
NO. A09-1961

State of Minnesota
 In Supreme Court

CITY OF NORTH OAKS, a municipal corporation and
 political subdivision of the State of Minnesota,

Petitioner,

vs.

RAJBIR S. AND CAROL L. SARPAL,

Respondents.

PETITIONER'S REPLY BRIEF

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LEGAL ARGUMENT

I. STANDARD OF REVIEW

Appellant has not appealed the issue of the Standard of Review generally used for bench trials involving mixed questions of law and fact – abuse of discretion – which was adopted by the Court of Appeals in its published decision in this matter. However, Respondents’ reference to the Court of Appeals’ “review and balancing of the totality of the facts” is not the proper standard of review. See Respondents’ Brief, p. 15.

The threshold issue presented in this appeal – whether the city’s good faith, yet erroneous, representation of facts to Respondent – presents a purely legal issue. No fact issues exist as to that threshold issue. As Respondent concedes, when only one inference can be drawn from the facts, then it is a question of law. Respondent’s Brief, p. 12 citing *L & H Transport, Inc. v. Drew Agency, Inc.*, 403 N.W.2d 223 (Minn. 1987). A reviewing court is not bound by a lower court’s decision a purely legal issue. *Frost-Benco Elec. Ass’n. v. Minn. Pub. Utl. Comm’n.*, 358 N.W.2d 639 (Minn. 1984). Accordingly, the Standard of Review to be used by this Court as to the threshold issue of wrongful conduct is de novo review.

II. THE CITY’S GOOD FAITH, YET ERRONEOUS, REPRESENTATION OF FACT IS INSUFFICIENT TO SATISFY THE WRONGFUL CONDUCT ELEMENT OF EQUITABLE ESTOPPEL.

A. THE CITY PROVIDED NO “GOVERNMENT ADVICE” TO RESPONDENT

Providing Respondents with an erroneous survey document was not governmental advice and Respondents, without citing to any “advice” given by the City, argue that the

City gave them a copy of what they believed was an as-built survey; that the City reviewed their permit application and that the City approved the same and that this conduct constitutes governmental advice. See Respondents' Brief, p. 22. However, none of this conduct constitutes governmental advice.

The City never advised the Respondents with respect to the actual use of the as-built survey, never advised Respondents how to locate the shed, never advised Respondents of the location of the lot lines and never engaged in any other conduct which rose to the level of governmental advice.

The evidence established that on a single occasion, a City employee gave Respondents an erroneous document. Such conduct, at most, is a mere mistake or amounts to mere inadvertence, but does not constitute governmental advice. The Court of Appeals failed to analyze why a government employee's simple act of providing a survey to a permit applicant for a non-city purpose should be considered to be the equivalent of providing government advice.

B. BOTH THE COURT OF APPEALS AND RESPONDENTS ACKNOWLEDGE THAT THE WRONGFUL CONDUCT ELEMENT OF EQUITABLE ESTOPPEL REQUIRES SOME DEGREE OF MALFEASANCE. NONE OCCURRED IN THIS CASE.

As stated by the Court of Appeals in this case, "The Supreme Court has noted that the wrongful conduct element has been interpreted since *Ridgewood* as requiring some degree of malfeasance." *K-Mart Corp. v. Co. of Stearns*, 710 N.W.2d 761, 771 (Minn. 2006). Respondents concede that is the appropriate legal standard to be applied. (See Resp.

Brief, p. 16, 17)¹ To the contrary, Amicus RSI Recycling argues that the *K-Mart* case is of no precedential value in analyzing Respondent's equitable estoppel claim. See RSI Brief, pp. 3, 4. By so doing, Amicus RSI Recycling has raised issues not previously raised or argued in prior proceedings and not even now raised or argued by Respondents. Issues not raised below will not be considered on appeal. *Thiele v. Stich*, 425 N.W.2d 580 (Minn. 1988).

In addition, Amicus RSI Recycling erroneously urges this Court to adopt different equitable estoppel standards for wrongful government advice as opposed to other omission-based governmental conduct and goes so far as to maintain that none of the Court's post-*Ridgewood* government estoppel cases apply to this case involving alleged government advice. See RSI Brief, pp. 3-7. However, such an approach has already been rejected in Minnesota. In *In Re Westling Mfg., Inc.*, 442 N.W.2d 328, 332 (Minn. App. 1989), the Court rejected Westling's attempt to have a separate equitable estoppel standard established based upon "fault" because it was found to be logically inconsistent to have two equitable estoppel standards, one for fault and one for government wrongful conduct, either of which may be satisfied to achieve a particular result. The same holds true in this case. Wrongful government conduct, if found to exist, constitutes wrongful government conduct whether it takes the form of government advice or government omission. To the extent that Amicus RSI is advocating the adoption of different equitable estoppel standards, it exceeds the proper scope of this Court's review because such issue was neither previously argued nor

¹ Curiously however, Respondents fail to even mention, much less argue, the *K-Mart* case in their brief.

briefed. The issue, therefore, should not now be considered by this Court. In any event, under *Westling*, RSI Recycling's position was rejected.

