IN THE COURT OF APPEALS OF IOWA

No. 8-1015 / 07-1857
Filed May 6, 2009

CITY OF JOHNSTON,
Plaintiff-Appellant,

vs.

ANDREW CHRISTENSON,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Artis I. Reis, Judge.

The City of Johnston appeals from a district court ruling on remand dismissing its petition for declaratory judgment. **REVERSED AND REMANDED.**

J. Russell Hixson of Hixson & Brown, P.C., Clive, for appellant.

Frank Murray Smith and Tyler Murray Smith, Des Moines, for appellee.

Considered by Vogel, P.J., and Mahan and Miller, JJ.

MILLER, J.

We filed our opinion in this appeal on April 8, 2009, but subsequently granted the plaintiff-appellant City of Johnston's petition for rehearing. Our April 8, 2009 decision is hereby vacated and this opinion replaces it.

The City of Johnston (City) appeals from a district court ruling on remand dismissing its petition for declaratory judgment against Andrew Christenson. We reverse the judgment of the district court and remand for further proceedings in this protracted dispute over Christenson's desire to build an accessory structure on his land to house his horses.

I. BACKGROUND FACTS AND PROCEEDINGS.

This is the second appeal in a case with a lengthy and complex procedural history. *See City of Johnston v. Christenson*, 718 N.W.2d 290 (Iowa 2006). The parties' dispute centers on a 9.7-acre tract of land owned by Christenson in the City of Johnston. As the Iowa Supreme Court stated in the first appeal in this case, that tract of land "is an island of bygone days, encased within a progressive, vibrant, rapidly sprawling metropolitan suburb." *Id.* at 293.

Prior to the City's incorporation in 1969, the land was used for agricultural purposes. When Christenson purchased the property in 1990, a single-family residence, a detached garage, and five outbuildings were located on it. The outbuildings consisted of a small barn, a tack shed, a farrier shed, a grain shed, and an insulated shed. Much of the land was enclosed by a fence to retain farm animals. Although the land is now located in a mixed-use center district of the City that includes a mixture of residential, office, and commercial uses,

Christenson continued to legally use it for agricultural purposes as a preexisting, nonconforming use. He kept several horses on his property and maintained a large portion of it as pasture for the horses.

In 1998, the detached garage and all of the outbuildings on Christenson's land were destroyed or damaged beyond repair by a severe storm. Christenson had used those buildings to store horse tack and related equipment, feed, and other supplies for his horses. He also occasionally put some of the horses in the buildings during inclement weather or for veterinarian visits.

After the storm, Christenson approached the city's zoning administrator about building a large accessory structure on the portion of his property that he used as pasture to replace the buildings that were destroyed. He proposed constructing a 16,000 square foot structure to be used for storage of feed and supplies, personal property, vehicles, and horses. He also envisioned using part of the building for exercising and training his horses. Christenson filed an application with the board of adjustment for a special exception to exceed the maximum area limitation of 3600 square feet for accessory structures. He additionally requested a variance from the fifteen-foot height restriction.

A hearing on Christenson's application was held on December 20, 2001. The city's zoning administrator informed the board in a written report prepared prior to the hearing that although "Christenson's horses are lawful, non-conforming uses," his proposed structure could conflict with the purpose of the city's nonconforming-use ordinances. Despite the concern expressed by the zoning administrator, the board ultimately passed a resolution approving the

special exception for area and granting a variance for height. It found, in relevant part, that the building size was "appropriate for the intended use as storage for equipment and an exercise area for horses." A condition of the board's resolution required Christenson to submit a site plan for approval by the planning and zoning commission and the city council.

The city council thereafter requested the board to reconsider its resolution following an opinion by the city attorney that the intended use of the structure for horses was prohibited under several city ordinances as an illegal expansion of a nonconforming use. In expressing that opinion, the city attorney "assumed that Mr. Christenson has been pasturing his horses on the entire 9.72 acres for a number of years and that the use of his land for such purpose is a legal nonconforming use." He nonetheless concluded that Christenson "would not be allowed to erect an entirely new building or structure ('**building use**'), simply because it would be used in conjunction with his nonconforming 'land use.'" The board of adjustment reconsidered the matter at a hearing on January 31, 2002. After discussing the concerns raised by the city attorney, the board voted in favor of confirming its prior resolution.

