STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1091

State of Minnesota ex rel
Bruce R. Schwichtenberg, et al.,

and

Bruce R. Schwichtenberg, et al., individually,
Appellants,

vs.

Kevin D. Garrison, et al.,
Respondents,

County of Carver, Minnesota, et al.,
Respondents.

Filed May 5, 2009
Affirmed
Hudson, Judge

Carver County District Court
File No. 10-CV-04-960

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Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Larkin, Judge.

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

HUDSON, Judge

On appeal from a summary judgment in favor of respondents Kevin and Lois Garrison, appellants challenge the district court's application of collateral estoppel to their nuisance claim. Appellants also contend that the district court's factual findings are not supported by the record. We affirm.

FACTS

Appellants Bruce and Darlene Schwichtenberg own a home located at 5250 County Road 140 in Chaska. At the time of the events that gave rise to this action, the Garrisons owned a home and lot that adjoined appellants' lot but was situated on a significantly higher elevation.

During the spring of 2000, appellants noticed a wet and flooded area in their back yard. Appellants hired a landscaping company to install drain tiles and perform additional grading in an attempt to get the collecting water to flow into a nearby wetland. Appellants also erected a concrete-block retaining wall on the hillside adjacent to the Garrisons' home. But appellants' back yard again became wet and flooded, and appellants detected an odor that they believed to be sewage.

On June 10, 2002, appellants contacted respondent Carver County's Environmental Services Department, stating that they believed sewage was leaking from the Garrisons' septic-treatment system into their back yard. Carver County sent two licensed individual sewage-treatment system (ISTS) inspectors to appellants' home. The

inspectors observed a wet area in appellants' back yard and water seeping underneath the retaining wall.

On July 19, 2002, appellants again called the Environmental Services Department, saying that tests of the water in their back yard revealed the presence of fecal coliform bacteria. The two inspectors again went to appellants' home to investigate. The inspectors told appellants that soil in the area was prone to sidehill seepage, and that the seepage into appellants' yard was perhaps exacerbated by appellants' retaining wall. They also told appellants that they did not believe that the wetness was the result of sewage and that, given the lower elevation of appellants' back yard, the collecting water might just be a naturally occurring ponding area.

The inspectors also met with the Garrisons, who allowed the inspectors to examine their drainfield. The inspectors observed that several of the drainfield's inspection tubes were not properly installed, but they detected no sewage leak.

On September 3, 2002, appellants asked Carver County to take water samples from their property. Two water samples were taken from the collecting water and tests revealed the presence of fecal coliform bacteria. But the coliform levels were not indicative of sewage, and the nitrite/nitrate levels in the water suggested that there was no sewage present in the water. The coliform levels were also consistent with samples taken from area lakes, ponds, and streams.

While at appellants' home, the inspectors also located the outlet pipes for the Garrisons' curtain drain. The pipes were located away from the ponding area and had no

water coming out of them; there was also no indication that any water had recently come out of them.

On September 18, 2002, Carver County wrote a letter to appellants stating that it was the belief of the Environmental Services Department that the collecting water in appellants' back yard was not sewage. In the letter, Carver County also declined to conduct additional testing requested by appellants.

Appellants filed a complaint with the Minnesota Pollution Control Agency (MPCA) in 2004. The MPCA contacted Carver County to determine what steps the county had taken to resolve appellants' concerns and was satisfied with Carver County's investigation. After appellants again complained at a county board meeting, Carver County sent another licensed ISTS inspector to appellants' home. The inspector observed water collecting in appellants' back yard but did not see or smell any sewage.

The same day, the Carver County Soil and Water Conservation District (SWCD) sent a licensed ISTS inspector to appellants' home. The SWCD inspector did not see or smell any sewage. Carver County subsequently inspected the Garrisons' home again and found no evidence of sewage seepage. The MPCA also performed another inspection and observed no sewage or sewage odor. The MPCA suggested that the fecal coliform bacteria in the ponded water could be attributed to a number of non-sewage sources and was not a conclusive indicator of the presence of sewage.

None of the inspectors from Carver County, the MPCA, or the SWCD believed that the Garrisons' sewage treatment system was an imminent threat to public health or safety.

Appellants hired two individuals to conduct their own separate inspections. Ted Mattke, an engineer and a hydrologist, believed that he smelled sewage in the area of appellants' back yard. Mark Hayes, a licensed ISTS inspector, conducted an ISTS compliance inspection, inspecting both appellants' and the Garrisons' properties. Hayes observed some wetness on appellants' property he believed was "septage remnants," but he did not notice any sewage surfacing or discharging from the Garrisons' property. Hayes concluded that that the Garrisons' treatment system was "maybe" an imminent threat to public health or safety.

