

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0692**

Ellen Kalahar-Grissom,
Appellant,

vs.

Marvin W. Stroschein, et al.,
Respondents.

**Filed March 8, 2021
Affirmed in part, reversed in part, and remanded
Slieter, Judge**

Morrison County District Court
File No. 49-CV-17-1071

Rory C. Mattson, Lauren M. Hoglund, Messerli & Kramer, P.A., Minneapolis, Minnesota
(for appellant)

Jonathan D. Wolf, Rinke Noonan, St. Cloud, Minnesota (for respondents)

Considered and decided by Slieter, Presiding Judge; Jesson, Judge; and Cochran,
Judge.

NONPRECEDENTIAL OPINION

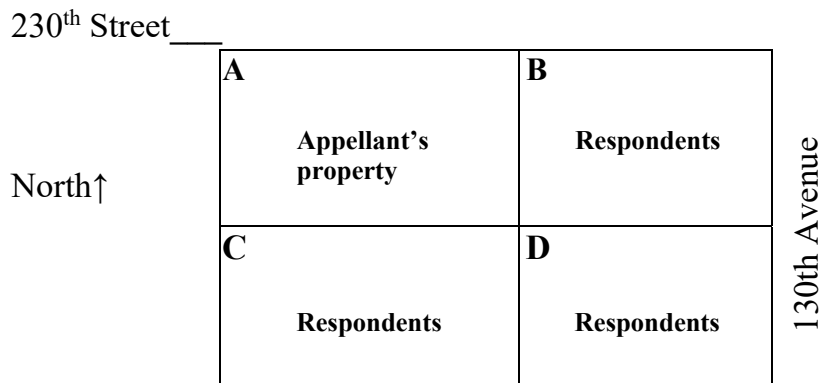
SLIETER, Judge

Following summary-judgment motions from both parties, appellant challenges the district court’s denial of her motion and the granting of respondents’ motion. Because genuine issues of material fact exist regarding the “continued and apparent use” and “necessity” of the claimed implied easement to the property by appellant, we reverse the

district court’s grant of summary judgment to respondents and affirm its denial of summary judgment to appellant.

FACTS

Appellant Ellen Kalahar-Grissom and respondent Marvin W. Stroschein are siblings. In 1993, their mother conveyed the northwest quarter of a section (640 acres) of property located in Darling Township, Morrison County, to appellant via two separate quitclaim deeds:¹



The first deed conveyed the northern half of appellant’s property, and the second deed conveyed the southern half of appellant’s property. The second deed stated that the conveyance was “subject . . . to a 33 foot wide easement for ingress and egress across the existing roadway running generally east and west across the middle of [the property] from the East line of [the property].” This is the line that runs horizontal through the middle of the property in the diagram above.

¹ This image is not to scale and is intended only to provide the reader with a sense of the areas in dispute.

After being denied access to her property through this easement, appellant sued respondents alleging this easement language established her rights to an express or implied easement through the property. *See Kalahar-Grissom v. Stroschein*, A18-1135, 2019 WL 510055 (Minn. App. Feb. 11, 2019). Our court reversed the district court’s conclusion that this language created an express easement to appellant, determining that the language instead reserved an express easement for mother. *Id.* We remanded, however, for additional proceedings regarding whether appellant possessed an implied easement.² *Id.*

Appellant claims an implied easement on a path running from 130th Avenue in the east along the boundary line between parcels B and D, continuing along the border between parcels A and C. *Id.* at *1-2.

On remand, the parties filed competing motions for summary judgment. The district court determined that appellant alleged “no facts” to establish that an implied easement existed at the time she received the property from her mother. Therefore, the district court granted summary judgment in favor of respondents, denied appellant summary judgment, and dismissed all claims.³ This appeal follows.

² Because it determined that their mother possessed an express easement, the district court did not address appellant’s claim to an implied easement.

³ Appellant also claimed nuisance and breach of quiet enjoyment and respondents claimed adverse possession. All such claims were dismissed, as the district court through its summary-judgment ruling determined that appellant had no easement rights.

DECISION

Appellant argues that the district court did not consider evidence alleged in the summary-judgment record which she believes established “continued and apparent use” and “necessity” of the alleged easement property as required to create an implied easement.

Summary judgment is appropriate if “there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.” Minn. R. Civ. P. 56.01. Appellate courts review *de novo* whether a genuine issue of material fact exists or whether the district court erred in its application of the law. *See Montemayor v. Sebright Prod., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017). “[T]he moving party has the burden of showing an absence of factual issues, and the nonmoving party has the benefit of that view of the evidence most favorable to [it].” *Id.* (quotations omitted). “All doubts and factual inferences must be resolved against the moving party.” *Id.* (quotation omitted).

In considering whether an implied easement exists, our court examines three factors:

(1) a separation of title; (2) the use which gives rise to the easement shall have been so long continued and apparent as to show that it was intended to be permanent; and (3) that the easement is necessary to the beneficial enjoyment of the land granted.

Lake George Park, LLC v. IBM Mid-Am. Emps. Fed. Credit Union, 576 N.W.2d 463, 465 (Minn. App. 1998), *review denied* (Minn. June 17, 1998). We are to look at the factors as they existed at “the time of severance.” *Id.* “Except for the necessity requirement, [the other] factors are only aids in determining whether an implied easement existed.” *Clark v. Galaxy Apartments*, 427 N.W.2d 723, 726 (Minn. App. 1988). “Necessity” means that the

easement be “more than mere convenience.” *Id.* at 727. The party asserting an implied easement exists has the burden of establishing necessity. *Id.*

The parties do not dispute, and the record establishes, that the first factor, (1) separation of title, exists. The parties dispute the remaining two factors: (2) whether use of the alleged easement property was “so long continued and apparent as to show that it was intended to be permanent,” and (3) whether the alleged easement property was “necessary” to access appellant’s property at the time of separation. *Id.* Because genuine issues of material fact exist for each contested factor, summary judgment is inappropriate.

