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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-1211**

MinnComm Utility Construction Co., et al.,  
Appellants,

vs.

Yaggy Colby Associates, Inc., et al.,  
Respondents.

**Filed April 30, 2012  
Affirmed in part, reversed in part, and remanded  
Larkin, Judge**

Houston County District Court  
File No. 28-CV-10-873

M. T. Fabyanske, Jesse R. Orman, Hannah R. Stein, Jeffrey Wieland, Fabyanske, Westra,  
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Considered and decided by Larkin, Presiding Judge; Peterson, Judge; and Collins,  
Judge.\*

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\* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals  
by appointment pursuant to Minn. Const. art. VI, § 10.

## UNPUBLISHED OPINION

**LARKIN**, Judge

Appellants challenge the district court's summary-judgment dismissal of appellants' claim for attorney fees under the third-party-litigation exception to the American rule of attorney fees. By notice of related appeal, respondents challenge the district court's rejection of their waiver, collateral estoppel, and res judicata based arguments for summary judgment. Because appellants' claim for attorney fees is not barred under waiver, res judicata, or collateral estoppel theories, we affirm in part. But because the district court erred in concluding, as a matter of law, that the third-party-litigation exception does not apply in this case, we reverse in part and remand for further proceedings.

### FACTS

On June 27, 2007, appellants MinnComm Utility Construction Co., and Daniel and Mary Weidner (collectively MinnComm) entered into a contract with the City of La Crescent (the city) to install a water main and a sanitary force main under the Mississippi River, running from La Crescent to La Crosse, Wisconsin (the project). The city retained respondents Yaggy Colby Associates Inc., and Donald Borcharding (collectively YCA) to design the project and prepare the plans and specifications. The contract between MinnComm and the city required MinnComm to complete the project according to YCA's plans and specifications. MinnComm was also required to furnish payment and performance bonds. MinnComm provided the bonds through Granite Re in the amount of \$1,219,276.65. Granite Re issued the bonds to MinnComm on the condition that

MinnComm agree to indemnify and hold Granite Re harmless from all liability under the bonds. The project was to be completed by November 30, 2007.

MinnComm began work on the project in July 2007. It made two attempts to install the sanitary force main underneath the Mississippi River, but both efforts were unsuccessful. The city denied MinnComm's request for additional time and money to complete the project and terminated its contract with MinnComm. The city made a claim against Granite Re. Granite Re commenced a declaratory-judgment action in federal court, seeking clarification of its obligations to the city, and MinnComm's obligations to it, under the bond. *Granite Re, Inc. v. City of La Crescent*, No. 08-441, 2009 WL 2982642, at \*10, 15 (D. Minn. Sept. 11, 2009). MinnComm cross-claimed against the city for breach of contract, breach of warranty, defamation, quantum meruit, and violation of Minnesota's Prompt Payment statute. *Id.* The city asserted a cross-claim against MinnComm for breach of contract and negligence. *Id.* at \*15.

Following a bench trial, the federal district court found that YCA "did not provide MinnComm with a constructible design [for the project] because (1) critical data regarding known obstructions was withheld and (2) the plans and specifications provided for an insufficient minimum cover over the pipeline." *Id.* at \*9. The federal district court therefore determined that the city breached the implied warranty of the plans and specifications. *Id.* at \*9-10. The federal district court further concluded that the city materially breached its contract with MinnComm and that Granite Re was therefore not liable to the city under the terms of the bond. *Id.* at \*10. The court dismissed the city's contract claim against MinnComm, reasoning that MinnComm's breach was due to the

city's failure to comply with the implied warranty of the project plans and specifications. *Id.* The court also denied the city's negligence claim. *Id.* at \*10-11. The federal district court denied MinnComm's defamation claim and its claim for attorney fees under the Prompt Payment statute, and MinnComm waived its quantum meruit claim. The court awarded MinnComm damages on its contract and implied warranty claims in the amount of \$1,569,251.23. *Id.* at \*11-12, 15.

