STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2117

Paul W. Welsh, et al.,
Respondents,

vs.

Anthony J. DeMars, et al.,
Appellants.

Filed February 12, 2008
Affirmed
Halbrooks, Judge

Washington County District Court
File No. C2-05-6109

James M. Lockhart, Christopher R. Grote, Christopher R. Sullivan, Lindquist & Vennum, P.L.L.P., 4200 IDS Center, 80 South 8th Street, Minneapolis, MN 55402 (for respondents)

Jack Y. Perry, Lisa M. Agrimonti, Briggs and Morgan, P.A., 2200 IDS Center, Minneapolis, MN 55402 (for appellants)

Considered and decided by Stoneburner, Presiding Judge; Halbrooks, Judge; and Minge, Judge.

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

HALBROOKS, Judge

On appeal from an order confirming the validity of respondents' easement over their property, appellants challenge the district court's ruling that the Marketable Title Act, Minn. Stat. § 541.023 (2006), does not preclude respondents from enforcing the easement. Because we conclude that the district court did not err, we affirm.

FACTS

Appellants Anthony and Christina DeMars and respondents Paul and Pamela Welsh are neighbors. The parties own fee interests in adjacent residential properties, the northern boundaries of which abut Juniper Street in Mahtomedi. When the parties acquired title to their respective residential tracts, they also acquired property interests providing them with access to nearby White Bear Lake. Appellants' deed conveyed to them a fee interest in a ten-foot wide strip of property abutting White Bear Lake (hereinafter the lakeshore property). This ten-foot strip of land is not contiguous with either parties' Juniper Street property. But the deed by which respondents obtained title to their residential property granted them an easement over appellants' lakeshore property.

A. The history of appellants' and respondents' properties.

In 1960, Terrance O'Toole acquired title to the property that appellants and respondents presently own, which was then a single parcel of land. That same year, O'Toole divided the Juniper Street property in half and sold the parcels to separate buyers. O'Toole conveyed a fee interest in the western half of the Juniper Street property

and a fee interest in the lakeshore property (together hereinafter referred to as the DeMars parcel) to Joseph and Gloria Blawat. The deed conveying this property to the Blawats noted that the conveyance of the fee interest in the lakeshore property was "subject to an easement of record for the benefit of" respondents' present-day property. O'Toole conveyed a fee interest in the eastern half of the Juniper Street property and, as described in the deed, "a perpetual easement over and across" the lakeshore property (together hereinafter referred to as the Welsh parcel) to Willmar Anderson.

In October 1966, Anderson conveyed the Welsh parcel to Richard and Frieda Morey. The Moreys owned the Welsh parcel until partial interests in the property passed to several different parties by testamentary conveyance in November 1996. All these partial interests were eventually obtained by Jeffrey Neudahl, who in turn sold the Welsh parcel to respondents on February 13, 2002.

Regarding appellants' property, the Blawats owned the DeMars parcel until 1985. Between 1985 and 2004, ownership of the DeMars parcel changed hands several times. Appellants purchased their fee interest in the DeMars parcel on June 10, 2004. The deed by which appellants acquired title to the DeMars parcel contained a description of the easement over the lakeshore property for the benefit of respondents' property. Anthony DeMars testified that he had actual notice of the existence of the easement because he read the deed prior to purchasing the property.

B. The present dispute

During the first few years after respondents purchased the Welsh parcel, they used the easement, primarily for swimming during the summer months. The present dispute

arose in the summer of 2005, when both parties desired to place boat lifts in the shallows adjacent to the lakeshore property. Because of its size, the lakeshore property could not accommodate two boat lifts. Thus, respondents placed their boatlift in the deeper waters of White Bear Lake beyond appellants' boatlift. But the placement of the two boat lifts violated a White Bear Lake Conservation District ordinance, and respondents were ordered to remove their boatlift.

Because respondents were prevented from placing a boatlift adjacent to the lakeshore property so long as appellants' boatlift remained, they filed suit in district court, seeking various forms of relief and compensation. Appellants counterclaimed. Eventually, the parties agreed to drop all claims except for those for declaratory relief, asking the district court to determine the parties' respective rights regarding the lakeshore property.

