

STATE OF MINNESOTA
IN SUPREME COURT

Kevin E. Burns,

Petitioner

DOCKET NO. A-09-466

TAX COURT DOCKET NO. 07929-R

v.

Commissioner of Revenue,

Respondent

PETITIONER'S INFORMAL REPLY BRIEF

Kevin E. Burns ("Petitioner") and Barbara R. Burns ("Attorney in Fact"¹) hereby respond to the Respondent's Brief, served upon the Petitioner on May 3, 2010. The Petitioner will respond to new issues raised by the Respondent ² on brief in the order in which the Respondent has raised them.

RESTATEMENT OF THE CASE

This matter is before the Minnesota Supreme Court on petition of Kevin E. Burns and Barbara R. Burns ("collectively "Burns"). It arises from an appeal to the Minnesota Tax Court that was taken in response to a decision by the Minnesota Department of Revenue to challenge a Homeowners' Tax Refund issued to Barbara Burns on or about September 30, 2004.

The Minnesota Tax Court properly held that the appeal was taken by two appellants, Kevin E. Burns and Barbara R. Burns. The Tax Court denied two pre-trial motions by the Attorney General for designation of Kevin Burns as the sole appellant and the case was

¹ Barbara Burns was designated Kevin Burns' de facto attorney and authorized legal representative by the Minnesota Commissioner of Revenue and the Minnesota Tax Court.

² The Petitioner notes that the Respondent's Brief was authored by Assistant Attorney General Mark Levinger, the successor state attorney to Assistants Attorney General Tamar Gronvall and Kevin Rodlund.

tried in a proceeding premised upon two appellants, Kevin E. Burns and Barbara R. Burns.

The Tax Court reversed this position only after trial was concluded and evidence was closed. The Burns have appealed this decision by the Tax Court to the Minnesota Supreme Court as plain and fundamental error on ground that (1) Barbara Burns filed the tax returns in question without consultation with Kevin Burns under authority conferred by the Minnesota Commissioner of Revenue and the tax refund in question was paid to Barbara Burns, not Kevin Burns, and Barbara Burns was and is a necessary and indispensable party; and (2) Barbara Burns has never applied for admission and, consequently, is not a member of the Minnesota Bar and, as a non-party, is not authorized under Minnesota law to represent Kevin Burns in a Minnesota court, as the Tax Court permitted her to do. The Burns assert that, in the unlikely event that the Minnesota Supreme Court determines that Barbara Burns is not a necessary and indispensable party, Kevin Burns is entitled to a new trial in which he represents himself pro se or is represented by a licensed Minnesota attorney.

At trial, the Burns brought forth credible, non-hearsay evidence, including, but not limited to, attorney affidavits and certifications, publicly filed court documents, and a filed lis pendens, that conclusively establish that the Burns both owned and occupied the subject Minnesota Torrens property ("the Property"), legally described as Lot 15, Block 6, in Palomino Woods, Apple Valley, Dakota County, Minnesota. The Burns also brought forth credible, non-hearsay evidence that unequivocally establishes that the Dakota County District Court, the most corrupt in Minnesota, went to unprecedented and extraordinary lengths to obstruct, undermine, and frustrate legal rights secured to them as

homeowners by operation of two Minnesota legislative statutes, the Minnesota Torrens Act and the Minnesota Lis Pendens Statute, and their constitutional due process right to obtain a legal and orderly disposition of their claims to the Property by a disinterested and unbiased court of competent jurisdiction. The Burns documented in their opening brief that among other actions, the Dakota County District Court issued a bogus arrest warrant to prevent Barbara Burns from participating in any proceedings involving the Property that was not quashed until February 20, 2004 and appeared to encourage a malicious prosecution of Kevin Burns by the City of Apple Valley to prevent Kevin Burns from exercising legal rights secured to him under Minn. Stat. § 504B.371 (4)(5)(6)(7) and the Minnesota Torrens Act. The Dakota County District Court has also demonstrated to have falsified district court records integral to perfection and prosecution of the Burns' appeal. Among other actions, the Dakota County Court Administrator falsely certified to the Minnesota appellate court that a cost bond had not been delivered to the Dakota County Court Administrator when, as the court administrator later admitted in a letter filed in the Petitioner's Appendix, it had been delivered.³

As detailed by the Petitioner's brief, the trial judge, George W. Perez, an appointee of Governor Tim Pawlenty, whose wife, then-Dakota County District Court Judge Mary E. Pawlenty, issued pertinent orders in the case upon which the Attorney General relies, summarily rejected and selectively suppressed all evidence proffered by the Burns,