Following the federal action, Granite Re sought, and MinnComm agreed to, indemnification in the amount of \$231,010.11. Thereafter, MinnComm requested indemnification from the city, but the city refused. MinnComm initiated an action in state district court seeking indemnification for the legal fees and costs incurred as a result of the city's breach of contract. *MinnComm Util. Constr. Co. v. City of La Crescent*, No. A10-1534, 2011 WL 2175852, at \*1 (Minn. App. June 6, 2011). The city moved for summary judgment, arguing that MinnComm's claim was barred by res judicata. *Id.* The district court granted the city's motion, and this court affirmed the dismissal. *Id.*

Later, MinnComm sued YCA, seeking an award of "attorney's fees, expert costs, and other unreimbursed costs incurred in defending the [p]rior [l]itigation," under the third-party-litigation exception to the American rule of attorney fees. In its answer, YCA asserted that MinnComm's claims were barred by "waiver, res judicata and/or collateral estoppel." YCA moved for summary judgment, arguing that MinnComm's claim was barred under the doctrine of res judicata, that MinnComm's claim could not be maintained because it was not based on a contract or statute, and that the third-party-litigation exception is inapplicable. YCA also argued that MinnComm waived its claim

for attorney fees arising out of the federal action because it “sought but did not pursue identical damages in the Federal Action.”

The district court concluded that MinnComm’s claim was not barred by the doctrines of res judicata or collateral estoppel. But the district court also concluded that MinnComm’s claim did not fall under the third-party-litigation exception to the American rule. Specifically, the district court reasoned that because the city and YCA were “joint tortfeasors,” YCA was not a third party and the exception does not apply. The district court therefore granted YCA’s motion for summary judgment.<sup>1</sup> This appeal follows.

## D E C I S I O N

“A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). “On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law.” *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). “[Appellate courts] review de novo whether a genuine issue of material

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<sup>1</sup> MinnComm contends that the district court dismissed MinnComm’s complaint under Minn. R. Civ. P. 12.02(e) for failure to state a claim. This assertion is based on a line at the end of the district court’s order, which states that “[t]his matter is hereby dismissed for failure to state a claim.” But YCA moved for summary judgment, and the district court’s order refers to and utilizes the standard for summary judgment. We therefore review the district court’s order as one for summary judgment.

fact exists” and “whether the district court erred in its application of the law.” *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). And we “view the evidence in the light most favorable to the party against whom judgment was granted.” *Fabio*, 504 N.W.2d at 761.

## I.

MinnComm seeks attorney fees from YCA under the third-party-litigation exception to the American rule of attorney fees. “[Minnesota appellate courts have] always been exceedingly cautious when awarding attorney fees as damages. Litigants ordinarily may not recover attorney fees absent a specific contract or statutory authorization.” *Osborne v. Chapman*, 574 N.W.2d 64, 68 (Minn. 1998) (quotation omitted). An exception to this general rule exists “where the natural and proximate consequences of a person’s tortious act projects another into litigation with a third person.” *Prior Lake State Bank v. Groth*, 259 Minn. 495, 499, 108 N.W.2d 619, 622 (1961) (quoting Restatement (First) of Torts § 914 (1939) (“A person who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover for the reasonably necessary attorney fees and other expenditures incurred.”)). In those instances, “attorney[] fees and expenses reasonably incurred by the injured party . . . may be recovered from the one guilty of the tortious conduct.” *Id.* To recover attorney fees under the third-party-litigation exception, the “action [must] have been conducted as a natural and proximate consequence of the defendant’s tortious action” and the “plaintiff [must] have conducted the same in good faith with reasonable ground for believing that

its outcome would reimburse him for the damages occasioned thereby.” *Id.* at 500, 108 N.W.2d at 623.

The district court concluded that the third-party-litigation exception does not apply, reasoning that YCA and the city are joint tortfeasors because “[YCA’s] alleged wrongful act, negligent design of the plans and specifications, united with the [c]ity’s wrongful act to cause [MinnComm’s] injury.” The district court relied on *OnePoint Solutions, LLC v. Borchert*, which recognized that the third-party-litigation exception applies only to attorney fees incurred in litigation with a third party and that a plaintiff may not recover fees incurred in litigation with one of the underlying tortfeasors. 486 F.3d 342, 352 (8th Cir. 2007) (concluding that the third-party-litigation exception did not apply because the plaintiff sought fees from a party who participated in the underlying tort).

