STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1761

Elizabeth Howell,
Appellant,

vs.

City of Minneapolis,
Respondent.

Filed April 22, 2013
Affirmed in part, reversed in part, and remanded
Stoneburner, Judge

Hennepin County District Court
File No. 27CV1122208

Kristin B. Rowell, Anthony Ostlund Baer & Louwagie P.A., Minneapolis, Minnesota (for appellant)

Susan L. Segal, Minneapolis City Attorney, Darla J. Boggs, Lee C. Wolf, Robin H. Hennessy, Assistant City Attorneys, Minneapolis, Minnesota (for respondent)

Considered and decided by Kirk, Presiding Judge; Stoneburner, Judge; and Hudson, Judge.

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

STONEBURNER, Judge

Appellant homeowner challenges dismissal of her lawsuit against respondent city (1) seeking a declaratory judgment that homeowner is not responsible for repair of a retaining wall located near her property; (2) asserting a claim of abuse of process; and

(3) seeking an award of attorney fees. Because a material fact question exists with regard to responsibility for repair of the wall, we reverse the grant of summary judgment dismissing appellant's request for a declaratory judgment that (1) appellant is not responsible for the retaining wall; (2) appellant need not repair the retaining wall; (3) respondent must repair or replace the retaining wall; and (4) respondent cannot charge appellant for repair or replacement of the wall. Because the district court did not err in granting summary judgment on appellant's abuse-of-process claim and because the request for attorney fees is dependent on that claim, we affirm summary judgment on those claims.

FACTS

Appellant Elizabeth Howell owns a home in respondent City of Minneapolis (city) located at 4753 Drew Avenue South, on the corner of Drew Avenue South and West 48th Street. The legal description of Howell's property is "Lot 14, Block 11, Kensington, Hennepin County, Minn., according to the recorded plat thereof." The original plat map of the Kensington Addition, dated May 1887, states that the original owners of the land "donate and dedicate to the public use forever all streets as shown on the accompanying plat." As platted, 80 feet (40 feet on each side of the center line) is designated as West 48th Street, and the south side of Howell's property ends where the area designated for the street begins.

Currently, the paved portion of West 48th Street is 36 feet wide with an eight-foot-wide boulevard, six-foot-wide sidewalk, and eight-foot strip of land on both sides of the street. A substantial retaining wall runs along the south side of Howell's property,

between a portion of the strip of right-of-way that is adjacent to the property and the sidewalk. The wall turns 90 degrees north, running perpendicular to the sidewalk and along Howell's driveway and ends at her garage, which appears to be dug into the hillside. The record does not contain the dimensions of the wall, but photographs show that the portion adjacent to Howell's driveway is nearly as tall as her garage. The wall provides support to the soil north of the sidewalk and west of Howell's driveway.

In August 2008, the city inspected the retaining wall and determined that it violated the Minneapolis Code of Ordinances (MCO). The city asked Howell to "[r]epair or replace the retaining wall at this property in a professional manner" and cited MCO § 244.1590 as the support for its position. Between September 2008 and November 2011, Howell had more than ten interactions with the city in which the city continuously insisted that it was her responsibility to repair the wall and Howell continuously asked for the legal authority supporting that position, which was never fully provided by the city.

In November 2011, Howell sued the city seeking a declaratory judgment regarding responsibility for the retaining wall, asserting a claim of abuse of process, and seeking attorney fees. Specifically, Howell sought a declaratory judgment:

> 1. Declaring that: Howell does not own the property on which the retaining wall sits at the southwest corner of 48th Street and Drew Avenue South, there is no right-of-way with respect to Howell's [p]roperty and the retaining wall, Howell is not an abutting property owner to the retaining wall, Howell is not an adjacent property owner to the retaining wall, and Howell's [p]roperty does not benefit from the retaining wall.
> 2. Declaring that: Howell is not responsible financially or otherwise for any repairs made to the retaining wall located at the southwest corner of 48th Street and Drew Avenue South, the [c]ity's issuance of the administrative citations to Howell

> was improper, the [c]ity's threat to attach baseless unpaid administrative fees to her taxes was improper, and the [c]ity pursued Howell as responsible for the retaining wall without a proper basis in law or fact.

The parties made cross-motions for summary judgment. After the hearing on the motions, the district court granted the city's motion for summary judgment on all claims and dismissed Howell's claims with prejudice. This appeal followed.

