STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1436

Three Putt, LLC,
Appellant,

vs.

City of Minnetonka,
Respondent,

SouthMetro Centers VIII, LLC, et al.,
Respondents.

Filed June 2, 2009
Affirmed
Worke, Judge
Dissenting, Johnson, Judge

Hennepin County District Court
File No. 27-CV-07-12139

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Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Johnson, Judge.

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

WORKE, Judge

In this land-use dispute, respondent-city first challenges the appealability of the district court's order. Appellant then challenges the district court's grant of summary judgment, arguing that zoning changes to an adjacent property (a) change the zoning of appellant's property; (b) had significant detrimental effects on appellant's property; and (c) resulted in a breach of the contract between the city and appellant. Appellant also argues that (1) the city improperly granted variances to respondent-adjacent landowner; (2) respondents interfered with appellant's easement; (3) appellant is a third-party beneficiary of a planned-unit-development agreement between the city and the adjacent landowner; and (4) the city should have been estopped from allowing the adjacent landowner from developing the property. We affirm.

FACTS

This land-use dispute arises out of the redevelopment of two adjacent properties located in respondent City of Minnetonka. Appellant Three Putt, LLC, owns the property referred to as the Three Putt Property. Respondent SouthMetro Centers VIII, LLC, (SouthMetro) owns the adjacent property referred to as the True North Property, which is leased to respondent True North Investments, LLC (True North).

Two closely affiliated partnerships previously owned the properties. Cross Oak Properties (COP) owned the True North Property, and Cross Oak East Partnership (COEP) owned the Three Putt Property. The True North Property was subject to an

easement, for the ingress and egress of persons and vehicles called the "declaration of driveway."

In 1987, COP and COEP applied to the city for rezoning of each property to a Planned Unit Development (PUD). The city adopted a resolution granting the applications, subject to, among other things, PUD agreements and the dedication of cross-access and parking easements between the two properties.

In August 1988, the city and COEP entered into PUD agreement 87075A for the development of the Three Putt Property, and the city and COP entered into PUD agreement 87075B for the development of the True North Property. Each agreement stated that the terms may be amended by mutual agreement of the signing parties and that the terms are binding on all successors and assigns. A master development plan (MDP) was attached to each agreement. The MDP attached to 87075A provided that it is subject to the dedication of cross-access and parking easements between the two properties. The MDP attached to agreement 87075B had no such stipulation

In September 1988, COP granted an easement for the benefit of both properties, which created northerly access and southerly access points. The purpose of the easement was to provide mutual access to and use of parking lots on the properties, but only granted an easement for ingress and egress upon the properties for the purpose of cross-access to the parking lots.

In 2004, appellant purchased the Three Putt Property. The purchase agreement was subsequently modified when appellant became concerned about inadequate parking. The seller reduced the purchase price by $50,000 in consideration of the lack of cross-

parking easements. Appellant attempted to negotiate a cross-access and parking-easement agreement with the then owner of the True North Property, but was unsuccessful.

In December 2005, SouthMetro purchased the True North Property and began leasing the property to True North. In March 2006, the city council adopted Ordinance 2006-04, which amended the MDP for the Three Putt Property. In July 2006, the city council adopted Ordinance 2006-14, which amended the MDP for the True North Property. The ordinances required the property owners to execute a shared-parking and access agreement. But the parties were unable to reach an agreement. In October 2006, the city subsequently amended the ordinances eliminating the requirement that the parties reach an agreement on the shared-parking and access issues.

Prior to developing the True North Property, True North presented a construction-management plan to the city and appellant detailing how construction would proceed. True North received no objections from appellant, and the city signed off on the construction-management plan. Pursuant to the plan, True North closed the northerly access for six months, making the southerly access the only entrance.

