STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0311

John Wesley Hebert, et al.,
Appellants,

vs.

City of Fifty Lakes,
Respondent.

Filed January 13, 2014
Affirmed in part, reversed in part, and remanded
Crippen, Judge[*]

Crow Wing County District Court
File No. 18-C2-05-001223

Lonny D. Thomas, Mark A. Severson, Thomas Law, P.A., Crosslake, Minnesota (for appellants)

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

Considered and decided by Schellhas, Presiding Judge; Stauber, Judge; and Crippen, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

CRIPPEN, Judge

Appellant landowners challenge the district court's judgment dismissing their claims of trespass and ejectment against the City of Fifty Lakes. They dispute the court's conclusions that the city's trespass was permanent rather than continuing and that appellants' ejectment claim is barred by the equitable defense of laches. We affirm the judgment on appellants' trespass claim, but we reverse and remand on appellants' ejectment claim.

FACTS

Appellants John Hebert and nine other landowners own six consecutive lots adjacent to the north shore of Mitchell Lake in the city. The lots were registered as Torrens properties in 1953. At that time, North Mitchell Lake Road cut through several of the lots. In 1954, a 66-foot-wide strip of land abutting the northern boundaries of the lots was dedicated and platted for reconstruction of the road. The city replaced part of the original road in 1962; although the southern boundary of the road may have been meant to coincide with the northern boundaries of lots 18-23, the road encroached into lots 18 and 19. In 1971, the city rebuilt the road again to flatten the slope of a hill and to widen the lanes. This gravel road again deviated from the plat and this time encroached onto lots 18-23. The exact encroachment differs by lot from 29 to 49 feet.

Since 1971, the city has taken steps to maintain the road, but the location of the road has not changed. This maintenance includes grading, sanding, snow removal, brush

removal, roadside mowing, ditch digging and cleaning, tree removal, and power sweeping. The road is the only access for residents living on the north shore of the lake, including appellants, and has been in continuous public use since it was built.

In 1998, the city conducted a survey of the area that demonstrated the road encroachment onto appellants' lots. One of appellants observed the encroachment when examining a copy of the survey distributed to residents at a special city meeting on the subject. Shortly thereafter, all of the appellants began demanding that the city move the road to comply with the plat. No resident complained about the road deviating from the platted area prior to 1998.

In May 2005, appellants filed the current action seeking declaratory judgment of their exclusive property rights in the encroached area, ejectment of the city from their properties, and damages for continuing, unlawful trespass. The ensuing litigation is reflected in three judgments of the district court interspersed with two decisions of this court and one of the supreme court.

The city initially moved to dismiss appellants' complaint for failure to state a claim upon which relief may be granted, arguing that the property was acquired by virtue of a de facto taking and that appellants' ejectment and trespass claims were time-barred. Thereupon, appellants moved for partial summary judgment on their declaratory judgment and ejectment claims. The district court granted the city's motion, concluding that the city demonstrated a de facto taking, triggering a 15-year statute of limitations that barred compensation under a theory of inverse condemnation.

On appeal, this court concluded that the city's actions did not amount to a de facto taking and reversed the district court. *Hebert v. City of Fifty Lakes* (*Hebert I*), A06-215, 2007 WL 582956, at *4 (Minn. App. Feb. 27, 2007), *aff'd*, 744 N.W.2d 226 (Minn. 2008). This court also determined that appellants' complaint sufficiently stated viable claims of continuing trespass and ejectment and remanded the case for further proceedings. *Id.* at *5. The supreme court granted review and affirmed the takings issue in *Hebert I*, not based on the absence of a de facto taking but by clarifying that Torrens property cannot be acquired by such a taking. *Hebert v. City of Fifty Lakes* (*Hebert II*), 744 N.W.2d 226, 232 (Minn. 2008).

The supreme court also held that the statute of limitations did not bar an ejectment claim on this Torrens property but that, despite this matter of law, the claim was susceptible to the equitable defense of laches. *Id.* at 233 n.6. Finally, the court concluded that appellants' trespass claim would be barred by the statute of limitations if it were permanent and not continuing, that appellants had successfully pleaded a claim for continuing trespass, but that there remained an issue of proof whether the trespass was continuing or permanent. *Id.* at 233, 236. The supreme court remanded to the district court for further proceedings. *Id.* at 236.

