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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A13-1612**

Sandra L. Balbach,  
Appellant,

vs.

Irving Township Board,  
Respondent.

**Filed June 16, 2014  
Affirmed; motions granted  
Bjorkman, Judge**

Kandiyohi County District Court  
File No. 34-CV-12-693

Margaret K. Koberoski, Kakeldey & Koberoski, P.A., Mankato, Minnesota (for appellant)

Jessica E. Schwie, Jardine, Logan & O'Brien, PLLP, Lake Elmo, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Bjorkman, Judge; and Reilly, Judge.

**UNPUBLISHED OPINION**

**BJORKMAN**, Judge

Appellant challenges the district court's grant of summary judgment and sanctions in respondent's favor and asserts that the court abused its discretion by denying her motion for

a continuance to complete discovery. Respondent moves to strike portions of appellant's appendix and for sanctions. We affirm, and grant respondent's motions.

### **FACTS**

Appellant Sandra Balbach sued respondent Irving Township Board, seeking a declaration that the township abandoned a lake-access road located between two lots Balbach owns, and requesting that the court quiet title in her name.

In 1965, the then-owners of the disputed property petitioned the township to publicly dedicate and construct a road extending from County Road 98 to Lake Calhoun. The township board granted the petition by a resolution that was noted in the township's meeting minutes. The road was dedicated and platted in two halves. The dedication of the east half of the road was recorded in 1967 in what is now known as the Pehrson Addition and the west half was recorded in 1972 as part of the Marvinella Addition.

On June 26, 1992, Balbach acquired by a contract for deed Lot 1 of Block 1 of the Pehrson Addition, which adjoins the east side of the road. On August 3, 2012, Balbach purchased by warranty deed the lot next to the west side of the road, described as Lot 1, Block 1, Marvinella. The deeds do not convey the property on which the road is located; the platted maps attached to the deeds show that the road is not within the boundaries of Balbach's lots.

The township does not dispute that it took no actions to maintain the road and that the land has not been used as a road by the township or members of the public. But in the fall of 2011, township workers began clearing the road area, including trimming trees and shrubs, and grading a path to the lake.

In November 2012, Balbach commenced this declaratory action seeking to quiet title to the property in her name because the township did not establish the property as a road and had abandoned the road. The township moved for summary judgment, arguing the road was properly dedicated and recorded for purposes of the Minnesota Marketable Title Act (MTA). The township also moved for \$500 in sanctions and \$23,000 in attorney fees based on Minn. R. Civ. P. 11 and Minn. Stat. § 549.211 (2012). Balbach asked the district court to continue the summary-judgment motion until discovery was completed. The district court granted the township's motions, holding that Balbach has no title or ownership interest in the road, and awarding the township a total of \$17,726.50 in attorney fees and costs and disbursements. This appeal follows.<sup>1</sup>

## D E C I S I O N

### **I. The district court did not abuse its discretion by denying Balbach's request to continue the summary-judgment motion.**

We review a district court's denial of a continuance motion for an abuse of discretion. *Cherne Contracting Corp. v. Wausau Ins. Cos.*, 572 N.W.2d 339, 346 (Minn. App. 1997), *review denied* (Minn. Feb. 19, 1998). A party may move for summary judgment "at any time." Minn. R. Civ. P. 56.02. A party opposing summary judgment must demonstrate that disputed material facts present a genuine issue for trial. Minn. R. Civ. P. 56.05. But where opposing affidavits are not available because discovery is needed, the district court may continue the motion. Minn. R. Civ. P. 56.06. A party seeking a

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<sup>1</sup> Balbach includes in the appendix to her brief an August 2013 survey that was created after the summary-judgment hearing. Because the survey is not part of the appellate record, we grant the township's motion to strike. *See Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988) (stating appellate court may not base its decision on information outside the record).

continuance must file an affidavit that is “specific about the evidence expected, the source of discovery necessary to obtain the evidence, and the reasons for the failure to complete discovery to date.” *Alliance for Metro. Stability v. Metro. Council*, 671 N.W.2d 905, 919 (Minn. App. 2003). The district court then considers whether the party (1) was “diligent in obtaining or seeking discovery” and (2) has a good-faith belief that the requested discovery will produce material facts. *Rice v. Perl*, 320 N.W.2d 407, 412 (Minn. 1982). A district court does not abuse its discretion by denying a continuance when the discovery sought would not change the result of the summary-judgment motion. *QBE Ins. Corp. v. Twin Homes of French Ridge Homeowners Ass’n*, 778 N.W.2d 393, 400 (Minn. App. 2010).

Balbach did not submit an affidavit pursuant to rule 56.06. Failure to do so is by itself sufficient to justify denying her motion for a continuance. *Molde v. CitiMortgage, Inc.*, 781 N.W.2d 36, 45 (Minn. App. 2010). But even if she had submitted the required affidavit, we discern no abuse of discretion. First, Balbach was not diligent in conducting discovery. She argues that a survey and other information developed through discovery would show that the township permitted construction of improvements in the road area. But Balbach had the ability to and did obtain a survey on her own; she did not need to obtain it through the discovery process. And evidence regarding whether the county issued permits allowing the construction of improvements is publicly available under the Minnesota Data Practices Act, because Kandiyohi County oversees land use issues in the township, and it is subject to the Act. *See* Minn. Stat. § 13.02, subd. 11 (2012). Second, the evidence Balbach sought to obtain—that the township took no action to publicly accept the area as a road and did not maintain it as such—is not material to the summary-judgment motion. The

township agrees that it has not maintained the road. And, as discussed below, Balbach is not entitled to relief under the MTA because she has no claim of title to the road. Whether the township can establish possession through maintenance or use is irrelevant.<sup>2</sup>

**II. The township is entitled to summary judgment because Balbach’s claims fail as a matter of law.**

Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.” Minn. R. Civ. P. 56.03. On appeal from summary judgment, we review the evidence de novo and in a light most favorable to the nonmoving party. *Valspar Refinish, Inc. v. Gaylord’s, Inc.*, 764 N.W.2d 359, 364 (Minn. 2009).

