STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0413

Pamela K. Hanson,
Appellant,

vs.

Northern J & B Enterprises, Inc., et al.,
Respondents.

Filed February 3, 2009
Affirmed in part and reversed in part
Halbrooks, Judge

Cass County District Court
File No. 11-CV-06-1779

Steven A. Nelson, 210 Fourth Avenue, International Falls, MN 56649 (for appellant)

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

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

HALBROOKS, Judge

Appellant challenges the district court's denial of her motion for a new trial on the grounds that the district court abused its discretion by not redacting portions of the liability-release form that she had signed and by giving negligence and comparative-fault

instructions to the jury. By notice of review, respondents argue that the district court erred in finding that res judicata did not bar this claim and that, as a matter of law, respondents' statements did not constitute an express warranty. Because we conclude that the district court did not abuse its discretion in its evidentiary rulings or in its jury instructions or err in its denial of respondents' motion for directed verdict, we affirm in part. But because we conclude that the district court erred by denying respondents' summary-judgment motion, we also reverse in part.

FACTS

Respondent Northern J & B Enterprises is a corporation that operates the Moondance Ranch and Wildlife Park; respondents Kathy Bieloh and William Bieloh are the sole shareholders of Northern J & B Enterprises. On June 26, 2002, appellant Pamela Hanson went to Moondance Ranch to go horseback riding. Before riding, appellant was given a document entitled Horse Rental Agreement and Liability Release Form to read and sign. The form had ten paragraphs that described the nature of horses and the risks involved with horseback riding and included a release-of-liability paragraph. The form also stated that the horses at the ranch were chosen for their "calm dispositions" and that the "stable follow[ed] a rigid risk reduction program." Appellant initialed each paragraph and signed the form.

While appellant was waiting for a horse, she noticed that Princess, the horse that she had been assigned to ride, seemed agitated and was stomping her feet and swaying back and forth. When appellant asked one of respondents' employees about Princess, the

employee responded, "Well, she'll be okay. She's all right. You don't be afraid. . . . You'll be just fine, you'll be just fine."

Appellant mounted Princess and sat for a few minutes without incident. While appellant was sitting on Princess, an employee brought another horse within a few feet of the back of Princess. Princess responded by kicking the second horse, and appellant fell to the ground, sustaining injury.

On December 14, 2004, appellant sued Bill Bieloh and Mrs. Bieloh dba Moondance Ranch & Wildlife Park, alleging negligence. In her complaint, appellant alleged that respondents "and their agents and employees, assured [appellant] that the horse she was on would be safe and gentle." Respondents moved the district court for summary judgment. Contesting the summary-judgment motion, appellant argued that respondents had breached implied and express warranties made by respondents' employee about the horse's nature. The district court granted respondents' motion for summary judgment on the ground that the liability-release paragraph in the rental agreement exculpated respondents from any liability based on negligence. The district court found appellant's breach-of-warranty argument to be meritless because her complaint had not included a breach-of-warranty claim.

On appeal to this court, appellant argued that the liability release was unenforceable, but, alternatively, even if it was enforceable that respondents' conduct constituted gross, not ordinary, negligence and was willful and wanton conduct that was not covered by the liability release. *Hanson v. Bieloh*, No. A06-1619, 2007 WL 1893315, at *1 (Minn. App. July 3, 2007). This court affirmed the district court,

concluding that the district court did not err in finding the release to be enforceable as to ordinary negligence and determining that appellant had failed to produce sufficient evidence to create a genuine issue of material fact concerning whether respondents' conduct was willful, wanton, or grossly negligent. *Id.* at *2-*3. We further concluded that the district court did not err in dismissing the breach-of-warranty claim when it had not been pleaded. *Id.* at *3.

Five days before the district court issued its order granting respondents' motion for summary judgment, appellant filed a second lawsuit arising out of the June 26, 2002 incident. The second complaint again named the Bielohs and Moondance Ranch & Wildlife Park but also named Northern J & B Enterprises as a defendant. In this complaint, appellant alleged that respondents had breached implied and express warranties that entitled appellant to damages under Minn. Stat. § 336.2A-520 (2006).

Respondents moved the district court for summary judgment on the ground that the second complaint was barred by res judicata. The district court denied respondents' motion, finding that res judicata was not appropriate because although the claims were related, they were not identical and because the parties were not the same.

Because negligence was not appellant's theory in the second complaint, the district court redacted the liability-release paragraph from the horse rental agreement that was subsequently admitted into evidence. During trial, respondents moved for a directed verdict, arguing that, as a matter of law, the statements made by respondents' employee to appellant did not constitute an express warranty. The district court denied

respondents' motion, finding that the express-warranty issue was a fact question for the jury.

