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STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1546

Rodger D. Robb, II,
Appellant,

vs.

Lucinda Jesson, et al.,
Respondents.

Filed March 26, 2012
Affirmed
Larkin, Judge

Ramsey County District Court
File No. 62-CV-11-1269

Rodger D. Robb II, Moose Lake, Minnesota (pro se appellant)

Lori Swanson, Attorney General, Anthony R. Noss, Steven H. Alpert, Assistant Attorneys General, St. Paul, Minnesota (for respondent)

Considered and decided by Peterson, Presiding Judge; Larkin, Judge; and Crippen, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

LARKIN, Judge

Appellant challenges the district court's dismissal of his claim for conversion, arguing that the district court erred in determining that his claim was barred under the doctrine of res judicata. We affirm.

FACTS

Appellant Rodger D. Robb II is a civilly committed patient in the Minnesota Sex Offender Program (MSOP). In March 2005, appellant absconded from the MSOP.[1] He was apprehended approximately 12 hours later in Omaha, Nebraska. He was eventually extradited back to Minnesota and charged with escape from custody. Appellant granted joint power of attorney to his sister C.B. and close friend J.P. Acting pursuant to that authority during the first week of April 2005, J.P. contacted respondent Matt Schroeder in his capacity as the director of the living unit from which appellant had absconded and requested the release of appellant's property to J.P. Schroeder refused to release appellant's property to J.P. On or about April 22, also acting pursuant to the power of attorney, C.B. wrote a memorandum to the administrator of the St. Peter Regional Treatment Center and asked to be informed of the procedures for picking up appellant's personal property. No one responded to her request. Schroeder purportedly sent all of

[1] The facts are primarily obtained from the complaint that is the subject of this appeal, as well as its supporting affidavit. *See Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003) (stating that, when reviewing a dismissal under Minn. R. Civ. P. 12.02(e), "[t]he reviewing court must consider only the facts alleged in the complaint, accepting those facts as true and must construe all reasonable inferences in favor of the nonmoving party.").

appellant's property to the MSOP at Moose Lake. In December 2005, a portion of appellant's property, consisting mostly of clothing, was returned to him.

In March 2006, appellant and a co-plaintiff, Larry Schultz, sought a temporary restraining order and permanent injunction in district court (the 2006 action) to enjoin several state-agency employees from transferring them to prison and seizing their property based on their refusal to participate in sex-offender treatment. Appellant[2] alleged, among other things, that defendants were punishing him for refusing treatment by "seiz[ing] more and more personal property." He alleged that "Defendants seem intent on . . . imposing conditions of confinement that in many ways are equal to or worse than those faced by prisoners. The final step has now become clear: move allegedly troublesome 'patients' to prison and take away almost all of their property!"

In January 2007, appellant was transferred to the MSOP at Moose Lake. Once he arrived at that location, he acquired more of his property. At this time, he learned that all of his property had not been sent to Moose Lake in 2005 and that some of his property was missing. In July 2007, appellant filed an amended complaint in the 2006 action, seeking permanent injunctive relief, as well as "any and all other remedies [the court] deems just." And in August 2009, appellant moved for compensatory and punitive damages. The motion stated:

> Plaintiffs [have] fully described their situation regarding their destroyed/missing property . . . . The property in question was either in the custody of the Defendants and their agents and was lost, or it was purposely destroyed by the Defendant and

[2] Although Schultz was a co-plaintiff in the 2006 action, we refer only to appellant for ease of reference.

> their agents after being seized by them. Because this property cannot be located or has been destroyed, the only manner in which Plaintiffs can be compensated for lost or stolen property is by cash payment of the replacement value of the property in question.

The motion also stated that "[c]ompensatory damages are appropriate because Defendants violated . . . this Court's . . . Order directing that Defendants 'shall take no action disposing of [appellant's] property'" and that "[t]he legal basis for compensatory damages for [appellant's] property already lost or destroyed would be the same as conversion."

On December 17, 2009, the district court issued an order and permanent injunction disposing of the issues raised in the 2006 action. The district court granted a permanent injunction concerning the storage, disposition, and delivery of any of appellant's "personal property items currently in the possession" of MSOP. But the district court denied appellant's requests for compensatory and punitive damages, in part because appellant was limited by the Tort Claims Act "to seeking redress through the Legislature's Joint Claims Subcommittee." *See* Minn. Stat. § 3.736, subd. 3(m) (2010) (stating that the state and its employees are not civilly liable for the "loss, damage, or destruction of property of a patient or inmate of a state institution"). The district court directed entry of judgment, and appellant did not pursue an appeal.

In February 2011, appellant filed the complaint that is the subject of this appeal (the 2011 action), alleging that several state-agency employees (respondents) engaged in acts that "constituted a conversion of [appellant]'s property." The complaint states:

> On or about April 7, 2005, or shortly thereafter, the Defendants . . . exercised dominion or control over [appellant]'s property by refusing to acknowledge [appellant]'s properly granted Power of Attorney, refusing to allow either of [appellant]'s joint Attorneys in Fact to gain possession of said property, alleging to have physically relocated said property to a MSOP location more than one hundred miles away while causing various items of [appellant]'s personal property to be lost, stolen, or destroyed as more fully described in [appellant]'s accompanying affidavit.

