STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1543

David Phaneuf, et al.,
Appellants,

vs.

Bruce Sobotta, individually and as Clearwater Township Commissioner, et al.,
Respondents,

Stephen J. Broughton, et al.,
Respondents.

Filed May 19, 2014
Reversed and remanded
Hooten, Judge

Wright County District Court
File No. 86-CV-12-5224

Thomas P. Melloy, Andrew J. Steil, Gray, Plant, Mooty, Mooty & Bennett, P.A., St. Cloud, Minnesota (for appellants)

Robert A. Alsop, Kennedy & Graven, Chtd., Minneapolis, Minnesota (for respondents Clearwater Township and Bruce Sobotta)

Gerald W. Von Korff, David J. Meyers, Rinke Noonan, St. Cloud, Minnesota; and

Kristen J. Hansen, Garth J. Unke, Stich, Angell, Kreidler, Dodge & Unke, P.A., Minneapolis, Minnesota (for respondents Stephen and Cristin Broughton)

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

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

HOOTEN, Judge

Appellants challenge the district court's grant of summary judgment to respondents, arguing that the district court erred by concluding that there are no genuine issues of material fact regarding appellants' ownership interest in certain real property, and dismissing their declaratory-judgment action and trespass, destruction-of-property, and slander-of-title claims. Because we conclude that there are genuine issues of material fact, we reverse and remand.

FACTS

In 1895, respondent Clearwater Township issued a road order that discontinued an existing road, moved it west, and reestablished it along the centerline of Section 13, running north-south with a 66-foot right-of-way. Although a number of landowners were affected by the placement of the road, only one landowner was awarded damages. The township did not record the road order.

George and Florence Lehman and Cabins Inc. (together, the Lehmans) owned Government Lot 1, located in the northeast corner of Section 13. The Lehmans executed a dedication of Government Lot 1 in 1956 and promptly recorded it in the Wright County register of deeds. The dedication states that the Lehmans as

> owners and proprietors of . . . All of Government Lot One (1) in Section Thirteen (13), Township One Hundred Twenty-Two (122) North, Range Twenty-seven (27) West, containing Thirty-eight & fifteen-hundredths (38.15) Acres, (more or less) and platted as 'FISH LAKE SHORES,'

> Have caused the same to be surveyed into Lots, Blocks, Streets, Avenues and Alleys as correctly shown on the annexed plat.
>
> . . . We hereby dedicate all Streets, Avenues, Alleys, Lanes or Parks, as shown on the annexed plat, to the Public, for use as such, forever.

The Fish Lake Shores plat includes a notation that the "Northwest Corner at Gov't Lot 1" lies on the centerline of the road established by the 1895 road order. The road extends north just past the northwest corner of Government Lot 1, and then turns west at a sharp right angle.

The plat divides Government Lot 1 into four larger outlots and several smaller parcels. Outlot A is the northernmost outlot and is described as being "8.05 Acres (more or less)." Outlot A's northern boundary is the same as Government Lot 1's northern boundary, and Government Lot 1's northern boundary extends west to the line that is the centerline of both Section 13 and the road as platted in the dedication. Outlot A also appears to share its western boundary with the western boundary of Government Lot 1—the centerline of Section 13 and the road as platted in the dedication. South of Outlot A are Outlots B, C, and D, with the southern border of Outlot D appearing to extend west to the centerline of Section 13 and the road. The plat also establishes that the road's right-of-way extends 33 feet on each side of the centerline.

In 1984, the Clearwater Town Board inventoried and recorded a map of the township's roads, noting that "nearly all of [the] town roads have been established by dedication or prescription, [but] there is no record of said roads in the Office of the County Recorder of Wright County." The inventory describes the road involved here as

a "66.00 foot easement for public right of way purposes" and curving west, rather than turning west at a right angle as depicted in the Fish Lake Shores plat.

