STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1139

Dean de Neui, et al.,
Respondents,

vs.

Eric J. Slindee, et al.,
Appellants.

Filed February 1, 2011
Affirmed and remanded
Minge, Judge

Cass County District Court
File No. 11-CV-09-2525

Stephen F. Rufer, Samuel S. Rufer, Pemberton, Sorlie, Rufer & Kershner, P.L.L.P., Fergus Falls, Minnesota (for respondents)

Mark E. Greene, Sarah L. Krans, Bernick, Lifson, Greenstein, Greene & Liszt, P.A., Minneapolis, Minnesota (for appellants)

Considered and decided by Shumaker, Presiding Judge; Peterson, Judge; and Minge, Judge.

U N P U B L I S H E D O P I N I O N

MINGE, Judge

Appellant challenges the district court's entry of summary judgment for respondents in their action for reformation of their deed with appellant. Because there is no genuine issue as to any material fact, because the deed was prepared, executed, and

delivered in a setting of a mutual mistake, and because appellant has standing to seek reformation of the deed, we affirm and remand.

FACTS

The genesis of this lawsuit, and related actions, is rooted in an attempt in 1969 to shift the boundary line between two tracts of land located on Mule Lake, in Cass County.[1] That year the owners of neighboring government lots signed an agreement moving their boundary line 98 feet to the west, effectively giving the owner of Government Lot 8 (the easterly lot) 98 (or more) feet of additional shoreline from Government Lot 7 (the westerly lot). They recorded the agreement but did not exchange a deed.

In 1971, the owner of the easterly tract deeded off a 200-foot-wide parcel described as the westerly portion of Government Lot 8. This 200-foot-wide parcel changed hands three times between 1980 and 2000. The most recent conveyance was a warranty deed from respondents Dean and Donna de Neui[2] to the present owners, appellants Eric and Jerilyn Slindee. Each time the 200-foot-wide de Neui/Slindee parcel was conveyed, the abstract and the deeds described it as having its western border on the "West boundary line of [Government] [L]ot 8," extending 200 feet east of that line. Although this separate parcel apparently was to include the easterly 98 feet or more of

[1] For a detailed recitation of the factual background of this case, see *Slindee v. Fritch Invs., LLC*, 760 N.W.2d 903, 904-906 (Minn. App. 2009), a related proceeding precipitated by the same initial transactions and properties that are the basis of the present litigation.

[2] At the early stage in the proceeding, Donna de Neui used the name Donna Hicok. She began using the de Neui name during the course of litigation. To minimize confusion, we use de Neui throughout.

lakeshore in Government Lot 7, none of these conveyances referred to the 1969 boundary shift or properly described that area.[3]

During their ownership, the de Neuis built a fence on the boundary line that had been established in 1969. The de Neuis believed that they had purchased and sold 200 feet of property east of that boundary. Various owners constructed the septic system, garage, part of the driveway, and the western side of the lake home on the 98-foot strip between the 1969 boundary and the line between Government Lots 7 and 8.

In 2002, Fritch Investments, LLC purchased a resort on Mule Lake that included the portion of Government Lot 8 directly east of the de Neui/Slindee parcel. Fritch intended to subdivide and develop the resort property. In the process, Fritch learned that the 1969 boundary shift was not being recognized and that the boundary was still being described as and with reference to the line between Government Lots 7 and 8.[4] Fritch then asked the Slindees for a quitclaim deed to the disputed strip in Government Lot 8. The Slindees refused.

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[3] Because government lots are established as part of the original public land surveys, their location is fixed, they are part of the framework used in describing real estate, and their lines are not subject to modification by private parties. What happened here is that the owners of the government lots agreed to transfer ownership of part of Government Lot 7. The record does not indicate the reason for not setting forth a proper description that referenced Lot 7. Perhaps the original parties thought that they had actually relocated the boundary between Government Lots 7 and 8.

The survey in the record indicates the dimensions of the parcel in the disputed area are not square and therefore the width varies depending on where in the parcel it is measured. Neither party disputes the location of the disputed area and for clarity and convenience the opinion will refer to the 98-foot width.

[4] This created a disputed strip of land on that east side of the de Neui/Slindee parcel depending on whether that 200-foot-wide parcel was measured from the 1969 boundary line or the line between Government Lots 7 and 8.