In response, the Garrisons hired David Gustafson, a licensed ISTS inspector, to conduct an ISTS compliance inspection. Gustafson did not observe any surfacing or discharging sewage and found that the Garrisons' treatment system was functioning properly. Gustafson determined that the Garrisons' treatment system was not an imminent threat to public health or safety.

Because of the conflicting results from the ISTS compliance inspections, Carver County hired Tim Haeg to conduct a third ISTS compliance inspection. In conducting his inspection, Haeg excavated around the Garrisons' individual draintile lines, something that was not done by any of the previous inspectors. Haeg determined that the Garrisons' treatment system was fully functional, and he did not observe any surface or discharging sewage. Haeg also inspected the slope adjoining the two properties and did not observe any flow of sewage from the Garrisons' property to appellants' back yard. Accordingly, Haeg did not believe that the Garrisons were discharging sewage onto

appellants' property, and he determined that the Garrisons' treatment system was not an imminent threat to public health or safety.

Appellants filed a complaint in district court on October 8, 2004, alleging that the Garrisons were discharging sewage onto their property. Appellants sought damages under claims of nuisance, trespass, and negligence. Appellants also sought equitable relief, alleging that the Garrisons' treatment system was an imminent threat to public health and safety. Appellants asked for further equitable relief under the Minnesota Environmental Rights Act (MERA). The parties stipulated to a bifurcated trial, in which appellants' claims for equitable relief would proceed first in a trial before the court, to be followed by a jury trial on appellants' claims for damages.

A trial was held on appellants' claims for equitable relief on August 27, 2007. The district court concluded that appellants "did not present any conclusive evidence that the Garrison ISTS is discharging sewage or effluent to the ground surface or surface waters. Nor [have they shown that] the Garrison system was adversely affecting or threatening public health or safety." As a result, the district court held that the Garrisons' treatment system was not an imminent threat to public health or safety, and that the treatment system did not violate MERA.

The Garrisons subsequently moved the district court for summary judgment on appellants' claims for damages, arguing that the district court, in its ruling on appellants' claims for equitable relief, ruled adversely to appellants on the essential elements of the claims for damages. According to the Garrisons, appellants were therefore collaterally

estopped from bringing their damages claims. The district court granted the Garrisons' motion. This appeal follows.

D E C I S I O N

I

Appellants challenge the district court's application of collateral estoppel to their nuisance claim and contend that the Minnesota Constitution affords them an absolute right to a jury trial on this claim.[1] Collateral estoppel, also known as issue preclusion, prohibits a party from relitigating issues that have been previously adjudicated. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5, 99 S. Ct. 645, 649 n.5 (1979); *Hauser v. Mealey*, 263 N.W.2d 803, 806 (Minn. 1978). "Collateral estoppel precludes the relitigation of issues which are both identical to those issues already litigated by the parties in a prior action and necessary and essential to the resulting judgment." *Ellis v. Minneapolis Comm'n on Civil Rights*, 319 N.W.2d 702, 704 (Minn. 1982).

Whether the doctrine of collateral estoppel applies is a mixed question of law and fact and is reviewed de novo. *Falgren v. Minn., Bd. of Teaching*, 545 N.W.2d 901, 905 (Minn. 1996). We review a district court's conclusions of law, construction of statutes, and application of the law de novo. *See A&H Vending Co. v. Comm'r of Revenue*, 608 N.W.2d 544, 546–47 (Minn. 2000) (reviewing grant of summary judgment by tax court). Where the doctrine of collateral estoppel precludes relitigation of an issue, there is no

[1] Although appellants also raised claims for trespass and negligence, appellants' focus at oral argument before this court was on their nuisance claim; accordingly, that is our focus in the opinion. We note, however, that—like their nuisance claim—appellants' trespass and negligence claims were properly barred by collateral estoppel.

issue of material fact, and summary judgment is proper. *Ryan v. Progressive Cas. Ins. Co.*, 414 N.W.2d 470, 472 (Minn. App. 1987), *review denied* (Minn. Jan. 15, 1988). If collateral estoppel is available, a reviewing court will not reverse a district court's decision to apply the doctrine absent an 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 bars the relitigation of an issue when: (1) the issue is identical to one in a prior adjudication; (2) there was a final judgment on the merits in the prior proceeding; (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. N. States Power Co.*, 353 N.W.2d 899, 902 (Minn. 1984). Collateral estoppel applies to issues "actually litigated, determined by, and essential to a previous judgment." *In re Application of Hofstad*, 376 N.W.2d 698, 700 (Minn. App. 1985) (quotation omitted), *review denied* (Minn. Apr. 18, 1991). Collateral estoppel is an equitable doctrine, *Colonial Ins. Co. of Cal. v. Anderson*, 588 N.W.2d 531, 533 (Minn. App. 1999), and courts do not apply it rigidly but "focus instead on whether an injustice would be worked upon the party upon whom the estoppel is urged." *Nelson v. Am. Family Ins. Group*, 651 N.W.2d 499, 511 (Minn. 2002). The party invoking collateral estoppel has the burden of proof. *Wolfson v. N. States Mgmt. Co.*, 221 Minn. 474, 480, 22 N.W.2d 545, 548 (1946).

