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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A06-2353**

Ronald Richard Johnson,  
Appellant,

Dee Johnson,  
Plaintiff,

vs.

City of Shorewood,  
Respondent,

City of Minnetonka,  
Respondent,

Riley-Purgatory-Bluff Creek Watershed District,  
Respondent,

Trivesco, et. al.,  
Respondents,

Highland Villa Builders, Inc.,  
Respondent.

**Filed February 19, 2008  
Affirmed  
Huspeni, Judge\***

Hennepin County District Court  
File No. 27-CV-04-016195

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\* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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Considered and decided by Hudson, Presiding Judge; Kalitowski, Judge; and Huspeni, Judge.

## **UNPUBLISHED OPINION**

**HUSPENI**, Judge

Appellant Ronald Johnson<sup>1</sup> challenges the district court's grant of summary judgment in favor of all named respondents. Appellant argues that the district court erred

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<sup>1</sup> The brief filed by counsel for Ronald Johnson lists Ronald and Dee Johnson as appellants. But the notice of appeal was filed by Ronald Johnson, pro se, and it was not signed by Dee Johnson. A family member who is not a lawyer cannot file a notice of appeal on behalf of another family member. *In re Conservatorship of Riebel*, 625

by (1) denying his request for a declaratory judgment and an additional takings proceeding under Minn. Stat. § 117.045 (2006), based on “[r]espondents’ future, continued and increased flooding and other takings of [appellant’s] property”; (2) dismissing appellant’s 42 U.S.C. § 1983 claims and not granting his motion for partial summary judgment; (3) dismissing appellant’s inverse-condemnation claim and refusing to enter a declaratory judgment related to alleged 2000 “Vine Hill Road” takings; (4) dismissing appellant’s state-law claims against respondent Trivesco; and (5) denying appellant’s postjudgment motion. Because the district court did not err in any of its determinations, we affirm.

## **FACTS**

Appellant and his wife purchased an undeveloped 20-acre parcel of land located in Hennepin County, City of Shorewood, in 1981. The property is bordered to the east by Vine Hill Road which abuts respondent City of Minnetonka. In 1973, by city ordinance, respondent City of Shorewood designated approximately 60% of the subject property as wetlands. And a portion of the subject property was designated wetlands on the 1980 National Wetlands Inventory map prepared by the United States Fish and Wildlife Service. Beginning in early 1993, appellant contacted the United States Army Corps of Engineers (Corps), disputing the existence of these wetlands.

At the time of purchase, a drainage ditch crossed the subject property and emptied into a creek to its south. Shorewood’s Waterford subdivision was constructed to the

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N.W.2d 480, 481 (Minn. 2001). Because Dee Johnson did not perfect an appeal, Ronald Johnson is the sole appellant.

south and west of the subject property beginning in 1984. Waterford was developed by respondent Trivesco, a Minnesota general partnership. Trivesco is in partnership with respondents Robert H. Mason, Inc., Highland Properties, Inc., and Steiner & Koppelman, Inc. In 1984, in connection with the planned Waterford subdivision, Shorewood constructed a road berm, culvert, and a pond-control structure to the south of the subject property. Respondent Riley-Purgatory-Bluff Creek Watershed District was involved in designing the pond-control structure and designated a 100-year storm-event flood plain at an elevation of 917.1 feet above sea level and prohibited construction at elevations lower than 919.1 feet. The pond-control structure raised the bottom of the drainage ditch above its original elevation and created a pond near the southern boundary of the subject property. Because the drainage ditch was raised, subsequent rains began flooding the subject property.

“Outlot C” is “a narrow, irregularly shaped outlot” between the southern boundary of the subject property and a public street called Waterford Circle. Trivesco purchased Outlot C on a contract for deed recorded on October 2, 1984. On June 3, 1985, Trivesco and appellant signed an “acknowledgment letter,” which granted appellant the right to purchase Outlot C “for \$60,000 representing the utility and street assessments.” This June 3, 1985 agreement is referred to by appellant as a “contract for deed.” On August 12, 1985, as part of the governmental approval process for the Waterford subdivision, Shorewood approved Trivesco’s amended development agreement. As part of the amended development agreement with Shorewood, Trivesco agreed to sell Outlot C to appellant. On September 19, 1985, Trivesco recorded a “Declaration of Covenants,

Conditions, Restrictions and Reservations for Waterford” with the Hennepin County Registrar which specifically encumbered Outlot C. The Waterford declaration established that an “architectural control committee” must approve plans for all construction within the Waterford subdivision. Twenty-two years after the alleged “contract for deed,” Trivesco remains the owner of Outlot C. And the Waterford declaration expired by its terms on September 19, 2005.

Beginning in 1992, the Ashcroft subdivision was constructed by Chimo Development Corp. to the east of Vine Hill Road. Highland Properties, Inc. served as a sales agent for Chimo. Respondent Highland Villa Builders, Inc. managed the construction of Ashcroft.

In April 2000, the Shorewood City Council approved construction of a bike path/walking trail along the west side of Vine Hill Road. In early June 2000, Shorewood moved construction equipment onto the subject property for the purpose of constructing the trail and placed a silt fence on the subject property. The equipment remained on appellant’s property for less than one day. The silt fence was removed one week later, on June 13, 2000. Shorewood has not authorized public use of the trail. A private company, not joined in this action, applied for a permit from Shorewood to install fiber optic cable along the west side of Vine Hill Road. Although Shorewood denied the company’s permit application, the company did install cable to the west of the roadway.