Eventually, the Slindees initiated an action to quiet title to the strip of land claimed by Fritch and for trespass damages. Fritch counterclaimed, arguing for a boundary by practical location and for reformation of the deed from the de Neuis to the Slindees. After litigation commenced, the de Neuis also gave Fritch a quitclaim deed to the disputed land in Government Lot 8 that was the focus of that litigation. In 2007, the district court determined that the legal doctrine of boundary by practical location applied, awarded the disputed land to Fritch, granted the Slindees a prescriptive easement to use a path on the disputed property from their lawn to the lake, and prohibited Fritch from constructing any improvements on a 30-foot buffer zone. The district court did not reach the alternative claim by Fritch for reformation of de Neuis' deed to the Slindees.

The district court's 2007 decision was appealed. We found no evidence to support a determination that there was a boundary by practical location. *Slindee v. Fritch Invs., LLC*, 760 N.W.2d 903, 909-10 (Minn. App. 2009). Based on the issues that had been litigated up to that point, we ruled that the disputed area should be awarded to the Slindees, noting: "The 1969 boundary agreement undisputedly marks the Slindees' western boundary; but, absent an express agreement, the eastern boundary remains as described in the parcel's abstract–200 feet east of and parallel to the platted line between [G]overnment [L]ots seven and eight." *Id.* at 910. However, we also recognized that Fritch's claim for reformation of the de Neui's deed to Slindee had not yet been considered by the district court and remanded for consideration of that claim. *Id.* We noted that the original parties to the instrument generally need to be involved. *Id.* at 911.

On remand, the district court dismissed the claim because Fritch was not an original party to the deed.

In October 2009, the de Neuis filed suit to reform the warranty deed based on a theory of mutual mistake. The Slindees counterclaimed, alleging a breach of the warranty deed and requested damages in the form of attorney fees. The de Neuis filed a motion for summary judgment, arguing that the findings in the prior quiet-title litigation established both the use of the 98-foot strip in Government Lot 7 and their intentions as sellers, and Slindees as purchasers, to convey this strip. The de Neuis further argued that these findings estopped the Slindees from denying a mistake, thus having a claim-preclusion effect. The Slindees countered that the de Neuis lacked standing to bring the reformation action and that claim preclusion did not apply. The district court granted summary judgment for the de Neuis.

This appeal followed.

D E C I S I O N

I.

The first issue is whether the de Neuis have standing to bring their reformation claim. Standing is a question of law subject to de novo review. *Hanson v. Wollston*, 701 N.W.2d 257, 262 (Minn. App. 2005) (citing *In re Petition for Improvement of Cnty. Ditch No. 86*, 625 N.W.2d 813, 817 (Minn. 2001)).

The Slindees raised standing only in their answer and an affidavit. They did not argue the issue to the district court. However, standing is a threshold issue that may be raised at any time. *United States v. Hays*, 515 U.S. 737, 742, 115 S. Ct. 2431, 2435

(1995); *In re Welfare of Mullins*, 298 N.W.2d 56, 61 n.7 (Minn. 1980). There are three elements to constitutional standing:

> First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of . . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Hays, 515 U.S. at 742, 115 S. Ct. at 2435 (quotation omitted); *see also Hanson*, 701 N.W.2d at 262. "Essentially, a potential litigant must allege injury in fact, or otherwise have a sufficient stake in the outcome, to have a court decide the merits of a dispute." *Cochrane v. Tudor Oaks Condo. Project*, 529 N.W.2d 429, 433 (Minn. App. 1995), *review denied* (Minn. May 31, 1995). The burden is on the party asking the court to exercise its jurisdiction "to allege facts demonstrating that [they are] a proper party to invoke judicial resolution of the dispute." *Hays*, 515 U.S. at 743, 115 S. Ct. at 2435 (quotation omitted).

In the context of reforming a written instrument, "[r]eformation is generally allowed against the *original* parties to an instrument and those in privity with the original parties." *Manderfeld v. Krovitz*, 539 N.W.2d 802, 805 (Minn. App. 1995), *review denied* (Minn. Jan. 25, 1996).

Neither side disputes that the de Neuis and the Slindees are the original parties to the warranty deed that is the subject of this reformation action. The question is whether the de Neuis have a claim to a concrete and particularized injury in fact if the warranty

deed is not reformed and whether the quitclaim deed for the disputed area that they gave Fritch had any impact on such a claim.

