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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1741**

Ren Xu, et al.,
Appellants,

vs.

Scott E. Sterling,
Respondent.

**Filed July 22, 2019
Affirmed
Reilly, Judge
Dissenting, Johnson, Judge**

Hennepin County District Court
File No. 27-CV-17-7742

William L. Davidson, João C.J.G. de Medeiros, Lind, Jensen, Sullivan & Peterson, P.A.,
Minneapolis, Minnesota; and

Robert B. Fine, Minneapolis, Minnesota (for appellants)

William M. Hart, Nicholas J. O'Connell, Julia J. Nierengarten, Meagher & Geer, P.L.L.P.,
Minneapolis, Minnesota; and

Wayne E. Gilbert, Lutter, Gilbert & Kvas, LLC, Eagan, Minnesota (for respondent)

Considered and decided by Hooten, Presiding Judge; Johnson, Judge; and Reilly,
Judge.

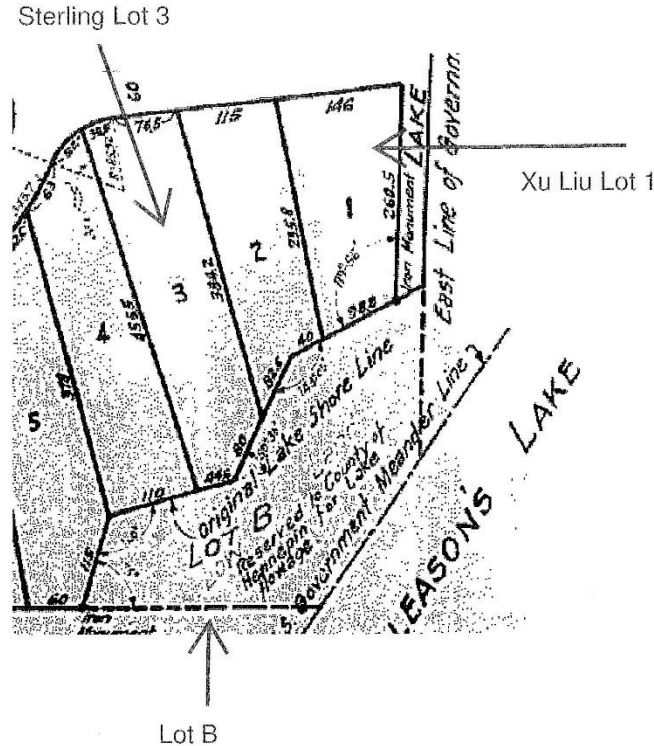
UNPUBLISHED OPINION

REILLY, Judge

After a court trial in this dispute between neighboring lakefront-property owners over respondent's construction of a dock, appellants argue that the district court erred in concluding that they failed to establish the elements of trespass. We affirm.

FACTS

Respondent Scott Sterling and appellants Ren Xu and Baiqing Liu own neighboring parcels of land in the City View Acres subdivision of the City of Plymouth. City View Acres is located on the west side of the northern portion of Gleason Lake. The original City View Acres plat was recorded in 1939, which is represented in the following diagram introduced at trial:



Appellants own part of Lot 1 and part of Lot B of the subdivision. Lot B is underwater, with water levels rising and receding seasonally; the lot was originally reserved to Hennepin County for lake flowage. Sterling owns Lot 3 of the subdivision. According to the originally recorded plat, the southern edge of Sterling's property abuts the original shoreline of Gleason Lake.¹

When Sterling purchased his property in 2015, it included a dock that had fallen into disrepair. Shortly after closing on the purchase, Sterling constructed a new dock that begins on his property, extends over the submerged Lot B through an area containing dense reeds and other aquatic vegetation, and into the open-water area of Gleason Lake. When Xu noticed the new dock in October 2015, he asked Sterling to remove the dock, claiming it trespassed on Lot B. Sterling refused to remove the dock.

In April 2017, appellants served Sterling with a summons and complaint, alleging trespass and seeking damages and a permanent injunction directing Sterling to remove the dock. Appellants also alleged that Sterling's property did not abut the shoreline of Gleason Lake. In his answer, Sterling denied that his dock trespassed onto appellants' property, denied appellants' allegation that his property does not abut the shoreline of Gleason Lake, and pleaded an affirmative defense of riparian rights on the ground that his property extends to the original shoreline of Gleason Lake.

