STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1494
A08-1505

In the Matter of the Application of
Anthony E. Sampair and Laurie K. Sampair
to register the title to the following described real estate
situated in Washington County, Minnesota, namely:
Lots 1 and 2, Block 1, Lakewood Park Third Division, applicants,
Respondents,

vs.

Village of Birchwood, et al.,
Defendants,

Jeffrey Lutz, et al.,
Appellants (A08-1494),

Josephine Berg Simes, et al.,
Appellants (A08-1505).

Filed June 9, 2009
Affirmed
Halbrooks, Judge

Washington County District Court
File No. C7-06-2146

Mark E. Greene, Sarah L. Krans, Bernick & Lifson, P.A., The Colonnade, Suite 1200, 5500 Wayzata Boulevard, Minneapolis, MN 55416 (for respondents)

Wayne B. Holstad, 30 East 7th Street, Suite 1690, St. Paul, MN 55101 (for appellants Jeffrey Lutz, Brian Lind, Karen Hagan-Lind, Karen Deann, James Simning, Jonathan and Susan Fleck, Eugene and Shirley Ruehle, Robert and Barbara Carson).

Frederic W. Knaak, Greg T. Kryzer, Knaak & Kantrud, P.A., 3500 Willow Lake Boulevard, Suite 800, Vadnais Heights, MN 55110 (for appellants Josephine Berg Simes, James Berg, Frima Bender, Douglas Krinke and Ursula Beate Krinke)

Cameron R. Kelly, Kevin S. Sandstrom, Eckberg, Lammers, Briggs, Wolff & Vierling, P.L.L.P., 1809 Northwestern Avenue, Stillwater, MN 55082 (for amicus curiae The City of Birchwood Village)

Considered and decided by Johnson, Presiding Judge; Halbrooks, Judge; and Ross, Judge.

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

HALBROOKS, Judge

In these consolidated appeals, appellants challenge the district court's grant of summary judgment to respondents based on the district court's determination that the Marketable Title Act (MTA), Minn. Stat. § 541.023 (2008), applies to appellants' claimed easement interests. Appellants contend that of-record easements cannot be extinguished by the MTA. In the alternative, appellants argue that they have preserved their claimed easement interests pursuant to the MTA's possession exception. Because there are no genuine issues of material fact and the district court applied the law correctly, we affirm.

FACTS

Approximately 100 years ago, numerous easements were created for purposes of boating and bathing access to White Bear Lake. The easements were granted across property now owned by respondents Anthony E. Sampair and Laurie K. Sampair.

In April 2006, James T. Krizak and Christina R. Palme-Krizak applied to register title to their lakefront property in Washington County (the property). The property

includes Lots 1 and 2 of Block 1, Lakewood Park Third Division. In July 2007, the Krizaks conveyed the property to respondents. As part of the registration process, respondents sought to terminate numerous easements over Lot 1 of the property. The examiner of titles identified approximately 60 parcels that were owned by at least 37 different individuals or families. Respondents served each property owner and subsequently obtained default judgments against the majority of them.

Appellants, who own nearby, non-lakeshore lots, answered respondents' complaint, asserting their claims for easements creating lakeshore access.[1] Appellants' easement interests can be traced to deeds that were created and recorded in the first decade of the 20th century. Each deed granted a "right of way" over Lot 1 for access to the shore of White Bear Lake for the purposes of boating and bathing. Appellants Eugene Ruehle and Shirley Ruehle claim an easement created by a January 5, 1907 deed. Appellants Karen Hagan-Lind and Brian Lind claim an easement created by a July 6, 1908 deed. Appellants Jonathan Fleck and Susan Fleck and Douglas Krinke and Ursula Beate Krinke claim easements created by an April 12, 1909 deed. Appellant Karen Deann and appellant James Simning claim easements created by a June 19, 1909 deed.[2]

[1] We conclude there are ten claimed easements at issue—one for each parcel of property owned by the 16 appellants.