By way of background, this case involves the fifth lawsuit filed by appellant regarding alleged takings of his property. Appellant’s first lawsuit, “the takings case,” was filed in Hennepin County District Court in 1991. Appellant successfully alleged that

Shorewood had taken his property without compensation and obtained a writ of mandamus compelling Shorewood to commence inverse-condemnation proceedings. Appellant's second action, filed in Hennepin County District Court in 1996 against the City of Minnetonka, alleged that the Ashcroft subdivision had been diverting storm water run-off onto his property as early as 1992. The action was dismissed without prejudice for failure to join necessary parties, and appellant did not appeal the dismissal. Appellant filed a 24-count complaint in United States District Court in 2000 as his third lawsuit, alleging numerous constitutional and state-law violations. This suit was eventually dismissed by the Eighth Circuit. Appellant's fourth lawsuit was filed in the Court of Federal Claims in 2001, alleging (1) both physical and regulatory takings arising out of the 1984 flooding, (2) tort claims against the government, and (3) that the United States Fish and Wildlife Service, by designating part of the subject property a wetland on its 1980 inventory map, had breached implied and/or express contracts with appellant. All claims were dismissed—unchallenged by appellant—based on the statute of limitations, lack of jurisdiction, and Fed. R. Civ. P. 12(b)(6), respectively. In 2004, for his fifth lawsuit, appellant refiled his 24-count 2000 federal complaint in Hennepin County District Court. In this current appeal, appellant challenges the district court's determination that all named respondents are entitled to summary judgment.

### **I. The Takings Case.**

In his 1991 suit against Shorewood, appellant claimed that his land had been taken without just compensation, and alleged specifically that, despite the pond-control structure, the pond frequently flooded his property with overflowing storm-sewer water.

Appellant also claimed that actions taken by Shorewood related to a plat-approval application, which prevented his development of the subject property, amounted to a taking.

The district court determined that the flood-plain restrictions were not a regulatory taking but that in creating the pond and control structure Shorewood had physically taken appellant's property up to 914 feet since December 31, 1984, because the water would rise to that elevation during "major storm events." The district court agreed with appellant and issued a writ of mandamus compelling Shorewood to commence condemnation proceedings for the purpose of acquiring a drainage easement on appellant's property up to 914 feet above sea level. The district court also ordered Shorewood to pay appellant's attorney fees and costs related to the action. The district court concluded that the flooding constituted a taking because appellant's property "is expected to flood to this level with sufficient frequency to constitute a permanent physical invasion." Although appellant argued that the taking occurred to 919.1 feet, the level below which development is restricted based on the 100-year flood event, the district court rejected that argument because "it is difficult to conceive of any case in which short-term flooding once every 100 years or so would be considered a permanent physical invasion."

Shorewood challenged the district court's award of attorney fees and its determination that there had been a taking. The district court's decision was affirmed by this court. *Johnson v. City of Shorewood*, No. CX-93-2452 (Minn. App. May 11, 1994), *review denied* (Minn. July 15, 1994). The condemnation petition was filed by

Shorewood with the district court, and commissioners were appointed to determine appellant's damages. The commissioners awarded appellant \$2,000 for the taking (the easement), \$3,000 repair costs, and \$500 as reasonable appraisal fees. Appellant then challenged the amount of the commissioners' award and the scope of the taking. On October 25, 1995, the district court found that appellant's objections regarding the scope of the taking were barred as untimely because the scope was determined by the June 1993 court order. But the district court did allow a jury to determine the value of the taking.

Three letters from the Corps dated March 2 and 17, 1993, and February 7, 1994, were admitted into evidence at the takings trial. During the trial, Shorewood's expert testified that, in his opinion, the Corps had determined that the property contained a wetland. The expert based his testimony on the fact that appellant had applied for a permit from the Corps to excavate a ditch on the subject property. And if the Corps had determined that it did not have jurisdiction over that property, it would have issued a no-jurisdiction order, not an exemption or permit. The Corps letter of March 2, 1993, explained how appellant's proposed agricultural ditch maintenance work might qualify for an exemption. By letter dated March 17, 1993, the Corps noted that, based on the information it had available, including the National Wetland Inventory maps, the property did contain wetlands. The February 7, 1994 Corps letter reiterated that "the effected area appears to have been a wetland before the dam and road construction in the mid 1980s and it appears to remain a wetland today." Appellant's expert testified to the contrary, stating that the subject property was pre-taking dry land and that "the only reason any portion of [appellant's] property appears as a designated wetland is a result of

the [1973] City ordinance[.]” Eventually appellant was issued an exemption by the Corps.

The district court did not refer to the Corps’ letters or the allegedly erroneous 1980 National Wetlands Inventory map in its decisions. Rather, the district court’s analysis focused on the 1973 city ordinance, holding that because the wetland designation occurred prior to appellant’s purchase of the subject property, appellant had no basis for arguing that any of the property rights he purchased were taken.

In October, 1996, the jury found that, although there was a difference of “\$0” between the value of the property before the taking and its value after the taking, appellant was entitled to \$2,000 for “the easement actually taken” and \$63,000 for “the reasonable cost of clean-up” related to the flooding/taking. The district court vacated the \$2,000 award because it concluded that it was inconsistent with the jury’s finding that there was no diminution in the property’s fair-market value due to the taking.

Shorewood moved for judgment notwithstanding the verdict and for a new trial, arguing that appellant should not be entitled to the \$63,000 for “clean-up” costs<sup>2</sup> because, without a reduction in the property’s value, there had been no taking. Notably, appellant did *not* challenge the amount of the award or the jury’s conclusion that the fair-market

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<sup>2</sup> The clean-up costs appear to be based on clearing dead trees from the drainage ditch. Appellant testified that the flooding caused by Shorewood killed a number of mature trees and that his time cleaning up the property (3,400 hours) should be compensated at an appropriate hourly rate (\$20).

value of the property was restored to its pre-taking value by the clean-up award.<sup>3</sup> Both of Shorewood's motions were denied. The district court concluded that "[i]t was proper for the jury to consider the cost of clean-up in that a potential buyer would clearly take into consideration the cost of cleaning up the property and arriving at its market value." Shorewood appealed the district court's denial of its motions. This court affirmed the district court in April 1998. *City of Shorewood v. Johnson*, No. C5-97-1525, 1998 WL 188561 (Minn. App. Apr. 21, 1998). This court ruled that it was proper for the jury to award "clean-up" costs despite its finding that the property's value was not diminished by the taking because

[t]he jury may have found there was no diminution in market value from the taking only because [appellant] *prevented* a diminution in market value by restoring [his] property to its pre-flood condition, incurring significant costs in doing so. If [appellant] had *not* cleaned up the damage, the property's fair market value would have been diminished because potential buyers would have subtracted clean-up expenses from the price they would pay for the property.