The matter was tried to the district court in June 2018. Four witnesses testified, and the court admitted numerous exhibits. The exhibits included a survey of the originally

¹ Lot 1 and Lot 3 are separated by Lot 2, which is not involved in this litigation.

recorded plat of City View Acres and a 2002 survey of the boundaries of Lot 1 and Lot B, which was revised in February 2018 to include the location of Sterling's dock. The revised survey of Lot 1 and Lot B indicates that Sterling's dock begins on Lot 3 and extends into Lot B. Neither party submitted for the court's consideration a survey of Lot 3.

The district court found that the 2002 survey "establishes that [Sterling's] dock begins on [his] property and extends out over Lot B," but "does not indicate the position of the wetlands in relation to Lot 3" and "does not establish at what point the dock extends into the water of the wetlands surrounding Lake Gleason." Because the survey did not establish the edge of the wetlands as to Lot 3, the district court relied on other evidence, specifically trial testimony, to determine whether Sterling's property abuts the water of Gleason Lake.

Based on the trial testimony, the district court found that the wetlands of Gleason Lake extend onto Lot 3. Although the district court noted that neither party presented evidence "conclusively establishing the boundary of the wetlands and whether or not [Sterling's] property abuts the water," it observed that both parties testified that Lot B is underwater, and credited Sterling's testimony that his dock begins in an area of water that is approximately one foot deep. The district court then found, "The evidence tends to demonstrate that both [appellants] and [Sterling] are riparian owners." To be clear, the district court did not state that appellants failed to meet the burden of establishing that Sterling is not a riparian owner; rather, it found that "[t]he evidence tends to demonstrate that" Sterling was a riparian owner. The district court therefore concluded that appellants "failed to meet their burden of proof establishing by the greater weight of the evidence"

that Sterling made an unlawful entry onto their property, and, therefore, failed to prove trespass. The district court directed judgment to be entered dismissing appellants' claims, and judgment was entered. This appeal follows.

D E C I S I O N

On appeal from judgment following a court trial, we review the district court's findings of fact for clear error and issues of law de novo. *Porch v. Gen. Motors Acceptance Corp.*, 642 N.W.2d 473, 477 (Minn. App. 2002), *review denied* (Minn. June 26, 2002). And "we view the record in the light most favorable to the judgment of the district court." *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999). We "must disregard any error" that is harmless. Minn. R. Civ. P. 61.

At the heart of this litigation is whether Sterling possesses riparian rights and, therefore, is a riparian owner. "[O]ne may have rights to the use and enjoyment of the water, rights exclusive of the general public, through ownership of lakeshore or lakebed. These rights the law calls riparian. One does not own the water; one owns riparian rights to the use and enjoyment of the water." *Pratt v. State, Dep't of Nat. Res.*, 309 N.W.2d 767, 772 (Minn. 1981) (footnote omitted). "The riparian owner may, to facilitate access to the water, build and maintain wharves, piers, landings, and docks on and in front of his land and extend the same into the water, even beyond low-water mark, to the point of navigability." *State ex rel. Head v. Slotness*, 185 N.W.2d 530, 532 (Minn. 1971).

In the district court, the parties focused on whether Sterling is a riparian owner. On appeal, appellants focus on civil procedure, specifically whether the assertion of riparian rights is an affirmative defense and which party bears the burden of proof. Appellants did

not raise this issue before the district court, and never asked the court to consider and rule on it. Neither party challenges the district court's evaluation of the evidence or its findings of fact.

Appellants argue that the district court erred by assigning them the burden of proving that Sterling is not a riparian owner. Specifically, appellants contend that Sterling's assertion of riparian rights is an affirmative defense to their trespass claim, and that the burden to prove riparian rights lies with Sterling as the party asserting those rights. In response, Sterling argues that the assertion of riparian rights is an "ordinary" defense to a trespass claim, and that appellants failed to prove the elements of trespass. Determining which party has the burden of proof is a question of law subject to de novo review. *Williams v. State*, 910 N.W.2d 736, 740 (Minn. 2018) (citing *Savig v. First Nat'l Bank of Omaha*, 781 N.W.2d 335, 338 (Minn. 2010)).

