STATE OF MINNESOTA
IN COURT OF APPEALS
A11-0004

Donald Hector, et al.,
Appellants,

vs.

Gary Hoffer, et al.,
Respondents,

City of Adrian,
Respondent.

Filed December 12, 2011
Affirmed
Hudson, Judge

Nobles County District Court
File No. 53-CV-07-119

Lawrence H. Crosby, Jay D. Olson, St. Paul, Minnesota (for appellants)

William J. Wetering, Andrew M. Titus, Hedeen, Hughes & Wetering, Worthington, Minnesota (for respondents Hoffer and Lonneman)

Paul A. Merwin, League of Minnesota Cities, St. Paul, Minnesota (for respondent City of Adrian)

Considered and decided by Ross, Presiding Judge; Minge, Judge; and Hudson, Judge.

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

HUDSON, Judge

Appellant landowners argue that the district court erred by denying their claims to ownership of the entire property underlying an unused city street easement. They also challenge the district court's determination of damages relating to (1) respondent neighboring-landowners' removal of a fence and trees located in the easement and (2) drainage onto appellants' land. Appellants also argue that the district court erred by granting summary judgment on their negligent-misrepresentation claim relating to respondent city's grant of permission to remove the fence. We affirm.

FACTS

An 1891 platted addition to the City of Adrian shows the location of a street easement designated as Second Street. That easement was never developed as a street near its western end. Respondents Gary Hoffer and Connie Hoffer and Mark Lonneman and Lori Lonneman own property located on Lots 1 and 2 of Block 5 of the addition, which are located immediately south of the undeveloped portion of the easement. Appellants Donald Hector and Victoria Hector own the majority of Block 6 of the addition, which is located to the immediate north of the easement. They also own property located across from the immediate west end of the easement.

The Hectors purchased their property in 1995 from Alvina Ruffing, a widow, who had owned the property with her husband, Leander. The Hoffers purchased their property in 2005, and the Lonnemans purchased their property in 2005 or 2006. None of the deeds conveying property to the parties conveyed title to the land under the easement.

When the Hoffers and the Lonnemans purchased their properties, a wire fence and volunteer trees were located in the approximate middle of the easement. The fence had been used by the Ruffings to confine hogs and cattle. Gary Hoffer testified that the fence was run down, buried in dirt, with barbed wire across the top, and that the trees were waist high to 20-feet high. Mark Lonneman testified that the fence was full of thistles and caught trash and that strands of barbed wire had to be moved during mowing and constituted a safety hazard. He testified that the volunteer trees contrasted with a well-maintained grove of trees located on the Hectors' property. Donald Hector testified that the fence was a "normal farm fence." The Hoffers and Lonnemans also installed drain tile that occasionally affects the drainage to one of the Hectors' driveways.

In 2006, Gary Hoffer, believing that the city owned the land underlying the easement, asked permission of the city zoning administrator to remove the fence. The zoning administrator told Hoffer that he saw no reason why not, because the fence was located on a city right-of-way and did not serve a purpose to the city. The Hoffers and the Lonnemans also asked Donald Hector for permission to remove the fence, and he refused. The Hectors then approached the city administrator who, after consulting with the zoning administrator, advised them that he agreed the fence could be removed. The city administrator told Gary Hoffer he could take down the fence, and the Hoffers and the Lonnemans removed the fence.

The Hectors filed a complaint in district court, seeking a declaration that they owned the property underlying the easement, either by title or by adverse possession. They asserted that the city had lost any ownership rights to the property by its

abandonment of the easement. They also requested damages from the Hoffers and Lonnemans for trespass and for conversion of the fence. The Hoffers and the Lonnemans sought dismissal of the suit or summary judgment. The district court granted partial summary judgment, concluding that it could not grant a declaratory judgment where the city was not properly joined as a party, and even if it could do so, the Hectors would have been estopped from litigating the abandonment issue by their inquiry of the city on issues relating to the street. The district court concluded, however, that the Hectors were entitled to litigate the trespass and conversion claims.

The Hectors moved to amend the complaint to join the city as a defendant, (1) seeking a declaration that the city lacked ownership rights to the property underlying the easement, either because the city had abandoned the property or because the Hectors adversely possessed the property and (2) asserting counts of trespass and conversion against the city. The district court granted the motion to add counts of trespass and conversion against the city, but denied the motion as to the theories of adverse possession or abandonment.[1] The district court denied the Hoffers' and Lonnemans' motion for summary judgment on the trespass and conversion claims.