Continued and Apparent Use

To establish “continued and apparent” use of the easement property, appellant submitted an affidavit from district court Judge Douglas Anderson who was the attorney that drafted the land-transfer deeds in 1993.⁴ Anderson states that “based on his review and recollection . . . it was the intent of [their mother] to maintain access to the parcel to the West that she conveyed to [appellant], and that *[their mother’s] family had always used the ‘existing road’* to [access the parcel] in the past.” (Emphasis added.) The ‘existing road’ refers to the easement property. He added that the easement “was the only practical means of ingress and egress to [appellant’s] Parcel, and [their mother] intended to maintain access by way of the ‘existing road’ because that is how she and her family had always accessed [appellant’s] Parcel.” Anderson believes that it was the mother’s “intent” to provide an ingress and egress “so the property would not be landlocked.” He concluded,

⁴ Judge Anderson was a district court judge in Morrison County from 2008 until his retirement in 2018, and was retired at the time of his affidavit.

“it was generally accepted and understood among the family that the [easement land] was how [appellant’s] parcel would be accessed.”⁵

Appellant also submitted her own answers to respondents’ interrogatories. In response to a question asking if she used the easement property on or prior to 1993, she indicates that “prior” to the conveyance she used “the land” for “hayrides, deer hunting, sighting in rifles, snowmobiling, rounding up cows that escaped the pasture (from the SE quarter of [the property]), and picking lilacs near the homestead on the NE corner of [the property].” She states that she “has used the entire portion of the easement, as have other family members, most notably during the deer hunting season traveling to deer stands, from cabin to cabin, or when looking for deer.” She also indicated family members have used the easement “numerous” times, though she does not specify a timeline for this latter use.

Respondents argue that appellant’s responses to the interrogatories are vague as to the timeframe of usage and description of the alleged easement and, therefore, do not establish facts to support a finding of “continued and apparent use” at the time of severance—when the 1993 deeds were finalized. Additionally, they presented an affidavit from respondent Marvin W. Stroschein which states that appellant “never” used the purported easement land because it was “unpassable” as it was a swamp or wetland. He

⁵ Respondents argue that Anderson’s affidavit is inadmissible hearsay and, hence, ought not be considered for summary judgment. Affidavits in support of or against summary judgment should be “made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on matters stated.” Minn. R. Civ. P. 56.03(d). Some of Anderson’s testimony is apparently related to his recollection of the grantor’s intent but he also speaks to his own recollections. In addition, the deed, which has been recorded, includes the easement language and supports appellant’s claim as to how the parcel was accessed.

also asserts that rather than using the purported easement land to access her property, appellant had their permission to use (and actually did use) a different path through respondents' property to access her land.

Respondent Marvin W. Stroschein's spouse indicated in an affidavit that she had "never" seen anyone use the easement property and that appellant and family members had always used an alternative path to access various parts of the larger property. Affidavits from two family friends also state that they observed appellant using the alternative path but "never" observed appellant using the alleged easement land.

We first recognize that, pursuant to *Clark*, "continuous and apparent use" of the easement property, while it is to be "considered," is not required to establish an implied easement. 427 N.W.2d at 726. This suggests that a failure by the non-moving party to present genuine issues of material fact regarding this factor is not fatal. However, the record reflects that both parties presented evidence of use, and non-use, of the easement property. Moreover, our court's previous decision concluded that the mother created an express easement for herself on the same property that appellant now claims an implied easement. *Kalahar-Grissom*, 2019 WL 510055, at *5. Therefore, that some of appellant's answers to interrogatories do not establish specific timelines is not fatal to her easement claim and must be resolved by the fact finder. In sum, the record establishes genuine issues of material fact as to the "continuous and apparent use" of the claimed easement.

Necessity

As evidence of "necessity," appellant submitted a township order from 1985. This order granted the request of the landowner located immediately to the west of appellant's

property, to vacate a road (230th Street) that ran along the northern edge of that landowner's property. The record reveals that 230th Street was, at some point in time prior to this township order, the only public road which provided access to this property from the west. This is evidence that an easement was "necessary" to access the property from the east. An affidavit from appellant's son indicates that, without reference to a time frame, he has "never" used 230th Street to access the property as the road does not extend all the way to the property.

Respondents provided a township resolution from 1994 which purportedly shows that 230th Street was never vacated. This resolution indicates that "[n]early all of the township roads have been established by use and/or prescription or by dedication" and that "easements for township roads and road right-of-ways listed on the attachment" would become the center lines of the roads. (Emphasis added.) The resolution, which lists all roads affected, also indicates that the portion of 230th Street along the northern boundary of the neighboring property was specifically recognized as an easement road. Respondents assert this establishes that the easement was not necessary to access appellant's property.

The presence of the 1985 and 1994 township orders, which may be in conflict, create a disputed fact issue as to whether 230th Street was indeed vacated. Because "necessity" is a required element to establish an implied easement, and because there are genuine issues of material fact regarding this element, summary judgment was improper.

We conclude that summary judgment for either party was inappropriate because genuine issues of material fact exist as to "necessity" and "continuous and apparent use." For this reason, we affirm the district court's denial of appellant's motion for summary

judgment and reverse its decision granting respondents' motion for summary judgment. Additionally, dismissal of the parties' nuisance, quiet enjoyment, and adverse possession claims must be reversed, as these claims may proceed if the district court concludes that an implied easement does exist.

Affirmed in part, reversed in part, and remanded.