

A06-2311

STATE OF MINNESOTA

IN COURT OF APPEALS

Raymond R. Pierce and Linda
Pierce, husband and wife

Appellants,

vs.

Blume Law Firm, PC

Respondent

APPELLANTS' REPLY BRIEF

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ARGUMENT

I. **APPELLANTS ARE NOT COLLATERALLY ESTOPPED FROM VACATING THE ARIZONA JUDGMENT IN MINNESOTA.**

Respondent agrees that the primary issue in this case is whether Appellants should be collaterally estopped from challenging the Arizona judgment in Minnesota. (See Respondent's Brief, p. 2.) Minnesota courts employ a standard four-part legal analysis to determine whether collateral estoppel applies.¹ See e.g. Ellis v. Minneapolis Comm'n on Civil Rights, 319 N.W.2d 702, 704 (Minn. 1982). In addition, Minnesota courts also look to the equities when deciding whether to apply collateral estoppel. Colonial Ins. Co. of California v. Anderson, 588 N.W. 2d 531, 533 (Minn. App. 1999) (collateral estoppel is an equitable doctrine); see Jack Faucett Assocs., Inc. v. American Tel. & Tel. Co., 744 F.2d 118, 126 (D.C. Cir. 1984) (Where there is substantial unfairness, application of offensive collateral estoppel is an abuse of discretion.)

As the following discussion shows, neither the law nor equities support application of collateral estoppel. As a result, Respondent's arguments to contrary are without merit.

A. **Collateral Estoppel Does Not Apply Because The Issue Of Personal Jurisdiction Was Never "Actually Litigated."**

Collateral estoppel will not apply unless an issue has been "actually litigated." McBroom v. Al-Chroma, Inc., 386 N.W.2d 369, 374 (Minn. App. 1986). Respondent agrees that the issue of personal jurisdiction was never actually

¹ The elements of collateral estoppel are: (1) the issue sought to be raised is identical to one in a prior adjudication; (2) there was a final judgment on the merits in the prior proceeding; (3) the estopped party was a party or in privity with a party to the prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue. Ellis, 319 N.W.2d at 704.

litigated in Arizona. Nevertheless, Respondent maintains this Court should still apply collateral estoppel because: (1) the Arizona Court implicitly ruled on the issue of personal jurisdiction by entering judgment; and (2) the Arizona Court entered its default judgment after Appellants raised the defense in their Answer. As shown below, both of these arguments must fail.

1. **Minnesota Law Requires That A Foreign Court Actually Address An Issue Before Collateral Estoppel Will Apply.**

Respondent asserts that the Arizona Court implicitly ruled on the issue of personal jurisdiction by entering judgment. (Respondent's Brief, p. 3.) While this might be literally correct, this court has refused to apply collateral estoppel in an identical circumstance. In Wright v. Mohs, 364 N.W.2d 848 (Minn. App. 1985), this Court found that while a foreign court might have "implicitly" found personal jurisdiction when it entered judgment, collateral estoppel did not apply because the record showed the foreign court had not actually addressed the issue:

Implicitly, the Tennessee court found that it had personal jurisdiction over the parties since it entered a judgment. However, the Tennessee court did not address this issue. The Minnesota court's affirmative finding that the Tennessee court properly had personal jurisdiction over the parties is not substantiated in the record.

Wright, 364 N.W.2d at 850. This Court emphasized again its requirement that a foreign court actually consider an issue before applying collateral estoppel in Lyons Financial Services, Inc. v. Waddill, 625 N.W.2d 155(Minn. App. 2001). In Lyons, a California court had specified, in its judgment, that it had made a "substantive ruling" on the issue of personal service. Lyons, 625 N.W.2d at 158. Notwithstanding this statement, this Court examined the record, found there was nothing to show that the California Court had indeed considered the issue, and then refused to apply collateral estoppel. Id.