In general, the party asserting an affirmative defense has the burden of proving that defense. *BankCherokee v. Insignia Dev., LLC*, 779 N.W.2d 896, 902 (Minn. App. 2010) (citing *MacRae v. Grp. Health Plan, Inc.*, 753 N.W.2d 711, 716 (Minn. 2008)), *review denied* (Minn. May 18, 2010). This case, however, does not require us to determine if the assertion of riparian rights is an affirmative defense to a trespass claim, nor does it require us to determine which party bears the burden of proving riparian rights. *See Pfeil v. St. Matthews Evangelical Lutheran Church*, 877 N.W.2d 528, 535 (Minn. 2016) (declining to characterize the ecclesiastical abstention doctrine as an affirmative defense or a form of abstention because it was unnecessary to resolve the case).

The supreme court recently stated that “a trespass is committed where a plaintiff has the ‘right of possession’ to the land at issue and there is a ‘wrongful and unlawful entry upon such possession by defendant.’” *Johnson v. Paynesville Farmers Union Coop. Oil Co.*, 817 N.W.2d 693, 701 (Minn. 2012) (quoting *All Am. Foods, Inc. v. Cty of Aitkin*, 266 N.W.2d 704, 705 (Minn. 1978)). In its order for judgment, the district court correctly stated that riparian rights attach to property that abuts water that is subject to the protection and control of the state, which includes wetlands. *See In re Application of Christenson*, 417 N.W.2d 607, 614 (Minn. 1987); *Bloomquist v. Comm’r of Nat. Res.*, 704 N.W.2d 184, 187-88 (Minn. App. 2005). Although the district court observed that neither party presented evidence “conclusively establishing the boundary of the [Gleason Lake] wetlands and whether or not [Sterling’s] property abuts the water,” the district court found that the “evidence supports that the wetlands extend onto” Sterling’s property. Moreover, the district court credited Sterling’s trial testimony that the area where his dock begins is approximately one foot deep. Specifically, the district court found, “The testimony as to the wet conditions at the end of Defendant’s property on Lot 3 were generally consistent and credible. The evidence supports that the wetlands extend onto Lot 3.” Thus, by finding that the wetlands extend onto Sterling’s property and by crediting Sterling’s testimony that the dock begins in an area that is approximately one foot deep, the district court implicitly found that the area where Sterling’s dock begins abuts the water of Gleason Lake, and is therefore riparian land. *See Christenson*, 417 N.W.2d at 614.

Moreover, the district court expressly found that “[t]he evidence tends to demonstrate that both [appellants] and [Sterling] are riparian owners,” and that “both

parties have nonexclusive rights to the use and enjoyment of the wetlands and waters of Lake Gleason.” We interpret the “tends to demonstrate” language used by the district court to be equivalent to a “fair preponderance of the evidence,” which is the standard a party must meet in order to satisfy its burden of proof in a civil action. *See Carpenter v. Nelson*, 101 N.W.2d 918, 921 (Minn. 1960). Thus, even if the burden was on Sterling to prove that his dock begins on riparian land, the district court’s finding that “[t]he evidence tends to demonstrate” that he is a riparian owner indicates that he carried this burden. *See id.* (“It is not required that the evidence be unequivocal or remove all reasonable doubt.”) Appellants do not challenge this finding. For these reasons, we do not affirm the district court’s judgment for reasons entirely different from the reasons stated by the district court. Rather, it is precisely *because* of the district court’s reasoning—particularly, its finding that “[t]he evidence tends to demonstrate” that Sterling is a riparian owner—that we affirm the district court’s judgment.

We observe that it is not entirely clear whether the assertion of riparian rights is an affirmative defense to a trespass claim. Minnesota Rule of Civil Procedure 8.03 does not list riparian rights as one of the enumerated defenses that must be pleaded affirmatively. Furthermore, neither party cites any precedential Minnesota case that has treated riparian rights as an affirmative defense, and our research does not reveal such a case. Neither party specifically asked the district court to determine which party bore the burden of proof regarding riparian rights at trial. But we need not answer that question in this case because the district court found that Sterling is a riparian owner. A riparian owner possesses rights to use and enjoy the water that abuts his real property. *Pratt*, 309 N.W.2d at 772;

Bloomquist, 704 N.W.2d at 187-88. This includes the right to build and maintain a dock that begins in the riparian owner's land and extends into the water to the point of navigability. *Slotness*, 185 N.W.2d at 532. Thus, the district court's finding that Sterling is a riparian owner means that he possessed the right to build a dock that began on his property and extended into the water of Gleason Lake. Accordingly, Sterling's status as a riparian owner negates the "unlawful entry" element of tortious trespass. *Johnson*, 817 N.W.2d at 701. Therefore, any possible error made by the district court in assigning the burden of proof was harmless. *See* Minn. R. Civ. P. 61 (requiring courts to disregard harmless error).

