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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-34**

Dr. James Hoffman, et al.,
Appellants,

vs.

City of White Bear Lake,
Respondent,

Arnt Construction Company, Inc.,
Respondent.

**Filed August 15, 2011
Affirmed in part, reversed in part, and remanded
Peterson, Judge**

Ramsey County District Court
File No. 62-CV-07-2219

Daniel N. Rosen, Tammy L. Pust, Douglas G. Wardlow, Parker Rosen, LLC,
Minneapolis, Minnesota (for appellants)

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City of White Bear Lake)

Considered and decided by Minge, Presiding Judge; Peterson, Judge; and
Muehlberg, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals
by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

PETERSON, Judge

In this property dispute involving what is now registered land, appellant-owners argue that (1) in granting a partial summary judgment that respondent-city had a license for a drainage system across appellants' land, the district court erred by drawing improper inferences from the record and by resolving factual questions against appellants; (2) any license that did exist was terminated by the registration of the land; and (3) if the license exists, the district court erred in rejecting appellants' claim for inverse condemnation of their property based on appellants' allegation that respondents' use of the property exceeded the extent of the license. We affirm in part, reverse in part, and remand.

FACTS

Appellants Dr. James and Veronica Hoffman own a parcel of property located on the southwest corner of Lake Avenue and Ninth Street in the City of White Bear Lake (the city). Lake Avenue runs north and south through the property. When appellants acquired the property in 2004, a concrete headwall, three feet wide by five feet high, was located on the eastern part of the property. A 12-inch corrugated-metal outlet pipe ran from a catch-basin on Lake Avenue to the headwall.

The outlet pipe was installed during a reconstruction and relocation of Lake Avenue that occurred between 1924 and 1928. The outlet pipe was part of the city's street-drainage system, which was intended to control storm water from Lake Avenue and adjacent properties and consisted of curbs, catch basins, and corrugated-metal outlet pipes. There was no written agreement between the city and Gladys Fredrick, who then

owned the property, permitting construction of the outlet pipe. Over the years, the outlet pipe fell into disrepair and may have partially collapsed.

In 1981, the then-owners of the property, William and Frances Goodwin, brought an action to register the property under the Minnesota Torrens Registration Act. The summons named the city as a party to the action, and the city was served with the summons but did not appear in the proceeding. The district court issued an order and decree of registration stating that the property is subject to

an easement for public road purposes in favor of the City of White Bear Lake as and to said part of the adjoining Lake Avenue lying west of a line parallel to and 35 feet east from the Easterly line of said Lot 1 and its extension, and as to the East 5 feet of said Lot 1.

As part of a 2007 reconstruction of Lake Avenue, the outlet pipe and headwall were removed and replaced with a 12-inch outlet pipe that terminates in a flared and grated end that is 23 inches wide by 12 inches high. To protect against erosion, the city also added riprap, which occupies an oval-shaped area about 12 feet by 14 feet at the end of the pipe.

Appellants brought this action against the city seeking damages for trespass and inverse condemnation. The district court granted partial summary judgment for the city, concluding that the city had a license to maintain the outlet pipe and headwall that was irrevocable as long as the outlet pipe and headwall were part of the Lake Avenue drainage system. The court explained:

38. This is one of those situations in which the City and Ms. Fredrick appear to have dealt with each other on an informal basis. It is the indisputable fact that Lake Avenue

was relocated and reconstructed with a drainage system that included the outlet pipe on the Property. Thus, the City gave consideration for whatever right, title, interest, or permission it received from the affected property owners, including Ms. Fredrick, by conveying to them its interest in the land between Lake Avenue as platted and the Lake [as held in *Magnuson v. City of White Bear Lake*, 295 Minn. 193, 196-98, 203 N.W.2d 848, 850-51 (1973)]. In return and in reliance of whatever permissions and easements it received, the City relocated and rebuilt Lake Avenue including its drainage system, which system included installing the outlet pipe across the Property.

39. The question of the scope and duration of this initial permission is also inferable from the fact that the outlet pipe was constructed, without apparent challenge, and remained in place without challenge for 81 years, including some 27 years after the registration proceeding. At a minimum, the permission allowed the City to use as much of the Property as it actually used, and no more, to install the outlet pipe and headwall. As to its duration, the only rational possibility is that the permission was only for so long as the outlet pipe was necessary for the operation of Lake Avenue.

