STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1926
A10-2021

Brian T. Carlson, et al.,
Appellants,

vs.

Bloomington Housing Partners II, et al.,
Respondents,

David B. Eide, et al.,
Respondents.

Filed July 11, 2011
Affirmed; motion denied
Johnson, Chief Judge

Hennepin County District Court
File No. CV-05-5593

Brian T. Carlson, Crosslake, Minnesota (for appellants)

Daniel R. Kelly, Richard R. Voelbel, Felhaber, Larson, Fenlon & Vogt, P.A., Minneapolis, Minnesota (for respondents Bloomington Housing Partners II, et al.)

William L. Davidson, Paul C. Peterson, Teresa E. Knoedler, Lind, Jensen, Sullivan & Peterson, P.A., Minneapolis, Minnesota (for respondents David B. Eide, et al.)

Considered and decided by Johnson, Chief Judge; Minge, Judge; and Harten, Judge.[*]

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[*]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

JOHNSON, Chief Judge

In 2005, Brian Carlson and his wife sued Bloomington Housing Partners II, a real-estate developer. The lawsuit was unsuccessful. In 2009, Carlson brought another lawsuit against Bloomington Housing Partners II, its general partner, an affiliated company, and the attorneys who represented it in the first lawsuit. The district court dismissed the second lawsuit on the grounds of collateral estoppel and *res judicata* and imposed sanctions on Carlson. We affirm.

FACTS

In April 2004, Carlson and his wife entered into an agreement to purchase a condominium unit from Bloomington Housing Partners I (BHP I). The Carlsons later decided that they wanted to purchase a less expensive condominium unit from Bloomington Housing Partners II (BHP II), which is affiliated with BHP I. In October 2004, the Carlsons canceled the April purchase agreement with BHP I and entered into a second purchase agreement with BHP II for a different condominium, with a closing date of March 25, 2005. The second agreement provided that BHP I would return $9,750 of the earnest money from the first purchase agreement and credit the remaining $16,000 in earnest money toward the second purchase agreement. Thereafter, the Carlsons lost interest in the second condominium. They sought to cancel the second purchase agreement and recover the $16,000 in earnest money, but BHP II refused to return the funds.

In April 2005, the Carlsons commenced an action against BHP II in the Hennepin County District Court. The Carlsons alleged claims of breach of contract and a violation of a statute governing real-estate disclosure statements. Carlson, who is an attorney, represented himself and his wife; BHP II was represented by attorneys at the law firm of Felhaber, Larson, Fenlon & Vogt, P.A. The district court granted BHP II's motion for summary judgment in March 2007 and awarded attorney fees to BHP II in April 2007. This court affirmed. *Carlson v. Bloomington Housing Partners II*, No. A07-1105, 2008 WL 3835176, at *8 (Minn. App. Aug. 19, 2008), *review granted* (Minn. Oct. 29, 2008), *review dismissed*, 763 N.W.2d 303 (Minn. 2009).

In December 2009, Carlson commenced this action, also in the Hennepin County District Court. He again sued BHP II and also named as defendants BHP I, an individual who is the general partner of BHP I and BHP II, the Felhaber law firm, five individuals who are attorneys of the Felhaber law firm, and the chair of Felhaber's board of directors. For purposes of this opinion, we will refer to these defendants in two groups: the BHP respondents and the Felhaber respondents. Carlson's complaint alleges claims of malice and intentional tort; unjust enrichment; a violation of 42 U.S.C. § 1983 (2006); theft and conversion; treble damages pursuant to Minn. Stat. §§ 481.07, .071 (2008); abuse of process; vacatur of the judgment in the prior action under Minn. Stat. § 548.14 (2008); legal malpractice by Felhaber and its attorneys; negligent misrepresentation; piercing the corporate veil, in order to find BHP I and the general partner jointly liable with BHP II; punitive damages; a declaratory judgment that the April 2004 disclosure statement was inadequate; "undue taking advantage"; inducement and conspiracy to breach the October

2004 purchase agreement; "intentional effort to harm plaintiffs"; and a request for attorney fees and costs under Minn. Stat. § 549.211 (2008).

