COURT OF APPEALS
DECISION
DATED AND FILED

September 15, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 98-3047

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

O-TON-KAH PARK PROPERTY OWNER'S ASSOCIATION, INC.,

PETITIONER-APPELLANT,

v.

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

RESPONDENT-RESPONDENT,

SHORE DRIVE PARTNERSHIP,

RESPONDENT.

APPEAL from an order of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Snyder, JJ.

BROWN, P.J. The O-Ton-Kah Park Property Owner's Association, Inc., appeals from an order affirming the DNR's denial of its application for a pier permit. Under § 30.12, STATS., only riparian owners are eligible for pier permits. It was established in previous litigation involving O-Ton-Kah that the members of O-Ton-Kah are not riparian owners, even though they are the holders of an easement granting them riparian rights. *See* ***Stoesser v. Shore Drive Partnership***, 172 Wis.2d 660, 663, 494 N.W.2d 204, 206 (1993). In addition, O-Ton-Kah's proposed pier does not meet the requirements of § 30.131, STATS., which allows persons other than riparian owners to maintain a pier under certain circumstances. Because O-Ton-Kah does not meet the criteria of either provision allowing the maintenance of a pier, the DNR properly denied it a permit. We thus affirm the circuit court's order upholding the DNR's denial.

The facts are not in dispute. Shore Drive Partnership owns riparian land along Lake Beulah and the members of O-Ton-Kah are nonriparian landowners in the O-Ton-Kah subdivision. In a 1939 warranty deed from O-Ton-Kah's predecessors in title to Shore Drive's predecessors in title, O-Ton-Kah's predecessors reserved to themselves the right to use the lakeshore for "bathing, boating or kindred purposes." *See* ***Stoesser***, 172 Wis.2d at 664, 494 N.W.2d at 206. Not until 1989 did O-Ton-Kah erect a pier. In 1990, O-Ton-Kah again put up its pier, but this time Shore Drive removed the pier, claiming that O-Ton-Kah had no right to erect a pier on its property. *See* ***id.*** O-Ton-Kah filed suit, claiming that it had "lake rights … to swim, dock boats, and erect a pier along the shores of Lake Beulah." ***Id.*** At some point prior to its appeal, O-Ton-Kah dropped its claim that it had the right to maintain a pier. *See* ***id.*** The case made it to the supreme court on certification, and the court held that riparian rights may be granted by easement to nonriparian owners. *See* ***id.*** at 669-70, 494 N.W.2d at 208-09.

Both O-Ton-Kah and Shore Drive applied to the DNR for pier permits. After a public hearing, the DNR denied both applications. The administrative law judge (ALJ) analyzed O-Ton-Kah's application on three grounds: under the easement, under § 30.131, STATS., and under § 30.12, STATS. First, the ALJ found that the 1939 easement did not expressly allow for the placement of a pier and the fact that for fifty years the association did not attempt to erect one "speaks volumes as to the intent of the parties." Second, O-Ton-Kah did not meet the requirements of § 30.131 because the pier had not been "placed seasonally … at least once every 4 years since the written easement … was recorded." Section 30.131(1)(d). Third, O-Ton-Kah was not eligible for a pier permit under § 30.12 because that section only applies to riparian owners. In denying Shore Drive's application, the ALJ noted that there were "numerous worthy objections" to the proposed plan and that Shore Drive had attempted to "end-run" these objections by amending its plan after the hearing. Both Shore Drive and O-Ton-Kah petitioned for review in the circuit court, where the DNR denials were upheld. Only O-Ton-Kah appeals from that circuit court decision.

O-Ton-Kah first argues that the rights granted to it under the easement include the right to construct a pier because such right is incidental to "boating or kindred purposes." Under the lease, it asserts that "O-Ton-Kah has been given the right to stand in the shoes of Shore Drive as riparian owners … including the right to apply for and erect a pier." Regarding § 30.12, STATS., O-Ton-Kah claims that the definition of "riparian owner" is ambiguous. The DNR responds that whatever pier placement right O-Ton-Kah may have under the lease, such right is subordinate to the interest of the state and the public. The DNR asserts that the legislature has limited the right to erect a pier to riparian owners and O-Ton-Kah is not a riparian owner. Further, the DNR points to ***Stoesser*** to

demonstrate that the term "riparian owner" is well defined. Finally, the DNR argues that O-Ton-Kah is judicially estopped from arguing it is entitled to a pier because it dropped that claim in previous litigation and affirmatively stated in its ***Stoesser*** brief that it did not have the right to erect a pier.

We address the DNR's estoppel argument as a threshold matter. Judicial estoppel is an equitable rule applied at the discretion of the court to prevent a party from adopting inconsistent positions in legal proceedings. *See* ***State v. Petty***, 201 Wis.2d 337, 347, 548 N.W.2d 817, 820 (1996). While its use is guided by well-established legal principles, the decision to apply the doctrine to a particular case is within the discretion of the trial court. *See* ***id.*** at 353, 548 N.W.2d at 823. The purpose of judicial estoppel is to preserve the integrity of the judicial system and prevent litigants from "playing 'fast and loose' with the courts." ***Harrison v. LIRC***, 187 Wis.2d 491, 497, 523 N.W.2d 138, 140 (Ct. App. 1994) (quoted source omitted). While its application is not rote, there are prerequisites to its appropriate use.