Joint tortfeasors are those tortfeasors jointly liable for a single tort. *See Tolbert v. Gerber Indus., Inc.*, 255 N.W.2d 362, 366 n.1 (Minn. 1977); *see also Ritter v. Vill. of Appleton*, 254 Minn. 30, 39, 93 N.W.2d 683, 688 (1958) (recognizing that the defendant was not a joint tortfeasor when he committed a wrong “distinct” from the other tortfeasors that gave rise to a separate action). For example, in *Tarnowski v. Resop*, the defendant was hired to investigate a potential business opportunity for the plaintiff. 236 Minn. 33, 34, 51 N.W.2d 801, 802 (1952). The defendant performed only a “superficial investigation,” adopted the third-party sellers’ false representations about the business, and passed those representations to the plaintiff. *Id.* at 35, 51 N.W.2d at 802. Plaintiff entered into a contract for the purchase of the business, but attempted to rescind that

contract when he learned of the defendant's misrepresentations regarding the extent and results of his investigation and the third-parties' misrepresentations regarding the business. *Id.*

After the third parties refused to return plaintiff's money, the plaintiff sued the third parties and obtained a verdict against them. *Id.* Later, the plaintiff sued the defendant for attorney fees incurred in litigation with the third parties. *Id.* The supreme court concluded that the plaintiff could seek attorney fees from the defendant, rejecting the defendant's arguments that such fees were not recoverable because defendant and the third parties were joint tortfeasors. *Id.* at 41, 51 N.W.2d at 805. The supreme court explained that the third parties and the defendant were "not joint tortfeasors in the sense that their wrongful conduct necessarily grows out of the same wrong," and concluded that although "[t]heir individual torts may have been based on the same fraud, . . . their liabilities to plaintiff do not have the same limitations. In simple terms, the causes of action are not the same." *Id.*

Here, MinnComm alleges that YCA was negligent in creating the plans and specifications for the project. There is no assertion that the city worked with YCA in creating the plans and specifications or that the city otherwise participated in YCA's alleged tortious act. The city's wrongful conduct consisted of breaching its obligation to provide constructible designs for the project. Although the allegations of wrongdoing against YCA and the city involve, to some degree, the design plans, the two actions are not the same: the action against YCA sounds in negligence and the action against the city sounded in contract. Because the causes of action are not the same and the wrongful

conduct did not grow out of the same wrong, the city and YCA are not joint tortfeasors. *See Tarowski*, 236 Minn. at 41, 51 N.W.2d at 805. The district court therefore erred in concluding that the third-party-litigation exception does not apply to MinnComm’s claim seeking attorney fees from YCA.

YCA offers alternative arguments to support the district court’s conclusion that the third-party-litigation exception is inapplicable. YCA first argues that the application of the third-party litigation exception applies in only “a few narrowly circumscribed contexts.” We disagree. No appellate court of this state has specifically narrowed application of the third-party-litigation exception to the categories suggested by YCA. The only prerequisites that apply to a request for attorney fees under the third-party-litigation exception are that (1) the action giving rise to the attorney fees must have been “conducted as a natural and proximate consequence of the defendant’s tortious action,” and (2) the plaintiff must have brought the action “in good faith with reasonable ground for believing that its outcome would reimburse him for the damages occasioned thereby.” *Groth*, 259 Minn. at 500, 108 N.W.2d at 623. YCA’s attempt to further limit the application of the third-party-litigation exception finds no support in the caselaw. *See id.* at 500, 108 N.W.2d at 622 (rejecting a breach-of-contract exception to the third-party-litigation rule).

