

A08-317

STATE OF MINNESOTA
IN COURT OF APPEALSIn the Matter of the
Application of:TRIAL COURT FILE NO.
25-CV-06-2670Jerry J. Barth and
Nancy J. Barth, husband
and wife.APPELLATE COURT CASE NO.
A08-317To Register the Title to Certain
Real Property Situated in Goodhue
County, Minnesota, Applicants,

Respondents,

vs.

Michael W. Stenwick, et al.

Defendants,

Wacouta Township, Goodhue County,
State of Minnesota,

Appellant.

BRIEF AND APPENDIX OF
APPELLANT WACOUTA TOWNSHIP,
GOODHUE COUNTY, MINNESOTA

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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

- I. WHETHER THE TRIAL COURT CORRECTLY APPLIED COLLATERAL ESTOPPEL TO GRANT RESPONDENTS JERRY J. BARTH AND NANCY J. BARTH SUMMARY JUDGMENT AGAINST APPELLANT WACOUTA TOWNSHIP, AND DISMISS THE ALLEGATIONS AND DEFENSES CONTAINED IN WACOUTA TOWNSHIP'S ANSWER?

The Trial Court held in the affirmative.

Apposite Authority: A&H Vending Company v. Commissioner of Revenue, 608 N.W.2d 544 (Minn. 2000); Care Institute, Incorporated - Maplewood v. County of Ramsey, 576 N.W.2d 734 (Minn. 1998); United States v. Mendoza, 464 U.S. 154, 104 S.Ct. 568, 78 L.Ed.2d 379 (1984).

- II. WHETHER APPELLANT THROUGH ITS PRESENTATION OF SUBSTANTIAL EVIDENCE AT THE HEARING ON THE SUMMARY JUDGMENT MOTION RAISED GENUINE ISSUES OF MATERIAL FACT SUFFICIENT TO CONTRAVENE RESPONDENTS' CLAIM OF ADVERSE POSSESSION OF THE "SAND BEACH"?

The Trial Court held in the negative.

Apposite Authority: Gange v. Schuler, 659 N.W.2d 261 (Minn.App. 2003); State Ex Rel. Anderson v. District Court of Kandiyohi County, 119 Minn. 132, 137 N.W. 298 (1912).

- III. WHETHER APPELLANT RAISED GENUINE ISSUES OF MATERIAL FACT CONCERNING PUBLIC USAGE OF THE "SAND BEACH" SO AS TO ESTABLISH COMMON LAW DEDICATION IN ITS WRITTEN SUBMISSIONS AND AT THE HEARING ON THE SUMMARY JUDGMENT MOTION BEFORE THE TRIAL COURT?

The Trial Court held in the negative.

Apposite Authority: Township of Villard v. Hoting, 442 N.W.2d 826 (Minn.App. 1989); Sackett v. Storm, 480 N.W.2d 377 (Minn.App. 1992).

- IV. WHETHER APPELLANT RAISED GENUINE ISSUES OF MATERIAL FACT CONCERNING PUBLIC USAGE OF THE "SAND BEACH" AREA SUFFICIENT

TO ESTABLISH AN EASEMENT BY PRESCRIPTION IN ITS WRITTEN
SUBMISSIONS AND AT THE HEARING ON THE SUMMARY JUDGMENT
MOTION BEFORE THE TRIAL COURT?

The Trial Court held in the negative.

Apposite Authority: Nordin v. Kuno, 287 N.W.2d 923
(Minn.App. 1980); Heuer v. County
of Aitkin, 645 N.W.2d 753
(Minn.App. 2002)

STATEMENT OF THE CASE

Appellant Wacouta Township, Goodhue County, Minnesota (hereinafter "Wacouta Township") appeals from Findings of Fact, Conclusions of Law, Order for Summary Judgment and Summary Judgment entered December 19, 2007, by the Goodhue County District Court, the Honorable Thomas Poch, granting Respondents Jerry J. and Nancy J. Barth's motion for summary judgment and dismissing the Answer of Wacouta Township.

