STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1524

North Star International Trucks, Inc.
d/b/a Astleford International Trucks,
Appellant,

vs.

Navistar, Inc.,
Respondent.

Filed May 20, 2013
Reversed and remanded
Peterson, Judge
Concurring specially, Johnson, Chief Judge

Hennepin County District Court
File No. 27-CV-12-7949

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George W. Soule, Melissa R. Stull, Bowman and Brooke LLP, Minneapolis, Minnesota; and

Michael R. Levinson (pro hac vice), Louis Chronowski, Seyfarth Shaw, LLP, Chicago, Illinois (for respondent)

Considered and decided by Johnson, Chief Judge; Peterson, Judge; and Chutich, Judge.

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

PETERSON, Judge

Appellant North Star International Trucks, Inc. challenges the district court's dismissal—on res judicata and collateral-estoppel grounds—of its claims challenging the termination of its franchise to act as a dealer of trucks manufactured by respondent Navistar, Inc. North Star also challenges the district court's denial as moot of its motion for summary judgment on one of its claims. Because appellant's claims in this action arise out of different factual circumstances and raise different issues than those litigated in a previous action, we reverse the dismissal and remand for the district court to address North Star's summary-judgment motion on its merits.

FACTS

Navistar manufactures the International line make of trucks. North Star holds a franchise to sell those trucks and operates a dealership in Minneapolis. H. Scott Dawson owns North Star. Dawson also owns Astleford International Trucks, Inc., another franchisee with a dealership in Burnsville. The Astleford dealership has been in Dawson's family since 1965, and Dawson acquired the North Star dealership from Navistar in 2006.

The previous action

North Star and Astleford commenced the previous action in December 2009 following Navistar's removal of 51 zip codes from North Star's area of responsibility, appointment of a new dealer for those zip codes, and notification to North Star and Astleford that Navistar considered them to be in breach of the terms of their Dealer

Sales/Maintenance Agreements (DSMs). The dealerships asserted eight claims, including multiple violations of the Minnesota Motor Vehicle Sale and Distribution Act (MVSDA), Minn. Stat. §§ 80E.01-.18 (2012), and the Heavy and Utility Equipment Manufacturer and Dealers Act (HUEMDA), Minn. Stat. §§ 325E.068-.0684 (2012).

In Count I of the complaint in the previous action, the dealerships alleged the bad-faith threatened termination of their franchises in violation of the MVSDA, Minn. Stat. § 80E.06, subds. 1-2, and sought injunctive relief precluding Navistar from terminating the franchises. Because the dealerships sought solely injunctive relief in relation to that claim, it was tried to the court, though the jury made advisory findings that Navistar had acted in good faith and had good cause to terminate North Star's dealership. The district court ultimately determined that the claim was not ripe because Navistar had not yet noticed a termination, and thus the court dismissed the claim.

Although North Star prevailed in demonstrating liability on some of its other claims, it was unable to recover any damages, and the district court denied injunctive relief based on its findings that the illegal conduct had ceased and that North Star had an adequate remedy in the form of damages. Of particular relevance to this court's consideration of the present appeal are the dispositions on Count V, for breach of the implied covenant of good faith and fair dealing in the DSMs, and Count VIII, for change in competitive circumstances in violation of the HUEMDA, Minn. Stat. § 325E.0681, subd. 1. With respect to Count V, the court found that Navistar had breached the covenant by discriminating in the prices that it charged the dealerships for new trucks between September 2006 and November 2008, but that the price discrimination ceased

after that time. With respect to Count VIII, the jury found that Navistar had changed North Star's competitive circumstances, but it did not make a specific finding as to how the competitive circumstances were changed. The jury also found that Navistar had good cause, within the meaning of the HUEMDA, for changing the competitive circumstances. The jury was not asked to and did not specify the conduct constituting the good cause.

The district court entered judgment in the previous action in August 2011 and issued an order ruling on posttrial motions in February 2012. North Star appealed, and this court affirmed the judgment. *N. Star Int'l Trucks, Inc. v. Navistar, Inc.*, No. A12-0732 (Minn. App. Apr. 8, 2013), *pet. for review filed* (Minn. May 8, 2013).