³ The Burns note that all of the Dakota County Court judges identified in the malicious prosecutions detailed by the Petitioner's brief, including Mary Pawlenty, have since resigned their commissions and are off the bench and that at least two of the Dakota County Court judges involved in the proceedings detailed by the Respondent's brief were publicly censured by the Minnesota Board on Judicial Standards and/or censured and removed from office by this court. A third Dakota County Court judge, Thomas Lacy, who is specifically named by the Respondent on brief, was found by the Board on Judicial Standards to have accorded preferential treatment to former Dakota County Court Judge Thomas Murphy, who was removed from the bench by this court in 2006 when Lacy directed the Dakota County Sheriff not to book and fingerprint Murphy after Murphy became intoxicated at a court reporter's Christmas party and was arrested for drunk driving. See I.M.O. Thomas Murphy (Minn. 2006)

including subpoenaed attorney testimony that proved the Burns' claims of extrinsic fraud and misconduct by Minnesota public officials. The Burns have raised these highly prejudicial trial rulings to this court on appeal on ground of plain and fundamental error and gross abuse of discretion. The Burns have further challenged the judgment of the Dakota County District Court upon which the Minnesota Tax Court relied on the basis that the judgment is void and on the basis that the judgment was procured and subsequently affirmed by the Minnesota Tax Court by operation of an extrinsic fraud against the Burns perpetrated by Bank of America and its purported assignees, acting in concert with certain officers, employees, and agents of the state of Minnesota and its inferior political subdivisions.⁴

RESTATEMENT OF FACTS

In 2004, Barbara Burns filed a property tax refund application, stating that Kevin Burns and/or a member of his immediate family owned and occupied the Minnesota Torrens property that underlies this litigation. Barbara Burns subsequently filed an amended Property Tax Refund application in her own name, as co-owner of the Property, and also filed a Renters' Credit application in the name of Kevin Burns pursuant to a Power of Attorney authorization filed with the Minnesota Department of Revenue and approved by the Minnesota Commissioner of Revenue.

The Minnesota Department of Revenue never disallowed the amended tax return filed by Barbara Burns in her own name and, had Barbara Burns claimed taxable income in the

⁴ Extrinsic fraud is defined as fraud that induces a party not to present a case in court or deprives a party of the opportunity to be heard or is not involved in the actual issues. Examples of extrinsic fraud may include preventing a witness from appearing and intentionally failing to join a necessary and indispensable party, as the Minnesota Tax Court did, misleading a party as to the jurisdiction of a court or some key fact concerning a court proceeding, as the Dakota County District Court did, and when a party forces a homeowner to lose his or her real or personal property based upon a fraudulent claim of standing or default, as Bank of America and Mary Pawlenty did.

Property Tax Refund application, the Department of Revenue surely would have taxed Barbara Burns on it. At the same time, the Minnesota Department of Revenue inexplicably opted to target Kevin Burns and to prosecute him for filing a homeowners' refund application that he did not file and that was superseded by the amended homeowners' application that was filed by Barbara Burns in her own name and accepted by the Department of Revenue.

The Burns specifically bring this point to the attention of the court because the Attorney General has alleged on brief that the Burns brought this action to re-litigate previously-decided issues. In reality, the Burns are the defendants to an action brought by the Attorney General in which the Burns have been called upon to state their legal position.

The Burns assert that a plethora of credible, non-hearsay evidence, including public records and attorney certifications and testimony suppressed by Governor Pawlenty's direct-report employee, George Perez, at trial conclusively establishes that (1) the Dakota County Court proceedings upon which the Attorney General relies were conducted in mala fides, in violation of Minnesota law and court rules, and in the absence of all jurisdiction and that, in accordance with the jurisprudence of this court and a majority of jurisdictions, do not have the effect of res judicata and are illegal and void⁵; (2) operation of an illegal and void judgment entered in the absence of all jurisdiction did not and does not deprive the Burns of their indefeasible Torrens title; and (3) as property owners with exclusive possessory rights in the property that were certified by a Minnesota attorney of reputation as of April 7, 2004 and conceded by Ungerman and his attorney, the Burns

⁵ As noted by the Petitioners on brief, Judge Steven Wheeler of the Second Judicial District of Minnesota, has interpreted Rule 63 to permit the Burns to challenge the Dakota County proceeding upon which the Attorney General relies on grounds of fraud and that the "judgment" is void; and that, in accordance with Judge Wheeler's ruling, the Burns have this right "forever"

were the only lawful occupants of the Property as of January 2., 2004. These facts compel the conclusion that the Burns owned and occupied the Property at all legally relevant times.

