STATE OF MINNESOTA
IN COURT OF APPEALS
A10-787

Estate of Kenneth A. Macke,
Respondent,

vs.

PureChoice, Inc., et al.,
Appellants,

and

PureChoice, Inc.,
Appellant,

vs.

Kathleen Macke,
Executor of the Estate of Kenneth A. Macke, et al.,
Respondents.

Filed January 11, 2011
Affirmed
Crippen, Judge[*]

Hennepin County District Court
File Nos. 27-CV-09-5010, 27-CV-09-7389

George G. Eck, Shari L.J. Aberle, Rebecca Weisenberger, Dorsey & Whitney LLP, Minneapolis, Minnesota (for respondent)

Jack Y. Perry, Diane B. Bratvold, Briggs and Morgan, P.A., Minneapolis, Minnesota (for appellants)

---

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

Considered and decided by Kalitowski, Presiding Judge; Minge, Judge; and Crippen, Judge.

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

CRIPPEN, Judge

Appellant PureChoice, Inc. challenges the district court's summary judgment that dismisses its claims against respondents Estate of Kenneth A. Macke and Kathleen Macke. The court found no merit in appellant's claims but concluded in any event that PureChoice was collaterally estopped from relitigating an issue that it had previously raised and litigated in federal court. Because the issue in this litigation is identical to an issue raised, litigated, and finally adjudicated in PureChoice's prior action, we affirm.

FACTS

PureChoice, Inc. is an air quality monitoring company. Kenneth Macke joined PureChoice's board of directors in 1997 and was a major shareholder in the company. In 2002, because PureChoice was not profitable and needed additional capital, the board approved a new financing plan using convertible debt (the offering). In September 2002, Macke and the other two PureChoice directors signed an irrevocable personal guaranty for up to $12 million of the offering.

Macke suffered from Parkinson's disease and by the late 1990s began experiencing mental deterioration. In August 2003, Macke's physician issued a certificate of incapacity stating that Macke became incapacitated on or before August 12, 2003.

In May or June of 2003, Macke and his wife, Kathleen Macke, hired attorney Paul Ravich to represent their financial interests. Macke, through Ravich, sent four letters to PureChoice regarding his guaranty of the offering. The first letter, sent in June 2003, stated that Ravich represented Macke and that Macke was suspending his personal guaranty of the offering. One month later, Macke resigned as a PureChoice director.

The second letter, sent shortly after the resignation, stated that Macke would not rescind the suspension and demanded that PureChoice make certain disclosures to potential investors regarding the suspension. It also stated that Macke was suffering from health problems and had no recollection of signing the guaranty. PureChoice informed potential investors that Macke had suspended his guaranty, but that it believed the guaranty was valid.

The third letter, in August 2003, stated that Macke would be unable to honor the guaranty if required to do so and warned PureChoice to disclose to potential investors that Macke contested the validity of the guaranty. The last of the letters, in November 2003, reiterated that Ravich represented Macke and that Macke disputed the validity and effectiveness of any guaranty.

In June 2004, M&I Bank sued PureChoice, Macke, Reichel, and Perkins to collect on an outstanding $2 million loan to PureChoice that Macke, Reichel, and Perkins had personally guaranteed. Macke defended against the lawsuit on the basis that he lacked capacity to enter into the guaranty. On summary judgment, the district court concluded that all defendants were liable for the M&I debt, except for Macke, because there were issues of fact regarding his competency.

On October 26, 2006, M&I Bank, PureChoice, Macke, Reichel, and Perkins entered into a settlement agreement. Because Macke was incapacitated at this point, Kathleen Macke signed the settlement agreement as his "attorney-in-fact." Macke died during the course of this litigation.

In paragraph 6(a) of the settlement agreement, the Mackes represent that they did not impede or interfere with the offering. Paragraph 6(b) states that the settlement has no impact on claims by PureChoice against the Mackes' son, Jeffrey Macke, for interfering with or impeding the offering. Despite its knowledge of evidence that Kenneth or Kathleen Macke retained attorney Paul Ravich, PureChoice nevertheless believed that Ravich was acting for Jeffrey Macke.