Navistar Notices Termination of North Star Franchise

On March 7, 2012, approximately one month after the district court's order on posttrial motions in the previous action, North Star received a letter from Navistar noticing its intent to terminate North Star's franchise effective June 12, 2012. The letter identifies as a basis for termination the following asserted breaches of the DSM: (1) North Star's failure to meet truck-sales requirements—including objectives for deliveries to users, market penetration, and gross market share—in breach of section 16(b) of the DSM; and (2) North's Star failure to submit or to timely submit financial statements in the form required by Navistar, in violation of section 25 of the DSM.

The current action

In April 2012, North Star commenced the current action, asserting six counts against Navistar: Count I, for terminating North Star's franchise in bad faith and without

good cause, in violation of Minn. Stat. § 80E.06-.09; Count II, for requiring North Star to adhere to performance standards that are not applied uniformly to other similarly situated dealers, in violation of Minn. Stat. § 80E.13(o); Count III, for attempting or threatening to terminate North Star's franchise based on the results of circumstances beyond North Star's control, in violation of Minn. Stat. § 325E.0682(b)(4); Count IV, for terminating North Star's franchise without good cause, in violation of Minn. Stat. § 325E.0681; Count V, for issuing a termination notice in violation of the terms of the DSM; and Count VI, for requiring North Star to make substantial alterations to its facilities during the course of the DSM in violation of Minn. Stat. § 80E.12(i). Under the terms of a standstill agreement, Navistar agreed to extend the effective date of its noticed termination until after entry of judgment on Counts I-V.

Navistar moved to dismiss Counts I-V as barred by the doctrines of res judicata and collateral estoppel. North Star moved for summary judgment on Count I. The court held a hearing and issued an order granting Navistar's motion to dismiss on res judicata/collateral-estoppel grounds and denying as moot North Star's motion for summary judgment. North Star dismissed its remaining claim (Count VI) and appealed, challenging both the grant of Navistar's motion to dismiss and the denial of its own summary-judgment motion. North Star also moved for and the district court granted an injunction precluding Navistar from terminating North Star's franchise during the pendency of this appeal.

D E C I S I O N

I.

This court reviews de novo the legal sufficiency of a claim dismissed by the district court under Minn. R. Civ. P. 12.02(e) for failure to state a claim on which relief can be granted. *Columbia Cas. Co. v. 3M Co.*, 814 N.W.2d 33, 36 (Minn. App. 2012) (citing *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010)). The district court's determination that Navistar's claims are barred under the doctrines of res judicata or collateral estoppel is also subject to de novo review. *See Rucker v. Schmidt*, 794 N.W.2d 114, 117 (Minn. 2011) (res judicata); *Hauschildt v. Beckingham*, 686 N.W.2d 829, 837 (Minn. 2004) (collateral estoppel).[1]

"Res judicata and collateral estoppel are related doctrines." *Hauschildt*, 686 N.W.2d at 837. "Although the terms are sometimes used interchangeably, each doctrine is distinct in its effect." *Id.*

> Res judicata, also known as "claim preclusion," while based on the same principle as collateral estoppel, is the broader of

[1] The courts have sometimes articulated a bifurcated standard of review, holding that the determination that res judicata or collateral estoppel is available is reviewed de novo, but that the determination to apply the doctrines when available is subject to review for abuse of discretion. *See, e.g., In re Trusts Created by Hormel*, 504 N.W.2d 505, 509 (Minn. App. 1993) (collateral estoppel), *review denied* (Minn. Oct. 19, 1993); *Erickson v. Comm'r of Dep't Human Servs.*, 494 N.W.2d 58, 61 (Minn. App. 1992) (res judicata). In this case, de novo review is appropriate both because the parties focus their arguments on whether the requisites for applying the doctrines are met and because this appeal is taken from summary judgment. *Cf. SCI Minn. Funeral Servs., Inc. v. Washburn-McReavy Funeral Corp.*, 795 N.W.2d 855, 861-62 (Minn. 2011) (reviewing de novo district court's summary-judgment determination that requirements for equitable remedies of rescission and reformation were not met but suggesting that abuse-of-discretion standard may be appropriate in cases in which "after balancing the equities, the district court determines *not* to award equitable relief" (emphasis added)).