Respondents Barth on September 26, 2006, filed an application with the Goodhue County District Court to register title to the boundaries of Lots 18 and 19, Block 6, Plat of Wacouta Beach, Goodhue County, Minnesota. In addition they sought to annex and register a portion of the adjoining beach known as the "Sand Beach," which extends east from the eastern boundary lines of Lots 18 and 19 down to the waters of Lake Pepin. The area of the "Sand Beach" sought to be annexed and registered constitutes approximately 7,320 square feet. The Barths claimed they owned this beach parcel through adverse possession. Wacouta Township was named as one of the Defendants in Respondents' application to the court, and Wacouta Township served an Answer objecting to Respondents' attempt to include the "Sand Beach" area in their registration proceeding.

On October 26, 2007, Respondents served and filed their motion for summary judgment arguing that they owned the portion

of the Sand Beach which they sought to register through adverse possession and also argued that Wacouta Township was precluded from defending against their claims by the Doctrine of Collateral Estoppel. Wacouta Township responded to the summary judgment motion by submitting evidence and legal authority for the propositions that collateral estoppel did not apply, and that Respondents had failed to prove by clear and convincing evidence that they had perfected ownership of the area of the Sand Beach in question through adverse possession. Wacouta Township submitted affidavits of Respondents' neighbors and legal authority to demonstrate that Respondents under existing statutory and case law were barred from employing adverse possession to lay claim to the "Sand Beach" parcel. In addition, Wacouta Township argued that Respondents had failed to follow the appropriate rules of the Minnesota General Rules of Practice and the Minnesota Rules of Civil Procedure in filing and presenting their summary judgment motion.

The Trial Court on December 19, 2007, issued its Findings of Fact, Conclusions of Law, Order for Judgment and Judgment, granting Respondents' motion for summary judgment and dismissing Wacouta Township's complaint. The Trial Court based its order for judgment on its Conclusion of Law No. 3, which states:

"3. That the Doctrine of Collateral Estoppel applies to preclude the claims of the Township to the area designated on the plat of Wacouta Beach as 'Sand Beach'."

STATEMENT OF THE FACTS

Respondents Jerry J. Barth and Nancy J. Barth acquired their title to Lot 18, Block 6 of Wacouta Beach from Mr. Barth's grandparents, who had acquired Lot 18 in 1950. The grandparents acquired title to Lot 19, in 1960, and the property was conveyed to the Respondents in 1982. (Affidavit of Jerry J. Barth; Appendix A-25). These particular lots, along with twenty-three adjoining lots located in Block 6 of the Plat of Wacouta Beach make up an area known as Green's Point. Lots 1 through 19, which join at a point at Lot 11, make up the two ends and center of Green's Point. Between these lots and Lake Pepin is what is known as and identified on the plat as the "Sand Beach".

(Memorandum of Law in Support of Applicants' Motion for Summary Judgment; Appendix A-28). The dimensions of each of Respondents' platted Lots 18 and 19, are 60 feet by 200 feet. The 7,320 square foot Sand Beach area which Respondents claim lies directly to the east of their two lots, between their lots and Lake Pepin. (Exhibit "B" to the Memorandum of Law in Support of Applicants' Motion for Summary Judgment; Appendix A-40). In its Answer, Wacouta Township affirmatively alleged the public nature of the "Sand Beach", through common law dedication, and/or constant public use giving rise to a prescriptive easement. Wacouta Township also alleged that Respondents had not obtained an ownership interest in the "Sand Beach" parcel through either

adverse possession or practical location of boundaries.

(Appendix A-18).

Respondents filed their motion for summary judgment alleging ownership of the Sand Beach parcel based on their alleged adverse possession. The evidentiary basis for this claim was contained in the Affidavit of Respondent Jerry J. Barth, who, made the following statements:

...

"8. The Swains controlled and maintained all of the Property and held out by their maintenance and control, that they were the owners of all of the Property.

9. That any use of the beach, which is a part of the property, by others was with the permission of the Swains."

The Swains were Respondent Barth's grandparents. Mr. Barth continued:

"12. From the time the Swains received title to Lots 18 and 19, Block 6 of the plat, the Swains used and occupied all of the Property in an actual, open, notorious, continuous, hostile, exclusive and adverse possession of under color of and claiming title in fee simple to the Property. Their use and occupancy has continued for more than 15 years.