40. Assuming such an informal agreement between Ms. Fredrick and the City, it does not matter whether it is characterized as a license, or an easement in gross, or a prescriptive easement. In any case, the registration proceeding did not “extinguish” whatever it is. A license, being a permissive personal legal right is not an interest in land, would not be extinguished by mere registration, especially where the permissive use obviously continued after the registration. Arguably, an easement in gross or a prescriptive easement, being “interests in real estate”, may be “extinguished” by registration in the sense that they could not bind a subsequent good faith purchaser of the Property. Here, the registration reserved the right for highways and the outlet pipe is without serious argument part of Lake Avenue. Secondly, whether [appellants] are good faith purchasers is an open question. The evidence is that they had actual knowledge of, at least, the headwall at the time they purchased. To the extent that registration had any [e]ffect on the City’s legal right to be on the Property, the post-

registration use by the City created, at a minimum, a new permissive license.

The district court also rejected appellant's claim that the city had abandoned the outlet pipe and headwall.

Appellants dismissed their trespass claim, and the inverse-condemnation claim was tried to the court. The district court granted judgment for the city based on its determination that the new outlet "pipe's bottom flair is within the area of the Property covered by the license to discharge water across the Property to [the lake]." This appeal followed.

DECISION

I.

On appeal from a summary judgment, appellate courts review de novo whether a genuine issue of material fact exists and whether the district court erred in applying the law; in doing so, appellate courts view the evidence in the light most favorable to the party against whom summary judgment was granted. *Peterka v. Dennis*, 764 N.W.2d 829, 832 (Minn. 2009). To survive a summary-judgment motion, the nonmoving party must present "sufficient evidence to permit reasonable persons to draw different conclusions." *Schroeder v. St. Louis Cnty*, 708 N.W.2d 497, 507 (Minn. 2006) (emphasis omitted).

The district court concluded in its summary-judgment order that the city had a license that applied to the 2007 Lake Avenue reconstruction.

A license is

“an interest in land in the possession of another which (a) entitles the owner of the interest to a use of the land, and (b) arises from the consent of the one whose interest in the land used is affected thereby, and (c) is not incident to an estate in the land, and (d) is not an easement.”

Chicago & N. W. Transp. Co. v. City of Winthrop, 257 N.W.2d 302, 304 (Minn. 1977) (quoting Restatement of Property § 512 (1944)).

The rights of the license are fixed by the agreement creating the license, if there is one. If there is no agreement, or the agreement does not fix the rights of the parties with respect to the matter in issue then it becomes a question of the reasonableness of the expectations of the parties.

8 David A. Thomas, *Thompson on Real Property* § 64.04(a), at 27 (1994).

In determining that the city had a license, the district court relied on *Magnuson v. City of White Bear Lake*, in which the supreme court addressed the 1924 reconstruction of Lake Avenue. 295 Minn. 193, 203 N.W.2d 848 (1973). In *Magnuson*, the supreme court affirmed the following findings by the district court:

The intent of the parties to the 1924 agreement was to establish a new Lake Avenue and to finally resolve the errors in the survey in the 1871 plat of White Bear. The parties created a new 60 foot right-of-way consisting of portions of private platted lots, portions of the traveled road, and portions of Lake Avenue as platted. The portions of the traveled road and the portions of Lake Avenue as platted which were not required for the new 60 foot Lake Avenue, were surrendered to the property owners.

No compensation was paid to the property owners as a result of the 1924 agreement for removal of trees or taking of the land necessary for the new Lake Avenue. Since 1924, Plaintiffs and their predecessors in title have enjoyed the continuous exclusive possession of the entire lake shore strip East of the 60 foot right-of-way of Lake Avenue without objection by the City The strip of shore land has been

assessed for taxes since at least 1920 and Plaintiffs and their predecessors have paid real estate taxes thereon.

295 Minn. at 195-96, 203 N.W.2d at 850 (quotation marks omitted). The supreme court explained:

... In the present case, until 1969, when the city adopted a resolution attempting to regulate the use of shoreland including the strip plaintiffs claim to own, the city of White Bear Lake has made no serious claim to that strip. The city has sought in the past to widen Lake Avenue by encroaching further upon private property; but in doing so, as the court found, it paid nothing for the land taken nor, so far as we have been able to determine from the record, has such property ever been condemned. We are convinced that the landowners surrendered part of this property in return for a settlement of the dispute as to ownership of the shore property. It is hard to see how else the city could have acquired the necessary property to widen Lake Avenue except by condemnation.

