REAL PROPERTY LAW UPDATE
MINNESOTA SOCIETY OF PROFESSIONAL SURVEYORS
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INTRODUCTION

This presentation is a general review of recent developments in case law and legislation over the last year which impact the use and ownership of real property, which we feel are of some interest to surveyors. If you have further questions about these recent developments, please feel free to contact the authors.

I. CASE LAW UPDATE.

A. CONSTRUCTION.

Kariniemi v. City of Rockford, 863 N.W.2d 430 (Minn. Ct. App. 2015)

The City of Rockford entered into an agreement with a developer to build townhouses on land with the City. The agreement provided that the city would design and construct the various improvements (e.g. storm sewers, ditches, water-retention ponds, erosion control measures, and street grading). The agreement authorized the city engineer, amongst other things, to determine when improvements were satisfactorily completed. At the time of the agreement, the services of the city engineer were provided by a contract engineering company, Bonestroo, Rosene, Anderlik and Associates. Acting as city engineer, Bonestroo designed the storm drainage improvement for the development. The Kariniemis owned a home adjacent to the townhouse development. In May 2011, their property experienced flooding after a rainstorm and their home was damaged a result of the flooding.

Kariniemis sued the City alleging that (1) the City had been negligent by designing, approving, and constructing an inadequate storm-drainage system; (2) that the City's design and approval of the storm-drainage system created a nuisance. The district court granted the City's motion for summary judgment on the negligence claim on the grounds of immunity, but the district court denied summary judgment on the nuisance claim because the City had failed to raise immunity as a defense to the nuisance claim.

The key issues for the Minnesota Court of Appeals were does official immunity protect contractors retained to carry out governmental functions in construction design capacity, and if so, does that immunity extend to the City contracting with them.

As to the negligence claim, the Court of Appeals agreed with the district court in finding that both the contractor and the City were immune from negligent design claims under a theory of official immunity. Through citation to other cases, the Court of Appeals provided a detailed

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analysis into the question of official immunity extending to private individuals retained by a public body. As detailed by the Court of Appeals, the City elected to contract the function to Bonestroo and the City should not lose vicarious official immunity merely because it chooses to outsource some of its functions. The official immunity at issue in this case with regard to discretionary functions (like design) does not extend to ministerial functions (like the building labor). The Court of Appeals further emphasized that negligent installation or construction claims may be available even where negligent design claims are not.

As for the nuisance claim, the Court of Appeals found that the district court erred in denying the summary judgment against the Kariniemis on the basis that the City had failed to claim official immunity as a defense on that count in a timely fashion. The Court of Appeals found that the untimeliness cannot be used to bar an immunity claim because immunity raises an issue of subject matter jurisdiction which can be raised at any time.

Quinn v. Johnson, 2015 WL 4994664 (Minn. Ct. App. 2015)

Plaintiffs brought an action alleging trespass and negligence due to unreasonable diversion of surface waters onto their property. The parties owned adjoining lots on Gull Lake in Beltrami County and plaintiffs testified that historically, surface waters from lots in the immediate area naturally entered a drainage ditch and flowed into Gull Lake. In 2010, defendants purchased their lot and constructed a house, mound system, and driveway on the property; construction was complete by March 2011. Plaintiffs argued that the backfill of the house's basement caused surface waters to be diverted over onto plaintiffs'' property, causing extensive erosion of their shoreline, and killing mature trees on their property.

Defendants got summary judgment against plaintiffs when the district could held plaintiffs' claims were barred by the two-year statute-of-limitations provision in Minn.Stat. § 541.051, subd. 1(a). This statute applies to claims "arising out of the defective and unsafe condition of an improvement to real property." Minn.Stat. § 541.051. The Court of Appeals overturned, finding that the action was timely initiated under Minn.Stat. § 541.05, subd. 1(3), which is the six-year statute of limitations applicable to trespass.

