. Wayman through REA and/or C&M.

On September 13, 2007, a fax from Mr. Wayman’s fax number was received by FMB, which included evidence that a Quit Claim Deed from the Graves to REA had been recorded on a fully executed copy of the Purchase Agreement bearing Mr. Wayman’s signature. A-35-36; APP-108-109. Mr. Guse was the loan officer/lender for FMB. A-36-34.

On September 17, 2007, Mr. Wayman used his C&M entity to redeem the Subject Property as a junior lienholder. APP-82-83; A-35. Upon redemption, he signed a mortgage instrument in favor of First Minnesota Bank (“FMB”) to purportedly secure the Subject Property. A-36; APP-84-91. The Mortgage was not recorded in the Ramsey County Recorder’s Office until November 8, 2007. *Id.* Although the Graves continued to openly possess their house through that time, FMB made no inquiry of the Graves. A-36-37.

A Settlement Statement memorialized disbursement of the C&M/FMB Mortgage. Of the \$145,000 of proceeds from the loan, the Settlement Statement showed just \$30,577.16 was given as a “Payoff to Amos and Carol Graves.” A-36; APP-110.

On September 17, 2007, C&M remitted \$110,355.73 to the Ramsey County Sheriff’s Office to redeem the property from foreclosure. A Certificate of Redemption was recorded the same day. APP-82. The same day, C&M obtained a \$145,000 loan from FMB to be secured by the Subject Property. APP-84-91. Charles Blair, the Executive Vice President of FMB, testified

that Mr. Guse was the loan officer for the transaction. A-36-37 He testified that the \$145,000 loan was just part of a master loan that FMB had with C&M and that the purpose of the master loan was to finance C&M's business of redeeming sheriff's certificates. *Id.* Mr. Guse was responsible for reviewing title conditions prior to funding the loans. Mr. Blair testified to his knowledge that C&M and REA were companies owned by Mr. Wayman. *Id.*

The loan was memorialized by several documents, including a Settlement Statement, a mortgage purporting to be secured by the Subject Property (the "C&M Mortgage"); and an "Assignment of Leases and Rents." A-36.

The Settlement Statement stated the \$145,000 loan was disbursed as follows:

Settlement Charges to Borrower:	\$4,317.50
Payoff to County Sheriff:	\$110,105.34
Payoff to Amos and Carol Graves:	\$30,577.16

APP-110-111- However, the Graves never received the \$30,577.17 alleged disbursement or any other amount from this transaction. A-36; A-38.

Mr. Graves continued living in the Subject Property, openly and continuously, through at least the date of trial. A-36. The testimony was consistent that at no time, including on or before September 17, 2007, did anyone from FMB contact the Graves to inquire about their possession in the Subject Property, their interest therein, or any other matter. *Id.*

Thereafter, FMB brought an action against Mr. and Mrs. Wayman, C&M and others for a judgment on various promissory notes and a decree of foreclosure on its foreclosure of transactions in Ramsey County involving C&M, which included the Subject Property in question. A-38. The Graves were not parties to that action and the district court took judicial notice of the entire court file. *Id.* C&M/REA failed to pay Appellant the amount due under the Purchase Agreement. *Id.*

The Impending Litigation

In May of 2009, Appellant brought the present action. As amended, he pleaded various legal claims arising from the transaction, including violations of Minn. Stat. §§ 325N.18, common law fraud and a declaration that Appellant was the fee titleholder of the Subject Property, subject to no interest of any defendant. APP-2-34. After discovery was complete, Appellant supplemented his claims, alleging a vendor's lien for the unpaid purchase price set forth in the Purchase Agreement. *Id.*

Appellant sought a declaration that the C&M/REA transaction was void and that it was the fee titleholder, subject to no interest of any defendant. He claimed the transaction was void under Minn. Stat. §§ 325N.10-.18 and due to fraudulent inducement. Alternatively, Appellant claimed if the deed was not void, he held a lien for the unpaid purchase price, which was in default, and that he was entitled to a decree of foreclosure for the delinquent payment due from C&M/REA under the Purchase Agreement. *Id.* FMB claimed its preceding action, to which Appellant was not a party, operated as *res judicata* to Appellant, and that it was nevertheless a bona fide purchaser for value that was entitled to protection. APP-48-49.

