STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0406

County of Pope, Minnesota,
Respondent,

vs.

Michael A. Kirkeby, et al.,
Appellants,

Wells Fargo Bank, N.A.,
Appellant.

Filed September 17, 2018
Affirmed
Hooten, Judge

Pope County District Court
File Nos. 61-CV-16-513, 61-CV-17-55

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Considered and decided by Halbrooks, Presiding Judge; Bjorkman, Judge; and Hooten, Judge.

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

HOOTEN, Judge

Appellant property owners challenge the district court's grant of summary judgment in favor of respondent county and its determination that the county has a 66-foot right-of-way for a road that runs along the shore of Lake Minnewaska and through appellants' properties. Appellants argue that: (1) the road order that established the road is invalid and special legislation did not cure the defects; (2) even if the road order is valid, the Marketable Title Act and Minnesota Recording Act prevent the county from relying on the documents that established the road; and (3) the county should be estopped from arguing for a 66-foot right-of-way. We affirm.

FACTS

In August 1869, residents of Pope County submitted a petition to create a four-rod (66-foot-wide) road in the county, the county board approved the petition, and the road was established in September 1869. The road, currently named County State Aid Highway 17 ("the Road"), is also known as South Lakeshore Drive, and has previously been named County-Aid Road 125-37, County Road 11, and the Glenwood to Benson Road. It is a two-lane paved highway, and the paved portion is approximately 20 feet wide. The record contains the road petition, the county board meeting minutes accepting the petition, the road order, and the original survey notes and plat drawing. The road calendar, which contains the road order, was originally stored in the courthouse under the supervision of the Pope County Auditor until 2004, when it was moved to the Office of the Pope County

Recorder. The 1869 road petition, county board meeting minutes accepting the petition, and the original survey notes and plat drawing were also under the supervision of the auditor's office until 2004 when they were moved to the Pope County Historical Society.

In 1878, Pope County Surveyor John Abercrombie compiled the county's road records, created a numbering system for the roads, and transferred information from road records into the road calendar book (which contains road orders and plats of county roads). In a report to the county board, and in notes written on some of the road orders in the road calendar book, Abercrombie explained his concerns about the general disorganization of the county's road records, mistakes in transcriptions from the original field notes into the legal description of roads in the road calendar book, missing calls in the legal descriptions in the road calendar book, issues with the size of the drawings being inadequate to provide the level of detail required, and his opinion of the general incompetence of previous surveyors in creating the records.

Abercrombie specifically referenced the Road in his report to the county board, noting that "the Original Paper of Field Notes for Road No. 11, in itself a very orderly, and intelligible document, clear and distinct, and then to Page 9 in which it has been recorded and platted; where it will appear it has without order, reason, or authority been falsified and in its record rendered worthless." In a note written on the original road order in July of 1878, Abercrombie explained that the original road survey included "71 Stations or bends, [but] the maker of this record has changed them, and reduced them to 28. This record and the plat . . . is an absolute misrepresentation of the Original Survey and a departure from what was originally done and intended."

In 1879, Minnesota passed special legislation to legalize certain roads in Pope County. *See* 1879 Minn. Spec. Laws ch. 230, at 355–56.

Over a century later, the underlying cases in this appeal began. Respondent county filed two complaints, one in November 2016 and another in February 2017, seeking a declaration that it has a 66-foot right-of-way for the Road by use under Minn. Stat. § 160.05 (2016). Each lawsuit was brought against different landowners, and in July 2017, the district court consolidated the two files.

Both sides moved for summary judgment. The district court granted respondent's motion for summary judgment and denied appellants' motion for summary judgment. Appellants now challenge the district court's grant of respondent's motion for summary judgment.

D E C I S I O N

Appellate courts review a district court's summary judgment decision de novo. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). Evidence is viewed "in the light most favorable to the party against whom summary judgment was granted." *Senogles v. Carlson*, 902 N.W.2d 38, 42 (Minn. 2017). "However, when determining whether a genuine issue of material fact for trial exists, the court is not required to ignore its conclusion that a particular piece of evidence may have no probative value, such that reasonable persons could not draw different conclusions from the evidence presented." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).

I. Validity of Road Order

Appellants challenge the validity of the road order and whether the Road was ever legally established as a 4-rod (66-foot-wide) road.

> The order by which a highway is laid out must in some manner definitely describe its location, or it will be void for uncertainty. By terms of description in the order, or at least by reference to other documents, as the survey or petition so referred to in the order as to become in effect a part of it, the location must be so certainly designated that a person conversant with such matters could trace it out on the ground.

