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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1895**

RSI Recycling, Inc.,
Appellant,

vs.

City of Bloomington,
Respondent.

**Filed July 23, 2012
Affirmed
Bjorkman, Judge**

Hennepin County District Court
File No. 27-CV-10-24440

Gerald S. Duffy, Leslie M. Witterschein, Matthew S. Duffy, Monroe Moxness Berg PA,
Bloomington, Minnesota; and

Jenneane Louise Jansen, Jansen & Palmer, Minneapolis, Minnesota (for appellant)

Paul D. Reuvers, Susan M. Tindal, Iverson Reuvers, Bloomington, Minnesota (for
respondent)

Considered and decided by Worke, Presiding Judge; Halbrooks, Judge; and
Bjorkman, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant challenges the summary judgment dismissing its claims and granting
respondent's counterclaim in this zoning dispute. Appellant argues that the district

court's interpretation of applicable ordinances is flawed, that genuine fact issues preclude summary judgment, and that respondent is not protected by official immunity. We affirm.

FACTS

Appellant RSI Recycling, Inc. is a metal-recycling business that collects and processes ferrous and non-ferrous metals and ships them around the country for recycling. RSI is owned by Tim Rosengren and Troy Halverson. In mid-2010, RSI began looking for a site to expand its business and quickly focused its search on a two-acre lot at 8860 and 8870 Wentworth Avenue in Bloomington (the property). The property is located in an I-3 industrial zoning district and has rail access, outdoor storage space, and an 11,200 square-foot building.

In July 2010, Rosengren met with Bloomington City Planner Londell Pease to discuss zoning and potential licensing and permitting requirements. Rosengren indicated that RSI would use the property for warehousing, which is a permitted primary use in an I-3 district, and neither Pease nor any other city employee said that RSI would need a conditional-use permit (CUP). Halverson subsequently sought to obtain a permit for a truck scale and asked whether any other permits or licenses were necessary for RSI's "recycling center/scrap yard" business. City staff told Halverson that no licenses or permits were necessary, aside from an electrical permit for the scale.

RSI purchased the property in late August. RSI obtained the electrical permit and installed the truck scale but did not obtain any other licenses, permits, or approvals before beginning operations on September 7. Shortly thereafter, the city received citizen

complaints about RSI. City employees visited the property multiple times in September and October, observing and photographing RSI's operations.

The city advised RSI in late September that it believed RSI's operations were outside the scope of activities previously described to the city and included "junk car storage/disposal and operating a hazardous waste and recycling collection facility, which are not approved uses in the I-3 zoning district." RSI continued its operations. The city sent RSI a "final notice" on October 19, again advising that RSI's business activities were not permitted uses of the property and ordering RSI to cease operations until it obtained a CUP. The city gave RSI a deadline of November 1, warning that noncompliance could result in fines of up to \$2,000 per day, plus other penalties.

RSI commenced this action on October 25, seeking a declaration that its "purchase, processing, and shipping of recyclable ferrous and non-ferrous metal materials on and from the Property is a permissible use of the Property," and alleging that the city negligently misrepresented that RSI would be permitted to conduct these operations on the property. The city denied the allegations and asserted a counterclaim alleging that RSI is violating multiple zoning ordinances. The city sought an injunction prohibiting RSI from operating in violation of the ordinances.

The city moved for summary judgment, and RSI moved for partial summary judgment as to several of the alleged ordinance violations. The district court denied RSI's motion and granted the city's motion for summary judgment, concluding that the undisputed material facts regarding RSI's operations indicate multiple ordinance violations, that RSI's negligent-misrepresentation and equitable-estoppel claims fail as a

matter of law, and that the claims against the city are barred by official immunity. This appeal follows.

D E C I S I O N

On appeal from summary judgment, we ask 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 de novo whether the district court erred in its application of the law and whether there are any genuine issues of material fact when the evidence is viewed in the light most favorable to the nonmoving party. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002).