13. When the Swains transferred the ownership of the Property to my wife and me, we continued to use and occupy all of the Property in an actual, open, notorious, continuous, hostile, exclusive and adverse possession of under color of and claiming title in fee simple to the Property. This use and occupancy has continued for more than 15 years."

(Affidavit of Jerry J. Barth; Appendix A-25). In response to the Barth affidavit, Wacouta Township submitted the Affidavits of Gary Iocco and Becky Poss, two neighbors of the Barths who live

at Green's Point. These two neighbors in their affidavits stated that their two families and other members of the public had utilized and continue to utilize the entire stretch of the Sand Beach at Green's Point regularly. Both Poss and Iocco had resided at Green's Point for over fifteen years. Both of those affiants stated that they had never observed that Respondents posted the area of the Beach that they claim, nor had they ever placed any barriers or told people not to come onto the Beach located in front of their home on Lots 18 and 19. (Affidavits of Gary Iocco and Becky Poss; Appendix A-128, 140).

However, Respondents in support of their motion for summary judgment principally focused on the argument that Wacouta Township was collaterally estopped from preventing Respondents' claim because in the past it had not answered or defended against three prior similar claims and was found by the Court to be in default. (Exhibits "F" and "I" of Memorandum of Law in Support of Applicants' Motion for Summary Judgment; Appendix A-44, 52; Transcript to Summary Judgment Hearing, pp. 4-6). In response, Wacouta Township submitted at the summary judgment hearing the reports of the Goodhue County Examiner of Titles recommending to the Court that the portion of the Sand Beach not be included in the Barth registration proceeding. Wacouta Township also submitted a 2005 application and answer of Wacouta Township and Order and Decree of the District Court in a case involving

neighbors of the Barths, J. Thomas and Peggy Wolner, who sought to register title to Lots 8, 9 and 10, Block 6 of Wacouta Beach along with a portion of the Sand Beach. (Affidavit of George L. May; Appendix A-107). The Township argued against collateral estoppel at the summary judgment hearing stating that collateral estoppel did not apply for Respondents here because of the clear authority in the Wolner decision, which had the exact same issues as the instant case. In Wolner, the Trial Court ruled against the applicants' attempt to register the "Sand Beach" property. Wacouta Township argued Wolner was precedent preventing the use of collateral estoppel in the instant case. Wacouta Township also argued that none of the cases which were cited by Respondents for the application of collateral estoppel were shown to have the same issues as the instant case. (Transcript of Summary Judgment Hearing, p. 29).

The Trial Court granted summary judgment in Respondents' favor and dismissed Wacouta Township's Answer.

ARGUMENT

I. THE TRIAL COURT INCORRECTLY RULED THAT WACOUTA TOWNSHIP WAS COLLATERALLY ESTOPPED FROM DEFENDING IN THIS CASE.

A. The Doctrine Of Collateral Estoppel Does Not Preclude A Governmental Subdivision From Re-litigating An Issue That The Subdivision Had Previously Litigated And Lost In A Prior Action.

Respondents cited three Goodhue County District Court cases involving title registration proceedings in Wacouta Township as a basis for arguing that collateral estoppel precluded Wacouta Township from defending in the instant case. The first case was a 1989 case, Application of Richard B. Culp v. Barbara Holden, et al., which included as a defendant Wacouta Township. Apparently, Wacouta Township filed no answer in this proceeding and a default judgment was entered. From the pleadings, it was not clear what the basis was nor what the issues were concerning the Culp claim to the portion of the Sand Beach which abutted the Culp property. In 1995, a similar application was made by Marya O'Malley, f/k/a Marya Greenberg. As in Culp, Wacouta Township served no answer and default judgment was entered. Later, in 2001, Michael and Judith Stenwick also filed an application to register title to their property located for the most part in Block 5 of the plat of Wacouta Beach and on a vacated street in Block 6. The application also involved a slight portion of the Sand Beach. As the court determined in that case, all of the defendants named in the Stenwick registration defaulted, including Respondents Jerry