Paragraph 7 contains an indemnification provision providing that PureChoice will indemnify Macke "upon the filing or service of any legal claim alleging that Macke is obligated for any guarantee given on behalf of PureChoice." Paragraph 10 states mutual releases of Macke and PureChoice as to all disputes, past, present, or future. Paragraph 11, labeled "Limitation on Releases," states that the mutual releases in paragraph 10 are "not intended to and shall not be construed to release any of the obligations that are created by [the settlement agreement]."

Paragraph 15 states that if the Mackes' non-interference representation in paragraph 6(a) is "determined to be false, PureChoice, Reichel and Perkins may pursue all remedies available to them by law." This paragraph also provides that in the event of an enforcement action, the prevailing party is entitled to reasonable legal fees and costs.

After settling the litigation with M&I Bank, PureChoice sued Jeffrey Macke in district court. In its complaint against Jeffrey Macke, PureChoice claimed that he was upset about his father's guaranty of the offering and his inability to persuade his father to withdraw his PureChoice investments. PureChoice alleged that without authorization from his father, Jeffrey Macke hired Ravich to send the letters, allegedly containing false statements, to dissuade potential investors from investing with PureChoice through the offering. PureChoice argued that paragraph 6 of the settlement agreement was a representation by the Mackes that they had nothing to do with sending the letters, and a concession that Jeffrey Macke was responsible for hiring Ravich and had authorized the letters.

Jeffrey Macke removed the case to federal district court and moved for summary judgment on PureChoice's claims of fraud and tortious interference. In order to survive summary judgment PureChoice had to produce sufficient evidence to raise issues of material fact as to whether the letters or the statements contained therein could be imputed to Jeffrey Macke. The court denied the assertion that the Mackes' representations in paragraph 6(a) of the settlement agreement imputed the letters or their statements to Jeffrey Macke, determining that paragraph 6(a) does not (1) specifically address the letters; (2) disclaim or concede that any false statements were made; or (3) attribute any false statements to Jeffrey Macke. The court granted Jeffrey Macke's motion and denied PureChoice's complaint with prejudice.

After its suit against Jeffrey Macke was dismissed, PureChoice filed a probate action in California claiming that it was a creditor of Macke's estate based on Macke's

guaranty of the offering. The California action has been suspended pending the outcome of this lawsuit.

This case arises from the consolidation of suits filed by PureChoice and the Macke Estate in Hennepin County. The Macke Estate sued PureChoice seeking enforcement of the settlement agreement. PureChoice sued the Mackes for making false representations in the settlement agreement. Both PureChoice and the Mackes filed for summary judgment.

The district court granted the Mackes' motion and dismissed all of PureChoice's claims. The court concluded that collateral estoppel barred PureChoice's claims and that the settlement agreement's plain language could not support PureChoice's claims. The court granted the Mackes' request for attorney fees for defending the current action minus duplicative and unreasonable fees and costs, but denied their request for expenses incurred in defending the California action.

PureChoice appeals, challenging the district court's application of collateral estoppel and its construction of the language of the settlement agreement. The Mackes appeal the district court's award of attorney fees and costs to the extent it did not include expenses incurred in the California action or the services of Anthony, Ostlund, Baer & Louwagie P.A.

D E C I S I O N

When reviewing a summary judgment, this court determines whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). There is no genuine

issue of material fact when the record, taken as a whole, would not permit a rational fact-finder to find for the nonmoving party. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). We review the record in the light most favorable to the nonmoving party. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

1.

