

NO. A05-0222

State of Minnesota
In Court of Appeals

TERRY L. ITTEL AND GINA L. ITTEL,

Appellants,

v.

JEROME PIETIG AND PIETIG BROS, INC.,

Respondents,

vs.

BERGSTROM STUCCO, INC.; SCHERER BROS.
LUMBER COMPANY; JAMES NOREEN, d/b/a NOREEN
CONSTRUCTION; AND DAVID MOORE, d/b/a
MOORE LATHING AND d/b/a MOORE STUCCO,

Respondents.

**BRIEF OF RESPONDENT
JAMES NOREEN d/b/a NOREEN CONSTRUCTION**

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Statement of Legal Issue

Plaintiffs/Appellants previously sued the Defendant/Respondent builder alleging construction defects. The builder settled that suit and Appellants gave the builder a full and final release and stipulated to a dismissal of their claims with prejudice. Appellants then sued the builder again.

Did the district court err in granting summary judgment to the builder and dismissing Appellants' claims against the builder, and in turn, the builder's third-party contribution claims against others, including Respondent James Noreen, d/b/a Noreen Construction?

District court ruling: The district court granted the builder's summary judgment motion and dismissed this case in its entirety.

Apposite authority:

Minn. Stat. § 327A.04

Sorensen v. Coast-to-Coast Stores (Central Organization), Inc., 353 N.W.2d 666 (Minn. Ct. App. 1984)

Favorite v. Minneapolis St. Ry. Co., 253 Minn. 136, 91 N.W.2d 459 (1958)

Statement of the Case

This appeal concerns the third lawsuit Appellants Terry Ittel and Gina Ittel ("Ittels") have brought against Respondents Jerome Pietig and Pietig Bros., Inc. ("Pietig") claiming defective construction of a house. In this suit, Ittels sued Pietig alleging claims of breach of contract, consumer fraud, and breach of statutory warranties. Ittels only seek reversal of the adverse summary judgment entered against them as to their statutory warranty claim. They agree that their contract and consumer fraud claims are barred as a result of their settlement of their second suit against Pietig for defective construction. *See* Appellants' brief at 7 ("Of the three claims brought in the present lawsuit, the [earlier settlement] Agreement barred two of them . . .").

In this third lawsuit, Pietig asserted third-party claims against various entities, including Respondent James Noreen, d/b/a Noreen Construction (“Noreen”). Noreen did the framing work on the construction of the house.

The Honorable Gary Larson, Hennepin County District Court, granted Pietig’s summary judgment motion, and also dismissed the third-party claims against Noreen and the other third-party defendants. Appellants’ Appendix (“AA”) at 27, AA 30 (“All claims against Defendants, Third-Party Defendants, and Fourth-Party Defendant are DISMISSED”). Judge Larson, who earlier presided over Ittels’ second suit, concluded that the release Ittels voluntarily entered into was valid and enforceable and did “not fall under the section 327A.04 requirement for modification or exclusion.” AA 27. Ittels appealed from the judgment entered below. AA 31.

Statement of Facts

First lawsuit and arbitration

Pietig built the house in late 1999 and early 2000. Ittels closed on the purchase of the property in February 2000. AA 2 (¶ 7), AA 7 (¶ 7).

As a result of alleged water problems and a flooded basement, Ittels sued Pietig in August 2001. AA 2-3 (¶¶ 8-12, 15). Ittels asserted claims for breach of the statutory warranties under Chapter 327A, breach of express and implied warranties, breach of contract, negligence, intentional and negligent misrepresentation, and sought rescission. Respondents’ Pietig Bros. Appendix (“R.P.A.”) at 1-9. Ittels and Pietig agreed to arbitrate that dispute, R.P.A. 10, and Ittels obtained an award of over \$14,000. AA 3 (¶¶

16-17). Pietig paid the award, though Ittels reserved the right to bring other claims if additional defects were revealed. *Id.* (¶ 18); R.P.A. 13 (¶¶ 5-6).

Second lawsuit, complete settlement and release, and dismissal of claims

In June 2002 Ittels brought a second lawsuit, in conciliation court, against Pietig. R.P.A. 11. This suit asserted similar claims arising out of the alleged defective construction of the house. AA 3 (¶¶ 21-23); R.P.A. 11. Ittels claimed that the house had “multiple defects” and that Pietig had made “repeated misrepresentations.” AA 3 (¶ 24). Ittels obtained a conciliation court award for the full amount of \$7,530 that they sought for all their damages for claimed repair costs for a missing exterior drain tile and an incorrectly installed interior drain tile. *Id.* (¶¶ 20-22).