J. Barth and Nancy J. Barth who were named in that proceeding, as well as Wacouta Township.

However, in 2005, the owners of Lots 8, 9 and 10, of Block 6, Plat of Wacouta Beach attempted to register title to their lots along with the adjoining Sand Beach which fronted those lots and led down to Lake Pepin. That action was entitled Application of J. Thomas and Peggy Wolner to Register Title to Lots 8, 9 and 10, Block 6, Wacouta Beach, along with a portion of the adjoining Sand Beach. In Wolner, Wacouta Township answered and defended, and the Wolners in resolving the title registration and boundary registration proceeding, abandoned their claims to the Sand Beach. (See Affidavit of George L. May, Exhibits "F", "G", "H" and "I"; Appendix A-107-127).

Respondents in their submissions to the Trial Court sought to disregard the outcome and the proceedings involved in the Wolner application which occurred in 2005. The Trial Court in considering the motions for and against summary judgment raised by Respondents, also apparently decided to disregard the outcome in the Wolner application. That disregard employed by the Trial Court in analyzing the summary judgment situation was in conflict with a recent decision of the Supreme Court of Minnesota directly in point with the instant case. In A&H Vending Co. v. Commissioner of Revenue, 608 N.W.2d 544 (Minn. 2000) the Supreme Court reviewed a decision of the Minnesota Tax Court which

entered summary judgment in favor of a number of tax payers against the Minnesota Commissioner of Revenue. The Tax Court had employed an earlier Tax Court case holding to collaterally estop the Commissioner from levying sales tax against the purchase of amusement devices. The Supreme Court in reversing began its analysis by stating the general rule for the review of a grant of summary judgment:

"We review a grant of summary judgment to determine whether there are any genuine issues of material fact and whether the granting court erred in its application of the law. See Hedglin v. City of Willmar, 582 N.W.2d 897 (Minn. 1998)...We review questions of law, such as the interpretation of a statute by the tax court, de novo. (Citation Omitted)." 607 N.W.2d at 546, 547.

As in the instant case, the Respondents in A&H Vending Co. argued that Collateral Estoppel precluded the Commissioner from re-litigating the Tax Court's holding in the earlier tax court case. The Supreme Court, however, set out the requirements to be met by a party who seeks to offensively employ collateral estoppel against a governmental unit:

"Collateral estoppel in income tax cases 'must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal principals remain unchanged'." supra at 547

The Supreme Court also stated that it would not apply collateral estoppel against a governmental entity where the complaining party was not a party to the prior litigation and where the issues were not identical. Citing Care Institute, Inc. -

Maplewood v. County of Ramsey, 576 N.W.2d 734 (Minn. 1998). The Supreme Court also cited to a U.S. Supreme Court case, United States v. Mendoza, 464 U.S. 154, 104 S.Ct. 568, 78 L.Ed.2d 379 (1984) where the U.S. Supreme Court held that non-mutual offensive collateral estoppel does not apply against the government. While the Supreme Court in A&H Vending Co. stated that it declined to adopt a blanket rule that there must always be mutuality of parties before collateral estoppel can apply against the government, it held that because none of the respondents in A&H Vending Co. was a party to the earlier cited tax court decision, they did not qualify to have collateral estoppel employed offensively against the government to preclude the government from re-litigating an issue that it had previously litigated and lost in a prior action. 608 N.W.2d at 547.

The holdings in A& H Vending Co. and Care Institute require reversal of the trial court's determination that Wacouta Township was collaterally estopped by the earlier boundary registration cases cited by Respondents as their authority for collateral estoppel. It is clear that the Barths were not involved in any of those cases except as neighboring property owners. In addition, there was no showing by Respondents before the Trial Court that the issues in those cases were "identical" with the issues in the instant case, as required by Care Institute and A&H Vending Co.