At trial, Mr. Bair testified that Mr. Guse was the loan officer for FMB. (Trans. 143:6-10) He further testified C&M was his customer and contact and that Mr. Guse would have closed the loan. (Trans. 160:16-18) The testimony was undisputed that Mr. Blair did not know whether Mr. Guse inquired about any interest or possessors in the Subject Property. (Trans, 161:8-11) He admitted he would be guessing what Mr. Guse knew about Mr. Guse's inquiry. Mr. Blair did not visit the property because he was not a lender, but rather was on the board of directors. (Trans, 161:15-21) Every loan officer had different record keeping habits and Mr. Blair testified he did

not know what phone calls were made prior to the loan. (Trans., 172-173) He admitted he did not know what Mr. Guse knew about occupancy. (Trans., 173:13-16)

After trial, the district court concluded the transaction between the Graves and REA/C&M violated Minn. Stat. §§ 325N.10-.18. It also concluded that, whether by contractual or statutory right, the Graves exercised their right to cancel by timely mailing the Notice of Contract Cancellation to the address supplied by Defendant. A-1-26. Rescission, the court noted, was effective upon mailing. A-16. It noted that, upon receipt of the notice of cancellation, REA, C&M and the Waymans were required to return without condition any original contract and any other documents signed by the foreclosed homeowner, including the Quit Claim Deed. *Id.* It also concluded Appellant had a lien for the unpaid purchase price and that C&M/REA were in default for failure to pay the same. A-21.

As to FMB, the district court concluded FMB was not a bona fide purchaser. A-23-24. It reasoned that FMB made no inquiry of the Graves or their possession of the premises. A-24. Specifically it concluded “[h]ad they done so they would have been aware of the Graves’ interest in the property.” *Id.* However, as to common law fraud, the district court determined Appellant had not established his reliance on Mr. Wayman’s false representations was “reasonable.” A-22-23.

Post-trial Motions and Proceedings

FMB made a motion to amend or, alternatively, for a new trial. APP-70-71. FMB argued inquiry notice only applies if it had actual notice that the Graves possessed the Subject Property. It claimed that by refusing to make an inquiry of the Graves, it was entitled to protection as a bona fide purchaser for value.

Appellant disagreed and further explained that FMB – not Appellant – was required to bear the burden of proving it was a bona fide purchaser. After hearing, the district court completely changed its bona fide purchaser conclusion by concluding FMB *was* a bona fide purchaser. A-49-50. It now determined Appellant had not met *his* burden of proving FMB was not a bona fide purchaser. A-29. In so reasoning, the court explained:

Mr. Blair of First Minnesota testified that First Minnesota made no inquiry of the Graves regarding their possession of the premises. However, even if they had done so they would have only been made aware of the limited extent of Graves' interest in the property. A title search would have shown that a previous foreclosure had occurred, the redemption period had expired, the property had been redeemed, and that Graves continued to occupy the premises pursuant to a Rent Back Agreement. Under the circumstances of this case, First Minnesota's status would not have been affected by those disclosures. On this record, this Court finds nothing that should disqualify First Minnesota from its status as a bona fide mortgagee. Accordingly, the Court declares that Plaintiff's interest in the premises is subject to that of First Minnesota.

Id. It also omitted the entire section dismissing FMB's *res judicata* claim as well as the section granting Appellant his lien for the unpaid purchase price and decree of foreclosure.

Appellant then filed his own motion to amend or, alternatively, for a new trial. APP-72-73. Appellant claimed the court erred in applying the correct bona fide purchaser burden and was compelled to rule that FMB was not a bona fide purchaser. Appellant explained that FMB – not Appellant - actually was required to prove its bona fide purchaser status and that the court incorrectly applied a standard that presumed FMB was a bona fide purchaser.

Appellant also argued that FMB nevertheless could not prove its lack of notice under the bona fide purchaser statute by calling an employee who had no involvement, rather than the employee with direct involvement, to meet its burden of proving lack of notice. Otherwise, according to Appellant, an organization could prove its status by calling anyone who predictably

lacked knowledge due to non-involvement – such as a receptionist, custodian, or upper-level executive who was not involved in the transaction – to show bona fide purchaser status. Appellant requested that the prior vendor’s lien findings, conclusions and judgment be once again included in amended findings. Appellant also requested amended findings, conclusions and judgment on the fraud claim, claiming he satisfied the elements of common law fraud. Appellant’s motions were denied in their entirety, albeit without little – if any - explanation. A-51.

Contemporaneous with Appellant’s motion for amended findings or new trial, FMB’s made a motion for “clarification of amended findings,” claiming it purchased the Subject Property from foreclosure, the redemption period expired, that FMB owned the premises fee and clear of any encumbrances of other parties. APP-74-78. The court granted its motion. A-52-53.

This appeal followed. Mr. and Mrs. Wayman, who were parties in the district court case, have since filed for bankruptcy and received a stay of the appellate proceedings for the time being.

