

NO. A08-317

State of Minnesota
In Court of Appeals

In the Matter of the Application of:

Jerry J. Barth and Nancy J. Barth, husband and wife.

To 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.

RESPONDENTS' BRIEF 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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STATEMENT OF THE ISSUES

I. WHETHER THE DISTRICT COURT CORRECTLY RULED THAT THE DOCTRINE OF COLLATERAL ESTOPPEL APPLIES TO PRECLUDE THE CLAIMS OF APPELLANT, WACOUTA TOWNSHIP, TO THE AREA DESIGNATED ON THE PLAT OF WACOUTA BEACH AS THE SAND BEACH.

The District Court held that the doctrine of collateral estoppel applies.

Apposite Authority: Kaiser v. Northern States Power Company, 353 N.W. 2d 899 (Minn. 1984); State v. Joseph, 636 N.W.2d 322 (Minn.2001); Nelson v. Short-Elliott-Hendrickson, Inc., 716 N.W.2d 394 (Minn. App. 2006); Gollner v. Cram, 258 Minn. 8, 102 N.W.2d 521 (1960)

II. WHETHER APPELLANT FAILED TO ESTABLISH GENUINE ISSUES OF MATERIAL FACT TO PRECLUDE SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS.

Appellant has failed to establish genuine issues of material fact.

Apposite Authority: DLH, Inc. v. Russ, 566 N.W.2d 60, 71 (Minn.1997)

III. WHETHER THE DISTRICT COURT ERRED IN DETERMINING THAT THE AREA DESIGNATED ON THE PLAT OF WACOUTA BEACH AS THE SAND BEACH IS NOT DEDICATED TO THE PUBLIC AND THAT THERE IS NO PRESCRIPTIVE EASEMENT OVER THE SAND BEACH IN FAVOR OF THE PUBLIC.

The District Court did not err when in its determination.

Apposite Authority: Neill v. Hake, 254 Minn. 110, 93 N.W.2d 821 (1958); Metalak v. Rasmussen, 184 Minn. 260, 238 N.W. 478 (1931); Keiter v. Berge, 219 Minn. 374, 18 N.W.2d 35 (Minn. 1945); McCuen v. McCarvel, 263 N.W.2d 64, (Minn. 1978)

IV. THE PROVISIONS OF MINN. STAT. §504.02, REQUIRING THE PAYMENT OF REAL ESTATE TAXES FOR FIVE YEARS, DO NOT APPLY.

The requirement to pay real estate taxes for five years does not apply.

Apposite Authority: Mellenthin v. Brantman, 211 Minn. 336, 1 N.W.2d 141 (1941)

STATEMENT OF THE FACTS

Respondents, Jerry J. Barth and Nancy J. Barth, filed an application to register the title to the property described at Appellants' Appendix A-03, (the Respondent's Property). The Respondents' Property consists of two platted lots and the land between the lots and the Mississippi River. The Respondents' Property is illustrated on the survey dated January 3, 2006. (Appellant's Appendix A-57).

In 1920, Edward H. Lidberg, the owner of Lot 1 of Section 32, Township 113 North of Range 13 West, Goodhue County, Minnesota, (Lidberg), filed for record the Map of Wacouta Beach in Book 3 of Plats, page 49 (the Plat). The Respondents' Property is part of the Plat. (Appellant's Appendix A-040). The Plat contains a dedication that dedicates the streets to the public for public use. There is no dedication for any public use, other than the streets. (Transcript, p. 11).

Lidberg conveyed a part of the platted property to Fred O. Green and Carl O. Gustofson by a Warranty Deed, joined in by spouse, dated December 23, 1929 and recorded December 26, 1929 in Book S-7 of Deeds, page 37. The property conveyed by this deed is described by a metes and bounds description and includes platted lots, vacated streets and the identified on the Plat as the Sand Beach. This deed included the Respondents' Property. (Appellant's Appendix A-015).