The matter was tried to the district court. Appellants relied on Minn. Stat. § 541.023 (2006) to preclude respondents' action to enforce their easement rights. At trial, O'Toole, the original grantor of the disputed easement, testified that he intended that there would be no restrictions of any kind placed on the use and enjoyment of the easement and that neither the benefited nor the burdened property owner was intended to have "any paramount rights over the other." The district court accepted and adopted this testimony in its findings of fact.

In its order, the district court ruled that section 541.023 does not preclude respondents from enforcing their easement rights because their predecessors-in-interest sufficiently used the easement to meet the possession exception contained in the statute.

The district court concluded that each party has equal rights to use the property and that neither parties' use could unreasonably interfere with the others. Because it found that appellants' boatlift interfered with respondents' use of the lakeshore property, the district court ordered that it be removed. This appeal follows.

D E C I S I O N

The parties dispute the proper standard of review that we should apply in this matter. We do not understand either party to be challenging the district court's findings of fact regarding the use of the easement, which would be reviewed for clear error. *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999). Instead, appellants are challenging the district court's legal conclusion that the undisputed facts regarding the use of the easement amounts to "possession" under Minn. Stat. § 541.023 (2006). A district court's interpretation of a statute is a question of law, which we review de novo. *State v. Al-Naseer*, 734 N.W.2d 679, 684 (Minn. 2007).

Appellants contend that the district court erred in its interpretation of Minn. Stat. § 541.023, often referred to as the Marketable Title Act (the act). They argue that the facts established at trial regarding the use of the easement by respondents' predecessors-in-interest do not meet the possession exception contained in the act.

Generally, a party may invoke the Marketable Title Act as a defense when the party claims an interest in property and another party asserts a hostile claim to the same property. *Foster v. Bergstrom*, 515 N.W.2d 581, 586 (Minn. App. 1994). A prerequisite for a party's invocation of the act as a defense is that the party have a "claim of title [to the disputed property] based upon a source of title," that source of title "having been of

record at least 40 years."[1] Minn. Stat. § 541.023, subd. 1. Once the act is properly invoked, it precludes any

> action affecting the possession or title of any real estate . . . to enforce any right . . . founded upon any instrument . . . which was executed . . . more than 40 years prior to the commencement of such action, unless within 40 years after such execution . . . there has been recorded in the office of the county recorder . . . a notice sworn to by the claimant . . . setting forth the name of the claimant, a description of the real estate affected and of the instrument . . . on which such claim is founded . . . .

Id. A party who fails to meet the recordation requirement is presumed to have abandoned any interest in the property. *Id.*, subd. 5; *Bergstrom*, 515 N.W.2d at 586. Here, the parties stipulated that respondents' easement over the lakeshore property had not been properly recorded as the act requires.

But the act does contain an exception to the presumption of abandonment. A party against whom the act is invoked can preserve his ability to enforce a claimed interest in property, despite failing to record sworn notice of the interest as the statute requires, if the party can demonstrate "possession" of the disputed property. Minn. Stat. § 541.023, subd. 6. Thus, here we must determine whether respondents fall within this exception because they or their predecessors-in-interest sufficiently possessed the easement over appellants' lakeshore property.

At trial, evidence established that O'Toole created respondents' easement interest on December 23, 1960. Therefore, any use of the easement must have occurred within 40

[1] The term "source of title" is defined in the act as "any . . . instrument which transfers or confirms, or purports to transfer or confirm, a fee simple title to real estate." Minn. Stat. § 541.023, subd. 7.

years of this date, i.e., by December 23, 2000, to be relevant under the act's possession exception. Because respondents' use of the easement did not begin until after their 2002 purchase of the Welsh parcel, they cannot rely on their own use to establish possession under the act.

The only evidence of use of the easement by respondents' predecessors-in-interest is use by the Moreys, who owned the Juniper Street property from 1966 until 1996. The Moreys' nephew, Todd Hunt, testified that he and Richard Morey used the easement for fishing four or five times a year from approximately 1968 to 1980. To facilitate their fishing, Richard Morey stored a small boat on the lakeshore property until 1980, and, occasionally, a motor was used on the boat. Hunt further testified that he swam from the lakeshore property and that Richard Morey's son also used the easement for fishing.