ARGUMENT

I. THE DISTRICT COURT ERRED IN APPLYING THE BONA FIDE PURCHASER DEFENSE WHEN APPELLANT REVOKED THE OFFER OR CANCELLED THE TRANSACTION A MONTH BEFORE FMB’S PURPORTED INTEREST.

The district court correctly concluded that any transaction between Appellant and REA/C&M had been cancelled. The issue is therefore whether REA/C&M had any interest after that date which could have been conveyed to FMB. If no interest existed, the bona fide purchaser statute is not available because it only protects conveyance of an interest.

Under Minn. Stat. § 325N.13, a foreclosed homeowner has a right to cancel a foreclosure reconveyance transaction with a foreclosure purchaser. Cancellation occurs when the foreclosed

homeowner delivers a written notice of cancellation. Minn. Stat. § 325N.13(b). If cancellation is mailed, delivery is effective upon mailing. *Id.* At that point, the transaction is void. If a transaction is void, a subsequent purchaser is precluded from claiming the BFP statute applies. *Stone v. Jetmar Properties, LLC*, 733 N.W.2d 480, 488, 43 A.L.R.6th 813 (Minn. 2007) (citing 14 Richard R. Powell, *Powell on Real Property* § 81A.04[2][a][iii] (Michael Allen Wolf ed., 2006)). A person cannot convey a greater interest than he or she holds.

There was no contract between C&M/REA and the Graves because C&M/REA never communicated its acceptance until well after cancellation. *See Bowler v. TMG Partnership*, 357 N.W.2d 109, 110 (Minn. App. 1984). Until accepted, the instruments signed by the Graves amounted to nothing greater than an offer which was revoked or withdrawn. *New England Mut. Life Ins. Co. v. Mannheimer Realty Co.*, 188 Minn. 511, 513, 247 N.W. 803, 804 (1933) (a withdrawn offer cannot be accepted or ripen into a contract). Days after cancellation, Mr. Wayman signed the transaction documents, recording the Quit Claim Deed the following month. However, C&M/REA had nothing to accept upon cancellation. To be sure, C&M and REA were forbidden from accepting or recording the Quit Claim Deed. Minn. Stat. § 325N.17(e)(2007).

In addition, the Graves never delivered title to REA/C&M. Although the district court stated they had, this was unsupported by the delivery rule: the “essential thing [for delivery of title] is that the grantor must part with control of the deed and put it beyond his power to revoke or recall.” *Ingersoll v. Odendahl*, 136 Minn. 428, 431, 162 N.W. 525 (1917). The Rent Back Agreement and Attached Cancellation of Contract Notice were clear that cancellation may be had “without any penalty or obligation.” By statute, C&M/REA were required to return all documents to the Graves within ten days of receipt of notice of cancellation “without condition any original contract and any other documents signed by the foreclosed homeowner.” Minn. Stat.

§ 325N.13 (2007) (emphasis added). Further, Appellant knew he had a right to cancel and immediately elected this right. The lack of delivery means the Graves continued to hold fee title. For its purported interest to attach, FMB was required to prove it held an interest, which requires evidence that Appellant delivered title. Because the Graves did not intend to put the power to revoke or recall the Quit Claim Deed beyond their control, delivery was not effective. It was timely cancelled.

Even assuming an agreement formed and the deed was delivered, the Graves immediately cancelled by mail and voicemail. Whether by contractual or statutory right, cancellation was effective at the moment of mailing. Minn. Stat. § 325N.13 (2007). The offer was withdrawn or revoked at that point and neither REA nor C&M held an interest capable of conveyance. The statute intended to protect Appellant by giving him a right to cancel.

The BFP statute does not operate to *create* an interest that does not exist. Instead, it assigns priority to those having interests. The court erred in finding an agreement had formed and/or that the deed was delivered. If a transaction was entered into and the deed delivered, the court erred by inconsistently concluding that the transaction was cancelled. If the transaction was cancelled before the purported transaction, the BFP statute would not apply

II. RESPONDENT FIRST MINNESOTA BANK – NOT APPELLANT - AFFIRMATIVELY RAISED THE BONA FIDE PURCHASER DEFENSE AND THEREFORE WAS REQUIRED TO PROVE ITS BONA FIDE PURCHASER DEFENSE.

Even if the BFP defense could be applied, the district court incorrectly held *Appellant*, rather than *FMB*, bore the burden of proving FMB was not a BFP. In other words, it presumed FMB was a BFP under Minn. Stat. § 507.34 (2007). Statutory construction is a question of law and subject to *de novo* review on appeal. *Sorenson v. St. Paul Ramsey Medical Center*, 457 N.W.2d 188, 190 (Minn. 1990).