D E C I S I O N

I. Summary judgment standard of review

"On appeal from summary judgment, we must review the record to determine whether there is any genuine issue of material fact and whether the district court erred in its application of the law." *Dahlin v. Kroening*, 796 N.W.2d 503, 504 (Minn. 2011). When the facts are not in dispute, we review the district court's application of law de novo. *In re Collier*, 726 N.W.2d 799, 803 (Minn. 2007). We "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). No genuine issue of material fact for trial exists where "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (quotation omitted).

II. Declaratory judgment on responsibility for repair of retaining wall

MCO § 244.1590 (2013) requires that "[e]very fence and retaining wall on or adjacent to residential property shall be kept well mended and in good repair, consistent with the design thereof." Because the ordinance is drafted in the passive voice, it does

not identify who is responsible for repair, but both parties and the district court construe the ordinance to place the responsibility for repair on the owner of the residential property to which a retaining wall is adjacent. But Howell argues that because the retaining wall is located in the right-of-way dedicated exclusively to the city, eight feet away from her property line, the retaining wall is neither on nor adjacent to her property and the ordinance does not make her responsible for repairs. She argues that the district court misconstrued the ordinance to conclude that the wall is on and adjacent to her property, making her responsible for repairs.

A. Construction of ordinances

"The rules governing statutory interpretation are applicable to the interpretation of city ordinances." *Cannon v. Minneapolis Police Dept.*, 783 N.W.2d 182, 192-93 (Minn. App. 2010) (citing *Yeh v. County of Cass*, 696 N.W.2d 115, 128 (Minn. App. 2005), *review denied* (Minn. Aug. 16, 2005)). As those rules are applied to the interpretation of city ordinances, "words and phrases are construed according to rules of grammar and according to their common and approved usage; but technical words and phrases and such others as have acquired a special meaning . . . are construed according to such special meaning or their definition." Minn. Stat. § 645.08(1) (2012). And as this concept specifically applies to the MCO, "[w]ords and phrases used in [the MCO] shall be construed in their plain, ordinary and usual sense, except that technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import." MCO § 3.10 (2013).

B. Definition of "adjacent to"

Howell argues that construing "adjacent to" to refer to a wall that is eight feet from her property line is contrary to the rule of construction that the city is presumed to intend that the entire ordinance be effective as written and that it does not intend an unreasonable or absurd result. *See* Minn. Stat. § 645.17(1), (2) (2012) (as applied to city ordinances through Minn. Stat. § 645.08(1), courts may presume that the city council "does not intend a result that is absurd, impossible of execution, or unreasonable" and that it does "intend[] the entire statute to be effective and certain"). Howell argues that the district court should have defined "adjacent to" in MCO § 244.1590 as it is used in MCO § 244.1600 (2013), which applies to fences "adjacent to" property lines: "Every fence hereafter erected *within five (5) feet of a property line* shall be erected in the following manner . . . ." (Emphasis added). We disagree.

Neither party asserts that "adjacent to" is a technical term, therefore we apply the common and approved usage of the word. *See* Minn. Stat. § 645.08(1). *Black's Law Dictionary* defines "adjacent" as "[l]ying near or close to, but not necessarily touching." *Black's Law Dictionary* 46 (9th ed. 2009). The *American Heritage Dictionary* defines "adjacent" as "1. Close to; lying near . . . . 2. Next to; adjoining." *American Heritage Dictionary* 22 (3rd ed. 1992). MCO § 244.1600 regulates future fences that will be built "adjacent to" (within five feet of) a property line. It is clear from the language of MCO § 244.1600 that the city has some specific interest in regulating new fences built within five feet of a property line, but nothing in the ordinances indicates that the city intends

the "within five feet" provision in this ordinance to limit the definition of "adjacent to" in all other ordinances.

The supreme court has stated that "[a]djacent does not necessarily mean adjoining or contiguous or abutting" and that "[t]he word is not inconsistent with the idea of something intervening; those tracts are adjacent which are not widely separated." *Booth v. City of Minneapolis*, 163 Minn. 223, 224-25, 203 N.W. 625, 625-26 (1925). There is no dispute that the wall lies outside Howell's deeded property line by approximately eight feet. Because the proximity of the wall to Howell's property falls within the common definition of "adjacent," the district court did not err by concluding that Howell is not entitled to judgment declaring that the retaining wall is not adjacent to Howell's property.

C. Fee ownership of land on which wall is located

One of the city's explanations for Howell's responsibility for the wall is that Howell

> hold[s] fee title interest in the streets abutting [her] property, up to the centerline of each street. . . . The retaining wall, together with the soil and grass that it supports, serve[s her] property. The fact that the wall does not lie within the legal boundaries of [her] established lot have no bearing on the foregoing analysis; rather, it suggests that [her] yard and retaining wall are encroaching on the city's right of way easement. Such encroachments are commonly allowed to exist; however the [c]ity bears no legal responsibility for the same.