Raymond B. Swain and Anna C. Swain, the grandparents of Jerry J. Barth, one of the Respondents, (the Swains), acquired Lot 18, Block 6 of the Plat in 1950 and Lot 19, Block 6 of the Plat in 1960. (Appellant's Appendix A-025). 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

Respondents' Property in an actual, open, notorious, continuous, hostile, exclusive, and adverse possession under color of and claiming title in fee simple to the Respondents' Property. This use and occupancy continued for more than 15 years. (Appellant's Appendix A-026). The Swains conveyed the Respondents' Property to Respondents, who used and occupied all of the Respondents' Property in an actual, open, notorious, continuous, hostile, exclusive, and adverse possession under color of and claiming title in fee simple to the Respondents' Property, for more than 15 years. (Appellant's Appendix A-026).

On September 26, 2006, Respondents filed an application to register the Respondents' Property. (Appellant's Appendix A-04). The Respondents' Property is illustrated on the survey dated January 3, 2006. (Appellant's Appendix A-057). The application also asked that the boundaries of the Property be registered. (Appellant's Appendix A-06). Wacouta Township was named as a defendant and was served with a Summons. Wacouta Township answered and alleged that the part of the Plat identified as the Sand Beach is public. (Appellant's Appendix A-018).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY RULED THAT THE DOCTRINE OF COLLATERAL ESTOPPEL APPLIES TO PRECLUDE THE CLAIMS OF APPELLANT, WACOUTA TOWNSHIP, TO THE AREA DESIGNATED ON THE PLAT OF WACOUTA BEACH AS THE SAND BEACH.

A. When the Doctrine of Collateral Estoppel Applies to Preclude Relitigation of an Issue, Then No Genuine Issue of Material Fact Exists and Summary Judgment Is Proper.

In an appeal from summary judgment, the appellate court must determine whether there are genuine issues of material fact and whether the district court erred in its application of the law. *Cooper v. French*, 460 N.W.2d 2 (Minn.1990). If the doctrine of collateral estoppel precludes relitigation of an issue, then no genuine issue of material fact exists and summary judgment is proper. *Ryan v. Progressive Cas. Ins. Co.*, 414 N.W.2d 470 (Minn. App. 1987).

The availability of collateral estoppel is a mixed question of law and fact subject to de novo review. *Falgren v. State, Bd. of Teaching*, 545 N.W.2d 901 (Minn.1996). But if collateral estoppel is available, this court will not reverse a district court's decision to apply the doctrine absent a "demonstrated abuse of discretion." *Pope County Bd. of Comm'rs v. Pryzmus*, 682 N.W.2d 666, 669 (Minn. App.2004), review denied (Minn. Sept. 29, 2004).

Collateral estoppel or "issue preclusion", bars a party from relitigating an issue determined against that party in an earlier action, even if the second action differs from the first one. Collateral estoppel is applicable where (1) the issue is identical to one in a prior adjudication; (2) there was a final judgment on the merits; (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. *Kaiser v. Northern States Power Company*, 353 N.W. 2d 899 (Minn. 1984). It applies not only to all claims actually litigated, but to all claims that could have been litigated in the earlier action. *Id.*

The first question to answer is whether the issue here is identical to that of the previous litigation, that being whether Respondents have the right to claim ownership to that part of the property identified on the Plat as the Sand Beach. In three previous cases, an application to register title to land, including the Sand Beach, was filed with the District Court in Goodhue County, Minnesota. The first case is Richard B. Culp, applicant, Court File No. 133, (Culp), (Appellant's Appendix A-044). The second case is Michael W. Stenwick and Judy A. Stenwick, applicants, Court File No. 25-C8-96-1059, (the Stenwicks), (Appellant's Appendix A-052). The third case is Marya L. O'Malley, formerly known as Marya Greenberg, applicant, Court File No. C6-95-515, (O'Malley/Greenberg), (Appellant's Appendix A-153).

