

NO. A06-0252

State of Minnesota
In Court of Appeals

Mary E. Rixmann,

Appellant,

v.

City of Prior Lake, a Minnesota municipal corporation,

Respondent.

APPELLANT'S REPLY BRIEF

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ARGUMENT

This action involves the question of whether the cul-de-sac, or Turnaround, at the end of Breezy Point Road has been deemed dedicated to the public by operation of Minn. Stat. § 160.05. The respondent City of Prior Lake (the “City”) raises several arguments in support of its claims that the Turnaround has not been so dedicated, and that the district court properly ordered summary judgment in favor of the City. For the reasons that follow, the City’s arguments are without merit and unpersuasive.

I. THE EVIDENCE BELOW INDICATED THAT BREEZY POINT ROAD IS A PUBLIC STREET.

Appellant Rixmann pointed out in her initial brief that Breezy Point Road has been used and maintained in precisely the same manner as the Turnaround at the end of Breezy Point Road. It is undisputed that Breezy Point Road was originally platted as a private driveway. Yet the City takes the position that Breezy Point Road is now a public street while the Turnaround is private property. This inconsistency cannot be reconciled. If Breezy Point Road became a public street by virtue of Minn. Stat. § 160.05, then the Turnaround must also be part of the public street under that same statute.

The City’s brief, apparently recognizing the flaw in its position, attempts to ignore the issue altogether by arguing that “[t]here is, of course, no evidence whatsoever in the record to support this suggestion [that Breezy Point Road is a public road].” *Brief of Respondent* at 15. This is patently untrue.

The City’s Public Works Director admitted at his deposition that Breezy Point Road has been a public street for years. Fourth Gunn Aff. Ex. D at 7-8. The City

Manager admitted at his deposition that he had “no reason to believe” that Breezy Point Road was not a public street. *Id.*, Ex. C at 9. The assistant City Engineer stated at his deposition that he understood that Breezy Point Road has been a city street for over 10 years. *Id.*, Ex. A at 7. Finally, at the hearing on the City’s motion for summary judgment, the judge asked the City’s attorney “is it correct that the road leading up to the cul-de-sac is a public road?” T. 11. The City’s attorney responded, “[t]hat’s correct, your honor.” *Id.*

In short, the unrefuted evidence and admissions below show that Breezy Point Road *is* a public street. Significantly, the City does not even attempt to dispute the facts set forth in Rixmann’s initial brief demonstrating that Breezy Point Road and the Turnaround have been used and maintained in the same manner. *Appellant's Brief and Appendix* at 16. Therefore, if Breezy Point Road is a public street, which all parties admit, then by implication the Turnaround must also be public. At the very least, it was erroneous for the district court to grant the City summary judgment on this issue as a matter of law.

II. THE ISSUES OF PUBLIC USE AND MAINTENANCE ARE QUESTIONS OF FACT.

As set forth in Rixmann’s initial brief, the Minnesota appellate courts have repeatedly and consistently held that the sufficiency of public use and maintenance under Minn. Stat. § 160.05 is a question of fact, and it should be determined by the appropriate finder of fact. *Appellant's Brief and Appendix* at 8. The City does not directly address

the authorities and principles cited therein, but rather it argues that summary judgment was appropriate in this case for three reasons:

- A. First, the City argues that summary judgment is appropriate if the nonmoving party fails to introduce evidence sufficient to raise a factual dispute. *Brief of Respondent* at 10. We have no quarrel with this legal principle in the abstract, but it does not apply in the present case. Rixmann provided the district court with 21 affidavits and four deposition transcripts that detailed the extensive public use and maintenance of both Breezy Point Road and the Turnaround. The content of those affidavits and deposition transcripts is summarized in *Appellant's Brief and Appendix* at pages 11-15, and we respectfully direct the Court's attention to those sections. The point is that this was *not* a case where a party failed to submit sufficient evidence to create a factual dispute. On the contrary, Rixmann submitted a great deal of evidence in support of her position, and the district court erred in granting the City summary judgment as a matter of law.
- B. Second, the City argues that Rixmann cited no authority for the proposition that these issues would have been tried to a jury, as opposed to a district court judge. *Id.* This argument misses the point entirely. The Minnesota Supreme Court has stated only that "[t]he boundary of a public highway acquired by public use is a question of fact to be determined by *the appropriate finder of fact...*" *Barfnecht v. Town Bd. Of Hollywood Twp.*, 304 Minn. 505, 509, 232 N.W.2d 420 (1975) (emphasis added). In the

present case, Rixmann was denied a trial before *any* finder of fact, because judgment was entered against her as a matter of law. The issue is not whether a judge or a jury should have been the finder of fact (though Rixmann did request a jury and pay the jury fee), but whether the district court erred in deciding the issue as a matter of law and depriving Rixmann of a trial on the merits.

