COURT OF APPEALS
DECISION
DATED AND FILED

January 23, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1316

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

JAMES KOMAREK AND RUTH KOMAREK,

PLAINTIFFS-APPELLANTS,

v.

WISCONSIN VALLEY IMPROVEMENT CO., INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Oneida County: ROBERT E. KINNEY, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. James Komarek and his wife, Ruth Komarek, appeal a summary judgment dismissing their claim seeking declaration of rights in

a thirty-foot strip of land bordering Lake Nokomis.[1] They argue that the trial court erroneously applied the doctrine of issue preclusion and improperly dismissed their adverse possession claim. We reject their arguments and affirm the judgment.

BACKGROUND

¶2 The following facts are undisputed.[2] The Wisconsin Valley Improvement Company constructs and operates dams on the Wisconsin and Tomahawk Rivers to regulate their flow. In 1911, the company built a dam on the Tomahawk River creating Rice Reservoir, an artificial lake. Before building the dam, the company purchased a large tract of land, known as Government Lot 1, on which to locate the reservoir. Because Lot 1 was larger than the reservoir, the company owned the land surrounding the reservoir as well.

¶3 In 1925, the company sold a portion of land surrounding Rice Reservoir. The deed excepted and reserved "a strip of land 30 feet in width extending and lying along above and contiguous to said flowage." Although the lot changed hands several times, the legal description has remained substantially the same until 1949 when it was changed to a metes and bounds description and failed to mention the thirty-foot strip. In 1993, the company's interests reappeared on a deed in a provision "excepting flowage." In 1995, the Komareks purchased the subject property and their deed contains a description similar to the 1993 deed.

[1] Also known as Rice Reservoir.

[2] In their motion for reconsideration, the Komareks agreed that the trial court's statement of facts recited "in its Opinion accurately states the nature of the facts" before the court. As a result, we rely on the trial court's factual summary.

¶4 In August 1998, the Komareks applied for a permit to place rock along the shoreline of the Rice Reservoir to prevent erosion near their cottage. The Department of Natural Resources denied their permit application because in its opinion, the company, not the Komareks, owned the shoreline.

¶5 The Komareks appealed to the Wisconsin Division of Hearings and Appeals, which held a contested hearing. With the assistance of legal counsel, the Komareks presented testimony and exhibits. The administrative law judge upheld the DNR's ruling that the company was the owner of the shoreline. The Komareks did not appeal that decision.

¶6 The Komareks filed this action in circuit court seeking a declaration of rights. The company moved for summary judgment, asserting that the Komareks' claim of ownership based upon their deed should be dismissed on the grounds of issue preclusion. The trial court ruled that the question of ownership of the shoreline was adequately litigated before a competent fact finder who issued a final determination on the merits and the Komareks could have appealed the ruling but did not. It therefore ruled in favor of the company on the issue of record title. The court further determined that the Komareks failed to offer any proofs in support of their adverse possession claim. The court entered summary judgment dismissing the Komareks' complaint. The Komareks appeal the summary judgment.

STANDARD OF REVIEW

¶7 When reviewing a summary judgment, we perform the same function as the trial court and our review is de novo. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is

appropriate when no material facts are in dispute and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08.[3]

ISSUE PRECLUSION

¶8 The general rule of issue preclusion has been stated as follows:

> When an issue of fact or law is actually litigated and determined by a valid judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

Precision Erecting, Inc. v. M&I Marshall & Ilsley Bank, 224 Wis. 2d 288, 301, 592 N.W.2d 5 (Ct. App. 1998) (citation omitted). "This rule was created to ward off endless litigation and ensure the stability of judgments." ***Id.*** "Furthermore, the rule guards against inconsistent decisions on the same set of facts." ***Id.*** at 301-02.

¶9 Issue preclusion is designed to limit the relitigation of issues that have been actually litigated in a previous action. ***Lindas v. Cady,*** 183 Wis. 2d 547, 554, 515 N.W.2d 458 (1994). "[I]ssue preclusion requires that the issue sought to be precluded must have been actually litigated previously." ***Id.*** at 559. Unlike claim preclusion, an identity of parties is not required. "[F]ormalistic applications of issue preclusion have given way to a looser, equities-based application of the doctrine." ***Id.*** at 558-59.