In all three cases, the description of the property in the applications included the Sand Beach. In fact, the property owned by the Stenwicks is adjacent to the Respondents' Property. Culp, the Stenwicks and O'Malley/Greenberg were claiming ownership of the Sand Beach. Since these claims are identical to the claims of Respondents, the first element of collateral estoppel is satisfied.

The second element of collateral estoppel is that there needs to be a final judgment on the merits in the prior adjudication. In all three prior actions, a final Order and Decree was issued by the court. (Appellant's Appendix A-044, A-052 & A-153). No appeal of any

of the Orders was ever filed and the time for filing such an appeal has expired. Therefore, the Order and Decree issued by the court in each of the prior actions is a final judgment on the merits.

The third element of collateral estoppel requires that the estopped party was a party or in privity with a party to the prior adjudication. This element is also satisfied in that Appellant was an actual party to the previous actions and was given notice that Culp, the Stenwicks and O'Malley/Greenberg were claiming ownership of the Sand Beach. (Appellant's Appendix A-044, A-052 & A-153).

The fourth element requires that the estopped party was given a full and fair opportunity to be heard on the adjudicated issue. Appellant was a named defendant in all of the prior actions and was given notice of the actions, both by actual service of the notice and by publication of the summons. Appellant did not answer or defend against the prior claims and was found by the court to be in default. (Appellant's Appendix A-044, A-052 & A-153).

Whether a party had a full and fair opportunity to litigate generally focuses on whether there were significant procedural limitations in the prior proceeding, whether the party had the incentive to litigate fully the issue, or whether effective litigation was limited by the nature or relationship of the parties. *State v. Joseph*, 636 N.W.2d 322 (Minn.2001).

Appellant was given the proper notice that Culp, the Stenwicks and O'Malley/Greenberg were claiming the Sand Beach. The notice also properly informed Appellant of the result of failing to take action. Appellant had the opportunity and ability to defend against the claims, but did not do so.

In addition, in the O'Malley/Greenberg case, Appellant made a specific determination that it had no claim to the Sand Beach. By a resolution adopted by the town Board of Wacouta Township, Minnesota, on December 8, 1998, Appellant disclaimed any ownership, rights or interest in the Sand Beach adjacent to the property which was the subject of the O'Malley/Greenberg registration. The resolution was filed with the court on December 17, 1998. (Appellant's Appendix A-160).

The doctrine of collateral estoppel involves circumstances that raise an issue and precludes a second claim for the same issue not only as to every matter which was actually litigated, but also as to every matter which might have been litigated in that action. *Nelson v. Short-Elliot-Hendrickson, Inc.*, 716 N.W.2d 394 (Minn. App. 2006). Appellant had the opportunity to litigate all of the issues, but failed to appear and defend against the claims. If a party had the opportunity to fully litigate the issues involved, the doctrine collateral estoppel is properly invoked to preclude relitigation. *Gollner v. Cram*, 258 Minn. 8, 102 N.W.2d 521 (1960). Therefore, Appellant had a full and fair opportunity to litigate its claim, but did not do so. The fourth prong of the test has been met.

Appellant contends that the Trial Court erred in applying the doctrine of collateral estoppel because the Trial Court disregarded a Registration of Title action titled in the Matter of the Application of J. Thomas Wolner and Peggy Wolner, Court File No. CX-02-571 (the Wolners) (appellant's Appendix A-107). Appellant states in its facts that "[i]n Wolner, the District Court ruled against the applicants' attempt to register the "Sand Beach" property." (Appellant's Brief 8). This is not a correct statement of the resolution of that case.

In their application, the Wolners included part of the Sand Beach. Appellant answered and defended against the claim of the Wolners to the Sand Beach. At the final hearing on the matter, which was held on September 12, 2005, the parties entered into a settlement on the record. (Appellant's Appendix A-152). The description on the application was replaced by a metes and bounds description of Lots 8, 9 and 10 of Block 6 of Wacouta Beach. The Order and Decree contained the revised description. (Appellant's Appendix A-120). By the agreement of the parties the description was changed and the Wolner's claim to the Sand Beach was withdrawn. Therefore, the issue of the ownership of the Sand Beach was not in front of the court when it entered its Order and Decree in the Wolner matter.