Appellant, alleging that the development of the True North Property caused it to suffer damages, commenced this litigation. On May 13, 2008, the district court dismissed all of appellant's claims against the city, and many of appellant's claims against True North. On June 5, 2008, the district court dismissed as a matter of law appellant's remaining claims against respondents, with the exception of appellant's trespass claim against True North. True North and appellant then entered into a

stipulation to dismiss the claims without prejudice, explicitly preserving them for future disposition, in order to facilitate an immediately appealable order. On June 26, 2008, an order based on the stipulation was filed. The order recited that most of the claims were disposed of by the May 13 and June 5 orders, and that the parties had stipulated to the dismissal of the only remaining claim. Per that order, judgment was entered on June 27, 2008. This appeal follows.

D E C I S I O N

Appealability

The city argues that the June 26, 2008 order is not appealable because it does not dispose of all claims. In multiple party actions the district court "may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Minn. R. Civ. P. 54.02. Absent such a determination, an order adjudicating fewer than all claims or rights and liabilities will not be appealable. *Id.*

The city relies on *Morgan Co. v. Minn. Mining & Mfg., Co.*, for the proposition that a party cannot simply dismiss an unresolved portion of a claim in order to create an appealable order. 310 Minn. 305, 308-09, 246 N.W.2d 443, 446 (1976). *Morgan*, however, is distinguishable. First, in *Morgan*, the district court issued an order for partial summary judgment on the issue of damages alone. *Id.* at 308, 246 N.W.2d at 446. The supreme court noted that the district court only determined damages on the claims addressed, that liability on those claims remained open, and that review would not have

been available, even if the district court had used the "no just reason for delay" and "let judgment be entered language." *Id.* at 308-09, 246 N.W.2d at 446. Second, the district court specifically declined to direct entry of judgment, and there was no stipulation between the parties. *Id.* at 307, 246 N.W.2d at 446. Instead, the plaintiff attempted to circumvent that denial and dupe the judgment clerk by unilaterally deciding to dismiss its remaining claims. *Id.* at 308, 246 N.W.2d 446.

Finally, despite the dubious conduct in *Morgan*, the supreme court actually reached the merits, in part because no one objected and in part because it apparently concluded that it would be more efficient to do so. *Id.* at 309, 246 N.W.2d at 446. While we do not have dubious conduct, we do have a specific determination by the district court that an appeal should be taken at this stage, and the district court had the power to authorize an interlocutory appeal. In addition, all but one of the claims was fully adjudicated. Accordingly, the district court had the power to order a final partial judgment. Although it did not do that, it did order a final judgment, based on the orders for summary judgment and the stipulation, which provided for the entry of a final judgment. Unlike *Morgan*, there was no attempt to circumvent a previous ruling and there is a specific district court order for entry of a final judgment. While we are leery of parties attempting to circumvent procedural rules in order to obtain premature review in this court, we do not conclude that this occurred here. Because the June 26, 2008 order disposes of all remaining issues, the resulting June 27, 2008 judgment is appealable.

Summary Judgment

Appellant argues that the district court erred in granting summary judgment. On appeal from summary judgment, this court must determine "whether there are any genuine issues of material fact and [] whether the [district] court[] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). We review the record "in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). But the party resisting summary judgment may not rest on mere averments; it must produce evidence of specific facts sufficient to raise a jury issue. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). When material facts are not in dispute, we review the district court's application of the law de novo. *Hubred v. Control Data Corp*., 442 N.W.2d 308, 310 (Minn. 1989).

Zoning Changes

Appellant argues that the city's zoning changes to the True North Property changed the zoning of the Three Putt Property because both properties were part of a single PUD. Alternatively, appellant argues that the zoning changes had a significant detrimental effect on the value of its property, and were violations of appellant's and the city's PUD agreement. We will address each argument in turn.

Appellant's argument that the properties were part of a single PUD is without merit. The purpose of contract interpretation "is to determine and enforce the intent of the parties." *Paradigm Enters., Inc. v. Westfield Nat'l Ins. Co.*, 738 N.W.2d 416, 421 (Minn. App. 2007). When the parties express their intent in unambiguous words, we give

effect to the contract's plain and ordinary meaning. *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 323 (Minn. 2003).