The district court consolidated the second lawsuit with post-judgment proceedings in the first lawsuit. In January and April 2010, the respondents moved to dismiss the complaint, based on evidentiary materials relating to the prior action, and moved for sanctions against Carlson pursuant to Minn. R. Civ. P. 11.03 and Minn. Stat. § 549.211 (2008). Carlson opposed all of the motions and attached affidavits to his memoranda in support of his position.

In June 2010, the district court granted respondents' motions to dismiss and motions for sanctions. The district court reasoned that the second lawsuit is barred by the doctrines of *res judicata* and collateral estoppel. The district court imposed sanctions on Carlson pursuant to Minn. R. Civ. P. 11. In September 2010, the district court determined the amount of the sanctions, awarding the BHP respondents more than $25,000 in attorney fees and costs and the Felhaber respondents approximately $58,500 in attorney fees and costs. Carlson appeals.

D E C I S I O N

In the district court, respondents filed motions to dismiss pursuant to rule 12.02(e) of the Minnesota Rules of Civil Procedure. A motion to dismiss under rule 12.02(e) is converted to a motion for summary judgment under rule 56 if "matters outside the pleading are presented to and not excluded by the district court." Minn. R. Civ. P. 12.02. Here, all parties attached affidavits and other evidence to their submissions to the district court, which the district court considered. Thus, the district court's decision should be

treated as a grant of summary judgment. Minn. R. Civ. P. 56.01; *Northern States Power Co. v. Minnesota Metro. Council*, 684 N.W.2d 485, 490-91 (Minn. 2004).

A district court must grant a motion for summary judgment "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 either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. "On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the nonmoving party. *Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 564 (Minn. 2008). We apply a *de novo* standard of review to a grant of summary judgment, and we view the evidence in the light most favorable to the nonmoving party. *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 364 (Minn. 2009).

I. Collateral Estoppel

We begin our analysis by considering an issue raised by the Felhaber respondents. They argue that the district court's dismissal on the basis of collateral estoppel may be affirmed without analysis because Carlson failed to challenge the district court's decision on that ground.

"Where a party fails to urge an assignment of error or contest a trial court order in his brief on appeal, the point is deemed waived by him, and the trial court's rulings will stand." *Lener v. St. Paul Fire & Marine Ins. Co.*, 263 N.W.2d 389, 390 (Minn. 1978).

"It is axiomatic that issues not 'argued' in the briefs are deemed waived on appeal." *In re Application of Olson for Payment of Services*, 648 N.W.2d 226, 228 (Minn. 2002).

Carlson's initial brief does not mention collateral estoppel. Carlson argues in his reply brief that, in his initial brief, he used the term *res judicata* to apply to both *res judicata* and collateral estoppel. It is true that *res judicata* and collateral estoppel are "related doctrines." *Hauschildt v. Beckingham*, 686 N.W.2d 829, 837 (Minn. 2004). Nonetheless, each doctrine has its own set of requirements, and some of the requirements of collateral estoppel are unique to that doctrine. *See Heine v. Simon*, 702 N.W.2d 752, 761 (Minn. 2005) (stating elements of collateral estoppel). Our careful review of Carlson's initial brief makes clear that he challenged only the district court's application of the doctrine of *res judicata*, not the doctrine of collateral estoppel. Carlson did not properly raise the issue of collateral estoppel in his reply brief because an appellant may not raise new issues in a reply brief. *McIntire v. State*, 458 N.W.2d 714, 717 n.2 (Minn. App. 1990), *review denied* (Minn. Sept. 28, 1990).

Thus, with respect to the Felhaber respondents, Carlson has forfeited the argument that the district court erred by dismissing Carlson's action on the basis of collateral estoppel. The doctrine of collateral estoppel is a sufficient, independent basis for the district court's judgment in favor of the Felhaber respondents.

II. *Res Judicata*

Carlson argues that the district court erred by dismissing his action on the basis of the doctrine of *res judicata*. Having concluded in part I that Carlson cannot prevail on

appeal with respect to the Felhaber respondents, it is necessary to analyze the *res judicata* issue only with respect to the BHP respondents.