B. When the Doctrine of Collateral Estoppel Is Applied in Non-tax Cases, Mutuality of Parties Is Not Required.

Appellant also contends that the District Court erred in applying the doctrine of collateral estoppel because of *A & H Vending Co. v. Commissioner of Revenue*, 608 N.W.2d 544 (Minn. 2000). Appellant argues that based on *A & H*, collateral estoppel does not apply against a governmental entity where the complaining party was not a party to the prior litigation. Appellant concludes that, because Respondents were not parties to the previous registration of title actions, collateral estoppel can not apply to preclude Appellant from defending in this action. However, *A & H* and the line of cases discussed by the Supreme Court are all tax cases.

In 1997, the tax court decided *Minnertainment Co. V. Commissioner of Revenue*, No. 6659, 1997 WL 45346 (Minn. T.C. Feb. 3, 1997). Because of that decision, the

taxpayers in *A & H* requested a refund of sales tax paid by them on their initial purchases of amusement devices, as well as sales tax paid on purchase of repair and upkeep material. The Minnesota Commissioner of Revenue denied their requests. The taxpayers appealed to the Minnesota Tax Court and filed a motion for summary judgment. Relying on *Minnertainment*, the Tax Court granted summary judgment to the taxpayers and awarded sales tax refunds. The Commissioner appealed to the Supreme Court. The Supreme Court reversed.

The taxpayers argued that the Commissioner was precluded from relitigating *Minnertainment*. The Supreme Court did not agree with the tax court and declined to apply collateral estoppel because none of the taxpayers were parties to the previous case. In reaching that conclusion, the Supreme Court reviewed the other cases where collateral estoppel was not applied against a government entity. All of the cases cited by the Supreme Court were tax cases. In fact, the only Minnesota cases that require mutuality of parties are tax cases. Finally, the Supreme court in *A & H* declined “to adopt a blanket rule that there must always be mutuality of parties before collateral estoppel can apply against the government” *A & H*, 608 N.W.2d 544, 547 (Minn. 2000). Since this case is not a tax case, mutuality of parties is not required for collateral estoppel to apply.

Where all of the elements of the doctrine of collateral estoppel are present, the application of the doctrine is appropriate and will not result in an injustice. *Illinois Farmers Ins. Co. v. Reed*, 647 N.W.2d 553 (Minn. App. 2002). If the doctrine of collateral estoppel precludes relitigation of an issue, then no genuine issue of material fact exists and summary judgment is proper. *Ryan*, 414 N.W.2d 470 (Minn. App. 1987). Here

the doctrine of collateral estoppel applies. Therefore, there are no genuine issues of material fact.

II. APPELLANT FAILED TO ESTABLISH GENUINE ISSUES OF MATERIAL FACT TO PRECLUDE SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS.

Even if collateral estoppel does not apply, Respondents are still entitled to summary judgment because there are no genuine issues of material fact. The affidavit of Jerry J. Barth, one of the Respondents, establishes that Respondents used and occupied all of Respondents' Property in an actual, open, notorious, continuous, hostile, exclusive, and adverse possession under color of and claiming title in fee simple to the Property and that their use and occupancy has continued for more than 15 years. (Appellant's Appendix A-25).

In opposition to this affidavit, Appellant filed the Affidavits of Gary Iocco and Becky Poss. (Appellant's Appendix A-128 & A-140). The affidavits state that the affiants use the Sand Beach on a regular basis. However, there is nothing in either affidavit to show that either affiant used the part of the Sand Beach that is being claimed by Respondents. "[T]he party resisting summary judgment must do more than rest on mere averments." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn.1997). Therefore, Appellant has failed to establish genuine issues of material fact.