The City filed a petition for writ of certiorari with the district court, challenging the decision of the board of adjustment. Christenson then submitted a site plan to the planning and zoning commission and the city council for its approval. The City declined to take action on the site plan, instead filing a petition for declaratory judgment requesting the district court to declare that it was not obligated to approve the plan because it revealed the intended "use of

the proposed structure" would violate various city ordinances. The City claimed that the use of the structure for horses was not a permitted use under Johnston Municipal Code section 17.10.182.40, which sets forth the permitted uses for accessory buildings. It additionally claimed the site plan violated the nonconforming-use-of-land provisions under section 17.04.150[1] and the nonconforming-use-of-structure provisions under section 17.04.160, specifically subsection (G).[2]

The district court stayed the writ of certiorari action and considered the declaratory judgment action on the summary judgment motions filed by each party. It granted summary judgment in favor of the City upon its conclusion that Christenson's proposed structure would violate sections 17.10.182.40 and

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[1] Section 17.04.150 provides that the

> lawful use of land upon which no building or structure is erected or constructed which becomes non-conforming . . . may be continued so long as it remains otherwise lawful, subject to the following provisions:
>
> A. No such non-conforming use of land shall be enlarged or increased nor extended to occupy a greater area of land than was occupied at the effective date of adoption or amendment of this ordinance;
>
> B. No such non-conforming use of land shall be moved in whole or in part to any other portion of the lot or parcel which was not occupied by such use at the effective date of adoption or amendment of this ordinance;
>
> C. If any such non-conforming use of land ceases for any reason for a period of more than six (6) months, any subsequent use of such land shall conform to the district regulations for the district in which such land is located.

[2] Section 17.04.160 states that the

> lawful use of a building or structure and adjacent land which is part of the plot upon which the building or structure is located, which becomes non-conforming . . . may be continued so long as it remains otherwise lawful, subject to the following provisions:
>
> . . . .
>
> G. Any structure devoted to a use made non-conforming by this ordinance that is destroyed or has substantial damage by any means to an extent of fifty (50) percent or more of its replacement cost at the time of destruction . . . shall not be reconstructed and used as before such event.

17.04.160(G). Both parties filed motions pursuant to Iowa Rule of Civil Procedure 1.904(2). Following a hearing, in a ruling filed January 14, 2004, the district court granted the City's 1.904(2) motion and expanded its summary judgment ruling to find that "all of the six structures at issue on Christenson's land were either destroyed or damaged beyond repair, which eliminated the non-conforming use status of the land" pursuant to section 17.04.160(F).[3]

Christenson appealed, claiming the issues of permitted and nonconforming uses were the same issues raised and decided adversely to the City in the board of adjustment action, and the doctrine of issue preclusion thus precluded the City from raising the issues again in the exercise of its authority to approve the site plan. Our supreme court agreed in part, concluding "the issue of whether Christenson's proposed use of the structure was permitted under the zoning ordinance was actually decided by the board of adjustment when it voted to reaffirm its decision to grant a special exception and variance . . . ." *Christenson*, 718 N.W.2d at 302. The court accordingly reversed the contrary judgment of the district court and remanded for further proceedings. However, in so doing, it observed

> that the summary judgment entered by the district court in this case granted additional relief in the form of a declaration that the prior nonconforming status of the land was eliminated, an issue not raised by Christenson on appeal or discussed by the parties in the appeal. We only decide appeals within the framework of the issues raised, and we leave it to the district court on remand to determine the viability of any portion of its judgment not challenged in this appeal.

[3] That subsection states in relevant part that "[w]here non-conforming use status applies to a structure and land in combination, removal or destruction of the structure shall eliminate the non-conforming status of the land." Johnston Municipal Code § 17.04.160(F).

Id. at 303 n.5.[4]

On remand, Christenson filed a motion to determine the viability of the district court's rulings on the parties' summary judgment motions in the declaratory judgment proceeding. He asserted, in relevant part, that the doctrine of issue preclusion applied to bar the City from litigating the nonconforming status of Christenson's land because the board approved that use when it granted the special exception and variance for Christenson's proposed accessory building. The district court agreed and entered an order finding the City is "barred by issue preclusion from relitigating the use of the underlying land in this Declaratory Judgment case." The court accordingly vacated its earlier summary judgment ruling and dismissed the City's declaratory judgment action, finding it "may argue the illegality of the Board's action in the Certiorari case."

The City appeals. It claims the district court on remand erred in applying the doctrine of issue preclusion with respect to the issue of whether the nonconforming status of Christenson's land was eliminated under section 17.04.160(F). It also claims the district court on remand lacked the jurisdiction or authority to vacate its January 14, 2004 ruling.

II. SCOPE AND STANDARDS OF REVIEW.

The parties agree that our review of this case is for the correction of errors at law. *See* Iowa R. App. P. 6.4; *Smith v. Bertram*, 603 N.W.2d 568, 570 (Iowa

[4] The court added this language to its original opinion in *Christenson* following a petition for rehearing submitted by the City, which requested the court limit its opinion to Christenson's proposed use of the structure because Christenson had not appealed the district court's determination that he lost his nonconforming use of the land under section 17.04.160(F).