*Id.* at \*2. On May 18, 1998, Shorewood paid appellant \$116,480.16 in satisfaction of the \$63,000 award, plus interest accrued from January 1, 1985, to the date of payment.

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<sup>3</sup> Appellant did challenge that the interest was calculated at the statutory rate, arguing that the interest should have been awarded based on the average interest rate for fixed-rate, 30-year, first mortgages compounded annually. The district court rejected his argument as part of the final judgment January 5, 2000, finding that the statutory interest rate provides reasonable and just compensation and that essentially appellant received a "windfall" because Shorewood agreed to pay interest on the entire amount from the date of the taking as opposed to when the costs were actually incurred.

A final judgment in the takings case was entered January 5, 2000, granting appellant's motion for costs. On April 5, 2000, Shorewood paid appellant the \$67,335.95 that he was awarded in costs.

## **II. The Federal Case/The Current Case.**

On June 22, 2000, appellant filed a 24-count complaint with the United States District Court alleging constitutional violations, naming all of the respondents involved in the current case and the United States and the Corps as defendants. Generally, the federal district court dismissed on July 11, 2001, "[a]ll claims arising from the prior state court litigation" against Shorewood and Minnetonka because they were barred by collateral estoppel and dismissed the remaining claims because they "either are unripe or are supplemental state law claims over which the Court declines to exercise jurisdiction." Following a challenge by appellant, the federal courts did not award him any of the relief he requested. *Johnson v. City of Shorewood*, 360 F.3d 810, 820 (8th Cir. 2004). The United States Supreme Court denied further review. *Johnson v. City of Shorewood*, Minn., 543 U.S. 810, 125 S. Ct. 43 (2004).

Within a month of the Supreme Court's denial of certiorari, appellant filed the same 24-count complaint with Hennepin County District Court. The sole difference between the 2004 state complaint and the 2000 federal complaint is that the former omitted the United States and the Corps as named defendants:

*i.* The attached federal complaint (previously served on [respondents'] counsel) is referenced and incorporated as though entirely rewritten herein with the state caption above as to all [appellant's] state and common law claims, expressed or implied, including [appellant's] 42

U.S.C. §§ 1983, 1985 claims including U.S. Const. Just Compensation.

*ii.* On March 5, 2004 the U.S. Eighth Circuit Court of Appeals on jurisdictional ground referred [appellant's] federal claims to the federal claims court and [appellant's] state and common law claims to this state court including the U.S.C. §§ 1983, 1985 state takings claims. On October 4, 2004 the U.S. Supreme Court denied review.

*iii.* The remainder of the complaint follows. The claims are tolled under 28 U.S.C. § 1367(d).

As characterized by the Eighth Circuit, the 24-count complaint's "primary allegation is that the [respondents] have, individually and in concert, effected various regulatory and physical takings of [appellant's] property and conspired to prevent [him] from receiving just compensation." *Johnson*, 360 F.3d at 814. More specifically, the counts of the complaint and their disposition by the Eighth Circuit and Hennepin County District Court can be divided into four categories: (1) claims brought under 42 U.S.C. §§ 1983 and 1985; (2) two declaratory-judgment requests; (3) state-law claims; and (4) claims not appealed here.

**A. 42 U.S.C. §§ 1983 and 1985 Claims.**

Eight counts of appellant's complaint were brought under 42 U.S.C. §§ 1983 and 1985, alleging physical and regulatory takings of the subject property and that his due process and equal protection rights had been violated.

**1. Eighth Circuit.**

The Eighth Circuit held that appellant did not produce evidence of a conspiracy sufficient to survive summary judgment under 42 U.S.C. § 1985. *Id.* at 817-18. Although appellant created a "voluminous record, including an affidavit by the former

mayor of Shorewood,” appellant failed to point to specific facts tending to show an illicit agreement and merely speculated to its existence. *Id.* (footnote omitted).

The United States District Court had concluded that the only potential violation of 42 U.S.C. § 1983 was the alleged taking of appellant’s property without just compensation. *Id.* at 818. Upon review, the Eighth Circuit determined that the United States District Court lacked jurisdiction to make that determination under the *Rooker-Feldman* doctrine because the “alleged constitutional injury stems from claims adjudicated in the prior state court judgment . . . [appellant is] asking the federal court for the same remedy requested in the state court action: just compensation. Moreover, the claims may be unripe . . . because [appellant] failed to appeal the sufficiency of the state court jury award” in the takings case. *Id.* at 818-19 (quotation and citations omitted).

As noted by the Eighth Circuit, since the first state proceeding, appellant has been collaterally estopped from challenging the wetland designation because it was already adjudicated then upon a motion for summary judgment. *Id.* at 815 n.6.

Finally, the Eighth Circuit noted in dicta:

Shorewood suggests that not only does collateral estoppel bar consideration of claims actually litigated, *res judicata* bars claims that could have been litigated during the state court proceedings. Perhaps so, but in light of our holding that *Rooker-Feldman* deprived the district court of subject matter jurisdiction, we need not address this argument. Because *Rooker-Feldman* and *Williamson County* preclude federal review of [appellant’s] various takings claims, the determination regarding the precise reach of the state court judgment is a matter for the state courts to decide.

*Id.* at 820.

## **2. Hennepin County District Court.**

The district court held that “all claims arising out of the 1984 flooding are . . . barred by the doctrines of res judicata, collateral estoppel and the applicable statute of limitations.” They “have been fully and fairly litigated to a final resolution as evidenced by state and federal actions.” The district court found that “[f]acts asserted regarding alleged taking in June 2000 are insufficient to support a claim” because the silt fence was immediately removed upon appellant’s request, the walking trail “was never constructed” and, further, “[a]ny preparatory actions taken by Shorewood were upon a public dedication.” And because “it is undisputed between the parties that Shorewood is not responsible for the installation of the fiber optic cable, nor did Shorewood issue a permit for it to be placed on [appellant’s] property,” Shorewood could not be held responsible for that invasion.

