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CASE NO. A12-0934

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State of Minnesota
In Court of Appeals

PAUL PHELPS AND TODD PHELPS, Co-Trustees of THE BOULDER SHORE TRUST Dated September 5, 2000,

Appellants,

vs.

STATE OF MINNESOTA AND CASS COUNTY, MINNESOTA,

Respondents.

APPELLANT'S BRIEF, ADDENDUM AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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LEGAL ISSUES

1. Can the trial court order summary judgment sua sponte when the only motion before the court is a motion for sanctions pursuant to Minn. Gen. R. Prac. 9.01?

   Respondents did not make a motion for summary judgment.

   The trial court granted summary judgment sua sponte when the only motion before the trial court was a motion for sanctions pursuant to Minn. Gen. R. Prac. 9.01.

   Apposite Authority: Minn. Gen. R. Prac. 9.01, 9.02(d), and 9.04.

2. Can the trial court amend Respondents' Answer sua sponte to include a statute of limitations defense when the only motion before the trial court was a motion for sanctions pursuant to Minn. Gen. R. Prac. 9.01?

   Respondents did not make a motion to amend their Answer.

   The trial court amended Respondents' Answer sua sponte to add a statute of limitations defense when the only motion before the trial court was a motion for sanctions pursuant to Minn. Gen. R. Prac. 9.01.

   Apposite Authority: *Lowry Hill Properties, Inc. v. Ashbach Construction Co.*, 195 N.W.2d 767 (Minn. 1972); *Alstad v. Boyer*, 228 Minn. 307 (1949); *Rupley v. Fraser*, 156 N.W. 350 (Minn. 1916); MINN. STAT. § 284.28, Subd. 5 (2011); MINN. R. CIV. P. 8.03; MINN. R. CIV. P. 12.02.

3. Can an easement agreement between Respondent and a third party affect Appellant's adverse possession property rights?

   Issue was raised in Respondents' Memorandum of Law in Support of Motion for Order Requiring Security and Imposing Sanctions Pursuant to Minn. Gen. R. Prac. 9.01.

   The trial court held that an easement agreement between Respondent Cass County and a third party can affect Appellant's adverse possession property rights.

STATEMENT OF THE CASE

Appellant The Boulder Shore Trust Dated September 5, 2000 ("Appellant") commenced this action by serving its Complaint on Respondents Cass County, Minnesota and the State of Minnesota ("Respondents") on October 21, 2011, in which it asserted that it had acquired fee title over certain property located in Cass County, Minnesota, by virtue of adverse possession. Respondents served and filed their Answer on November 4, 2011.

Prior to the issuance of any scheduling order, Respondents served and filed a Motion for Sanctions pursuant to Rule 9.01 of the Minnesota General Rules of Practice ("Rule 9 Motion"), in which it sought sanctions and security from Appellant on February 15, 2012. Appellant served and filed its Response to Respondents' Rule 9 Motion on March 2, 2012.

The trial court issued its Findings of Fact, Conclusions of Law, Order for Judgment and Judgment on April 3, 2012, in which it denied Respondents' Rule 9 Motion. However, the trial court amended Respondents' Answer sua sponte to add a statute of limitations defense and ordered summary judgment sua sponte against Appellant. Judgment was entered dismissing Appellant's Complaint on April 3, 2012.

STATEMENT OF FACTS

Every fact relevant to this action occurred between August 1934 and October 1956. On August 20, 1934, Mary Jane Phelps (grandmother of co-trustees Paul Phelps and Todd Phelps) purchased the real property now owned by Appellant via warranty deed from John M. Ramey.[1] Affidavit of Paul J. Phelps to Appellant's Response to Respondents' Rule 9 Motion, Exs. D (Affidavit of Joseph D. Phelps ("J. Phelps Aff.") ¶ 4) and E (Affidavit of Allie Lu Dunlevy ("A. Dunlevy Aff.") ¶ 4); Trial Court Order, Findings of Fact ("Order, F.F.") ¶ 1.) In or about 1939, Harold Phelps, Sr. (husband of Mary Jane Phelps) built a driveway (the "Phelps Driveway") to the property off of Northland Lane Northwest and across property then owned by Samuel H. Gerber. J. Phelps Aff. ¶ 7; A. Dunlevy Aff. ¶ 7; Order, F.F. ¶ 3. In October 1, 1956, then owned by Samuel H. Gerber's property was tax forfeited to Respondent State of Minnesota. J. Phelps Aff. ¶ 11; A. Dunlevy Aff. ¶ 11 Order, F.F. ¶ 7.