¶10 The more modern approach requires courts to conduct a "fundamental fairness" analysis. ***Id.*** "Whether issue preclusion should bar litigation in a particular situation is a decision that must be made on considerations

[3] All statutory references are to the 1999-2000 edition unless otherwise noted.

of fundamental fairness." ***Precision Erecting***, 224 Wis. 2d at 304. "Our supreme court has adopted a five-part fundamental fairness test bottomed in guarantees of due process which require that a person must have had a fair opportunity procedurally, substantively and evidentially to pursue the claim before a second litigation will be precluded." ***Id.*** at 304-05 (citation omitted). Courts may consider some or all of the following factors when deciding whether to invoke issue preclusion:

> (1) could the party against whom preclusion is sought, as a matter of law, have obtained review of the judgment;
>
> (2) is the question one of law that involves two distinct claims or intervening contextual shifts in the law;
>
> (3) do significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issue;
>
> (4) have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; or
>
> (5) are matters of public policy and individual circumstances involved that would render the application of [issue preclusion] to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action?

Id. (citation omitted).

¶11 "While the weight to be given to each of these factors involves the exercise of discretion, certain of the factors present questions of law." ***Id.*** "The final decision rests on the circuit court's sense of justice and equity." ***Id.*** at 305-06. This fairness determination "should be made on a case-by-case basis" and "whether issue preclusion applies in a particular case is one committed to the discretion of the circuit court." ***Id.*** "We thus review the circuit court's final

decision on an erroneous exercise of discretion standard, reexamining de novo the questions of law implicit in that decision." ***Id.***

¶12 The Komareks do not dispute that under proper circumstances, unreviewed fact-finding of a state agency may be given preclusive effect. *See* ***Lindas***.[4] They argue, however, that the application of the doctrine in the case before us violates fundamental fairness in three ways: (1) the Company "had a significantly lower burden of proof in the administrative hearing;" (2) there is a significant difference in the quality of the two proceedings; (3) the timing of the actions establishes that they were not attempting to duplicate efforts. We are unpersuaded.[5]

1. Burden of Proof

¶13 The Komareks contend that at the administrative hearing, the company "was only required to prove that it was a riparian owner."[6] They argue

[4] "When deciding whether to give preclusive effect to the unreviewed factfindings of state agencies … courts must first determine a) whether the agency was adjudicating a disputed issue of fact properly before it and b) whether the agency's proceedings provided the parties an adequate opportunity to litigate." ***Lindas v. Cady***, 183 Wis. 2d 547, 554, 515 N.W.2d 458 (Ct. App. 1994). The Komareks do not contest that the agency was acting in an adjudicatory capacity when it reviewed the DNR's initial ownership determination. Similarly, it is not disputed that the issue of riparian ownership was properly before the agency in the context of the Komarek's DNR application. In addition, the Komareks do not contest that the administrative proceedings provided them an adequate opportunity to litigate by presenting witnesses and exhibits, having an attorney's assistance, and to seek judicial review of the agency's determination. *See* ***id.***

[5] On review, we confine ourselves only to the theories raised and issues argued by the appellant. ***Public Serv. Employees' Union v. WERC***, 246 Wis. 190, 199, 16 N.W.2d 823, 827 (1944).

[6] "Strictly speaking, a riparian owner is one whose land abuts upon a river and a littoral owner is one whose land abuts upon a lake. 78 AM. JUR. 2D *Waters* § 260 (1975). However, most Wisconsin cases make no distinction in applying the terms 'littoral' and 'riparian.'" ***Mayer v. Grueber***, 29 Wis. 2d 168, 174, 138 N.W.2d 197 (1965). In Wisconsin the term 'riparian' is acceptable as to land abutting upon either rivers or lakes." ***Stoesser v. Shore Drive P'ship***, 172 Wis. 2d 660, 665-66 n.1, 494 N.W.2d 204 (1993).

that the company was not required to prove "the quality of its ownership rights as against those of the Komareks." They claim that here, in contrast, in order to defend this suit, the company "must prove that not only does it have an interest, but that such an interest is superior to that of the Komareks."

¶14 We reject this argument. The Komareks' characterization of the administrative proceedings is inaccurate. As the trial court noted, the DNR denied the permit application solely because, in the agency's opinion, the Komareks were not the riparian owners of the shoreline. Consequently, the administrative law judge had to decide, as a matter of fact, the ownership of the shoreline in order to determine whether the DNR's decision was correct. Therefore, in deciding ownership, the administrative proceeding implicitly determined the quality of the company's rights.

¶15 The Komareks cite no legal authority for their proposition that the company had a significantly lower burden of proof in the administrative hearing. *See* ***State v. Waste Mgmt., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). Also, their argument lacks of record citation to support their claim. *See* WIS. STAT. RULE 809.19(1)(e). We are satisfied that this factor does not point towards making an exception to the general rule of issue preclusion.

2. Quality of the Two Proceedings

¶16 Next, the Komareks argue that there were significant differences in the quality of the two proceedings. In their petition for a contested case hearing, the Komareks indicated that they were not planning to argue a claim based on adverse possession at the administrative level and the administrative law judge did not consider any adverse possession claim. They contend that because adverse possession was not an issue at the administrative hearing, it would be

fundamentally unfair to preclude them from litigating this claim before the trial court.