The doctrine of *res judicata*, also known as claim preclusion, operates to prevent the re-litigation of causes of action already determined in a prior action. *Beutz v. A.O. Smith Harvestore Prods., Inc.*, 431 N.W.2d 528, 531 (Minn. 1988). *Res judicata* is based on the principle of finality to litigation. *Dorso Trailer Sales, Inc. v. American Body & Trailer, Inc.*, 482 N.W.2d 771, 773-74 (Minn. 1992). A party must raise "all alternative theories of recovery in the initial action." *Id.* at 774. Under the doctrine of *res judicata*, a subsequent claim is barred if

> (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.* (quoting *Hauschildt*, 686 N.W.2d at 840). Carlson challenges the district court's analysis with respect to each of these four requirements.

1. Same Set of Factual Circumstances

As stated above, a subsequent claim may be barred by the doctrine of *res judicata* if, among other things, "the earlier claim involved the same set of factual circumstances." *Id.* The doctrine applies not only to claims that were actually litigated but to all claims arising from the same set of circumstances that could have been litigated in the earlier action. *Hauschildt*, 686 N.W.2d at 840. Accordingly, "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); *see also Martin ex rel. Hoff v. City of Rochester*, 642 N.W.2d 1, 9 (Minn. 2002) (defining "claim" or "cause of action" as "group of operative facts giving rise to one or more bases for suing"). The test to determine whether a case involves the same cause of action as a previous case is "whether the same evidence will sustain both actions." *Hauschildt*, 686 N.W.2d at 840-41 (quoting *McMenomy v. Ryden*, 276 Minn. 55, 58, 148 N.W.2d 804, 807 (1967)).

Carlson argues that the claims alleged in this action do not arise from the same set of factual circumstances as the claims in the prior action. In the prior action, the Carlsons challenged the legitimacy of BHP II's cancellation of the second purchase agreement and its retention of their $16,000 in earnest money. The Carlsons made numerous claims about the deficiency of the second purchase agreement, claimed that BHP II violated a statute governing real-property disclosures, and faulted BHP II for commencing a statutory cancellation proceeding. In this action, Carlson again challenges BHP II's actions with regard to the disclosure statement and the statutory cancellation proceeding. In short, all of the causes of action alleged in the present case are based on factual allegations that occurred (or allegedly occurred) before the commencement of the prior action. The evidence that would support the claims in the first lawsuit is identical to the evidence needed to support the claims in the second lawsuit. *See Hauschildt*, 686 N.W.2d at 840-41. Thus, the first requirement of *res judicata* is satisfied.

2. Same Parties or Parties in Privity

A claim may be barred by the doctrine of *res judicata* if "the earlier claim involved the same parties or their privies." *Rucker*, 794 N.W.2d at 117. "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." *Id.* at 118 (quotations omitted). "Privies are those so connected with one another in law as to be identified with each other in interest." *SMA Servs., Inc. v. Weaver*, 632 N.W.2d 770, 774 (Minn. 2001). A person may be in privity with a party if that person: (1) has controlling participation in the action; (2) has an active self-interest in an action; (3) is a successor in interest to a derivative claim of a party involved in an action; or (4) has interests that are represented by a party to the action. *See Rucker*, 794 N.W.2d at 119 (identifying "categorical circumstances in which privity has been found," as derived from the Restatement (First) of Judgments § 83 cmt. a (1942)).

Carlson sued BHP II in both the prior and the present action. Carlson does not argue that the other BHP respondents are not in privity with BHP II. Carlson's brief states, "The question is whether the Felhaber firm and its attorneys are privies for purposes of prong two." Carlson argues that issue, but it is moot in light of our conclusion above in part I. Carlson apparently concedes that all of the BHP respondents are in privity with BHP II. That concession is consistent with the law on privity between corporate entities. *See SMA Servs., Inc.*, 632 N.W.2d at 774 (stating that owners of corporation "have sufficient common interest to be in privity with the corporation"

(quotation omitted)). Thus, the second requirement of *res judicata* is satisfied with respect to the BHP respondents.

3. Final Judgment on the Merits

A claim may be barred by the doctrine of *res judicata* if "there was a final judgment on the merits." *Rucker*, 794 N.W.2d at 117. A judgment is final, for purposes of *res judicata*, once "the appellate process is exhausted." *Brown-Wilbert, Inc. v. Copeland Buhl & Co.*, 715 N.W.2d 484, 488 (Minn. App. 2006).