But Howell has consistently argued that she does not hold fee title to the land under the city's right-of-way. The district court rejected Howell's arguments, noting that "it has

long been the law in Minnesota that the owner of property abutting a platted street holds the fee interest in the land that lies between the lot line of the property as platted to the center of the abutting street." We agree with the district court. *See Rich v. City of Minneapolis*, 37 Minn. 423, 424, 35 N.W. 2, 3 (1887) ("If the plaintiff owned the land abutting on the street, he presumably owned the fee in the street, such being the established presumption of the common law."); *see also Town of Rost v. O'Connor*, 145 Minn. 81, 83, 176 N.W. 166, 167 (1920) ("In [Minnesota] the title of the owner of land extends to the center of a street or highway abutting thereon, . . . subject to the general public right to take and use any thereof as may be necessary in the improvement of the highway for public use.").

When determining whether property abuts the right-of-way, the relevant demarcation is the land as platted, not the land as constructed or paved. *See Kooreny v. Dampier-Baird Mortuary, Inc.*, 207 Minn. 367, 369-70, 291 N.W. 611, 612 (1940) (holding that when the platted street was 66 feet wide but the public only utilized 60 feet of the right-of-way, the landowner owned the unused portion of the dedicated land until "taken by the public for its appropriate use"). The district court noted that the original plat map shows that Howell's property line abuts West 48th Street as platted, even if that roadway as paved does not abut the property line. The common-law rule does apply, and Howell has fee ownership of the land from her platted property line to the center of West 48th Street. The wall is about eight feet from her platted property line, within the public easement over which she holds a fee interest.

D. Howell has not established that the city acquired fee interest in the right-of-way based on language of the original grantors

As a general rule, the owner of the land at the time it was platted becomes "entirely disassociated" with the land's title and has no interest in the fee to the street when the land passes to a subsequent owner. *White v. Jefferson*, 110 Minn. 276, 283, 124 N.W. 373, 374-75 (1910). This rule is subject to an exception when the express written intent of the grantor is that the fee not belong to subsequent owners of abutting lots. *See Drake v. Chicago, Rock Island & Pac. Ry.*, 136 Minn. 366, 367–68, 162 N.W. 453, 454 (1917).

Howell submitted the affidavit of expert witness Rick Little, the former Examiner of Titles for Hennepin County, who opined that the city, not Howell, owns fee title to the land underlying the right-of-way. Little's opinion is based in part on the relevant statute in effect at the time the plat was created, providing that:

> every donation . . . to the public . . . noted [on the plat] shall be deemed in law and equity a sufficient conveyance to vest the fee simple of all such parcels of land . . . ; and the land intended to be for the streets, alleys, ways, commons, or other public uses in any town or city, or addition thereto, shall be held in the corporate name thereof, in trust for the uses and purposes set forth and expressed or intended.

Minn. Gen. Stat. ch. 29 § 5 (1878). Little asserts that because the streets in Kensington are "donated and dedicated" to the public use forever, fee title passed to the city by virtue of the statute. The city submitted the affidavit of expert witness William Brown, Hennepin County Surveyor since 2003. Brown opined that the dedication language in the plat means that park land was *donated* while the streets, alleys, and avenues were

dedicated as easements to the public. Brown explains that the 1878 statute defines the nature of two different property rights, one involving donated parcels of land and one involving land dedicated for streets, alleys, ways, commons, or other public uses. Brown states:

> In 2006 the Minnesota Society of Professional Surveyors, the Minnesota Association of County Surveyors, and the Real Property Section of the Minnesota Bar, collaborated to amend Minn. Stat. § 505.01, clarifying the long standing ambiguity of this issue.[1]

Brown opines that the city "never held a fee title interest in the public right-of-way areas noted" on the relevant plats. Noting the general principle of law that "where a street has been dedicated by the owner who platted the property, the fee title in the street rests in the ownership of the adjoining property," Brown opined that Howell has fee title to the dedicated streets that adjoin her property.

---

[1] The amended statute currently provides in relevant part:

> Plats of land may be made in accordance with the provisions of this chapter, and, when so made and recorded, every donation of a park to the public shall operate to convey the fee of all land so donated, for the uses and purposes named or intended, with the same effect, upon the donor and the donor's heirs, and in favor of the donee, as though such land were conveyed by warranty deed. Land donated for any public use in any municipality shall be held in the corporate name in trust for the purposes set forth or intended. A street, road, alley, trail, and other public way dedicated or donated on a plat shall convey an easement only. Easements dedicated or donated on a plat shall convey an easement only.

