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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-903**

Craig Johanns, et al.,
Respondents,

vs.

Minnesota Mobile Storage Inc.,
Appellant.

**Filed May 6, 2008
Affirmed; motion denied
Ross, Judge**

Scott County District Court
File No. 70-2004-09678

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Considered and decided by Ross, Presiding Judge; Wright, Judge; and Johnson, Judge.

UNPUBLISHED OPINION

ROSS, Judge

The dispute in this case arose after a self-storage company seized and then sold \$67,750 worth of a couple's possessions for \$1,305 after the couple missed their first

three monthly payments of \$196 in violation of their lease with the company. After a jury determined that Minnesota Mobile Storage, Inc., had violated the Minnesota Liens on Personal Property in Self-Storage Act, Minn. Stat. §§ 514.970-.979 (2004), Minnesota Mobile appealed. This court remanded for the district court to decide the disputed factual issue of whether Minnesota Mobile's violation was willful so as to render unenforceable an exculpatory clause in the parties' lease agreement that would otherwise limit the company's damages to \$5,000. On remand, the district court did not allow additional evidence to be submitted to a new jury, and instead it conducted a bench trial based on record evidence. It found that Minnesota Mobile had willfully violated the law. In this second appeal, Minnesota Mobile argues that the district court disregarded the remand order and made its ruling regarding willfulness as a matter of law, that Minnesota Mobile did not waive its right to a jury trial, and that the district court erred by finding the statutory violations to have been willful. Because none of these arguments is persuasive, we affirm.

FACTS

Craig and Mary Johanns sought temporary storage for some of their personal property in preparation for a move. On November 10, 2001, they signed a contract with Minnesota Mobile to lease a self-contained storage unit. The lease contract included an exculpatory clause limiting Minnesota Mobile's total responsibility for any loss to \$5,000. That exculpatory clause would not limit damages, however, if Minnesota Mobile willfully violated the law.

The Johannses failed to make any additional payments after securing the lease. Minnesota Mobile tried but failed to contact the Johannses by telephone several times. Minnesota Mobile mailed and published notice in a local newspaper indicating that the Johannses' property would be sold at auction. Minnesota Mobile sold the Johannses' property at auction for \$1,305.

When the Johannses learned of the sale, they sued Minnesota Mobile for violating the Minnesota Liens on Personal Property in Self-Service Storage Act. A jury determined that Minnesota Mobile is liable and that the Johannses suffered damages of \$67,750. In its posttrial memorandum, Minnesota Mobile asked the district court to find that it complied with the statutory requirements, and, in the alternative, to apply the exculpatory clause to limit Minnesota Mobile's liability.

The Minnesota Liens on Personal Property in Self-Service Storage Act forbids an owner of a self-storage unit from exempting itself from liability for negligence. Minn. Stat. § 514.975 (2006). Applying that act, the district court ruled that the exculpatory clause's \$5,000 damage limitation was unenforceable because it exempted Minnesota Mobile from liability. When Minnesota Mobile appealed, we held that the exculpatory clause's damages limitation is valid. *Johanns v. Minn. Mobile Storage, Inc.*, 720 N.W.2d 5, 12 (Minn. App. 2006), *review denied* (Minn. Oct. 25, 2006). Because the application of the exculpatory clause depended on willfulness, however, we remanded the case for a factual finding regarding whether Minnesota Mobile acted willfully. *Id.*

On remand, the district court denied Minnesota Mobile' s motion for a new jury trial on the issue of willfulness, explaining that Minnesota Mobile had not previously requested a jury to decide the issue of willfulness. The district court then found that Minnesota Mobile willfully failed to comply with the statute. Minnesota Mobile appeals, arguing that on remand the district court should have conducted a new jury trial on the issue of willfulness, and that the district court improperly decided the issue as a matter of law rather than to address it as a question of fact.

D E C I S I O N

I

We do not agree with Minnesota Mobile that the district court decided willfulness as a matter of law. Although the district court' s order included language that implied that judgment as a matter of law would also have been appropriate, it acted as a factfinder when it decided that Minnesota Mobile acted willfully. The district court noted explicitly that it was finding facts, stating, “ While the court is cognizant of the rule that fact issues are generally left to the jury, [Minnesota Mobile] did not ask that this issue be submitted to the jury, and left the applicability of the exculpatory clause to the court.” In reaching its factual determination of willfulness, the district court explained,

It is clear to the court that the defendant made a conscious decision to enforce its statutory lien against plaintiffs and their property, and that [its] conduct in selling the property was an intentional act. [Its] failure to follow the statutory requirements at a minimum evinces a “careless disregard” of those requirements, but, in this court' s view, also a “disregard

for governing statutes and an indifference to [its] requirements.”

Minnesota Mobile contends that because the district court’s specific finding of willfulness was listed in the “Conclusions of Law” section of its judgment, it therefore made the determination as a matter of law, not fact. But we treat a fact found by the court, even if expressed as a conclusion of law, as a finding of fact. *Graphic Arts Educ. Found., Inc. v. State*, 240 Minn. 143, 145–46, 59 N.W.2d 841, 844 (1953).

It is unclear from its briefs and oral argument whether Minnesota Mobile alternatively contends that if the district court engaged in fact-finding, its findings are contrary to the evidence. We review challenges to a district court’s factual findings for clear error. *Zander v. Zander*, 720 N.W.2d 360, 364 (Minn. App. 2006), *review denied* (Minn. Nov. 14, 2006). In the previous appeal, we determined that there are sufficient facts in the record to sustain a finding of willfulness when we stated that “there is at least a fact question as to whether [Minnesota Mobile] engaged in willful conduct.” *Johanns*, 720 N.W.2d at 12. We defer to a district court’s factual findings unless we have a “firm conviction that a mistake has been made.” *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999). Because we already determined that there was a factual basis to establish willfulness, the district court’s finding of willfulness is not contrary to the evidence.

