

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0035**

Dr. Ba Lam,
Appellant,

vs.

County of Ramsey, Minnesota, et al.,
Respondents.

**Filed January 27, 2009
Affirmed
Stoneburner, Judge**

Ramsey County District Court
File No. 62C805012545

Alfred Stanbury, Stanbury Law Firm, P.A., 2209 St. Anthony Parkway, Minneapolis,
MN 55418 (for appellant)

Susan Gaertner, Ramsey County Attorney, C. David Dietz, Assistant County Attorney,
Suite 560, Ramsey County Government Center West, 50 West Kellogg Boulevard,
St. Paul, MN 55102-1556 (for respondent)

Considered and decided by Stoneburner, Presiding Judge; Peterson, Judge; and
Halbrooks, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

A jury found that respondent county did not intentionally or negligently create or
maintain a nuisance alleged by appellant landowner and that appellant sustained zero
damages. Appellant challenges denial of his motion for judgment as a matter of law or a

new trial arguing that the district court erred or abused its discretion by: (1) summarily dismissing his breach-of-contract claim for failure to present evidence of damages; (2) denying his motion to add a claim of punitive damages; (3) dismissing named employees of respondent county; (4) refusing to apply the doctrine of res judicata to bar defenses asserted by respondent; (5) ordering certain discovery; and (6) awarding costs and disbursements. Respondent noticed review of the district court's denial of summary judgment on appellant's nuisance claim. Because the district court did not abuse its discretion in denying appellant's posttrial motions or in awarding costs and disbursements, we affirm.

FACTS

In October 2002, appellant Dr. Ba Lam sued respondent Ramsey County (the county), alleging multiple causes of action, including nuisance, mental anguish, taking of property, discrimination, and trespass, as a result of his dispute with the county over drainage problems that resulted from Lam's landscaping in the county's right-of-way easement on Lam's property.¹ The lawsuit was settled by an Agreement and Release (the Agreement) signed by the parties in April 2005. Under the Agreement, the county stipulated that it would construct a new drainage system, extend a curb "to the western

¹ The county moved for summary judgment on all claims. The district court granted the motion in part but denied summary judgment on the trespass and nuisance claims. The county appealed, arguing that official immunity barred the trespass claim. The county also petitioned for discretionary review of denial of summary judgment on the nuisance claim. Lam noticed review of summary judgment on his discrimination and taking claims. This court declined discretionary review, dismissed Lam's notice of review and affirmed the district court's denial of summary judgment on the trespass claim. *Lam v. County of Ramsey*, A03-1753 (Minn. App. June 8, 2004), *review denied* (Minn. Sept. 21, 2004).

edge” of Lam’s property, and place a new catch basin (drain) on the paved portion of Lake Johanna Boulevard. The county agreed to complete the work by October 31, 2005, and to pay Lam \$2,100. The county completed the work on November 8, 2005, but the curb was not extended, and the new drain was installed on the unpaved portion of the county’s right of way.

Lam moved the district court to use its constructive civil-contempt powers to strictly enforce the Agreement. The district court, concluding that Lam had not presented evidence of deliberate disregard for a court order, denied the motion. Lam appealed, and this court affirmed. *Lam v. County of Ramsey*, A05-2543 (Minn. App. Aug. 15, 2006).

In December 2005, Lam brought this action against the county and individual county employees for breach of contract and nuisance, asserting that the county breached the Agreement and thereby created or maintained a nuisance. Lam alleged that his property and his enjoyment of his property “have been and will be damaged in an amount in excess of \$50,000.”

In November 2006, the county moved the drain to the paved portion of the boulevard and extended the curb as required by the Agreement. The “nuisance” claimed in the current lawsuit, therefore, involves only conditions that existed from November 2005 to November 2006.

The county moved for summary judgment on Lam’s breach-of-contract claim, arguing that Lam had failed to establish damages. Lam argues that the nuisance is the damage that supports his breach-of-contract claim. The district court granted summary judgment dismissing the breach-of-contract claim for failure to present evidence of

damages. The district court, however, concluded that evidence of damages is not required in a nuisance action and denied summary judgment on Lam's nuisance claim.²

Lam then moved to add a claim for punitive damages. The district court concluded that Lam failed to show a prime facie case of deliberate disregard for his rights or safety and denied the motion. After the district court denied Lam's motion to add a claim for punitive damages, the county requested that the individually named county employees be dismissed from the lawsuit. The district court concluded that the county was ultimately responsible for the acts of the named employees and, over Lam's procedural and substantive objections, dismissed Lam's claims against the individually named county employees.