[2] Simning states by affidavit that he owns three properties. It is not clear from the record how many easements he claims or when any of his easements were created. The record indicates that Simning and his wife received part of Lot 2, Block 6, Lakewood Park Third Division. Deann owns another part of that lot, and she traces her easement to a deed conveying Lot 2 in its entirety.

Appellants Jeffrey Lutz, Robert Carson and Barbara Carson, Josephine Berg Simes, Frima Bender,[3] and James Berg claim easements created by an August 30, 1909 deed.[4]

Three motions for summary judgment were filed: one by respondents, one by a group of five appellants, and one by a group of 15 appellants. The latter group also moved the court for a permanent injunction against respondents. Respondents also moved to compel discovery.

The district court held that the MTA applies and found that none of the appellants had filed a notice of easement as required by the MTA. The district court also held that appellants had "not provided sufficient evidence to create a material issue of fact regarding their alleged possession of the easement that could rebut the presumption of abandonment under [the MTA]." The district court granted respondents' motion for summary judgment and extinguished appellants' claimed easements over Lot 1 of the property. Appellants' motions for summary judgment and a permanent injunction were denied, as was respondents' motion to compel discovery.

The subsequent appeals of Lutz, Deann, the Flecks, the Linds, the Carsons, the Ruehles, and Simning (the Lutz appellants), and the appeals of Simes, Bender, Berg, and

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[3] Appellant Frima Bender died during the pendency of this appeal.

[4] Simes and Bender were sisters; Berg is Simes's son. According to Simes, her parents purchased the family property in 1943. In 1989, Bender received the northeast portion of this property; Simes received the southwest portion. In 2002, Simes and her husband conveyed their interest to Simes and Berg. It is not clear from the record when the easements claimed by Bender, Berg, and Simes were created. But it appears that these three appellants own part of Lot 3, Block 6, Lakewood Park Third Division. The August 30, 1909 deed, cited by Lutz and the Carsons, conveyed Lot 3 in its entirety and established an easement over Lot 1.

the Krinkes (the Simes appellants) were consolidated. The City of Birchwood Village filed an amicus brief in support of respondents.

D E C I S I O N

I.

As a preliminary issue, we consider whether Simning is a party to this appeal. Simning is listed in the caption of the Lutz appellants' notice of appeal and statement of the case. His name does not appear on the brief's cover, but he is mentioned as an appellant in the brief itself. Minn. R. Civ. App. 103.01, subd. 2, provides: "When a party in good faith files and serves a notice of appeal from a judgment or an order, and omits, through inadvertence or mistake, to proceed further with the appeal, or to stay proceedings, the appellate court may grant relief on such terms as may be just." We conclude that the omission of Simning's name from the cover of the Lutz appellants' brief was a clerical error. Respondents make no argument that they will suffer prejudice if Simning is considered a party to this appeal. We therefore conclude that Simning is an appellant.

II.

On appeal from summary judgment, we review de novo whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *STAR Ctrs., Inc. v. Faegre & Benson, LLP*, 644 N.W.2d 72, 76–77 (Minn. 2002).

> A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law. On

> appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted.

Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993) (citation omitted). "[W]hen the nonmoving party bears the burden of proof on an element essential to the nonmoving party's case, the nonmoving party must make a showing sufficient to establish that essential element." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