III. THE DISTRICT COURT DID NOT ERR IN DETERMINING THAT THE AREA DESIGNATED ON THE PLAT OF WACOUTA BEACH AS SAND BEACH IS NOT DEDICATED TO THE PUBLIC AND THAT THERE IS NO PRESCRIPTIVE EASEMENT OVER THE SAND BEACH IN FAVOR OF THE PUBLIC.

Appellant also contends that there are issues of material fact because there is a

dispute as to whether the Sand Beach is public. However, where an issue can be resolved merely by applying statutory provisions to undisputed material facts, such issue is necessarily a legal one subject to disposition by summary judgment. *Tyler Lumber Co. v. Logan*, 293 Minn. 1, 195 N.W.2d 818 (1972).

Appellant claims that the part of Respondents' Property designated as the Sand Beach on the Plat is public and has been so since the filing of the plat in 1920. The platting of real property in Minnesota is controlled by statute. The statute in effect at the time Wacouta Beach was platted was Gen. St. 1913 §685. See Appellant's Appendix 58. The statutory requirement for dedicating property to the public is as follows:

“On the plat shall be written an instrument of dedication, which shall be signed and acknowledged by the owner of the land. Said instrument shall contain a full and accurate description of the land platted and shall set forth what part or parts of said land is dedicated, and also to whom, and for what purpose said part or parts are dedicated.”

The plat of Wacouta Beach contains the following dedication:

“We the undersigned ... [d]o hereby declare that we have caused said premises to be surveyed and platted and monuments fixed as designated on plat by Albert E. Rhame, County Surveyor, in the manner shown on the within plat and do hereby designate and name the same as “WACOUTA BEACH” of Township of Wacouta, and do further declare that we are the owners in fee-simple of said real estate and that the said premises are free from all incumbrances, and we hereby dedicate to the Public Use forever the Streets and Alleys hereon designated, to be used, occupied and enjoyed as such Streets and Alleys.”

The dedication does not refer to the Sand Beach, nor does it describe any property to be dedicated to the public other than the streets. In addition, in the Order and Decree in the O'Malley/Greenberg matter, the court found “[t]hat there has been no statutory dedication of any portion of the land being registered herein to the public including areas

identified on the Plat of Wacouta Beach as ‘public bottom’ and ‘sand beach’”. (Appellant’s Appendix A-153).

Appellant next claims that the public has established ownership to the Sand Beach through common-law dedication. The requisites of a common-law dedication are (1) an intent on the part of the owner to dedicate land to public use; (2) some action on his part to give effect to such intention; and (3) acceptance of such dedication by the public. *Neill v. Hake*, 254 Minn. 110, 93 N.W.2d 821 (1958).

None of these requisites are present in this case. There was no intent on the part of any of the owners of the part of the property identified as the Sand Beach to dedicate the land to the public. In 1920, the plat of Wacouta Beach was filed by Edward H. Lidberg, (Lidberg). In 1929, he conveyed a part of the platted property by a Warranty Deed dated December 23, 1929 and recorded December 26, 1929 in Book S-7 of Deeds, page 37. (Respondents’ Appendix R-1). The description used on the Warranty Deed is a metes and bounds description, encompassing platted lots, vacated streets and the property identified on the Plat as the Sand Beach. If Lidberg intended the Sand Beach to be public, he would not have included it in the deed. He could have described the property using only the platted lots and streets. He did not do so, he used a specific metes and bounds description that included the Sand Beach. Nothing has been offered to show that the owners intended to dedicate the Sand beach. In addition, intent can not be inferred from the actions of the owners, because none of the owners have ever acquiesced in the public use of the land. *Metalak v. Rasmussen*, 184 Minn. 260, 238 N.W. 478 (1931).

The second requisite is that there has to be some action to give effect to the intention. There has been no action on the part of any of the owners of the part of the property identified as Sand Beach to give effect to such intention.