1999) (stating a declaratory judgment tried as an action at law is reviewed to correct errors at law). The district court's findings of fact are therefore binding upon us if those facts are supported by substantial evidence. Iowa R. App. 6.14(6)(*a*). The court's legal conclusions, however, are not. *Tim O'Neill Chevrolet, Inc. v. Forristall*, 551 N.W.2d 611, 614 (Iowa 1996).

III. MERITS.

In support of its claim that the district court erred in applying the doctrine of issue preclusion, the City argues that it did not actually litigate the issue of whether Christenson lost the nonconforming use of his land for horses under section 17.04.160(F) in the board of adjustment action. We agree.

Under the doctrine of issue preclusion, when an issue has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. *Christenson*, 718 N.W.2d at 297. Issue preclusion serves two purposes: (1) "to protect litigants from 'the vexation of relitigating identical issues with identical parties or those persons with a significant connected interest to the prior litigation,'" and (2) "to further 'the interest of judicial economy and efficiency by preventing unnecessary litigation.'" *Winnebago Indus., Inc. v. Haverly*, 727 N.W.2d 567, 571-72 (Iowa 2006) (citations omitted). In order for the prior determination to have a preclusive effect in subsequent litigation, the following four elements must be met:

> (1) the issue determined in the prior action is identical to the present issue; (2) the issue was raised and litigated in the prior action; (3) the issue was material and relevant to the disposition in the prior action; and (4) the determination made of the issue in the prior action was necessary and essential to that resulting judgment.

Id. at 572.

The element in question in this case is whether the status of Christenson's nonconforming use of his land was "raised and litigated" in the board of adjustment proceedings.[5] "Iowa law is clear that issue preclusion requires that the issue was 'actually litigated' in the prior proceeding." *Id.*; *see also* Restatement (Second) of Judgments, § 27 at 250 (1982) ("When an issue of fact or law is actually litigated and determined by a valid and final 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.").

> An issue is not actually litigated if the defendant might have interposed it as an affirmative defense but failed to do so; nor is it actually litigated if it is raised by a material allegation of the party's pleading but is admitted (explicitly or by virtue of a failure to deny) in a responsive pleading; nor is it actually litigated if it is raised in an allegation by one party and is admitted by the other before evidence on the issue is adduced at trial; nor is it actually litigated if it is the subject of a stipulation between the parties . . . .

Restatement (Second) of Judgments § 27 cmt. e, at 256; *see also Winnebago*, 727 N.W.2d at 572 (quoting with approval Restatement (Second) of Judgments § 27 cmt. e). Thus, facts determined by admissions are generally not entitled to preclusive effect, because facts so determined are not actually litigated. *See* 50 C.J.S. *Judgments* § 813, at 381 (1997).

Here, the City admitted in the board of adjustment action that Christenson's use of his land for horses was a valid nonconforming use, but

[5] We note that, as in the first appeal, the parties do not dispute that a decision by the board of adjustment can have a preclusive effect. *See Christenson*, 718 N.W.2d at 298 (recognizing an administrative adjudication by an entity such as the board of adjustment can have a preclusive effect in a judicial proceeding).

argued that his proposed structure would be an illegal expansion of that nonconforming use. The prehearing report prepared by the city's zoning administrator stated, "Christenson's horses are lawful, non-conforming uses." He further explained to the board at the hearing that Christenson's use of his land for horses was "lawful, it's legal, but it's non-conforming, so it can't be expanded." After the board passed its resolution approving Christenson's applications for a special exception and variance, the city attorney prepared a letter at the request of the city's zoning administrator and the city council regarding the legality of the board's resolution. In that letter, the city attorney stated, "[I]t is assumed that Mr. Christenson has been pasturing his horses on the entire 9.72 acres for a number of years and that the use of his land for such purpose is a legal nonconforming use." The City continued in that vein in the certiorari action, in which it admitted in its trial brief that "Christenson's horses and the use of his land for pasturing the horses are considered a legal non-conforming use of the land."

In light of the foregoing, we agree with the City that its admission regarding the nonconforming use status of Christenson's land in the board of adjustment proceedings did not constitute actual litigation of that issue for the purpose of applying issue preclusion. *See Winnebago*, 727 N.W.2d at 572 (finding employer's admission of liability in an alternate-care proceeding did not constitute actual litigation for issue preclusion purposes); *accord Tyson Foods, Inc. v. Hedlund*, 740 N.W.2d 192, 195 (Iowa 2007). We conclude the doctrine of issue preclusion did not prevent the City from litigating in this declaratory

judgment action the issue of whether Christenson lost the nonconforming use of his land for horses.