The MTA applies "to every right, claim, interest, incumbrance, or lien founded by any instrument, event, or transaction that is at least 40 years old," Minn. Stat. § 541.023, subd. 2(a), including easements. *See Lindberg v. Fasching*, 667 N.W.2d 481, 485–87 (Minn. App. 2003), *review denied* (Minn. Nov. 18, 2003); *see also Hersh Props., LLC v. McDonald's Corp.*, 588 N.W.2d 728, 735 (Minn. 1999). Appellants state that they all possess abstracts of title that identify two transactions that occurred early in the 20th century—the platting of the subdivision and the subsequent initial conveyance of lots within the subdivision. All of the initial conveyances included a right of access to White Bear Lake over Lot 1. When an easement is created by a deed more than 40 years old, the claimant of the easement must file notice as described in the MTA within 40 years of the easement's creation or the easement is conclusively presumed to have been abandoned. *See Hersh Props.*, 588 N.W.2d at 734; *United Parking Stations, Inc. v. Calvary Temple*, 257 Minn. 273, 275, 101 N.W.2d 208, 210 (1960); *B.W. & Leo Harris Co. v. City of Hastings*, 240 Minn. 44, 48-49, 59 N.W.2d 813, 816 (1953). Here, no appellant claims to have satisfied the MTA's notice requirement. And it is clear from caselaw that merely recording the deed by which an easement was created does not

satisfy the statutory-notice requirement. *See Caroga Realty Co. v. Tapper*, 274 Minn. 164, 166, 179–80, 143 N.W.2d 215, 218, 226 (1966) (extinguishing an easement created by a recorded deed).

Appellants argue that they are exempt from the MTA under the possession exception, which states that the MTA "shall not . . . bar the rights of any person, partnership, or corporation in possession of real estate." Minn. Stat. § 541.023, subd. 6. An easement may be possessed under subdivision 6 of the MTA, excusing the claimant from the filing requirement. *See Lindberg*, 667 N.W.2d at 485. The claimant bears the burden of establishing possession. *See Twp. of Sterling v. Griffin*, 309 Minn. 230, 235, 244 N.W.2d 129, 133 (1976) (stating that a party seeking to escape application of the MTA must establish possession to bring it within the exception of subdivision 6). To demonstrate possession, appellants must show (1) use of their respective easements no later than the expiration of the 40-year periods following the creation[5] of their easements and (2) use from the end of the 40-year period until the commencement of the action. *See Sterling*, 309 Minn. at 237, 244 N.W.2d at 133; *B.W. & Leo Harris*, 240 Minn. at 49, 59 N.W.2d at 816; *Lindberg*, 667 N.W.2d at 487.[6]

[5] Here, the dates of creation are the dates of execution for the deeds establishing the easements—not the dates when the deeds were recorded. *See* Minn. Stat. § 541.023, subd. 1 (extinguishing claims "founded upon any instrument, event or transaction which was executed or occurred more than 40 years prior to the commencement of such action"); *see also Caroga*, 274 Minn. at 166, 143 N.W.2d at 218 (stating that a right-of-way was created "through the execution of a written instrument" that was later recorded).

[6] At the time *Sterling* and *B.W. & Leo Harris* were decided, the MTA distinguished between claims that would have been 40 years old on January 1, 1948, and claims that would have been 40 years old after that date. *See B.W. & Leo Harris*, 240 Minn. at 49, 59 N.W.2d at 816. A series of amendments in 2001 eliminated this distinction, applying

To survive dismissal of their claims on a motion for summary judgment, appellants must show that use of their respective easements commenced by the end of the respective 40-year periods—dates which range from January 5, 1947 to August 30, 1949. The only evidence in the record relating to use within the relevant 40-year period involves the easements claimed by Simes, Berg, and Bender. Berg stated by affidavit that his family has used "the Easement" every year since their purchase of the property. But the record indicates that Berg was born after the expiration of the relevant 40-year period. His statements regarding his family's use of any easement in the 1940s are therefore inadmissible. *See* Minn. R. Civ. P. 56.05 (requiring affidavits to be made "on personal knowledge").

Simes has presented the only evidence that she, Bender, and their predecessors-in-interest used their claimed easements across Lot 1 before their 40-year period expired on August 30, 1949. Simes submitted two affidavits. In these documents, Simes stated that, since the summer of 1943, she has been at her family's property during the summer months and "does not remember a year in which the Easement was not used by a member of the Berg family or their guests for purposes of accessing White Bear Lake." Simes also stated that she had seen Bender "use the lakeshore easement continually over the past sixty years."