When the district court instructed the jury, it included instructions on comparative fault and negligence. The special-verdict form asked the jury whether respondents made any warranty to appellant and, if so, whether respondents breached any warranty. The jury found a warranty but no breach. The special-verdict form also asked the jury to find whether appellant was negligent and, if so, whether her negligence was a direct cause of her damages. The jury did not answer the negligence question but did answer the direct-cause question, responding, "No."

Appellant moved the district court for a new trial on the grounds that the district court erred by denying her motion to amend the complaint to add a claim for punitive damages and abused its discretion by not redacting paragraphs E through J of the horse rental agreement; by instructing the jury on negligence and comparative fault; by giving an instruction that referred to a sale of goods that appellant claimed confused the jury; and by not listing specific warranties in the special-verdict form. The district court denied appellant's motion. This appeal follows.

D E C I S I O N

Before this court, appellant raises two issues: whether the district court abused its discretion by its evidentiary ruling on what paragraphs in the horse rental agreement were admitted into evidence and by instructing the jury on negligence and comparative fault. By notice of review, respondents challenge the district court's denial of summary judgment based on res judicata. Because we conclude that the district court erred by

denying summary judgment to respondents on res judicata grounds and, therefore, that trial in this matter was not warranted, we first address that issue.

I.

Respondents contend that the district court erred in not granting summary judgment based on res judicata. Appellant did not address this issue in her principal brief; nor did she submit a reply brief. "The application of the doctrine of res judicata is a question of law that we review de novo." *Care Inst., Inc.-Roseville v. County of Ramsey*, 612 N.W.2d 443, 446 (Minn. 2000).

The doctrine of res judicata prohibits parties to an action "from raising any matter in a second suit that was or could have been litigated in the first suit." *Id.* at 447. "The doctrine applies when the parties to the two actions are the same, the second suit is for the same cause of action, and the original judgment was on the merits." *Id.*

In its order denying summary judgment, the district court stated:

> The Court finds that all four elements of res judicata are not met in this instance. While the two actions are related, they are not identical. The original action of December 14, 2004, focused on a claim of negligence, while the current claim is alleging breach of warranty. The evidence used to prove a breach of warranty will be different than evidence used to prove a negligence claim. Thus, the same evidence will not sustain both actions. The parties in the current action are also different than the parties involved in the original December 14, 2004 action. The current action includes Northern J&B Enterprises, Inc., which was not a party named in the December 14, 2004 action.

On review, we must first determine whether the parties in both suits were the same. "[T]he parties to the separate actions must either be identical or in privity with identical parties." *SMA Servs., Inc. v. Weaver*, 632 N.W.2d 770, 774 (Minn. App. 2001). The term "privity" refers to "those so connected with one another in law as to be identified with each other in interest." *Id.* "An individual who has full ownership of a corporation and is in complete control of its affairs is presumed to have a sufficient common interest to be in privity with the corporation." *Id.* (quotation omitted).

Here, the named defendants in the first lawsuit were "Bill Bieloh and Mrs. Bieloh dba Moondance Ranch & Wildlife Park." The named defendants in the second lawsuit were "Northern J & B Enterprises, Inc. a Minnesota Corporation; William Bieloh and Kathy Bieloh, individually and d/b/a Moondance Ranch & Wildlife Park." The only difference between the two sets of defendants is the addition of Northern J & B Enterprises and William and Kathy Bieloh, individually, in the second lawsuit. But William and Kathy Bieloh are the sole shareholders of Northern J & B Enterprises, and the only function of Northern J & B Enterprises is to run Moondance Ranch. The evidence was undisputed that the Bielohs had complete control of Northern J & B Enterprises and Moondance Ranch. We therefore conclude that both lawsuits involved the same parties or their privies.

We next examine whether the two actions "involve[d] the same set of factual circumstances or [whether] the same evidence [would] sustain both actions." *Id.* In *Care Inst., Inc.*, the supreme court held that the two claims were not the same cause of action because the two claims involved different tax years. 612 N.W.2d at 447-48. Here, both

claims arose out of the same incident. Both claims relate to the horse that respondents provided appellant and involve representations made by respondents. The same evidence would have sustained either lawsuit. Accordingly, we conclude that both claims arose out of the same set of factual circumstances.