Minn. Stat. § 507.34 provides that unrecorded conveyances are void against any subsequent purchaser in good faith for valuable consideration. This burden of proof under Minn. Stat. § 507.34 has already been construed as follows: “[t]he burden of proving bona-fide purchaser status is on the party seeking to show that he or she is a bona fide purchaser.” *MidCountry Bank v. Krueger*, 762 N.W.2d 278, 283 (Minn. App. 2009); *see also Miller v. Hennen*, 438 N.W.2d 366, 369 (Minn. 1989) (“The burden is on the party resisting the prior unrecorded title to prove that he purchased or acquired such title in good faith”); *Goette v. Howe*, 232 Minn. 168, 172, 44 N.W.2d 734, 738 (1950). This burden does not shift and falls upon the person asserting bona fide purchaser status through trial. *Errett v. Wheeler*, 109 Minn. 157, 162-163, 123 N.W. 414 (1909) (burden rests upon the asserting party throughout the trial and does not shift, even if a prima facie case is presented by the asserting party); *MidCountry Bank*, 762 N.W.2d at 283 (burden remained on asserting party).

FMB raised the BFP affirmative defense and therefore bore the burden of proof at all stages. The district court erred in holding Appellant was required to show “by a preponderance of the evidence that First Minnesota Bank (‘the Bank’) was not a good faith bona fide mortgagee of the premises.”

III. RESPONDENT FIRST MINNESOTA BANK FAILED TO PROVIDE CONCLUSIVE EVIDENCE THAT IT WAS A BONA FIDE PURCHASER FOR VALUE.

The district court initially concluded FMB was not a BFP and that Appellant was therefore the owner of the Subject Property. But on FMB’s motion, the district court changed its conclusion to state “[o]n this record, this Court finds nothing that should disqualify First Minnesota from its status as a bona fide mortgagee.” This conclusion was, of course, based upon its improper belief that Appellant must bear the burden of proving FMB was not a bona fide purchaser for value. However, as will be seen, FMB was required to provide conclusive

evidence that an inquiry of the Graves would not have led to their claims or rights in the Subject Property. FMB failed to provide conclusive evidence, which defeats the BFP defense in its entirety as a matter of law.

A. The Minnesota Recording Act, Minn. Stat. § 507.34.

Minnesota's Recording Act requires every conveyance of real estate to be recorded; unrecorded conveyances shall be void against any subsequent purchaser in good faith for valuable consideration. Minn. Stat. § 507.34 (2007). A purchaser in good faith is one who gives consideration without actual, implied or constructive notice of the inconsistent outstanding rights of others. *Miller v. Hennen*, 438 N.W.2d 366, 369 (Minn. 1989). The purpose of the recording act is to protect those who purchase real estate in reliance upon the record. *Id.* "Implied notice has been found where one has 'actual knowledge of facts which would put one on further inquiry.'" *Id.* at 370 (quoting *Anderson v. Graham Inv. Co.*, 263 N.W.2d 382, 384-85 (Minn.1978)).

A party dealing with real estate of which another is in actual possession "is bound to make inquiries of the occupants, and to ascertain the nature and extent of their interests;" *Id.* at 419, 428. Actual possession of real property is prima facie evidence of title. It serves as notice to all the world of the title and rights of the person in possession and also of all facts connected therewith which reasonable inquiry would have developed. *Anderson*, 263 N.W.2d at 385; *Flowers v. Germann*, 211 Minn. 412, 418, 1 N.W.2d 424, 428 (1941) This is true even after the grantor delivers a deed that is recorded. *See Teal v. Scandinavian-American Bank*, 114 Minn. 435, 441, 131 N.W. 486, 488 (1911)

When a person is in actual possession of real property:

The court will not speculate in cases of this character upon what might happen or be discovered if inquiry were made, but will presume, in the absence of evidence conclusively showing the contrary that upon inquiry the true

situation and claims of the possessor would be made known. The only way of overcoming this presumption is to produce the conclusive evidence, or make the inquiry.

Hauger v. J.P. Rogers Land Co., 156 Minn. 45, 194 N.W. 95 (1923). The “failure to make inquiry may be regarded as an intentional avoidance of the truth which it would have disclosed.”

Ludowese v. Amidon, 124 Minn. 288, 295, 144 N.W. 965, 968-969 (1914).

B. FMB made no inquiry of the Graves and therefore could only be a good faith purchaser for value unless FMB provided evidence conclusively showing that Appellant’s claims would not have been learned upon inquiry.