### **B. Declaratory Judgment Claims.**

Two counts of appellant’s complaint sought declaratory judgments.

#### **1. Eighth Circuit.**

For the remaining federal claims, the Eighth Circuit concluded that, although not barred by *Rooker-Feldman*,

all of the claims which [appellant] failed to present in the state litigation, as well as all of the claims which arose after the state court fixed the takings issues to be decided, are unripe for adjudication in federal court because [appellant has] failed to pursue state postdeprivation remedies for those alleged takings.

*Johnson*, 360 F.3d at 819 (citing *Kottschade v. City of Rochester*, 319 F.3d 1038, 1042 (8th Cir. 2003), *cert. denied*, 540 U.S. 825 (2003)).

## **2. Hennepin County District Court.**

The district court, in an exercise of its discretion citing Minn. Stat. § 555.06 (2006), denied appellant's requests for declaratory judgments.

### **C. State-Law Claims.**

Twelve counts of appellant's complaint involved state-law claims related to breach of contract, promissory estoppel, fraud, misrepresentation, negligence, tortious conduct, and slander of title. Appellant sought specific performance and requested that another inverse-condemnation proceeding be compelled.

#### **1. Eighth Circuit.**

The Eighth Circuit held that the district court did not abuse its discretion by declining to exercise supplemental jurisdiction over the state-law claims and dismissed them without prejudice. *Johnson*, 360 F.3d at 819. Regarding appellant's claims of misrepresentation and fraud, the Eighth Circuit noted that federal review was barred under *Rooker-Feldman* and noted that "[appellant's] remedy, *if any* is to return to state court and utilize its procedures for remedying fraud." *Id.* at 819 (emphasis added).

#### **2. Hennepin County District Court.**

The district court dismissed the counts related to breach of contract, holding that appellant has "failed to establish that there were any implied or express contracts between the parties," and without this, a breach cannot be shown. From that conclusion, the district court was compelled to deny appellant's requests for specific performance of the

alleged contracts. The district court dismissed the negligence and tort claims because they “either stem from the 1984 flooding and are barred by collateral estoppel or are based on unsupported claims of takings in 2000 . . . or are barred by the applicable statute of limitations.” The district court found that the fraud and misrepresentation claims failed because appellant “offered no evidence that would show the existence of a conspiracy . . . [in the federal court action and] failed to offer any additional evidence, . . . but instead made the decision to rely on allegations in the previous Complaint.” The district court found that the claim for slander of title was either barred by collateral estoppel or the statute of limitations because it arises out of the 1984 flooding of the subject property.

**D. Other Claims.**

The remaining two counts of appellant’s complaint, an alleged Freedom of Information Act violation and a request to preserve the right to amend pleadings after discovery, were not challenged on appeal.

Thus, this appeal is limited to challenging the summary-judgment determination in favor of respondents on the 22 remaining claims.

**DECISION**

The scope of review applicable to a grant of summary judgment is whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *Wallin v. Letourneau*, 534 N.W.2d 712, 715 (Minn. 1995). If no material facts are at issue on appeal, the reviewing court need only determine “whether the district court erred in applying the law regarding the accrual of the cause of action and

the running of the statute of limitations.” *Peterson v. Johnson*, 720 N.W.2d 833, 837 (Minn. App. 2006) (quoting *Brock v. Park Nicollet Health Servs.*, 660 N.W.2d 439, 441 (Minn. App. 2003), *review denied* (Minn. July 15, 2003)). Although an appellate court reviews the evidence in a light most favorable to the nonmoving party, and is prohibited from *weighing* the evidence, it is not enough for the nonmoving party to show “some metaphysical doubt.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70-71 (Minn. 1997) (holding that a court is not required to ignore its conclusion that a piece of evidence has no probative value).

A challenge to the district court’s application of a statute of limitations is a question of law to be reviewed *de novo*. *Antone v. Mirviss*, 720 N.W.2d 331, 334 (Minn. 2006). And whether a “taking” has occurred is question of law, also to be reviewed *de novo*. *Fitger Brewing Co. v. State*, 416 N.W.2d 200, 205 (Minn. App. 1987), *review denied* (Minn. Feb. 23, 1988).

The applicability of collateral estoppel is subject to *de novo* review. *Falgren v. State, Bd. of Teaching*, 545 N.W.2d 901, 905 (Minn. 1996). Applying collateral estoppel is appropriate if all of the following are satisfied:

- 1) the issue must be identical to one in a prior adjudication;
- 2) there was a final judgment on the merits;
- 3) the estopped party was a party or was 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.

*Care Inst., Inc.-Roseville v. County of Ramsey*, 612 N.W.2d 443, 448 (Minn. 2000).

Broader than collateral estoppel, *res judicata* precludes relitigating entire claims rather than specific issues. *Klinefelter v. Crum & Forster Ins. Co.*, 675 N.W.2d 330, 336

(Minn. App. 2004) (citing *Hauser v. Mealey*, 263 N.W.2d 803, 806 (Minn. 1978)). From that principle, res judicata applies equally to claims that actually were litigated and claims that *could have been* litigated in the earlier action. *Brown-Wilbert, Inc. v. Copeland Buhl & Co.*, 732 N.W.2d 209, 220 (Minn. 2007). Res judicata precludes parties from raising subsequent claims in a later action when:

- (1) the earlier claim involved the same set of factual circumstances;
- (2) the earlier claim involved the same parties or their privities;
- (3) there was a final judgment on the merits;
- [and] (4) the estopped party had a full and fair opportunity to litigate the matter.