[1] The parties and the district court subsequently agreed that the arguments relating to the city's ownership rights to the property were asserted in error, based on the law relating to ownership of property underlying a public easement. *See Bolen v. Glass*, 755 N.W.2d 1, 4 (Minn. 2008) (noting that, if platted property is dedicated for public use, fee title of property remains in the dedicator, subject to easement). We note that, on appeal, the parties have not raised an issue relating to whether proof of adverse possession, together with abandonment, can eliminate municipal ownership. *See Fischer v. City of Sauk Rapids*, 325 N.W.2d 816, 819 (Minn. 1982) (stating that claims of adverse possession against municipalities have been upheld only when the municipality abandoned use of the land).

The city moved for summary judgment, alleging that it had an interest in the easement, but that its interest did not affect the private dispute between the landowners. The district court granted summary judgment in favor of the city, concluding that the Hectors had no cause of action against the city because the city's advice had been based on a negligent misrepresentation of law, which is not actionable.

After a bench trial, the district court issued its findings of fact, conclusions of law, and judgment, finding that the Hectors owned the property underlying the easement, up to and including the fence line, but it did not find that they adversely possessed the property south of the fence line. The district court also determined that the Hoffers and the Lonnemans had trespassed and converted the Hectors' fence and trees. The district court awarded $200 in damages for the loss of the fence, but awarded no damages for the loss of the trees or unreasonable drainage onto the Hectors' property. The district court denied the Hectors' motion for a new trial. The Hectors appeal.

D E C I S I O N

I

The Hectors challenge the district court's determination that they owned the land only up to and including the fence line. They argue instead that they owned the land underneath the entire easement on the alternative theories that they either (1) owned two intersecting sides of the land underlying the easement or (2) adversely possessed the land underneath the easement south of the fence line.

"A street, road, alley, trail, and other public way dedicated or donated on a plat shall convey an easement only." Minn. Stat. § 505.01 (2010). "As to the ownership of

the underlying fee interest" of a public easement, the Minnesota Supreme Court has recognized the presumption "that any abutting landowner owns to the middle of the platted street or alley and that the soil and its appurtenances, within the limits of such street . . ., belong to the owner in fee, subject only to the right of . . . public [use] . . . for the purpose of improvement." *Bolen v. Glass*, 755 N.W.2d 1, 4 (Minn. 2008) (quoting *Kochevar v. City of Gilbert*, 273 Minn. 274, 276, 141 N.W.2d 24, 26 (1966)). Therefore, the dedication of the plat containing the easement conveyed only an easement to the city and did not affect fee title to the underlying property. And under the general rule, the Hoffers, the Lonnemans, and the Hectors would each own the property underlying the easement that extends from their property to the middle of the platted street. *See id.*

The Hectors first argue that they owned the land underlying the entire easement outright, based on their ownership of the property on intersecting sides of the easement. The presumption that, when a deed to property represented in a town plat conveys premises bounded by a street, the grantee takes title to the property to the center line of the street, does not apply if the platter manifests a different intent, or when the evidence lacks foundation for the presumption. *In re Robbins*, 34 Minn. 99, 101, 24 N.W. 356, 357 (1885). Thus, when "a person plats land owned by him, and lays a street on the margin thereof, wholly upon the land platted, and next to and adjoining land owned by a stranger, the grantee of a lot abutting upon such street takes title to the entire street fronting his lot." *Owsley v. Johnson*, 95 Minn. 168, 171, 103 N.W. 903, 904 (1905). But "if the owner of the ground [that was] platted [also] owned property on the opposite side

of the street," the person purchasing the land "would acquire title to the center of the street only." *Id.*

Here, the portion of the abstract in evidence relating to the plat shows that the original platters owned all of the land designated in the platted addition and conveyed that property as part of the plat. This included Block 6, the location of the Hectors' property, as well as Block 5, the location of the Hoffers' and the Lonnemans' properties. Because the platters owned the land both to the north and the south of the easement, the presumption applies that the Hectors, who took title to the portion of Block 6 that abutted the easement, had title to the center of the street only. *See id.*

The Hectors argue that "[t]he western edge of the 'easement box' runs parallel to the . . . land to the west held by [the] Hectors," and that "[i]t is logical to presume that land encumbered by the easement belongs entirely [to the] Hectors since the easement follows the Hectors' property lines on two sides at a right angle and not only along one side." The plat shows that the west end of the easement ends approximately 30 feet east of the west end of platted Blocks 5 and 6. But on this record, that evidence does not rebut the general presumption as to the ownership of the land underlying the easement itself, and the district court did not err by declining to conclude that the Hectors owned all of the land underlying the easement.