> the two and applies more generally to a set of circumstances giving rise to entire claims or lawsuits. 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. Collateral estoppel . . . "a miniature of res judicata," applies to specific legal issues that have been adjudicated and is also commonly and accurately known as "issue preclusion."

Id. (citations omitted).

Res judicata standards

"Res judicata is a finality doctrine that mandates that there be an end to litigation." *Id.* at 840. Under the doctrine, a party is precluded from raising a claim that was, or could have been, raised in an earlier action. *Drewitz v. Motorwerks, Inc.*, 728 N.W.2d 231, 239 (Minn. 2007). Res judicata is available 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." *Brown-Wilbert, Inc. v. Copeland Buhl & Co., P.L.L.P.*, 732 N.W.2d 209, 220 (Minn. 2007). Only the first element is in dispute here.[2]

In applying the first element of res judicata, Minnesota courts address whether the previous and current litigation arise out of the same cause of action, which, in this context, means "a group of operative facts giving rise to one or more bases for suing."

[2] Notwithstanding the pending appeal in the previous action, the district court judgment in that action was properly treated as a final judgment for purposes of res judicata and collateral estoppel. *See Brown-Wilbert, Inc.*, 732 N.W.2d at 221 (reaffirming "that for res judicata purposes, a judgment becomes final when it is entered in the district court and it remains final, despite a pending appeal, until it is reversed, vacated or otherwise modified").

Hauschildt, 686 N.W.2d at 840 (quotation omitted). But "[i]dentity of subject matter does not establish that two claims are the same cause of action." *Care Inst., Inc.-Roseville v. Cnty. of Ramsey*, 612 N.W.2d 443, 448 (Minn. 2000). And res judicata does not apply to claims that had not yet arisen at the time that a previous lawsuit was commenced. *Hauschildt*, 686 N.W.2d at 841; *see also Drewitz*, 728 N.W.2d at 239 (explaining that claims that could have been asserted in previous action are limited to claims that existed at the time the first complaint was served); *Care Inst.*, 612 N.W.2d at 447 (stating that, "if the right to assert the second claim did not arise at the same time as the right to assert the first claim, then the claims cannot be considered the same cause of action").

Applying this rule, the supreme court has held that previous litigation addressed to whether an entity qualified as a public charity during the 1994 tax year did not preclude a subsequent suit raising the same issue with respect to later tax years. *Care Inst.*, 612 N.W.2d at 447. The court explained that, "[w]hile these two cases involve the same subject matter and *type* of cause of action, they are not the *same* cause of action." *Id.*; *see also Drewitz*, 728 N.W.2d at 239-40 (holding that claims for annual shareholder distributions that did not arise until after previous litigation was commenced were not barred by res judicata).

With respect to suits involving continuing and renewed conduct,

> [a] substantially single course of activity may continue through the life of a first suit and beyond. *The basic claim-preclusion result is clear: a new claim or cause of action is created as the conduct continues. . . .*

> A second challenge to continuing conduct may be precluded despite the general rule if the object of the first proceeding was to establish the legality of the continuing conduct into the future. . . .
>
> Events that are related in origin and nature may nonetheless involve such clear separations or discontinuities as to create separate causes of action without room for dispute. *The easiest circumstances occur when the second action draws on facts or seeks remedies that simply could not have been asserted in the first action.* . . . Other repeated wrongs that arise from the same motivation, such as well-separated acts of discrimination or retaliation, may follow the same rule.

18 Charles Alan Wright, et al., 18 *Federal Practice and Procedure* § 4409, at 227, 232, 239, 241, 245-46 (2d ed. 2002) (emphasis added) (footnotes omitted). The treatise further explains that, although no longer actionable by themselves, the facts underlying the first claim may be relevant to the second claim:

> The conclusion that continuing activity generates a new claim need not mean that the earlier activity is irrelevant to the new claim. Although claim preclusion bars reopening the claim advanced in the first action, evidence of the underlying activity may be admissible to prove the new claim.

Id. at 246.