In sum, the district court did not err by concluding that Sterling is a riparian owner, and, therefore, did not err by concluding that Sterling's dock did not trespass on appellants' property.

Affirmed.

JOHNSON, Judge (dissenting)

The sole issue presented by this appeal is whether the district court erred by assigning to the plaintiffs the burden of proof with respect to whether the defendant has a common-law riparian right to place his dock on the plaintiffs' property. I would resolve the appeal by answering that question, and I would answer it by concluding that the district court erred by placing the burden on the plaintiffs. Therefore, I respectfully dissent from the opinion of the court.

A.

The answer to the question on which the parties disagree is found in the supreme court's opinion in *Danielson v. Kyllonen*, 126 N.W. 404 (Minn. 1910). In that case, the plaintiff sued the defendant for trespass, alleging that he entered the plaintiff's property and removed a fence. *Id.* at 404. The defendant, in his answer, admitted entering the plaintiff's property, but "he justified his conduct upon the ground that the fence was within the limits of a public highway and that he was acting as a public official." *Id.* At trial, the plaintiff introduced evidence that the fence was on his property. *Id.* The trial court "dismissed the action upon the ground that no evidence had been introduced to sustain the allegations of the complaint." *Id.* On appeal, the supreme court reversed, stating that "the burden was upon [the defendant] to prove what he alleged, and, having failed to do so, it was error for the trial court to dismiss the action at the close of [the plaintiff's] case." *Id.*

Seventy years later, the supreme court again stated that the defendant in a trespass claim bears the burden of proof with respect to whether he or she had a right to enter the plaintiff's property. In *Murphy v. City of Minneapolis*, 292 N.W.2d 751 (Minn. 1980), the

supreme court discussed “the various privileges . . . which are recognized as defenses to intentional torts” and stated that, *in claims of trespass*, “such intentional invasions of the interests of another are regarded as prima facie wrongful, and the privilege is a matter of excuse or defense; while in negligence, . . . it is considered that no wrong at all has occurred unless the defendant’s conduct has been unreasonable in the light of the risk, and the burden is upon the plaintiff from the outset to establish the fact.” *Id.* at 754 (emphasis added) (quoting William L. Prosser, *Handbook of the Law of Torts* § 31, at 148 (4th ed. 1971)).

The *Danielson* and *Murphy* opinions are consistent with the *Restatement of Torts*, which states that non-consensual privileges “must always be pleaded and proved by one who seeks thereby to destroy the seemingly tortious character of his conduct, and so protect himself from being subject to liability.” *Restatement (Second) of Torts* § 10 cmt. c (1965). In addition, a well-respected Minnesota treatise states that “privilege in trespass . . . cases” is an affirmative defense that must be pleaded in the answer pursuant to rule 8.03 of the rules of civil procedure. 1 David F. Herr & Roger S. Haydock, *Minnesota Practice* § 8:8, at 278-79 (6th ed. 2017).

Furthermore, in this case, the defendant, Sterling, pleaded riparian rights as an affirmative defense in his answer. Under the heading “Affirmative Defenses,” Sterling expressly pleaded five affirmative defenses in a detailed manner. As his third affirmative defense, he alleged as follows:

3. **Riparian Rights.** Lot 3 extends to the “*original Lake Shore Line*” of Gleason's Lake.

A. Defendant and his predecessors in interest have constructed, maintained and replace[d] docks either onto Lot

3, or extending from Lot 3 to waters lying beneath the shoreline of Gleason's Lake.

B. Defendant has riparian rights to use of the waters of Gleason's Lake by virtue of his ownership of the original shoreline of Gleason's Lake. Such riparian rights include, but are not limited to construction, maintenance or replacement of a dock over the waters of Gleason's Lake.

Sterling's answer demonstrates that, when he served and filed his answer, he considered his alleged riparian rights to be an affirmative defense, not a part of Xu and Liu's *prima facie* case.