Sonnek v. Town of Minnesota Lake, 52 N.W. 961, 961 (Minn. 1892). The standard to determine whether a road order is valid is whether the order "describe[s] the location of the road so definitely as to enable a 'person conversant with such matters to trace it out on the ground.'" *State v. Hager*, 138 N.W. 935, 936 (Minn. 1912) (quoting *Sonnek*, 52 N.W. at 961). If a portion of the legal description is invalid, the entire road order is invalid. *See Sonnek*, 52 N.W. at 961–62 ("The line of the road was definitely described where it ran through the plaintiff's premises. But the proceeding for laying out the whole road must be regarded as an entirety. . . . Hence, as the order laying out this road was fatally defective for uncertainty as to a part of the entire line, it cannot be deemed effectual as legally laying out a road across the plaintiff's premises.").

Appellants have at least created a material dispute of fact over whether the road order is invalid. The report and notes from then county surveyor John Abercrombie point out the omission of numerous stations and bends from the legal description of the Road in the road order that were included in the survey notes and plat drawing from the original survey of the Road. While respondent explains that the description was "lacking not

because they had the road in the wrong place, but because it did not contain the detail that the field notes and original survey had," the omission of numerous bends in the road is enough to create a genuine dispute of fact over whether a surveyor could accurately trace out the road based on the legal description in the road order.[1]

However, our inquiry is not complete because respondent argues that even if the road order did not validly establish the Road, special legislation passed by the state legislature in 1879 cured any defect and declared the Road to be lawfully laid out. The special legislation is titled "An Act to Legalize Certain Roads and Highways in the County of Pope." 1879 Minn. Spec. Laws ch. 230, at 355. It reads:

> Section 1. That all roads or highways laid out and opened prior to the year A. D. one thousand eight hundred and seventy-nine, in the county of Pope and the state of Minnesota by the commissioners of said county or the supervisors of any town in said county are hereby declared to be public roads or highways and confirmed and established as such whether the same have been lawfully laid out and opened or not, provided that public work or public money has been expended upon any such road or roads or any part thereof.
>
> Sec. 2. Any person having an unsettled claim for damages against said county or any town in said county by reason of the laying out and opening of said roads or any of them, shall at any regular meeting before the regular meeting of the commissioners of said county or the supervisors of any town in said county in the month of July, A. D. one thousand eight hundred and eighty present such claim in writing to the auditor of said county or the clerk of such town who shall lay the same before said commissioners or supervisors, as the case may be, for their action thereon, and if any person having such

[1] Because we conclude that appellants have created a genuine issue of material fact as to whether the road order legally established the road, we need not address appellants' other arguments that the road order did not legally establish the Road because in two places the Road is currently located in a different place than shown on the plat drawing in the road order.

> claim shall fail to present it as aforesaid, he shall forever be debarred from further redress for said damages.
>
> *Provided*, That nothing in the act shall be so construed as to revive any right on claim for damages now barred by law or the statutes of limitations, and provided further that any party may appeal from the decision of such supervisors or commissioners as is not provided by law for appeals from awards or damages in laying out county or town roads.
>
> Sec. 3. This act shall take effect and be in force from and after its passage.
>
> Approved March 7, 1879.

Id. at 355–56. The 1869 road order demonstrates that public money was spent to establish the Road, so it falls under the act.

As for the width of the right-of-way, the petition for the Road that was approved by the county board in 1869 requested "that a County Road of the width of four rods be laid out and established." And a width of four rods (66 feet) is consistent with the minimum width requirements for roads, other than cartways, in all published editions of state statutes in effect both before and at the time that the special legislation was enacted, and before, during, and after the establishment of the Road. *See* Minn. Gen. Stat. ch. 13, § 47 (1878); Minn. Gen. Stat. ch. 13, § 56 (1866); Minn. Gen. Stat. ch. 13, § 57 (1863); Minn. Gen. Stat. ch. 11, § 10 (1858); Minn. Rev. Stat. (Terr.) ch. 13, § 10 (1851). Thus, the petition and road order, the defects in the road order having been cured by the special legislation, legally established the Road as four rods (66 feet) wide.[2]

[2] Having concluded that the Road was legally established and thereby that respondent need not rely on statutory dedication by public use to establish the right-of-way for the Road, we need not address appellants' argument that respondent is limited to a 22-foot right-of-way based on use, or their alternative argument that there is a material dispute of fact over the width of the right-of-way based on use. *See* Minn. Stat. § 160.05, subd. 1 (limiting acquisition of road interest acquired by use to "the width of the actual use").