*Id.* (quoting *Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004)). The applicability of res judicata is a question of law reviewed de novo. *Id.*

## I.

Appellant argues first that the district court erred by not granting him a proceeding under Minn. Stat. § 117.045 (2006), based on respondents’ “future, continued, and increased flooding and other takings” of the subject property and a declaratory judgment. Appellant argues further that this section “statutorily preempts any res judicata or collateral estoppel effect from Shorewood’s prior condemnation proceeding because the governmental . . . takings were ‘omitted’ from Shorewood’s prior condemnation proceeding.” Moreover, appellant argues that even the *litigated* taking was essentially “omitted” because appellant only received damages for his “clean-up costs” and he argues he received “ZERO” compensation for the taking itself. We disagree with appellant’s interpretation of the statute. Moreover, appellant’s claims based on flooding are barred by the doctrines of res judicata and collateral estoppel, and, in some cases, a

statute of limitations. And although the district court incorrectly determined that, when the underlying cause of action is barred by a statute of limitations, a declaratory judgment is per se inappropriate, a denial here was nonetheless within its discretion.

Upon successfully bringing an action compelling an acquiring authority to initiate eminent domain proceedings relating to a person's real property which was omitted from any current or completed eminent domain proceeding, such person shall be entitled to petition the court for reimbursement for reasonable costs and expenses, including reasonable attorney, appraisal and engineering fees, *actually incurred in bringing such action.*

Minn. Stat. § 117.045 (emphasis added).

This statute does not allow a claimant to recover damages for omitted *takings*. And it does not indicate that if a claimant does not receive compensation for a taking that it is "omitted." Rather, it provides that a claimant may later recover costs associated with the prior action. Because appellant's claimed damages are not related to costs actually incurred in the prior eminent-domain action, the district court did not err in denying a request for a proceeding pursuant to Minn. Stat. § 117.045. Appellant misinterpreted the breadth of this statute, and we shall apply the doctrines of res judicata and collateral estoppel.

**A. Res Judicata and Collateral Estoppel.**

Appellant's central argument appears to be that the jury-awarded damages in 1996 did not justly compensate him for the flooding takings which began in 1984. During the

original takings proceedings, appellant was prevented from relitigating the scope of the taking. And res judicata and collateral estoppel preclude him from doing so here.<sup>4</sup>

Over a nine-year period, appellant's inverse-condemnation claims against Shorewood, related to the flooding takings, were fully and fairly litigated, resulting in his just compensation. This action involves the same set of facts as the earlier case that had a final judgment on the merits on January 5, 2000, after several reviews by this court. And appellant, the estopped party, was the party involved in the earlier action. Appellant argues that, because of the "misrepresentation" that the subject property included a pre-taking wetland, he did not have a full and fair opportunity to litigate this matter. We disagree.

A 1993 survey of the subject property was stipulated to by the parties at a summary-judgment hearing held June 22, 1993. The Eighth Circuit, relying on the previous state court actions, concluded that "because the issue concerning the pre-ownership wetland designation relating to the Property . . . [was] already adjudicated [in the first state proceeding] . . . upon a motion for summary judgment, the doctrine of collateral estoppel clearly precludes the introduction of evidence [to the] . . . contrary."

*Johnson v. City of Shorewood*, 360 F.3d 810, 815 n.6 (8th Cir. 2004) (quoting *City of*

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<sup>4</sup> Claims related to the Waterford subdivision/1984 flooding are also barred by the applicable statute of limitations. Appellant argues that his claims cannot be barred by a statute of limitations because "[a]pplication of any statute of limitations in this context would itself be a taking." Appellant cites no authority for this argument, and therefore it is waived. *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997). Moreover, a 15-year limitations period applies to inverse-condemnation actions. See Minn. Stat. § 541.02 (2006); see also *Vern Reynolds Constr., Inc. v. City of Champlin*, 539 N.W.2d 614, 618 n.2 (Minn. App. 1995), review denied (Minn. Dec. 20, 1995). Thus, claims related to the 1984 taking are outside of the statutory period.

*Shorewood v. Johnson*, No. CD-2344, at 5 (Minn. Dist. Ct., Oct. 10, 1996, Memorandum and Order)).

But appellant argues that Shorewood *fraudulently* asserted during the takings trial that the subject property contained wetlands prior to the taking “even in contradiction of the prior District Court opinion that the damming caused the flooding on [appellant’s] property” and therefore this court should refuse to invoke the preclusive doctrines. Appellant’s argument appears to be based on his theory that, because the 1991 taking was based on *flooding* of the subject property, the property could not logically contain a wetland. We cannot conclude that Shorewood committed fraud.

[A]bstract statements of law or pure legal opinions are not actionable [as fraudulent representations]; however, a mixed statement of law and fact may be actionable “if it amounts to an implied assertion that facts exist that justify the conclusion of law which is expressed” and the other party would ordinarily have no knowledge of the facts.

*Hoyt Props., Inc. v. Prod. Res. Group L.L.C.*, 736 N.W.2d 313, 318 (Minn. 2007) (quotation omitted). Contrary to the fraud allegation, the record shows that the jury was presented with a battle of experts at trial. Shorewood’s expert testified that he believed that because the Corps’ letters indicated that they had jurisdiction over appellant’s property that it did indeed contain wetlands. And this is not a matter where appellant possessed no knowledge of the facts. Appellant presented his own expert who testified that, based on his evaluation of the property, it did not contain wetlands.

Because it remains unsettled whether the land actually contains wetlands, appellant’s argument that Shorewood intentionally misled the court in the takings trial

must fail. In the ensuing years, appellant has repeatedly asked the Corps to confirm that the subject property does not contain wetlands and the Corps has repeatedly advised appellant that it would need to visit the subject property to make that determination. Appellant has refused to grant the Corps permission to inspect the subject property. Notably, the Corps informed appellant July 8, 2002:

The information that you have provided indicates substantial portions of your property have all three of the criteria (hydrology, soils, and vegetation) necessary to be considered a wetland. Your correspondence and other documents indicate that portions of your property experience frequent inundation (several times a year). Your consultant indicates that portions of the site have organic soils and are clearly dominated by hydrophytic vegetation.

