STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2257
A07-2258

Edward A. Martin,
Appellant (A07-2257),

Fletcher W. Hinds,
Appellant (A07-2258),

vs.

Lafarge Group d/b/a Lafarge North America, Inc.,
defendant and third party plaintiff,
Respondent,

vs.

City of Duluth,
Third Party Defendant.

Filed December 9, 2008
Affirmed
Huspeni, Judge[*]

St. Louis County District Court
File Nos. 69DU-CV-06-2239 & 69DU-CV-06-2248

Scott A. Wilson, 900 Second Avenue South, Suite 400, Minneapolis, MN 55402; and Harry A. Sieben, Jr., Jeffrey M. Montpetit, Sieben, Grose, Von Holtum & Carey, Ltd., 900 Midwest Plaza East, 800 Marquette Avenue, Minneapolis, MN 55402 (for appellants)

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

Robert E. Kuderer, Stacey A. Molde, Johnson & Condon, P.A., 7401 Metro Boulevard, Suite 600, Minneapolis, MN 55439 (for respondent)

Considered and decided by Hudson, Presiding Judge; Bjorkman, Judge; and Huspeni, Judge.

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

HUSPENI, Judge

Appellants challenge the district court's grant of summary judgment to respondent, arguing that (1) appellants need not meet a heightened burden of demonstrating the presence of a material fact issue to avoid summary judgment; (2) the district court erred by improperly determining the admissibility of evidence; and (3) there is a genuine issue of material fact regarding ownership of the railroad track crossing on which appellants suffered injuries. Because the district court required the appellants to satisfy the ordinary burden of demonstrating the existence of a material fact issue, and the district court did not err in determining admissibility of the evidence, and there is no material fact issue in this case, we affirm.

FACTS

Appellants Edward A. Martin and Fletcher W. Hinds brought suit against respondent Lafarge Group for personal injuries sustained while bicycling across a railroad track. Respondent is a supplier of construction materials. The railroad track that allegedly caused appellants' injuries is a spur track located near the intersection of

Railroad Street and Eighth Avenue West in Duluth, Minnesota.[1] Running parallel to Railroad Street are tracks owned and operated by Burlington Northern Railroad. Branching off the parallel track is the spur track at issue here, which crosses Railroad Street, continues across respondent's land, and terminates at a loading slip near the Duluth harbor.

Appellants contend that respondent owns the spur track; respondent contends that the spur track is owned by the Chicago and Northwestern Railway Company (Railway Company). Appellants brought suit against the City of Duluth and respondent. Both respondent and the City of Duluth moved for summary judgment. In support of its motion for summary judgment, respondent submitted certificates of title indicating that the City of Duluth owns Railroad Street in fee for use as a public thoroughfare and respondent owns the adjoining lots 1, 2, 3, and 4 of Block 10 in the Bayfront Division. The certificates also show that respondent owns those lots in the Bayfront Division except for portions owned by the City of Duluth. And the city's certificates in turn contain a reservation granted to the Railway Company. Appellants do not dispute that their injuries occurred on the spur track contained within the Railway Company's reservation. Nevertheless, appellants argue that respondent owns the spur track and that there are genuine issues of material fact precluding summary judgment.

In opposition to respondent's motion for summary judgment, appellants submitted (1) a deposition by James Sweeney; (2) responses to interrogatories by the City of

[1] The railroad track is registered with the U.S. Department of Transportation as crossing number 075101U and with the Minnesota Department of Transportation as number 69014590.

Duluth; (3) the expert opinion and supporting documents of John Hinzmann, Jr. (Hinzmann) that respondent owns the disputed land; and (4) insurance documentation related to the Railroad Street Reconstruction Project (Reconstruction Project) that names respondent as an insured party. The district court concluded that appellants' evidence was either inadmissible or insufficient to create a genuine issue of material fact regarding ownership of the spur track and awarded summary judgment to both respondent and the City of Duluth.[2]

D E C I S I O N

I.

We initially address the parties' dispute as to the basis upon which the district court awarded summary judgment. Appellants argue that the court applied the heightened burden of proof enunciated in *Rogers v. Clark Iron Co.*, 104 Minn. 198, 116 N.W. 739 (1908). We disagree. In *Rogers*, upon appeal after a trial, the supreme court stated:

> This case is governed by the principle that, where an assault on a record title is made by attempting to establish a title in a third person by secondary proof of a lost muniment of title, a high degree of proof is required. Such evidence must be strong and satisfactory. The benefit of the doubt and the strong presumption is to be given to the record title.

Rogers v. Clark Iron Co., 104 Minn. 198, 210, 116 N.W. 739, 743 (1908). The *Rogers* case makes no reference to summary judgment.