In 2002, appellants David and Lisa Phaneuf purchased by warranty deed Outlot A. In 2012, respondents Stephen and Cristin Broughton purchased by warranty deed real property located just north of and bordering the Phaneufs' property. The Broughtons, with the consent of the township, constructed a driveway over certain real property (the subject property) to access the road from their lot.

The Phaneufs sued, seeking a declaratory judgment that they own the subject property under the Marketable Title Act (MTA), and asserting trespass, destruction-of-property, and slander-of-title claims. The record includes two surveys that the Phaneufs submitted to the district court for purposes of describing the subject property. The surveys depict the road as curving west before meeting the northwest corner of Government Lot 1, rather than extending past the northwest corner of Government Lot 1 and turning west at a right angle as shown in the Fish Lake Shores plat. The surveys illustrate that the subject property is a trapezoid-shaped area of land that lies outside of the curved right-of-way of the road, but within the right-of-way as depicted in the Fish Lake Shores Plat.

The Broughtons and the township moved for summary judgment, arguing that the Phaneufs do not have a source of title in the subject property because the subject property lies within the road's right-of-way and, even if they did, the township has sufficiently possessed the property. The district court granted their motions, concluding that the

Phaneufs do not have an ownership interest in the subject property, and dismissed the Phaneufs' complaint with prejudice.

The Phaneufs appeal.

D E C I S I O N

"We review a district court's summary judgment decision de novo. In doing so, we determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010) (citation omitted). "We view the evidence in the light most favorable to the party against whom summary judgment was granted." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76–77 (Minn. 2002). No genuine issue for trial exists "[w]here 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) (alteration in original) (quotation omitted). But "summary judgment is inappropriate if the nonmoving party has the burden of proof on an issue and presents *sufficient evidence* to permit reasonable persons to draw different conclusions." *Schroeder v. St. Louis Cnty.*, 708 N.W.2d 497, 507 (Minn. 2006).

The purpose of the MTA is "to ensure that 'ancient records shall not fetter the marketability of real estate.'" *Weber v. Eisentrager*, 498 N.W.2d 460, 462 (Minn. 1993) (quoting Minn. Stat. § 541.023, subd. 5 (1992)). The MTA provides:

> As against a claim of title based upon a source of title, which source has then been of record at least 40 years, no action affecting the possession or title of any real estate shall be

> commenced by a person, partnership, corporation, other legal entity, state, or any political division thereof, to enforce any right, claim, interest, incumbrance, or lien founded upon any instrument, event or transaction which was executed or occurred more than 40 years prior to the commencement of such action, unless within 40 years after such execution or occurrence there has been recorded in the office of the county recorder in the county in which the real estate affected is situated, a notice sworn to by the claimant or the claimant's agent or attorney setting forth the name of the claimant, a description of the real estate affected and of the instrument, event or transaction on which such claim is founded, and stating whether the right, claim, interest, incumbrance, or lien is mature or immature.

Minn. Stat. § 541.023, subd. 1. Put another way,

> when X holds property in fee simple that has been of record for over 40 years, and Y claims an interest in that property that is also at least 40 years old, then Y, or Y's predecessors in interest, must have filed the statutorily prescribed notice of Y's claim within 40 years of the creation of the interest Y now claims. The purpose of notice under the MTA is to confirm the continuation of Y's interest in property and to eliminate stale claims that may clutter X's title. Any potential claimant who has not filed the statutorily prescribed notice within 40 years of the creation of its interest shall be conclusively presumed to have abandoned any interest it might have had in the property.

