STATE OF MINNESOTA
IN COURT OF APPEALS
A14-0088

City of Mountain Lake,
Respondent,

vs.

Kenneth Yoder, et al.,
Appellants.

Filed May 12, 2014
Affirmed
Larkin, Judge

Cottonwood County District Court
File Nos. 17-CV-10-446, 17-CV-13-112

Maryellen Suhrhoff, Muske, Muske & Suhrhoff, Ltd., Windom, Minnesota (for respondent)

Timothy J. Keane, Douglas W. Peters, Kutak Rock, LLP**,** Minneapolis, Minnesota (for appellants)

Considered and decided by Larkin, Presiding Judge; Stauber, Judge; and Kirk, Judge.

U N P U B L I S H E D O P I N I O N

LARKIN, Judge

Appellant land-owners challenge the district court's summary-judgment determination regarding the extent to which respondent city's plan to surface a trail

within respondent's right-of-way easement on appellants' lake shore exceeds the scope of the easement. We affirm.

FACTS

In September 2003, Raymond and Harriet Dick conveyed real property located on the northern shore of Mountain Lake to appellants Kenneth and Rachel Yoder. At the time of the conveyance, the property was encumbered by a 60-foot-wide right-of-way easement, which the Dicks expressly granted to respondent City of Mountain Lake in 1996 for "walk path or trail purposes." The easement states, in relevant part:

> Such grant of easement shall be subject to the following:
>
> a. Outstanding rights and interest, if any.
> b. City shall construct and maintain said right-of-way at its own expense.
> c. The right-of-way shall be open to the general public.
> d. City shall, during construction, maintenance and operation of the walk path or trail, protect and preserve soil and vegetation cover and scenic values on the right-of-way.
> e. Dick shall not be liable to City or any person for any injuries or damages to persons or property arising from the construction, operation or maintenance of said right-of-way.
> f. City shall provide for the prevention and control of soil erosion within the right-of-way that might be affected by the construction, operation or maintenance of the walk path or trail.

The public began using the easement shortly after the conveyance in 1996, by crossing over the Dicks' lakeshore property on an unimproved trail. In 1999, the city improved the trail by leveling it, increasing its width to five feet, and spreading gravel on it. In 2002, the city adopted a plan to surface the trail to enhance the public's enjoyment and usage of the trail and to increase access and safety for runners, bicyclists, and the

elderly and disabled. In an effort to secure funds for the project, the city applied for a grant from the Minnesota Department of Transportation (MnDOT). MnDOT preliminarily approved the city's grant application and agreed to pay 80% of the cost of the project, so long as the city modified its plan to comply with the public accommodation provisions of the Americans with Disabilities Act (ADA). To be ADA compliant, the trail must be a minimum of eight-feet wide and have a consistent gradient of no more than five percent throughout. The city modified its plans accordingly. In 2003, the city expanded the trail to a width of eight to ten feet and spread additional gravel and crushed rock on it.

Appellants oppose the surfacing project and contend that it exceeds the scope of the easement. In protest of the project, appellants barricaded a portion of the trail crossing their property in 2005, posted no trespassing signs in 2006, and removed measurement stakes in 2010.

In August 2010, the city sought a declaratory judgment in district court ruling that the surfacing project is within the scope of the easement. The city also sought a temporary injunction and an order "to cease and desist all activity which obstructs [the city's] lawful use of its easement rights." Appellants counterclaimed, arguing that the surfacing project is beyond the scope of the easement and seeking "[a]n order that, if the [c]ity desires to proceed with the construction, it must compensate [appellants] for the additional damages that result from improvements beyond those contemplated in the original [e]asement grant."

The district court notified the parties of its authority to sua sponte grant summary judgment on questions of law and invited them to submit memoranda regarding whether the easement is ambiguous. The parties submitted memoranda, and in October 2010, the district court issued its summary-judgment order construing the easement. The district court concluded that the "easement agreement is unambiguous" and authorizes the city to "grade and level the trail to the extent necessary to prepare it for surfacing," "to surface the trail," and "to install essential erosion, drainage, and sediment controls." But the district court also concluded that the city, "by de facto taking, acquired an additional easement, permitting it to make alterations to the soil and vegetation cover and scenic values on the right-of-way for purposes of constructing a trail compliant with public accommodation laws." The district court therefore ordered that the city may proceed with construction of the trail in accordance with its surfacing plan, but that appellants are entitled to just and fair compensation for the de facto taking and a jury trial on the issue of damages.