I. RSI is operating in violation of city zoning ordinances.

We review the interpretation of a zoning ordinance de novo. *Clear Channel Outdoor Adver., Inc. v. City of St. Paul*, 675 N.W.2d 343, 346 (Minn. App. 2004), *review denied* (Minn. May 18, 2004). “A zoning ordinance should be construed (1) according to the plain and ordinary meaning of its terms, (2) in favor of the property owner, and (3) in light of the ordinance’s underlying policy goals.” *Id.* (quotation omitted). We give “weight to the interpretation that, while still within the confines of the term, is least restrictive upon the rights of the property owner to use his land as he wishes.” *Frank’s Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608-09 (Minn. 1980).

The district court concluded as a matter of law that RSI is operating a junk yard, a junk car disposal business, and a household hazardous waste and/or recycling collection facility in violation of city ordinances. RSI argues that the district court’s legal conclusions are flawed because (1) the district court erred in interpreting the subject

ordinances and (2) there are factual disputes as to whether RSI is using the property in the manner the ordinances prohibit. We address each of the ordinances in turn.

Junk yard

The city code defines the term “junk yard” as “[a]n open area where waste, used or second-hand materials are bought, sold, exchanged, stored, baled, parked, disassembled, or handled including but not limited to scrap iron and other metals, paper, rags, rubber tires, and bottles.” Bloomington, Minn., City Code (City Code) § 19.03 (1958). A “junk yard” is not a permitted, accessory, interim or conditional use in I-3 industrial districts. City Code § 19.33 (2002). Accordingly, the property may not be used as a junk yard. City Code § 19.26(b) (2002) (providing that a use “not specifically listed in this Chapter as a permitted, accessory, provisional, interim, or conditional use” is prohibited).

RSI challenges the district court’s conclusion that RSI operates a junk yard, arguing that the definition of junk yard is unconstitutionally vague and subject to arbitrary enforcement and that the district court erred by failing to resolve ambiguity in the definition of junk yard in favor of RSI. We are not persuaded.

First, RSI’s constitutional argument is not properly before us. Our review is limited to issues presented to and decided by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). RSI did not allege a constitutional infirmity in its complaint; RSI asserted the constitutional issue for the first time in its reply memorandum in support of summary judgment. Because the city never raised a constitutional issue, RSI’s constitutional arguments were not proper and the district court did not consider them. *See* Minn. R. Gen. Pract. 115.03(c) (limiting reply memorandum

to “new legal or factual matters raised by an opposing party’s response to a motion”); *Fontaine v. Steen*, 759 N.W.2d 672, 676 (Minn. App. 2009) (stating that issues not raised in a principal appellate brief cannot be raised in a reply brief). On this record, we conclude that RSI waived its constitutional challenge to the ordinance.

Second, the undisputed evidence places RSI’s operations squarely within the definition of a junk yard.¹ RSI processes 2,000 tons of scrap iron and other ferrous metals per month in an open area of its property. According to Rosengren and Halverson, this processing involves “dismantling,” “shearing,” “cutting,” “crunch[ing],” “rip[ping],” and “crushing” used vehicles, household appliances, and scrap ferrous metals. These actions constitute disassembling and handling of metal as set out in the ordinance’s definition of a junk yard.

RSI’s storage of various other ferrous metals also falls within the junk yard definition. It is undisputed that RSI stores as many as 40 vehicles at a time, in 12- to 15-foot piles in an open area while they await processing, sale, and shipment. Nonetheless, RSI argues that there is a genuine issue of material fact as to whether this conduct constitutes storage because there is no definitive evidence as to how long the vehicles remain on site. RSI points to a different part of the city code that prohibits “the storing or leaving of any abandoned vehicle upon any real property . . . within the City for a period of seven (7) successive days,” City Code § 8.37 (2009), urging this court to