The district court found Appellant was in actual possession at the time of FMB’s mortgage on the property and therefore was required to determine whether FMB provided conclusive evidence that it would not have learned of the Graves’ interest or to make an inquiry. The court found FMB made no inquiry. Because of the Graves’ actual possession, the district court was compelled to presume, in the absence of evidence conclusively showing the contrary, that each of the Graves’ claims would have been known if FMB made an inquiry.

The trial court’s conclusion that FMB was a BFP can only be sustained if FMB provided conclusive evidence showing the true situation and claims of the Graves would not have been made known upon inquiry. Although the district court did not apply the rule, a de novo review would require a finding that FMB failed to provide conclusive evidence.

C. FMB did not provide evidence conclusively showing Appellant’s claims and true situation would not have been known upon inquiry.

On the question of inquiry notice, the district court’s conclusion compels a finding that FMB provided conclusive evidence that upon inquiry of the Graves, it would not have learned that the Graves cancelled the transaction a month before FMB’s C&M. Naturally, this presupposition is in direct odds with the court’s finding that Mr. Graves knew he cancelled the

transaction. Indeed, the Graves' cancellation would have been learned upon reasonable inquiry. FMB just had to ask.

The district court's conclusion also is unsupported unless FMB provided conclusive evidence that upon inquiry of the Graves, it would not have learned the Graves had not been paid \$182,000. The Settlement Statement, as the court noted, does not reflect \$182,000 disbursed to the Graves. At best, it shows just a portion was disbursed to the Graves. A reasonable inquiry would have asked the Graves whether they received this money. Mr. Graves knew he did not receive the money. FMB just had to ask.

The district court's conclusion also is unsupported unless FMB provided conclusive evidence that, upon inquiry of the Graves, it would not have learned the Graves could reside in the Subject Property up to and beyond October 1, 2007 – well after closing of the C&M Mortgage. Appellant knew this information. FMB just had to ask. In fact, the district court even agreed that FMB could have learned the Graves had a right to live in the Subject Property. But it speculates FMB would have only learned of a “limited” interest. The court speculates on what would have been learned, which is impermissible, and this is true even if the Graves were not aware of the fraud practiced upon them. *Hauger*, 256 Minn. at 50 (denying BFP status even though the possessor had not awakened to the realization of the fraud that had been practiced upon him as this does not overcome the presumption arising from failure to make an inquiry and is not conclusive as the rule requires).

In addition, FMB would have naturally learned of the following findings of fact had it made an inquiry of the Graves: ¶¶1-2, 7-22, 24-27, 36-37, 42-46, and 50. *See* A-28-51. It would have learned the transaction was a foreclosure reconveyance, that the Graves were foreclosed homeowners and that C&M/REA operated as a foreclosure purchaser. Minn. Stat. § 325N.10.

Upon viewing the documents comprising the transaction, FMB would have learned the contract provided to the Graves did not comply with Minn. Stat. § 325N.11. It would have also learned the contract did not include the terms required by Minn. Stat. § 325N.12 or the notice of cancellation form mandated by Minn. Stat. § 325N.14. FMB would have learned that the Graves already notified C&M/REA of their cancellation by mail, which operated as cancellation. Minn. Stat. § 325N.13(2007). Finally, though without limitation, FMB would have learned of facts that amounted to prohibited practices that the court held violated Minn. Stat. § 325N.17.

Yet we need not speculate on what would have been learned upon inquiry because the court will presume, in the absence of evidence conclusively showing the contrary, that the true situation and claims would be known upon inquiry of the Graves. *Teal*, 114 Minn. at 442. FMB failed to provide conclusive evidence that it could not have learned of any of the findings of fact upon inquiry. Based upon the court's own findings of fact, it was compelled to rule that FMB had not provided evidence conclusively showing it would have not learned of the Graves' interest. Accordingly, the presumption must apply and FMB was not an innocent mortgagee. *See Hauger*, 256 Minn. at 50.

D. In addition, or alternatively, FMB cannot be regarded as having proved it lacked actual knowledge of the Graves' interest in the Subject Property.

Although the failure to provide conclusive evidence is sufficient to defeat FMB's BFP defense, the district court erred with any conclusion that FMB lacked actual knowledge.