In making this determination, the Court of Appeals noted that diversion of surface waters is appropriately addressed under the Reasonable Use Doctrine, which states:

> "if certain conditions are met, a landowner acting in good faith has the right to drain surface water and cast the water upon the burdened land of a neighbor. The conditions include1) there is a reasonable necessity for the drainage; 2) care is taken to avoid unnecessary injury to the burdened land; 3) the utility or benefit accruing to the drained land outweighs the gravity of the harm resulting to the burdened land; and 4) the drainage is accomplished by reasonably improving and aiding the natural drainage system, or if, in the absence of a practical natural drain, a reasonable and feasible artificial drainage system is adopted."

B. CONSTRUCTION / TRESPASS.

Apitz v. Hopkins, 863 N.W.2d 437 (Minn. Ct. App. 2015)

Lehns owned two adjacent lots in Itasca County described as Lots 2 and 3, Block 1, Bluffs of Shoal Lake. Lehns sold Lot 3 to Hopkins in 2006. When Lehns sold Lots 3 in 2006, the Lehns agreed to convey to Hopkins an access easement across Lot 2, the parcel the Lehns were retaining. However, the deed from Lehns to Hopkins failed to include the easement in favor of Hopkins.

Lehns sold their remaining parcel, Lot 2 to Nash in 2007. To correct the error in failing to create an easement to benefit Hopkins, when Lehns sold Lot 2 to Nash, they reserved an easement to themselves in Lot 2 which they then conveyed to Hopkins. The following clause was used to create the easement:

> Reserving unto the Grantors [Lehns], their heirs and assigns, an exclusive easement for ingress, egress and utility purposes over, under and across the East 33 feet of Lot 2, Block 1, Bluffs of Shoal Lake for the benefit of Lot 3, Block 1, Bluffs of Shoal Lake.

Nash then sold Lot 2 to Brauer in 2008. Brauer sold Lot 2 to Apitz in 2012. After Apitz purchased Lot 2, Hopkins as owner of Lot 3, attempted to exclude Apitz from the easement property by erecting a fence and posting "private drive" signs.

Apitz brought an action seeking a judgment that Hopkins could not exclude them from reasonable use of the easement. The district court granted summary judgment to Hopkins based on the district court's interpretation of the term "exclusive easement" to mean that the Hopkins had the right to exclude Apitz from the easement property. Apitz, as owner of the Lot burdened by the property, appealed the district court's determination that they were not entitled to use the easement that ran over and across their property.

The issue for the Minnesota Court of Appeals was whether an "exclusive easement for ingress, egress, and utility purposes" grant the easement owner the right to exclude the owner of the servient estate from the easement property.

In the published opinion, the Court of Appeals explained that while generally the grant of an easement over land does not preclude the grantor from using the land in a manner not unreasonably interfering with the special use for which the easement was acquired. However, the Court of Appeals found the easement language "exclusive easement" ambiguous and subject to multiple meanings. The Court of Appeals remanded the case to the district court to make a factual determination regarding the intent of the original parties to the easement (i.e. Lehn and Nash) as demonstrated by the language used to create the easement and by extrinsic evidence that demonstrates their intent.

C. FORECLOSURE.

CitiMortgage, Inc. v. Kraus, 2015 WL 134180 (Minn. Ct. App. 2015).

This case was one of many foreclosure challenges discussed by the Court of Appeals during 2015, and is notable for the strength of its language concerning the foreclosed owners' counsel, whose license has been suspended. Here, the challenges were raised as a defense to a post-foreclosure eviction action, despite the fact that in Minnesota the validity of a foreclosure proceeding cannot be an issue in an eviction action. Additionally, the challenges raised had been previously litigated without success in the federal courts.