Collateral estoppel standards

"[C]ollateral estoppel precludes relitigation of issues which are both identical to those issues already litigated by the parties in a prior action and necessary and essential to the resulting judgment." *In re Disciplinary Action against Murrin*, 821 N.W.2d 195, 205 (Minn. 2012) (quotation omitted). Minnesota courts have applied a four-part test, under which collateral estoppel applies if

> (1) the issue [is] 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.

Hauschildt, 686 N.W.2d at 837 (quotation omitted).

Only the first collateral estoppel factor is at issue in this appeal. With respect to this factor, we note that issues are not identical if, despite their nominal similarity, they are defined differently in separate statutes. *See, e.g.*, *Haley v. Retsinas*, 138 F.3d 1245, 1248-49 (8th Cir. 1998) (explaining that it would be inappropriate to apply collateral estoppel to preclude plaintiff from relitigating reason for discharge because second suit was asserted under different statutory scheme); *Klinefelter v. Crum & Forster Ins. Co.*, 675 N.W.2d 330, 336 (Minn. App. 2004) (rejecting application of collateral estoppel because issues arose "under different substantive and procedural rules"); *see generally* 18 Wright, *supra* § 4417. Issues also are not identical if the burden of proof shifts from one action to the next. *See* Restatement (Second) of Judgments § 28(4) (1982) (identifying as exception to collateral estoppel application circumstance in which the burden of proof has shifted from one party to the other).

Applying these principles, we conclude that none of North Star's claims is barred by res judicata or collateral estoppel, primarily because the claims in the current action challenge Navistar's conduct after the previous litigation commenced, particularly Navistar's termination of North Star's franchise. North Star explains:

> [W]hile the First Action focused on whether Navistar breached legal duties in connection with its destructive alteration of North Star's franchise in 2009 (by removing

> territory from North Star, establishing Boyer as a competing dealer and allowing Boyer to compete at and from locations in proximity to North Star), the Current Action challenges Navistar's 2012 termination of the diminished North Star franchise that remained after the 2009 changes.

Because North Star had not yet been terminated or subjected to the other conduct alleged in this action, it could not have asserted these claims in the first action and the issues asserted in this action cannot be identical to those litigated in the previous action. While this reasoning applies broadly to all of North Star's claims, we will separately address why each of North Star's claims is not barred by res judicata or collateral estoppel.

Count I

In Count I, North Star asserts that Navistar terminated its franchise without good faith or good cause as required by the MVSDA, Minn. Stat. §§ 80E.06-.09. The statute defines "good faith" as "honesty in fact and the observation of reasonable commercial standards of fair dealing in the trade as is defined and interpreted in section 336.2-103, clause (1)(b)." Minn. Stat. § 80E.03, subd. 9. And "good cause" exists if a "new motor vehicle dealer fails to comply with a provision of the franchise which is both reasonable and of material significance to the franchise relationship; provided, that the dealer has been notified in writing of the failure within 180 days after the manufacturer first acquired knowledge of the failure." Minn. Stat. § 80E.06, subd. 2. Additionally,

> [i]f failure by the new motor vehicle dealer relates to the performance of the new motor vehicle dealer in sales or service, then good cause shall be defined as the failure of the new motor vehicle dealer to comply with reasonable performance criteria established by the manufacturer; provided, that the new motor vehicle dealer was apprised by the manufacturer in writing of the failure; the notification

> stated that notice was provided for failure of performance pursuant to sections 80E.01 to 80E.17; the new motor vehicle dealer was afforded a reasonable opportunity in no event less than six months to comply with the criteria; and the dealer did not demonstrate substantial progress toward compliance with the manufacturer's performance criteria during the period.

Id. Navistar bears the burden to demonstrate good faith, proper notice, and good cause. Minn. Stat. § 80E.07, subd. 2.

The district court's order does not make clear whether the district court dismissed this claim under the res judicata or collateral estoppel doctrine, but the district court determined "that the issues of good faith and good cause were directly litigated in the 2010 Lawsuit and are therefore precluded here." With respect to good faith, the district court relied on the finding in the previous action that Navistar had not (with one time-limited exception) breached the implied covenant of good faith and fair dealing with respect to North Star's DSM. With respect to good cause, the district court relied on the finding in the previous lawsuit that Navistar had good cause under the HUEMDA, Minn. Stat. § 325E.0681, subd. 1, to change the competitive circumstances of North Star's franchise.

We conclude that neither res judicata nor collateral estoppel applies to bar litigation of Count I. Res judicata does not apply because Count I could not have been asserted in the previous action. North Star could not challenge a termination that had not yet occurred. This is why the district court in the previous action dismissed as premature the dealerships' claim (Count I in that action) challenging the threatened termination of their franchises. The district court in the previous action reasoned that the dealerships

could not obtain relief under the MVSDA unless and until Navistar noticed termination. Because the claim asserted in Count I could not have been asserted in the previous action, it is not barred by res judicata.

Collateral estoppel does not apply to Count I because the related claims in the first action involved different legal standards, different burdens of proof, and different underlying facts. As an initial matter, the good-faith standard required under Minn. Stat. § 80E.06, subd. 1(b)—honesty and compliance with industry standards of fair dealing—is not necessarily satisfied by an adverse finding on a claim for breach of the implied covenant of good faith and fair dealing, which requires proof that one party hindered another's ability to perform. *See In re Hennepin Cnty. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 502 (Minn. 1995) ("Under Minnesota law, every contract includes an implied covenant of good faith and fair dealing requiring that one party not 'unjustifiably hinder' the other party's performance of the contract."). Similarly, the MVSDA's good-cause standard is different from the HUEMDA's, the latter requiring proof of failure "to substantially comply with essential and reasonable requirements imposed upon the dealer by the dealership agreement, if the requirements are not different from those requirements imposed on other similarly situated dealers by their terms." Minn. Stat. § 325E.0681, subd. 1.

As important as the differences between the legal standards is the fact that, while North Star had the burden of proving the good-faith and good-cause issues in the previous action, Navistar bears the burden of proof on these issues in relation to Count I in this action. Finally, of critical importance is the fact that the good-faith and good-

cause standards must be applied to different facts. In the previous action, North Star challenged the good-faith and good-cause bases for Navistar's conduct before and during 2009, including its removal of 51 zip codes. In the current action, North Star challenges the good-faith and good-cause bases for the 2012 termination and other conduct that occurred after the previous action was commenced.

Count II

In Count II, North Star asserts that Navistar required North Star to adhere to performance standards that are not uniformly applied to other similarly situated dealers in violation of Minn. Stat. § 80E.13(o), which was added to the MVSDA in 2010, with an effective date of May 14, 2010. 2010 Minn. Laws ch. 339, §§ 3,7, at 1032, 1035. The district court dismissed this claim on res judicata and collateral estoppel grounds, reasoning that the claim was barred based on the district court's conclusion in the previous case that there was evidence to support that Navistar applied its sales objectives consistently among its dealers.

Count II is not barred by either res judicata or collateral estoppel. Res judicata does not apply because North Star is challenging the performance standards imposed by Navistar for a different time period than was at issue in the previous litigation. By virtue of both the effective date of the statute and North Star's allegations, this claim is limited to the period after May 14, 2010. Although the previous action may have encompassed some of that period (the jury trial began in November 2010), there is no basis for barring the entire claim. Count II is not barred by collateral estoppel because the issues raised in

this claim are different from those raised in the previous case. Count II challenges different conduct under a different statute than the claims in the previous action.[3]

Count III

In Count III, North Star asserts that Navistar has threatened or attempted to terminate North Star's franchise based upon the results of circumstances beyond North Star's control in violation of the HUEMDA, Minn. Stat. § 325E.0682(b)(4). The district court dismissed this claim solely on the basis of res judicata, reasoning that the facts underlying this claim were also alleged in the previous action and the jury determined in the previous action that Navistar had good cause, under HUEMDA, Minn. Stat. § 325E.0681, subd. 1, to change North Star's competitive circumstances. For the same reasons as are explained with respect to Counts I and II—particuarly because of the different time periods involved—we conclude that res judicata does not apply to bar Count III. We further conclude that collateral estoppel cannot apply because there were no relevant findings in the previous litigation.

Count IV

In Count IV, North Star asserts that Navistar terminated its franchise without good cause in violation of HUEMDA, Minn. Stat. § 325E.0681, subd. 1. The district court addressed only res judicata and based dismissal on the jury's finding in the previous

[3] There are differences in the language of the statutes at issue. The HUEMDA addresses "requirements imposed on other similarly situated dealers" under franchise agreements, Minn. Stat. 325E.0681, subd. 1, while the new section of the MVSDA references "performance standards that are not applied uniformly to other similarly situated dealers." Minn. Stat. § 80E.13(o).

action that Navistar had good cause to change North Star's competitive circumstances. By extension, the district court reasoned, Navistar had good cause to terminate.

Neither res judicata nor collateral estoppel applies. As is true for claims I-III, res judicata cannot apply because Navistar had not yet noticed termination at the time of the previous action. Collateral estoppel does not apply because Count IV raises different issues than those litigated in the previous action. It is true that HUEMDA provides one definition of "good cause" that applies both to changes in competitive circumstances and terminations. The previous action, however, addressed whether there was good cause under HUEMDA in 2009 or early 2010 for changes to North Star's competitive circumstances. Count IV challenges whether there was good cause under HUEMDA in 2012 for termination of North Star's franchise.

Count V

In Count V, North Star asserts that Navistar breached the DSM by terminating its franchise without providing proper notice of North Star's alleged breaches and an opportunity to cure them. The district court dismissed this claim based on its determination that the issues underlying it were litigated in the previous action.

For similar reasons as we have explained in relation to Counts I-IV, we conclude that Count V is not barred by either res judicata or collateral estoppel. Res judicata does not apply because, although some of the facts underlying this claim, including notice of the alleged breaches, took place before the previous action, North Star could not have asserted this claim until Navistar noticed the termination of North Star's franchise. Collateral estoppel does not apply because the parties did not litigate in the previous

action the sufficiency of Navistar's notice of breaches or whether North Star had an adequate opportunity to cure those breaches.

II.

North Star separately challenges in this appeal the denial of its motion for summary judgment on Count I. Having dismissed this claim as barred by res judicata and/or collateral estoppel, the district court denied North Star's summary-judgment motion as moot. Under these circumstances, we conclude that the appropriate disposition is remand for the district court's consideration of the summary-judgment motion on the merits in the first instance. *See Doe v. F.P.*, 667 N.W.2d 493, 500 (Minn. App. 2003) (holding that, when district court granted summary judgment on erroneous determination that statutes were unconstitutional, remand was appropriate remedy because district court had not had "the opportunity to consider whether the evidence, viewed in the light most favorable to [defendant], showed that there was no genuine issue of material fact" and "[t]his court cannot address what the district court did not address" (citing *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988))), *review denied* (Minn. Oct. 21, 2003).

Reversed and remanded.

JOHNSON, Chief Judge (concurring specially)

I concur in part II of the opinion of the court, and I concur in part I with respect to the doctrine of collateral estoppel. I concur in part I with respect to the doctrine of *res judicata* only insofar as the opinion concludes that North Star's claims are not barred. I reach that conclusion for different reasons than those stated in the opinion of the court. I believe that Navistar has satisfied the first requirement of the *res judicata* doctrine with respect to each of North Star's five counts because North Star is pursuing a cause of action that it previously pursued in the first lawsuit. But I believe that Navistar has not satisfied the third requirement of the *res judicata* doctrine with respect to each of North Star's five counts because, in the first lawsuit, the district court did not enter a final judgment on the merits of Navistar's primary cause of action.

As an initial matter, it is important to emphasize the breadth of the first element of the *res judicata* doctrine, which asks whether a prior action and a subsequent action arise from the "same cause of action." *Nelson v. American Family Ins. Group*, 651 N.W.2d 499, 511 (Minn. 2002); *see also Montana v. United States*, 440 U.S. 147, 153, 99 S. Ct. 970, 973 (1979). The first element is satisfied if the counts alleged in the prior action concerned "the same set of factual circumstances" as the counts alleged in the present action. *Brown-Wilbert, Inc. v. Copeland Buhl & Co.*, 732 N.W.2d 209, 220 (Minn. 2007) (quotation omitted). Two actions concern the "same cause of action" if they arise from the same "group of operative facts giving rise to one or more bases for suing." *Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004) (quotation omitted). For purposes of the first element of *res judicata*, it is irrelevant whether counts alleged in two

different actions are asserted under different legal theories. *Id.* Furthermore, *res judicata* "applies equally" to all claims actually litigated in the prior action and to all claims that could have been litigated in the prior action. *Brown-Wilbert*, 732 N.W.2d at 220.

In this dispute, there are essentially two "causes of action," as that term is used in the context of *res judicata*. *See Nelson*, 651 N.W.2d at 511. One cause of action relates to the terms and conditions of the parties' ongoing business relationship; the other cause of action relates to Navistar's threatened or actual termination of the business relationship. In its first lawsuit, North Star pleaded legal theories addressing both causes of action. In its second lawsuit, North Star again pleaded legal theories addressing the termination-related cause of action and confined its pleadings to that cause of action. Because North Star's second lawsuit seeks relief on a cause of action that was litigated in the first lawsuit, Navistar has established the first requirement of the *res judicata* doctrine.

North Star's second lawsuit is based in part on alleged conduct by Navistar that occurred before the commencement of the first lawsuit and continued to occur after the commencement of the first lawsuit. The continuous nature of the alleged conduct does not, by itself, require this court to recognize separate causes of action, to be divided in time by the commencement of the first lawsuit. A new cause of action may arise from continuing conduct only in limited circumstances, such as when the defendant's alleged conduct reaches a "stopping point" and subsequently resumes. 18 Charles Alan Wright *et al.*, Federal Practice & Procedure: Jurisdiction § 4409 (2d ed. 2002). But if a defendant is alleged to have engaged in certain conduct in a consistent and continuous manner, only

one cause of action is recognized. *See In re Trusts by Hormel*, 543 N.W.2d 668, 672-73 (Minn. App. 1996) (holding that action based on violation of fiduciary duties was precluded by prior action in which continued investment strategies were found not to violate fiduciary duties); s*ee also Sutliffe v. Epping Sch. Dist.*, 584 F.3d 314, 328 (1st Cir. 2009) (holding that first amendment action was precluded by prior action in which same conduct was at issue even though evidence was from different time periods); *Yankton Sioux Tribe v. United States Dept. of Health & Human Servs.*, 533 F.3d 634, 639-43 (8th Cir. 2008) (holding that action to enjoin closure of hospital was precluded by prior action in which same relief was sought but denied); *Brooks v. Giuliani*, 84 F.3d 1454, 1462-64 (2d Cir. 1996) (holding that action based on continued failure to provide care was precluded by prior action in which underlying factual predicate was substantially similar); Wright, *supra*, § 4409.

In this case, North Star's complaint in the second lawsuit alleges termination-related conduct by Navistar that occurred consistently and continuously, both before and after the commencement of the first lawsuit. According to the complaint, there is no discernible "stopping point" and, more importantly, no discernible re-starting point that would trigger a new termination-related cause of action. I conclude that the termination-related counts in North Star's second lawsuit arise from the "same set of factual circumstances" as the first lawsuit, are part of the same "group of operative facts," and therefore relate to the same cause of action. Thus, I conclude that Navistar has satisfied the first requirement of the *res judicata* doctrine.

Navistar, however, has not satisfied the third requirement of the *res judicata* doctrine with respect to North Star's termination-related cause of action. In the first lawsuit, the district court did not enter a final judgment on the merits of count I, Navistar's termination-related cause of action. Rather, the district court dismissed that count without prejudice on the ground that the claim was not yet ripe, despite the fact that the district court allowed count I to go to trial. This procedural oddity frustrates Navistar's otherwise valid *res judicata* argument. Ordinarily, a plaintiff that proactively engages in commercial litigation while still engaged in an ongoing business relationship, perhaps with the goal of preventing its termination, does so at its own peril. Such a plaintiff typically will be precluded from relitigating the dispute if and when the business relationship ceases to exist. This case is atypical because the district court did not enter a final judgment on count I in the first lawsuit.

For these reasons, I join in the decision to reverse the district court's judgment and remand for further proceedings.