Carlson argues that the district court erred by concluding that there was a final judgment on the merits in the prior action. The argument fails. The district court plainly granted BHP II's motion for summary judgment on the merits of Carlson's claims, the court administrator entered judgment for BHP II, and this court affirmed. *See Carlson*, 2008 WL 3835176, at *8. The judgment became final when the supreme court dismissed Carlson's appeal. *See Carlson*, 763 N.W.2d at 303. Thus, the third requirement of *res judicata* is satisfied.

4. Full and Fair Opportunity to Litigate

A claim may be barred by the doctrine of *res judicata* if "the estopped party had a full and fair opportunity to litigate the matter." *Rucker*, 794 N.W.2d at 117. "[W]hether a party had a full and fair opportunity to litigate a matter generally focuses on whether there were significant procedural limitations in the prior proceeding, whether the party had the incentive to litigate fully the issue, or whether effective litigation was limited by the nature or relationship of the parties." *State v. Joseph*, 636 N.W.2d 322, 328 (Minn. 2001) (quotations omitted).

Carlson argues that he did not have a full and fair opportunity to litigate the prior action because the district court did not grant some of his discovery requests and failed to compel the respondents to provide some discovery. He also argues that the district court cut off his oral argument at one hearing, issued orders without giving him an opportunity to respond, and denied him the opportunity to call witnesses. Our review of the record reveals that Carlson had a full and fair opportunity to present his claims. He filed many motions and evidentiary materials with the district court. He corresponded extensively with the district court and opposing counsel. The district court held several hearings, at which Carlson presented lengthy oral argument. When issuing orders in the case, the district court fully explained its reasoning. In addition, Carlson received appellate review from this court.

A district court has broad discretion to issue discovery orders and to control courtroom proceedings. *Shetka v. Kueppers, Kueppers, Von Feldt & Salmen*, 454 N.W.2d 916, 921 (Minn. 1990) (discovery); *Rice Park Props. v. Robins, Kaplan, Miller & Ciresi*, 532 N.W.2d 556, 556 (Minn. 1995) (observing that district court "has considerable discretion in . . . furthering what it has identified as the interests of judicial administration and economy"). There is no indication of any procedural flaws in the course of the prior action. In essence, Carlson merely complains about the district court's adverse rulings. But "a litigant's disagreement with a legal ruling does not necessarily mean that the court denied the litigant a full and fair opportunity to litigate a matter." *Joseph*, 636 N.W.2d at 329. Thus, the fourth requirement of *res judicata* is satisfied.

5. Equitable Considerations

Even if all four requirements of the *res judicata* doctrine are satisfied, a claim may not be barred if equitable considerations dictate otherwise. "[R]es judicata is an equitable doctrine that must be applied in light of the facts of each individual case." *R.W. v. T.F.*, 528 N.W.2d 869, 872 n.3 (Minn. 1995). The doctrine is "flexible," and a court should inquire "whether its application would work an injustice on the party against whom estoppel is urged." *Id.*

Carlson argues that our affirmance of the district court's application of the *res judicata* doctrine to Carlson's second lawsuit would "work an injustice on" him. After reviewing the record of this action and the record of the prior action, we discern no reason why that would be so. The district court did not make an erroneous or unfair decision on the merits such that the principle of finality should yield to Carlson's interest in continued litigation.

In sum, the district court did not err by concluding that Carlson's present action is barred by the doctrine of *res judicata*.

III. Sanctions

Carlson argues that the district court erred by granting the respondents' motion for sanctions. When signing a pleading or other paper that is filed with a district court, a party or an attorney must certify that the paper is not presented to the court for an improper purpose and the legal contentions are warranted by law or by a non-frivolous argument for the modification, extension, or reversal of the law. Minn. R. Civ. P. 11.02(a), (b). A violation of rule 11.02 may justify sanctions, including "some or all of

the reasonable attorney fees and other expenses incurred as a direct result of the violation." Minn. R. Civ. P. 11.03(b). We apply an abuse-of-discretion standard of review to a district court's award of sanctions. *Hornberger v. Wendel*, 764 N.W.2d 371, 377 (Minn. App. 2009).