Since on or about 1939, members of the Phelps family (Appellant's predecessors) and their guests have continuously and exclusively used and maintained the Phelps Driveway, at all times holding themselves out as the true owners of the Phelps Driveway. J. Phelps Aff. ¶¶ 5, 8, and 10; A. Dunlevy Aff. ¶¶ 5, 8, and 10; Order, F.F. ¶¶ 2, 4 and 6. Nobody other than the Phelps family has ever contributed to the maintenance of the Phelps Driveway, nor has anybody ever objected to the Phelps family's continued use of

[1] The property originally purchased by Mary Jane Phelps has been divided into numerous parcels, one of which is owned by Appellant and another by Todd Phelps and Molly Phelps. Deposition Transcript of Joshua Stevenson ("Stevenson Depo."), Ex. 7.

and maintenance of the Phelps Driveway. J. Phelps Aff. ¶ 8; A. Dunlevy Aff. ¶ 8. Since on or about 1939, the Phelps family has installed and maintained signage and other fixtures at the intersection of Northland Lane Northwest and the driveway, to indicate that the Phelps Driveway led to the cabins on the property. J. Phelps Aff. ¶ 9; A. Dunlevy Aff. ¶ 9; Order, F.F. ¶ 5. Since on or about 1939, the Phelps family and their guests have used the Phelps Driveway exclusively to travel to and from the cabins on the property; the Phelps Driveway has never been used to access any neighboring property. J. Phelps Aff. ¶ 10; A. Dunlevy Aff. ¶ 10; Order, F.F. ¶ 6.

Respondents have not provided any evidence contesting Appellant's adverse possession claim. Cass County Land Commissioner Joshua Stevenson, acknowledges that he has no idea who built the Phelps Driveway (Stevenson Depo. 50:10–19) and testified that he has no basis to dispute that the Phelps Driveway was created to provide ingress and egress to the Phelps Property (Stevenson Depo. 48:1–7). Mr. Stevenson believes that the Phelps Driveway was built around 1933, but has no knowledge of anyone using the Phelps Driveway other than members of the Phelps family and their guests between August 1934 and October 1956. Stevenson Depo. 88:14–23.

Instead, Respondents summarily assert that an easement agreement entered into in March 2008 between third parties, Todd Phelps and Molly Phelps, neither of who are parties to this litigation, and Respondent Cass County (the "Easement Agreement"), terminated Appellant's fee title ownership of the Phelps Driveway. Appellant has never entered into an easement agreement with either of the Respondents.

Neither Todd Phelps nor Molly Phelps can act on behalf of Appellant, or convey, waive, or terminate any property rights of Appellant.[2] All decisions made by Appellant must be approved by all trustees of Appellant. At the time the Easement Agreement was entered into, Appellant was controlled by three trustees: Brian Phelps, Paul Phelps, and Todd Phelps.

[2] Appellant recognizes that the trust agreement governing Appellant is not part of the record before this Court. However, as described in more detail below, Respondents' Rule 9 Motion stayed all proceedings and prohibited Appellant from offering the trust agreement into the record. Respondents offered no proof that Todd Phelps or Molly Phelps could bind Appellant or convey, waive, or terminate Appellant's property rights.

ARGUMENT

Construction of a rule of procedure or general practice is a question of law, which this court reviews de novo. *Smigla v. Schnell*, 547 N.W.2d 102, 103 (Minn. Ct. App. 1996).

A. THE TRIAL COURT ERRED IN ORDERING SUMMARY JUDGMENT SUA SPONTE WHEN THE ONLY MOTION BEFORE THE COURT WAS A MOTION FOR SANCTIONS PURSUANT TO MINN. GEN. R. PRAC. 9.01.