YCA also contends that the record does not show a genuine issue of material fact regarding a necessary element of MinnComm’s attorney-fees claim: causation. A claimant may recover attorney fees under the third-party-litigation exception only if the claimant establishes that the tortfeasor’s conduct proximately caused the third-party

litigation. *Id.* at 500, 108 N.W.2d at 623. A tortious act is the proximate cause of an injury when “the act [is] one which the party ought, in the exercise of ordinary care, to have anticipated was likely to result in injury to others.” *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995) (quotation omitted). The supreme court has examined the causal requirement of the third-party-litigation exception using a “but-for” analysis. *See Kallok v. Medtronic, Inc.*, 573 N.W.2d 356, 363 (Minn. 1998) (“It is undeniable that but for [a new employer’s] tortious actions, [the previous employer] would not have had to enforce its valid noncompete agreements with [its employee].”).

YCA relies primarily on the supreme court’s holding in *Osborne* and contends that “*Osborne* controls in the analysis of whether YCA’s alleged [negligence] constitutes a ‘direct and proximate’ cause of [MinnComm’s] attorney[] fees in the [f]ederal [a]ction.” In *Osborne*, the defendant negligently caused a fire in a home owned by the plaintiffs. 574 N.W.2d at 65. Plaintiffs pursued claims with their insurer, but the insurer rejected some of the claims, resulting in a months-long dispute before the claims were resolved. *Id.* at 65-66. Plaintiffs then sued the defendant seeking, among other things, damages in the form of attorney fees incurred in pursuit of their claims against the insurer. *Id.* at 66. The supreme court held that “a tortfeasor should not be held liable, pursuant to the third-party-litigation rule, for attorney fees incurred by an insured in a failure-to-settle action, absent proof that the insurer did not breach its contract.” *Id.* at 69. And under the facts of that particular case, the supreme court concluded that, “[a]s a matter of law, . . . [the tortfeasor]’s negligence did not proximately cause the [plaintiffs] to enter into litigation with [the insurer]—[the insurer]’s failure to settle did.” *Id.*

The supreme court's holding is based on an implicit conclusion that the litigation between the plaintiffs and the insurer was not a reasonably anticipated consequence of the defendant's tortious conduct. We do not construe *Osborne* as establishing a rule that a breach of contract by a third party may never be a reasonably foreseeable consequence of a tortious act. Such a rule would constitute a departure from precedent, including the supreme court's decision one week earlier in *Kallok*. See *Kallok*, 573 N.W.2d at 363 (recognizing that litigation to enforce a noncompete covenant was a reasonably foreseeable consequence of tortious interference with the noncompete covenant); see also *Groth*, 259 Minn. at 500, 108 N.W.2d at 622 (rejecting the defendant's contention that because the third-party litigation rose out of the third party's breach of contract and the defendant did nothing to induce such breach, the defendant should not be compelled to reimburse the plaintiff for its expenses therein).

Moreover, as the supreme court recognized in *Osborne*, “[p]roximate cause is a question of fact, except when the facts are undisputed and are reasonably susceptible of but one inference.” 574 N.W.2d at 69 (quotation omitted). Our examination of the factual record in this case indicates that there is a genuine issue of material fact regarding whether YCA's alleged tortious act proximately caused MinnComm's litigation with the city. See *Osborne*, 574 N.W.2d at 69. In summary, because the district court's summary-judgment dismissal was based on the erroneous conclusion that the third-party-litigation exception to the American rule is inapplicable and there are genuine issues of material fact regarding application of the exception, the dismissal was in error.

## II.

In YCA's related appeal, it offers several alternative arguments in support of the district court's grant of summary judgment. We address each in turn.

### *Res Judicata*

YCA argues that the doctrine of res judicata bars MinnComm's claim against YCA. The doctrine of res judicata precludes a party from pursuing a claim commenced after the completion of a prior action 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) (quotation omitted). "Res judicata applies equally to claims actually litigated and to claims that could have been litigated in the earlier action." *Id.* The application of res judicata is a question of law, which we review de novo. *Id.*

The party or privity prong of the res judicata analysis is dispositive in this case. *See Rucker v. Schmidt*, 794 N.W.2d 114, 117 (Minn. 2011) ("All four prongs must be met for res judicata to apply." (quotation omitted)). It is undisputed that YCA was not a party to the prior federal litigation with MinnComm. Moreover, YCA does not argue that it was in privity with either the city or Granite Re in the federal action, arguing instead that an "exception" to the privity requirement applies here. YCA cites *Gammel v. Ernst & Ernst*, 245 Minn. 249, 72 N.W.2d 364 (1955), as support.