The facts were conclusive that Mr. Guse was the loan officer for FMB. (Trans. 143:6-10) C&M was his customer and contact. Mr. Guse would have closed the loan. (Trans. 160:16-18) The testimony was undisputed that Mr. Blair did not know whether Mr. Guse inquired about any interest or possessors in the Subject Property. (Trans, 161:8-11) He admitted he would be guessing what Mr. Guse knew about Mr. Guse's inquiry. Mr. Blair did not visit the property

because he was not a lender, but rather was on the board of directors. (Trans, 161:15-21) Every loan officer had different record keeping habits and Mr. Blair testified he did not know what phone calls were made prior to the loan. (Trans., 172-173) He admitted he did not know what Mr. Guse knew about occupancy. (Trans., 173:13-16) Being conclusive, the district court must have taken these into account in making a determination or erred in failing to do so.

If an organization could call a witness who lacked knowledge, due to non-involvement, what kind of testimony would be expected from the witness? Naturally, we would expect testimony that the person lacked knowledge. So is this enough to prove lack of knowledge for an organization? If it is, the burden would effectively shift to persons similarly situated to Appellant, who would be required to disprove actual knowledge. The evidence sufficient to form a conclusion on actual knowledge, at least insofar as oral testimony is concerned in an organization, should require testimony from those who would best be in a position to testify about the organization's knowledge at the time the bona fide purchaser interest allegedly attached. To reason otherwise would undermine the purpose and objective of the BFP doctrine. Accordingly, Appellant requests this Court declare that FMB could not have established it lacked actual knowledge under these facts.

IV. THE DISTRICT COURT ERRED IN AMENDING ITS JUDGMENT TO EXCLUDE APPELLANT'S VENDOR LIEN UNDER THE GUISE THAT FMB WAS A BONA FIDE PURCHASER.

After trial, the district court concluded Appellant held a vendor's lien for the unpaid purchase price of the Subject Property. However, it amended its findings, conclusions and judgment to hold "Plaintiff's right to the Property, whether via Minn. Stat. §§ 325N.10-.18, statutory fraud, and/or a vendor's lien is subject to First Minnesota's mortgage because First Minnesota is a bona fide mortgagee." For this reason, it removed verbiage holding that Appellant held a superior vendor's lien. However, this determination was based on its

misapplication of the BFP statute and therefore the district court erred with its amended conclusions of law and judgment.

A vendor's lien is an "implied equitable lien upon real property for the amount of the unpaid purchase price." *In re Butler*, 552 N.W.2d 226, 229 (Minn. 1996). The lien exists independently of any express agreement at the time of the conveyance and without regard to the absence of the grantor's intention to claim it. *Id.* The basis for the lien is found upon the broad equitable principle that a person obtaining the estate of another should not be allowed to keep it without paying the purchase price. *Id.* (citing *Grace Dev. Co. v. Houston*, 306 Minn. 334, 335-36, 237 N.W.2d 73, 75 (1975)). Like the interest of a purchase money mortgagee, the lien protects the vendor's or owner's property rights from being appropriated by creditors of a vendee. *Id.* (citation omitted). A vendor's lien follows the land into the hands of subsequent purchasers and mortgagees, except a bona fide purchaser or mortgagee without notice. *Brooks v. Thorne*, 176 Minn. 188, 191, 222 N.W. 916, 918 (1929).

The purchase price was set out in a Purchase Agreement at \$182,000. [Finding 46] Defendant C&M remitted \$110,105.34 to the Ramsey County Sheriff to redeem the property. [Finding 35] The Settlement Agreement purported only \$30,577.16 was paid to the Graves, though an inquiry would have noted the Graves received nothing. FMB had a copy of the Purchase Agreement in its files before closing, and therefore it knew or should have known that the Graves had not been paid \$182,000. The simple figures are telling. At the very least, the suspicious circumstances triggered inquiry notice. *Stone v. Jetmar Properties, LLC*, 733 N.W.2d 480, 489 (Minn. App. 2007).

In addition, each of the facts and exhibits in the trial transcript and record that predated FMB's mortgage would have been known had it inquired. FMB would have known the

transaction was a foreclosure reconveyance, that the Graves were foreclosed homeowners and that REA/C&M was a foreclosure purchaser. It would have known C&M/REA had a statutory duty to ensure Appellant received at least 82% of the Subject Property's fair market value. Minn. Stat. § 325N.17 (2007).(b). It would have known that Appellant was entitled to \$182,000 and was paid nothing. It would have known that the Graves cancelled the transaction. It would have known about the many violations of Minn. Stat. § 325N.17 that were found by the district court. If it did not already know from the plain language of the Purchase Agreement and Settlement Statement, FMB would have learned about every fact necessary to show the Graves were owed money. FMB had the burden of providing conclusive evidence that these facts would not have been known. Because the district court held that Appellant held the burden of proof and applied the wrong standard, it follows that the district court erred in its application of law and in denying Appellant's motion for amended findings or , alternatively, for a new trial. Intentional avoidance offers no protection to FMB.