Article I, section 4, of the Minnesota Constitution states that "[t]he right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the

amount in controversy." Appellants claim that this provision provides them with an absolute right to a jury trial on their nuisance claim, such that under no circumstances can the district court prevent them from presenting their claim to a jury. But appellants cite no authority for their sweeping interpretation of the constitutional right to a jury trial, and their argument ignores that collateral estoppel prevents the relitigation of even those issues for which a right to jury trial exits. *See, e.g.*, *Reil v. Benjamin*, 584 N.W.2d 442, 445 (Minn. App. 1998) (affirming the use of collateral estoppel to bar a claim for damages in a personal injury suit), *review denied* (Minn. Nov. 17, 1998); *Burgmeier v. Bjur*, 533 N.W.2d 67, 71 (Minn. App. 1995) (affirming the application of collateral estoppel to a trespass claim), *review denied* (Minn. Sept. 20, 1995).

Further, appellants sought both damages and equitable relief. "[I]n an action not of a strictly legal nature, where the plaintiff seeks both equitable and legal relief, neither party is entitled to a jury trial as a matter of right." *Koeper v. Town of Louisville*, 109 Minn. 519, 522, 124 N.W. 218, 218–19 (1910). Therefore, appellants' claim is without merit.

We acknowledge that in *Onvoy v. Allete*, the supreme court held that a jury's "factual findings that are common to claims of law and claims for equitable relief [are] binding on the district court." 736 N.W.2d. 611, 617 (Minn. 2007). This language, together with other portions of the *Onvoy* opinion, seems to suggest that when a case involves both claims at law and claims for equitable relief, factual issues common to both must be tried to a jury. Indeed, the cases relied upon by the *Onvoy* court establish that when claims at law and claims for equitable relief turn on the same operative facts in

federal court, the jury must decide the claims at law first in order to preserve the jury trial right. *See, e.g., Ag. Servs. of Am., Inc. v. Nielsen*, 231 F.3d 726, 730 (10th Cir. 2000) ("[W]hen a case involves both a jury trial and a bench trial, any essential factual issues which are central to both must be first tried to the jury, so that the litigants' Seventh Amendment jury trial rights are not foreclosed on common factual issues.").

But the *Onvoy* court did not go so far as to require a jury to decide factual issues common to both claims at law and claims for equitable relief. Rather, *Onvoy* only holds that when both claims are presented to a jury, the jury's factual findings are binding upon the district court regarding those factual issues common to both claims. Because appellants decided not to present both claims to a jury, *Onvoy's* holding is inapplicable here. Moreover, to the extent that *Onvoy* does require a jury to decide factual issues common to both claims at law and claims for equitable relief, appellants waived any such requirement by stipulating to a bifurcated trial in which their claims for equitable relief would be presented to the district court before their claims at law were presented to the jury.

Appellants also argue that the issues raised by their nuisance claim are not identical to those raised in their claims for equitable relief. We disagree. Appellants asked the district court for equitable relief under Minn. Stat. § 145A.04, subd. 8 (2008), which provides that "[i]f a threat to the public health such as a public health nuisance, source of filth, or cause of sickness is found on any property, the board of health or its agent shall order the owner or occupant of the property to remove or abate the threat."

Appellants claimed that the Garrisons' treatment system was an imminent threat to public safety because it was discharging sewage into their back yard.

In regard to appellants' nuisance claim, Minn. Stat. § 561.01 (2008) defines "nuisance" as "[a]nything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." Appellants base their nuisance claim on the allegation that the Garrisons' treatment system was leaking sewage into appellants' back yard, thereby interfering with appellants' enjoyment of their property. Identical to both claims is the issue of whether the Garrisons' treatment system was discharging sewage into appellants' back yard.

The district court specifically found that appellants "did not present any conclusive evidence that the Garrison ISTS is discharging sewage or effluent to the ground surface or surface waters." Because one of the essential elements of appellants' nuisance claim is identical to one of the issues previously adjudicated by the district court adverse to appellants, it was not an abuse of discretion for the district court to bar appellants' nuisance claim under the doctrine of collateral estoppel.

II

Appellants also argue that the district court's factual findings are not supported by the record. But appellants fail to identify any specific finding of the district court that they believe is erroneous. Rather, appellants generally challenge the evidence that suggests the Garrisons' treatment system was not failing. But the district court made no finding as to whether the Garrisons' treatment system was failing. Further, to the extent

that the district court's overall judgment suggests that the Garrisons' treatment system was not failing, its decision is clearly supported by the record. Therefore, we reject appellants' claim.

Affirmed.