The record indicates that the city and COEP entered into PUD agreement 87075A, and the city and COP entered into PUD agreement 87075B. Each agreement governs a separate property, and, although similar, each contains different language and requirements. Appellant contends that the agreements were often referred to as "*a* PUD" in city council minutes and memorandum. (Emphasis added.) While this contention may be true, it is not dispositive because the agreements speak for themselves. Because there are two PUD agreements governing two separate properties, appellant's argument fails.

Appellant next argues that the zoning changes to the True North Property PUD had a significant detrimental effect on the use of its property. Appellant relies on *Alexander v. City of Minneapolis*, for the proposition that "where zones have been established in a municipality, and property has been purchased with intent to use it in conformance with such zoning, the purchaser ordinarily has a right to so use it." 267 Minn. 155, 160, 125 N.W.2d 583, 587 (1963). This reliance is misplaced. Here, the zoning of an adjacent property was changed, but the zoning of appellant's property was not. Appellant contends that the zoning change to the adjacent property affects the use of its property. But appellant is entitled to use the property in exactly the same manner as before the zoning changes to the True North Property.

Appellant also argues that the zoning amounted to prohibited spot zoning, resulted in a substantial diminution of value of its property, and therefore requires compensation from the city. Spot zoning applies to "zoning changes, typically limited to small plots of

land, which establish a use classification inconsistent with surrounding uses and create an island of nonconforming use within a larger zoned district." *State by Rochester Ass'n of Neighborhoods v. City of Rochester*, 268 N.W.2d 885, 891 (Minn. 1978). The party challenging the ordinance has the burden of demonstrating that a particular zoning amendment is spot zoning, and the usual presumption of validity attached to zoning amendments as legislative acts applies. *Id.* When cities enact spot-zoning ordinances which result in "substantial diminution of value of property affected thereby" they must offer just compensation. *Alexander*, 267 Minn. at 160, 125 N.W.2d at 586.

Contrary to appellant's assertion, the zoning changes to the True North Property do not amount to spot zoning. Although the amendments affect a small plot of land, they are consistent with the surrounding uses and do not create an island of nonconforming use within a larger district. In fact, the current use is similar to the previous and surrounding use. In addition, "generalized claims that their property may decline in value, absent some evidence of an actual decline sufficient to prove a taking of property without compensation, do not form a basis for invalidating a zoning ordinance or amendment." *State by Rochester Ass'n of Neighborhoods*, 268 N.W.2d at 891. Because the zoning changes do not amount to spot zoning and because appellant has failed to provide more than generalized claims of diminution of value, the district court did not err in ruling that there was no substantial detrimental impact to appellant's property.

Appellant next argues that the city violated PUD agreement 87075A, and that it should be able to use the property in the same manner as its predecessors. Appellant suggests that the rezoning of the True North Property removed cross-parking and sight-

line rights, and dramatically changed the use and value of its property. The district court determined that the city did not violate any contractual requirements and that appellant is free to use its property in the same manner as its predecessors. Minnesota law recognizes that zoning ordinances do not create a property right in adjacent landowners. *McCavic v. DeLuca*, 233 Minn. 372, 378, 46 N.W.2d 873, 876 (1951) (stating that "set-back lines or building lines do not really create an easement in the strict legal sense. . . . The effect of set-back lines . . . in zoning ordinances is merely to regulate the use of property") (quotation omitted).

The record indicates that PUD agreement 87075A governs only the Three Putt Property, and PUD agreement 87075B governs the True North Property. The agreements are between the city and *the developer*; importantly, developer is singular. (Emphasis added.) Generally, no one can sue for breach of contract who is not a party or in privity to the contract. *N. Nat'l Bank v. N. Minn. Nat'l Bank*, 244 Minn. 202, 208, 70 N.W.2d 118, 123 (1955). The complained-about changes were made to agreement 87075B, which expressly stated that it could be amended by mutual consent of the *parties*. Neither appellant nor its predecessor was a *party* to that agreement. In addition, agreement 87075A remains unchanged by the changes to agreement 87075B. Because appellant was not a party to agreement 87075B and appellant may continue to use its property in the same manner as appellant's predecessor, we conclude that the city did not breach any contractual provision and the district court did not err in granting summary judgment in favor of the city.