On remand, the district court granted summary judgment to the city based on the city's demonstration that it validly obtained the road property through statutory dedication. The court dismissed appellants' motion that they were entitled to judgment that the city's trespass was continuing and their ejectment claim was not barred by laches.

In *Hebert v. City of Fifty Lakes* (*Hebert III*), 784 N.W.2d 848 (Minn. App. 2010), this court determined that statutory dedication and common law dedication are inapplicable to Torrens properties because they amount to a taking by adverse possession, and we remanded for further proceedings. *Id.* at 855, 857. We affirmed the district court's denial of appellants' motion for summary judgment, concluding there were still issues of material fact regarding the trespass and laches issues. *Id.* at 856-57.

This court's second remand was followed by a district court trial in August 2012. In its subsequent findings of fact and conclusions of law, the court concluded that the road encroachment constituted a permanent rather than a continuing trespass and, as a result, appellants' trespass claim was barred by the applicable statute of limitations. The court also ruled that appellants' claim of ejectment was barred by the equitable doctrine of laches. This appeal follows.

D E C I S I O N

1. Permanent trespass

On appeal from a judgment where there has been no motion for a new trial, as in this case, this court reviews only whether the evidence sustains the district court's finding of facts and whether the findings of fact support the conclusions of law and the judgment. *See Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn.*, 664 N.W.2d 303, 309-10 (Minn. 2003) (stating that a motion for a new trial is not a prerequisite to appellate review of substantive legal issues properly raised and considered in district court); *Gruenhagen v. Larson*, 310 Minn. 454, 458, 246 N.W.2d 565, 569 (1976) (stating

that absent a motion for a new trial, appellate courts may review whether the evidence supports the district court's findings of fact and whether those findings support the conclusions of law and the judgment); *see also City of Minneapolis v. Minneapolis Police Relief Ass'n*, 800 N.W.2d 165, 172 (Minn. App. 2011) (citing *Alpha Real Estate*, 664 N.W.2d at 309-10; *Gruenhagen*, 310 Minn. at 458, 246 N.W.2d at 569). We cannot set aside findings of fact unless they are clearly erroneous. Minn. R. Civ. P. 52.01. This court reviews de novo whether the findings of fact support a district court's conclusions of law and judgment. *Ebenhoh v. Hodgman*, 642 N.W.2d 104, 108 (Minn. App. 2002). At both oral arguments and in their reply brief, appellants acknowledged that they do not challenge any of the district court's factual findings; these include numerous findings supporting the district court's conclusions regarding the nature of the city's trespass.

A claim of trespass is subject to a six-year statute of limitations. Minn. Stat. § 541.05, subd. 1(3) (2012). But if a trespass is continuing rather than permanent, a party is not barred from collecting damages for the six years prior to its action for trespass, regardless of the timing of the initial invasion. *Hebert II*, 744 N.W.2d at 233-34. In this case, unless the city's invasion constitutes a continuing trespass, the limitations period lapsed in 1977, and appellants are barred from seeking any damages under a theory of trespass.

In *Hebert II*, the supreme court stated that the test to determine whether the city's claimed trespass is permanent is "whether the whole injury results from the original wrongful act—the construction of the gravel road in 1971—or from the wrongful

continuance of the state of facts produced by such act." *Id.* at 234 (alteration in original) (quotations omitted). The court further explained that resolution of this issue "centers on the nature of the wrong complained of." *Id.* (quotation omitted) (internal quotation marks omitted). "If the wrong complained of is the act of the City in constructing the gravel road, the trespass is permanent." *Id.* "[I]f the wrong complained of is some continuing or recurring intrusion onto the landowners' property, the trespass is continuing." *Id.* The supreme court also noted that whether a trespass is continuing or permanent is not "always purely a question of law." *Id.* at 235. Rather, the "character of the invasion . . . is essentially one of proof." *Id.* at 236 (quotation omitted).