It is not difficult to understand the rationale for holding that the government should not be collaterally estopped where it is not shown that the party seeking offensive collateral estoppel was a party to the prior litigation and the issues were identical. It is recognized that municipal governments, such as Wacouta Township, are not in an identical position to a private litigant. Because of the nature of the issues that municipal governments become involved in and are required to litigate they must have greater flexibility to defend themselves. Government is a party to a far greater number of cases on a regional basis than even the most litigious private entity. As the U.S. Supreme Court in United States v. Mendoza, *supra* wrote:

"Government litigation frequently involves legal questions of substantial public importance; indeed, because the proscriptions of the United State Constitution are so generally directed at governmental action, many constitutional questions can arise only in the context of litigation to which the government is a party. Because of those facts, the government is more likely than any private party to be involved in lawsuits against different parties which nonetheless involve the same legal issues.

A rule allowing non-mutual collateral estoppel against the government in such cases would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue..."

464 U.S. at 160; 104 S.Ct. at 572. In further support of the rule laid down in the A&H Vending Co. and Care Institute, it should be noted that township officials who are elected to their positions come and go over a span of time. Successive municipal

administrations may take differing positions with respect to the resolution of a particular issue, leading to certain inconsistencies, such as allowing a default judgment to be taken on a certain issue during one decade, and vigorously contesting that issue in a later decade. Such is the situation here.

One thing that is quite clear in the holdings of the Supreme Court in A&H Vending Co. and Care Institute is that when a different plaintiff seeks to preclude the government from re-litigating an issue that the government had previously litigated and lost in a prior action, offensive collateral estoppel may not be employed to decide the issues in the case unless the later Plaintiff was a party to the original action. The Trial Court in holding that Wacouta Township was collaterally estopped by the cases cited by Respondents going back almost twenty years, committed reversible error.

II. RESPONDENTS FAILED TO ESTABLISH GENUINE ISSUES OF MATERIAL FACT THAT WOULD SUPPORT PROOF BY CLEAR AND CONVINCING EVIDENCE OF THEIR RIGHT TO OWNERSHIP OF THE "SAND BEACH" PARCEL THROUGH ADVERSE POSSESSION.

On appeal from summary judgment, the reviewing court must determine (1) whether there are genuine issues of material fact and (2) whether the trial court erred in its application of the law. Betlach v. Wayzata Condominium, 281 N.W.2d 328 (Minn. 1979). There is no genuine issue of material fact when the record, taken as a whole, could not lead a rational fact finder to find for the nonmoving party. DLH, Inc. v. Russ, 566 N.W.2d 60 (Minn. 1997).

To show adverse possession, the disseizor must show, by clear and convincing evidence an actual, open, hostile, continuous and exclusive possession for fifteen years. Gange v. Schuler, 659 N.W.2d 261 (Minn.App. 2003); Minn. Stat. §541.02. In addition, §541.02 also requires that the disseizor pay property taxes for at least five consecutive years on property adversely possessed. The only evidence submitted by Respondents to justify their claim of adverse possession of the Sand Beach parcel was the Affidavit of Respondent Jerry J. Barth in which he claimed that his grandparents had adversely possessed the Sand Beach for the fifteen year period and later, that he and his wife had also adversely possessed the Sand Beach parcel for fifteen years. There was no evidence that either Respondents' grandparents or Respondents ever paid property taxes for five consecutive years on the Sand Beach parcel. Nor was there any showing by Respondents that they ever erected signs or barriers which informed the public to stay off the Sand Beach, or took any steps to prevent the public from utilizing the beach area in question.

In contravention of the Barth affidavit were the Poss and Iocco affidavits submitted by Wacouta Township that detailed the activities of the affiants and the general public with respect to usage of the Sand Beach at Green's Point. Both Mrs. Poss and Mr. Iocco detailed their lengthy residential status (16 and 19 years,

respectively), and enjoyment of the Sand Beach. They both observed that the Respondents had done nothing to exclude the public from the Sand Beach parcel which Respondents now claim to own.

It is respectfully submitted that Respondents did not, as a matter of law, demonstrate the required elements of adverse possession clearly and convincingly to entitle them to summary judgment on this particular issue. In fact, Wacouta Township, through the affidavits of Mr. Iocco and Mrs. Poss and their specific factual re-countings, demonstrated that specific facts exist which create a genuine issue for trial with respect to Respondents' claim of ownership through adverse possession of the Sand Beach parcel.