In the alternative, the Hectors argue that the district court erred by failing to conclude that they adversely possessed the property underlying the easement south of the

fence line.[2] Adverse possession requires that the district court find that the disputed parcel "has been used [by the disseizor] in an actual, open, continuous, exclusive, and hostile manner for 15 years," and that the relevant findings are supported by clear and convincing evidence. *Rogers v. Moore*, 603 N.W.2d 650, 657 (Minn. 1999). The clear-and-convincing-evidence standard requires that "the truth of the fact to be proven is highly probable." *Id.* (quotation omitted). "[I]f there is reasonable evidence to support the district court's findings of fact, [appellate courts] will not disturb those findings." *Id.* at 657–58. This court reviews district court's factual findings for clear error. Minn. R. Civ. P. 52.01. But whether the findings support the conclusions of law presents a question of law, which we review de novo. *Ebenhoh v. Hodgman*, 642 N.W.2d 104, 108 (Minn. App. 2002).

Continuity requires 15 consecutive years of possession, although it may include the possession of successive occupants of the land. *Id.* at 109. "The exclusivity requirement is met if the disseizor takes possession of the land as if it were his own with the intention of using it to the exclusion of others." *Id.* at 108 (quotation omitted). The district court determined that the requirements for adverse possession had not been met for the requisite 15-year period. The district court found that, "[w]hile there is evidence that Leander Ruffing made hostile, open, actual, continuous and exclusive use of the land contained in the Second Street easement, there was no evidence submitted that [p]laintiffs

[2] The district court erred by characterizing the Hectors' ownership of the property up to and including the fence line as based on adverse possession. But that error is harmless in view of the district court's conclusion that they own that portion of the property. *See* Minn. R. Civ. P. 61 (stating that harmless error is to be ignored).

themselves have made hostile, open, actual, continuous and exclusive use of the land past the general area of the fence/volunteer tree line."

To the extent that the district court appeared to conclude that the requirements for adverse possession must be established by the current occupant of the property, the district court erred. A district court may look to prior use of the disputed property by predecessors in interest to establish the requirement of continuous use, even if that use and ownership ended during a 15-year consecutive period. *See Fredericksen v. Henke*, 167 Minn. 356, 361, 209 N.W. 257, 259 (1926) (holding that "[t]o maintain a title, acquired by adverse possession, it is not necessary to continue the adverse possession beyond the time when title is acquired" and that, once title is adversely possessed, it "is not lost by a cessation of possession, and continued possession is not necessary to maintain it"); *Kelley v. Green*, 142 Minn. 82, 84, 170 N.W. 922, 923 (1919) (stating that "[a]dverse possession for any consecutive period of 15 years is sufficient to sustain the decision"). But that error is harmless because the district court did not err by concluding that the Hectors failed to establish adverse possession of the property south of the fence line underlying the easement. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored); *Denman v. Gans*, 607 N.W.2d 788, 794 (Minn. App. 2000) (applying harmless-error test when district court determined that appellants failed to prove adverse possession), *review denied* (Minn. June 27, 2000).

Because the Hectors' warranty deed was recorded in October 1995, their own possession could not establish 15 years of continuous use of that portion of the property before the district court's order in April 2010. In addition, Victoria Hector testified that

the Hoffers and the Lonnemans used a portion of the easement south of the fence to park a utility trailer. Therefore, to prove adverse possession, the Hectors were required to establish continuous, exclusive use of that property for a 15-year period before 2005 or 2006, when the Hectors and the Lonnemans moved to their properties.

The district court found credible the testimony of a former neighbor who lived in a trailer park on the land south of the easement from 1970–1975. The neighbor testified that when he lived there, Leander Ruffing stated that he owned the land underlying the entire easement. According to the neighbor, the residents of the trailer park had to request permission from Ruffing to park on the easement, and Ruffing would not allow trailer-park residents to put in a garden or shed south of the fence. But based on the clear-and-convincing-evidence standard, this testimony is insufficient to establish the 15-year continuous-use requirement because the neighbor lived in the trailer park for only a five-year period, and his testimony relates only to that period. The district court did not err by concluding that the Hectors failed to establish adverse possession of the land underlying the entire easement.

II

The Hectors challenge the district court's award of $200 in damages for the loss of the fence and the district court's failure to award damages for the loss of the trees or for unreasonable drainage onto their property. They first argue that the district court clearly erred by determining that the trees had no value and improperly failed to award treble damages for the loss of the trees under Minn. Stat. § 561.04 (2010). Generally, damages for loss of trees or shrubbery are measured by the difference between the value of the

property before and after the trees have been removed. *Baillon v. Carl Bolander & Sons Co.*, 306 Minn. 155, 157, 235 N.W.2d 613, 614 (1975). But if trees and shrubbery "have aesthetic value to the owner as ornamental and shade trees or for purposes of screening sound and providing privacy," the district court may consider the replacement cost of the trees in assessing damages. *Rector, Wardens & Vestry of St. Christopher's Episcopal Church v. C. S. McCrossan, Inc.*, 306 Minn. 143, 146, 235 N.W.2d 609, 611 (1975).