Id. at 197-98, 203 N.W.2d at 851.

In *Magnuson*, the supreme court concluded that the property owners had title to shore land property based on evidence that they had surrendered property to the city in exchange for settlement of a title dispute. The *Magnuson* case, however, did not address the drainage system, and no evidence in the record in this case indicates whether the drainage system was part of the exchange.

Also, in *Johnson v. Skillman*, 29 Minn. 95, 12 N.W. 149 (1882), the supreme court concluded that an oral agreement was insufficient to create an irrevocable license:

The form of the alleged agreement, as found by the court, is that plaintiff's grantor verbally promised and agreed with defendants "that if they would erect a good custom mill at a certain point, he would give them the privilege of flowing his land so long as they would maintain such mill." Such an

agreement might very properly be construed as intending to give an interest in the land, commensurate with a permanent right of occupancy thereof for mill purposes, and so be made the subject of equitable relief, on the basis of part performance, had its terms been more definite. There may be specific performance in such cases upon a proper showing, though the improvements and expenditures are entirely on the land of the licensee, and there be no other possession than that incident to the enjoyment of the privilege. Such a remedy is not, however, available here for several reasons.

... [T]he terms of the agreement are altogether too general and indefinite. Neither the height of the dam nor extent of the flowage allowed appear. In the second place, the court finds that the defendants, relying on said agreement, and in part induced thereby, “erected on their own land adjoining a dam and mill at great cost.” In the absence of any supporting evidence, we are left to infer that they were also influenced by other considerations in the matter. The rule is quite strict that the alleged part performance must be founded on and referable solely to the agreement.

29 Minn. at 99, 12 N.W. at 150-51 (citation omitted).

In this case, as in *Johnson*, there is no evidence of a definite agreement with specific terms. The district court concluded that the permission the city received in the 1920’s to construct and rebuild Lake Avenue included permission to install the drainage system that included the outlet pipe. The district court also concluded, “As to its duration, the only rational possibility is that the permission was only for so long as the outlet pipe was necessary for the operation of Lake Avenue.” But the only evidence of the agreement in this case is the installation of the drainage system, and there is no evidence as to the terms of the agreement. Absent such evidence, the district court erred in concluding that the only rational possibility is that the agreement applied to the 2007 Lake Avenue reconstruction. It is also reasonable to infer that any agreement between

Fredrick and the city applied only to the drainage system that was installed during the 1920's and not to upgrades or that the city installed the drainage system without an agreement. Because there is no clear, undisputed evidence regarding the terms of any agreement, the record does not establish a license as a matter of law, and we reverse the district court's conclusion that the city had a license.

II.

Although the district court's decision was based on a determination that the city had a license, the district court also considered whether the city had a prescriptive easement for the drainage system.

To establish an easement by prescription, a claimant must prove he or she used the easement for the prescriptive period of 15 years and that such use was hostile, actual, open, continuous, and exclusive. . . . Use of an easement is presumed to be adverse or hostile when the easement claimant shows open, visible, continuous, and unmolested use for the statutory period that is inconsistent with the owner's rights, under circumstances from which the owner's acquiescence may be inferred. Unless the defendant successfully rebuts this presumption, the claimant prevails. Without the aid of this presumption, the adverse character of the original user is an issue of fact, and the easement claimant must present clear and unequivocal proof of inception of hostility. Once a prescriptive easement comes into existence, it passes to subsequent owners of the property.

Block v. Sexton, 577 N.W.2d 521, 524 (Minn. App. 1998) (citations and quotation omitted).

In *Alstad v. Boyer*, the supreme court concluded that an oral agreement to construct a shared concrete driveway that straddled a property line created a prescriptive easement, rather than a license:

Reasonable men would not surface a driveway with a slab of concrete ten feet wide—a type of construction designed to last for many years—if only a temporary use were intended or if either party thought that the use was to be merely permissive and subject to termination at any time. The original owners over the years had used, and each asserted, a right of use to the entire driveway that was hostile to the servient estate of the other. Each party acquiesced in the assertion of a hostile right by his neighbor. Acquiescence is the inactive status of quiescence or unqualified submission to the hostile claim of another, and is not to be confused with permission, which denotes a grant of permission in fact or a license. Here, the facts do not show a permissive use, and there is nothing to rebut the presumption of hostile user for the full statutory period. An un rebutted presumption prevails and controls the decision as a matter of law.