Sampair v. Vill. of Birchwood, 784 N.W.2d 65, 68–69 (Minn. 2010) (quotation and citations omitted).[1]

[1] The MTA "is a statute of limitations which restricts a party from asserting an unregistered interest in another person's title to property" and "was designed to be invoked as a defense in a situation where a party claims title to property and another party asserts a hostile claim to the same property." *Padrnos v. City of Nisswa*, 409 N.W.2d, 37–38 (Minn. App. 1987), *review denied* (Minn. Sept. 23, 1987). Here, the Phaneufs invoked the MTA in support of their request for a declaratory judgment that they own the subject property. Because the impact of this arguably atypical posture for invoking the MTA was neither briefed adequately to this court nor addressed by the district court, we

Under the MTA, there are two requirements to extinguish an interest in land claimed by another. *Padrnos*, 409 N.W.2d at 38. "First, the party desiring to invoke the statute for his own benefit must have a requisite claim of title based upon a source of title, which source has then been of record at least 40 years, (i.e. a recorded fee simple title)." *Id.* (quotation omitted). Second, "the person against whom the act is invoked must be one who is conclusively presumed to have abandoned all right, claim, interest . . . in the property." *Id.* (quotation omitted).

A. Claim of Title

The Phaneufs must establish a claim of title based upon a source of title in the subject property. "Source of title" means "any deed, judgment, decree, sheriff's certificate, or other instrument which transfers or confirms, or purports to transfer or confirm, a fee simple title to real estate." Minn. Stat. § 541.023, subd. 7 (2012).

The Phaneufs argue that they acquired a claim of title in the subject property because they purchased Outlot A by warranty deed. Outlot A's western boundary, they contend, extends to the centerline of Section 13. The district court determined that the township established the road with a 66-foot right-of-way along the centerline of Section 13 in 1895, and that the "west 33 feet of the right-of-way was *purchased*" by the township. (Emphasis added.) As a result, the district court reasoned that "the undisputed facts demonstrate the westerly boundary of Outlot A stops 33 feet to the east" of the

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decline to address the point. *State, Dep't of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997) (declining to address a question absent adequate briefing); *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating appellate courts generally address only questions presented to and considered by the district court).

centerline of Section 13 (Government Lot 1's western boundary). As further evidence that the western boundary of Outlot A stops 33 feet short of the centerline, the district court declared that the "1956 plat of Fish Lake Shores confirms that Outlot A only extends 33 feet to the east of the [centerline] in the North half of Section 13." Similarly, the district court noted that Phaneufs' own surveys demonstrate that Outlot A's western boundary lies 33 feet east of Section 13's centerline. The district court concluded that there is no evidence that the Phaneufs had any ownership interest in the subject property. We disagree.

At oral argument, the Broughtons conceded that the road is an easement, and that the Phaneufs purchased their property subject to the easement. An easement does not convey an estate, title, or possession, but conveys only a right of use. *State v. Hess*, 684 N.W.2d 414, 420 (Minn. 2004); *Romans v. Nadler*, 217 Minn. 174, 181, 14 N.W.2d 482, 487 (1944).

The township argues that because the Fish Lake Shores plat and Phaneufs' own surveys show that the western boundary of Outlot A is 33 feet east of the Section 13 and road centerline, the Phaneufs are unable to establish a source of title in the subject property. But there is a presumption that landowners abutting a road own the fee underlying the road up to the middle of the street, subject to a public easement. *In re Robbins*, 34 Minn. 99, 101–02, 24 N.W. 356, 356–57 (1885).

Moreover, the evidence is ambiguous as to what the township purchased to create the road. No deeds exist in the record indicating that the township purchased the fee title to the 66-foot right-of-way. The road order requires the payment of damages to one of

the landowners affected by the establishment of the road, but does not specify whether those damages are for a purchase of the underlying property in fee, for use as an easement, or for some other reason. And the 1984 resolution for an inventory of the township's roads states that nearly all of the town roads have been established by dedication or prescription. The inventory itself describes the road as a "66.00 foot easement for public right of way purposes" and curving west.