The District Court's opinion included the following language:

> On appeal, the Krauses' counsel raises legal arguments that were dismissed with prejudice by the federal district court and affirmed by the Eighth Circuit Court of Appeals. *After a careful review of the record, we conclude that these arguments are without any legal or factual support . . .*
>
> The Krauses' counsel has *unsuccessfully asserted similar legal arguments in a number of mortgage-foreclosure appeals*. When he was asked at oral argument why he continued to file appeals rehashing claims that have not gained any traction, he replied that we have not yet rejected his arguments in a published case. But we do not publish opinions where the law is clear and settled.
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> The Krauses' counsel also *misrepresented the record before the district court*. In his principal brief, he alleged that the district court failed to stay the proceedings pending the resolution of a Torrens action that the Krauses had commenced in another forum. But at oral argument, he conceded that the Krauses had not started a Torrens action to support their request for a stay of the eviction proceeding pending resolution of a separate active action challenging the foreclosure.
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> In light of the record before us, the meritless legal arguments made by the Krauses, and the lack of any ambiguity in controlling law, we adopt the language of our supreme court in Schuneman v. Tolman . . . : *"[The Krauses'] appeal in this case is one of the most frivolous that has ever been presented to this court, and the questions raised are not entitled to any discussion whatever*. The judgment appealed from stands affirmed."

(Emphasis added) The Court's strong language is likely the result of having to deal with a large number of similar matters.

D. LIENS

T & R Flooring, LLC v. O'Byrne, 2015 WL 4528693 (Minn. Ct. App. 2015)

In this mechanic's lien case, various subcontractors sought to foreclose their mechanic's liens. The homeowners contended that the liens were invalid because no prelien notice was

served. The subcontractors pointed to Minn. Stat. § 514.011, subd. 4(a), which provides that no prelien notices are required if the owners were acting as the contractors. The owners tried to argue that the husband, not the wife, was acting as the contractor, so while he didn't need to receive prelien notice, the failure to give notice to the wife rendered the liens unenforceable. The court ruled that prelien notice need not be served on every person with an interest in the property but must be served on someone with an ownership interest. An owner's knowledge of the property improvements can be imputed to others with an ownership interest

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E. TITLE

In re Fischer Sand & Aggregate, LLP, 2015 WL 1128658 (Minn. Ct. App. 2015)

Fischer Sand & Aggregate brought a Torrens proceeding to register certain parcels it owned. An adjacent neighbor contested the boundary line, contending that an old fence line marked the observed boundary between the parcels. But the court found the line to be uncertain given the scatted posts and the overall decrepit state of fence. The court also rejected the neighbor's argument that the legal description of the land was ambiguous because it did not reference the fence.

F. MISCELLANEOUS

Strelow v. Winona Steamboat Days Festival Association, 2015 WL 5511451 (Minn. Ct. App. 2015)

Strelow was attending the Winona Steamboat Days Festival listening to a band play on stage in the "beverage garden." The band went on break and a Winona radio station began tossing t-shirts and Frisbees from the stage; the Frisbees had tickets to the Minnesota Zoo taped to them. As she went to catch a Frisbee, Strelow fell and fractured her shoulder. She claimed she tripped over large extension cords and sued the Festival for negligence. The court rejected the claim, noting that there were no hidden hazards that would have made the beverage garden more dangerous than it otherwise appeared. The activities occurring were obvious; Strelow was aware that Frisbees were being thrown in a crowded parking lot at dusk. There was no evidence that respondent should reasonably have foreseen that these conditions, even if hazardous, might cause Strelow injury. The Festival owed no duty to protect or warn against those conditions.

II. LEGISLATIVE UPDATE

A. SURVEYING.

Effective August 1, 2015, numerous amendments were made so as to clarify various state statutes governing public and private land surveying. The changes cleaned up language, made technical clerical changes, and provided consistent terminology across the statues. Affected statutes include:

Minn. Stat. § 160.15, subds. 1 and 4
Minn. Stat. § 358.47
Minn. Stat. § 381.12
Minn. Stat. § 389.09, subd. 1
Minn. Stat. § 505.021, subds. 1, 5, 7 and 9
Minn. Stat. § 505.04
Minn. Stat. § 507.093
Minn. Stat. § 505.1792, subd. 1
Minn. Stat. § 508.47, subd. 4
Minn. Stat. § 508A.47, subd. 4