¶17 This argument mischaracterizes the trial court's ruling. The court did not apply the doctrine of issue preclusion to dismiss the Komareks' adverse possession claim. It entered summary judgment dismissing the adverse possession claim because the Komareks failed to support it with any proofs. *See* WIS. STAT. § 802.08. This question will be dealt with more fully in the following section discussing adverse possession. We conclude that this argument fails to identify any unfairness in applying issue preclusion.

3. Timing of the filings

¶18 The Komareks next argue that the timing of the filings of the two proceedings, which were only one day apart, establish that the purpose of the circuit court action was not to duplicate proceedings. They assert that the purpose of the administrative remedies was to quickly obtain a permit to prevent further erosion of the shoreline. We are not satisfied that this is an individual circumstance that would render the application of issue preclusion fundamentally unfair. Also, the Komareks' argument fails to identify legal authority for its proposition that the timing or purpose of the dual filings is a significant factor in evaluating fairness. *See* WIS. STAT. RULE 809.21(1)(e). Consequently, we agree with the trial court's determination that the Komareks have failed to demonstrate that the application of issue preclusion is fundamentally unfair.

ADVERSE POSSESSION

¶19 Next, the Komareks argue that the trial court erroneously entered summary judgment dismissing their adverse possession claim. They contend that

disputes of material fact prevent summary judgment. We conclude that the record fails to support this argument. Under summary judgment methodology, the court must examine pleadings to determine if a claim has been stated and whether an issue of material fact is joined. ***In re Cherokee Park Plat***, 113 Wis. 2d 112, 115-16, 334 N.W.2d 580 (Ct. App. 1983). Summary judgment "shall be rendered 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 the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08.

> Supporting and opposing affidavits shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence. Copies of all papers or parts thereof referred to in an affidavit shall be attached thereto and served therewith, if not already of record. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. *When a motion for summary judgment is made and supported as provided in this section, an adverse party may not rest upon the mere allegations or denials of the pleadings but the adverse party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for trial.* If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against such party.

WIS. STAT. § 802.08(2) (emphasis added).

¶20 In reviewing the pleadings, we are satisfied that the Komareks' complaint fails to state a claim for adverse possession. Nonetheless, assuming that it did, we next review the company's summary judgment motion and supporting documents. As previously discussed, the record supports the trial court's determination that the company demonstrated record title to the disputed strip. Under summary judgment methodology, the burden then shifts to the Komareks to

rebut the company's showing by demonstrating facts supporting an adverse possession claim, as provided in WIS. STAT. § 802.08(2).

¶21 "Persons seeking to establish title to property by adverse possession must show that they--and/or their predecessors-in-title--have used the disputed property in a 'hostile, open and notorious, exclusive and continuous manner'" for the requisite time period. ***Keller v. Morfeld***, 222 Wis. 2d 413, 416-17, 588 N.W.2d 79 (Ct. App. 1998) (footnote omitted). The term "hostile" means only "that one in possession claims exclusive right to the land possessed." ***Id.*** at n.1.

¶22 Here, the Komareks did not file an affidavit or other proof demonstrating the elements of adverse possession as required by summary judgment methodology. WIS. STAT. § 802.08(2). Instead, they relied on statements in their brief that they maintained a cabin and dock on at least part of the disputed strip. The company, however, does not dispute these facts. The company responds that the existence of the cabin and dock fail to demonstrate hostile possession, because the company never objected to the Komareks' use of the strip of land.

¶23 It is undisputed that the 1925 deed conveys the "right to enter upon and use the said strip of land" subject to any use the company may make of the strip. Given this grant, the Komareks could have used the property in any way as long as the company did not object. Assuming that the Komareks have possessed the property for the statutory period, there is no showing that the company has objected. Accordingly, the use is permissive. "[I]f possession was pursuant to permission of the true owner, there could not be the hostile intent necessary to constitute adverse possession." ***Northwoods Dev. Corp. v. Klement,*** 24 Wis. 2d 387, 392, 129 N.W.2d 121 (1964).

¶24 The Komareks respond that even though a party may have been given permission to use the premises, the party may adversely possess the property by doing acts that exceed the scope of permission. *See* ***Leciejewski v. Sedlak***, 116 Wis. 2d 629, 342 N.W.2d 734 (1984). The Komareks, however, fail to offer proofs to show that maintaining a cabin and dock are outside the scope of the company's permission. They fail to demonstrate any objection by the company. As a result, the Komareks fail to demonstrate hostile use. Accordingly, the trial court correctly determined that the record failed to establish a dispute of material fact with respect to the Komareks' adverse possession claim and therefore properly granted summary judgment to the company.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.