Lam moved in limine to preclude the county from litigating its right to drain water across his property as a defense to the nuisance claim, asserting that dismissal of his original lawsuit precluded relitigation of that issue under the doctrine of res judicata. The district court implicitly denied Lam's motion by allowing the county to assert defenses to the original nuisance claim.

The district court resolved a discovery dispute by ordering Lam to produce all documents requested by the county over Lam's objection that the documents related to claims that were barred by res judicata. The order stated that Lam would not be able to introduce any documents not produced. Lam then produced only the documents that he intended to introduce into evidence. The district court again ordered Lam to disclose all

² The parties dispute whether the county's motion requested summary judgment on the nuisance claim, but it is undisputed that both Lam and the district court addressed the nuisance claim in connection with the county's motion.

documents requested, and those documents were admitted into evidence at trial over Lam's objections.

After trial, the jury returned a special verdict, finding that the county had not intentionally or negligently created or maintained a nuisance between November 2005 and November 2006. The jury also found that Lam had not sustained any damages as a result of a nuisance created or maintained by the county. This appeal followed.

D E C I S I O N

I. Summary judgment on breach-of-contract claim

We review a summary-judgment decision based on whether there are any genuine issues of material fact and whether the district court erred in its application of law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990).

Lam argues that the district court erred in granting summary judgment on his breach-of-contract claim for failure to establish that any measurable damages resulted from the county's admitted breach of the Agreement to place the drain in the paved portion of the boulevard and extend the curb to the edge of Lam's property. Lam asserts that the district court's holding that his nuisance action could proceed without evidence of measurable damages is inconsistent with dismissal of the breach-of-contract claim. He argues that under *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854), nuisance resulting from the breach was reasonably foreseeable or contemplated by the parties, and, therefore, nuisance damages are recoverable under his breach-of-contract claim. We disagree. The issue in *Hadley v. Baxendale* was the foreseeability of a demonstrable loss of profit due to a breach of contract, and the case does not relieve a plaintiff from the

requirement that there be demonstrable damages to support an action for breach of contract. *See Lassen v. First Bank Eden Prairie*, 514 N.W.2d 831, 838 (Minn. App. 1994) (stating that “*Hadley v. Baxendale* . . . holds that damages recoverable in contract actions are those arising naturally from the breach or those which can reasonably be supposed to have been contemplated by the parties when making the contract as the probable result of that breach”).

There can be no recovery in breach of contract for damages which are remote, conjectural, or speculative. *Jensen v. Duluth Area YMCA*, 688 N.W.2d 574, 578–79 (Minn. App. 2004). Here, Lam presented no evidence of measurable damages for the “annoyance” and “discomfort” that he claims were caused by the breach of contract. The district court did not err by granting summary judgment dismissing Lam’s breach-of-contract action. Additionally, the jury’s determination that the county did not create or maintain a nuisance and that Lam suffered no damages caused by a nuisance moots Lam’s argument that he was damaged by a nuisance created by the county’s breach of contract.

II. Punitive damages

We review an order denying a motion to amend a complaint to add punitive damages for abuse of discretion. *Bjerke v. Johnson*, 727 N.W.2d 183, 196 (Minn. App. 2007), *aff’d* 742 N.W.2d 660 (Minn. 2007). Minn. Stat. § 549.191 (2008) requires a court to grant the moving party permission to amend their claim for punitive damages “if the court finds prima facie evidence in support of the motion” However, “[p]unitive damages shall be allowed in civil actions only upon clear and convincing evidence that

the acts of the defendant show deliberate disregard for the rights and safety of others.”

Minn. Stat. § 549.20, subd. 1(a) (2008). The district court concluded that, at most, Lam demonstrated that the county’s actions were incompetent or inept, but failed to present any factual evidence of a deliberate disregard for his rights or safety. Lam argues that the district court made impermissible credibility findings in assessing his motion to add punitive damages. We disagree. The record is devoid of any evidence that the county acted with deliberate disregard for Lam’s rights or safety. The district court did not abuse its discretion by denying his motion to add a claim for punitive damages.³