V. THE DISTRICT COURT ERRED IN DENYING APPELLANT'S COMMON LAW FRAUD CLAIM BY CONCLUDING APPELLANT DID NOT "REASONABLY RELY" ON REPRESENTATIONS MADE BY RESPONDENTS AND A FIDUCIARY RELATIONSHIP DID NOT EXIST.

The district court denied Appellant's common law fraud claim by concluding:

Plaintiff's initial interaction with Wayman on August 15, 2007 was not sufficient to form a fiduciary relationship. The meeting was relatively brief and resemble a sales pitch as opposed to the establishment of a fiduciary relationship. Moreover, within 24 hours the Plaintiffs attempted to cancel the agreements purportedly entered into on that day. In all, the Court has determined that there is insufficient evidence to establish that a fiduciary relationship existed or that Plaintiffs justifiably relied on the representations of the Waymans. For these reasons, Plaintiffs' claim for common law fraud should be dismissed.

a. The elements of constructive fraud and common law fraud.

Constructive fraud is presumed in transactions involving a confidential relationship. Constructive fraud involves situations where (1) one party reposes trust and confidence in another party and (2) the latter party obtains benefits with no or inadequate consideration. *Village of Burnsville v. Westwood Company*, 189 N.W.2d 392, 397 (Minn. 1971). The burden is on the person obtaining such benefits to show that they acted righteously. *Id.*

In cases not involving constructive fraud, the following elements have been identified to “accurately” reflect common law fraud: (1) there must be a representation; (2) that representation must be false; (3) it must have to do with a past or present fact; (4) that fact must be material; (5) it must be susceptible of knowledge; (6) the representer must know it to be false, or in the alternative, must assert it as of his own knowledge without knowing whether it is true or false; (7) the representer must intend to have the other person induced to act, or justified in acting upon it; (8) that person must be so induced to act or so justified in acting; (9) that person's action must be in reliance upon the representation; (10) that person must suffer damage; and (11) that damage must be attributable to the misrepresentation, that is, the statement must be the proximate cause of the injury. *Davis v. Re-Trac Mfg. Corp.*, 276 Minn. 116, 149 N.W.2d 37, 38-39 (Minn., 1967).

b. Fraud was presumed because both elements of constructive fraud were established.

As noted, constructive fraud is presumed if a fiduciary relationship exists, coupled with inadequate consideration. A fiduciary relationship exists when one party places its trust and confidence in the other. *Gibson v. Coldwell Banker Burnet*, 659 N.W.2d 782, 788 (Minn. App. 2003). This may occur when the party relied upon has superior knowledge. *Norwest Bank Hastings v. Clapp*, 394 N.W.2d 176 (Minn. App. 1986). Disparity in business experience and

invited confidence can also be a basis for a finding of a fiduciary relationship. *Cherne Contracting Corp. v. Wausau Ins. Co.*, 572 N.W.2d 339, 342 (Minn. App. 1998); *May v. First National Bank of Grand Forks, North Dakota*, 427 N.W.2d 285, 290 (Minn. App. 1988) (quoting *Murphy v. Country House, Inc.*, 307 Minn. 344, 240 N.W.2d 507, 512 (1976)). The *Murphy* court also noted that the existence of a fiduciary relationship can depend on whether the alleged fiduciary knew of the other party's ignorance as to the legal effect of the transaction or whether the fiduciary should have reasonably known that the other would not have understood any disclosure. *Id.* The relation need not be legal, but may be moral, social, domestic or personal.

In this matter, conclusive evidence of a confidential relationship at the time of inducement compels a conclusion of law that a confidential relationship existed. Appellant had limited education. He graduated from high school and began working right away in construction labor. (Trans., 22:18-25). He has always worked in manual roles far removed from real estate, namely the janitorial and meatpacking. (*Id.*, 23:3-25). He never held a professional license or worked in the real estate or mortgage industry. (*Id.*, 24:5-10).

Aside from the Subject Property, Appellant never purchased or sold any real property. He never refinanced his original mortgage, which made him a prime target as someone holding significant equity. (*Id.*, 26:8-19). Mr. Graves did not understand how the foreclosure process worked and, considering he had never owned real property, he had never experienced foreclosure. (*Id.*, 42:15-17). He did not know what a quit claim or warranty deed was, even at trial. (*Id.*, 42:18-22). When they originally purchased, the Graves retained a real estate professional, rather than going it alone.