[2] The award of summary judgment to the City of Duluth is not challenged on appeal.

Review of the record here convinces us that the district court applied the ordinary summary judgment standard in determining whether appellants had demonstrated the existence of a material fact issue for trial.[3] This court also applies the ordinary standard and asks (1) whether there are any genuine issues of material fact and (2) whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990).

II.

Appellants challenge several of the district court's evidentiary rulings. "Evidence offered to support or defeat a motion for summary judgment must be such evidence as would be admissible at trial." *Hopkins by LaFontaine v. Empire Fire and Marine Ins. Co.*, 474 N.W.2d 209, 212 (Minn. App. 1991). Affidavits filed in support or opposition of a summary judgment motion "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Minn. R. Civ. P. 56.05. An affiant's "[s]tatements must contain more than unsupported conclusionary facts and

[3] The sole mention of *Rogers* in the district court's memorandum appears to be directed to discussion of the admissibility of expert opinion. In contrast, the ordinary and appropriate summary judgment standard is set out at length in the memorandum. Further, the heightened-burden requirement announced in *Rogers* in a trial setting might logically be argued to apply to the summary judgment stage of proceedings also. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254, 106 S. Ct. 2505, 2513 (1986) (stating that in a case alleging defamation, "in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden"). If that were to be the case and the district court were to have erred in applying the ordinary standard in awarding summary judgment that error would have enured to the benefit of appellants because they only were required to meet the lower, ordinary standard and such error would thus be of no consequence here.

unwarranted opinions or legal conclusions." *Gutwein v. Edwards*, 419 N.W.2d 809, 812 (Minn. App. 1988) (citing *Urbaniak Implement Co. v. Monsrud*, 336 N.W.2d 286, 287 (Minn. 1983)).

In awarding summary judgment to respondent, the district court concluded that appellants' "secondary proof regarding the ownership of the spur track is inadmissible and thus insufficient to dispute the ownership interests stated in the Certificates of Registration." Thus, in effect, the district court determined that appellants had submitted no specific facts showing a genuine issue for trial. *See Gross v. Victoria Station Farms, Inc.*, 578 N.W.2d 757, 762 (Minn. 1998) (concluding summary judgment was appropriate because without expert opinion, there was no evidence of causation). We review each item of appellants' evidence in turn.[4]

City of Duluth's interrogatory responses

Appellants argue that the City of Duluth's interrogatory responses indicate that respondent asserted ownership of the spur track, and that such assertion constitutes an admission of a party-opponent and is admissible pursuant to Minn. R. Evid. 801(d)(2). We disagree. Appellants' proffered interrogatory response by the City of Duluth states:

> Plaintiff's expert witness, John Hinzmann of Seaway Engineering, has opined that Defendant and Third-Party Plaintiff ("LaFarge") owns the subject railroad tracks and crossing. Upon information and belief, LaFarge represented that it was the owner of the subject tracks and crossing during the street improvement project of Railroad Street. See the

[4] Issues not briefed on appeal are waived. *Melina v. Chapman*, 327 N.W.2d 19, 20 (Minn. 1982). The district court's conclusion that Sweeney's deposition was insufficient as a matter of law to create a material fact issue is not challenged on appeal and is thus deemed waived.

> attached Sheet 3 of 3 for project No. 94026 drawn by "KEJ" of Seaway Engineering Co. that indicates LaFarge as the owner of the tracks and crossing that are the subject matter of this lawsuit.

We conclude that because the City of Duluth's response is made merely "upon information and belief" and appears to rely on appellants' expert, Hinzmann, as well as survey maps prepared by Hinzmann's former company, the City's response is not an admission by respondent. Appellants failed to satisfy the requirements of Minn. R. Evid. 801(d)(2) and the district court did not err in declaring such evidence inadmissible. Further, even if not declared inadmissible, the City of Duluth's interrogatory response raised no material fact issue as to the ownership of the spur track.

Hinzmann's expert opinion

Appellants also argue that the district court erred in declaring Hinzmann incompetent to opine on the state of the spur track title. We conclude that there was no error.

An expert opinion is admissible if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Minn. R. Evid. 702. And the witness must be "qualified as an expert by knowledge, skill, experience, training, or education." *Id.* A district court's evidentiary ruling on the admissibility of an expert opinion will not be reversed unless it is based on an erroneous view of the law or it is an abuse of discretion. *Gross*, 578 N.W.2d at 760. This is a very deferential standard and even if this court would have reached a different

conclusion as to the sufficiency of the foundation, the district court's decision will not be reversed absent clear abuse of discretion. *Id.* at 761.