III. WACOUTA TOWNSHIP RAISED GENUINE ISSUES OF MATERIAL FACT SUFFICIENT TO ESTABLISH COMMON LAW DEDICATION OF THE SAND BEACH AND/OR A PRESCRIPTIVE EASEMENT IN THE PUBLIC.

At the summary judgment hearing before the Trial Court, Wacouta Township argued that the ownership of the entire Sand Beach at Green's Point was in the public through common law dedication, or in the alternative, that the public had established a prescriptive easement in the beach property. The Trial Court, with minimal comment, dismissed both of these theories.

In order to establish common law dedication in the public, such dedication must be established from (1) a land owner's

intent (expressed or implied) to have his land appropriated and devoted to a public use; and (2) the public's acceptance of that use. Township of Villard v. Hoting, 442 N.W.2d 826 (Minn.App. 1989). The requisite intent for devoting land to public use may be implied from acts and conduct of the owner which are unequivocally and convincingly indicative of a dedication and upon which the public has the right to and does rely. Flynn v. Beisel, 257 Minn. 531, 102 N.W.2d 284 (1960). In the instant case, Wacouta Township submitted evidence that in the original plat of Wacouta Beach, the landowner had constructed a public road which extended across Block 6 and connected one end of the Sand Beach with the other end. Wacouta Township submitted to the Court that this was an implied dedication to the public by the original owner of the "Sand Beach" by allowing direct public access to both ends of the beach from the road. The road was vacated some years later, but the public's acceptance of this dedication was evidenced by continued general public usage and enjoyment of the beach over the years. In Sackett v. Storm, 480 N.W.2d 377 (Minn.App. 1992) this Court held that a landowner's intent to dedicate may be inferred from the landowner's long assent to, and acts in furtherance of, public use. Once the public accepts the owner's dedication, the common law dedication is immediately effective. In addition, dedication is irrevocable after public acceptance unless the public consents to revocation.

In the instant case, genuine issues of material fact concerning common law dedication exist which preclude Respondents from obtaining summary judgment on the ownership of the "Sand Beach" parcel.

Likewise, genuine issues of material fact concerning the public's right to a prescriptive easement exist, and must be determined by a finder of fact at a trial. In order to establish a prescriptive easement, a claimant must prove use for a period of 15 years, and that such use was open, continuous, actual, hostile and exclusive. Heuer v. County of Aitkin, 645 N.W.2d 753 (Minn.App. 2002).

"Use of an easement is to presumed to be adverse or hostile when the easement claimant shows open, visible, continuous, and unmolested use for the statutory period that is inconsistent with the owner's rights, under circumstances in which the owner's acquiescence may be inferred." (Citations Omitted).

Case law holds that the claimant prevails unless the Defendant successfully rebuts this presumption. Hartman v. Landings, Inc., 288 Minn. 415, 181 N.W.2d 466 (1970). It is also the rule with respect to prescriptive easements that if the other elements are shown, adverseness will be presumed; where the presumption is unavailable, adverseness becomes a question of fact with the burden on the party claiming the easement to prove the allegation by a preponderance of the evidence. Rice v. Miller, 306 Minn. 523, 238 N.W.2d 609 (1976).

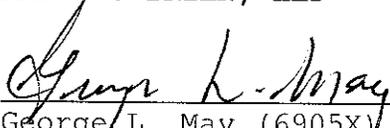
It is clear that factual issues which are of such a nature to affect the outcome of the case exist, involving a prescriptive easement in the public, as well as outcome determinative facts concerning common law dedication. Under these circumstances, the Trial Court's order dismissing the allegations and affirmative defenses contained in Wacouta Township's Answer must be reversed and the case remanded to the Trial Court for a trial of these issues.

CONCLUSION

Based upon the reasoning and authorities cited above, the decision of the Goodhue County District Court granting summary judgment to Respondents must be reversed and this case remanded for a trial on all of the issues.

Respectfully submitted,

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