The new ditch and the apparent discharge sites for the dredged material are in areas mapped as wetland on the National Wetland Inventory and the Metro Wetland Inventory maps. The Hennepin County Soil Survey identifies this part of the site as "Marsh." As stated in our previous correspondence, these sources are only indicators that wetlands may exist. An on-site visit is necessary to determine conclusively whether wetlands are on your property and, if so, their extent. While we have offered to make an on-site determination/delineation of any wetlands or other waters that might be on your property, you have not yet given us permission to do so.

Because as recently as 2002 the Corps told appellant that the information in its possession indicated that his property may have contained wetlands before he purchased it, appellant's argument that Shorewood committed a fraud on the court during the original takings trial cannot prevail.

Further, it is not clear that the jury's determination that, after appellant was compensated for clean-up costs, there was no diminution in the property's value, was

even based on the contested wetland designation. And, moreover, if appellant did not consider himself to be justly compensated by the jury's award, he should have appealed it directly. Having notably failed to do so, he is precluded from relitigating his claim here.<sup>5</sup>

And, because *res judicata* precludes later bringing claims that could have been brought in the earlier action, it is proper that the claims against Minnetonka based on alleged Ashcroft-subdivision-related flooding are also barred. Appellant admitted that as early as 1992, he suspected that the Ashcroft subdivision was causing additional flooding of his property. Although at this point the takings litigation had commenced, appellant should have joined Minnetonka as a necessary party to the litigation because its omission may have left Shorewood to "incur[] double, multiple, or otherwise inconsistent obligations." Minn. R. Civ. P. 19.01.

Because the remaining respondents are non-governmental, their actions cannot constitute a taking in the constitutional sense.

And, finally, we note that although appellant argues that he is merely following the Eighth Circuit's directive by returning to state court, the federal appellate court did not suggest that appellant was actually entitled to relief. *Johnson*, 360 F.3d at 819

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<sup>5</sup> We recognize that an argument can be made that the takings award *was* insufficient. Because the jury found that there was no diminution in the value of appellant's property *because of* the clean-up work performed by appellant, it does seem logical that as the flooding continued more clean-up would be required through the years. But the very reason that this flooding was considered a taking was because it was expected to be of a sufficiently regular nature. Had it been more sporadic appellant's potential claim would have been in tort for nuisance or trespass. *See Vern Reynolds*, 539 N.W.2d at 619. Appellant had the opportunity to fully litigate this taking over nine years and is precluded from making these arguments here. Notably, respondent *Shorewood* was the party who challenged the damages award on appeal; based on his inaction, appellant presumably was satisfied.

(stating that appellant’s remedy “if any” was to return to the state courts). Rather, the Eighth Circuit explained that, under the *Rooker-Feldman* doctrine, federal appellate review was precluded. *Id.* After reviewing the claims in the proper forum—state court—we conclude that the district court correctly dismissed appellant’s claims.

**B. Declaratory Judgment.**

Two counts of appellant’s 24-count complaint requested a declaratory judgment. The count requesting a declaration of appellant’s remaining property rights to the subject property, in addition to damages and an injunction preventing respondents from further claimed violations of appellant’s property rights, is relevant here.

Under the Uniform Declaratory Judgments Act, a party may seek a declaration of his rights to remove uncertainty. Minn. Stat. § 555.05 (2006). Under this act, courts “have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.” Minn. Stat. § 555.01 (2006). But “[t]he court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.” Minn. Stat. § 555.06 (2006). And under the concurrent-remedy rule, “equity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy.” *Cope v. Anderson*, 331 U.S. 461, 464, 67 S. Ct. 1340, 1341 (1947).

Here, because the concurrent legal remedies are barred, the district court correctly denied appellant’s requests for equitable relief. No uncertainty remains because appellant has been clearly told that he cannot relitigate his takings claims. He is left with the

previous judgment. It was within the district court's discretion to deny appellant's request for a declaratory judgment.

## II.

Appellant also argues that the district court erred by denying his motion for partial summary judgment and by granting respondent's motion for summary judgment on appellant's 42 U.S.C. § 1983 claims against Shorewood.<sup>6</sup> Again, appellant argues that he never received the just compensation for the takings related to the 1984 flooding because his "1996 zero compensation award ... was based on Shorewood's fraudulent misrepresentation that the Corps had determined a pre-taking Clean Water Act wetland on [appellant's] property." Again, we disagree. Because appellant relies on mere speculation to suggest that the wetland designation was fraudulent, and we have already disposed of that argument, summary judgment is not precluded. *See DLH, Inc.*, 566 N.W.2d at 70-71.

### A. **Res Judicata and Collateral Estoppel.**

Although appellant asserts that he received "ZERO" in the 1991 takings case and that this violates the substantive due process he is owed under the United States and Minnesota Constitutions, appellant's assertions are both inaccurate and barred by the doctrines of res judicata and collateral estoppel. Further, because takings-related

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<sup>6</sup> Because appellant does not argue that he was entitled to partial summary judgment against any other respondent regarding his section 1983 claims, those arguments are waived. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (holding issues not briefed are waived). But because claims asserted against any other respondent essentially mirror those discussed above, this waiver causes no prejudice because our analysis would be the same as articulated there.

compensation is intended only to make the property owner whole, if the net loss is zero, the compensation that is due is zero. *Brown v. Legal Found. of Washington*, 538 U.S. 216, 237, 123 S. Ct. 1406, 1420 (2003). Here, the jury awarded appellant \$63,000 in clean-up costs that it reasoned were necessary to restore the subject property to its pre-taking fair-market value. And Shorewood, not appellant, challenged the amount of the award.

As aptly explained by Shorewood, appellant cannot relitigate this taking claim by simply renaming it a § 1983 claim. *See San Remo Hotel v. City & County of San Francisco*, 545 U.S. 323, 341-348 125 S. Ct. 2491, 2503-2507 (2005) (applying the doctrine of collateral estoppel to bar relitigating in federal court a takings claim already litigated in state court). And although appellant argues that he has not had a full and fair opportunity to litigate these claims because of the “fraudulent” wetland designation, appellant has challenged this designation for well over a decade, and we have already rejected the argument regarding fraud of Shorewood earlier in this opinion.