After a full trial, the district court made the following findings of fact:

> 8. In 1971, the City rebuilt North Mitchell Lake Road . . . . After this, the road continued to be off the plat so as to encroach onto Lots 18-23 . . . . The rebuilt road was a gravel road . . . and it has essentially remained as such up to the present time.
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> . . . .
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> 26. The whole of the injury that was inflicted on Lots 18-23 herein, resulted from that original act of the road being constructed in 1971.
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> 27. The construction of the road in 1971 so as to encroach on Lots 18-23, and the damage that resulted to Lots 18-23, occurred simultaneously.
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> 28. All damages that resulted from the road being constructed in 1971, whether present or prospective, were determinable at that time.
>
> 29. Aside from the road's initial encroachment onto Lots 18-23 that occurred in 1971, and aside from effects that the road

> would have on the lots that were known and determinable as far back as 1971, the road's existence has not caused any injury or recurring injury to any of Lots 18-23.

These uncontested findings satisfy the supreme court's test for permanent trespass. The district court determined that the whole injury inflicted by the city's invasion occurred simultaneously to the construction of the road in 1971 and that there has not been any recurring injury since that initial construction. If appellants wished to challenge the sufficiency of the district court's factual determinations, they needed to do so pursuant to the "clearly erroneous" standard set out in Rule 52.01 of the Minnesota Rules of Civil Procedure. Because they have not stated such an argument[1] this court is bound by the district court's findings. The court did not err in determining that the city's trespass was permanent, and we affirm the court's dismissal of appellants' trespass claim.

2. Ejectment and laches

Appellants also argue that the district court erred by concluding that their ejectment claim is barred by the equitable doctrine of laches. The application of this principle depends largely on the facts of each case. *Aronovitch v. Levy*, 238 Minn. 237, 242, 56 N.W.2d 570, 574 (1953). Accordingly, this court reviews a district court's decision to apply laches for an abuse of discretion. *Lloyd v. Simons*, 97 Minn. 315, 317,

[1] The main thrust of appellants' argument is that several prior supreme court decisions mandate the conclusion that the city's trespass is continuing in nature. These decisions include *Alevizos v. Metro. Airports Comm'n of Minneapolis & St. Paul*, 216 N.W.2d 651 (Minn. 1974); *N. States Power Co. v. Franklin*, 265 Minn. 391, 122 N.W.2d 26 (1963); *Heath v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.*, 126 Minn. 470, 148 N.W. 311 (1914); and *Harrington v. St. Paul & Sioux City Ry. Co.*, 17 Minn. 215, 17 Gil. 188 (1871). However, these cases are not premised on specific findings like those in this case and have no applicability here.

105 N.W. 902, 903 (1906); *Jackel v. Brower*, 668 N.W.2d 685, 690 (Minn. App. 2003), *review denied* (Minn. Nov. 25, 2003).

Although the supreme court held that a statute of limitations does not apply to an ejectment action on Torrens property, the court specifically observed that a claim of ejectment on Torrens property, requiring relief that is equitable in nature, is subject to the equitable defense of laches, "a relinquishment or abandonment of rights." *Hebert II*, 744 N.W.2d at 233 n.6.

"Laches is an equitable doctrine that prevents one who has not been diligent in asserting a known right from recovering at the expense of one who has been prejudiced by the delay." *Carlson v. Ritchie*, 830 N.W.2d 887, 891 (Minn. 2013) (internal quotation marks and alterations omitted) (quotation omitted). Length of delay is measured from when a party knew or should have known of the relevant facts. *Clark v. Reddick*, 791 N.W.2d 292, 294 (Minn. 2010); *Lindquist v. Gibbs*, 122 Minn. 205, 208, 142 N.W. 156, 158 (1913) ("[A] party is not guilty of laches until he discovers the mistake, or until he is chargeable with knowledge of facts from which, in the exercise of proper diligence, he ought to have discovered it."). However, "lapse of time is only one of the elements to be considered[;] [m]ere delay does not constitute laches, unless the circumstances were such as to make the delay blamable." *Elsen v. State Farmers Mut. Ins. Co.*, 219 Minn. 315, 321, 17 N.W.2d 652, 656 (1945) (internal citation and quotation omitted). Laches is an affirmative defense, Minn. R. Civ. P. 8.03, and, thus, the city bears the burden of establishing the elements of the doctrine, *see MacRae v. Group Health Plan, Inc.*, 753

N.W.2d 711, 716 (Minn. 2008). To prevail over legal title in an ejectment action, the equities of the city "must be shown to be strong, clear, and decisive." *McClane v. White*, 5 Minn. 178, 190, 5 Gil. 139, 150 (1861).