Carlson challenges the district court's imposition of sanctions on numerous grounds. First, he contends that the district court erred by finding that he violated rule 11.02. He contends that he did not violate rule 11.02(b) because he made non-frivolous arguments on the issue of *res judicata*. But the district court found that Carlson violated rule 11.02(a), not rule 11.02(b). The district court stated that Carlson "repeatedly filed pleadings with this Court that were for an improper purpose and that needlessly increased the cost of litigation." A violation of either rule 11.02(a) or 11.02(b) may result in sanctions. *See* Minn. R. Civ. P. 11.03.

Second, Carlson contends that the district court lost jurisdiction to award sanctions against him after dismissing the action. The district court granted respondents' motions for sanctions at the same time that it granted the motions to dismiss and determined the amount of attorney fees in a subsequent order. A motion for sanctions is "collateral to the merits of the underlying litigation." *Kellar v. Von Holtum*, 605 N.W.2d 696, 700 (Minn. 2000), *superseded by rule on other grounds*, Minn. R. Civ. P. 11.03; *see also Spaeth v. City of Plymouth*, 344 N.W.2d 815, 825 (Minn. 1984) ("[A] claim for attorneys' and experts' fees . . . should be treated as a matter independent of the merits of the litigation."). A district court retains jurisdiction to consider a motion for sanctions after entering judgment, even if a notice of appeal has been filed. *Kellar*, 605 N.W.2d at 700.

Thus, the district court did not lose jurisdiction before determining the amount of sanctions.

Third, Carlson contends that the respondents did not comply with the applicable procedural rules when bringing the motion for sanctions. Carlson contends that the respondents did not file their motions for sanctions separately from other motions or requests. *See* Minn. R. Civ. P. 11.03. Carlson is incorrect; the respondents did file their motions separately from their motions to dismiss. Carlson also contends that the respondents failed to observe the 21-day "safe harbor" provision of rule 11.03(a)(1). Carlson is incorrect again; the respondents served Carlson with motions for sanctions in December 2009 and January 2010, respectively, but did not file the motions until April 2010 and May 2010. Carlson also contends that a letter sent in December 2009 did not provide proper notice of a motion for sanctions. But the letter was accompanied by a notice of motion and motion for sanctions. Carlson also contends that the respondents did not provide 28 days' notice of the hearing on the motions for sanctions. *See* Minn. R. Gen. Pract. 115.03. But the hearing on the motions occurred several months after initial service of the motions and 29 days after the motions were filed with the district court. Finally, Carlson contends that the respondents failed to provide an affidavit in support of their request for attorney fees. *See* Minn. R. Gen. Pract. 119.02. In fact, respondents complied with the applicable rule by filing numerous affidavits that described the legal work performed, the attorney's hourly rate, and disbursements and expenses.

Fourth and finally, Carlson challenges the amount of attorney fees awarded to respondents. Carlson argues that the attorney fees should be reduced by the portion that

may be attributed to the consolidation of the first action with the second action, which Carlson argues "had nothing to do with any alleged misconduct." But the district court's conclusion that the present action was brought for an improper purpose applies to the action generally and, thus, may justify an award of all fees incurred defending the action. *See Radloff v. First Am. Nat'l Bank*, 470 N.W.2d 154, 157 (Minn. App. 1991); *review denied* (Minn. July 24, 1991). Furthermore, the amount of fees awarded is supported by the detailed submissions in support of the motions for sanctions.

Thus, the district court did not abuse its discretion by granting respondents' motions for sanctions and awarding them attorney fees and costs.

IV. Motion for Temporary Injunction

Carlson last argues that the district court erred by denying his motion to enjoin the disbursement of funds that the Carlsons paid in satisfaction of the judgment in prior action. Carlson's brief does not include citations to the record that identify the relevant district court actions. *See* Minn. R. Civ. App. P. 128.03; 128.02, subd. 1(c). We have independently reviewed the district court record but are unable to identify any ruling that may be subjected to appellate review. Thus, we reject this argument on the ground that it is not adequately briefed. *State, Dep't of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997).

Carlson has filed a motion to strike certain parts of the appendix filed by the BHP respondents. The motion is denied as moot.

Affirmed; motion denied.