It was decided that the parties would proceed with a condemnation action, and in March 2013, the city petitioned for condemnation in a separate district court proceeding. In November 2013, the district court entered judgment on its October 2010 order regarding the scope of the easement. This appeal follows in which appellants challenge the district court's construction of the easement. Appellants indicate that "[t]he appeal

. . . is necessary to finally interpret the scope of the Easement, which will determine the scope of [appellants'] damages in the pending Condemnation Action."[1]

D E C I S I O N

"[Appellate courts] review a district court's summary judgment decision de novo. In doing so, we determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010) (citation omitted).

An easement created by express grant is a contract, the scope of which depends entirely upon the construction of the terms of the grant. *Lindberg v. Fasching*, 667 N.W.2d 481, 487 (Minn. App. 2003), *review denied* (Minn. Nov. 18, 2003). "[T]he primary goal of contract interpretation is to determine and enforce the intent of the parties." *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 323 (Minn. 2003). "Where the parties express their intent in unambiguous words, those words are to be given their plain and ordinary meaning." *Id*. "But if the language is ambiguous, parol evidence may be considered to determine intent." *Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578, 582 (Minn. 2010). Where no ambiguity exists, the interpretation of a contract is a question of law, which is reviewed de novo. *Rosenberg v. Heritage Renovations, LLC*, 685 N.W.2d 320, 324 (Minn. 2004). "Generally, an easement grant is

[1] When there is a partial taking involving an easement, damages are measured "by the difference in the market value of the entire tract before the taking and the market value of the tract remaining." *State by Lord v. N. Star Concrete Co.*, 265 Minn. 483, 488, 122 N.W.2d 118, 123 (1963).

to be strictly construed against the grantor." *Bergh & Misson Farms, Inc. v. Great Lakes Transmission Co.*, 565 N.W.2d 23, 26 (Minn. 1997).

Ambiguity

The district court recognized that it had to determine whether the easement is ambiguous. Thus, the district court ordered the parties "to submit memoranda addressing the issue of patent or latent ambiguity of the express easement," after which, the court would "promptly consider and resolve the ambiguity issue." The district court ordered that if it determined "the express easement to be ambiguous, the Court Administrator shall promptly contact counsel of record and set the [case] on for trial, which shall commence no later than 30 days after filing of the order determining the ambiguity issue."

Appellants submitted a memorandum in accordance with the district court's order, in which they argued that the district court should "find that the plain and clear language of the Easement grant is unambiguous, and the City's Project is outside the scope and extent of the Easement grant." The city similarly argued that the easement is unambiguous, but it argued that the easement authorizes it to grade and pave the trail. Unsurprisingly, the district court ruled that the easement is unambiguous.

In their principal brief to this court, appellants maintain that "[t]he plain and clear language of the [e]asement is unambiguous." The principal brief does not argue that the easement is ambiguous; it merely acknowledges that if the court determines that the easement is ambiguous, a trial would be appropriate. Despite their historical position that the easement is unambiguous, appellants argue in their reply brief—for the first time—

that this court "should reverse the District Court's finding that the easement language is unambiguous" and remand "to allow the parties to introduce and develop the extrinsic evidence that will allow proper findings of fact on the Parties' intent."

A party cannot raise an argument for the first time in a reply brief. *Fontaine v. Steen*, 759 N.W.2d 672, 676 (Minn. App. 2009). Moreover, "a party [may not] obtain [appellate] review by raising the same general issue litigated [in district court] but under a different theory." *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Appellants' theory in district court, and in their principal brief to this court, was that the easement is unambiguous and that the city's project exceeds the plain language of the easement. Appellants' contention that the easement is ambiguous and that a determination regarding the parties' intent therefore should be based on extrinsic evidence is a new theory raised for the first time in their reply brief, which we will not consider on appeal. *See id.*; *Fontaine*, 759 N.W.2d at 676. Instead, we assume, without deciding, that the easement is unambiguous and interpret the easement on its face, as appellants invited the district court to do. *See McAlpine v. Fidelity & Cas. Co.*, 134 Minn. 192, 199, 158 N.W. 967, 970 (1916) ("The settled general rule is that a party cannot avail himself of invited error.").

