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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1572**

In the Matter of the Administrative Order Issued to Steven A. Hackbarth, individually,
and dba Hackbarth Roofing.

**Filed May 7, 2018
Affirmed
Reyes, Judge**

Minnesota Department of Labor and Industry
File No. 80-1902-33189

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Considered and decided by Jesson, Presiding Judge; Schellhas, Judge; and Reyes,
Judge.

UNPUBLISHED OPINION

REYES, Judge

In this certiorari appeal, relator challenges the Minnesota Commissioner of Labor and Industry's (the commissioner) order granting summary disposition to respondent Minnesota Department of Labor and Industry (the department) based on relator's violation of a previously imposed 2010 consent order. We affirm.

FACTS

Relator Steven A. Hackbarth owned and operated Hackbarth Roofing from 1996 until the department revoked his license pursuant to a consent order dated May 21, 2010 (the consent order), which prohibited relator and his company from either acting or holding themselves out as residential-building contractors, residential remodelers, and residential roofers. The consent order stayed an \$8,000 civil penalty, jointly and severally, on the condition that relator and his company comply with the order and all other laws and rules enforced by the department.

Richard Hackbarth, relator's uncle, owned Richard Hackbarth Construction, Inc., d/b/a R.H.H., Inc. (R.H.H.), which was licensed as a residential-building contractor from 2009 until its license expired on March 31, 2013. In November 2012, D.M. entered into a \$26,000 residential remodeling contract with R.H.H. at relator's suggestion. D.M. entered into a separate oral contract with relator for the application of spray-foam insulation. From November 2012 until June 2013, relator independently performed substantial remodeling work on D.M.'s home under separate oral agreements that were outside the scope of the contract between D.M. and R.H.H.

In July 2013, relator filed a \$40,500 mechanic's lien against D.M.'s property for his work under the oral agreements, and R.H.H. filed a \$21,400 mechanic's lien based on its written contract with D.M. Relator claimed that his lien was for work that he performed "for [D.M.] when [D.M.] was acting as his own general contractor for the work that was not in the scope of the work as stated in the [D.M.] loan documents," for an hourly wage of \$50.

In December 2013, relator sued D.M. in a mechanic's-lien foreclosure action. D.M. moved for summary judgment. In response, relator argued that disputed facts precluded summary judgment and provided his sworn affidavit to the district court detailing work he had completed outside of the R.H.H. contract. The district court denied D.M.'s summary-judgment motion based, in part, on two fact questions: (1) whether D.M.'s involvement in the project exempted relator from providing a pre-lien notice and (2) whether D.M. had hired relator as a construction worker or a residential-building contractor.

D.M. then filed a complaint against relator with the department concerning relator's compliance with the 2010 consent order. The department investigated the complaint and, in 2015, issued an administrative order against relator for performing activities as an unlicensed residential-building contractor, unlicensed residential remodeler, or unlicensed residential roofer in violation of the 2010 consent order and applicable statutory-licensing requirements. The order lifted the stay on the 2010 consent order's \$8,000 penalty and imposed an additional \$17,000 penalty, later reduced to \$7,000, for a total administrative penalty of \$15,000. The department commenced the present action in February 2016 following relator's timely request for a hearing. The administrative-law judge (ALJ) continued the hearing date several times to permit a final resolution of the underlying litigation between relator and D.M.

The district court held a bench trial on May 31 and August 6, 2016. D.M. argued that relator's lien was invalid as a matter of law because relator knowingly engaged in unlicensed residential-building-contractor activities. D.M. also asserted that the consent order prohibited relator from contracting with D.M. as he claimed he had. Relator deviated

from his previous arguments, instead demanding a \$17,986 mechanic's lien for the insulation work only and abandoning the remaining balance of the lien he had filed against D.M.'s property. But relator continued to assert that D.M. was the general contractor and that he served only as an employee.

The district court rejected relator's arguments that his work did not require licensure and concluded that relator had acted as a residential-building contractor, in violation of the 2010 consent order, because he provided two or more specialized skills, as defined in Minn. Stat. § 326B.802, subd. 15 (2016), and because he provided control over the direction of the project. The district court invalidated the mechanic's lien pursuant to Minn Stat. § 326B.845 (2016), but awarded relator an \$8,270.15 judgment against D.M. for relator's insulation work based on a contract theory.

Thereafter, the department moved for summary disposition affirming the 2015 administrative order, which relator opposed. The ALJ issued a recommended order applying collateral estoppel to the previously litigated issue of whether relator acted as a residential-building contractor in violation of the 2010 consent order and applicable statutory-licensing requirements. The commissioner adopted the ALJ's recommended findings of fact, conclusions of law, and order, and affirmed relator's \$15,000 penalty. This certiorari appeal follows.

DECISION

I. The commissioner did not err in applying collateral estoppel to preclude relator from contesting the district court's factual findings and legal conclusions.