On appeal, Sterling argues that he was mistaken when he pleaded his riparian rights as an affirmative defense, and he asks this court to disregard his answer. He cites no authority for the proposition that a party's pleading may be disregarded in such a manner. Sterling's argument runs contrary to the well-established principle that parties are bound by their pleadings and that matters admitted in a pleading are deemed conclusive for purposes of that particular case. *See, e.g., Roberge v. Cambridge Coop. Creamery Co.*, 67 N.W.2d 400, 403 (Minn. 1954); *JEM Acres, LLC v. Bruno*, 764 N.W.2d 77, 81 (Minn. App. 2009). An opposing party obviously may be prejudiced if a party is allowed to change its position after trial with respect to a factual issue that was established by the pleadings. *See Phelps v. Benson*, 90 N.W.2d 533, 545-48 (Minn. 1958); *see also LaSalle Cartage Co. v. Johnson Bros. Wholesale Liquor Co.*, 225 N.W.2d 233, 236-37 (Minn. 1974). In the present circumstances, the plaintiffs would be justified in relying on the defendant's answer by, for example, electing to do less investigation and discovery or to introduce less evidence on that particular issue.

Thus, based on both the caselaw and Sterling's answer, I would conclude that Sterling should have borne the burden of proof with respect to his alleged riparian rights and that the district court erred by assigning that burden to Xu and Liu.

B.

In Sterling's responsive brief, he argues only that the district court properly placed the burden of proof with respect to his alleged riparian rights on Xu and Liu. He does not argue in the alternative that, if the district court erred in its assignment of the burden of proof, the error would be harmless. Yet that is the essence of the reasoning in the opinion of the court. Xu and Liu did not have an opportunity to address the determinative issue in their reply brief. Resolving an appeal on an issue that was not briefed by either party is contrary to the basic nature of the adversary system, in which "we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Greenlaw v. United States*, 554 U.S. 237, 243, 128 S. Ct. 2559, 2564 (2008).

Furthermore, even if Sterling had made a harmless-error argument, the opinion of the court still would be in error by resting its decision on the district court's findings of fact. *See supra* at 7-8. The essence of Xu and Liu's argument is that, because the district court erred by assigning to them the burden of proof with respect to Sterling's alleged riparian rights, the erroneous burden of proof is baked into all of the findings of fact, making them invalid and unreliable. This court should not avoid Xu and Liu's argument that the district court's findings of fact are erroneous and then conclude that the burden of proof is immaterial because the district court made findings of fact that are adverse to them.

If the district court applied an erroneous burden of proof, it necessarily follows that *all* of the district court's findings of fact concerning Sterling's alleged riparian rights are invalid and unreliable. See *Texas Commerce Bank v. Olson*, 416 N.W.2d 456, 461 (Minn. App. 1987) (reversing and remanding for new trial because jury instructions assigned burden of proof to wrong party).

Moreover, it is not at all clear that the district court would decide the case in Sterling's favor after assigning the burden of proof to him. Sterling's evidence is contradicted by Xu and Liu's evidence. For example, Xu and Liu introduced evidence that the average water level of Lake Gleason is 944 feet above sea level and that all of Lot 3 is higher in elevation than 944 feet. The majority emphasizes the district court's statements that "[t]he evidence tends to demonstrate that both Plaintiffs and Defendant are riparian owners" and that "both parties have nonexclusive rights to the use and enjoyment of the wetlands and waters of Lake Gleason." *Supra* at 7-8. But those statements are made near the end of the district court's conclusions of law, and they are sandwiched between statements that "Plaintiffs have the burden of proof of establishing Defendant's entry as unlawful by the greater weight of the evidence" and that "Plaintiffs have therefore failed to meet their burden of proof establishing by the greater weight of the evidence that Defendant's entry is unlawful." In other words, those statements are made with an incorrect understanding of which party bears the burden of proof. Near the beginning of the findings of fact, the district court states, "Neither party offered evidence or testimony clearly establishing the boundaries of Lake Gleason, and its surrounding wetlands, in regards to the metes and bounds of Lot B and Lot 3." That statement illustrates the

importance of the burden of proof in this case. Sterling's brief confirms it. He contends that "Appellants had to show where the water falls in relation to a survey of Lot 3 to show that Sterling had no legal right to access Lake Gleason," that the only survey in the record was of Lot 1 and Lot B, and that "[t]here was no evidence presented establishing that Lot 3 does *not* abut the shores of Lake Gleason, which is necessary to demonstrate a trespass onto Lot B." In short, Sterling's argument depends on the lack of evidence introduced by Xu and Liu. The only way to know how the district court would find the pertinent facts based on the proper burden of proof is to reverse and remand so that the district court can do so.

For these reasons, I would reverse the judgment of the district court and remand the case to the district court for amended findings of fact and conclusions of law based on an assignment to Sterling of the burden of proof with respect to his affirmative defense of alleged riparian rights.