The Burns also note that, even if non-cancellable lis pendens had not been filed, vesting jurisdiction of the Burns-Bank of America property dispute in a federal court, which it was, and even if the Dakota County District Court had not been divested of subject-matter jurisdiction by an appeal docketed by the Clerk of the Appellate Courts on December 23, 2003, which the Dakota County Court admitted it was, the Attorney General's reliance upon the 2003 Dakota County proceedings is misplaced and misguided. By the determination of this court, issue and claim preclusion cannot apply to bar a legal claim or defense unless the party claiming estoppel can establish that the following four criteria are met: (1) the parties to the original and subsequent actions must be identical; (2) the claims asserted by the parties must be identical; (3) the issues must actually have been litigated by a court of competent jurisdiction; and (4) all interested parties must have been accorded a full and fair opportunity to be heard. That is not the case here.

As the Petitioner will discuss in more detail in the Argument section of this Reply-Brief, (1) Bank of America, which seized and conveyed the Property to Ungerman, was not a party to any proceeding in any Minnesota state court, excepting the seminal 2001 foreclosure action that was removed to the Minnesota District Court in 2001 and transferred to the New York federal court by the Minnesota District Court in 2002; (2) no Minnesota court has ever heard or adjudicated the issue of mortgage default attributed by Bank of America to the Burns that is predicate to a valid foreclosure action and that Bank

of America admitted and certified did not occur⁶; (3) none of the Burns-Bank of America/Ungerman claims were litigated in any Minnesota court and the Dakota County Court was divested of jurisdiction to hear and decide the claims in question by operation of the Minnesota Lis Pendens statute and the transfer of jurisdiction to the Minnesota appellate court that was perfected on December 23, 2003; and (4) the Burns, particularly Barbara Burns, a necessary and indispensable party, were not permitted a full and fair opportunity to be heard in the divested Dakota County District Court proceeding that underlies the Respondent's estoppel claim; to the contrary, the Record is unequivocal that the Dakota County District Court went to extraordinary lengths to prevent the Burns from being heard, even to the point of falsification of court records, a malicious prosecution of Kevin Burns, and issuance of a bogus arrest warrant against Barbara Burns that was conveniently quashed only after an obliging and corrupt Dakota County Court judge⁷ upheld jurisdiction of which the Dakota County District Court was divested by operation of the Minnesota Lis Pendens Statute and the Minnesota Rules of Civil Appellate Procedure.

Based upon these facts, the Supreme Court must conclude that, as a matter of fact, the Burns owned and occupied the Property as of January 2, 2004 and that, as a matter of law, the Burns are legally entitled to claim the Homeowners' Property Tax Refund claimed by Barbara Burns and the Renters' Credit claimed by Kevin Burns.

⁶ Referring the court to the Petitioner's Brief and Appendix, Bank of America in its official capacity as reporter of consumer credit information certified on three separate occasions that derogatory data concerning the Burns was reported in error and should not have been reported and, for the past seven years, has certified the Burns consumer trade line as "foreclosed, never late."

⁷ It is again noted that, by the determination of the Minnesota Board on Judicial Standards and the account of the Dakota County Sheriff, Judge Thomas Lacy received a telephone call from then-Dakota County Court Judge Thomas Murphy following Murphy's arrest for drunk driving and demanding that Lacy order the Dakota County Sheriff to accord Murphy, a felon, special treatment by not subjecting Murphy to the same booking and fingerprinting procedures as all other criminals, similarly situated, and that Lacy, without hesitation, complied.

ARGUMENT

The legal authorities and arguments in support of the Burns' position are set forth at length in the Petitioners' principal brief and need not be repeated herein. For brevity and to avoid duplication of argument, the Burns will briefly respond to each point raised by the Respondent's Reply Brief in the order in which it is raised.

POINT I

The Minnesota Tax Court misapprehended and misapplied pertinent decisional authority of this court, interpreting the Minnesota Torrens Act and the Minnesota Lis Pendens Statute. The issue of whether a lower court has misinterpreted and misapplied a legislative statute or other legal authority is one of law that this court determines de novo without deference to the findings of the trial court. The Minnesota Supreme Court may modify any Minnesota Court Rule in the interests of justice and upon good cause shown and may issue writs of mandamus and prohibition to remedy defects of justice where a more effectual legal remedy is not available. The Minnesota Supreme Court has consistently held that judgments rendered by a Minnesota court in the absence of jurisdiction do not have the effect of res judicata. See, e.g., *Hauser v. Mealey*, 263 N.W. 2d 803, 808 (Minn. 1978).