The district court abused its discretion by misapplying the law of laches. First, the court failed to consider the city's relative fault for the delay in this case. It is axiomatic that "he who seeks equity must do equity." *Williams v. Murphy*, 21 Minn. 534, 537 (1875). "Where both parties are at fault, laches should not be strictly applied." *Indus. Loan & Thrift Corp. v. Benson*, 221 Minn. 70, 73, 21 N.W.2d 99, 101 (1945) (quotation omitted). The district court did not address whether the city knew of the encroachment prior to 1998 and, if it did, whether the city contributed to the delay in this case by withholding that knowledge from appellants. This consideration is a special matter of concern in light of one of the district court's findings, which indicates that in 1998, the city presented one of the appellants with copies of surveys from 1976 and 1989. These surveys both showed that the road encroached onto appellants' land. Thus, the city had possession of these surveys before openly illustrating the encroachment prior to 1998.

In addition, the district court's findings do not support its conclusion that "under the circumstances" appellants "unreasonably delayed filing" their 2005 claim for ejectment. The court found that the owners of four of the lots "knew or should have known" that the road encroached on their property when the road was improved in 1971; two of these owners, the court concluded, also "knew or should have known" of the

encroachment when the road was improved in 1962. But neither the evidence nor the district court findings disclose the sources for this knowledge.

Addressing the knowledge of the owners of the other two affected lots, who bought the property in 1982, the court found that they had "actual knowledge of the road's physical location and the practical effect it had on the size of the lots" and that they "could have" commissioned a survey or found one earlier prepared for others. But the physical location of the road, by itself, does not reveal any encroachment. Some knowledge of the platted boundary lines would be required, and such knowledge is not evident.[2]

The court found that a 1976 survey demonstrated the encroachments, but there is no evidence that any of the owners saw the survey, which was prepared for the purchasers of nearby lots to facilitate the drafting of a purchase agreement. Similarly, the court found that there was no evidence that any of the appellants were aware of a survey prepared in 1989. Confirming the limited knowledge of earlier plats, the court found that disclosure of the 1998 survey prompted all of the owners to demand relocation of the road.

Finally, the district court focused exclusively on the question whether delay was reasonable and failed to consider whether the city suffered any prejudice as a result of the delay. In *Hebert III*, the city argued, and this court agreed, that material fact issues on

[2] The city has not claimed and we find no authority suggesting, for purposes of a real estate dispute, that the owner of a platted parcel has constructive notice of platted boundaries as a matter of law.

ejectment included both inexcusable delay by appellants and prejudice to the city due to the delay. 784 N.W.2d at 856. On this appeal, the city argues that evidence of prejudice is not required to apply the defense of laches.

The city looks to the following quote from *Klapmeier v. Town of Ctr. of Crow Wing Cnty.*, 346 N.W.2d 133 (Minn. 1984), to support its position: "While evidence of prejudice is not always essential to the application of laches, it is a circumstance of importance in determining whether a plaintiff's delay was reasonable." *Id.* at 137. Although *Klapmeier* states that prejudice is "not always essential," in the very next sentence the supreme court acted to reverse the district court's application of laches because there was "no evidence or testimony concerning prejudice" presented at trial. *Id.* Additionally, this court has questioned the persuasive value of the laches discussion in *Klapmeier* because the supreme court was able to dispose of that case on jurisdictional grounds alone and, thus, its discussion of laches was nonbinding dicta. *Shortridge v. Daubney*, 400 N.W.2d 841, 845 (Minn. App. 1987), *rev'd on other grounds*, 425 N.W.2d 840 (Minn. 1988). Finally, although *Klapmeier* cites to *Aronovitch* as authority for the proposition that prejudice is not essential for laches, 346 N.W.2d at 137, *Aronovitch* states that "evidence of prejudice is not always essential" to laches, without citing to other authority, 238 Minn. at 242, 56 N.W.2d at 574. Moreover, the court in *Aronovitch* explicitly considered prejudice to determine whether the death of a witness could support a finding of laches. *Id.* at 244, 56 N.W.2d at 575 ("Under these circumstances, no

prejudice could have resulted by the delay after the death of the two doctors."). Thus, the city and district court's reliance on *Klapmeier* is unpersuasive here.