- C. Third, the City argues that Rixmann cannot identify any evidence that the district court improperly “weighed” in connection with its grant of summary judgment. *Id.* at 11-12. In one sense this is true, because the district court did not itself specify the evidence to which it referred. Nonetheless, the district court did write in its Order and Memorandum that “evidence presented by Plaintiff of maintenance of the turnaround by the City is weak...” *Appellant’s Brief and Appendix* at A-5 (emphasis added). The point is that the court below found Rixmann’s evidence to be “weak,” which is an implicit acknowledgment that there *was some evidence* in support of Rixmann’s position. We respectfully disagree with the district court’s finding that the evidence was weak, because we believe there was considerable evidence of public maintenance of the Turnaround (including paving, blacktop repairs, extensive snowplowing, etc., *see Id.* at 13-15). On a motion for summary judgment, it is not the function of the trial court to resolve such factual disputes, but only to determine whether or not such factual disputes exist. DLH, Inc. v. Russ, 566 N.W.2d 60, 70 (Minn. 1997).

If it was reversible error for the district court to find that evidence was “speculative” on a summary judgment motion in Fairview Hospital & Health care Services v. St. Paul Fire and Marine Ins. Co., 307 Minn. 344, 240 N.W.2d 507 (1976), then it is at least equally erroneous for the judge in this case to have granted summary judgment on the grounds that one of the parties’ evidence was “weak.”

For these reasons, Rixmann respectfully submits that it was erroneous for the district court to grant the City summary judgment on a question of fact, particularly when there was some evidence (and we believe there was a great deal of evidence) in support of her position.

III. THE ISSUE OF PUBLIC USE OF THE TURNAROUND IS NOT A “RED HERRING.”

The City argues that Rixmann’s discussion of the extensive public use of the turnaround is “a red herring.” *Brief of Respondent* at 10 n.1. It appears that the City may be conceding that there was sufficient “public use” of the Turnaround to meet the public use requirement of Minn. Stat. § 160.05, and that the City is now arguing only that there was not sufficient “public maintenance” under that statute. Whatever the City’s exact position may be, Rixmann respectfully submits that the issue of public use is extremely important, and not a red herring, because: (a) the Minnesota decisions applying Minn. Stat. § 160.05 inquire into the extent of the public use, (b) the historical and ongoing public use of the Turnaround does, contrary to the City’s suggestion, indicate that the Turnaround was “kept in repair” as a roadway, as required by Minn. Stat. § 160.05, and

(c) we are not aware of any authority directly on point, but it seems reasonable to believe that the courts would consider the issues of public use and public maintenance somewhat together, and not as two unrelated variables, and that in determining whether a statutory dedication has occurred under Minn. Stat. § 160.05 a very strong showing on one of the issues may, in some cases, help to offset a weaker showing on the other issue.

For all of these reasons, Rixmann respectfully submits that the extensive public use of the Turnaround is relevant.

IV. THE CITY HAS MAINTAINED THE TURNAROUND FOR AT LEAST SIX YEARS.

Rixmann's initial brief to this Court described the evidence which demonstrated that the City had maintained the Turnaround for six years. *Appellant's Brief and Appendix* at 13-16. The City argues, however, that it did not so maintain the Turnaround. *Brief of Respondent* at 11-15. For the reasons that follow, Rixmann respectfully submits that the City's analysis is incomplete and misleading:

- A. The City repeatedly cites to the deposition of Rixmann, and to a lesser extent to the deposition of her husband, and then declares that Plaintiff-Appellant "acknowledges," "essentially conceded" and "could not satisfy the requirements of Minn. Stat. § 160.05" based on her deposition testimony. *Id.* at 11-12. The fatal flaw in this approach, however, is that it ignores all of the *other* evidence submitted to the district court. Indeed, earlier in this brief when we referred to the 21 affidavits and four deposition transcripts submitted by Rixmann, those figures did not even include the

deposition transcripts of Rixmann and her husband which were submitted by the City. The Rixmann deposition transcripts cannot be viewed in isolation, as the City is indirectly asking the Court to do. Rather, the Court must consider *all of* the evidence that was submitted on the various issues, and not just the personal knowledge of one witness. Complete summaries of the evidence that was submitted were included in Rixmann's initial brief, and they will not be repeated here.