228 Minn. 307, 312, 37 N.W.2d 372, 376 (1949) (emphasis omitted) (citations omitted).

Here, as in *Alstad*, the installation of the drainage system is inconsistent with a temporary use, and there is no evidence of an agreement granting a mere permissive use. Thus, the record demonstrates that, before the Torrens registration proceeding occurred, the city held a prescriptive easement for the drainage system as a matter of law.

III.

Appellants argue that any easement for the drainage system that the city may have held was extinguished by the Torrens registration proceeding. The registration statute states:

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 the same free from all encumbrances and adverse claims, excepting only such estates, mortgages, liens, charges, and interests as may be noted in the last certificate of title in the office of the registrar

.....

Minn. Stat. § 508.25 (1980).

The title certificate issued after the Torrens proceeding certifies that the owners' interest in the property is

[s]ubject to an easement for public road purposes in favor of the City of White Bear Lake as and to said part of the adjoining Lake Avenue lying west of a line parallel to and 35 feet east from the Easterly line of said Lot 1 and its extension, and as to the East 5 feet of said Lot 1.

The title certificate also states that the owners' interest in the property is subject to “[a]ll rights in public highways upon the land” as required by Minn. Stat. § 508.25. The city argues that the easement and reservation of rights in public highways permit the city to maintain the outlet pipe because the storm drainage system is “an integral part” of Lake Avenue.

In *Farnes v. Lane*, an easement for the “purpose of ‘right-of-way’ to the lake” was confirmed in a Torrens registration proceeding, and the issue was whether the defendants had the right to install a dock on the servient estate. 281 Minn. 222, 223, 161 N.W.2d 297, 299 (1968). The supreme court stated:

Although the determination of the district court in the land registration proceedings is not subject to collateral attack and defendants are therefore precluded from claiming an easement in addition to that of a right-of-way to the lake, they are free to argue that the installation and use of a dock is a proper exercise of the easement which the Torrens proceedings confirmed. . . .

. . . .

The grantee of an easement or right-of-way to the lake may or may not be entitled to install and use a dock extending

from the way into the lake, depending on the circumstances of the particular case. If the easement is granted in terms which clearly and specifically allow or deny this use, the language of the instrument creating the right will control.

Where, as here, the easement for a way is granted in general terms, no reference being made to the installation or use of a dock, the uncertainty must be resolved by applying the general principles of law relating to the construction of ambiguous writings.

Id. at 223, 225, 161 N.W.2d at 299, 300 (emphasis omitted) (footnote omitted) (citations omitted).

Here, as in *Farnes*, the easement for public-road purposes is described in general terms and does not clearly and specifically allow or deny use for a drainage system. Consequently, the uncertainty must be resolved by applying the general principles of law relating to the construction of ambiguous writings. Under these general principles,

“[t]he rule is well established that ordinarily the construction of a writing which is unambiguous is for the court, particularly when the intention of the parties is to be gained wholly from the writing. However, if the language is ambiguous, resort may be had to extrinsic evidence, and construction then becomes a question of fact, unless such evidence is conclusive.”

Marso v. Mankato Clinic, Ltd., 278 Minn. 104, 114, 153 N.W.2d 281, 288 (1967) (quoting *Leslie v. Minneapolis Teachers Ret. Fund Assn.*, 218 Minn. 369, 373, 16 N.W.2d 313, 315 (1944)).

The district court stated in its summary-judgment memorandum:

Arguably, an easement in gross or a prescriptive easement, being “interests in real estate”, may be “extinguished” by registration in the sense that they could not bind a subsequent good faith purchaser of the Property. Here, the registration

reserved the right for highways and the outlet pipe is without serious argument part of Lake Avenue.

But because the language describing the easement for public-road purposes does not specifically allow use for a drainage system and “road purposes” arguably may not include the drainage system, the language is ambiguous, and its construction is a fact question that could not properly be resolved on summary judgment. Therefore, we remand to the district court for further proceedings to determine the fact question of the proper construction of the language.

IV.