**B. Other 42 U.S.C. § 1983 Claims.**

Appellant explains that “[g]enerally, [his] section 1983 claims are based on Shorewood’s misconduct denying [appellant] a fair and full opportunity to be heard—i.e., denied appropriate access to the state court.” Given the numerous times that appellant has been heard by this court and other courts, we disagree. And, to the extent that appellant’s argument is based upon his claim that an inaccurate wetland designation effectively denied him access to the courts, we again reject this argument for the reasons set forth above.

Appellant's section 1983 claim based on equal protection was insufficiently pleaded. Mere averments set forth in the pleadings are insufficient to counter a motion for summary judgment. Minn. R. Civ. P. 56.05. Although appellant asserts generally that other landowners are allowed to develop their properties while he was precluded from doing so, he fails to point to specific similarly situated individuals who are receiving this "better treatment." See *Linberg v. Steffen*, 514 N.W.2d 779, 784 (Minn. 1994).

### III.

Appellant additionally argues that the district court erred by denying his motion for a declaratory judgment/partial summary judgment against Shorewood related to the 2000 Vine Hill Road taking. Again, we disagree.

Appellant claimed that the takings included: (1) the 33-foot Vine Hill Road easement; (2) construction of the fence on June 5, 2000; (3) construction of the walking trail on June 5, 2000; and (4) installation of fiber optic cable along Vine Hill Road. The district court held that the facts asserted by appellant were insufficient to support his claims. The district court found that "[a]ny preparatory actions taken by Shorewood were upon a public dedication and were never completed." The court also found that "[t]he 'fence' that [appellant] claim[s] to have been constructed along [his] property was a silt fence . . . [that] was immediately removed upon [appellant's] request that it be removed" and "[t]he walking trail . . . was never constructed." Finally, because it is undisputed that Shorewood did not install the fiber optic cable, nor did it issue the permit to do so, that alleged invasion could not be considered a governmental taking despite its permanence.

A party seeking compensation in a condemnation action must prove that (1) he has an interest in the condemned property at the time of condemnation; (2) the interest was taken by the government in the course of the condemnation; and (3) the interest taken is compensable. *Hous. & Redev. Auth. of City of St. Paul v. Lambrecht*, 663 N.W.2d 541, 545-46 (Minn. 2003). Here, a taking did not occur because appellant did not demonstrate he had an interest in the 33-foot portion of Vine Hill Road.

When any road or portion of a road has been used and kept in repair and worked for at least six years continuously as a public highway by a road authority, it shall be deemed dedicated to the public to the width of the actual use and be and remain, until lawfully vacated, a public highway whether it has ever been established as a public highway or not.

Minn. Stat. § 160.05, subd. 1 (2006). And “[t]he width of the prescriptive easement . . . is not limited to that portion of the road actually traveled; it may include the shoulders and ditches that are needed and have actually been used to support and maintain the traveled portion.” *Barfnecht v. Town Bd. of Hollywood Twp.*, 304 Minn. 505, 509, 232 N.W.2d 420, 423 (1975). And because the interest in the property is established by statute, appellant’s argument that Shorewood has no recorded easement on this portion of the subject property lacks merit. *See Northfork Twp. v. Joffer*, 353 N.W.2d 216, 218-19 (Minn. App. 1984) (allowing the township to assert an unregistered interest in a road whereby intermittent use and maintenance of the land had been dedicated to the public statutorily). Moreover, a public dedication of a roadway may be established by the use of a small number of persons. *Id.* at 218.

Shorewood argues that for at least six years before the alleged takings of June 2000, it maintained the shoulder of Vine Hill Road located on the subject property (by mowing, weed-spraying, snow storage, and cleaning). Appellant does not dispute these asserted facts, but argues instead that applying this statute constitutes a taking even if its conditions are satisfied because it is an “unconstitutional” statute. Appellant, alleging violations of his constitutional rights, admitted that Shorewood has added a curb along the east boundary of the subject property and paved the shoulder to the curb “creating a bicycle path and to temporarily store snow.” And appellant also established in his complaint that the roadway has been used by the public.

Moreover, even if Shorewood did not already have a prescriptive easement over the property under the adverse-public-use doctrine, the facts asserted are insufficient to support appellant’s claim of a taking. Appellant argues that under the Constitution a citizen must be justly compensated for even the briefest and least invasive of takings. But it is the degree of interference with an owner’s property rights—resulting in a loss of interest in his real property—that determines whether the governmental action constitutes a “taking in the constitutional sense.” *See Spaeth v. City of Plymouth*, 344 N.W.2d 815, 822 (Minn. 1984) (noting that the difference between a land intrusion of such frequency, regularity, and permanency, which constitutes taking, and a mere temporary intrusion, which should be left only to possible damages recovery, “is a question of degree”). If the government’s use of the subject property was temporary, the landowner does not have a

valid claim for a taking, but may have a claim in tort for nuisance or trespass.<sup>7</sup> *Vern Reynolds*, 539 N.W.2d at 619.

Here, the silt fence was on appellant's property for less than a week, and the walking trail was not graded or constructed. The fiber optic cable, although permanent, was installed by a private company operating without a permit. Thus, appellant did not establish that there had been any new takings by Shorewood.

#### IV.

Appellant argues that the district court erred by granting Trivesco's summary-judgment motion regarding his state-law claims regarding Outlot C because they involve disputed material facts. We disagree because appellant's claims are barred by statutes of limitation.

A six-year statute of limitations applies to claims based on a "contract or other obligation." Minn. Stat. § 541.05, subd. 1(1) (2006). Promissory estoppel is considered an "other obligation" within the purview of Minn. Stat. § 541.05 (2006). *Deli v. Univ. of Minn.*, 578 N.W.2d 779, 781-82 (Minn. App. 1998), *review denied* (Minn. July 16, 1998). And an action to compel specific performance must be brought within the statutory period. *Lewis v. Prendergast*, 39 Minn. 301, 301-02, 39 N.W. 802, 802 (1888). A claim for tortious interference with a contract, because it resembles a breach of contract claim, is subject to the same six-year statute of limitations. *Wallin v. Minn. Dep't of Corrections*, 598 N.W.2d 393, 401 (Minn. 1999), *review denied* (Minn. Sept. 28, 1999).