Respondents moved to dismiss appellant's complaint under Minn. R. Civ. P. 12.02(e) for failure to state a claim on which relief could be granted, arguing that appellant's conversion claim is barred under the doctrine of res judicata. In considering the motion to dismiss, the district court took judicial notice of the district court file in the 2006 action and ultimately concluded that the conversion claim is barred. The district court reasoned that appellant "previously sought monetary damages for his alleged missing or damaged property at MSOP. Those claims were denied by [the district court] in December 2009." The district court reasoned that the claims in the 2006 and 2011 actions

> clearly arise from the same operative nucleus of facts. The factual circumstances involve [appellant]'s property that was taken at MSOP. The earlier claim involves the same parties. [Appellant] does not dispute that he was a party to the 2009 litigation. The [respondents] are employees of the State and are considered in privy with defendants previously sued. There was a final judgment on the merits in 2009. [Appellant], the estopped party, has had full and fair opportunity to litigate the matter. The general expectation is that all claims are to be tried at once. [Appellant] admits that the allegations set forth in this case were prior to the previous lawsuit.

This appeal follows, in which appellant challenges the district court's dismissal of the 2011 action.

D E C I S I O N

"When reviewing a case dismissed pursuant to Minn. R. Civ. P. 12.02(e) for failure to state a claim on which relief can be granted, the question before [an appellate court] is whether the complaint sets forth a legally sufficient claim for relief." *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008) (citing *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997)). "The reviewing court must consider only the facts alleged in the complaint, accepting those facts as true and must construe all reasonable inferences in favor of the nonmoving party." *Bodah*, 663 N.W.2d at 553. "The standard of review is therefore de novo." *Id.*

Res judicata is a finality doctrine that mandates that there be an end to litigation. *Dorso Trailer Sales, Inc. v. Am. Body & Trailer, Inc.*, 482 N.W.2d 771, 773-74 (Minn. 1992). Under res judicata, a party is "required to assert all alternative theories of recovery in the initial action." *Id.* at 774. Once there is an adjudication of a dispute between parties, res judicata prevents either party from relitigating claims arising from the original circumstances, even under new legal theories. *Wilson v. Comm'r of Revenue*, 619 N.W.2d 194, 198 (Minn. 2000). Res judicata not only applies to all claims actually litigated, but to all claims that could have been litigated in the earlier action. *State v. Joseph*, 636 N.W.2d 322, 327 (Minn. 2001).

"Res judicata applies as an absolute bar to a subsequent claim when: (1) the earlier claim involved the same set of factual circumstances; (2) the earlier claim involved the

same parties or their privies; (3) there was a final judgment on the merits; and (4) the estopped party had a full and fair opportunity to litigate the matter." *Rucker v. Schmidt*, 794 N.W.2d 114, 117 (Minn. 2011) (footnote omitted). "All four prongs must be met for res judicata to apply." *Id.* (quotation omitted). "[Appellate courts] review the application of res judicata de novo." *Id.*

Appellant argues that the district court erred in dismissing the 2011 action under the doctrine of res judicata because (1) the 2006 action did not involve the same claims or facts as the current action; (2) not all defendants in the 2011 action are in privity with the defendants in the 2006 action; and (3) application of the doctrine of res judicata would work an injustice in this case. We address each argument in turn.[3]

Same Set of Factual Circumstances

With regard to the first prong of the res judicata test, "a plaintiff may not split his cause of action and bring successive suits involving the same set of factual circumstances." *Hauser v. Mealey*, 263 N.W.2d 803, 807 (Minn. 1978). Thus, the focus of res judicata is on whether the second claim arises out of the same set of factual circumstances. The "common test for determining whether a former judgment is a bar to a subsequent action is to inquire whether the same evidence will sustain both actions."

[3] Although appellant concludes his brief with a statement that "[n]one of the four prongs of the [res judicata] test have been met, precluding a finding of *res judicata*," his briefing is limited to the three arguments set forth above. We therefore limit our review to these arguments. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (stating that issues not briefed on appeal are waived); *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (stating that assignment of error in brief based on mere assertion and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection).

McMenomy v. Ryden, 276 Minn. 55, 58, 148 N.W.2d 804, 807 (1967).

In this case, the same evidence sustains both the 2006 and 2011 actions. In both actions, appellant sought damages because his property had been "lost, stolen, or destroyed" by the MSOP. Both actions concerned the same property: a Canon i560 inkjet printer power cord, a Maroon cloth-upholstered seven-way adjustable office chair, a fire-retardant foam mattress topper with cover, a custom-made pad for a piano bench, a Yamaha digital-piano power cord, an e-machines OEM computer disk system, a Philips-brand coffeemaker, and a Gevalia ceramic mug.