Even if the City's conduct is found to constitute erroneous governmental advice, the conduct by the City falls far short of the malfeasance required to constitute wrongful conduct. The City has never maintained, as Respondents assert, that malice must exist for malfeasance to be established. However, even Respondents concede that the Court of Appeals was correct when it declared that wrongful government conduct requires affirmative misconduct. See Respondents' Brief, p. 17.

Affirmative misconduct is defined as 1.) an affirmative act of misrepresentation or concealment of a material fact; intentional wrongful behavior; 2.) with respect to a claim of estoppel against the federal government, a misrepresentation or concealment of a material fact by a government employee – beyond a merely innocent or negligence representation. *Black's Law Dictionary*, 9th Ed., 2009, p. 1089.

Here, no affirmative misconduct or malfeasance by the City exists. The evidence is unequivocal that the City's governmental advice, if it is found to exist at all, consists of a simple unintentional misrepresentation of fact. This Court has already confirmed, for example, that a government employee's good-faith provision of erroneous legal advice cannot satisfy the wrongful conduct element of equitable estoppel as a matter of law because a "good faith interpretation of a statute, even if erroneous, would not rise to the level of malfeasance." *K-Mart Corp.*, 710 N.W.2d at 771-772. The same reasoning applies in the present case.

It remains important to note that although the survey, or as-built, provided by the City to Respondents may have been the wrong survey or as-built, it, nonetheless, contained all correct information (including the location of the lot lines) except for depicting the location of the structure labeled “proposed house” in a location other than where the home was actually built. Incredulously, Respondents continue to maintain that “the shed was built in the exact location as depicted in the survey”. See Respondents’ Brief, p. 20. If that were the case, this lawsuit would not exist. If that were the case, Respondents would have built the shed outside of the 30 foot side yard setback area because that is what Respondents’ depiction showed. In other words, Respondents drew the shed in a location outside of the 30 foot setback area.

Though Respondents attempt to factually distinguish cases cited by the City which hold that issuance of a building permit is insufficient to estop the government from enforcing its ordinance, Respondents are unable to cite any case which holds to the contrary. See Respondents’ Brief, p. 18. The proposition that issuance of a building permit is insufficient to equitably estop the City is a correct statement of the law.

Contrary to Respondents’ assertion, the City is not introducing “new legal issues or theories that were not raised below”. See Respondents’ Brief, pp. 19-20. The City’s arguments include taking exception to numerous errors of law made by the Court of Appeals. Those issues, necessarily, arose at the time the Court of Appeals affirmed the District Court decision and are properly raised at this time by the City and could not have been raised below. The trial record is replete with instances where the City called into

question Respondents' method of locating the shed and their manner of measurement and the City's current analogy to other "cavalier methods" of locating the shed is proper.

Since the wrongful conduct element of equitable estoppel requires some degree of malfeasance and because no malfeasance by the City occurred, the Court of Appeals' determination that wrongful conduct was established must be reversed. It is only if wrongful conduct is established that the Court is required to address the remaining elements of equitable estoppel. *Mesaba Aviation Div. of Halvorsen of Duluth, Inc. v. Co. of Itasca*, 258 N.W.2d 877 (Minn. 1977).

C. THE COURT OF APPEALS' FINDING OF EQUITABLE ESTOPPEL BASED UPON FACTS SURROUNDING THE ISSUANCE OF THE BUILDING PERMIT IS ERRONEOUS.

The District Court Order denying Summary Judgment clearly identified the ONLY issue for trial concerning the wrongful conduct element of equitable estoppel to be "whether or not the City engaged in wrongful conduct by giving the AAA map to Mr. Sarpal when he asked about an as-built survey". AA-96. The District Court Order made no mention of whether or not the City's building permit approval process constituted wrongful conduct. *Id.* The lawsuit was tried on the sole issue identified by the District Court Summary Judgment Order.