Appellant argues that in the summary-judgment order, the district court determined that “[t]he physical dimension of the Property subject to the license is co-extensive with the area occupied by the original outlet pipe and headwall” and that the district court improperly modified that determination following trial. In the summary-judgment order, the district court found, “At a minimum, the permission allowed the City to use as much of the Property as it actually used, and no more, to install the outlet pipe and headwall.” The district court concluded:

b. The City is entitled to summary judgment on the question of its right to continue to lawfully maintain an outlet pipe and headwall on the Property pursuant to the license granted to it in 1928, or, alternatively, after the 1982 registration proceeding, which license is irrevocable so long as the outlet pipe and headwall are part of the drainage system of Lake Avenue.

c. The physical dimension of the Property subject to the license is co-extensive with the area occupied by the original outlet pipe and headwall.

d. Under the license, the City has the right to enter the Property in order to repair, maintain, or replace the outlet pipe and headwall, provided it does so in a reasonable fashion and without unnecessary harm to the Property.

e. It follows that the City does not have the right to unilaterally expand or extend the physical area subject to its license and that it does not have the right to unreasonably damage the Property in exercising its right of entry to repair, maintain, or replace the outlet pipe and headwall.

43. [Appellants'] cause of action for inverse-condemnation is limited [to] any land "taken" by the City in excess of the physical area covered by its license. Also, [appellants] have a cause of action for damages for any unreasonable damage the City may have inflicted on the Property in exercising its license to repair, maintain, and replace the outlet pipe and headwall.

At the beginning of trial, the following discussion occurred between the district court and appellants' counsel:

[APPELLANTS' COUNSEL]: So the only claim that we present here today is: Did they go beyond the right that Your Honor found that they had . . . in the court's earlier ruling?

Now the guidelines for that . . . are in the court's ruling, and the court says that the physical dimension of what the city had was – and this now I'm quoting – "is coextensive with the area occupied by the original outlet pipe and head wall." . . .

THE COURT: Did I stop there or did I say, "and a reasonable right to maintain"?

[APPELLANTS' COUNSEL]: You said that they had a geographical right . . . defined in the way that I have just – and they also had the reasonable right to repair, maintain –

In the order for judgment following trial, the district court stated:

[The summary-judgment order] did not directly address the precise physical limits of the area of the Property subject to the license. In deciding the City's summary judgment motion, [the district court] had no occasion to define exactly

what area was subject to the license because the essential question put to [the court] on summary judgment were: (a) whether the City had any legal basis to be on the Property; and (b) whether, legal basis or not, the City had committed a trespass or other tort. . . . [Appellants] read my general descriptor, the license area is at least co-extensive with the physical area occupied by the outlet pipe and headwall, restrictively. . . . [I]t is an incomplete reading because the license to buil[d] and maintain the outlet pipe of necessity includes a license to discharge water over that portion of the Property extending from the old headwall toward White Bear Lake. It follows that the summary judgment order did not define the entire area encompassed by the license. The question of the exact physical extent of the license beyond the headwall was for another day.

“We defer to a district court’s interpretation of its own order.” *LaChapelle v. Mitten*, 607 N.W.2d 151, 162 (Minn. App. 2000), *review denied* (Minn. May 16, 2000). The summary-judgment order, read in its entirety, supports the district court’s interpretation.

In reviewing court trials, an appellate court views the record in the light most favorable to the judgment and will not reverse the district court’s findings of fact unless they are clearly erroneous. *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999). A finding of fact is clearly erroneous when it is “manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole.” *N. States Power Co. v. Lyon Food Prod., Inc.*, 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975). We review the district court’s conclusions of law de novo. *W. Insulation Servs., Inc. v. Cent. Nat’l Ins. Co.*, 460 N.W.2d 355, 357 (Minn. App. 1990).

The district court found that, although “the bottom portion of the new pipe extends approximately 1.5 feet further towards White Bear Lake,” this fact

does not necessarily equate to a violation of the license. The pipe's bottom flair is within the area of the Property covered by the license to discharge water across the Property to the White Bear Lake. Accordingly, I conclude that the approximate 1.5 foot extension of the new pipe does not constitute a violation of the license to construct and maintain a drainage outlet system across the Property.

The same analysis applies to an easement. Therefore, if on remand the district court determines that the easement for public-road purposes includes the drainage system, it should also determine whether extending the outlet pipe violates the easement.

Affirmed in part, reversed in part, and remanded.