> First, the later position must be clearly inconsistent with the earlier position; second, the facts at issue should be the same in both cases; and finally, the party to be estopped must have convinced the first court to adopt its position—a litigant is not forever bound to a losing argument.

Petty, 201 Wis.2d at 348, 548 N.W.2d at 821 (quoted source omitted).

Here, assuming arguendo that O-Ton-Kah did indeed adopt a clearly inconsistent position and that the facts at issue are the same here as in ***Stoesser***, we still find judicial estoppel inapplicable because the pier privilege issue was not before the supreme court in ***Stoesser***. Before its case reached the supreme court, O-Ton-Kah had dropped its claim that it had the right to build a pier. That the court did not consider the issue is clear from the statement in the case that O-Ton-

Kah members "no longer claim the right to maintain a pier." ***Stoesser***, 172 Wis.2d at 664, 494 N.W.2d at 206. Thus, O-Ton-Kah did not convince the ***Stoesser*** court of any position regarding pier rights. In such a situation, the application of judicial estoppel is inappropriate.[1]

Having decided that O-Ton-Kah was not estopped from litigating its right to erect a pier, we turn our attention to the decision on that score. We review the agency's decision, not the circuit court's. *See* ***Sea View Estates Beach Club, Inc. v. DNR***, 223 Wis.2d 138, 145, 588 N.W.2d 667, 670 (Ct. App. 1998), *review denied,* 225 Wis.2d 489, 594 N.W.2d 383 (1999). When reviewing an agency's determination of a question of fact, we employ the substantial evidence standard. *See* ***id.*** at 148, 588 N.W.2d at 671. That is, we set aside the agency's conclusion only if, considering the evidence of record, no reasonable person could have reached the same result. *See* ***id.*** The deference with which we examine the agency's decision on a question of law varies according to the agency's expertise in the area, among other factors. *See* ***id.*** at 148-49, 588 N.W.2d at 672. In a pier permit case, the DNR's decision is entitled to great weight deference. *See* ***id.*** at 149, 588 N.W.2d at 672. Thus, we will uphold the DNR's decision even if there is a more reasonable interpretation.

The DNR was correct that the easement granting riparian rights "does not confer the status of riparian owner upon the easement holder." ***Stoesser***, 172 Wis.2d at 669, 494 N.W.2d at 208. Because O-Ton-Kah is not a riparian

[1] Sua sponte, we question whether claim preclusion may have been the more appropriate estoppel argument, since O-Ton-Kah could have maintained the pier issue before the ***Stoesser*** court. *See* ***Stoesser v. Shore Drive Partnership***, 172 Wis.2d 660, 494 N.W.2d 204 (1993). However, because this was not raised by the parties we reach the merits. *See* ***Waushara County v. Graf****,* 166 Wis.2d 442, 451, 480 N.W.2d 16, 19 (1992).

owner, it is not eligible to put up a pier under §§ 30.12, or 30.13, STATS. Those sections, on their faces, apply only to riparian owners and riparian proprietors. And while O-Ton-Kah urges that the term "riparian owner," as used in the statute, is ambiguous, we deem it well defined in Wisconsin: "A riparian owner is one who holds title to land abutting a body of water." ***Stoesser***, 172 Wis.2d at 665, 494 N.W.2d at 207. Easement holders do not fall into this category because "[i]n the case of an easement title does not pass." ***Id.*** at 667, 494 N.W.2d at 207. Indeed, the ***Stoesser*** court stated categorically that "[t]he [O-Ton-Kah] subdivision owners did not become riparian owners based upon the easement." ***Id.*** Because O-Ton-Kah is not a riparian owner, it is not eligible for a permit under § 30.12 or to build without a permit under § 30.13.

As an easement holder, O-Ton-Kah's only hope for putting in a pier lies in § 30.131, STATS. But that section is of no help to O-Ton-Kah. First, we note that the section only applies to piers "of the type which do[] not require a permit under ss. 30.12(1) and 30.13." Section 30.131(1). We doubt that O-Ton-Kah's proposed pier was such a pier, since O-Ton-Kah applied for a pier permit. But even assuming it was, O-Ton-Kah does not fulfill the other requirements of § 30.131. A § 30.131 pier must "[have] been placed seasonally in the same location at least once every 4 years since the written easement … was recorded." Section 30.131(1)(d). It is undisputed that the pier was first erected in 1989, fifty years after the recording of the easement.

Because O-Ton-Kah was not eligible to maintain a pier under ch. 30, STATS., the DNR rightly denied its pier permit application and the circuit court properly upheld that decision.

By the Court.—Order affirmed.

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