Rule 9 of the Minnesota General Rule of Practice provides authority for a court to order sanctions and security against a litigant for asserting frivolous claims. Rule 9 of the Minnesota General Rules of Practice provides,

> Upon the motion of any party or on its own initiative and after notice and hearing, the court may, subject to the conditions stated in Rules 9.01 to 9.07, enter an order: (a) requiring the furnishing of security by a frivolous litigant who has requested relief in the form of a claim, or (b) imposing preconditions on a frivolous litigant's service or filing of any new claims, motions or requests. *All Motions under this rule shall be made separately from other motions or requests . . . .*

Minn. Gen. R. Prac. 9.01 (emphasis added).

> No determination or ruling made by the court upon the motion shall be, or be deemed to be, a determination of *any issue in the action or proceeding or of the merits thereof.*

Minn. Gen. R. Prac. 9.02(d) (emphasis added).

> When a motion pursuant to Rule 9.01 is properly filed prior to trial, *the action or proceedings is stayed and the moving party need not plead or respond to discovery or motions,* until 10 days after the motion is denied, or if granted, until 10 days after the required security has been furnished and the moving party given written notice thereof.

Minn. Gen. R. Prac. 9.04 (emphasis added).

Rule 9 specifically requires a litigant to make a Rule 9 motion separately from any other motion. MINN. GEN. R. PRAC. 9.01. In addition, Rule 9 unambiguously prohibits a trial court from deciding any issue other than a Rule 9 motion when a Rule 9 motion is before the court. MINN. GEN. R. PRAC. 9.02(d). Once a Rule 9 motion is filed by an opposing litigant, all proceedings are stayed. MINN. GEN. R. PRAC. 9.04. Appellant, consequently, was unable to conduct full and adequate discovery.

Here, despite the Respondents' failure to make a motion, the trial court ordered summary judgment sua sponte. The trial court had no authority to make such an order under Rule 9.02(d), and cited no case law or other statute or rule that would otherwise allow it to disregard the plain language of Rules 9.01 and 9.02(d). Since Respondents only made a Rule 9 motion, Appellant only responded to that motion. Consequently, the trial court violated the plain language of Rule 9 and therefore should be reversed.

B. THE TRIAL COURT ERRED IN AMENDING RESPONDENTS' ANSWER SUA SPONTE TO INCLUDE A STATUTE OF LIMITATIONS DEFENSE WHEN THE ONLY MOTION BEFORE THE TRIAL COURT WAS A MOTION FOR SANCTIONS PURSUANT TO MINN. GEN. R. PRAC. 9.01.

Respondents waived their statute of limitations defense when they failed to assert it in their Answer. The trial court's effort to revive such defense by amending Respondents' Answer sua sponte was without authority and should be reversed.

Rule 8.03 provides that "In pleading to a preceding pleading, a party *shall* set forth affirmatively . . . statute of limitations, waiver . . . and any other matter constituting an avoidance or affirmative defense." MINN. R. CIV. P. 8.03 (emphasis added). In addition, Rule 12.02 states that "*Every* defense, in law or fact, to a claim for relief in any pleading .

. . *shall* be asserted in the responsive pleading thereto if one is required . . . ." Minn. R. Civ. Pro. 12.02 (emphasis added). The statute of limitations defense is waived if not timely asserted. *See Lowry Hill Properties, Inc. v. Ashbach Construction Co.*, 195 N.W.2d 767, 775 (Minn. 1972); *Moser v. Kaml*, 233 N.W. 802, 804 (Minn. 1930); *State v. Joseph*, 622 N.W.2d 358, 363 (Minn. Ct. App. 2001), rev'd on other grounds, 636 N.W.2d 322 (Minn. 2001).

Under both Rule 8.03 and Rule 12.02, Respondents were required to assert their statute of limitations defense in their Answer, as Appellant's Complaint is a pleading to which a responsive pleading, an answer, is required to be made (Minn. R. Civ. P. 7.01) and the statute of limitations defense is an affirmative defense (Rule 8.03). Because the Respondents failed to assert a statute of limitations defense in their Answer, despite the fact that Respondents had a specific check box in their form Answer for the statute of limitations defense (Ans. at 2), Respondents waived their right to assert such a defense.

