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STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0045

John Athanasakoupolous, et al.,
Appellants,

vs.

William F. Bogart, et al.,
Respondents,

Michael Behm, et al.,
Respondents.

Filed December 24, 2018
Affirmed
Larkin, Judge

Hennepin County District Court
File No. 27-CV-14-21006

Robert H. Leibman, Bloomington, Minnesota (for appellants)

S. Warren Gale, S. Warren Gale Law Office, P.A., Minneapolis, Minnesota (for respondents William F. Bogart and Catherine A. Laliberte)

Aleksandra Ljubisavljevic, Aleksandra Ljubisavljevic Law Office, Minneapolis, Minnesota (for respondents Michael Behm and Stephanie Behm)

Considered and decided by Larkin, Presiding Judge; Connolly, Judge; and Reyes, Judge.

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

LARKIN, Judge

In this dispute over an easement for a shared driveway, appellants argue that the district court erred by denying their request for a permanent injunction against respondents' alleged encroachments onto the easement and by determining that respondents were the prevailing parties for the purpose of costs and disbursements. We affirm.

FACTS

In 1988, River Pointe Partnership (the developer) entered into a planned development agreement with the City of Bloomington for the use of property in the creation of a single-family subdivision. The developer worked with a surveyor to create the plat for the property. Common driveways were needed to preserve Indian burial mounds and bluffs, which made creating individual driveways difficult. The city allowed the developer to give the lots long "goosenecks" so the developer could create the number of lots desired and still provide at least 15 feet of access to a public right of way as the city required. Lots 11, 12, 13, and 14 of the River Pointe development share a common driveway. Lots 12, 13, and 14 have "gooseneck" extensions that allow them access to 110th Street West through that common driveway.

The surveyor for the River Pointe development created and certified a legal description of a common driveway easement for Lots 11, 12, 13, and 14. In 1989, the developer recorded the River Pointe development's plat and two documents containing applicable restrictive covenants with the Hennepin County Recorder's office: (1) the Declaration of Protective Covenants, Conditions, Restrictions and Easements, River Pointe

(the General CCR) and (2) the Declaration of Protective Covenants, Conditions, Restrictions, and Easements for Indian Mounds and Bluff of River Pointe (the Mound Lot CCR).

Paragraph 3.5 of the General CCR provides that "[a]ny driveway located on a Lot shall be of a 'hard surface' material and shall be installed in accordance with the City of Bloomington City Code." Paragraph 1.7 of the Mound Lot CCR provides that the common driveways in the development, including the driveway common to Lots 11, 12, 13, and 14, "must be constructed within the area depicted on Exhibit C . . . and within the Common Driveway Easements . . . as shown on Exhibit D." In Exhibits C and D, the common driveway for Lots 11, 12, 13, and 14 is hand-drawn on a plat map. Paragraph 6.3 of the Mound Lot CCR provides that each common driveway easement shall allow "pedestrian and vehicular ingress to and egress from public streets and the applicable group of Benefitted Lots." Paragraph 6.5 of the Mound Lot CCR further provides that

> [n]o obstructions which would prevent, restrict, or otherwise inhibit the passage of pedestrians or vehicles over any portion of a Common Driveway shall be erected, condoned, or permitted by any owner of any Benefitted Lot . . . nor shall any other action, including, but not limited to, the parking or storage of vehicles, be permitted which would in any manner restrict the rights of the respective owners of each Benefitted Lot . . . to fully utilize the applicable Common Driveway Easement as permitted herein.

The city approved the location of the common driveway for Lots 11, 12, 13, and 14 as represented in the drawings in Exhibits C and D of the Mound Lot CCR. The surveyor's legal description of an easement for the common driveway for Lots 11, 12, 13, and 14 was not recorded with the plat and restrictive covenants.

In 1993, appellants John Athanasakopoulos and Sherrie Athanasakopoulos purchased Lot 14 of the River Pointe development.[1] Lot 14 is the southernmost of the lots in relation to the common driveway easement. In 1994, Sarin Hem and Sokmean Hem purchased Lot 11, which is adjacent to Lot 12, is the northernmost of the lots in relation to the easement, and is adjoined to the western edge of the common driveway easement. In 1996, appellants sued the developer and a number of other parties, alleging violations of the development's restrictive covenants. Appellants agreed to settle the lawsuit. In connection with that settlement, appellants purchased Lot 13 in 1998, and the seller, Simcote, Inc., agreed to pave the driveway easement. Lot 13 is adjacent to Lot 14 and Lot 12.