Appellant argues that the 2006 and 2011 actions are different because although both cases involve his property, they do so "in completely different ways." Appellant argues that the 2006 action was based on the denial of his right to possession of his property and that the 2011 action was based on the "conversion" of his property. This is a distinction without a difference. *See Bates v. Armstrong*, 603 N.W.2d 679, 682 (Minn. App. 2000) ("Conversion is the wrongful exercise of dominion or control over the property of another."), *review denied* (Minn. Mar. 14, 2000). Moreover, the record belies appellant's supporting contentions.

Appellant contends that he asked for damages in the 2006 action, "*not* because [he] believed [his] property was missing or had been stolen or discarded by the defendant, but because [he was] denied [the] right to have access to and enjoy the use of [his] property." He also contends that at the time of his demand for damages in the 2006 action, he had not "alleged that [his] property was missing, damaged, or destroyed" and

that "he did not know that the property in question was missing from Respondents' custody until the very end of the [2006 action]."

But appellant's motion for compensatory damages in the 2006 action referred to his property as "destroyed/missing," alleged that his property was "lost" or "purposely destroyed," and asserted that because "this property cannot be located or has been destroyed, the only manner in which [appellant] can be compensated for lost or stolen property is by cash payment." And the affidavit that appellant submitted in support of his complaint in the 2011 action indicates that he learned that his property was missing in January 2007. Appellant's affidavit states that he was transferred to Moose Lake in January of 2007 and that "[i]t was at this time that I was able to confirm that certain items of my property had never been sent to Moose Lake in 2005 and were currently missing." Appellant attempts to rewrite his affidavit on appeal, asserting that the affidavit describes "events that eventually came about at that location during the period of January 2007 through approximately October of 2009" and that he was "not aware of or informed of missing property immediately upon his arrival in Moose [L]ake in January 2007 or any time soon thereafter." We reject appellant's attempt to change the record on appeal.

In sum, appellant's own pleadings and motions demonstrate that his 2006 and 2011 actions involved the same set of factual circumstances: MSOP's purported loss or destruction of appellant's property.

Same Parties or Privies

The supreme court has recently described privity as follows:

> Privity expresses the idea that as to certain matters and in certain circumstances persons who are not parties to an action but who are connected with it in their interests are affected by the judgment with reference to interests involved in the action, as if they were parties. Privies to a judgment are those who are so connected with the parties in estate or in blood or in law as to be identified with them in interest, and consequently to be affected with them by the litigation. . . . Because the circumstances in which privity will be found cannot be precisely defined, we have held that determining whether parties are in privity requires a careful examination of the circumstances of each case.

Rucker, 794 N.W.2d at 118 (quotations and citations omitted). Thus, to be in privity with a party, a nonparty must be so connected with the party that the interests of both were affected by the judgment in the prior litigation. *Id.* at 123 (Dietzen, J., concurring).

Appellant argues that even if this court were to find that "some of the Respondents were in privy with the defendants in the [2006 action], not all of them were." Appellant contends that "Defendant Matt Schroeder,[4] though an employee of the Department of Human Services/MSOP, was not involved at any time as a named or unnamed defendant in [the 2006 action]." Once again, the record belies appellant's contention. The named defendants in the 2006 action included Jack D. Erskine, in his official and personal capacity as director of the MSOP and Dean Mooney, in his official and personal capacity as former director of the MSOP. Appellant requested judgment against "defendants, and all persons acting under them." Schroeder was a unit director at the MSOP at that time

[4] Appellant's brief includes a footnote stating that he sued Schroeder "in both his official and personal capacity." But appellant does not offer any argument or analysis regarding whether or how that distinction impacts the privity analysis. We will not consider the impact in the absence of briefing. *See Melina*, 327 N.W.2d at 20 (stating that issues not briefed on appeal are waived).

and, therefore, a person acting under the MSOP program director. Thus, Schroeder's interests were affected by the judgment in the 2006 action, which states that "the Defendants and all their successors and assigns are hereby ORDERED AND PERMANENTLY ENJOINED" to comply with the court's enumerated requirements.

Appellant complains that the district court concluded that res judicata applied, "without any indication of careful inquiry or analysis regarding the privity issue." But this court reviews a district court's application of the doctrine of res judicata, including a determination regarding the existence of privity, de novo. An "appeal de novo" is one "in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings." *Black's Law Dictionary* 112 (9th ed. 2009). And based on our non-deferential legal analysis, we conclude that because the interests of both Schroeder and the named MSOP directors were affected by the judgment in the 2006 action, the privity prong is satisfied.

Injustice

The supreme court has observed that res judicata is not to be rigidly applied. *Hauschildt v Beckingham*, 686 N.W.2d 829, 837 (Minn. 2004). "Instead, the focus is on whether [its] application would work an injustice on the party against whom the doctrine[] [is] urged." *Id.*

Appellant argues that application of the doctrine of res judicata "in this case . . . would work an injustice." We disagree. Appellant was aware that Schroeder refused to release his property to his attorneys-in-fact and that his property was destroyed or missing when he sought compensatory damages in the 2006 action. Because appellant

had the opportunity to request compensatory damages based on Schroeder's conduct in the 2006 action and the opportunity to appeal the district court's refusal to award damages, we discern no injustice.

Affirmed.