In *Gammel*, the supreme court explained that “a plaintiff, who has selected his forum and presented his proof on an *issue*, is bound by the judgment rendered therein on such *issue* in any subsequent action, even though against another party, since public policy should not permit retrial of an *issue* each time a new defendant can be found.” 245 Minn. at 257, 72 N.W.2d at 369 (emphasis added). Thus, the plaintiff in *Gammel* was not permitted to relitigate the issue of fraud in a subsequent action against a new defendant. *Id.* at 258, 72 N.W.2d at 370.

Although language in *Gammel* refers to the doctrine of res judicata, it is clear that the court was discussing the doctrine of collateral estoppel or issue preclusion. “Res judicata, or claim preclusion, prevents parties from splitting claims into more than one lawsuit and precludes further litigation of the same claim. Collateral estoppel, or issue preclusion, prevents a party from relitigating issues actually litigated and necessarily determined in a prior lawsuit.” *Loo v. Loo*, 520 N.W.2d 740, 744 n.1 (Minn. 1994) (citation omitted). In *Gammel*, the court stated that “a plaintiff who deliberately selects his forum and there unsuccessfully presents his proofs, is bound by such adverse judgment in a second suit involving all the identical *issues* already decided.” 245 Minn. at 257, 72 N.W.2d at 369 (emphasis added) (quotation omitted). The court further stated that the requirement of mutuality must yield to public policy, because to hold otherwise “would be to allow repeated litigation of identical questions, expressly adjudicated, and to allow a litigant having lost on a question of fact to re-open and re-try all the old *issues* each time he can obtain a new adversary not in privity with his former one.” *Id.* (emphasis added) (quotation omitted). The supreme court has since recognized that its

*Gammel* holding eliminated the mutuality requirement of collateral estoppel. *See Aufderhar v. Data Dispatch, Inc.*, 452 N.W.2d 648, 652 (Minn. 1990) (recognizing that “Minnesota rejects the ‘mutuality’ requirement some jurisdictions have imposed upon the use of collateral estoppel” and citing to *Gammel* as “abandonment of the ‘mutuality’ rule”). In sum, *Gammel* did not do away with the privity requirement of res judicata or claim preclusion.

YCA’s reliance on *Nevada v. United States*, 463 U.S. 110, 103 S. Ct. 2906 (1983) is similarly misplaced. While the Supreme Court recognized in *Nevada* that “exceptions to the *res judicata* mutuality requirement have been found necessary” in certain cases, (including that case), *Nevada* involved a very fact-specific and comprehensive adjudication of water rights to the Truckee River from 1944. 463 U.S. at 113, 143, 103 S. Ct. at 2910, 2925. The Supreme Court recognized that the original adjudication of the water rights was “no garden variety quiet title action,” and that failing to recognize an exception in that case “would make it impossible to ever finally quantify a reserved water right.” *Id.* at 143-44, 103 S. Ct. at 2925.

Relying on the Supreme Court’s stated desire to avoid a manifest injustice, YCA argues that the same reasoning should apply here, to avoid a manifest injustice. *See id.* at 144, 103 S. Ct. at 2925 (recognizing that “under ‘these circumstances it would be manifestly unjust not to permit’” the application of res judicata in subsequent litigation). YCA argues that it settled the city’s indemnification claim against it in reliance on the full and final adjudication of MinnComm’s claims against the city in the federal action. YCA equates its reliance on the outcome of the federal litigation between MinnComm

and the city with the reliance on the prior resolution of water rights in *Nevada*. The comparison is not persuasive. The facts of this case do not give rise to the same concerns that were at issue in *Nebraska*, and we discern no reason to permit an exception to the mutuality requirement of res judicata in this case.