Grant of Variances

Appellant argues that the city improperly granted True North variances because there were no findings of undue hardship, and as a result appellant is entitled to injunctive relief. We review a city's variance decision independent of the findings and conclusions of the district court to determine whether the action was reasonable or arbitrary and capricious. *VanLandschoot v. City of Mendota Heights*, 336 N.W.2d 503, 508 (Minn. 1983). We must decide whether the reasons articulated by the city were "legally sufficient and had a factual basis," or did not have the "slightest validity or bearing on the general welfare of the immediate area." *Id.* (quotation omitted). Although rebuttable, there is a strong presumption that a city's actions are proper. *Arcadia Dev. Corp. v. City of Bloomington*, 267 Minn. 221, 226, 125 N.W.2d 846, 850 (1964). We review a local zoning authority's exercise of its discretion to determine whether there was a rational basis for the decision. *Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 162, 178 (Minn. 2006). The fact that this court may have arrived at a different conclusion does not invalidate the judgment of a local zoning authority if it acted in good faith and within the broad discretion accorded it by statutes and the relevant ordinances. *See VanLandschoot*, 336 N.W.2d at 509.

"[S]ince zoning laws are a restriction on the use of private property . . . there is a heavier burden required on . . . those [] challenging the approval" of a zoning decision, "as compared to the degree of proof required of a landowner whose application is denied." *Bd. of Supervisors of Benton Twp. v. Carver County Bd. of Comm'rs*, 302 Minn. 493, 499, 225 N.W.2d 815, 819 (1975). We "may look to the evidence in the record, and,

absent a showing that the proposed use would be detrimental to public health, safety, or welfare, [] the governmental decision must be upheld." *Id*. at 500, 225 N.W.2d at 819. Because there is no evidence in the record from appellant showing that the proposed use is or would be detrimental to public health, safety, or welfare, the district court did not err in granting summary judgment in favor of the city.

Interference with Ingress and Egress Easements

Appellant argues that the district court erred in dismissing its claim that respondents interfered with its ingress and egress easements. Appellant also contends that the city's approval of the construction management plan allowing the interference makes the city liable as well, but cites no authority supporting this claim. The grantee of an easement is entitled to a limited use or enjoyment of the land. *Minneapolis Athletic Club v. Cohler*, 287 Minn. 254, 258, 177 N.W.2d 786, 789 (1970). The extent of an easement by grant is defined entirely by the construction of the terms of the grant. *Highway 7 Embers Inc. v. Nw. Nat'l Bank*, 256 N.W.2d 271, 275 (Minn. 1977). "[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." *Bergh & Misson Farms, Inc. v. Great Lakes Transmission Co*., 565 N.W.2d 23, 26 (Minn. 1997). "Generally, an easement grant is to be strictly construed against the grantor." *Id.* But "the extent of an easement should not be enlarged by legal construction beyond the objects originally contemplated or expressly agreed upon by the parties." *Id.*

Generally, injunctions are granted in easement cases only when an interference with or obstruction of the easement substantially changes or unreasonably interferes with

the owner's use of the easement. *See, e.g.*, *Minneapolis Athletic Club*, 287 Minn. at 259, 177 N.W.2d at 790 (construction of skyway over alley did not interfere with right-of-way easement to use alley); *Giles v. Luker*, 215 Minn. 256, 261, 9 N.W.2d 716, 718 (1943) (injunction granted when owner of servient estate threatened to prevent use of right-of-way by trucks hauling gravel).

The language in the easement agreement is unambiguous. The easement agreement created a perpetual, nonexclusive easement for the benefit of the Three Putt Property for driveway purposes over, under, and across the northerly and southerly easement area. The easement agreement defines the northerly and southerly easement areas, and states that the owner "shall use the rights granted [] with due regard to the rights of others and their use thereof, and shall not use the [e]asement in any way that will impair the rights of others . . . and shall not obstruct passage thereon." The easement requires that "[n]o obstructions which would prevent, restrict, or otherwise inhibit the passage . . . over any portion of the [e]asement shall be erected, condoned or permitted to endure" and states that "[t]he owner of each parcel agrees to use the [e]asement in such a manner that the use thereof will in no way adversely affect the use and enjoyment of the other's land."