- B. The City argues that Rixmann must prove the public maintenance of the turnaround was of a "quality and character appropriate to an already existing public road," citing Shinneman v. Arago Township, 288 N.W.2d 239 (Minn. 1980). *Brief of Respondent* at 11. Rixmann agrees. As discussed *supra*, Breezy Point Road is a public street, and the evidence presented in this case demonstrated that it has been maintained in the same manner and to the same extent as the Turnaround. *See Appellant's Brief* at 16. Accordingly, under the City's own argument the Turnaround must be regarded as part of the public street.
- C. The City argues that there was no evidence of public maintenance, other than snow plowing, going back more than six years. *Brief of Respondent* at 14. In fact, the City did regularly plow the snow from the Turnaround for over six years; it made repairs to the blacktop in the Turnaround; it performed a major re-paving of the Turnaround, along with a concrete spillway, in 2004; and it maintained a fire hydrant and a manhole in the

middle of the Turnaround for over 10 years. *See Appellant's Brief and Appendix* at 13-15. The appellate decisions applying Minn. Stat. § 160.05 have consistently stated that it is “not necessary that every part of a road be worked at government expense or that any particular part receive attention every year of the six year period.” Town of Belle Prairie v. Kliber, 448 N.W.2d 375, 379 (Minn. Ct. App. 1989). Indeed, in Northfork v. Joffer, 353 N.W.2d 216, 218 (Minn. Ct. App. 1984) the Court held that the public maintenance requirement under Minn. Stat. § 160.05 was met where the evidence showed that “[m]aintenance was performed when necessary.” That is precisely what the evidence revealed in this case: that maintenance was performed when necessary, which is all that is required under Minn. Stat. § 160.05.

- D. Finally, the City suggests that the presence of public utilities in the middle of the Turnaround is not evidence of public maintenance or otherwise relevant. *Brief of Respondent* at 14-15. Rixmann respectfully disagrees. First, the City had no lawful right to locate the utilities in the Turnaround unless it were part of the public street. This is a very significant point, and it is powerful evidence that the Turnaround was every bit as public as was the rest of Breezy Point Road (which also had public utilities running under it). Second, the Court in Leeper v. Hampton Hills, Inc., 290 Minn. 143, 187 N.W.2d 765 (1971) (as quoted in Belle Prairie, supra) stated that the placement of culverts under a road constituted evidence of public

maintenance. Arguably, maintaining sewer and water utilities in the Turnaround is also evidence of similar public maintenance.

In summary, there is more than sufficient evidence of public maintenance of the Turnaround to require the reversal of the decision below granting summary judgment to the City.

V. THE DISTRICT COURT DID NOT MAKE ANY FINDINGS REGARDING THE CITY'S "INTENT," AND IF IT DID MAKE SUCH A FINDING THEN SUMMARY JUDGMENT WAS EVEN MORE INAPPROPRIATE.

The City finally argues that “[t]he District Court also correctly found that summary judgment was appropriate because the City did not intend to create a public road in the driveway.” *Brief of Respondent* at 16. This statement is problematic in two respects. First, in reviewing the order below, it does not appear that the district court made any such finding regarding the “intent” of the City. Second, as this Court is well aware, the issue of intent is regarded as a question of fact, and it is only in very rare circumstances that issues of intent should be decided on a motion for summary judgment. Thus, to the extent there is any accuracy in the City’s claim, it weighs in favor of reversing the decision below because it improperly decided issues of intent on a motion for summary judgment.

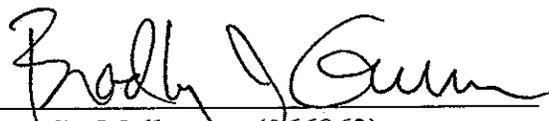
CONCLUSION

For all of the reasons set forth herein, and in her previous brief, Mary Rixmann respectfully requests this Court to reverse the summary judgment below and to remand this matter for a trial on the question of whether the Turnaround has been sufficiently

used and maintained by the public to be deemed dedicated to the public pursuant to Minn. Stat. § 160.05.

Dated: May 4, 2006.

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**STATE OF MINNESOTA
IN COURT OF APPEALS**

Mary Rixmann,

Appellate Court Case No.: A06-0252

Appellant,

vs.

**CERTIFICATION OF BRIEF LENGTH:
APPELLANT'S BRIEF**

City of Prior Lake, a Minnesota municipal corporation,

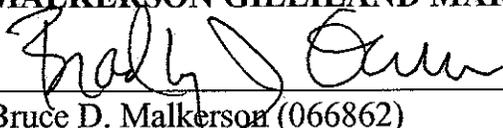
Respondent.

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 2,950 words. This brief was prepared using Microsoft® Word 2000.

Respectfully submitted,

Dated: May 4, 2006.

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