Finally, there was no acceptance of such dedication by the public. The court has held that acceptance of a common-law dedication may be inferred from use for such a period of time that public accommodation and private rights would be materially affected by an interruption thereof, even though the municipality does not act officially thereon, or from acts in improving or maintaining the dedicated grant. *Keiter v. Berge*, 219 Minn. 374, 18 N.W.2d 35 (Minn. 1945). Appellant has offered no evidence to show acceptance.

If there was no intent to dedicate the property to the public and no action to give effect to a dedication, then there can be no acceptance. In addition, any use of the Sand Beach by the public has always been with permission.

The last claim of Appellant is that the public has acquired a prescriptive easement. In order to establish a prescriptive easement, a party must prove use for a period of 15 years, and that such use was open, continuous, actual, hostile, and exclusive. *McCuen v. McCarvel*, 263 N.W.2d 64, (Minn. 1978). Use of an easement is 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 from which the owner's acquiescence may be inferred. *Heuer v. County of Aitkin*, 645 N.W.2d 753 (Minn. App. 2002).

Here, Respondents and their predecessors in title 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. Any use of the beach, which is a part of the Property, by others, was with the permission of Respondents and their predecessors in title. The only proof offered by Appellant was the affidavits of Iocco and Poss. However, as discussed above, neither affidavit established use of the part of Sand Beach being claimed by Respondents.

Therefore, since the dedication on the plat of Wacouta Beach does not describe the Sand Beach, nor does it state that the Sand Beach is dedicated to the public for a public purpose, the Sand Beach is not, nor has it ever been public land. Further, there is no common law dedication of the Sand Beach, nor is there a prescriptive easement over the Sand Beach in favor of the public.

IV. THE PROVISIONS OF MINN. STAT. §504.02, REQUIRING THE PAYMENT OF REAL ESTATE TAXES FOR FIVE YEARS, DO NOT APPLY.

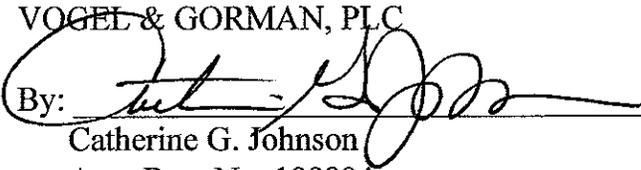
Finally, Appellant contends that Respondents are not entitled to claim the Sand Beach by adverse possession because they have not paid taxes on the real estate in question for five years as required by Minn. Stat. §504.02. However, that statute goes on to say that the requirement to pay taxes on the real estate in question “shall not apply to actions relating to . . . lands not assessed for taxation.” Where the owner of a lot claims title by adverse possession to an adjoining area held and claimed by him and where such disputed area is not separately assessed, it is not necessary that he should have paid taxes on the disputed area. *Mellenthin v. Brantman*, 211 Minn. 336, 1 N.W.2d 141 (1941). The part of the Sand Beach included in the Respondents’ application is not a separate tax parcel and is not assessed separately for real estate taxes. Therefore the requirement to pay real estate taxes for five years does not apply.

CONCLUSION

The District Court did not err when it determined that the doctrine of collateral estoppel applies to preclude the claims of Appellant. Even if collateral estoppel does not apply, Respondents are still entitled to summary judgment because there are no genuine issues of material fact. The District Court did not err when it determined that the area designated on the plat of Wacouta Beach as the Sand Beach is not dedicated to the public. The District Court did not err when it determined that there is no prescriptive easement over the Sand Beach in favor of the public. Respondents are not required to comply with the provisions of Minn. Stat. §504.02 and pay taxes on the real estate in question, because it is not separately assessed.

Because it is proper to apply the doctrine of res judicata, there are no genuine issues of material facts and it was proper for the District Court to grant summary judgment for Respondents. For all of these reasons, Respondents respectfully request that this Court affirm the District Court's order granting summary judgment.

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