As the district court acknowledged, at first blush, this evidence seems to be sufficient for Simes, Bender, and Berg to defeat the summary-judgment motion. But the

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the MTA to all claims at least 40 years old unless an exception applies. 2001 Minn. Laws ch. 50, §§ 31–32, 35.

content of Simes's affidavits is contradicted by the content of the correspondence that she attached to one of the affidavits. One of these letters, dated January 6, 2005, was sent from Simes's attorney to the Krizaks. The relevant part of the letter states:

> We are the attorneys for Josephine Simes and her family.
>
> The purpose of this letter is only to put you on actual notice of the existence of an easement over your property for lake access purposes for the benefit of the Simes property near yours. . . . The easement has existed for many decades.
>
> As a practical matter, Ms. Simes and her family have been members of the dock association next to your property since before the Second World War *and have had no reason to exercise their right of entry*. Nor is there any reason for you to expect that they would want to do so in the foreseeable future, given their ease of access over the Dock Association's dock and access point.

(Emphasis added.)

"A self-serving affidavit that contradicts other testimony is not sufficient to create a genuine issue of material fact." *Risdall v. Brown-Wilbert, Inc.*, 759 N.W.2d 67, 72 (Minn. App. 2009), *review denied* (Minn. Mar. 17, 2009); *see also Griese v. Kamp*, 666 N.W.2d 404, 408 (Minn. App. 2003) (stating that "a party cannot eliminate the damage done in prior evidence by providing later, contradictory evidence"), *review denied* (Minn. Sept. 24, 2003). Simes's statements in her affidavits that she and her family have used their easements every year since 1943 cannot be reconciled with the statements made by her attorney on her behalf that she and her family have used the dock-association

property and lake-access point instead of Lot 1.[7] Simes's affidavits do not clarify or explain the prior statements—they are an attempt to negate them. We therefore conclude that Simes has not presented evidence that creates a genuine issue of material fact regarding possession.

Due to appellants' failure to show use before the expiration of their respective 40-year periods, we do not reach the issue of whether appellants have shown possession from the end of their 40-year periods to the commencement of the registration action. But we note that the proper standard for showing possession of an easement is set forth in *Lindberg*. 667 N.W.2d at 486–88. *Lindberg* makes it clear that the MTA possession standard is "flexible" and "more relaxed" than the standard for showing an easement by prescription. *Id.* at 485–86.

III.

Appellants assert that the burden of proving possession properly belongs with respondents. As discussed above, Minnesota caselaw clearly demonstrates that the burden of showing possession falls to the party who failed to comply with the MTA's filing requirement and seeks to prevent extinguishment of his or her interest. It is not our role to change or extend the law. *Lake George Park, L.L.C. v. IBM Mid-Am. Employees Fed. Credit Union*, 576 N.W.2d 463, 466 (Minn. App. 1998), *review denied* (Minn. June 17, 1998); *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987), *review denied*

[7] Amicus curiae City of Birchwood Village has provided material indicating that the public has access to White Bear Lake via a vacated roadway easement adjacent to Lot 1 that has been dedicated as a boat launch. The launch area includes a village dock-association boat dock and boat lifts.

(Minn. Dec. 18, 1987). Because the district court properly placed the burden of proving possession with appellants, we decline to address appellants' argument that respondents have not met their burden with regard to possession.

IV.

Appellants appear to challenge the constitutionality of the MTA as applied to them. Appellants raise this issue for the first time on appeal.[8] Constitutional issues generally will not be addressed for the first time on appeal. *See In re Welfare of C.L.L.*, 310 N.W.2d 555, 557 (Minn. 1981). Furthermore, appellants did not notify the attorney general of their challenge to the constitutionality of the MTA. *See* Minn. R. Civ. App. P. 144. We therefore decline to consider appellants' constitutional arguments.

Affirmed.

[8] There is no record of oral argument before the district court, and appellants' summary-judgment memorandum does not raise the issue.