True North blocked the northerly access point for six months, which violated the easement because it prevented and restricted passage over the easement area. But appellant and its customers continued to have unfettered access to the southerly access point and there is no evidence in the record showing that appellant's business suffered as a result of the temporary closure of the northerly access. In addition, appellant was aware

that the northerly access would be temporarily closed and did not voice any complaints prior to the closure. We conclude that, although the closure of the northerly access was a violation of the easement, the district court did not err in granting summary judgment when appellant knew of and did not complain about the closure, appellant's customers had access to the southerly access, and appellant failed to demonstrate any adverse impact on its business as a result of the temporary closure.

Third-party Beneficiary Status

Appellant argues that it has rights under agreement 87075B as intended third-party beneficiary. Ordinarily, non-parties to a contract acquire no rights under the contract. *Wurm v. John Deere Leasing Co*., 405 N.W.2d 484, 486 (Minn. App. 1987). An exception involves a third-party beneficiary of a contract. *Dufresne v. Am. Nat'l Bank & Trust Co*., 374 N.W.2d 763, 766 (Minn. App. 1985), *review denied* (Minn. Dec. 13, 1985). A third-party beneficiary must meet the intent-to-benefit test or the duty-owed test to acquire rights under the contract. *Cretex Cos. v. Constr. Leaders, Inc*., 342 N.W.2d 135, 139 (Minn. 1984).

We must determine whether there was intent to benefit appellant. To meet this test, the contract must express some intent by the parties to benefit the third party through contractual performance. *Id.* at 138. The requisite intent must be found in the contract as read in light of all the surrounding circumstances. *Buchman Plumbing Co. v. Regents of the Univ. of Minn*., 298 Minn. 328, 334, 215 N.W.2d 479, 483 (1974). Unless the contract expresses the parties' intent to benefit a third party through contractual

performance, the third party is no more than an incidental beneficiary and cannot enforce the contract. *Wurm*, 405 N.W.2d at 486.

Appellant contends that because the two PUD agreements were entered into at the same time, and both incorporated MDPs which had various setback and building placements, the properties were intended to function together. As a result, appellant suggests that it was an obvious intended third-party beneficiary. Appellant further contends that it relied on the cross-parking and sight-line rights established in agreement 87075B when it developed the property.

Even though the agreements were created the same day, agreement 87075B states that the agreement is between the city and COP. COEP, Three Putt's predecessor in title, was not mentioned at all and is therefore presumptively an incidental beneficiary. *Id.* Furthermore, agreement 87075B may be amended by mutual consent of COP and the city, and it is devoid of the language in agreement 87075A that provides for the dedication of cross-access and parking easements between the properties. Had COEP been an intended beneficiary the same cross-access and parking easement language would have been included in agreement 87075B. There is no dispute that appellant knew that there were problems with the cross-parking rights when it purchased the property. Because appellant has failed to establish that it was an intended third-party beneficiary, the district court did not err in granting summary judgment in favor of respondents.

Estoppel

Finally, appellant argues that the district court erred in dismissing its estoppel claim. "When the facts permit only one conclusion, the application of equitable estoppel

is a question of law subject to de novo review." *Concept Props., LLP v. City of Minnetrista*, 694 N.W.2d 804, 821 (Minn. App. 2005), *review denied* (Minn. July 19, 2005). An equitable-estoppel claim against a government entity generally requires some fault by the government agency whose action is sought to be estopped. *Ridgewood Dev. Co. v. State*, 294 N.W.2d 288, 292-93 (Minn. 1980). Further analysis is required only if wrongful conduct is found to exist. *Id.* at 293. "Affirmative misconduct, rather than simple inadvertence, mistake, or imperfect conduct is required for estoppel to be applied against the government." *AAA Striping Servs. Co. v. Minn. Dep't of Transp.*, 681 N.W.2d 706, 720 (Minn. App. 2004); *Kmart Corp. v. County of Stearns*, 710 N.W.2d 761, 771 (Minn. 2006) (stating that the wrongful conduct requires some sort of malfeasance).