Pietig appealed the conciliation court judgment to district court. *Id.* (¶ 23); R.P.A. 13 (¶¶ 9-10). Ittels hired an attorney and amended their complaint to assert claims for breach of contract and for violating Minnesota’s Consumer Fraud Act. AA 3 (¶11); R.P.A. 15-18. Two months later, Ittels entered into a full and final Mutual Release and Settlement with Pietig. AA 3 (¶¶ 24-25). Pietig paid Ittels \$5,375 to resolve the claims. AA 15 (¶¶ 1-2). As part of the “complete and final settlement and compromise of all claims against Pietig,” Ittels voluntarily released all claims against Pietig, “whether known or unknown, suspected or unsuspected, which Ittels now have or may have against Pietig.” *Id.* The settlement agreement stated:

It is understood and agreed by Ittels that the above-referenced payment by Pietig is in full accord and satisfaction of the aforesaid claims by Ittels against Pietig.

Id. (¶4).

As discussed in the settlement agreement, *id.* (§1), Ittels and Pietig stipulated to an order for dismissal of all claims “on the merits and with prejudice without cost to any party.” R.P.A. 19. Judge Larson signed an Order for Dismissal and directed entry of judgment accordingly. R.P.A. 20. Ittels’ current attorneys represented them in the second suit and Ittels acknowledged having the advice of their counsel before they entered into the settlement. AA 16 (§ 6). Ittels do not contend that their voluntary settlement or the release they provided is invalid.

Third lawsuit and judgment of dismissal

In February 2004 Ittels brought this action, their third, against Pietig. AA 6. They alleged that Pietig breached the contract and breached the warranties of Chapter 327A by failing to meet building code requirements, failing to install sufficient kick-out flashing, and by improperly designing and installing the flashing. AA 7 (§§ 14-17); AA 8 (§§ 19-22). Ittels also claimed that Pietig breached the Consumer Fraud Act by allegedly representing that the property was in compliance with all building code requirements. AA 8-9 (§§ 26-28).

Argument and Authorities

Standard of Review

In reviewing an appeal from a summary judgment, an appellate court determines whether any genuine issues of material fact exist and whether the district court erred in its application of the law. *Offerdahl v. University of Minn. Hosps. & Clinics*, 426 N.W.2d 425, 427 (Minn. 1988). A district court’s review of and enforcement of a prior settlement

agreement is reviewed for an abuse of discretion. *See Johnson v. St. Paul Ins. Co.*, 305 N.W.2d 571, 573 (Minn. 1981). A district court's enforcement of a settlement will not be reversed absent a showing that the court acted in such an arbitrary manner as to frustrate justice. *Chalmers v. Kanawyer*, 544 N.W.2d 795, 797 (Minn. Ct. App. 1996).

A correct judgment below will not be reversed simply because it is founded on incorrect reasons. *Epland v. Meade Ins. Agency*, 564 N.W.2d 203, 208 n.8 (Minn. 1997); *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722, 728 (Minn. 1990). The availability and application of res judicata presents a mixed question of law and fact that is reviewed *de novo* on appeal. *See Wilson v. Commissioner of Revenue*, 619 N.W.2d 194, 197 (Minn. 2000). Once it is determined that res judicata is available, whether to apply the doctrine is left to the trial court's discretion and should be reversed only upon a demonstrated abuse of that discretion. *See Erickson v. Commissioner of Dep't of Human Services*, 494 N.W.2d 58, 61 (Minn. Ct. App. 1992).

I. Ittels' voluntary settlement and dismissal of their earlier lawsuit against Pietig precludes this lawsuit.

The district court did not err when it determined that Ittels' voluntary settlement of their prior lawsuit against Pietig released all claims they had or might have had against Pietig, including any statutory warranty claims. Because of the dismissal of Ittels' earlier lawsuit against Pietig, their current claims are barred.

A. Ittels' voluntary Release bars their claims in this action.

Respondent Noreen joins in the arguments of Pietig and the other respondents that the district court did not abuse its discretion in enforcing Ittels' voluntary settlement.

A valid release is a defense to any action on a claim released. *Sorensen v. Coast-to-Coast Stores (Central Organization), Inc.*, 353 N.W.2d 666, 669 (Minn. Ct. App. 1984). The law generally presumes that an agreement settling a dispute is valid. *Id.* (citing *Schmitt-Norton Ford, Inc. v. Ford Motor Co.*, 524 F. Supp. 1099, 1102 (D. Minn. 1981)). A party seeking to avoid the effect of a settlement bears the burden of proving that the settlement does not bind them. *See Gould v. Johnson*, 379 N.W.2d 643, 646 (Minn. Ct. App. 1986).