Collateral estoppel prevents parties from relitigating issues determined in a prior action. *Heine v. Simon*, 702 N.W.2d 752, 761 (Minn. 2005). The applicability of collateral estoppel presents a mixed question of law and fact which we review de novo. *Id.*

Four factors determine whether collateral estoppel is available: (1) the issue litigated in the present action must be identical to an issue in a prior adjudication; (2) there must have been a final adjudication on the merits; (3) the estopped party must have been "a party or in privity with a party to the prior adjudication; and (4) the estopped party [must have been] given a fair and full opportunity to be heard on the adjudicated issue." *A & H Vending Co. v. Comm'r of Revenue*, 608 N.W.2d 544, 547 (Minn. 2000). Additionally, collateral estoppel applies only if resolving the disputed issue was a "necessary component" in the original decision. *Transamerica Ins. Group v. Paul*, 267 N.W.2d 180, 182 (Minn. 1978).

Based on PureChoice's prior action against Jeffrey Macke in federal court, the district court determined that each factor was satisfied and therefore PureChoice's claims were collaterally estopped. PureChoice contends that collateral estoppel does not preclude its claims against the Mackes because there are no identical issues between the

prior litigation and this case, or, alternatively, if there were any identical issues, the federal court's analysis regarding those issues was dictum and therefore wholly unnecessary to its decision. PureChoice does not dispute that the last three factors of collateral estoppel are satisfied.

The issue that PureChoice now seeks to litigate is identical to an issue litigated and decided in its prior action against Jeffrey Macke. To survive summary judgment in its prior litigation, PureChoice had to present a genuine issue of material fact as to whether Jeffrey was responsible for sending the letters. To establish a fact issue, PureChoice argued that the Mackes' representation in paragraph 6(a) of the settlement agreement could be interpreted as disclaiming responsibility for sending the letters and thus conceding that Jeffrey Macke was responsible for sending the letters. Thus, a claim pointedly raised by PureChoice in the prior litigation was whether the Mackes disclaimed responsibility for the letters in the settlement agreement.

The federal district court necessarily determined this issue to decide whether Jeffrey Macke was responsible for the letters, and the court adjudicated the issue on the merits of the claim. It concluded that responsibility for the letters could not be imputed to Jeffrey Macke based on the Mackes' representations in paragraph 6(a) of the settlement agreement because the provision is silent regarding the letters, neither disclaims nor concedes the occurrence of false statements, and does not attribute false statements to Jeffrey Macke. Because the federal district court concluded that the Mackes' representations in paragraph 6(a) could not be interpreted as disclaiming

responsibility for the letters, PureChoice failed to raise a fact issue and the court dismissed PureChoice's claims against Jeffrey Macke.

In this case, PureChoice asserts the same argument and, in so doing, raises the identical issue it raised in the prior litigation against Jeffrey Macke. PureChoice asserts that the Macke's representation in paragraph 6(a) of the settlement agreement is false; that the Macke's could not truthfully say they did not impede in the offering because it is evident that Kathleen Macke, not Jeffrey Macke, authorized the Ravich letters. The necessary implication of this assertion is that the Mackes' representations in paragraph 6(a) can be interpreted as disclaiming responsibility for the letters, suggesting Jeffrey Macke's responsibility. This raises the issue of whether the Mackes disclaim responsibility for the letters in the settlement agreement, which is identical to the issue raised, litigated, and finally adjudicated in PureChoice's prior action against Jeffrey Macke.

In addition, the federal court's analysis of the issue was not dictum and was necessary to its decision on summary judgment. Dictum is a statement concerning an issue without the benefit of adversarial briefing and argument that goes "beyond the facts before the court" and constitutes the non-binding individual view of the opinion's author. *Pecinovsky v. AMCO Ins. Co.*, 613 N.W.2d 804, 808 (Minn. App. 2000) (quotation omitted), *review denied* (Minn. Sept. 26, 2000). The federal court's interpretation of paragraph 6(a) of the settlement agreement did not stray into hypothetical facts and was not offered merely in passing. Rather, it addressed a specific claim of PureChoice on the implications of evidence. Its interpretation was a reasoned analysis based on the

arguments presented by PureChoice. It's analysis was also necessary to the decision on summary judgment because if the Mackes' representations in paragraph 6(a) could have been interpreted as disclaiming responsibility for the letters, then there would have been an issue of fact as to whether Jeffrey Macke was responsible for them and PureChoice's claims would have survived summary judgment.