Despite Respondents' wavier and failure to bring a motion to amend their Answer, the trial court amended Respondents' Answer sua sponte to include a statute of limitations defense. The trial court's sua sponte order is specifically prohibited by Rules 9.01 and 9.02(d). Rule 9.01 requires that a Rule 9 motion be made separately from other motions. Even if Respondents would have made a motion to amend their Answer, which they did not, such a motion should have been stricken by the trial court pursuant to Rule 9.01. Rule 9.02(d) specifically prohibits a trial court from deciding any issue other than a Rule 9 motion when such a motion is before the trial court. The trial court's order in this case amending Respondents' Answer sua sponte and deciding the statute of limitations

defense in Respondents' favor both consider issues outside of the Respondents' Rule 9 Motion, and for which Appellant had no opportunity to object. Thus, the trial court's order violated Rules 9.01 and 9.02(d) and reversed.

Notwithstanding that the trial court's failure to abide by Rules 9.01 and 9.02(d) is reversible error, its ultimate decision that MINN. STAT. § 284.28, Subd. 5 (2011) barred Appellant's claim is simply wrong. MINN. STAT. § 284.28, Subd. 5 does not apply to this case.

MINN. STAT. § 284.28, Subd. 5 provides:

> In cases where the lands are and ever since the time of filing the auditor's certificate of forfeiture under section 281.23, subdivision 9, or filing of service of notice of expiration of redemption under section 281.21, have been in the actual, open, continuous, and exclusive possession of the owner, or the owner's successors in interest, claiming adversely to the state or its successors in interest, the period of limitations as to such owner, or the owner's successors in interest, shall be
>
> (i) the time of possession, or
> (ii) the period of limitations provided in subdivision 2 and 3, which period is greater.

The trial court interpreted MINN. STAT. § 284.28, Subd. 5 to read that no matter when the adverse possessor fulfills the elements of adverse possession, including the 15 year requisite time period, forfeiture of such property for non-payment of taxes can terminate such adverse possessor's rights if such adverse possessor does not bring his claim while he continues to "adversely possess[]" the property. Order, Discussion ¶ 2. This reasoning fails because it contradicts the accepted standard that after all elements of adverse possession have been met for a period of 15 years, the adverse possessor obtains

fee title to the adversely possessed property by operation of law. *See Alstad v. Boyer*, 228 Minn. 307, 315–16 (1949) (considering an easement by prescription).

MINN. STAT. § 284.28, Subd. 5 applies to cases where an adverse possessor has met the elements of adverse possession, but before the 15 year limitations period expires, such property is tax forfeited to the State of Minnesota. *See generally Rupley v. Fraser*, 156 N.W. 350, 351 (Minn. 1916) (considering adverse possession of tax-forfeited land). MINN. STAT. § 284.28, Subd. 5 provides that the limitations period applies "where the lands *are* and *ever since* the time of filing the auditor's certificate of forfeiture . . . have been in the actual, open, continuous, and exclusive possession of the owner . . . claiming adversely to the *state* . . . ." MINN. STAT. § 284.28, Subd. 5 (emphasis added).

Here, Appellant does not claim that its predecessor adversely possessed the Phelps Driveway from Respondents. Instead, Appellant's predecessor obtained fee title to the Phelps Driveway by virtue of adverse possession by operation of law before October 1, 1956, which was *prior* to the tax forfeiture of the property owned by Samuel Gerber to Respondent State of Minnesota. Accordingly, because Appellant's predecessor obtained fee title to the Phelps Driveway prior to the tax forfeiture, MINN. STAT. § 284.28, Subd. 5 does not apply.

C. AN EASEMENT AGREEMENT BETWEEN RESPONDENT CASS COUNTY AND THIRD PARTY LANDOWNERS CANNOT AFFECT APPELLANT'S ADVERSE POSSESSION PROPERTY RIGHTS.

It is undisputed that no easement agreement exists between Respondents and Appellant. The trial court held that the Easement Agreement entered into between Respondent Cass County, and third party property owners, Todd Phelps and Molly

Phelps, waived Appellant's adverse possession claim. This constitutes reversible error for two reasons.