Balbach argues that summary judgment is improper because there are disputed fact issues about whether the township abandoned its interest in the road. Balbach bases her argument on the MTA, asserting that she has an ownership interest in the road because the township has abandoned it.

A party invoking the MTA for her own benefit must meet two requirements. *Town of Belle Prairie v. Kliber*, 448 N.W.2d 375, 378 (Minn. App. 1989). First, she must demonstrate that she has a “claim of title based upon a source of title, which source has then been of record at least 40 years.” Minn. Stat. § 541.023, subd. 1 (2012); *Foster v.*

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<sup>2</sup> Balbach’s warranty deed conveyed the Marvinella property to her as a trustee. The township argued that the case should be dismissed because the trust was not a party, and Balbach moved to amend. A trustee of an express trust may sue in that person’s own name. Minn. R. Civ. P. 17.01. In addressing the merits of Balbach’s claim, the district court noted that the “real party should have been the trust.” Because her claim fails on the merits, the district court’s failure to address her motion to amend is harmless error.

*Bergstrom*, 515 N.W.2d 581, 587 (Minn. App. 1994). Source of title refers to “fee simple ownership.” *Kliber*, 448 N.W.2d at 378-79 (holding that because appellant submitted no evidence of fee simple ownership, appellant was not entitled to invoke the MTA). Second, she must show that the party against whom the MTA is invoked is “conclusively presumed” to have abandoned all interest in the property. *Id.* at 378. This conclusive presumption only arises when the party against whom the MTA is invoked failed to record its property interest within 40 years of acquiring that interest. Minn. Stat. § 541.023, subds. 5, 6 (2012); *Foster*, 515 N.W.2d at 586-87.

Balbach has not met either requirement. She submitted no evidence that she has fee simple ownership of the road; the plats attached to her deeds show that her properties are next to but do not include the road. Because she has not established a claim of title, we do not consider her argument that the possession exception to the presumption of abandonment applies. *See Kliber*, 448 N.W.2d at 379 (stating that court would not consider possession exception to abandonment because appellants had no claim of title to invoke the MTA). And even if Balbach had a claim of title, the presumption of abandonment does not apply; the district court found that the township properly recorded its interest in the road, and Balbach does not dispute this finding. Because Balbach cannot invoke the MTA, her claims fail as a matter of law.<sup>3</sup>

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<sup>3</sup> Balbach argues that the township did not comply with Minn. Stat. § 164.35 (2012), which makes formal board action required for a municipality to assert rights in property. This is a new argument in her reply brief, so we will not consider it. *McIntire v. State*, 458 N.W.2d 714, 717 n.2 (Minn. App. 1990), *review denied* (Minn. Sept. 28, 1990).

**III. The district court did not abuse its discretion by awarding attorney fees to the township, and the township is entitled to attorney fees on appeal.**

Both district courts and appellate courts may impose sanctions on parties who pursue claims that are not “warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.” *See* Minn. Stat. § 549.211, subds. 2(2), 3; Minn. R. Civ. P. 11.02, 11.03. In determining whether sanctions are appropriate, we apply an “objective, reasonableness test.” *In re Adoption of T.A.M.*, 791 N.W.2d 573, 579 (Minn. App. 2010). Generally, a colorable or good-faith claim does not warrant sanctions. *Block v. Target Stores, Inc.*, 458 N.W.2d 705, 713 (Minn. App. 1990), *review denied* (Minn. Sept. 28, 1990). We review a district court’s award of sanctions for an abuse of discretion. *Collins v. Waconia Dodge, Inc.*, 793 N.W.2d 142, 145 (Minn. App. 2011), *review denied* (Minn. Mar. 15, 2011).

On March 11, 2013, the township served a notice of motion and motion for sanctions on Balbach. The township filed its sanction motion with the district court on April 26, 2013, after the 21-day safe-harbor period expired. The district court awarded fees to the township, finding that Balbach failed to conduct a reasonable inquiry before commencing the action, failed to establish a reasonable basis for her claim, and failed to follow substantive and procedural law after sufficient notice. The township also seeks to recover the attorney fees and costs it incurred on appeal because the appeal is frivolous. The township sent Balbach its motion for sanctions in August 2013, prior to briefing, and Balbach did not withdraw her appeal. The township served and filed its motion in January 2014, well after the 21-day safe-harbor period elapsed.

Balbach argues that the district court abused its discretion by ordering sanctions, and that we should not award appellate fees because she asserted a legitimate claim under the MTA. We disagree. Balbach's assertion that she is entitled to declaratory relief under the MTA without a claim of title to the property at issue is not warranted by existing law and she did not make an argument to modify or reverse existing law. The claim-of-title requirement is well-settled in Minn. Stat. § 541.023, subd. 1, and in Minnesota caselaw. Balbach provided no evidence to the district court to support that she has a claim of title based on a source of title. And her deeds, including the recorded plats, show that her two lots do not include the land under the road. On this record, we conclude that her factual allegations to the district court and our court have no arguable basis in law or fact. We discern no abuse of discretion in the district court's award of attorney fees, and the township is entitled to reasonable appellate attorney fees upon submission of supporting documentation in accordance with Minn. R. Civ. App. P. 139.06, subd. 1.

**Affirmed; motions granted.**