In support of Hinzmann's qualifications to opine on title to the spur track, appellants submitted an affidavit by Hinzmann, survey maps prepared by Hinzmann for the Reconstruction Project, and a memo drafted by Hinzmann in 1996 stating that respondent owns the spur track. Hinzmann's affidavit establishes that he is employed as an engineer and land surveyor; that his previous company completed surveying work for the Reconstruction Project; that he is familiar with the spur track, having sought to determine who owned it when surveying for the Reconstruction Project; and that, in his opinion, respondent owns the spur track. But Hinzmann's affidavit does not explain how his work on the Reconstruction Project provided him with knowledge of the state of title to the spur track. Nor does the affidavit explain how he determined that respondent owns the spur track. And as the district court correctly pointed out, the 1996 memorandum concluding that respondent owns the spur track is merely a legal conclusion based on unsupported facts drafted by Hinzmann and contains no information on how he reached this conclusion.

Appellants, citing *Ellis v. Wingate*, 155 N.E.2d 783, 787 (Mass. 1959), argue that Hinzmann is competent and that questions about his knowledge of the state of ownership go to the weight of his testimony and not to his competency. To the extent that *Ellis*—as caselaw from a jurisdiction other than Minnesota—may be informative, it is also distinguishable. In that case, the court stated that in an action to quiet title, it was not an abuse of discretion to permit a surveyor to testify to the location of the westerly boundary

of the contested property. *Ellis*, 155 N.E.2d at 787. The *Ellis* court did not require courts to accept the testimony of a surveyor on matters of title but recognized that proper foundation might be presented. *Id.* Here, appellants have not laid the proper foundation for Hinzmann's opinion and the district court did not err in declaring his testimony inadmissible.

Insurance evidence

In opposing summary judgment, appellants submitted insurance documentation that appellants argue creates a genuine issue of material fact as to the ownership of the spur track. Appellants also argue that the district court improperly weighed the insurance documentation from the Reconstruction Project that listed respondent as an insured.

Appellants' evidence regarding the insurance identifies respondent as the insured in a binder prepared in connection with the Reconstruction Project. The binder does not identify the beneficiary, nor does it identify who purchased the insurance. An addendum to the agreement for the Reconstruction Project requires the contractor to carry insurance when working on railroad property or within 25 feet of track centerline. Other documents list respondent as well as railroad companies that own tracks and crossings affected by the Reconstruction Project.

There may be some merit to appellants' argument that the district court weighed the evidence as shown by the district court's statement that whether respondent purchased insurance is "not determinative of their ownership interest in the spur track" because respondent "may have purchased the insurance policy for various reasons." Appellants argue that one reasonable inference is that respondent purchased the insurance because it

owns, or believes it owns, the spur track. But whether the district court weighed evidence is not determinative of the issue of whether there is a genuine material fact issue. The record reflects that a contractor has a responsibility to carry insurance on the project. There is no indication on this record that respondent purchased the insurance, nor is there any indication that respondent was in any manner involved in working on the project for which insurance was purchased. Therefore, the district court did not err in determining that the insurance coverage evidence was insufficient to create a material fact issue regarding ownership of the spur track.

Examination of the entirety of evidence presented by appellants in opposition to respondent's motion for summary judgment causes this court to conclude that no issues of material fact for trial are present in this case.

III.

In the interest of a full analysis we address an issue that we conclude underlay the district court's decision. Minn. R. Civ. App. P. 103.04 (allowing appellate courts to address questions as justice requires). Preliminary to that analysis, however, we revisit our discussion of *Rogers v. Clark Iron Co.* and we question whether *Rogers* permits an assault on Torrens title by attempting to establish title in a third person through secondary evidence. *Rogers* neither mentions nor discusses certificates of title. *See Rogers*, 104 Minn. at 210, 116 N.W. at 743 (permitting assault on "record" title). Rather, *Rogers* allowed defendants to use secondary evidence to defeat plaintiffs' claim to title by patent. *Id.* at 203-08, 116 N.W. at 740-42. Moreover, even if *Rogers* does permit assault on Torrens title using secondary evidence, there is a strong contrast between this case—a

negligence action seeking to prove ownership in a party who denies ownership—and the posture of *Rogers*. In *Rogers*, which was a quiet title action, defendants presented a chain of transfers of title sufficient to defeat plaintiff's claim to title by patent. *Id.* "A genuine issue of material fact must be established by substantial evidence." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997) (quotation in original). And here, appellants have presented no evidence of a transfer of title to the spur track, either recorded or unrecorded, to respondent.