The Court of Appeals held that the City was equitably estopped from enforcing its setback ordinance requirement against Respondents' pool shed based upon the following: first, a City employee in response to a request from Respondents for an "As-Built" survey of their home – that they needed for a non-city purpose – provided a survey similarly labeled as an "as-built" which included a depiction of a "proposed house" showing

Respondents' home in a location different from where it was actually constructed; and second, the City issued Respondents a building permit based on application materials that, on their face, showed a proposed structure that complied with the City's setback ordinance.

Respondents' Supreme Court Brief fails to address, much less argue, in opposition to the City's position on this point. It is axiomatic that issues not "argued" in the briefs are deemed waived on appeal. *In Re Application of Olson*, 648 N.W.2d 226 (Minn. 2002), citing *State v. Grecinger*, 569 N.W.2d 189, 193, n. 8 (Minn. 1997).

It should also be noted, Amicus RSI Recycling fails to even mention the Court of Appeals' reliance on facts surrounding the building permit issuance to find equitable estoppel. In that respect, Amicus RSI Recycling's analysis is flawed because it erroneously limits its wrongful conduct discussion to the sole issue of alleged wrongful government advice related to the as-built when the Court of Appeals' decision clearly went beyond that issue and erroneously based its finding of equitable estoppel on the facts surrounding the issuance of the building permit.

Because the City's good faith, yet erroneous, representation of fact does not constitute wrongful conduct since no malfeasance was established and because the Court of Appeals based its finding of wrongful conduct on issuance of the building permit, it was error, as a matter of law, for the Court of Appeals to conclude that the City's action in providing the survey to Respondents was wrongful government advice.

III. RESPONDENTS' RELIANCE WAS NOT REASONABLE.

It is only if Respondents successfully establish wrongful conduct by the City that the Court then determines if Respondents reasonably and in good faith relied on the City's

conduct. Respondents maintain that they are merely “innocent homeowners” who “did everything they could and everything they were required to do, in connection with the construction of an improvement to their property” and that should the City be allowed to enforce its 30 foot side yard setback ordinance against them, Respondents would be “denied use of their property through no fault of their own.” See Respondents’ Brief, pp. 13, 17, 29.

However, what the record actually reflects is that Respondents’ actions fell short in many ways including that:

- Respondents failed to accurately note that the survey depicted the proposed house location.
- Respondents, though having no knowledge of what an as-built is, failed to make any inquiry to educate themselves in their capacity as contractor on the project.
- **Respondents failed to locate the lot line.**
- **Respondents failed to measure from the lot line even though the ordinance required a 30 foot setback from the lot line.**
- Respondents failed to note the terms of their Warranty Deed which identified the trail easement and required that no structure be built thereon.

In spite of these glaring shortcomings, Respondents argue that they would be denied use of their property “through no fault of their own if required to relocate the shed.” See Respondents’ Brief, p. 17. However, Respondents possess no general property right that is superior to the zoning code – especially in light of the Warranty Deed easement restriction.

The Court of Appeals determined that Respondents’ measuring technique was reasonable because the ordinance does not provide explicit instructions as to how the setback is to be measured. Respondents urge that this Court should not go beyond “the plain meaning” of the ordinance. See Respondents’ Brief, p. 25. City Ordinance § 151.050

unequivocally requires that no structure be constructed within 30 feet of the lot line. It says nothing about using an as-built as a way to measure setback compliance. It says nothing about using the location of a proposed home as a way to measure setback compliance. But if one is to assure compliance with the 30 feet setback from the lot line requirement, the proper way to measure is from the lot line. What else would the plain meaning of the ordinance require the measurement to be taken from?

Respondents put forth no evidence as to the plain meaning of the ordinance nor how to properly measure the setback. Though Respondents label as “self-serving” the testimony of the City’s building official that the proper way to measure pursuant to the ordinance is to measure from the lot line, it is undisputed that it constitutes the ONLY trial evidence on how one is to properly measure to ensure compliance with the side yard setback requirement. Respondents had the burden of proof to establish each element of equitable estoppel and failed to do so, including that their measuring technique was reasonable.

Respondents again attempt to interject irrelevant facts that were not litigated at trial. Respondents, in support of their reasonable reliance argument, maintain that the City’s building inspector observed the commencement of construction of the shed. See Respondents’ Brief, p. 27. However, as previously ruled on by the District Court, pursuant to Minn. Stat. § 326.02, subd. 4, a building inspector may not locate lot lines – only a licensed land surveyor may do so.

It was error for the Court of Appeals to ignore the uncontroverted trial evidence of how to properly measure the setback. It was also error for the Court of Appeals to determine Respondents’ measuring technique was reasonable. Lastly, it was error for the

Court of Appeals to determine that Respondents' reliance was reasonable when their own actions fell far short than that of a "reasonable" contractor.