The Fish Lake Shores plat also establishes that there are genuine issues of material fact regarding the Phaneufs' claim of title in the subject property. The dedication states that the Lehmans were "owners and proprietors of . . . *All* of Government Lot One." (Emphasis added.) The plat shows Government Lot 1's northern boundary as running east-west to the centerline of Section 13 and the road as platted. Outlot A is in the northernmost part of Government Lot 1 and shares its northern boundary with Government Lot 1. If the township owned the 33 feet to the east of the centerline in fee simple, the Lehmans would not be able to dedicate all of Government Lot 1. They would be limited to dedicating Government Lot 1 with a western boundary located 33 feet to the east of the centerline. Thus, contrary to the district court's determination, the dedication and plat does not clearly establish that Outlot A's western boundary is 33 feet to the east of the centerline. The Fish Lake Shores plat also measures Outlot A as "8.05 acres, more or less." The Phaneufs point out that to arrive at this measurement the western boundary of Outlot A must coincide with the centerline, because measuring Outlot A to exclude the right-of-way would yield only 7.016 acres.

The Phaneufs also dispute the township's and district court's interpretation of their surveys describing the subject property, claiming that the surveys are consistent with their contention that the subject property lies within Government Lot 1. The Phaneufs stated at the summary-judgment hearing that the surveys were submitted for illustrative purposes only. Illustrative evidence is admitted to illustrate, express, or clarify testimony. *State v. Stewart*, 643 N.W.2d 281, 293 (Minn. 2002). It is not substantive evidence. *See id.* (contrasting substantive and illustrative evidence, and explaining that substantive evidence is evidence offered to support a fact in issue); *Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458, 481–82 (Minn. App. 2006) (noting that the district court admitted evidence for illustrative, as opposed to substantive, purposes), *review denied* (Minn. Aug. 23, 2006). Therefore, reliance on these surveys to resolve the issue of the Phaneufs' claim of title in the subject property is misplaced.

On this record, we conclude that there are genuine issues of material fact regarding the Phaneufs' ownership interest in the subject property. The record, taken as a whole, could lead a rational factfinder to conclude that the Phaneufs have a claim of title in the subject property that is subject to an easement.[2]

[2] Because we conclude that there are genuine issues of material fact that preclude the district court's grant of summary judgment that the Phaneufs have a claim of title to the subject property as owners of Outlot A, we do not address the Phaneufs' alternative theory that they have a claim of title in the subject property as owners of property abutting a dedicated road.

B. Abandonment of All Right, Claim, and Interest in Property

"A presumption of abandonment arises if the party against whom the Act is invoked has failed to record its interest in the property within 40 years from the date that interest is established." *Foster v. Bergstrom*, 515 N.W.2d 581, 586–87 (Minn. App. 1994). Easements can be abandoned under the MTA. *Sampair*, 784 N.W.2d at 69. But the MTA does not "bar the rights of any person, partnership, or corporation in possession of real estate." Minn. Stat. § 541.023, subd. 6 (2012). "This standard requires use sufficient to put a prudent person on notice of the asserted interest in the land, giving due regard to the nature of the easement at issue." *Sampair*, 784 N.W.2d at 70.

Because the township failed to record its interest in the road, abandonment is presumed. But the township may rebut the presumption that it did not abandon the property by showing sufficient use. Whether the township sufficiently used the subject property is an issue of fact. *See Lindberg v. Fasching*, 667 N.W.2d 481, 487–88 (Minn. App. 2003) (remanding "[a] factual determination . . . as to whether the use of an easement would constitute adequate notice to put a prudent person on notice of . . . possession"), *review denied* (Minn. Nov. 18, 2003).

On appeal, the Broughtons and the township assert that township rebuts the presumption of abandonment, and emphasize that this issue was presented to the district court. But the district court did not consider whether the township abandoned or possessed the subject property. We decline to address this issue because we generally consider issues that were presented to *and* considered by the district court. *Thiele*, 425 N.W.2d at 582.

In sum, the district court erred by granting summary judgment based on the first requirement of the MTA and concluding that there are no genuine issues of material fact regarding whether the Phaneufs have a claim of title in the subject property. Accordingly, the district court erred by dismissing the Phaneufs' declaratory-judgment action and, trespass, destruction-of-property, and slander-of-title claims. Because of this error, we reverse and remand for further proceedings.

Reversed and remanded.