The guarantees of a warranty deed are statutorily defined and include that "the grantor will defend the title thereto against all persons who may lawfully claim the same." Minn. Stat. § 507.07 (2010). The title of the land de Neuis purchased matched the title of the land they sold to the Slindees. However, there is a problem: the legal description does not include the area on which significant improvements are located, including the septic system, a garage, part of the driveway, and the west wall and portion of the lake home. The de Neuis allege that they represented to the Slindees that these improvements were part of the land they were selling to them. The possibility of litigation resulting from this representation is a prospect of economic injury that creates a stake in the outcome of the litigation and therefore confers standing. *See Cochrane*, 529 N.W.2d at 433 (discussing requirement of standing).

This potential liability is an interest sufficient to confer standing on the de Neuis unless they lost standing by giving Fritch a quitclaim deed. A quitclaim deed conveys "all right, title, and interest of the grantor in the premises described" to the grantee. Minn. Stat. § 507.07. The de Neuis, however, gave Fritch a quitclaim deed that includes the disputed area. The quitclaim deed does not change the fact that they are still an original party to the warranty deed conveyed to the Slindees and subject to liability if the warranty deed does not accurately describe the property they attempted to convey. Accordingly, we conclude that the de Neuis have standing and the quitclaim deed does not affect that standing.

II.

The second issue is whether the district court applied collateral estoppel and, if so, whether it was proper. Here, the district court found the basic elements necessary to establish reformation. The Slindees argue that the district court looked to the prior litigation between Fritch and the Slindees and that the district court in effect used collateral estoppel improperly to prevent them from litigating fact-related issues. "Whether collateral estoppel precludes litigation of an issue is a mixed question of law and fact that we review de novo." *Hauschildt v. Beckingham*, 686 N.W.2d 829, 837 (Minn. 2004). If it is decided that collateral estoppel is available, the district court's decision to apply the doctrine is reviewed for abuse of discretion. *Pope Cnty. 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, applies when:

> (1) the issue was 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.

Ellis v. Minneapolis Comm'n on Civil Rights, 319 N.W.2d 702, 704 (Minn. 1982); *see also A & H Vending Co. v. Comm'r of Revenue*, 608 N.W.2d 544, 547 (Minn. 2000) (listing the same factors). "Collateral estoppel precludes the relitigation of issues which are . . . necessary and essential to the resulting judgment." *Ellis*, 319 N.W.2d at 704.

Here, the earlier litigation between Fritch and the Slindees addressed the boundaries of the property the Slindees intended to purchase, the problems of the de

Neuis' deed to the Slindees, and the Slindees' mistake in that regard. However, in the *Fritch* case, the district court dismissed the reformation claim with prejudice on the ground that the proper parties were not before the court. Because the district court did not reach the merits of the claim of reformation for mutual mistake, there was not a final judgment on the merits of that claim.

We agree with the Slindees that the findings about mistake in the earlier litigation were not necessary and essential to the judgment, and therefore those findings cannot be used to estop the Slindees in this case. However, after carefully examining the record, we conclude that the district court does not refer to collateral estoppel or rely on the earlier Fritch/Slindee litigation in granting summary judgment. The district court noted that the "issues in this case were previously tried in Cass County District Court." The district court then proceeded with a brief discussion of the facts of the present case and granted summary judgment. So while collateral estoppel is not available to the district court as a matter of law, the district court did not rely on the doctrine, but determined mutual mistake based on the record before it.

III.

The third issue is whether the district court abused its discretion by not granting additional time for discovery before ruling on the summary judgment motion. Minn. R. Civ. P. 56.06 allows the district court to grant additional time for discovery if the district court determines it to be necessary. Discovery orders by the district court will not be disturbed absent a clear abuse of discretion. *Shetka v. Kueppers, Kueppers, Von Feldt & Salmen*, 454 N.W.2d 916, 921 (Minn. 1990).

The Slindees submitted an affidavit from their lawyer stating that he had a good-faith belief that discovery would result in admissible evidence on the issue of reformation. However, prior to the de Neuis' motion for summary judgment, the Slindees had not engaged in any discovery in this action. Once a summary judgment request was before the district court, the Slindees did not identify specific discovery that they wished to undertake, and they did not serve any motions for discovery. They simply requested that the district court deny summary judgment to enable them to engage in undesignated discovery. The Slindees point to no caselaw to support their claim that the district court abused its discretion by ruling without additional discovery. A mere assertion not supported by argument or authority is waived on appeal unless prejudicial error is obvious upon inspection. *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (citing *Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519-20, 187 N.W.2d 133, 135 (1971)). On this record, we conclude that the district court did not abuse its discretion in precluding undefined discovery by granting summary judgment.

IV.