In *Briggs v. Buzzell*, a case relied upon by both the district court and the city, the supreme court squarely addressed whether prejudice is required to assert laches. 164 Minn. 116, 120, 204 N.W. 548, 549 (1925).

> In *McQueen v. Burhans*, 77 Minn. 382, 80 N. W. 201, it was remarked that the fact that defendant's position had not changed to his detriment did not necessarily defeat the defense of laches; but in *Haataja v. Saarenpaa*, 118 Minn. 255, 136 N. W. 871, we find this language: "Delay must be culpable in order to become laches, and prejudice must result." The latter statement appeals to reason, for, so long as the parties are in the same condition as they were before the delay occurred, it matters little whether the plaintiff presses his right promptly or slowly within the period allowed by law. Not until the situation has changed so that the defendant cannot be restored to his former state, if the right should be enforced, does the delay become inequitable or operate as an estoppel against the assertion of the right.

Id. Further, in *Lloyd*, a property dispute case involving the recording of a lost deed, the supreme court indicated that, "The practical question . . . is whether there has been such an unreasonable delay in asserting a known right, resulting in prejudice to others, as would make it inequitable to grant the relief prayed for." 97 Minn. at 317, 105 N.W. at 903.

The supreme court has also made several other general statements emphasizing the importance of prejudice. *See, e.g., Elsen*, 219 Minn. at 321, 17 N.W.2d at 656 ("The main question to be determined [when deciding to apply laches] is whether defendants will be prejudiced."); *Modjeski v. Fed. Bakery of Winona, Inc.*, 307 Minn. 432, 439, 240

N.W.2d 542, 546 (1976) ("Laches consists of more than a mere failure to act[;] [i]t requires that prejudice result from the failure to act."). Further, the supreme court has explicitly required a finding of prejudice in order to apply the doctrine of laches in other contexts. *M. A. D. v. P. R.*, 277 N.W.2d 27, 29 (Minn. 1979) (citing prejudice as one element the court "must consider" when applying laches to paternity actions); *Desnick v. Mast*, 311 Minn. 356, 365, 249 N.W.2d 878, 883-84 (1976) (stating that, in an action for enforcement of stock transfer, "[a]n essential element of laches . . . is that the party asserting it be prejudiced by the delay"). Prejudice is an essential element of laches and the district court erred by failing to consider whether the city suffered prejudice as a result of the delay in bringing the current suit.

Appellants argue that the city did not offer any evidence of prejudice and that, therefore, laches cannot apply in this case. Although the district court did not address this argument, we review it here in the interest of judicial economy. *See In re Estate of Vittorio*, 546 N.W.2d 751, 756 (Minn. App. 1996).

Initially, the city claims that it has been prejudiced by expending resources maintaining the road since its construction; the city presented evidence of the costs associated with this maintenance. Yet the city would have been required to maintain the road had it been placed in the correct location as well. The city also asserts that it has been prejudiced by delay because the value of land has increased since the original placement of the road. But the plat approved by the city already provides an area in which the city can legally place the road without acquiring additional property.

Finally, the city believes that the plat is slightly misaligned to the north and that it will have to acquire private property from a neighboring landowner if a road located as designated on the plat is to smoothly connect with the existing road to the east of the plat. A resident without expertise mentioned on the record that the "right-of-way just stops in midair up against my property." The city presented no evidence indicating that a taking was unavoidable or showing the extent of such a taking. Although the city argues that its taking would involve tree removal and replacing wetlands, it has shown neither the cost associated with any taking nor any lesser cost if the property had been taken in 1971. On the record it produced, the city has not carried its burden to show prejudice from the delay in assertion of appellants' ejectment claim.

In sum, the district court's decision on laches wrongfully omits attention to the city's conduct, contains inadequate findings that appellants have unreasonably delayed asserting their ejectment claim, and overlooks the need for a showing of prejudice suffered by the city. The district court's dismissal of appellants' ejectment claim is reversed, and the claim is remanded to the court for further consideration on its merits.

Affirmed in part, reversed in part, and remanded.