Because PureChoice's claims against the Mackes are based on an issue that is identical to an issue it raised in its prior litigation against Jeffrey Macke, and because that issue has been fully litigated and finally adjudicated, the district court did not err when it dismissed PureChoice's claims against the Mackes based on the doctrine of collateral estoppel.

There also is merit in the district court's interpretation of the phrase "are determined to be false" in paragraph 15 of the settlement agreement to mean that PureChoice could only sue the Mackes based on evidence discovered in the future and not on facts known to it at the time that the settlement agreement was executed. It is clear from the record that before the settlement agreement was executed, PureChoice believed the letters "interfered with" or "impeded" the offering. They also knew the patent evidence that the Mackes authorized the letters. Moreover, in these circumstances and in light of the broad mutual release provision, PureChoice had the burden of making manifest its intent to reserve the right to sue the Mackes based on the letters. *See U.S. v. William Cramp & Sons Ship & Engine Bldg. Co.*, 206 U.S. 118, 128, 27 S. Ct. 676, 679 (1907) (providing that parties must make intent to reserve claims from broad release

manifest). The settlement agreement fails to reflect PureChoice's intent to preserve any claims based on the letters.

Because we affirm on the issue of collateral estoppel, a result further sustained by the district court's reading of paragraph 15 of the settlement agreement, we have no occasion to review the district court's interpretation of language in paragraph 6(a) of the settlement agreement. Similarly, we need not address respondent's several claims that dismissal of the suit is appropriate for other reasons.

2.

Attorney fees may not be awarded unless authorized by statute or contract. *Fownes v. Hubbard Broad., Inc.*, 310 Minn. 540, 542, 246 N.W.2d 700, 702 (Minn. 1976). We review the district court's award of attorney fees or costs for abuse of discretion. *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 661 (Minn. 1987).

The district court determined that the Mackes were entitled to attorney fees and costs under the settlement agreement. The Mackes sought attorney fees in the amount of $331,159.25 for services provided by Dorsey & Whitney LLP (Dorsey) and $17,840.75 for services provided by Anthony, Ostlund, Baer & Louwagie P.A. (AOB). The Mackes also sought attorney fees and costs incurred in the California action. The Mackes challenge the district court's denial of their request for attorney fees and costs related to the California action and AOB's services.

The district court denied the Mackes' request for attorney fees and costs related to AOB because it found that AOB's work was duplicative of the work performed by

Dorsey. The Mackes argue that the district court abused its discretion because it did not specifically describe the work it found to be duplicative.

But we note that in addressing the issues raised in regards to attorney fees, the district court considered hourly rates and the hours expended on the case. *See Anderson v. Hunter, Keith, Marshall & Co.*, 417 N.W.2d 619, 628-29 (Minn. 1988) (providing formula for determining reasonableness of attorney fees). Additionally, the court considered the complexity of the case, the time and labor involved, the experience, reputation, and skill of the attorneys, and the appropriate market rate for similar services. *See State v. Paulson*, 290 Minn. 371, 373, 188 N.W.2d 424, 426 (1971) (listing factors to consider when determining reasonable fees). Based on this record and the court's grasp of the evidence submitted in support of AOB's fees, the district court did not abuse its discretion by denying the Mackes' request for attorney fees related to AOB's services.

There is also no error in the district court's denial of the Mackes' request for attorney fees and costs related to the California action. The court limited the award of attorney fees to those the Mackes incurred in this litigation only. The Mackes argue that their request should have been granted because the California action is based on the same claims and raises the same issues as this case. In support of their argument, the Mackes point to a stipulation agreement executed by the Mackes and PureChoice stating that PureChoice's allegations in the California action are identical in all relevant aspects to this case. The district court declined to analyze the California action to determine whether it is, in fact, identical to this action.

Although the allegations in the two cases may resemble each other, the record, including the stipulation, is not conclusive, and the district court did not abuse its discretion by denying the Mackes' request for attorney fees and costs related to the California action.

Affirmed.