The undisputed record shows the Arizona Court never considered the issue of personal jurisdiction. Indeed, it did not even consider the merits; otherwise it could not have found Appellants liable on a promissory note they never signed. In any event, the Arizona Court's failure to address the issue of personal jurisdiction precludes application of promissory estoppel.

2. **The Arizona Court's "Default" Judgment Does Not Have Collateral Estoppel Effect.**

Citing one New York case from the 1970's, Respondent argues that the Arizona Court's "default" judgment should have collateral estoppel effect because Appellant raised the defense in its Answer. (Respondent's Brief, pp. 5-6, quoting L & W Air Conditioning Inc. v. Varsity Inn of Rochester, Inc., 371 N.Y.S.2d 997 (NY Sup.Ct. 1975)). This argument is contrary to Minnesota law, the Restatement, and case law of other jurisdictions.

In Wright v. Mohs, *supra*, the defendant had, like Appellants, asserted the lack of personal jurisdiction in the foreign court. Wright, 364 N.W.2d at 849. Like the Arizona Court in our case, the foreign court in Wright entered judgment without considering the defendant's personal jurisdiction arguments. Id. Focusing on the fact that the foreign court did not address the issue of personal jurisdiction, the Wright Court declined to apply collateral estoppel and allowed the defendant to vacate the foreign judgment. Id., at 850.

Respondent's assertion that a default judgment is given collateral estoppel effect has been overwhelmingly rejected. The Restatement (Second) of Judgments § 27 Comment e (1982), provides, in relevant part, that "[i]n the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated. Therefore, the rule of this Section does not apply with respect

to any issue in a subsequent action." Similarly, the Seventh Circuit Court of Appeals, citing the above, ruled that "a default judgment is not a proper basis for collateral estoppel." Grip-Pak, Inc. v Illinois Tool Works, Inc., 694 F2d 466, 469 (7th Cir 1982); see also Matter of Cassidy, 892 F2d 637, 640 n 1 (7th Cir 1990) ("default judgments do not have collateral estoppel effect"); In re Brink, 27 Bankr 377, 379 (Bankr W D Wis 1983) ("Where the prior judgment was procured by default, the relevant issue has not been actually litigated"); In re Anderson, 49 Bankr 655, 656 (Bankr W D Wis 1984) ("A default judgment is not an adjudication on the merits for collateral estoppel purposes because it is not the result of actual litigation").

In conclusion, the fact that the Arizona Court never considered the issue of personal jurisdiction prevents application of collateral estoppel.

B. The Equities Preclude Application of Collateral Estoppel.

Along with being legally unwarranted, application of collateral estoppel would also be manifestly unfair. Respondent's gripes about Appellants' conduct of the Arizona lawsuit belie one undisputable fact -- that Respondent obtained judgment against Appellants by lying to the Arizona Court. Respondent has never disputed Appellants' affidavit testimony that they received no legal services from Respondent, did not sign the promissory note and did not guarantee their son's obligations to Respondent in any way. (See R.Pierce Aff., ¶¶9-19.) Nevertheless Respondent falsely represented to the Arizona Court, in a verified statement served with its motion for summary judgment, that Appellant Ray Pierce had signed the promissory note:

"A valid promissory note and security agreement was entered into by Jason Pierce **and Raymond Pierce** for the payment of a principal sum of \$28,000.00 . . . "

(Plaintiff's Separate Statement of Material Fact, ¶1, submitted as Defendants' Exhibit 8 (emphasis added).)²

The Arizona Court compounded Respondent's misrepresentation by failing to make even a cursory examination of the record, which would have revealed that Appellants had not signed the promissory note.³ In light of Respondent's false representations, the Arizona court's inattention and the fact that the required elements of collateral estoppel are not present, application of promissory estoppel would be inequitable and contrary to law.