IV. NO TRIAL EVIDENCE EXISTS TO SUPPORT THE COURT OF APPEALS' FINDING THAT RESPONDENTS WOULD SUFFER A FINANCIAL HARDSHIP WERE THE SHED TO BE MOVED.

Respondents concede that the Court of Appeals relied on only two factors in determining that moving the shed would result in a financial hardship to Respondents. See Respondents' Brief, p. 28. One factor was a letter written by Respondents, not in support of any claim of potential financial hardship, but a request by Respondents for more time to move the shed after their variance request was denied. AA-202, 203. The second factor was Dr. Sarpal's deposition testimony regarding the cost of moving the shed, which was not trial evidence. See Respondents' Brief, p. 28, citing AA-000079. Yet, in spite of these concessions, Respondents maintain that the Court of Appeals correctly determined that they would suffer an injustice if required to bear the cost of shed re-location "especially in light of the significant time and money expended on the initial construction of the shed." *Id.*, citing RA-227.

The trial record is void of ANY evidence to support the Court of Appeals' conclusion. The ONLY evidence presented by Respondents at trial was the \$2,800 valuation of the proposed shed's building costs, AA-195; Respondents' concession that his after-the-fact variance request was not based on financial hardship, AA-198; and Respondents' admission that moving the shed would not cause him financial hardship, AA-129.

V. THE PUBLIC INTEREST IN ENFORCING THE ORDINANCE OUTWEIGHS THE EQUITIES, IF ANY, ADVANCED BY RESPONDENTS.

The Court of Appeals erroneously determined that no adjacent property interest was adversely affected by Respondents' shed. AA-225. The trial record clearly establishes that, not only does the shed extend into the 30 foot side yard setback area, it also extends 15 feet onto the North Oaks Homeowners Association trail easement and will interfere with construction of a trail within the easement area. It matters not whether evidence exists that the trail has been built, is in the process of being built or will be built in the future. Respondents' shed encroaches on the easement property rights of North Oaks Homeowners Association and, by its very placement and existence, the shed diminishes those property rights.²

In addition, the Court of Appeals incorrectly determined that when the shed location encroaches 15 feet on the trail easement and no evidence of financial hardship exists, that the broad public interest in enforcing the City's zoning ordinances to ensure uniform and equitable application of the law, minimize nuisances and to protect property values was insufficient to outweigh the equities.

Amicus RSI Recycling's public policy argument is, necessarily, less persuasive because it, admittedly, has a private interest to be affected by the Court's ruling in this matter. In addition, Amicus RSI Recycling erroneously limits its public policy argument to

² Contrary to Respondents' assertion, the City did raise this issue at the time of trial, as can be seen by Trial Exhibit 16 (RA-201) – which Respondents also cites to – which advises Respondents' of their shed's interference with the trail easement. See Respondents' Brief, p. 29. It should also be noted that, North Oaks Homeowners Association was not a party to this lawsuit and, therefore, none of North Oaks Homeowners Association's rights were litigated or adjudicated.

the narrow issue concerning only government advice when the Court of Appeals' decision went beyond that issue in finding equitable estoppel to apply.

Because the trial record establishes that the public good and the private trail easement are both frustrated by Respondents' setback violation, any equities that could have been advanced by Respondents would not outweigh the public interest which is frustrated by estoppel.

VI. CONCLUSION

This Court has never recognized Respondents' type of equitable estoppel claim against a government. The facts presented in this case do not rise to the level to constitute wrongful conduct which would justify this Court's departure from precedent and expansion of the doctrine of equitable estoppel.

The wrongful conduct element of equitable estoppel is extremely narrow, requiring proof of affirmative misconduct on the part of the government. "This 'wrongful conduct' element has since been interpreted to require some degree of malfeasance." *K-Mart Corp. v. Co. of Stearns*, 710 N.W.2d 761, 771 (Minn. 2006).

The City provided no government advice. Even if it did, the government advice was not wrongful because no malfeasance has been established. Without proof of malfeasance, equitable estoppel will not lie. It was error as a matter of law for the Court of Appeals to conclude that the City's good faith, yet erroneous, representation of fact is sufficient to satisfy the wrongful conduct element of equitable estoppel.

In addition, even if wrongful conduct could be established, Respondents' reliance on the City's good faith representation was not reasonable. The Court of Appeals also erred in affirming the District Court's balancing of the equities in Respondents' favor.

The City respectfully requests that this Court reverse the Court of Appeals' decision.

Dated: 12/17/10

Respectfully submitted,

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