Minn. Stat. § 505.01, subd. 1 (2012).

The district court rejected Howell's argument, relying on the supreme court's consistent interpretation from the inception of the statutory provision for land donated in plats that dedications and donations of land for purposes of streets, roads, and other public ways convey an easement only. *See Schurmeier v. St. Paul & Pac. R.R.*, 10 Minn. 82, 104, 10 Gil. 59, 78 (1865) ("[A]s to the lands intended for streets and alleys, the language is not that a fee-simple shall pass, but that it 'shall be held in the corporate name in trust to and for the uses and purposes expressed or intended.'"); *see also Betcher v. Chicago, Milwaukee, and St. Paul Ry.*, 110 Minn. 228, 234, 124 N.W. 1096, 1099 (1910) ("This statute, without substantial change of language, has been in force in this state ever since the organization of the territory of Minnesota."). We too are bound by the supreme court's interpretation of the law, and the district court did not err by concluding that Howell owns the fee title interest in the land to the center of West 48th Street subject to the city's right-of-way easement. The district court therefore did not err by concluding that Howell failed to establish that she is entitled to a declaratory judgment on three issues: (1) that she is not an abutting property owner to the retaining wall; (2) that she does not have fee title interest to the middle of the street; and (3) that there is no right-of-way easement in favor of the city over Howell's property.

F. City's obligation on right-of-way

On appeal, Howell asserts that the district court erred by failing to analyze the impact the city's right-of-way has on any obligation she has to repair the wall. She argues that the city's charter and multiple ordinances create an obligation for the city to maintain the land in its right-of-way. The city admits that it has a right-of-way easement

over the property on which the wall is located, but does not address Howell's argument on the effect of the easement on the duty to repair the wall. But Howell did not argue to the district court that it must analyze the impact of the city's right-of-way on its argument that she is responsible for repairing the wall. In fact, the only real mention of the city's right-of-way appears in her memorandum opposing the city's motion for summary judgment where Howell argues that "there is no right-of-way easement" over the land, arguing instead that the city owns the property outright. Issues not argued to and considered by the district court are waived on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). We therefore decline to address this issue.

G. Lateral support

"It is settled law that every person has the right to the lateral support of the land adjoining his and is entitled to damages for its removal. This rule is based on the proposition that in a state of nature all land is held together and supported by adjacent lands through operation of forces of nature." *Brewitz v. City of St. Paul*, 256 Minn. 525, 531, 99 N.W.2d 456, 461 (1959).

> The right to the lateral support of adjacent soil is fully recognized in this state as an absolute right, so that, if the owner of such adjacent soil remove the support, he is liable without any question of negligence, for whatever injury ensues to the soil of his neighbor. . . .[I]n respect to this right, a municipal corporation, in its title to streets, (where the right to remove such support has not been acquired by condemnation,) stands on the same footing as an individual owner.

McCullough v. St. Paul, Minneapolis & Manitoba Ry., 52 Minn. 12, 15-16, 53 N.W. 802, 803 (1892). "The city may not divest the land-owner of what he is entitled to enjoy as a

natural right, and then tax upon him the cost of replacing what has been thus taken away." *Armstrong v. City of St. Paul*, 30 Minn. 299, 300, 15 N.W. 174, 174 (1883).

Howell argued to the district court that because the city owes a nondelegable duty of lateral support, the city cannot shift responsibility for maintenance of the retaining wall, which provides lateral support to her property, to Howell. The city's only response to this argument is to deny that the city took any action to deprive Howell's property of lateral support. And the district court failed to address the issue of the city's lateral support obligation other than to state, in a footnote, that regardless of fee ownership of the land on which the wall is located, the city has the authority under Minn. Stat. § 429.051 (2012) to assess the cost of repairs to Howell because her property is "undeniably benefited by any such repairs."[2] On appeal, Howell asserts that the district court erred by declining to analyze the city's lateral support obligation. We agree and conclude that the need for such analysis demonstrates the existence of a material fact question that precludes summary judgment on Howell's declaratory judgment action.