Appellants rely on *Prescott v. Beyer*, 26 N.W. 732 (Minn. 1886), for the proposition that a road which exists by special legislation is only enforceable to the extent of actual use and repair. But in *Prescott*, the special legislation at issue directed the establishment of a road and was not an act to legalize roads with legal defects in their establishment. *See id.* at 732 (noting that the special legislation at issue was chapter 16 of the Special Laws of Minnesota for 1861); *see also* 1861 Minn. Spec. Laws ch. 16, at 249–50 (appointing a commission "to survey and locate a State road" and describing the general course of the road). And the road in *Prescott* was not legally established because "the commissioners did not comply with the requirements of law by filing the plat" of the road in the town clerk's office. 26 N.W. at 732. Because *Prescott*, unlike this case, did not involve special legislation enacted to cure the legal defects in the establishment of a road and legally establish the road, it does not support appellants' argument.

Appellants also argue that to construe the special legislation to create a 4-rod road is an unconstitutional taking because the legislation did not provide for prior judicial determination of public purpose and necessity. But the availability of certiorari review or a declaratory judgment action is sufficient to provide for judicial review of public purpose and necessity where the legislature has not explicitly provided for judicial review in the statute. *See State ex rel. Utick v. Bd. of Comm'rs of Polk Cty.*, 92 N.W. 216, 220 (Minn. 1902) ("In cases where no appeal is provided, the matter being discretionary with the legislature, certiorari or other proper remedy is open to injured parties to review the proceedings."). Appellants rely on *In re Rapp*, but the statute at issue in that case explicitly discussed a right to judicial review of damages, and this court interpreted that provision as

limiting judicial review to the issue of damages and thereby foreclosing judicial review of necessity and public purpose. 621 N.W.2d 781, 787 (Minn. App. 2001). Here, the special legislation is silent on the issue of judicial review and therefore it did not foreclose judicial review of necessity and public purpose. *See id.*

II. Marketable Title Act and Minnesota Recording Act

Appellants next contend that the Marketable Title Act (MTA) and the Minnesota Recording Act (MRA) grant them relief. The MTA provides that any claim of title to real estate that is not recorded within 40 years is presumed to be abandoned. Minn. Stat. § 541.023, subds. 1–2, 5 (2016). "Easements are among the property interests that can be eliminated under the MTA." *Sampair v. Village of Birchwood*, 784 N.W.2d 65, 69 (Minn. 2010). But the MTA does not bar the rights of those in possession, including easement holders. Minn. Stat. § 541.023, subd. 6 (2016); *Sampair*, 784 N.W.2d at 69. Application of the possession exception "requires use sufficient to put a prudent person on notice of the asserted interest in the land, giving due regard to the nature of the easement at issue." *Sampair*, 784 N.W.2d at 70. The party invoking the protection of the possession exception, in this case respondent, has the burden of proving that the exception applies. *See id.* at 74.

There is no question in this case that respondent's use of its right-of-way easement is "sufficient to put a prudent person on notice of the asserted interest in the land." *See id.* at 70. Respondent's interest is a right-of-way easement for a road, and respondent used its right-of-way by constructing and maintaining a road travelled by the public. *Cf. Township of Sterling v. Griffin*, 244 N.W.2d 129, 134 (Minn. 1976) (noting that even the absence of a physically constructed and maintained road would not have been fatal to township's

possession claim if the evidence had established "that the public used the 'roadway' in a manner from which it could reasonably be concluded that the public was using the area as a road").

Moreover, "[a]ctual possession of real property is notice to all the world of the title and rights of the person so in possession and also of all facts connected therewith which reasonable inquiry would have developed." *Claflin v. Commercial State Bank of Two Harbors*, 487 N.W.2d 242, 248 (Minn. App. 1992), *review denied* (Minn. Aug. 4, 1992). The existence of the Road is actual notice that respondent has an easement interest and is thus a sufficient prompt requiring appellants to inquire about the extent of respondent's easement interest in the road. Appellants claim that they made a proper and reasonable inquiry at the time they each acquired their property. However, examination of the affidavits appellants rely upon reveals that their inquiry was limited to an examination of the title records in the county recorder's office. Given that there is no question that respondent has an interest in the Road that it maintains and which physically traverses appellants' properties, and because examination of title records at the recorder's office did not reveal respondent's interest, a reasonable inquiry cannot end with examination of title records in the recorder's office. Because the record does not reveal any further inquiry attempted by appellants, we will not speculate about "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." *Teal v. Scandinavian-Am. Bank of Grand Forks, N.D.*, 131 N.W. 486, 488 (Minn. 1911).