Relator argues that the commissioner erred in adopting the district court's factual findings and legal conclusions through its application of collateral estoppel, because relator was a bona-fide employee exempt from the statutory-licensing requirements. But, as relator conceded at oral argument, the first three elements of collateral estoppel are met here, and he challenges only the fourth, arguing that he was not given a full and fair opportunity to be heard on the bona-fide-employee issue during the district court proceedings. We disagree.

The commissioner applied collateral estoppel and granted summary disposition in favor of the department. Summary disposition, the administrative-law equivalent of summary judgment, is granted only when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *Pietsch v. Minn. Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); see Minn. R. 1400.5500(K) (2017). "Where the doctrine of collateral estoppel precludes relitigation of an issue, there is no issue of material fact, and summary judgment is proper." *Barth v. Stenwick*, 761 N.W.2d 502, 508 (Minn. App. 2009).

"Whether collateral estoppel precludes litigation of an issue is a mixed question of law and fact that we review de novo." *Hauschildt v. Beckingham*, 686 N.W.2d 829, 837 (Minn. 2004) (citation omitted). Collateral estoppel has four requirements:

1) [T]he issue must be identical to one in a prior adjudication; 2) there was a final judgment on the merits; 3) the estopped party was a party or was 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.

Id. (quoting *Care Inst., Inc.-Roseville v. County of Ramsey*, 612 N.W.2d 443, 448 (Minn. 2000)).

The district court gave relator ample notice that his violation of the consent order needed to be litigated at trial. When it denied D.M.’s summary-judgment motion, the district court specifically stated:

Whether [relator] was employed as a construction worker or as a contractor is a fact question. If he was acting as a construction worker, he did not violate the Consent Order. If he acted or held himself out as a residential building contractor, remodeler or roofer, he did violate the Consent Order.

This fact issue was critical to the district court’s final decision because relator’s mechanic’s lien against D.M.’s property was void if relator had violated the consent order. Minn. Stat. § 326B.845 (“An unlicensed person who knowingly violates sections 326B.802 to 326B.885 has no right to claim a lien under section 514.01 and the lien is void.”).

The district court also provided relator ample opportunity to be heard on the issue of his violation of the consent order. The district court conducted a two-day bench trial, heard testimony from five people, including relator, who was represented by counsel during the entire proceeding.

Thereafter, the district court issued its findings of fact, conclusions of law, and order. It noted that relator “testified that he completed spray-foam insulation, roof repairs, and electrical on his own and outside the scope of R.H.H.’s contracting license.” It also

found that relator “was clearly the person providing the control over the direction of the project, including making repair suggestions, and was acting as the contractor.” It concluded that “[o]n the [D.M.] project, [relator] provided two or more specialized skills of his own and outside the scope of R.H.H. Inc. in violation of the Consent Order.” The commissioner did not err in applying collateral estoppel to the issue of whether relator acted as a residential-building contractor, rather than an employee, and granting summary disposition in favor of the department.

II. The commissioner did not abuse its discretion in declining to consider materials outside of the evidentiary record.

Relator also argues that the commissioner abused his discretion when he declined to consider material outside of the evidentiary record. We disagree.

“An appellate court may reverse or modify an administrative decision if substantial rights of the petitioners have been prejudiced by administrative findings, inferences, conclusions or decisions that are unsupported by substantial evidence in view of the entire record, or arbitrary and capricious” *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 277 (Minn. 2001) (citation omitted).

Relator submitted to the commissioner a 2013 W-4 dated in 2017, as well as two checks issued in satisfaction of the district court’s judgment, to demonstrate that he was a bona-fide employee. It is unclear whether the commissioner considered this evidence in making his decision because his order does not address it.

Had the commissioner specifically declined to consider such evidence, it would not have been an abuse of his discretion. The plain language of Minn. Stat. § 14.61 states that

“the officials of the agency who are to render the final decision shall not be made until . . . an opportunity has been afforded to each part adversely affected to file exceptions and present argument” to the officials who are to render the decision. Minn. Stat. § 14.61, subd. 1 (2016). An exception is a “formal objection to a court’s ruling by a party who wants to preserve an overruled objection or rejected proffer for appeal.” *Black’s Law Dictionary* 644 (9th ed. 2009). And an argument is a “statement that attempts to persuade; esp., the remarks of counsel in analyzing and pointing out or repudiating a desired inference, for the assistance of the decision-maker.” *Id.* at 121. It is clear that the additional evidence proffered by relator is neither an exception nor an argument.

In addition, as the department correctly points out, relator relies on this same evidence on appeal. In an informal letter, relator asked this court to supplement the record pursuant to Minn. Stat. § 14.67 (2016). This court rejected his request and directed him to file a formal motion in compliance with Minn. R. Civ. App. P. 127. Relator failed to do so, and we therefore do not consider such evidence.

Affirmed.