Easement Interpretation

We now turn to the interpretation of the easement. The district court's conclusion that the city "acquired an additional easement" by de facto taking is not challenged on appeal. We therefore limit our review to the district court's conclusion that the easement authorizes the city to "grade and level the trail to the extent necessary to prepare it for surfacing," "to surface the trail," and "to install essential erosion, drainage and sediment

controls." Appellants argue that "the 'walk path or trail' provided by the Easement grant was to consist of a natural, meandering path over and across the existing land that would be used by people walking on foot." Appellants therefore contend that "[t]he plain and unambiguous language of the Easement grant does not support or include any part of the City's trail project." For the reasons that follow, we disagree.

First, the plain language of the easement does not limit the purpose of the trail to walking. The easement was granted for "walk path or trail purposes." The Minnesota Supreme Court has stated, in the context of construing a statute, that "[a]bsent context revealing that the word 'or' should be read as a conjunctive, we have generally read 'or' to be disjunctive," *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 385 (Minn. 1999), and that "[t]he word 'or' . . . ordinarily refers to different things as alternatives." *Aberle v. Faribault Fire Dep't Relief Ass'n*, 230 Minn. 353, 360, 41 N.W.2d 813, 817 (1950). Thus, the easement in this case authorizes one of two things: a "walk path" or a "trail." Because the word trail is not modified, its purpose is not limited to walking. Appellants contend that "[w]ith no modifier to limit the definition of trail, the word could mean practically anything." But we only decide whether the proposed trail is within the scope of the easement, and not whether any conceivable trail would exceed its scope.

Second, the plain language of the easement indicates that the parties intended that the existing trail would be subject to construction. The easement states that the city "shall, during construction, maintenance and operation of the walk path or trail, protect and preserve soil and vegetation cover and scenic values on the right-of-way." That language clearly anticipates construction, but it requires the city to simultaneously protect

and preserve soil, vegetation cover, and scenic values. If we were to interpret the easement to require the trail to remain in the same condition that it was in when the easement was granted, we would render the construction language meaningless. "Because of the presumption that the parties intended the language used to have effect, [appellate courts] attempt to avoid an interpretation of the contract that would render a provision meaningless." *Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 526 (Minn. 1990). We also observe that the construction and preservation language is consistent with the relative widths of the trail and right-of-way. Because the proposed trail is up to ten-feet wide and the right-of-way is 60-feet wide, the preservation language provides protection for that portion of the right-of-way that is not used for the trail.

Third, the plain language of the easement does not restrict the method or materials that may be used to construct the trail. Absent such a limitation, the city may construct a trail that reasonably facilitates the use granted, including a paved trail. *See St. Anthony Falls Water-Power Co. v. City of Minneapolis*, 41 Minn. 270, 274, 43 N.W. 56, 57 (1889) (stating that "where a grant is made it must have been the intention of the parties that the grantee should have the means of using the thing granted").

In sum, the district court's conclusion that "the parties intended for the [c]ity to 'construct' a trail that would further reasonable and convenient enjoyment of the easement by the public and result only in incidental alterations to the natural state of the land" is consistent with the plain language of the easement. Appellants' contention that "the lack of consideration given for the easement suggests a narrower scope than the city asserts" does not persuade us otherwise. Appellants argue that "[t]he fact that Mr. Dick

asked for no compensation in exchange for the easement compels the conclusion that [he] did not envision or intend the escalation in use that eventually followed" and that "where, as here, an easement is granted for free, it reasonably can be assumed that the parties envision and intend only minor changes." Appellants' argument ignores the fact that the city improved the trail by leveling off a five-foot-wide path and spreading gravel on it in 1999, when the Dicks still owned the property.

Moreover, because the easement language is unambiguous, we do not consider extrinsic evidence regarding the Dicks' intent when determining the scope of the easement. *See Dykes*, 781 N.W.2d at 582. Appellants had the opportunity to argue that the easement is ambiguous and to obtain a trial to establish the Dicks' intent based on extrinsic evidence. But appellants argued that the easement is unambiguous, and they cannot change that position on appeal. *See Thiele*, 425 N.W.2d at 582. Thus, the resulting record before this court does not "compel[] the conclusion that Mr. Dick did not envision or intend the escalation in use that eventually followed."

Although we certainly understand appellants' frustration with the city's plan to make the trail more accessible to the public, we conclude that the district court did not err in construing the easement. We therefore affirm.

Affirmed.