Through this appeal, Ittels seek to set aside and avoid the terms of their voluntary settlement of their second lawsuit. Settlements, however, are highly favored and are not lightly set aside. *Johnson*, 305 N.W.2d at 573. Ittels concede that the district court correctly noted that Minnesota has a strong public policy favoring settlements, a policy derived from Minnesota's common law. *See* Appellants' brief at 8. Ittels' current attorneys represented them in settling the prior lawsuit.¹

Ittels argue that the release they provided somehow is void, or voidable, because it is a "waiver" or "modification" of the statutory home warranty provided in Chapter 327A. This argument is incorrect. Pietig did not argue that Ittels waived their warranty rights or that the warranty was modified to exclude whatever warranty claim Ittels asserted below. There was no waiver, modification, or exclusion of the statutory new home warranties, and thus the requirements of Chapter 327A for a waiver, modification,

¹ While the absence of counsel has been considered significant when courts examine a party's intent to release a claim, the "presence of counsel is a strong factor indicating" such an intent. *Sorensen*, 353 N.W.2d at 669. Here, Ittels' counsel advised them as to their voluntary settlement and release of all of their previously asserted claims, including the statutory warranty claims.

or exclusion are inapplicable. Instead, Pietig argued that the warranty claim should be dismissed because Ittels released that claim as part of their earlier voluntary settlement.

Minn. Stat. § 327A.04 prohibits a waiver, modification, or exclusion of the contractual warranties unless certain steps are taken. The statute does not state that a party cannot release their statutory warranty claims as part of the settlement of litigation. Indeed, it does not mention releases or the settlement of claims at all.

In enacting Minn. Stat. § 327A.04, the Legislature did not intend to restrict the ability of parties to a district court action, represented by counsel, from voluntarily resolving their disputes. There is nothing in the language of the statute itself that restricts that right, nor is there any evidence of any such legislative intent to restrict that right or to alter the common-law affirmative defense of release. Compare *TNT Properties, Ltd. v. Tri-Star Developers, LLC*, 677 N.W.2d 94, 98-100 (Minn. Ct. App. 2004) (enforcing a settlement and rejecting argument that settlement on the record in a district court action is not valid because of purported failure to comply with writing requirement of statute of frauds, Minn. Stat. § 513.04).

In order to alter the common law, the Legislature must act expressly. Statutes are presumed to be consistent with the common law and a modification of the common law will not be assumed. *In re Shetsky*, 239 Minn. 463, 60 N.W.2d 40, 45 (1953). Given that the common law and public policy encourages settlement, Ittels must overcome the strong presumption that the Legislature did not intend to change the common law and hamper settlements absent express and explicit statutory language. See *Ly v. Nystrom*, 615 N.W.2d 302, 314 (Minn. 2000) (rejecting notion that “fundamental principle of

common law deeply ingrained in our common law jurisprudence,” the “American rule” prohibition against recovering attorney fees, could be altered in absence of express statutory language). Because Minn. Stat. § 327A.04 contains no such express and explicit language, the district court did not err in concluding that Ittels’ voluntary settlement and release bars their current lawsuit.

Ittels could have tried to condition the settlement of their second lawsuit on the right to pursue other claims if subsequent defects were discovered at their property. Importantly, when they settled their first lawsuit following the arbitration, they specifically conditioned the settlement on the ability to bring additional claims. AA 3 (¶¶ 16-18). Similarly, they could have bargained for a substitute warranty going forward – though one must speculate whether Pietig would have agreed to that given that he sought and obtained a full and final release of all claims. Because Ittels did neither, their complaint about the dismissal of their third lawsuit should be rejected.

To bolster their appeal, Ittels make assertions regarding the effect of a settlement outside of a district court action or by a party not represented by an attorney. These facts are not apposite. Whether a party’s voluntary release of warranty claims is valid in the absence of actual litigation or by an unrepresented party is not at issue in this case. Thus, the district court properly rejected the concern Ittels raised about an attempted modification of the statutory home warranties that was mentioned in *Kurle v. Ryland Group, Inc.*, 2004 WL 1049039 (Minn. Ct. App. May 5, 2004). *Kurle* is distinguishable.²

² Additionally, as an unpublished decision, *Kurle* is not precedential. *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 801 (Minn. Ct. App. 1993).

It did not involve a voluntary settlement and release of all claims in a lawsuit where counsel ably represented the releasing parties.

Ittels suggests that this Court cannot and should not “create” public policy. No one is asking this Court to do so; nor did anyone ask the district court to do so. What the district court did, properly, was to consider and apply the well-recognized and strong public policy in favor of settlements. No public policy needs creating. Because the district court did not abuse its discretion in enforcing Ittels’ voluntary settlement, this Court should affirm.

B. The dismissal with prejudice of Ittels’ second lawsuit precludes them from pursuing this action.

In settling their second lawsuit against Pietig, Ittels voluntarily stipulated to a dismissal of prejudice of all of their claims in that suit. Based on that stipulation, Judge Larson ordered a dismissal with prejudice of that suit and directed the entry of a judgment of dismissal. R.P.A. 19-20. That judgment bars Ittels’ current claim.