Here, the district court found that the four-to-five trees destroyed were volunteer tress, approximately four to six inches in diameter, and that no evidence was presented that their removal reduced the value of the property. This finding is not clearly erroneous. Donald Hector testified that the trees "just kind of came up." An expert landscape contractor testified as to the replacement value of five ash trees but also stated that it was impossible to know if the lost trees were ash, and, if they were instead Chinese elm, it would be better to get rid of them. There is no evidence that the trees were valuable for aesthetic purposes or that the Hectors engaged in upkeep of the fence area. Therefore, the district court applied a correct measure of damages and did not clearly err by determining that the property did not lose value as a result of the loss of the trees. And because the evidence sustains the district court's determination that no damages were owing to the Hectors as a result of this loss, we need not consider their claim that this loss entitled them to treble damages.

We further conclude that the district court did not err by declining to award punitive damages under Minn. Stat. § 549.20 (2010). To sustain an award for punitive damages, the record must contain clear and convincing evidence that the defendant's acts

"show[ed] deliberate disregard for the rights or safety of others." *Id.*, subd. 1(a). This "deliberate disregard" standard is met by demonstrating that a defendant had knowledge of facts creating "a high probability of injury to the rights or safety of others" and that the defendant consciously, deliberately, or indifferently acted in a manner that disregarded this high probability of injury. *Id.*, subd. 1(b).

The evidence shows that the Hoffers and the Lonnemans asked Donald Hector for permission to remove the fence. But there is no evidence that they believed their request to be more than a formality, based on earlier conversations with city employees, who had already given them permission to remove the fence. Because they did not believe that the Hectors owned the fence or trees, they did not have knowledge of facts that created "a high probability of injury to [their] rights," *id.*, and punitive damages were inappropriate.

The Hectors contend that the district court erred by determining that they failed to establish unreasonable drainage of water onto their land. Liability for the diversion of surface waters in Minnesota is governed by the reasonable-use doctrine. *Enderson v. Kelehan*, 226 Minn. 163, 167, 32 N.W.2d 286, 289 (1948). Whether the diversion of surface waters is reasonable presents a question of fact. *Duevel v. Jennissen*, 352 N.W.2d 93, 96 (Minn. App. 1984). A landowner has the right to divert surface waters onto another's land if the landowner acts in good faith and such action is reasonable. *Enderson*, 226 Minn. at 167–68, 32 N.W.2d at 289. *Enderson* set forth a four-part standard for determining whether diversion of surface waters is a reasonable use: (1) there must be a reasonable necessity for the drainage; (2) the landowner must take reasonable care to avoid unnecessary damage to another's property; (3) the benefit of the

diversion must outweigh the harm to that property; and (4) where practicable, the "normal and natural" system of drainage is improved; when not practicable, a reasonable artificial drainage system should be adopted. *Id.* at 168, 32 N.W.2d at 289.

The Hectors argue that "[w]here one carries water through down spouts and tiles to the edge of another's land and the increased flow damages another's property, one violates the natural right to drainage." They maintain that the drainage system installed by the Hoffers and the Lonnemans diverted water onto their property, which affected one of their driveways during heavy rainstorms. Mark Lonneman testified that the drainage from a portion of his house goes to the edge of his property and through perforated tiles, and that if it rains hard, water comes out of the tiles.

"[T]he balancing of plaintiff's benefits against defendant's injury is not the sole test" governing the right to dispose of surface waters. *Pell v. Nelson*, 294 Minn. 363, 366, 201 N.W.2d 136, 138 (1972). "[A]n owner may drain his land by ditching or tiling although the effect . . . may be to accelerate the movement and to increase the volume of water which reaches his neighbor's land." *Id.* at 367, 201 N.W.2d at 139. The district court examined evidence of photos of the drainage tiles and also viewed the subject property by agreement of the parties. Based on this evidence, the district court observed no indication that the drainage was causing erosion or any other damage to the Hectors' land. The record also lacks evidence that the drainage improvements altered the natural course or direction of drainage onto the Hectors' land. On this record, we cannot conclude that the district court erred by declining to grant relief on this issue.