In July 1998, Craig Bruneau and Amy Bruneau purchased Lot 12, which is adjacent to Lot 13 and adjoins the western edge of the common driveway easement. In November 1998, Simcote finished paving the common driveway for Lots 11, 12, 13, and 14. The driveway was paved to a width of 12 feet. In September 1999, appellants and their counsel corresponded with the Bruneaus regarding various complaints, including that work crews had trespassed on the backyard of Lot 13 and that the Bruneaus' front lawn encroached onto the driveway easement. Appellants became concerned that the 12-foot wide driveway

[1] The case caption in the district court identifies appellants as "John Athanasakoupolous" and "Sherrie Athanasakoupolous," and those are the names used in the caption on appeal. *See* Minn. R. Civ. App. P. 143.01 ("The title of the action shall not be changed in consequence of the appeal."). However, the parties' briefs and the district court's post-trial order identify appellants as "John Athanasakopoulos" and "Sherrie Athanasakopoulos." That spelling will be used in the body of this opinion.

was too narrow because two cars could not pass on the pavement. Also, service trucks and other vehicles occasionally blocked the driveway.

In 2000, appellants obtained a survey of the easement area. The 2000 survey indicated that sodding from Lot 12 extended about four feet onto the easement area.

In 2012, respondents William Bogart and Catherine Laliberte, n.k.a., Catherine Bogart, (the Bogart respondents) purchased Lot 12 from the Bruneaus. In January 2014, appellants sued the Bogart respondents and the Hems, requesting (1) reformation of the Mound Lot CCR to include a detailed legal description and sketch of the driveway easement, (2) reformation of the Mound Lot CCR to exclude a portion of the easement that extends beyond the northern boundaries of Lots 13 and 14, (3) reformation of the Mound Lot CCR to provide for widening the paved area of the driveway easement, (4) reformation of the Mound Lot CCR to include administrative provisions regarding the driveway easement, (5) a permanent injunction against the Bogart respondents' and the Hems' encroachment onto Lot 13, and (6) a permanent injunction against the Bogart respondents' and the Hems' encroachment onto the driveway easement area. Appellants alleged that title to the lots affected by the driveway easement were not marketable because they lacked a recorded legal description of the easement. Appellants also alleged that "portions of the front lawns of . . . Lots 11 and 12 have each encroached eastward onto and over the lot line of [appellants'] Lot 13, and thereby also encroaching onto the parties' shared driveway easement area."

In September 2014, respondents Michael Behm and Stephanie Behm (the Behm respondents) purchased Lot 11 from the Hems. Following the Behm respondents' purchase

of Lot 11, appellants substituted the Behm respondents for the Hems in this action. The Behm respondents stipulated that they would not be actively involved in the litigation and would accept any result of this action that is rendered by the district court or any appellate court with regard to appellants' disputes against the Bogart respondents.

In May 2015, the Bogart respondents moved to dismiss appellants' complaint or in the alternative, grant respondents summary judgment. The district court granted the motion to dismiss regarding appellants' requests to reform the Mound Lot CCR to exclude a portion of the easement, to widen the paved area of the driveway easement, and to include administrative provisions regarding the easement. On April 10, 2017, appellants' remaining claims were tried to the district court.

On July 10, 2017, the district court ordered that the Mound Lot CCR be amended to include a legal description of the driveway easement, dismissed appellants' claims regarding encroachment onto Lot 13 and the driveway easement, and determined that respondents were the prevailing parties and entitled to recover their costs and disbursements. The district court reasoned that the titles affected by the lack of a recorded legal description of the easement were not unmarketable, but that the existence of uncertainty regarding the easement boundaries was a sufficient basis to amend the Mound Lot CCR to include a legal description of the easement. The district court also reasoned that (1) the evidence presented at trial did not establish that an encroachment currently existed and (2) to the extent that sodding exists in portions of the easement and respondents mow the sod, that sodding is not an improper encroachment onto the easement or Lot 13 because it does not impede appellants' use of the driveway.

On August 18, 2017, the district court amended its order for judgment to correct an error that resulted in dismissal of all of appellants' claims with prejudice, including appellants' claim regarding amendment of the Mound Lot CCR to include a legal description of the easement. In September 2017, appellants moved for amended and supplemental findings and order, or a new trial. The district court denied appellants' motion. This appeal follows.[2]

D E C I S I O N

I.

Appellants contend that the district "court abused its discretion by holding that a portion of the respondents' front lawns and driveways located within the driveway easement are not encroachments" and by denying their request for an injunction against respondents.