Thus, while the road order and other unrecorded establishment documents are not themselves sufficient notice of respondent's interest, *see Griffin*, 244 N.W.2d at 132, the existence of the Road is sufficient notice that respondent has an easement interest, and the establishment documents set forth the extent of respondent's interest—66 feet. Respondent was in sufficient possession of its right-of-way interest to invoke the protection of the possession exception to the MTA. Therefore, based upon the undisputed facts in this record, appellants have failed to show that they are entitled to relief under the MTA.

Appellants also claim that they are protected by the MRA. The MRA provides that unrecorded interests in real estate are void against a later purchaser in good faith. Minn. Stat. § 507.34 (2016). "A purchaser in good faith is one who gives consideration in good faith without actual, implied, or constructive notice of inconsistent outstanding rights of others. A person who purchases land with notice that the property is burdened takes the property subject to the easement." *Levine v. Bradley Real Estate Tr.*, 457 N.W.2d 237, 240 (Minn. App. 1990) (quotation omitted), *review denied* (Minn. Aug. 7, 1990).

Appellants are not purchasers in good faith because they had actual notice of respondent's interest due to the physical existence of the Road running through their properties, and they had inquiry notice of the 66-foot width of the road based on the establishment documents. Because appellants are not purchasers in good faith, they are also not entitled to relief under the MRA.

III. Estoppel

Appellants argue that there is a genuine dispute of material fact over whether respondent is estopped from asserting a 66-foot right-of-way. To establish estoppel

appellants must prove: (1) continued nonuse by the municipality; (2) "the possession by private parties in good faith and in the belief that its use as a street has been abandoned"; (3) "the erection of valuable improvements thereon without objection from the municipality"; (4) the municipality has knowledge of the valuable improvements such that "to reclaim the land would result in great damage to those in possession"; and (5) an "affirmative or unequivocal act of the municipality which, in view of all the circumstances, induced a third person reasonably to believe in and to rely upon such act as constituting a representation of an intent in fact to abandon the street." *Halverson v. Village of Deerwood*, 322 N.W.2d 761, 767 (Minn. 1982) (quotations omitted). "The doctrine of estoppel is not applicable to municipal corporations as freely and to the same extent that it is to individuals." *Id.* (quotation omitted).

Appellants fail on the very first prong because they cannot establish nonuse by respondent given that the Road is a paved highway that has been used by the public for over 100 years. *See also Parker v. City of St. Paul*, 50 N.W. 247, 248 (Minn. 1891) ("Moreover, streets, levees, and the like are often laid out on land acquired for or dedicated to such purposes with reference to future as well as present requirements, and therefore it is not legitimate to assume that the property has been abandoned merely because it has not yet been used by the public."). Additionally, appellants cannot point to any "affirmative or unequivocal act of the municipality" that would reasonably induce a third party "to rely upon such act as constituting a representation of an intent in fact to abandon the street." *Halverson*, 322 N.W.2d at 767 (quotation omitted).

At oral argument, appellants pointed to a 1998 agreement on the Road's right-of-way between respondent and several other landowners not involved in this litigation as showing respondent's intent to abandon its 66-foot right-of-way. In addition to the 1998 agreement not being between respondent and any of the appellants, all the agreement states is that respondent "has acquired a public right-of-way approximately 22 feet in width by use and pursuant to Minn. Stat. 160.05." The agreement says nothing about whether respondent has, does not have, or is abandoning its 66-foot right-of-way based on the legal establishment of the Road. At best, by not addressing the legal establishment of the Road and only addressing a right-of-way acquired by use, the agreement implies that respondent only has a right-of-way acquired by use. But implication by non-reference is not an affirmative or unequivocal act sufficient to demonstrate that respondent intended to abandon its 66-foot right-of-way based on the legal establishment of the Road.[3]

Appellants also pointed to respondent's vacation of a discontinued roadbed where the Road used to travel, but the vacation of the discontinued roadbed only shows an intent to abandon the discontinued portion, not an intent to abandon respondent's entire right-of-way on the Road as it currently travels. Because appellants have failed to produce evidence that creates a material dispute of fact over nonuse of the Road by respondent, and have failed to produce evidence that creates a material dispute of fact over whether respondent affirmatively or unequivocally acted in a manner that demonstrated its intent to abandon

[3] We express no opinion as to the rights of the landowners who were actually parties to the 1998 agreement and whether or not the county is estopped from asserting the existence of a 66-foot right-of-way against them.

its 66-foot right-of-way over the Road, the district court properly granted summary judgment in favor of respondent.

Affirmed.