The certificates of title submitted by respondent indicate that the locus of appellants' injuries was on the portion of the spur track that lies within the reservation granted to the Railway Company. We conclude that even if the interrogatory responses of the City of Duluth, the Hinzmann opinion and documentation, and the insurance evidence were determined to be admissible, the sum of that evidence is insufficient as a matter of law to raise a genuine issue of material fact as to the ownership of the spur track because of the conclusiveness of the certificates of title on the record before us.

Torrens certificates

> Prior to 1901, all real property in Minnesota was abstract property. Under the abstract system, documents evidencing marketable title may be found in recorded documents or by material outside the recording system . . . .
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> In 1901, Minnesota adopted the Torrens system. . . . The purpose of the Torrens system was to create a title registration procedure intended to simplify conveyancing by eliminating the need to examine extensive abstracts of title by issuance of a single certificate of title, free from any and all rights or claims not registered with the register of title. . . . Torrens registration provides a means to determine the state of title through the inspection of a single document, the

> certificate of title, except for seven specified interests enumerated in Minn. Stat. § 508.25 (1998).
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> . . . When Minnesota adopted the Torrens system, the goal of the legislature was to clear up and settle land titles and, to that end, a proceeding was authorized by which title could be settled by judicial decree. An officer of the court, the examiner of titles, oversees all stages of registration of title under the Torrens system.
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> Title registration does not create or transfer a legal interest until the examiner of titles, subject to the jurisdiction of the court, makes a comprehensive assessment of the current state of title. Initial title registration of real property is a relatively involved proceeding that ultimately results in a certificate of title being issued, which shall be received in evidence in all the courts of this state and be conclusive evidence of all matters and things contained in it.
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> . . . .
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> Unlike the abstract system, where *evidences of title* are recorded, under the Torrens system there is a judicial proceeding whereby *title itself* is registered. . . . The conclusiveness of certificates of title is maintained by court adjudication and through statutes of limitation. . . . Accordingly, in order to maintain the reliability of certificates of title, certain subsequent transfers of title and changes to the certificate must be made either by court order or by approval of the examiner of titles. . . . The conclusive nature of certificates of title allows real property owners to rely on the certificates of title while disregarding most interests not evidenced on the current certificate of title.

Hersh Props., LLC v. McDonald's Corp., 588 N.W.2d 728, 733-34 (Minn. 1999) (citations and quotations omitted; emphasis in original). As the discussion in *Hersh Props.* indicates, the Torrens Act is fundamentally different than the abstract system and its purpose is to clearly and definitively provide the state of title for registered properties.

The Torrens Act provides that the "certificate of title . . . shall be received in evidence in all the courts of this state and be conclusive evidence of all matters and things contained in it." Minn. Stat. § 508.36 (2004); *see Hersh Props.*, 588 N.W.2d at 733-34 (quoting Minn. Stat. § 508.36); *In re Metro Siding*, 624 N.W.2d 303, 307 (Minn. App. 2001) (stating that once a proceeding has been held to register land, the certificate of title is conclusive proof of ownership and cannot be altered except as authorized by the Torrens Act). "The Torrens Act operates to vest conclusive title in the holder of a certificate of title issued pursuant to judicial proceedings." *Hersh Props.*, 588 N.W.2d at 733. And "because of this strong presumption . . . there are detailed and explicit statutory mechanisms that property owners must follow in order to correct error or amend an erroneous certificate of title." *Walther v. Lundberg*, 654 N.W.2d 694, 698 (Minn. App. 2002). In this case, the Torrens Act dictates that respondent's certificate of title is conclusive of the matters contained within it, including that, at least on the record presented here, the Railway Company holds title to the spur track.

The Torrens Act provides for several exceptions to the conclusiveness of a certificate of title. Minn. Stat. § 508.25 (2004). But appellants have not argued that any of the statutory exceptions apply to mitigate the conclusiveness of the certificate of title. In addition to the statutory exceptions listed in Minn. Stat. § 508.26, the supreme court has clarified that the good faith requirement of Minn. Stat. § 508.25 (2004) is not satisfied when a purchaser of Torrens property has actual knowledge of a prior unregistered interest in the property. *In re Collier*, 726 N.W.2d 799, 809 (Minn. 2007). A certificate of title may also be challenged in cases of fraud. *Estate of Koester v. Hale*,

297 Minn. 387, 393-94, 211 N.W.2d 778, 782 (1973). But appellants in this case have not made a challenge to the conclusiveness of the certificate of title under the fraud or good faith exception.

As indicated earlier, appellants' evidence claiming to show that respondent owns the spur track is insufficient as a matter of law to create a genuine issue of material fact as to the ownership of the spur track where respondent denies ownership and certificates of title, the validity of which are not in question, place ownership in a third party.

Affirmed.