II

Minnesota Mobile also argues that it was denied its right to a jury trial on the issue of willfulness. Our previous opinion did not state whether the factual question of

willfulness should be decided by a jury. We said only that, on the issue of willfulness, there was a question for the factfinder. *Johanns*, 720 N.W.2d at 12. Litigants have a general right to a jury trial. Minn. Const., art. I, § 4. But this right can be waived. *Id.* If a party does not request a jury trial on an issue before the jury retires, that party waives the right to a trial by jury on that issue. Minn. R. Civ. P. 49.01(a).

Minnesota Mobile argues that it did not waive its right to a jury trial on the issue of willfulness because it did not bear the burden to prove willfulness. Acknowledging that it did not request a jury trial on this issue, Minnesota Mobile argues that rule 49.01(a) applies only to the party that bears the burden of proof on an issue. The cases Minnesota Mobile cites do not support this argument. And cases interpreting rule 49.01 contradict Minnesota Mobile's interpretation of the rule. *See, e.g., Lemmer v. IDS Props., Inc.*, 304 N.W.2d 864, 870 (Minn. 1980) (applying rule 49.01 to hold that defendant in negligence action waived right to jury on damages issue, even though plaintiffs had burden to prove damages). The rule does not distinguish between parties based on their burdens of proof.

Failure to object to a special verdict form before its submission to the jury waives a party's right to object on appeal. *Kath v. Burlington N. R.R.*, 441 N.W.2d 569, 572 (Minn. App. 1989), *review denied* (Minn. July 27, 1989). Minnesota Mobile did not object to the special verdict form, which omitted willfulness. Even in posttrial briefing, Minnesota Mobile did not object to the jury instructions. In fact, Minnesota Mobile acknowledged that once the jury completed the special verdict form, the district court would decide the remaining issues. More telling, although the Johannses' proposed

instructions included willfulness, Minnesota Mobile's instructions did not. The district court agreed with Minnesota Mobile and did not send the issue of willfulness to the jury.

Once the jury retired, both Minnesota Mobile and the Johannses indicated that they understood that the district court would decide the issues that were not submitted to the jury. Minnesota Mobile's posttrial brief asked the district court to make several factual findings, including a finding that Minnesota Mobile complied with the applicable statutes in enforcing its lien, and a finding that the Johannses were in default. Minnesota Mobile asked the court to enforce the exculpatory clause if it were found liable. Because Minnesota Mobile's posttrial brief noted that the contract's exculpatory clause did not cover "willful injury or willful violation," its request that the court enforce the exculpatory clause plainly asked the court to find that it had not acted willfully. The Johannses met the argument by contending for a finding of willfulness in their posttrial briefs. The issue of willfulness was presented to the district court by both parties.

The record does not disclose what arguments Minnesota Mobile offered at the hearing after remand. The willfulness issue seems to have been discussed at a remand hearing on December 19, 2006, but Minnesota Mobile did not order a transcript of that hearing. *See* Minn. R. Civ. App. P. 110.02, subd. 1(a) (stating that appellant has a duty to order transcript). Where the absence of a transcript results in an incomplete or ambiguous record, we have affirmed the district court's decision on matters in which reversal would depend on the transcript. *See, e.g., Kendaco, Inc. v. Rickard-Borske Co.*, 290 Minn. 346, 350–51, 187 N.W.2d 697, 700 (1971).

It is clear that Minnesota Mobile waived the right to a trial by jury on the issue of willfulness.

III

Minnesota Mobile asks that the matter be remanded again for the district court to reopen the record and hear more evidence. Having agreed, after trial, that the district court could resolve the issue of willfulness on the existing record, Minnesota Mobile cannot successfully argue now that the district court must reopen the record. A party that consents to a legal proceeding may not later challenge its validity, or take a contradictory position on appeal. *N. States Power Co. v. Gas Servs., Inc.*, 690 N.W.2d 362, 366 (Minn. App. 2004); *see also Am. States Ins. Co. v. Ankrum*, 651 N.W.2d 513, 522–23 (Minn. App. 2002) (party who agreed to submit an issue to jury could not argue on appeal that issue should not have gone to jury); *see, e.g., Johnson v. Jensen*, 446 N.W.2d 664, 665-66 (Minn. 1989) (defendants who consented to trial of plaintiffs’ entitlement to punitive damages could not contend on appeal that plaintiffs were limited to statutory damages).

IV

The Johannses request attorney fees because they claim that Minnesota Mobile improperly added to the cost, burden, and delay of this case. They argue that Minnesota Mobile’s legal arguments are without colorable support and that Minnesota Mobile used this second appeal to burden the Johannses with additional costs and delay. For the Johannses to prevail in their motion for attorney fees, they must produce evidence of Minnesota Mobile’s bad faith, intent to delay proceedings, or intent to increase costs. *See Thomas A. Foster & Assocs. v. Paulson*, 699 N.W.2d 1, 9 (Minn. App. 2005).

Although Minnesota Mobile did not prevail in its arguments on appeal, the arguments are not without support in the law. We have already stated that our previous remand instruction did not specifically require either a jury or the district court to find facts. Minnesota Mobile's argument that it was entitled to a jury was therefore not baseless. Minnesota Mobile's brief was well written, was well researched, and contained detailed citations to the record. We cannot infer that Minnesota Mobile was attempting to add cost and delay to this case. We deny the motion for fees.

Affirmed; motion denied.