II. ARIZONA DID NOT HAVE PERSONAL JURISDICTION OVER APPELLANTS.

Three factors must exist before an Arizona Court has jurisdiction over a non-resident: (1) The nonresident defendant must "purposefully avail" himself of the privilege of conducting activities in the forum; (2) [t]he claim must be one which arises out of or results from the defendant's forum-related activities; and (3) exercise of jurisdiction must be reasonable. Williams v. Lakeview Co., 199 Ariz. 1, 3, ¶ 7, 13 P.3d 280, 282 (2000); see discussion and further citation in Appellants' Brief, pp. 12-13. All three of these factors must be present otherwise personal jurisdiction does not exist. Omeluk v. Langsten Slip & Batbyggeri A/S, 52 F.3d 267, 270 (9th Cir. 1995).

² Respondent's Arizona Complaint also alleged that the Note was enforceable against Raymond Pierce and he breached the note by failing to make the payments. (See Arizona Complaint, ¶¶14, 16.)

³ Respondent attached the Promissory Note as Exhibit1 to its Arizona Complaint, which in turn was submitted by Appellants as Defendant's Exhibit 4.

A. **Respondent's Arizona Lawsuit Does Not Arise Out of or Relate To Appellants' Contacts With Arizona.**

Respondent focuses on the "purposeful availment" factor and devotes only one sentence to the required connection between its cause of action and Appellants' contacts with Arizona:

2. The claim must be one which arises out of or results from the defendant's forum-related activities; (the repossession of the motorcycle that, on the title was signed to be transferred by Raymond Pierce) . . .

Respondent's Brief, p. 11-12. Respondent's argument is indecipherable. This is because it is simply impossible to connect Appellants' March 2000 motorcycle purchase to Respondent's claims against their adult son which did not arise until nearly four years later. (See arguments in Appellants' Brief at pp. 10-13.)

B. **Respondent Cannot Show Purposeful Availment.**

Given the absence of any connection between Appellants' contacts with Arizona and Respondent's Arizona claims, the issue of purposeful availment is moot. In any event, Respondent provides neither coherent argument nor legal authority to support its claim that Appellants' contacts with Arizona suffice to constitute a purposeful availment.

It is necessary, however, to correct Respondent's characterization of the record. At several points in its argument, Respondent maintains Appellants used an Arizona address on the financing paperwork for the motorcycle. (See Respondent's Brief, p. 3, 8.) This is incorrect. The Installment Sales Contract and Security Agreement for the motorcycle list Appellant Raymond Pierce's current Minnesota address. (See Defendants' Exhibit 1.) Respondent also alleges, at various points in its arguments, that Raymond Pierce attempted to transfer title by signing the reverse of the title. (Respondent's Brief, p. 3,9, 11-12.) How this

allegation supports Respondent's arguments is unclear. In any event, the allegation is inaccurate. Appellants' unopposed affidavit testimony states that Raymond Pierce's signature was forged See Raymond Pierce Supplemental Affidavit, ¶2-3; Defendants' Supplemental Exhibit A. Moreover, Respondent acknowledged, during the Arizona proceedings, that the signature was a forgery:

Also attached as Exhibit 7 is an affidavit of Raymond Pierce stating he has never signed the title over. While this is not specifically pertinent to the Rule 60 motion, it is indicative of the character of Jason Pierce.

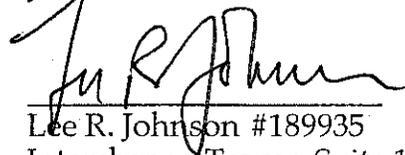
Respondent's Arizona Court Response to Motion to Vacate Judgment, p. 8, lines 22-26, submitted as Defendants' Reply Exhibit B.

CONCLUSION

Based on the above, and the arguments in their primary brief, Appellants Raymond and Linda Pierce respectfully request that this Court reverse the district court's denial of their motion to vacate and grant Appellants' motion to vacate the Arizona judgment because that Court lacked personal jurisdiction.

Dated: February 20, 2007.

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