The third res judicata factor is whether the original judgment was on the merits. A judgment is final when it is entered by the district court and only loses that status when reversed or modified by an appellate court. *Brown-Wilbert, Inc. v. Copeland Buhl & Co.*, 732 N.W.2d 209, 221 (Minn. 2007). The first lawsuit resulted in a final judgment on the merits—summary judgment that was affirmed by this court. *Hanson*, 2007 WL 1893315, at *2–*3. Summary judgment is a judgment on the merits. *Dollar Travel Agency, Inc. v. Nw. Airlines, Inc.*, 354 N.W.2d 880, 882 (Minn. App. 1984), *review denied* (Minn. Dec. 21, 1984). Appellant did not petition the Minnesota Supreme Court for review of our decision. Therefore, there was a final judgment on the merits.

Because all of the elements of res judicata existed and appellant's breach-of-warranty claim could have been brought in the first lawsuit, we conclude that the district court erred in denying respondents' motion for summary judgment. We therefore reverse on this issue.[1]

[1] Respondents also argue that the district court erred in denying their motion for a directed verdict because, as a matter of law, the statements made to appellant by respondents' employee did not constitute an express warranty. Appellant neither addressed this issue in her principal brief nor submitted a reply brief. Because of our conclusion that the district court erred by denying summary judgment on res judicata grounds to respondents, we do not address respondents' additional argument.

II.

Although our reversal of the district court's denial of summary judgment to respondents is dispositive, and we conclude that the matter should not have proceeded to trial, we will also address the issues that appellant raised in her brief. *See McGovern v. City of Minneapolis*, 480 N.W.2d 121 (Minn. App. 1992) (reversing denial of summary judgment to defendants and affirming district court on other issues), *review denied* (Minn. Feb. 27, 1992); *see also* Minn. R. Civ. App. P. 103.04 (providing for review of other matters on appeal "in the interest of justice").

Appellant has challenged the district court's determination that only paragraph K would be redacted from the horse rental agreement and the district court's instructions to the jury on negligence and comparative fault. "Evidentiary rulings . . . are committed to the sound discretion of the [district] court and those rulings will only be reversed when that discretion has been clearly abused." *Pederson v. United Servs. Auto. Ass'n*, 383 N.W.2d 427, 430 (Minn. App. 1986).

"To establish a warranty claim the plaintiff must . . . prove: the existence of a warranty, a breach, and a causal link between the breach and the alleged harm." *Peterson v. Bendix Home Sys., Inc.*, 318 N.W.2d 50, 52-53 (Minn. 1982). An express warranty is created by "[a]ny affirmation of fact or promise made by the lessor to the lessee which relates to the goods and becomes part of the basis of the bargain" or "[a]ny description of the goods which is made part of the basis of the bargain." Minn. Stat. § 336.2A-210(1)(a)-(b) (2008). The supreme court has held "[n]o particular words are required to constitute an express warranty, and the representations made must be interpreted as an

ordinary person would understand their meaning, with any doubts resolved in favor of the user." *McCormack by McCormack v. Hankscraft Co.*, 278 Minn. 322, 336, 154 N.W.2d 488, 498 (1967).

An implied warranty can consist of either the implied warranty of merchantability or the implied warranty of fitness for a particular purpose. Minn. Stat. §§ 336.2A-212 to .2A-213 (2008). The implied warranty of merchantability requires goods to be "fit for the ordinary purposes for which goods of that type are used." Minn. Stat. § 336.2A-212(2)(c). The implied warranty of fitness for a particular purpose requires that the goods "be fit for th[e] purpose" that the lessee specifies. Minn. Stat. § 336.2A-213.

"Whether a given representation constitutes a warranty is ordinarily a question of fact for the jury." *Crothers by Crothers v. Cohen*, 384 N.W.2d 562, 563 (Minn. App. 1986), *review denied* (Minn. June 13, 1986). The district court here redacted paragraph K, entitled "Liability Release," from the Horse Rental Agreement and Liability Release Form because the issue of negligence had been resolved by summary judgment in the first lawsuit, but left the rest of the form intact.

The redacted paragraph K stated:

> LIABILITY RELEASE I AGREE THAT: In consideration of THIS STABLE allowing my participation in this activity, under the terms set forth herein, I, the rider . . . , do agree to hold harmless, release, and discharge THIS STABLE, its owners, agents, employees, . . . from all claims, demands, causes of action and legal liability, whether the same be known or unknown, anticipated or unanticipated, due to THIS STABLE'S . . . ordinary negligence; and I do further agree that except in the event of THIS STABLE'S gross

> negligence and willful and wanton misconduct, I shall not bring any claims, demands, legal actions and causes of action, against THIS STABLE . . . as stated above in this clause, for any economic and non-economic losses due to bodily injury, death, property damage, sustained by me . . . in relation to the premises and operations of THIS STABLE, to include while riding, handling, or otherwise being near horses owned by or in the care, custody and control of THIS STABLE, whether on or off the premises of THIS STABLE.