The evidence brought forth by the Burns that was suppressed by the Minnesota Tax Court at trial is unequivocal that (1) Bank of America, Ungerman's purported assignee, was not of record as a mortgagee or assignee of a mortgagee on the Certificate of Title and, as four Minnesota attorneys of reputation all certified, had no standing to convey good title to Ungerman and, by implication, to Kenneth and Beth Johnson⁸; (2) Bank of

⁸ The Petitioners again note that the lis pendens filed by the Dakota County Recorder of Titles recites to the public, including Ungerman and the Johnsons, that jurisdiction of the Burns-Bank of America title dispute

America was not a participant in any proceeding in any Minnesota court concerning this property except for the 2001 action that was removed to the Minnesota District Court and transferred by that court to the New York federal court named in the lis pendens and expressly stipulated to transfer venue to New York, which stipulation was approved by a Minnesota federal judge in 2002; (3) on July 25, 2003 the Burns vacated the Pawlenty writ in unlawful detainer that was issued to Ungerman by Mary Pawlenty in an ex parte proceeding on July 21, 2003 and filed lis pendens on August 3, 2003, preserving federal jurisdiction and vesting jurisdiction in the New York federal court, which upheld jurisdiction on December 14, 2004; (4) the Dakota County District Court never reacquired jurisdiction following the filing of the lis pendens on August 3, 2003; (5) the Burns appealed on jurisdictional and due process grounds orders issued by the Dakota County District Court in the action, *I.M.O. R.A. Ungerman*, that was brought by Ungerman and Bank of America to circumvent the lis pendens, (6) an appellate docketing order was issued by the Clerk of the Appellate Courts to the Dakota County Court Administrator on December 23, 2003 and the Dakota County District Court judge who convened the December 24, 2003 proceeding upon which the Attorney General relies himself noted and commented upon the appellate docketing order, evidenced that he was completely familiar with it, and admitted that, if an appeal had been perfected, he was divested of jurisdiction.

By the determination of the present chief justice of this court, perfection of an appeal occurs upon the filing of a notice of appeal in the Office of the Appellate Courts with

is vested in the New York federal court and that, in addition to the lis pendens, the Johnsons were personally served with notice of the Burns' legal claims. Thus, the Johnsons had both constructive and actual notice that Ungerman and his purported assignor did not convey good title and, consequently, cannot claim to be good-faith purchasers for value, as the Attorney General appears to argue for the first time on brief.

service upon the opposing party and the trial court administrator. No other action, including, but not limited to, delivery of a cost bond or filing fee—which, in any case, was obstructed and falsified by the Dakota County Court Administrator, who, by his own admission, lied to the appellate court by falsely representing that a cost bond had not been delivered to the district court when it had been delivered to the district court—is not jurisdictional and is not required to perfect an appeal. The fact that the Dakota County District Court misapprehended and misapplied the 1999 Rule revision does not affect the validity of the Rule or the effect of the jurisdictional transfer, which occurred on December 19, 2003, the date that the Burns filed and served the Notice of Appeal upon the Clerk of the Appellate Courts, the trial court administrator, and the opposing party.

By the admission of the trial judge in a transcribed proceeding on December 24, 2003, all necessary jurisdictional acts were completed as of December 23, 2003 and the trial court was aware of this fact before the December 24, 2003 proceeding was convened. The Record also confirms that Kevin Burns appeared and objected on jurisdictional grounds on the record before the trial judge issued the ruling upon which the Attorney General relies.

These facts compel the conclusion that the trial court was informed and acknowledged receipt of all pertinent information necessary for the trial court to conclude that an appeal had been perfected before the December 24, 2003 district court proceeding was convened. The Petitioner further notes that, even if the docketing notice had not been issued by the Clerk of the Appellate Courts to the trial court administrator, which the trial judge admitted that it was, the docketing notice is a public record of which the trial court

was required to take judicial notice upon citation by Kevin Burns in the December 24, 2003 proceeding and that no additional action by Kevin Burns was required.

The above-stated facts compel the conclusion that the December 24, 2003 Dakota County Court proceeding could not possibly have been jurisdictionally valid and, consequently, cannot have the effect of res judicata for which the Burns may properly petition this court for vacatur on the basis that the lower court judgment is void. The Burns have also brought forth compelling evidence of actual and constructive fraud, both intrinsic and extrinsic, and misconduct by public officials that, in and of itself, is grounds for vacatur of both the Bank of America property seizure and the December 24, 2003 Dakota County Court proceeding upon which the Tax Court relied.

Based upon these facts, collateral estoppel cannot apply and the orders of the Dakota County District Court and the Minnesota Tax Court cannot be considered dispositive as to the issue of ownership and occupancy of the Burns' Minnesota Torrens property. Accordingly, the Minnesota Supreme Court should vacate the orders of the Minnesota Tax Court and the Dakota County District court and grant the Burns' petition for a writ for mandamus and prohibition.

CONCLUSION

For the reasons stated, the Minnesota Supreme Court should reject and vacate the findings of the Minnesota Tax Court and the Dakota County District Court upon which the Commissioner of Revenue and the Minnesota Tax Court rely.

DATED: May 11, 2010

BY:



Kevin E. Burns



Barbara R. Burns