Ittels’ argument that they can continue to bring claim after claim ignores the res judicata effect of the judgment of dismissal entered in the suit they voluntarily settled. Accordingly, the district court did not abuse its discretion in granting judgment to Pietig, as well as to Noreen and the other third-party defendants.

Though the district court did not directly base its decision on res judicata grounds, to the extent Ittels’ argument on appeal succeeds as to the release issue, this Court should still affirm. Appellate courts will not reverse correct decisions based upon the wrong reasoning. *See Bains v. Piper, Jaffray & Hopwood, Inc.*, 497 N.W.2d 263, 270 (Minn. Ct.

App. 1993); *see also Epland*, 564 N.W.2d at 208 n.8; *Schweich*, 463 N.W.2d at 728. As this Court has ruled, it will affirm a district court's decision if it can be sustained on any grounds. *Myers through Myers v. Price*, 463 N.W.2d 773, 775 (Minn. Ct. App. 1990); *see also State Casualty Underwriters v. Casualty Underwriters, Inc.*, 266 Minn. 536, 124 N.W.2d 185, 187 (1963) (appellate court should affirm a district court's decision if it is right as a matter of law, even if based on the wrong theory).

Under res judicata principles, the judgment of dismissal entered in the earlier lawsuit bars Ittels' current suit against Pietig as a matter of law. Any and all claims that were brought or could have been brought against Pietig merged into the judgment of dismissal that was entered following the parties' stipulation of dismissal with prejudice.

Res judicata is "essentially a finality doctrine which dictates that there be an end to litigation." *Dorso Trailer Sales, Inc. v. Am. Body and Trailer, Inc.*, 482 N.W.2d 771, 773-74 (Minn. 1992) (citations omitted). Res judicata exists to avoid wasteful or repetitive litigation and is based upon considerations of judicial economy and of the need for finality and certainty in legal relations. *Gulbranson v. Gulbranson*, 408 N.W.2d 216, 217 (Minn. Ct. App. 1987) (affirming dismissal of action on res judicata grounds when earlier action settled by stipulation). It relieves parties of the burden of relitigating issues already determined so that a party is not twice vexed for the same cause of action. *Id.*

A judgment on the merits acts as a bar in a second suit based on the same cause of action and is conclusive not only as to every matter that was actually litigated but also as to every matter that might have been litigated. *Beutz v. A.O. Smith Harvestore Prods., Inc.*, 431 N.W.2d 528, 531 (Minn. 1988). As the Minnesota Supreme Court made clear:

Res judicata operates as an absolute bar to a subsequent claim when: (1) the earlier claim involved the same claim for relief; (2) the earlier claim involved the same parties or their privities; (3) there was a final judgment on the merits; and (4) the estopped party had a full and fair opportunity to litigate the matter.

State v. Joseph, 636 N.W.2d 322, 327 (Minn. 2001) (citations omitted).

All four elements are met here as a matter of law. Ittels' earlier suit involved the same claims for relief arising out of the alleged defective construction of their house. Their earlier suit involved the same parties. That suit was reduced to a final judgment following the voluntary stipulation of dismissal. Finally, Ittels had a full and fair opportunity to litigate their prior claims, which they chose to voluntarily settle.

Importantly, a dismissal with prejudice entered on a voluntary stipulation – as Ittels did – is given preclusive effect. *See Favorite v. Minneapolis St. Ry. Co.*, 253 Minn. 136, 91 N.W.2d 459 (1958) (“dismissal with prejudice was binding upon the parties and stood as a bar to the bringing of another action on the same cause . . .”); *see also Amalgamated Meat Cutters & Butcher Workmen of N. Amer. v. Club 167, Inc.*, 295 Minn. 573, 204 N.W.2d 820 (1973) (“[a] stipulated dismissal with prejudice bars another action on the same claim”); *Gulbranson*, 408 N.W.2d at 217. Because res judicata bars Ittels' current claims as a matter of law, this Court should affirm.

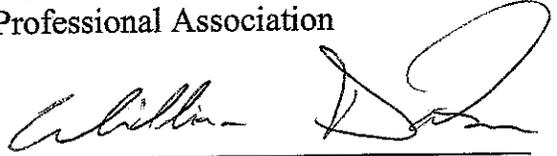
Conclusion

The judgment entered below should be affirmed. The district court did not abuse its discretion in concluding that the earlier full and final voluntary release that Appellants provided to Pietig barred Appellants' claims. Alternatively, this Court should affirm

because Appellants' current suit against Pietig is barred by res judicata based on the earlier judgment of dismissal that was entered following the second lawsuit.

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