"An easement is an interest in land possessed by another which entitles the grantee of the interest to a limited use or enjoyment of that land." *Scherger v. N. Nat. Gas Co.*, 575 N.W.2d 578, 580 (Minn. 1998); *Minneapolis Athletic Club v. Cohler*, 177 N.W.2d 786, 789 (Minn. 1970). An easement privileges its owner "to make particular uses of a servient tenement." *Minneapolis Athletic Club*, 177 N.W.2d at 789. "To say that an

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[2] Respondents argue that appellants "mistakenly appeal from the July 10, 2017 Order for Judgment," which was entered as a judgment on August 10, 2017, rather than the district court's August 18, 2017 amended order for judgment, which was entered as a judgment on September 22, 2017. But respondents agree that this matter should be addressed on the merits. The district court's amended order is properly within the scope of this appeal. *See* Minn. R. Civ. App. P. 103.04 ("On appeal from or review of an order the appellate courts may review any order affecting the order from which the appeal is taken and on appeal from a judgment may review any order involving the merits or affecting the judgment.").

easement has been created is but to say that certain privileges of use of land in the possession of one other than the one having the privilege have been created." *Id.* "Generally, the grant of an easement over land does not preclude the grantor from using the land in a manner not unreasonably interfering with the special use for which the easement was acquired." *Id.*

"The parameters of an easement created by a grant depends entirely upon the construction of the terms of the grant." *Bergh & Misson Farms, Inc. v. Great Lakes Transmission Co.*, 565 N.W.2d 23, 26 (Minn. 1997) (quotation omitted). When the terms of an easement grant are clear, courts apply those terms as written. *See id.* ("[W]hen the language granting the easement is clear and unambiguous, the court's power to determine the extent of the easement granted is limited."); *Minneapolis Athletic Club*, 177 N.W.2d at 789-90 ("[T]he extent of an easement should not be enlarged by legal construction beyond the objects originally contemplated or expressly agreed upon by the parties.").

"The granting of an injunction generally rests within the sound discretion of the [district] court, and its action will not be disturbed on appeal unless, based upon the whole record, it appears that there has been an abuse of such discretion." *St. Jude Med., Inc. v. Carter*, 913 N.W.2d 678, 684 (Minn. 2018) (quotation omitted); *In re Minnwest Bank Litig. Concerning Real Prop.*, 873 N.W.2d 135, 145 (Minn. App. 2015). "The burden of proof is on the party seeking an injunction to establish that . . . the injunction is necessary to prevent great and irreparable injury." *St. Jude Med., Inc.*, 913 N.W.2d at 684 (quotation omitted).

Paragraph 6.3 of the Mound Lot CCR provides that the driveway easement's purpose is to allow "pedestrian and vehicular ingress to and egress from public streets and the applicable group of Benefitted Lots." Paragraph 6.5 of the Mound Lot CCR prevents obstructions or "any other action" that would "restrict the rights of the respective owners of each Benefitted Lot . . . to fully utilize" the driveway easement.

The district court reasoned that "to the extent that there exists sodding in the easement, and that defendants mow the sod, this would not constitute an improper 'encroachment' onto the easement." The district court noted that the Mound Lot CCR requires only that common driveways be completed in accordance with city code and that it can be assumed that the city approved the agreement between Simcote and appellants to pave only a portion of the easement. The district court held that the sod "does not impede [appellants'] use of the driveway" easement and that the only difference between sodding the unpaved portion of the easement and covering it with a different material is that driving over the sodded areas "might cause damage that would require the parties to repair the non-paved easement area periodically."

Appellants argue that the district court's reasoning "ignores other explicit language in the CCRs," which "mandates that there be unfettered vehicular traffic on all 24 feet of the easement." (Emphasis omitted.)

The Mound Lot CCR does not provide a right to unfettered vehicular traffic on all 24 feet of the driveway easement. The purpose of the driveway easement, as described in the Mound Lot CCR, is to allow "pedestrian and vehicular ingress to and egress from public streets and the applicable group of Benefitted Lots." Appellants, as owners of lots

benefitted by the driveway easement, have a privilege to use the easement for that limited purpose. To hold that appellants have a right to unfettered vehicular traffic on all 24 feet of the driveway easement would impermissibly enlarge the scope of that easement beyond the purpose expressly agreed upon by the parties. *See Minneapolis Athletic Club*, 177 N.W.2d at 789-90 ("[T]he extent of an easement should not be enlarged by legal construction beyond the objects originally contemplated or expressly agreed upon by the parties.").

Appellants argue that the sodding of the unpaved portion of the easement is prohibited by Paragraph 6.5 of the Mound Lot CCR because it would "restrict the rights of the owners to fully utilize the driveway easement."