It is respondents' duty to provide sufficient evidence of possession to overcome the presumption that they abandoned their easement interest by failing to record sworn notice of the interest in accordance with the act's requirements. *Twp. of Sterling v. Griffin*, 309 Minn. 230, 235, 244 N.W.2d 129, 133 (1976); *Bergstrom*, 515 N.W.2d at 587. The early case law on the stringency of the possession required to fall within the act's exception is somewhat inconsistent. *See Lindberg v. Fasching*, 667 N.W.2d 481, 485-487 (Minn. App. 2003) (discussing various cases that appear to contemplate different standards regarding the extent of the possession that is required to fall within the act's exception), *review denied* (Minn. Nov. 18, 2003). But the more recent case of *Lindberg* clarified that the extent of the possession that the act requires in the context of an

occasional-use easement is a relatively accommodating standard. *Id.* The standard is less stringent than the standard required to demonstrate adverse possession. *Id.*

A two-part inquiry is utilized in evaluating whether an easement has been sufficiently used to fall within the act's possession exception. First, a court must evaluate the scope or nature of the easement. *Id*. at 487; *see also Wichelman v. Messner*, 250 Minn. 88, 103, 83 N.W.2d 800, 814 (1957) (stating that "right-of-way easements which are manifested by actual use or 'occupancy' (*consistent with the nature of the easement created*) are protected even if the requirement of filing notice is not met" (emphasis added)). Second, giving due regard to the nature of the easement, a court must determine whether the use was sufficient to provide an owner of the servient tract with notice of the existence of the easement. *Lindberg*, 667 N.W.2d at 487; *see also Caroga Realty Co. v. Tapper*, 274 Minn. 164, 178, 143 N.W.2d 215, 225 (1966) (stating that, in order for the use of an easement to amount to possession under the act, the use "must be of a character which would put a prudent person on inquiry" (quotation omitted)). When the easement at issue is an occasional-use one, it "would be illogical to insist that possession sufficient to protect such easements be the same intensity of possession as required to establish or maintain fee title or an intensively used easement like a road." *Lindberg*, 667 N.W.2d at 487. Thus, *Lindberg* clarified that in an easement context, a court should consider the entirety of the facts and circumstances to determine whether the use would put a reasonable owner of the servient estate on notice of the easement's existence.

We agree with the district court that the Moreys' use of the easement here was sufficient to fall within the possession exception in Minn. Stat. § 541.023 and to allow the

respondents to enforce the easement. The nature of the easement interest that O'Toole created in 1960, and that respondents currently own, was for occasional use only. In other words, constant or intensive use of the easement is not required for the use to be deemed "possession" under the act. The Moreys used the easement in exactly the manner that it was seemingly intended—fishing and swimming—from the mid-1960s to 1980. Appellants admit that they had actual notice of the easement, due to its notation in their deed. Therefore, the rationale of the possession requirement—to put an owner of the servient land on notice of a property interest not recorded under the act—is satisfied here. Accordingly, we believe the Moreys' consistent intermittent use of the easement for a substantial portion of the 40-year time period meets the flexible possession standard contemplated by Minn. Stat. § 541.023, subd. 6, as that provision is applied to occasional-use easements.

Appellants additionally argue that because there is no evidence of respondents' predecessors-in-interests' use of the easement during the second half of the 40-year period, respondents cannot meet the possession exception contained in the act. They cite language from the *Lindberg* case, stating that the "critical timeframe" in determining whether the possession exception is met is at the end of the 40-year period. *Id.* But we read this language as referring only to the crucial time period within the specific facts of that case for determining whether Lindberg's easement had been sufficiently used for that use to amount to possession under the act. *See id*. (discussing how the most detailed testimony regarding use of the easement by Lindberg and his predecessors-in-interest concerned use at the end of the 40-year period and that some use was actually after this

40-year period expired, so not legally relevant). Furthermore, the plain language of Minn. Stat. § 541.023, subd. 6, in no way suggests that courts should artificially weight the importance of the use of the disputed property based on when it occurred within the 40-year time frame. We believe that the proper inquiry under the flexible *Lindberg* standard is to evaluate use during the 40-year period as a whole and not to divide it into discrete segments of time. We therefore conclude that the district court did not err.

Affirmed.