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<sup>7</sup> Appellant did not assert a claim in tort for nuisance or trespass.

Absent fraud, Minnesota courts interpreting Minn. Stat. § 541.05 have held the statute begins to run when the cause of action accrues, meaning when a plaintiff's claim would survive a defendant's motion to dismiss for failure to state a claim upon which relief can be granted. *Dalton v. Dow Chemical, Co.*, 280 Minn. 147, 152-53, 158 N.W.2d 580, 584 (1968) (holding a cause accrues when plaintiff would survive a 12(b)(6) motion); *Juster Steel v. Carlson Cos.*, 366 N.W.2d 616, 618 (Minn. App. 1985) (holding a breach of contract claim must be brought within six years of the action causing the breach).

Negligence claims are also subject to a six-year statute of limitations. Minn. Stat. § 541.05, subd. 1(5) (2006).

Fraud claims are also subject to a six-year statutory limitations period. Minn. Stat. § 541.05, subd. 1(6). But if the injured party is ignorant of a cause of action because of the other party's fraud, the statutory period is tolled. *Dalton*, 280 Minn. at 153, 158 N.W.2d at 584. The statute begins to run "only from the time the cause of action is discovered or might have been discovered by the exercise of diligence." *Schmucking v. Mayo*, 183 Minn. 37, 38-39, 235 N.W. 633, 633 (1931). And a document, once properly recorded, provides constructive public notice. Minn. Stat. § 507.32 (2006).

Here, appellant claims that Trivesco (1) by entering into a restrictive covenant encumbering Outlot C breached his so-called contract to purchase the property and that (2) Trivesco "changed . . . Outlot C" to include less access to the exterior roadway. Appellant claims, further, that this "secret signing and recording" of the restrictive covenants constituted fraud. But even assuming that the contract was binding and the signing was a fraudulent breach, a proper recording of a document cannot be done in

secret. Appellant had constructive knowledge of the “breach” when the restrictive covenant was filed with Hennepin County on September 19, 1985, at which time appellant could have discovered it through a search of the public records. Further, appellant had actual notice of the “changed” dimensions of Outlot C no later than 1988, when he submitted an application to Shorewood to plat an area in the southwest corner of the subject property adjacent to Outlot C.

Thus, even if fraudulent, and even if actual notice were required, the statutory period expired no later than 1994, and appellant’s state-law claims against Trivesco alleging breach of contract, third-party beneficiary breach of contract, promissory estoppel, fraud, misrepresentation, negligence, joint concerted tortious conduct, and the request for specific performance brought in 2004<sup>8</sup> are time-barred.<sup>9</sup>

Finally, because the legal remedies are barred, appellant is not entitled to the equitable remedies he has requested under the “declaratory judgment” heading. *See Cope*, 331 U.S. at 464, 67 S. Ct. at 1341. And a declaratory judgment merely clarifying the parties’ respective rights is unnecessary. The “restrictive covenant” encumbering Outlot C expired by its terms on September 19, 2005. There is no evidence—and

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<sup>8</sup> Even if appellant is correct that the statutory period was tolled for his state claims pursuant to 28 U.S.C. § 1367(d), the claims were time barred *before* his federal complaint was filed in 2000.

<sup>9</sup> It appears that the district court was incorrect when it stated that “[t]he United States District Court found that the breach of contract claim arose out of the 1984 flooding and was barred through collateral estoppel and were dismissed with prejudice.” This was part of the federal magistrate’s report and recommendation. But the Eighth Circuit declined to exercise supplemental jurisdiction over appellant’s state-law claims. *Johnson*, 360 F.3d at 819.

appellant has not alleged the existence of any—that he offered to purchase or Trivesco refused to sell Outlot C for \$60,000. Highland Properties, general partner of Trivesco, stated in its brief that “[o]bviously, if Appellant[] were ever to pay Trivesco the purchase price for Outlot C specified in the Amended Development Agreement and in the 1985 letter agreement, there simply would be no impediment to [his] use of Outlot C to access [his] property.”

## V.

Without citing any authority, appellant stated in the “legal issues” section of his brief that “[w]hether the [d]istrict [c]ourt erred in denying [appellant’s] post-judgment motions” is a question before this court. But appellant omitted this argument from the body of his brief, and it was completely omitted from his reply brief. Assignment of error in a brief based on “mere assertion” and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection. *Modern Recycling, Inc.*, 558 N.W.2d at 772 (quoting *Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519-20, 187 N.W.2d 133, 135 (1971)). Here, because it is not even clear which post-judgment motions appellant is referring to, it is not obvious that a denial by the district court constituted prejudicial error. Thus, appellant has waived this argument, and we decline to address it.

A final word is, we believe, appropriate. Litigation between appellant and the numerous respondents has been ongoing for over 16 years. Five Minnesota district court judges have ruled on various issues; the federal district court for the State of Minnesota has done so also; this court has issued three appellate opinions, this opinion is the fourth;

the Eighth Circuit Court of Appeals has spoken; two petitions for further review have been denied by the Minnesota Supreme Court; one petition for writ of certiorari has been denied by the United States Supreme Court. All issues have been resolved. Although we are not insensitive to appellant's belief that he has not received the relief to which he is entitled, we must disagree. Each of appellant's claims has been resolved. He is not satisfied with the resolution, but the claims are nonetheless resolved. We have considered all of appellant's arguments, including supplemental authorities filed after oral arguments pursuant to Minn. R. Civ. App. P. 128.05, and found them to be without merit.<sup>10</sup> It is time that this prolonged litigation and the emotional and financial toll it has taken on all involved—appellant and respondents alike—is declared to be at an end.

**Affirmed.**

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<sup>10</sup> We agree with Shorewood that appellant's supplemental submission exceeded the permissible scope of rule 128.05. We have reviewed the additional authorities, without considering the impermissible arguments, and find that they do not alter our reasoning.