III. Grant of the county’s untimely motion to strike individual employees from caption

Lam’s challenge to dismissal of individual county employees is based primarily on the fact that the county’s motion to dismiss the individual employees was not in writing and was, Lam asserts, untimely. But to prevail on appeal, an appellant must show both error and prejudice. *Midway Ctr. Assocs. v. Midway Ctr. Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975). And Lam fails to show how he was prejudiced by the district court’s grant of the county’s request. At oral argument on appeal, Lam conceded that he was not making any claims against the individual employees that were not ultimately the county’s responsibility. The individual employees testified at trial, and Lam was able to fully develop his claims about their actions or inactions. Even if the district court abused its discretion by failing to deny the county’s motion on procedural grounds, Lam has

³ The district court also based denial of the motion on statutory immunity under Minn. Stat. § 466.02 (2008). This ground for denial was not briefed by either party on appeal, and, therefore, we do not address it.

failed to show prejudice, and any error was harmless. Therefore Lam is not entitled to relief on appeal. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored).

IV. Res judicata

Lam argues that the litigation of issues of (1) whether the land underlying the county's right-of-way is Lam's property and (2) whether the county has the right to drain water across that property were decided in his original lawsuit, and the county should have been barred from relitigating those issues by the res judicata effect of the settlement and dismissal of Lam's first lawsuit. "We review de novo whether the doctrine of res judicata can apply to a given set of facts." *Erickson v. Comm'r of Dep't of Human Servs.*, 494 N.W.2d 58, 61 (Minn. App. 1992). "If the doctrine applies, the decision whether to actually apply it is left to the discretion of the trial court." *Id.*

The district court implicitly denied Lam's motion in limine based on res judicata by allowing the county to defend Lam's nuisance claim by asserting its right-of-way easement over the subject property. "Res judicata requires (1) a final judgment on the merits; (2) identical parties or parties in privity; and (3) that the second suit involves the same cause of action." *Mower County Human Servs. v. Graves*, 611 N.W.2d 386, 388 (Minn. App. 2000). "Two causes of action are the same when they involve the same set of factual circumstances or when the same evidence will sustain both actions." *Myers Through Myers v. Price*, 463 N.W.2d 773, 777 (Minn. App. 1990), *review denied* (Minn. Feb. 4, 1991). "A judgment based on a settlement agreement is a final judgment on the merits, but only with respect to those issues and claims actually settled." *Goldberger v. Kaplan, Strangis and Kaplan, P. A.*, 534 N.W.2d 734, 736 n.1 (Minn. App. 1995), *review*

denied (Minn. Sept. 28, 1995). Here, the county did not admit or litigate the existence of a nuisance in Lam's original lawsuit. We conclude that the Agreement and dismissal of the prior lawsuit does not preclude the county's defense in this action. Even if res judicata was applicable, because Lam asserted that the county maintained an existing nuisance, the district court did not abuse its discretion by failing to prevent the county from presenting evidence of the origin and history of the current claim to argue that a nuisance never existed on Lam's property.

V. Discovery and admission of evidence

Lam argues that the district court abused its discretion by ordering him to produce photographs and a diary that were created prior to the Agreement. But the district court has wide discretion to issue discovery orders; absent clear abuse of that discretion, we will normally not disturb a discovery order. *Shetka v. Kueppers, Kueppers, Von Feldt & Salmen*, 454 N.W.2d 916, 921 (Minn. 1990). The origin of the current alleged nuisance was relevant, and the documents requested were not privileged. The district court did not abuse its discretion in requiring production of all documents requested. Lam's reading of the district court's order to require production of only documents that Lam wanted placed in evidence is absurd. The district court plainly ordered Lam to produce *all* documents requested.

Lam also challenges the admission into evidence of the documents that he was required to produce. But Lam's failure to brief this issue waives consideration of the issue on appeal. *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982).

VI. Award of costs and disbursements

Lam argues that the district court abused its discretion by allowing the county to tax a portion of the mediation fee and motion filing fees. This argument is frivolous; Minn. Stat. § 357.021, subd. 2(4) (2008), includes motion filing fees as allowable costs. And Minn. Gen. R. Pract. 114.11(b) gives the district court authority to determine final allocation of the costs of alternative dispute resolution (ADR) where the parties have failed to agree on allocation of ADR costs. The district court did not abuse its discretion by awarding costs and disbursements.

VII. County's challenge to district court's denial of summary judgment on nuisance claim

The county filed a notice of review challenging the district court's denial of its motion for summary judgment on Lam's nuisance claim. The jury verdict finding that the county did not intentionally or negligently create a nuisance and that Lam did not suffer any damages resulting from a nuisance created by the county makes this issue moot.

Affirmed.