III

The Hectors challenge the district court's grant of summary judgment in favor of the city. In reviewing a grant of summary judgment, this court examines whether any genuine issues of material fact exist and whether the district court erred in applying the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). We view the evidence in the light most favorable to the party against whom summary judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). But the nonmoving party must present evidence that is "sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). This court "review[s] de novo whether a genuine issue of material fact exists" and "whether the district court erred in its application of the law." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002).

The city initially argues that the Hectors' complaint failed to place it on notice of a negligent-misrepresentation claim. The Minnesota Supreme Court has held that, "[i]n the furtherance of justice, pleadings are to be liberally construed." *Milner v. Farmers Ins. Exch.*, 748 N.W.2d 608, 618 (Minn. 2008) (quotation omitted). If the pleadings contain factual notice of a claim and the relief requested, the pleadings need not contain a specific legal theory. *Johnson v. Mut. Serv. Cas. Ins. Co.*, 732 N.W.2d 340, 343 (Minn. App. 2007), *review denied* (Minn. Aug. 21, 2007). The district court granted the Hectors' motion to amend their complaint to add counts of trespass and conversion against the city. The factual basis for those counts relates to city employees granting permission to

enter the property and remove the fence, resulting from the mistaken assertion that the city owned the property underlying the easement. Therefore, although the pleadings as amended do not assert a specific negligent-misrepresentation theory, we conclude that the factual allegations placed the city on sufficient notice that it could be subject to such a claim.

Although Minnesota has recognized a cause of action against a government employee or official for a negligent misrepresentation of fact, no cause of action exists for a negligent misrepresentation of law. *Northernaire Prods., Inc. v. Cnty. of Crow Wing*, 309 Minn. 386, 389–90, 244 N.W.2d 279, 282 (1976); *Mohler v. City of St. Louis Park*, 643 N.W.2d 623, 637 (Minn. App. 2002), *review denied* (Minn. July 16, 2002). Misrepresentations of law are treated as misrepresentations of fact if the person misrepresenting the law stands in a fiduciary or similar relationship to the party seeking advice. *Stark v. Equitable Life Assur. Soc.*, 205 Minn. 138, 143, 285 N.W. 466, 469 (1939). But in the absence of facts indicating that individual governmental employees intended to assume a fiduciary duty to the public seeking advice, they do not owe such a duty. *Northernaire*, 309 Minn. at 389, 244 N.W.2d at 282; *cf. Mulroy v. Wright*, 185 Minn. 84, 88, 240 N.W. 116, 117–18 (1931) (holding city custodian of records liable for negligently furnishing false certificate showing no special assessments against a property).

We conclude that the district court did not err in determining that the city's representations amounted to misrepresentations of law. The Hectors have alleged no facts tending to show that the city acted in a fiduciary capacity with respect to advising

the Hoffers and the Lonnemans. Although the question of who owns the property underlying the easement presents a question of fact, the consequence of that ownership relating to the city's advice on whether the Hoffers and the Lonnemans were permitted to remove the trees and fence presents a legal issue. *See, e.g.*, *Northernaire*, 309 Minn. at 388, 244 N.W.2d at 281 (concluding that misrepresentation of law occurred when county officials innocently misrepresented to promoters that a permit was not necessary to hold a rock concert); *Mohler*, 643 N.W.2d at 636–37 (concluding that city official's misinterpretation of zoning ordinance by mistakenly overlooking a garage-height requirement amounted to misrepresentation of law). This resolution finds support in the public policy stated in *Northernaire* that "[t]o subject [government] officials to the prospect of liability for innocent misrepresentation would discourage their participation in local government or inhibit them from discharging responsibilities inherent in their offices." *Northernaire*, 309 Minn. at 389, 244 N.W.2d at 282.

But even if we were to conclude that the district court erred in its analysis of this claim, we would decline to reverse the district court's summary judgment. As we have concluded, the record sustains the district court's determination that the Hectors incurred damages of $200 from loss of the fence and no damages from loss of the trees. Thus, their ability to litigate a negligent-misrepresentation claim would have only a minimal effect on the disposition of this lawsuit. *Cf. Flynn v. Am. Home Prods. Corp.*, 627 N.W.2d 342, 350–51 (Minn. App. 2001) (stating that recovery for negligent-misrepresentation claim is for pecuniary damages proximately caused by reasonable reliance on negligent provision of false information). The nominal value of damages

proved does not warrant the reversal of summary judgment. *See, e.g.*, *Bondy v. Allen*, 635 N.W.2d 244, 249 (Minn. App. 2001) (declining to reverse summary judgment, based on conclusion that facts would support only de minimis damages on plaintiffs' negligence claim).

Affirmed.