In contrast, Mr. Wayman had superior knowledge about real property transactions and foreclosure, particularly when compared to Appellant. (*Id.*, 43:4-14). To induce reliance, Mr.

Wayman represented he was licensed in real estate. (Id., 65:8-12). He also represented he could be depended upon to stop the foreclosure and that Appellant would not lose the house to a completed foreclosure. (Id., 44:14-20; 52:2-4). After all, Mr. Wayman stated he had arranged this same type of transaction for a lot of people in the past. (Id., 52:5-9). Mr. Wayman specifically represented the transaction was a “[r]efinance loan.” (Id., 43:1-3; 44:21-23; 50:7-10). He also presented Appellant with a cancellation form during the course of conversation, indicating it would stop Mr. Wayman from proceeding if Appellant elected to cancel the transaction. (Id., 53:1-9) Mr. Wayman drafted each of the documents that were part of the transaction. Mr. Wayman’s depth of knowledge is underscored by the sophisticated redemption mechanism used to purportedly redeem the foreclosure. Surely, Appellant was drastically outmatched. To suggest the two were on equal footing is not supported by the record and the only conclusion that could have been reached from these irrefutable facts was that a confidential relation existed.

As a matter of law and fact, the Graves received insufficient consideration. The Court correctly found that the \$182,000 purchase price was not paid to the Graves. Indeed, the court found Mr. Graves had not received any amount from the transaction. [Finding 36]. By law, the Graves were entitled to a minimum of 82% of their title, which was the only amount that would be considered legally sufficient consideration. See Minn. Stat. § 325N.17(b); *In re Estate of Malchow*, 143 Minn. 53, 59, 172 N.W.915 (1919) (consideration less than required by statute is insufficient consideration, satisfying the second prong of constructive fraud).

The district court’s only claim against constructive fraud was its belief that “the meeting” was relatively brief, resembling more of a sales pitch than a fiduciary relationship. However, the

Minnesota Supreme Court found a situation of confidence in a sale of a business to inexperienced purchasers. See *Spiess v. Brandt*, 230 Minn. 246, 41 N.W.2d 561, 566 (1950).

In this matter, both prongs were established by the court's findings and conclusive evidence in the record. The district court was compelled to find constructive fraud.

c. Alternatively, and in addition, reliance was justifiable (reasonable).

Minnesota case law holds that one who deceives another may not defend that the other party was negligent in taking him at his word. *Spiess v. Brandt*, 230 Minn. 246, 41 N.W.2d 561, 567 (1950). The reason is compelling:

[W]here, as here, a party to whom a representation has been made has not made an investigation adequate to disclose the falsity of the representation, the party whose misstatements have induced the act cannot escape liability by claiming that the other party ought not to have trusted him.

Davis, 149 N.W.2d at 39.

The district court held the Graves relied upon representations directed to them by Mr. Wayman, which induced the Graves' signing of the documents. Mr. Wayman cannot escape liability by claiming the Graves should not have relied upon him. To rule otherwise mean we must treat every person with whom we deal to be a liar.

Neither of the district court's two reasons relate to reasonable reliance. It is unnecessary to find that Mr. Wayman was a fiduciary in order to find reasonable reliance. Further, the fact that the Graves cancelled within 24 hours does not take away from reasonable reliance. Instead, the fact that the Graves elected to cancel on the form supplied by Mr. Wayman shows they relied upon the representations that they had a right to cancel. The documents consistently allow cancellation just as Mr. Wayman represented. How could their reliance upon the right to cancel be unreasonable?

CONCLUSION

The district court erred in requiring Appellant disprove FMB was a bona fide purchaser. Under the correct standard, FMB was required to present conclusive evidence that it would not have learned of Appellant's interest. It failed to do so and the district court agreed that FMB could have learned of at least some interest of the Graves. Whatever that interest, it was entitled to priority. In fact, the bona fide purchaser defense should not have been applied because the Graves' cancellation pre-dated FMB's interest. In addition, the court's reasons for failing to find reasonable reliance are not supported. The court erred in its application and its refusal to grant a new trial.

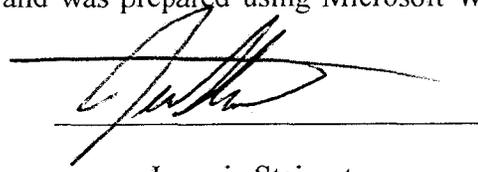
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Minn. R. App. P. 132.01, subds 1 and 3, contains 9,589 words and was prepared using Microsoft Word 2010.

A handwritten signature in black ink, appearing to read "Jeramie Steinert", is written over a horizontal line.

Jeramie Steinert