There is no evidence that the city engaged in malfeasance. Appellant knew that there were problems with the parking and chose to develop the property. Any mistake by the city was no more than "simple inadvertence, mistake, or imperfect conduct," which this court has stated is insufficient for estoppel. *AAA Striping*, 681 N.W.2d at 720. Because appellant failed to satisfy the wrongful-conduct requirement, its equitable estoppel claim fails, and the district court did not err in granting summary judgment.

Affirmed.

JOHNSON, Judge (dissenting)

I respectfully dissent from the opinion of the court. In the first part of the opinion, the majority concludes that this case is appealable in its present procedural posture. I would conclude that the district court's order granting partial summary judgment is not appealable because the district court did not enter a truly final judgment and did not certify its partial summary judgment order as appealable pursuant to rule 54.02.

After the district court granted in part and denied in part the motions for summary judgment, Three Putt and True North entered into a stipulation of dismissal without prejudice, which the district court signed and filed. Pursuant to the stipulation, Three Putt voluntarily dismissed the remaining part of count V, and True North voluntarily dismissed counts II, III, and IV of its counterclaims. But the stipulation provides that Three Putt and True North may "reinstate" or "revive" any or all of those claims after this court's decision in this appeal, regardless of our disposition of the appeal. The stipulation, which is eight paragraphs long, is admirable in its thoroughness, specificity, and clarity.

The stipulation, however, is an illegitimate means of circumventing the rule that a party may appeal from a grant of partial summary judgment only if the district court has entered final judgment or has determined pursuant to Minn. R. Civ. P. 54.02 that "there is no just reason for delay." Minn. R. Civ. App. P. 103.03(a); *Pederson v. Rose Coop. Creamery Ass'n*, 326 N.W.2d 657, 660 (Minn. 1982). In this case, the district court did not enter final judgment and did not determine that there was no just reason for delay, and it appears that there was no basis for such a determination.

In *Morgan Co. v. Minnesota Mining & Mfg. Co.*, 310 Minn. 305, 246 N.W.2d 443 (1976), the supreme court rejected a similarly illegitimate attempt to appeal from an interlocutory order, which resulted in what the supreme court described as an "unauthorized judgment." *Id.* at 309, 246 N.W.2d at 446. The supreme court commented, "Whatever authority plaintiff relied on for that action certainly escapes us." *Id.* at 308, 246 N.W.2d at 446. There is no meaningful distinction between the *Morgan* case and this case. First, it is immaterial that the district court in *Morgan* had adjudicated only the issue of damages. It is material that the district court's adjudication of the case had not yet reached final judgment and, thus, was not yet appealable. Second, it is immaterial that the parties in *Morgan* did not enter into a stipulation and that the district court did not direct entry of judgment. It is material that, through various machinations, the parties circumvented rules 54.02 and 103.03. In fact, the district court in *Morgan* previously had denied the plaintiff's motion for entry of judgment pursuant to rule 54.02. 310 Minn. at 307, 246 N.W.2d at 445. Finally, *Morgan* did not hold that a district court's partial judgment is appealable despite non-compliance with rule 54.02. Rather, the supreme court concluded that the matter was not appealable as of right but nonetheless proceeded to "treat the appeal as a request for discretionary review" under Minn. R. Civ. App. P. 105, which it granted. *Id.* at 309, 246 N.W.2d at 449.