¹ RSI argues that, to the extent that it does operate a junk yard, such use is “ancillary” rather than “primary,” and therefore does not constitute a violation of the city code. But a junk yard is neither a permitted nor an ancillary use in an industrial district, City Code § 19.33, so the characterization of RSI’s junk-yard operation as “ancillary” or “primary” is immaterial.

import this temporal requirement to the junk-yard ordinance. We decline to do so. Nothing in the ordinance's definition of a junk yard or the common meaning of the word "store" requires that storage be for any particular length of time, let alone seven days. *See American Heritage Dictionary* 1708 (4th ed. 2006) (defining "store" as "[to] reserve or put away for future use"). In fact, the use of the time reference in City Code § 8.37 and omission of a time reference from the definition of junk yard implicitly recognizes that materials can be stored for periods shorter than seven days.

Finally, RSI contends that it does not put the metals "away for future use" because it does not resell the vehicles or other items "as is." But RSI undisputedly puts the metals away for future processing, sale, and shipment, which are uses well within the definition of junk yard.

Junk-car disposal business

"Junk car disposal businesses" may operate in I-3 industrial districts only if the owner obtains a CUP. City Code § 19.33(d)(12). The city code does not define "junk car disposal businesses" but requires that "the business including all storage and dismantling or wrecking and display of parts for sale is conducted within a fire resistant building, provided that the entire premises is enclosed by screen fencing and provided the premises abut railroad trackage." City Code § 19.33(d)(12).

RSI argues that the district court erred by concluding that RSI operates a junk-car disposal business. We disagree. On any given day, there are up to 40 inoperable vehicles stacked in 12- to 15-foot piles on the property. And it is undisputed that RSI systematically drains fluids and removes hazardous materials from the vehicles, then

removes the tops or compresses the vehicles. RSI contends that these actions do not constitute dismantling because the vehicle parts are not removed for reuse. Nothing in the ordinance or the common usage of the term “dismantle” requires reuse of the vehicle parts. *See American Heritage Dictionary* 520 (4th ed. 2006) (defining “dismantle” as “[to] take apart; disassemble; tear down” or “put an end to in a gradual systematic way”). RSI urges this court to read this requirement into the ordinance because the automobile-*reclamation* industry defines the term dismantle as “systematic removal of automobile components for the purpose of reuse.” We decline to do so.

Household hazardous waste and recycling collection facilities

“Household hazardous waste and recycling collection facilities” are also conditional uses in I-3 industrial districts. City Code § 19.33(d)(26). The city code provides standards for the design and operation of such facilities, City Code § 19.63.04 (2009), and defines some of the constituent terms. Household hazardous waste means

waste generated from household activity that exhibits the characteristics of or that is listed as hazardous waste under Minnesota Rules, Chapter 7045, but does not include waste from commercial activities that is generated, stored, or present in a household. Household hazardous waste materials include, but are not limited to caustics, flammables, oxidizers, poisons, irritants, and corrosives.

City Code § 19.03. Recyclable materials are “materials that are separated from refuse for the purpose of recycling and include[] aluminum recyclables, can recyclables, corrugated cardboard, glass recyclables, paper recyclables and plastic recyclables.” *Id.*

RSI argues that the district court erred by concluding as a matter of law that it operates a facility that requires a CUP under City Code § 19.33(d)(26). We disagree.

There may be a fact question as to whether RSI collects household hazardous waste, since it processes only hazardous materials (such as mercury, motor oil, and car batteries) that it extracts from other items. *See* City Code § 19.33(d)(26) (excluding from “household hazardous waste,” waste “from commercial activities that is generated, stored, or present in a household”). But RSI’s undisputed acceptance of recyclable materials—aluminum cans and other aluminum recyclables—makes it a recycling collection facility under the plain language of City Code §§ 19.03, .33(d)(26). Because the plain language of the city code requires a CUP for household hazardous waste collection facilities *and* recycling collection facilities, RSI’s operation of a recycling collection facility without a CUP constitutes a violation of the city code.