The grant of an easement does not prohibit the use of the land subject to the easement in a manner that does not "unreasonably interfer[e] with the special use for which the easement was acquired." *Id.* at 789. As noted above, the purpose of the driveway easement is to allow pedestrian and vehicular ingress to and egress from public streets and the lots benefitted by the easement. The record supports the district court's determination that the sod on the unpaved portion of the easement has not unreasonably interfered with that purpose. The only evidence introduced to support appellants' claim that the sod interferes with the purpose of the easement is appellant John Athanasakopoulos's testimony that the paved driveway was inadequate because "[i]t wasn't wide enough to pass cars" and has been blocked in the past by delivery and service trucks, and a December 2015 photograph of a truck blocking the common driveway. Appellants make assertions

about problems specific to driving on sod, but they do not point to evidence in the record to support those assertions.

Although an occasional inability for cars to pass each other on the common driveway and occasional blocking of the driveway by delivery and service trucks is certainly inconvenient, it is difficult to conclude that those harms constitute a great and irreparable injury justifying an injunction. Thus, the district court did not abuse its discretion by denying appellants' request for an injunction preventing respondents' lawns from encroaching onto the driveway easement.

We reach the same conclusion regarding any alleged driveway encroachments into the driveway easement. As to that issue, the district court's order denying appellants' motion for amended and supplemental findings or for a new trial states that appellants sought "amended findings on the grounds that the Court's Order does not refer to the [respondents'] paved driveways, which protrude into the easement area to connect with the paved area of the easement." In the same order, the district court explained that "paved surfaces would not constitute an 'encroachment,' because they do not interfere with [appellants'] use of the easement," noting, "[i]ndeed, [appellants] suggest that the entire easement should be paved." We discern no error in the district court's reasoning and agree that the alleged driveway encroachments do not support the grant of injunctive relief. *See id.* (stating that grant of an easement does not prohibit the use of the land subject to the easement in a manner that does not "unreasonably interfer[e] with the special use for which the easement was acquired").

II.

Appellants contend that the "district court abused its discretion when it determined that [respondents] were the 'prevailing parties' for purposes of assessing costs and disbursements against [them]."

"In every action in a district court, the prevailing party . . . shall be allowed reasonable disbursements paid or incurred . . . ." Minn. Stat. § 549.04 (2018). "The prevailing party in any action is one in whose favor the decision or verdict is rendered and judgment entered." *Borchert v. Maloney*, 581 N.W.2d 838, 840 (Minn. 1998). "A prevailing party is one who prevails on the merits in the underlying action, not one who was successful to some degree." *Elsenpeter v. St. Michael Mall, Inc.*, 794 N.W.2d 667, 673 (Minn. App. 2011) (quotation omitted). Appellate courts review a district court's award of costs and disbursements, including its prevailing-party determination, for an abuse of discretion. *Posey v. Fossen*, 707 N.W.2d 712, 714 (Minn. App. 2006). The district court abuses its discretion "when its decision is against logic and facts on the record." *Id.*

Appellants argue that the district court should not have named either the respondents or the appellants as prevailing parties since "they each prevailed on their claims" and had an "equal 'win.'" Appellants further argue that the district court abused its discretion in determining that respondents were the prevailing parties because the Bogart respondents' argument that title to the lots affected by the easement was still marketable despite a lack of a recorded legal description of that easement was a "wholly frivolous defense."

The district court dismissed appellants' claims regarding encroachment onto Lot 13 and the driveway easement. As requested by appellants, the district court ordered that the Mound Lot CCR be amended to include a legal description of the driveway easement. However, it agreed with the Bogart respondents that "the evidence does not support the claim that the affected titles are unmarketable" and ordered that the legal description nonetheless be recorded because of the existence of uncertainty regarding the easement boundaries.

In sum, respondents prevailed on two of the three issues that were tried. The district court granted relief for appellants on the remaining issue, but in doing so rejected appellants' argument that title to the affected lots was not marketable without the recorded legal description of the easement. Under these circumstances, the district court did not abuse its discretion by concluding that respondents were the prevailing parties.

III.

Appellants contend, in their principal brief, that the district court erred by denying their request for a new trial. Appellants summarily assert that the district court's decision and order is not justified by the evidence and is contrary to law. As support, appellants generally refer to the preceding sections of their brief, which, according to appellants, "are *replete* with instances where the [district] court's decision is not justified by the evidence, and/or is contrary to law." Appellants do not offer additional argument supporting their challenge to the district court's denial of their motion for a new trial. Moreover, appellants' reply brief states that "[a]fter so much effort has been expended by [them] to reach this stage of the appeal, [they] waive their request for an entirely new trial."

We have determined, in section I of this opinion, that the district court's decision is justified by the evidence and the law. Because appellants have waived their request for a new trial, we do not discuss any of the other alleged errors related to the denial of appellants' motion for a new trial.

Affirmed.