The federal rule concerning appeals from partial judgments is similar to Minnesota's rule, *see* Fed. R. Civ. P. 54(b), and there is a body of federal caselaw on this issue. If presented with the facts of this case, a majority of the federal circuit courts would conclude that the case is not appealable because of the non-binding nature of the

dismissal of the pending claims. *See Rabbi Jacob Joseph Sch. v. Province of Mendoza*, 425 F.3d 207, 210-11 (2d Cir. 2005); *Marshall v. Kansas City S. Ry. Co.*, 378 F.3d 495, 500 (5th Cir. 2004); *West v. Macht*, 197 F.3d 1185, 1189-90 (7th Cir. 1999); *State Treasurer v. Barry*, 168 F.3d 8, 16 (11th Cir. 1999); *Dannenberg v. Software Toolworks, Inc.*, 16 F.3d 1073, 1074-75 (9th Cir. 1994); *Bhatla v. U.S. Capital Corp.*, 990 F.2d 780, 786 (3d Cir. 1993); *Cook v. Rocky Mountain Bank Note Co.*, 974 F.2d 147, 148 (10th Cir. 1992). Most of the remaining circuit courts have not addressed the issue. *See Swope v. Columbian Chems. Co.*, 281 F.3d 185, 192 & nn. 20-22 (5th Cir. 2002) (collecting cases). The federal circuit court for this region of the country has, on one occasion, treated a voluntary dismissal of pending claims without prejudice as a dismissal *with* prejudice, commenting that plaintiff's counsel had "badly miscalculated" in believing that the plaintiff could later reinstate the claims that it had voluntarily dismissed. *Minnesota Pet Breeders, Inc. v. Schell & Kampeter, Inc.*, 41 F.3d 1242, 1245 (8th Cir. 1994).

Whatever the appropriate remedy, the basic thrust of the above-cited federal caselaw is that a stipulation of dismissal without prejudice that expressly contemplates and provides for the reassertion of dismissed claims is not a genuine dismissal that gives rise to a truly final judgment. Rather, such a stipulation is only a means of pretending that the requirements of appealability have been satisfied when, in fact, they have not been satisfied. In a similar situation, the Minnesota Supreme Court expressed disapproval of an attempt to circumvent the rules requiring a final judgment: "The fact that both parties involved in this litigation may want a speedy determination of their rights and have briefed and argued the merits of the case cannot operate to confer

jurisdiction upon this court." *Morey v. School Bd. of Indep. Sch. Dist. No. 492*, 268 Minn. 110, 112-13, 128 N.W.2d 302, 305 (1964). The supreme court also stated that a judgment is not "final," and thus not appealable, unless "the matter is conclusively terminated so far as the court issuing the order is concerned." *Id.* at 113, 128 N.W.2d at 305 (interpreting Minn. Stat. § 605.09 (1961)). In this case, the matter is not "conclusively terminated" because, pursuant to the stipulation, Three Putt and True North have an unconditional right to continue litigating the voluntarily dismissed claims in the district court.

To be sure, parties sometimes may find it desirable to use the gambit employed by Three Putt and True North to take an interlocutory appeal from a district court action that has been only partially decided. But such an approach, if permitted, would lead to piecemeal appeals from the same district court action. This court has limited resources. To permit multiple appeals when parties find it convenient but when the requirements of rule 54.02 cannot be satisfied is to impose greater burdens than necessary on this court, to the detriment of both the court and litigants in other cases. *See Financial Relations Bd. v. Pawnee Corp.*, 308 Minn. 109, 111, 240 N.W.2d 565, 566 (1976) (describing purpose of rule 54.02). A similar principle protects the district courts from multiple lawsuits arising from the same dispute; no attorney would justifiably believe that he or she could commence an action against a defendant but withhold one or more causes of action until a later date, after the district court has decided the causes of action originally pleaded. *See Brown-Wilbert, Inc. v. Copeland Buhl & Co., P.L.L.P.*, 732 N.W.2d 209, 220 (Minn.

2007) (stating that doctrine of *res judicata* "applies equally to claims actually litigated and to claims that could have been litigated in the earlier action").

Thus, consistent with *Morgan* and *Morey*, Three Putt and True North should be required either to proceed to trial on their remaining claims or to voluntarily dismiss those claims *with* prejudice. Because they have done neither, I would dismiss the appeal.