In sum, the undisputed evidence establishes that RSI is operating a junk yard, which is clearly prohibited under the city code, and both a junk-car disposal business and a recycling-collection facility without a CUP for either. Accordingly, we conclude that the district court did not err by ordering RSI to cease these operations and denying RSI’s request for a declaration that it is engaged in permissible uses of the property.

II. RSI’s negligent-misrepresentation and equitable-estoppel claims fail as a matter of law.

RSI also argues that there are factual disputes material to its negligent-misrepresentation and equitable-estoppel claims that preclude summary judgment. We address each claim in turn.

Negligent misrepresentation

Negligent misrepresentations of fact may be actionable against government officers and employees to the extent that they involve misrepresentations as to “factual information maintained by the government” to which members of the public have no other access except through government officers and employees. *Mohler v. City of St. Louis Park*, 643 N.W.2d 623, 637 (Minn. App. 2002), *review denied* (Minn. July 16, 2002). But a property owner is “charged with knowledge of applicable laws.” *Snyder v. City of Minneapolis*, 441 N.W.2d 781, 786 (Minn. 1989). Accordingly, Minnesota does not recognize a cause of action against government employees for negligent misrepresentation of law, except under very limited circumstances. *Mohler*, 643 N.W.2d at 637; *see Northernair Prod., Inc. v. Cnty. of Crow Wing*, 309 Minn. 386, 388-89, 244 N.W.2d 279, 281-82 (1976) (noting limited circumstances justifying misrepresentation-of-law claim).

RSI’s complaint alleges that the city, through Pease and other city employees, negligently misrepresented to RSI that it could operate its business on the property without obtaining any permits or licenses. RSI seeks to characterize its claim as one of misrepresentation of fact, arguing that the city maintains “unwritten city policies that govern the procedures by which city employees implement the code.” We are not persuaded. It is apparent from RSI’s complaint and all of its arguments that the alleged misrepresentations relate to the interpretation of the city code and RSI’s status under the city code. These are representations of law, not fact. *See Mohler*, 643 N.W.2d at 637. And there is no indication that any relevant portions of the city code have changed during

RSI's tenure at the property such that RSI could not be charged with knowledge of the applicable ordinances.

RSI also argues that even if the misrepresentations it alleges are misrepresentations of law, they are actionable. We disagree. Misrepresentations of law are actionable only in circumstances involving bad faith. *See Northernair*, 309 Minn. at 389, 244 N.W.2d at 281-82 (stating that misrepresentations of law are treated as misrepresentations of fact in fiduciary relationships and in circumstances of a learned individual taking advantage of solicited confidence). There is no allegation or evidence that any city employee or official acted in bad faith or deliberately took advantage of RSI. To the contrary, the record indicates the type of "good-faith effort to respond to . . . inquiries" that the supreme court held to be not actionable. *See id.* at 389, 244 N.W.2d at 282. We therefore conclude that RSI's negligent-misrepresentation claim fails as a matter of law.

Moreover, the city is entitled to vicarious official immunity with respect to RSI's negligent-misrepresentation claim. Vicarious official immunity protects a municipality from suit based on the official immunity of its employee on the rationale that it would be "anomalous" to impose liability on the municipality for the very same acts for which its employee receives immunity.² *Wiederholt v. City of Minneapolis*, 581 N.W.2d 312, 316 (Minn. 1998); *see also Anderson v. Anoka Hennepin Indep. Sch. Dist. 11*, 678 N.W.2d

² RSI argues that the district court's immunity determination is overbroad because it seems to bar all of RSI's claims, rather than just its negligent-misrepresentation claim. Any error in this regard is harmless because we conclude that official immunity applies to the conduct underlying RSI's negligent-misrepresentation claim and RSI's other claims fail on their merits as a matter of law.