Both parties agree that there is no conclusive evidence about who constructed the wall or the purpose of the wall. As the district court noted, the wall adjacent to the sidewalk plainly benefits Howell's property: it provides lateral support for her property. The city, noting a portion of the wall abuts Howell's garage, argues that because 1924 construction permits for Howell's home show that the garage was constructed at the same

[2] The city has never sought to assess Howell for repairs to the wall under Minn. Stat. § 429.051 (2012) (the assessment statute), but if the city owes a duty of lateral support, it is doubtful that the city would be able to rely on this statute to shift responsibility for the wall to Howell.

time that the house was built, "it is reasonable to infer that the [w]all was also built at that time." The city describes the wall as "provid[ing] support to the soil along both [Howell's] driveway and along the south side of [Howell's] [p]roperty . . . and prevents soil from obstructing [Howell's] driveway and the adjoining sidewalk." But the city's argument merely supports Howell's argument that the wall provides lateral support and does not answer the question about the circumstances under which the need for lateral support arose.[3] This is a fact question that is not appropriately resolved by the city's assertion of reasonable inference. It is equally reasonable to infer that Howell's predecessors were not responsible for the grade of the street and sidewalk that the city placed on its right-of-way, which is considerably lower than Howell's adjacent lot, giving rise to an obligation of lateral support from the city. In order for the district court to determine whether the city has an obligation of lateral support there must first be a factual determination of who or what created the need for lateral support.

Because a material question of fact exists concerning the city's lateral support obligation, the district court erred by granting summary judgment to the city on Howell's request for judgment declaring that (1) Howell is not responsible for the retaining wall; (2) Howell need not repair the retaining wall; (3) the city must repair and/or replace the retaining wall; and (4) the city cannot charge Howell for repair or replacement of the wall.

[3] The city appears to focus on who built the wall, but the real issue is who created the need for lateral support. There is nothing in the existing record to conclusively show that Howell's predecessors created that need.

III. Summary judgment on abuse-of-process claim

"The essential elements for a cause of action for abuse of process are the existence of an ulterior purpose and the act of using the process to accomplish a result not within the scope of the proceedings in which it was issued, whether such result might otherwise be lawfully obtained or not." *Kellar v. VonHoltum*, 568 N.W.2d 186, 192 (Minn. App. 1997) (citing *Hoppe v. Klapperich*, 224 Minn. 224, 231, 28 N.W.2d 780, 786 (1947)), *review denied* (Minn. Oct. 31, 1997). The district court granted summary judgment to the city on Howell's abuse-of-process claim, concluding that "the record is devoid of any evidence of improper motive on the part of the [c]ity during its repeated efforts to enforce its legal right to compel [Howell] to pay for the repairs to the [w]all."

On appeal, Howell argues that her statement in an affidavit that "the [c]ity stated to [her] during a visit to inspect the retaining wall, 'Well, you know, money is pretty tight right now at the [c]ity'" is sufficient evidence to avoid summary judgment on this claim. We disagree.

In Howell's affidavit, she actually said: "during one of the visits at [her] house by a [c]ity inspector, the inspector stated to [her] something to the effect of, 'Well, you know, money is pretty tight right now at the [c]ity.'" There is no evidence in the record that the inspector who allegedly made this statement had any actual knowledge of the city's motivation for its actions, and the statement itself does not demonstrate that the city was acting with any improper motive. In her brief on appeal, Howell argues that the city should have proceeded under Minn. Stat. §§ 429.021, subd. 1(10), .051 (2012) (authorizing the city to maintain restraining walls and assess the cost on property

benefitted by such maintenance). She engages in extensive speculation regarding the city's reasons for "chasing [her] down," and asserts as a conclusion not supported by evidence that "[t]he [c]ity had no interest in figuring out the legal issues or using the proper procedure." No genuine issue for trial exists where, as here, "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *DLH Inc.*, 566 N.W.2d at 69 (quotation omitted).

IV. Attorney fees

Howell asserts that the district court erred by granting summary judgment to the city on her claim for attorney fees. "The general rule in Minnesota is that attorney fees are not recoverable in litigation unless there is a specific contract permitting or a statute authorizing such recovery." *Dunn v. Nat'l Beverage Corp.*, 745 N.W.2d 549, 554 (Minn. 2008) (quotation omitted). There is no contract between the parties, and Howell does not point to any statute giving her the right to recover attorney's fees in this matter. Howell argues that attorney's fees are recoverable for abuse of process that does not otherwise result in a statutory award of sanctions.[4] But because the district court did not err by dismissing Howell's abuse-of-process claim, the district court did not err by dismissing her claim for attorney's fees.

Affirmed in part, reversed in part, and remanded.

[4] Howell cites several unpublished, federal, and/or foreign cases supporting this proposition. We note that "[u]npublished opinions of the Court of Appeals are not precedential," Minn. Stat. § 480A.08, subd. 3(c) (2012), and "federal court interpretations of state law are not binding on state courts." *State ex rel. Hatch v. Employers Ins. of Wausau*, 644 N.W.2d 820, 828 (Minn. App. 2002), *review denied* (Minn. Aug. 6, 2002).