Christenson argues that the City should nevertheless be judicially estopped from litigating the nonconforming use status of his land. We do not agree.

The doctrine of judicial estoppel prohibits a party who has successfully and unequivocally asserted a position in one proceeding from asserting an inconsistent position in a subsequent proceeding. *Winnebago*, 727 N.W.2d at 573. "It is a 'common sense' rule, designed to protect the integrity of the judicial process by preventing deliberately inconsistent—and potentially misleading—assertions from being successfully urged in succeeding tribunals." *Id.* Judicial estoppel may apply in situations where issue preclusion would not. *Whitacre P'ship v. Biosignia, Inc.*, 591 S.E.2d 870, 881 (N.C. 2004). This is in part because judicial estoppel does not require that an issue actually have been litigated in a prior proceeding. *Id.*

Christenson raised the doctrine of judicial estoppel for the first time in this case in the second appeal from the district court proceedings. Although the doctrine "may properly be raised by courts, even at the appellate stage, on their own motion," *Winnebago*, 727 N.W.2d at 573, it "applies only when needed to protect the integrity of the judicial process." *Tyson Foods*, 740 N.W.2d at 199; *see also Whitacre P'ship*, 591 S.E.2d at 887 (describing judicial estoppel as a discretionary equitable doctrine). Moreover, our courts have "been flexible in our past application of the doctrine and view its flexible parameters as a strength in

its ability to achieve its goal" of protecting the integrity of the judicial process. *Tyson Foods*, 740 N.W.2d at 196; *see also Vennerberg Farms, Inc. v. IGF Ins. Co.*, 405 N.W.2d 810, 814 (Iowa 1987) (noting judicial estoppel has been sparingly applied in other jurisdictions and only alluded to in our own). We do not believe application of the doctrine in this case will further the goal of protecting the integrity of the judicial process where the doctrine was not raised until the second appeal in a case that has been pending for several years.

As noted above, the City also claims the district court on remand erred in vacating its January 14, 2004 ruling. The City argues that when an issue decided by that ruling, that Christenson had lost the nonconforming use of his land for his horses, was not raised by Christenson in his ensuing appeal it became a final judgment and was not subject to change on remand. We agree.

In *Gail v. Western Convenience Stores*, 434 N.W.2d 862 (Iowa 1989), Gail was awarded a money judgment consisting of damages and interest. *Gail*, 434 N.W.2d at 862. Following affirmance in an appeal in which Western did not challenge the interest award, *see Gail v. Clark*, 410 N.W.2d 662 (Iowa 1987), Western sought and secured a modification of the interest award by the trial court. *Gail*, 434 N.W.2d at 863. In reversing the trial court's modification of the interest award, our supreme court stated, in part:

> The doctrine of res judicata provides that a final judgment on the merits of an action *precludes the parties from litigating issues which* were or *could have been raised in that action.* The res judicata consequences of a final, unappealed judgment on the merits are not altered by the fact the judgment may have been wrong or rested on a legal principle subsequently overruled in another case.
>
> *A judgment merely voidable* because based upon an erroneous view of the law is not open to collateral attack, but *can*

> *be corrected only by a direct review.* A judgment may be attacked collaterally only if it was entered without jurisdiction.
>
> . . . Because Western did not challenge the interest award on appeal the order must be allowed to stand.

Id. at 863 (citations omitted) (emphasis added).

In *Gail*, in Western's appeal it did not challenge the interest award portion of the trial court's judgment and that portion of the judgment became final and not subject to collateral attack. Similarly, in this case in Christenson's appeal he did not challenge the portion of the district court's ruling holding he had lost the nonconforming use of his land for horses, and it became final and not subject to subsequent collateral attack. We conclude the district court erred in vacating that portion of its January 14, 2004 ruling.

IV. CONCLUSION.

We conclude Christenson did not sustain his burden to establish the elements of issue preclusion with respect to the issue of whether his nonconforming use of the land was eliminated under city ordinance 17.04.160(F). That issue was not actually litigated in the board of adjustment proceedings because the City conceded the nonconforming status of the land in arguing that Christenson's proposed structure would be an illegal expansion of that nonconforming use. We deny Christenson's further attempt to preclude the City from litigating that issue in the declaratory judgment proceedings under the doctrine of judicial estoppel.

We further conclude the district court erred in vacating the portion of its January 14, 2004 ruling holding Christenson had lost the nonconforming use of his land for horses.

The judgment of the district court on remand is therefore reversed, and this case is remanded for any further proceedings, consistent with the prior opinion of our supreme court and consistent with this opinion, as may be necessary.

Costs on appeal are taxed to Christenson.

REVERSED AND REMANDED.