651, 664 (Minn. 2004) (stating that vicarious official immunity applies “in situations where officials’ performance would be hindered as a result of the officials second-guessing themselves when making decisions, in anticipation that their government employer would also sustain liability as a result of their actions”). Official immunity protects conduct that calls for the exercise of judgment or discretion unless the conduct is willful or malicious. *Gleason v. Metro. Council Transit Ops.*, 582 N.W.2d 216, 220 (Minn. 1998). “A discretionary decision is one involving more individual professional judgment that necessarily reflects the professional goal and factors of a situation.” *Wiederholt*, 581 N.W.2d at 315.

Pease and other city staff exercised discretion in responding to RSI’s inquiries regarding the necessity of a CUP or any other license or permits for its proposed use of the property. *See Snyder*, 441 N.W.2d at 786 (stating that issuance of permits involves exercise of discretion, and even issuance of illegal permits is protected by immunity because property owner is “charged with knowledge of applicable laws”). RSI’s allegations that city staff failed to solicit all of the information necessary to determine whether RSI’s proposed use of the property was permitted does not indicate willful or malicious conduct. As the district court concluded, “[a]t worst, the record indicates City staff mistakenly believed RSI’s proposed use of the Property was a permitted use.”

Subjecting Pease, other city employees or officials, or the city itself to suit based on representations to the public regarding application of zoning laws when those laws are undisputedly publicly available is also inconsistent with established caselaw. *See Mohler*, 643 N.W.2d at 638 (emphasizing general rule that discretionary immunity

precludes suit for public employee's inaccurate representations as to written ordinances because the property owner is charged with knowledge of the illegal nature of the land use). We conclude that Pease's conduct, and that of other city officials and employees with whom RSI interacted, is protected by official immunity and that the city is entitled to vicarious official immunity.

Equitable estoppel

Equitable estoppel is a "doctrine addressed to the discretion of the court and is intended to prevent a party from taking unconscionable advantage of his own wrong by asserting his strict legal rights." *N. Petrochemical Co. v. U.S. Fire Ins. Co.*, 277 N.W.2d 408, 410 (Minn. 1979). Equitable estoppel is not freely applied against the government. *City of N. Oaks v. Sarpal*, 797 N.W.2d 18, 25 (Minn. 2011). One seeking to apply equitable estoppel against the government has the heavy burden of proving that the equities are "sufficiently great." *Id.* (quotation omitted). To meet that burden, the claimant must show that (1) there was "wrongful conduct" on the part of an authorized government agent, (2) the party seeking equitable relief reasonably relied on the wrongful conduct, (3) the party incurred a "unique expenditure" in reliance on the wrongful conduct, and (4) the balance of the equities weighs in favor of estoppel. *Id.* (quotations omitted). Failure to produce evidence as to any one of these elements warrants summary judgment against the party seeking estoppel. *See Lloyd v. In Home Health, Inc.*, 523 N.W.2d 2, 3 (Minn. App. 1994) (affirming grant of summary judgment as "mandatory" against party who failed to establish an essential element of a cause of action).

RSI argues that fact issues preclude summary judgment on its equitable-estoppel claim. We disagree. First, RSI failed to identify any evidence of wrongful conduct, which is “the most important element of equitable estoppel.” *See Sarpal*, 797 N.W.2d at 25. Wrongful conduct must be more than “simple inadvertence, mistake, or imperfect conduct”; it requires “some degree of malfeasance.” *Id.* (quotations omitted). Because the record indicates merely alleged mistaken oral representations of city employees and officials, as we discussed above in the context of negligent misrepresentation and official immunity, there is no evidence of wrongful conduct. Second, RSI could not reasonably rely on representations by Pease or other city employees that were contrary to the plain language of the city code. *See Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 63, 104 S. Ct. 2218, 2225 (1984) (stating that “those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law”); *Snyder*, 441 N.W.2d at 786 (stating that a property owner is “charged with knowledge of applicable laws”). In the absence of any evidence to establish these essential elements, we conclude that RSI’s equitable-estoppel claim fails as a matter of law.

Affirmed.