First, the trial court based its order on the misunderstanding that Todd Phelps is a plaintiff in this case. The trial court perpetuates its confusion in numerous paragraphs throughout its Findings of Fact, Conclusions of Law, Order for Judgment and Judgment. Examples include, but are not limited to: (1) "*Plaintiffs* are bound by an easement agreement dated March 26, 2008, between *Plaintiffs* and Defendant Cass County," (Order, Contentions of the Parties (emphasis added)); (2) "*Plaintiffs* through their attorney negotiated an agreement with Cass County for an easement . . ." (Order, F.F. ¶ 9 (emphasis added)); and (3) "*Plaintiffs* acknowledged Cass County's ownership of the tax forfeited subject property [in the easement]" (Order, Discussion ¶ 2 (emphasis added)). The trial court's confusion served as the basis for its conclusion that Todd Phelps bound Appellant by his entering into the Easement Agreement with Respondent Cass County. Order, Conclusions of Law ("Order, C.L.") ¶ 2.

The record makes clear that Todd Phelps is not a party to this action, and thus cannot bind Appellant. The clearest indicator is the case caption: "Paul Phelps and Todd Phelps, *Co-Trustees* of The Boulder Shore Trust Dated September 5, 2000, Plaintiff" (emphasis added). Paul Phelps and Todd Phelps are representing, as co-trustees, The Boulder Shore Trust Dated September 5, 2000, Appellant, because Appellant is a separate legal entity. Counsel for Respondents recognized that Todd Phelps is not a party to this case during the deposition of Joshua Stevenson (Stevenson Depo: 72–73) and again, along with the trial court, during the Rule 9 Motion hearing (Trial Court Transcript

of Rule 9 Motion hearing: 12–13). Because the trial court based its conclusions on the false premise that Todd Phelps is a plaintiff in this case, the trial court should be reversed.

Second, Todd Phelps and Molly Phelps, the only "Grantees" under the Easement Agreement (Order, F.F. ¶ 10), have no authority to convey, waive or terminate Appellant's property rights. Molly Phelps is neither a trustee nor a beneficiary under Appellant's trust agreement, and therefore has no authority to waive or terminate Appellant's property rights. Although Todd Phelps is currently one of two trustees of Appellant, he cannot act alone to bind Appellant or terminate Appellant's property rights.[3]

As independent third party property owners, Todd Phelps and Molly Phelps have no ability to obstruct Appellant's property rights similar to any other unrelated party. As a result, the trial court's conclusion that the Easement Agreement "prevents [Appellant] from asserting adverse possession" (Order, C.L. ¶ 2) is flawed and should be reversed.

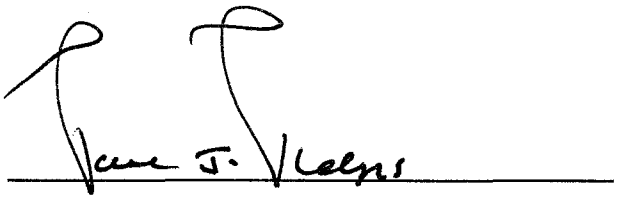
[3] *See supra* note 2.

CONCLUSION

Based on the foregoing, Appellant respectfully requests that the trial court's order be reversed, the judgment be vacated, and the case remanded.

SAWICKI & PHELPS, P.A.

Dated: July 2, 2012



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FORM 132. CERTIFICATION OF BRIEF LENGTH

STATE OF MINNESOTA
IN COURT OF APPEALS

Paul Phelps and Todd Phelps,
Co-Trustees of the Boulder Shore Trust
Dated September 5, 2000

Appellant,

CERTIFICATION OF BRIEF LENGTH

vs.

State of Minnesota and
Cass County, Minnesota,

APPELLATE COURT CASE NUMBER: A12-0934

Respondents.

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds.1 and 3, for a brief produced with a Time New Roman 13 font. The length of this brief is 268 lines and 3,118 words. This brief was prepared using Microsoft Office Word 2007.

DATED: 7-2-12

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