In sum, because YCA does not argue that it was in privity with the city or Granite Re at the time of the federal action, we conclude that the res judicata doctrine does not bar MinnComm's claim for attorney fees without addressing the remaining prongs of the res judicata analysis. *See Rucker*, 794 N.W.2d at 117.

#### *Collateral Estoppel*

YCA contends that the doctrine of collateral estoppel prevents MinnComm from relitigating the issue of YCA's negligence and the issue of whether MinnComm is entitled to attorney fees. The doctrine of collateral estoppel prevents parties from relitigating identical issues determined in a prior action. *Heine v. Simon*, 702 N.W.2d 752, 761 (Minn. 2005). "Whether collateral estoppel is available presents a mixed question of law and fact that we review de novo." *Id.* If the doctrine applies, the decision to apply it is left to the discretion of the district court. *In re Estate of Perrin*, 796 N.W.2d 175, 179 (Minn. App. 2011), *review denied* (Minn. June 28, 2011). To apply the doctrine of collateral estoppel, all four of the following prongs must be met:

- (1) the issue must be 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 v. Beckingham*, 686 N.W.2d 829, 837 (Minn. 2004) (quotation omitted).

The identical-issue prong of the collateral-estoppel analysis is dispositive. The district court correctly concluded that the federal district court did not consider or determine whether YCA was negligent in its preparation of the plans. Moreover, the attorney-fees issues in the federal action and the first state action concerned the city's liability for MinnComm's fees under the Prompt Payment Act and Granite Re's attorney fees under the doctrine of indemnity. YCA's liability for MinnComm's attorney fees under the third-party-litigation exception was not raised or decided in either lawsuit. We therefore conclude that the doctrine of collateral estoppel does not bar MinnComm's claim for attorney fees without addressing the remaining prongs of the collateral-estoppel analysis.

#### *Waiver*

Finally, YCA claims that MinnComm waived the ability to assert a claim for attorney fees against YCA by failing to pursue all of its pleaded claims against the city in prior litigation, citing to *Morehart v. Furley*, 152 Minn. 388, 188 N.W. 1001 (1922). “[O]nce a plaintiff has litigated his claim(s) and entered a judgment, he must abide by that judgment both as to claims he *might* have raised in the action and as to claims actually raised. The plaintiff cannot go back into court to seek judgment on claims that should have been litigated in the original action but that he neglected to pursue.” *State Bank of Morristown v. Labs*, 275 N.W.2d 37, 40 (Minn. 1979) (citing *Morehart*, 152 Minn. at 390, 188 N.W. at 1001-02).

In *Morehart*, the plaintiff sought to recover a commission earned on the sale of real estate. 152 Minn. at 389, 188 N.W. at 1001. The case went to trial and a verdict was

rendered for the plaintiff. *Id.* The judgment was affirmed on appeal. *Id.* The defendant subsequently moved to vacate the judgment. *Id.* The district court granted the motion and vacated the judgment because it did not “dispose of the issue raised by the allegations of the complaint.” *Id.* The supreme court “observed that the judgment simply ignored one of plaintiff’s affirmative claims.” *Id.* at 390, 188 N.W. at 1001. The supreme court reversed the order to vacate, reasoning that because the plaintiff “went through a trial, obtained a verdict and caused a money judgment to be entered,” he had waived the other claims that were asserted in his complaint. *Id.* Because MinnComm has not previously pleaded and litigated any claims against YCA, *Morehart* is factually distinguishable and therefore inapplicable.

Because the doctrines of res judicata, collateral estoppel, and waiver do not bar MinnComm’s claim in this case, YCA is not entitled to summary judgment on these grounds. But because the summary-judgment dismissal was based on the erroneous conclusion that the third-party-litigation exception is inapplicable and there are genuine issues of material fact regarding its application, the dismissal was in error. We therefore affirm in part, reverse in part, and remand for further proceedings.

**Affirmed in part, reversed in part, and remanded.**