The other paragraphs that addressed the risks involved in horseback riding that were not redacted stated:

> C. ACTIVITY RISK CLASSIFICATION–I UNDERSTAND THAT: Horseback riding is classified as RUGGED ADVENTURE RECREATIONAL SPORT ACTIVITY, and that there are numerous obvious and non-obvious inherent risks always present in such activity despite all safety precautions. According to NEISS (National Electronic Injury Surveillance Systems of United States Consumer Products) horse activities rank 64th among the activities of people relative to injuries that result in a stay at U.S. hospitals. Related injuries can be severe requiring more hospital days and resulting in more lasting residual effects than injuries in other activities. . . .
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> D. NATURE OF STABLE HORSES–I UNDERSTAND THAT: THIS STABLE chooses its rental horses for their calm dispositions and sound basic training as is required for use as riding horses for novice and beginning riders, and THIS STABLE follows a rigid risk reduction program. Yet, no horse is a completely safe horse. Horses are 5 to 15 times larger, 20 to 40 times more powerful, and 3 to 4 times faster than a human. If a rider falls from horse to ground it will generally be at a distance of from 3 1/2 to 5 1/2 feet, and the impact may result in injury to the rider. Horseback riding is the only sport where one much smaller, weaker predator animal (human) tries to impose its will on another much larger, stronger prey animal with a mind of its own (horse) and each has a limited understanding of the other. If a horse is frightened or provoked it may divert from its training and act

> according to its natural survival instincts which may include, but are not limited to: Stopping short; Changing directions or speed at will; Shifting its weight; Bucking, Rearing, Kicking, Biting, or Running from danger.
>
> E. RIDER RESPONSIBILITY–I UNDERSTAND THAT: Upon mounting a horse and taking up the reins the rider is in primary control of the horse. The rider's safety largely depends upon his/her ability to carry out simple instructions, and his/her ability to remain balanced aboard the moving animal. I agree that the rider shall be responsible for his/her own safety . . . .

Appellant's theory at trial was that respondents' written agreement and their employee's statements to appellant that she would be "just fine" and that Princess would be "okay" created implied and express warranties that were breached by respondents' actions in selecting an inappropriate horse for her and by bringing a second horse too close to Princess, who was known to sometimes kick other horses behind her. Because the unredacted portions of the rental agreement were relevant to both appellant's claims and respondents' defense, we conclude that the district court acted within its discretion in its evidentiary ruling.

Appellant argues that the district court should not have instructed the jury on negligence and comparative fault because the issue of negligence was resolved in the prior lawsuit. When jury instructions fairly and correctly state the applicable law, an appellate court will not grant a new trial. *Alevizos v. Metro. Airports Comm'n*, 452 N.W.2d 492, 501 (Minn. App. 1990), *review denied* (Minn. May 11, 1990). Appellate courts will not reverse a district court's decision unless the instructions constituted an abuse of discretion. *Alholm v. Wilt*, 394 N.W.2d 488, 490 (Minn. 1986).

"A party is entitled to a jury instruction that sets forth his or her theory of the case if evidence supports it and if it is consistent with the applicable law." *Kirsebom v. Connelly*, 486 N.W.2d 172, 174 (Minn. App. 1992). When a party alleges a breach of a warranty, that party may seek consequential damages, which can include "injury to person or property proximately resulting from any breach of warranty." Minn. Stat. § 336.2A-520(2)(b) (2008). Comparative fault is a valid defense to a breach-of-warranty claim when consequential damages are sought. *Peterson*, 318 N.W.2d at 53.

It is undisputed that appellant claimed consequential damages for her injuries resulting from respondents' alleged breach of warranty. As a result, respondents had the right to assert the defense of comparative fault and to ask the district court to instruct the jury in accordance with their theory and the evidence in support of it. In discussion with counsel, the district court stated that a negligence instruction was warranted because "[w]hen [appellant] went out and saw the horse and it started jostling around, whether a reasonable person would get on the horse or not. And I think that's a jury question . . . ." Because appellant testified that she saw Princess acting skittish before she got on her, there was evidence on which the jury could have found that appellant's actions were negligent.

Regardless, as respondents argue, any possible error relating to the comparative-fault and negligence instructions was harmless. "Entitlement to a new trial on the grounds of improper evidentiary rulings rests upon the complaining party's ability to demonstrate prejudicial error." *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 46 (Minn. 1997) (quotation omitted). Here, the jury answered "No" to the question of "Did

[appellant]'s negligence cause her damages?" Based on this record, we conclude that the district court did not abuse its discretion when it instructed the jury on the issue of negligence and comparative fault.

Affirmed in part and reversed in part.