The specific changes include:

- Clarification of terms used in perpetuation of corners, ties, monuments, certificate of location of government corner, and licensed land surveyor.
- Coordination of references to drainage and utility easements.
- Exceptions to recording standards for registered land surveys and plats regardless of whether a notary stamp was used.
- Clarification of what is being certified to when a county surveyor approves a plat.
- Standardization of clerical requirements for plats.
- Repeal of language related to preserving section or quarter-section corners and approval of plats, surveys, and condominium plats.

B. FORECLOSURE BY ADVERTISEMENT.

Minnesota is one of the states that allows foreclosure by advertisement, i.e., foreclosure of a mortgage without a lawsuit. *See, generally,* Minn. Statutes Chapter 580. To initiate a foreclosure by advertisement, the holder of a lender's interest must advertise the sheriff's sale of the property. *Id*. The advertisements are expensive, and a borrower looking to avoid foreclosure by reinstating the mortgage must reimburse the foreclosing party for their cost.

Historically, foreclosing parties have been able to advertise in any "qualified newspaper, and except as otherwise provided by law, in one that is likely to give notice in the affected area or to whom it is directed." Minn. Stat. § 331A, Subd. 1. In 2011, an order was entered in an Olmsted County District Court case holding that it was not "likely that a newspaper [the Stewartville Star] with a circulation of approximately one thousand issues that purports to serve six communities outside and to the southeast of the City of Rochester . . . would be likely to give notice to . . . a resident living in, Northwest Rochester." *Furlow v. HSBC Bank USA et al.*, Olmsted County Court File 55-CV-11-928.

In response to concerns raised by this case, the Minnesota Legislature passed a statute in 2015, Minn. Stat. Ann. § 580.033, that sets forth exactly which newspapers are qualified for the purpose of advertising foreclosures:

> Subdivision 1. Location of qualified newspaper. For purposes of this chapter, publication of the notice of sale is sufficient if it occurs:(1) in a qualified newspaper *having its known office of issue located in the county where the mortgaged premises,* or some part of the mortgaged premises *are located*; or(2) in a qualified newspaper having its known office of issue *located in an adjoining county, if the publisher of the newspaper states,* in the sworn affidavit of publication required by section 331A.07, *that a substantial portion of the newspaper's circulation is in the county where the mortgaged premises, or some part of the mortgaged premises are located*. In all cases, the affidavit of publication must state the county where the newspaper's known office of issue is located and that the newspaper complies with the conditions described in clause (1) or (2).
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> Subd. 2. Definitions. As used in this section, "known office of issue" is defined as provided in section 331A.01, subdivision 2, and "qualified newspaper" is defined as provided in section 331A.01, subdivision 8.

Minn. Stat. Ann. § 580.033 (West) (emphasis added).

C. SAFE AT HOME.

The Safe at Home Program is an address-confidentiality program available to Minnesota residents who fear for their own safety, or a member of their household's safety, because of actual or threatened domestic violence, sexual assault, or stalking. The Program went into effect in 2007 and is administered by the Secretary of State.

The Program works by enabling state and local agencies to respond to data requests without disclosing the address of a Program participant. Participants use an address designated by the Secretary of State as a substitute mailing address for all purposes.

About 600 Minnesota households are enrolled in the Program, and about 1,500 individual participants. About 12 of these households are homeowners.

2013 saw the Legislature add a new section to the Minnesota Government Data Practices Act to prevent the dissemination of identity and location data of a Program participant by counties and

other government entities. 2014 amended some of those new provisions. The 2013/2014 changes are significant to real estate attorneys because they affect the integrity and reliability of Minnesota's county land records (the Recording system), and the ability of participants to acquire or convey Minnesota real estate or to use real estate that they own as collateral.