The fourth issue is whether there are any genuine issues of material fact that preclude the district court from ordering summary judgment and reforming the deed. "We review de novo whether a genuine issue of material fact exists" and "whether the district court erred in its application of the law." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002).

Summary judgment is granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. The evidence must be viewed in the light most favorable to the non-moving party. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). To reform a written instrument based on mutual mistake the evidence must be "clear, unequivocal, and convincing." *Norwest Bank Minnesota, N.A. v. Ode*, 615 N.W.2d 91, 95 (Minn. App. 2000) (quotation omitted), *review denied* (Minn. Oct. 17, 2000). "This does not mean that a party is required to establish such mistake beyond reasonable doubt." *Golden Valley Shopping Ctr., Inc. v. Super Value Realty, Inc.*, 98 N.W.2d 55, 58 (Minn. 1959).

To grant reformation based on mutual mistake, the district court must find "(1) there was a valid agreement between the parties expressing their real intentions; (2) the written instrument failed to express the real intentions of the parties; and (3) this failure was due to a mutual mistake of the parties . . . ." *Norwest Bank Minnesota, N.A.*, 615 N.W.2d at 95 (quotation omitted).

Here, the de Neuis testified that they conveyed a 200-foot-wide parcel, but that they were mistaken in describing the western boundary. Their mistake is not challenged. To decide the issue of reformation, the remaining question is whether the Slindees were also mistaken.[5] The district court had the parties' motions and oral arguments, along with

[5] The parties do not urge this court to analyze the location of the east and west boundaries of the parcel conveyed separately in connection with the determination of a mutual

nine pages of the transcript from the Fritch trial. The nine pages include sections from the direct and cross-examinations of Eric Slindee and Dean de Neui.

During cross-examination, Eric Slindee agreed that Dean de Neui pointed out the fence built on the relocated, 1969 boundary line as the western boundary of the property when Mr. Slindee was inspecting the property. Later, Slindee's attention was directed to the title-insurance policy and the deed, both of which state that he was purchasing 200 feet of property. The cross-examination continued:

> Q: And you thought it started at the Muscari fence line [relocated, 1969 boundary line] on the west, the two hundred feet that you were purchasing, correct?
> A: That's what, Mr. de Neui pointed out the fence line as what he thought was the west boundary line, yes.

Eric Slindee also testified on cross:

> A: I don't believe there is a mistake in the description from the deed that Mr. de Neui gave me.
> Q: Do you understand that the description in the deed that you got from Mr. de Neui doesn't include your garage for instance?
> A: I understand that today.
> Q: And you don't consider that to be a mistake?
> A: Not after talking to the previous owners of the property, I don't believe it to be a mistake, no.

Drawing all inferences in favor of the Slindees, the testimony indicates that there was a valid agreement between the parties expressing their intentions. The Slindees thought they were purchasing 200 feet of property starting at the fence line built on the

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mistake. We analyze the mistake question relating to the location of the 200-foot-wide parcel as a whole.

1969 boundary. The Slindees also thought that the 200 feet of property included the path to the lake that was actually more than 200 feet from the fence line.

There was an agreement between the parties to convey a 200-foot-wide parcel of land measured from the boundary line established by the 1969 boundary-shifting agreement. What was to be 200 feet was confused with what was approximately 300 feet. The Slindees inspected the property three times before purchasing. The possibility of acquiring approximately 300 feet does not create a genuine issue of material fact of whether there was a mistake as to the location of west and east boundaries. Eric Slindee's testimony that there was not a mistake conflicts with his testimony of what he viewed and understood, and the statement does not address his view at the time he purchased the property. His testimony is not enough to raise a genuine issue of material fact. *See Banbury v. Omnitron Int'l, Inc.*, 533 N.W.2d 876, 881 (Minn. App. 1995) ("A self-serving affidavit that contradicts earlier damaging deposition testimony is not sufficient to create a genuine issue of material fact."). The written instrument failed to accurately describe the lake-home property being purchased and that failure was caused by a mutual mistake of the parties. Due to the mutual mistake, the deed should be reformed.

V.

Finally, in affirming reformation of the deed, this court notes that the warranty deed now conveys property that the de Neuis did not have proper title to and that the de Neuis are likely liable for quieting title to that portion of the property. The de Neuis noted this liability to the district court.

Because there was no genuine issue of material fact on the issue of reformation of the deed, we affirm. Because it is not clear from the record whether this action was to be continued to quiet title to the western portion of the property under the reformed deed, we remand for such further appropriate proceedings as the district court or the de Neuis my determine is necessary.

Affirmed and remanded.

Dated: