STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0174

J.J., et al.,
Appellants,

vs.

S.F., et al.,
Respondents.

Filed November 12, 2013
Affirmed
Kirk, Judge

Hennepin County District Court
File No. 27-CV-11-3938

Karen R. Cole, Law Office of Karen Cole, St. Paul, Minnesota; and

Gavin P. Craig, Minnetonka, Minnesota (for appellants)

William L. Davidson, Richard A. Lind, Ryan P. Myers, Lind, Jensen, Sullivan & Peterson, P.A., Minneapolis, Minnesota (for respondents)

Considered and decided by Cleary, Chief Judge; Kalitowski, Judge; and Kirk, Judge.

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

KIRK, Judge

Appellants J.J. and C.J. challenge (1) the district court's order denying their motion to vacate an arbitrator's decision, and (2) the district court's entry of judgment on the arbitration award requiring appellants to pay liquidated damages for violating a confidentiality clause in the parties' mediated settlement agreement. We affirm.

FACTS

In February 2011, appellants filed claims against respondents S.F., X-Corp., and Y-Corp. arising from a dispute over appellants' investments in the respondent corporations. The district court referred the case for mediation and the parties executed a mediated settlement agreement (MSA) in September 2011. Under the terms of the MSA, respondents would pay appellants specified sums of money over the course of several years and appellants would transfer their holdings in X-Corp., Y-Corp., and related entities to respondents. The parties agreed to negotiate and sign ancillary documents necessary to complete the transfer and effectuate the payments at a later date. They also agreed to keep the terms of the MSA confidential, that breaches of confidentiality would be subject to a specified amount of liquidated damages, and that disputes about the MSA's terms or its confidentiality provisions would be resolved by arbitration.

The parties' negotiations regarding the ancillary documents failed, and on November 9, 2011, appellants filed a motion asking the district court to enforce the MSA. Appellants did not file the motion under seal. On November 29, 2011, respondents served a request for arbitration, asking the arbitrator to determine whether appellants had

breached confidentiality by filing their motion unsealed. Respondents sought liquidated damages, attorney fees, and costs. They also asked the arbitrator to decide outstanding issues regarding the terms to be incorporated in the ancillary documents.

The district court heard appellants' motion to enforce on December 2, 2011, while respondents' arbitration request was pending. The district court denied appellants' motion, sealed the district court record, and ordered the parties to submit their dispute to arbitration. The court also ordered that if the parties did not submit a stipulation of dismissal by December 31, 2011, the case would be set for trial. Arbitration occurred by teleconference on December 22, 2011. The arbitrator scheduled a follow-up hearing to address the breach-of-confidentiality claim for March 2012, found that neither party had otherwise breached the MSA, and ruled on the terms to be incorporated in the ancillary documents.

On or about December 27, 2011, the parties executed a stipulation of dismissal. The stipulation stated, in pertinent part, that the dispute had "been fully, finally and completely compromised between the parties" and directed "that all claims, including all cross-claims, be and hereby are dismissed with prejudice, on the merits, and without costs and disbursements to any party . . . ."

In March 2012, the parties arbitrated respondents' breach-of-confidentiality claim. Appellants argued that they had not breached the confidentiality agreement, but did not argue that the stipulation of dismissal resolved the breach-of-confidentiality dispute. The arbitrator found that appellants had breached confidentiality and were liable for liquidated damages, attorney fees, and costs. Appellants filed a motion before the district

court to vacate the arbitrator's decision. In their memorandum in support of that motion, appellants did not argue that the stipulation resolved the breach-of-confidentiality claim. But during the hearing, appellants read a passage from the stipulation (roughly the same language quoted in the previous paragraph of this opinion) and stated that the stipulation "should take care of it . . . because that would have, this is certainly part of all claims and that was dismissed." Appellants cited no statutory or caselaw authority. Respondents had no notice that this issue would be raised, and no opportunity to analyze or address it in their memorandum opposing appellants' motion.

The district court denied appellants' motion to vacate and ordered them to pay the amounts awarded by the arbitrator. The district court's order and memorandum give no indication that the district court considered the effect of the stipulation on the breach-of-confidentiality claim.

D E C I S I O N

Appellants argue that (1) the stipulation of dismissal resolved the breach-of-confidentiality claim and should be given res judicata effect so as to foreclose the liquidated-damages claim, and (2) their res judicata arguments are properly before this court. We consider appellants' second argument first, because it addresses a threshold issue.

"A reviewing court must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it." *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1998) (quotation omitted). In cases involving arbitration, the *Thiele* rule is roughly paralleled by a rule that a party who

participates in arbitration without arguing that the dispute is not arbitrable is generally estopped from raising that argument later. *See Twomey v. Durkee*, 291 N.W.2d 696, 699 (Minn. 1980) (stating that a party concedes that an issue is arbitrable by participating in the arbitration proceeding). The parties make complex and vigorous arguments about whether the *Twomey* holding applies to this case, or whether a different line of cases applies. We do not consider these arguments because we find the *Thiele* rule dispositive.

In *Schmidt v. City of Columbia Heights*, we decided that an argument mentioned in passing during oral argument with a general reference to a statutory chapter could be considered waived. 696 N.W.2d 413, 416–17 (Minn. App. 2005) (citing *Thiele*, 425 N.W.2d at 582). In *Brodsky v. Brodsky*, we held that a district court does not err when it does not address issues raised in a conclusory fashion without supporting affidavits, testimony, or argument, and that mentioning an issue in a conclusory fashion does not preserve it for appeal. 733 N.W.2d 471, 478 (Minn. App. 2007). Here, we find that appellants failed to preserve their argument for appeal because they mentioned it only in passing, in a conclusory fashion, before the district court. It is undisputed that appellants cited no statutes, caselaw precedents, or other legal authorities on point. Also weighing against appellants' argument is the fact that there is no evidence that the district court considered the stipulation-of-dismissal argument. Appellants do not argue that the district court considered the argument, and the district court's order and memorandum do not mention it.

Appellants rightly point out that the *Thiele* rule is not ironclad, focusing on an exception allowing an appellate court to consider issues not raised below when the issue

"is plainly decisive of the entire controversy on its merits, and where, as in [a case] involving undisputed facts, there is no possible advantage or disadvantage to either party in not having had a prior ruling by the trial court on the question." *Watson v. United Servs. Auto. Ass'n*, 566 N.W.2d 683, 687 (Minn. 1997). This case is unlike *Watson* in that the *Watson* court noted other factors favoring consideration of the new theory that do not apply here. The most prominent factor the *Watson* court noted was that the new theory raised a novel legal issue of first impression. *Id.* at 688. Here, appellants' argument does not raise a novel issue of first impression. The *Watson* court also noted that the new theory at issue in that case was "implicit in or closely akin to the arguments below." *Id.* Here, appellants' arguments below are not closely akin to their new argument.

We find that the argument appellants now seek to assert was not preserved for appeal because it was not properly presented to or considered by the district court, and that the exceptions that might justify appellate consideration of a new argument do not apply.

Affirmed.