While the statutory updates are commendable in their purpose, as enacted, they conflict with and override other Minnesota statutes, including those that require recorders and registrars to index the names of individuals that appear in recordable documents and to make those documents public.

Prior amendments in 2014 were aimed at addressing some of these problems while preserving the protection they offered. For example, each county is now required to establish a procedure to handle documents to be recorded for a program participant: That procedure shall include a process for masking or hiding the identity or location of the program participant and preventing the unauthorized disclosure of his or her location; but it shall also provide public notice of the existence of a private document. The process may include the establishment of separate lists or indices of documents that are private; but the recorded notice of a private document is deemed constructive notice of the document.

In 2015, the statute was to expand its protections from those who are "involved in a legal proceeding as a party or witness," to "anyone protected under section 5B.05" from being:

> "compelled to disclose the participant's actual address during the discovery phase of or during a proceeding before a court or other tribunal unless the court or tribunal finds that: (1) there is a reasonable belief that the address is needed to obtain information or evidence without which the investigation, prosecution, or litigation cannot proceed; and (2) there is no other practicable way of obtaining the information or evidence."

Also the statute was changed to

> "provide the program participant with notice that address disclosure is sought and an opportunity to present evidence regarding the potential harm to the safety of the program participant if the address is disclosed. . . . In determining whether to compel disclosure, the court must consider whether the potential harm to the safety of the participant is outweighed by the interest in disclosure."

The statute provided that protective orders would continue to be available:

> "Nothing in this section prevents the court or other tribunal from issuing a protective order to prevent disclosure of information other than the participant's actual address that could reasonably lead to the discovery of the program participant's location."

See: PUBLIC SAFETY—GENERAL AMENDMENTS, APPROPRIATIONS, 2015 Minn. Sess. Law Serv. Ch. 65 (S.F. 878) (WEST)

D. BUFFER ZONE

Chapter 103F constitutes the water law of Minnesota and under section 103F. 48, the legislature enacted new guidelines for buffers on riparian lands. The purpose of the new buffer law is to establish riparian buffers to (1) protect state water resources from erosion and runoff pollution; (2) stabilize soils, shores, and banks; and (3) protect or provide riparian corridors.

"Buffer" means an area consisting of perennial vegetation, excluding invasive plants and noxious weeds, adjacent to all bodies of water within the state and that protects the water resources of the state from runoff pollution; stabilizes soils, shores, and banks; and protects or provides riparian corridors.

The width of a buffer must be measured from the top or crown of the bank. Where there is no defined bank, measurement must be from the edge of the normal water level.

KEY PROVISIONS

- Buffers apply to landowners owning property adjacent to a water body identified and mapped on a buffer protection map.

- By November 1, 2017—buffers must be in place on lands adjacent to public waters as identified and mapped on a buffer protection map. Counties and municipalities will be required to ensure public shore lands have an average buffer of 50 feet (with a minimum 30 foot width) or the landowner must follow the state shore land standards and criteria adopted in section 103F.211, whichever is more restrictive.

- November 1, 2018—buffers must be in place on lands adjacent to ditches within the benefitted area of public drainage systems as identified and mapped on a buffer protection map.

- Alternative water quality practices, or combination of practices, may be used to sufficiently meet water quality goals, if the property is farmed. In these instances, buffers may not be needed.

PENALTIES

- Landowners found in violation will have 11 months to correct the issue before being subject to a civil penalty up to $500.

- Soil and water conservation districts are required to assist with the implementation of the requirements. The state may withhold funding from a local water management authority or a soil and water conservation district that fails to enforce the law.

EXEMPTIONS

- Land enrolled in the federal Conservation Reserve Program (CRP).
- Public or private water access or recreational use area.
- Area covered by a road, building or other structures.

- Temporary non-vegetated condition due to drainage tile installation and maintenance, seeding, conservation project constructions.
- Municipalities or others in compliance with federal and state sewer or storm water law.

VIII. CONCLUSION.

If you have questions regarding these materials, please feel free to contact the authors. Thank you very much.

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