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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0890**

650 North Main Association,
Respondent,

vs.

Frauenshuh, Inc.,
Defendant,

Territorial Springs Riverview, LLC, et al.,
Respondents,

Kraus-Anderson Construction Company,
Appellant,

Doe Affiliates 1-20, et al.,
Defendants,

and

Kraus-Anderson Construction Company,
Defendant and Third Party Plaintiff,

vs.

Berwald Roofing Company, Inc., et al.,
Third Party Defendants.

**Filed April 9, 2018
Affirmed
Johnson, Judge**

Washington County District Court
File No. 82-CV-11-6366

Hannah R. Stein, Levin Law Group, LLP, Minneapolis, Minnesota (for respondents)

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Considered and decided by Johnson, Presiding Judge; Cleary, Chief Judge; and Kirk, Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

After a jury trial and post-trial motions, the district court denied relief on a defendant's cross-claim because the cross-claimant was not liable to the plaintiff for the conduct of the co-defendant against which the cross-claim was alleged. On appeal, this court reversed in part and concluded that the cross-claimant *is* liable to the plaintiff for the co-defendant's conduct. The cross-claimant then moved for relief from the earlier judgment under rule 60.02 of the rules of civil procedure and requested leave to proceed on its cross-claim. The district court granted the motion because the cross-claimant's successful defense on the plaintiff's underlying claim was "the very premise" on which the district court had denied relief on the cross-claim and that this court's subsequent opinion "radically altered the reason for the previous denial" of relief on the cross-claim. We conclude that rule 60.02 authorizes relief from the prior judgment in these circumstances and, therefore, affirm.

FACTS

This construction-defect case is on appeal for a second time. The case was tried to a Washington County jury in February 2014, and the district court entered final judgment in August 2015 after resolving post-trial motions. This court affirmed in part, reversed in

part, and remanded. *650 North Main Ass’n v. Frauenshuh, Inc.*, 885 N.W.2d 478 (Minn. App. 2016), *review denied* (Minn. Nov. 23, 2016). This appeal concerns an order issued by the district court after the remand. We will recite in simplified fashion the facts and procedural history that are directly relevant to this appeal, and we refer the reader to our prior opinion for a more detailed version of the history of the case.

In 2005, two development companies, Territorial Springs Riverview, LLC and Frauenshuh Sweeney, LLC, both of which are wholly owned by Frauenshuh, Inc. (and, thus, are collectively identified in this opinion as Frauenshuh), hired Kraus-Anderson Construction Company to build a condominium building at 650 North Main Street in the city of Stillwater. Residents of the building later discovered water damage. In September 2011, the homeowners’ association, 650 North Main Association, sued Frauenshuh and Kraus-Anderson. Frauenshuh alleged a cross-claim against Kraus-Anderson based on a contractual right to indemnification or contribution.

In February 2014, at the conclusion of an 11-day trial, a Washington County jury found that Frauenshuh did not commit a breach of warranty, that the project’s architect (which was not a party to the case) designed the project in a defective manner, and that Kraus-Anderson committed a breach of statutory warranty. The jury found that the association sustained damages of \$202,500. The jury also found that the association did not give timely notice of the construction defects to either Frauenshuh or Kraus-Anderson and that Frauenshuh and Kraus-Anderson did not have actual notice of the defects. On July 10, 2014, the district court issued an order stating that, in light of the lack of notice,

the association is not entitled to an award of damages against either defendant. On the same date, the district court administrator entered judgment “in favor of the defendants.”

The parties filed post-trial motions. The association moved for judgment as a matter of law (JMOL) or, in the alternative, a new trial. In January 2015, the district court granted the association’s motion in part on the ground that Frauenshuh is vicariously liable for the architect’s defective design. But the district court denied the association’s motion in part on the ground that Frauenshuh is not liable for Kraus-Anderson’s defective construction. The district court ordered judgment for the association and against Frauenshuh in the amount of \$101,250. Frauenshuh moved for JMOL on its cross-claim against Kraus-Anderson for contractual indemnification or contribution. The district court denied the motion on the ground that Frauenshuh was not liable to the association for Kraus-Anderson’s defective construction. On August 4, 2015, the district court administrator entered judgment against Frauenshuh for \$101,250, plus attorney fees, costs, and disbursements.

Frauenshuh filed a notice of appeal, and the association filed a notice of related appeal. See Minn. R. Civ. App. P. 104, subd. 4. In August 2016, this court issued an opinion in which we concluded that the district court erred by denying the association’s motion for JMOL to the extent that the association sought to hold Frauenshuh liable for Kraus-Anderson’s defective construction. *650 North Main Ass’n*, 885 N.W.2d at 489-91. We also concluded that the district court did not err by granting the association’s motion for JMOL to the extent that the association sought to hold Frauenshuh liable for the architect’s defective design. *Id.* at 493-94. Accordingly, with respect to the association’s

claims against Frauenshuh, this court reversed in part and remanded with directions for “the district court to enter judgment for the association for an additional \$101,250.” *Id.* at 500. The supreme court denied Frauenshuh’s petition for further review, and the clerk of appellate courts entered judgment.

In February 2017, Frauenshuh sought to reassert its cross-claim against Kraus-Anderson. Frauenshuh moved for relief under rule 60.02 of the Minnesota Rules of Civil Procedure. Frauenshuh’s motion was based on the fact that, at the conclusion of district court proceedings in August 2015, Frauenshuh was determined to be not liable to the association for Kraus-Anderson’s defective construction, which meant that the district court had no basis to allow Frauenshuh to proceed on its cross-claim against Kraus-Anderson, but that, after this court’s subsequent opinion, Frauenshuh now *is* liable to the association for Kraus-Anderson’s defective construction. Frauenshuh argued to the district court that this court’s opinion “nullified” the premise on which the district court previously had denied Frauenshuh’s motion for JMOL on its cross-claim against Kraus-Anderson. In its memorandum of law in support of its rule 60.02 motion, Frauenshuh expressed its intention to seek leave to amend its complaint to assert an additional claim, a claim of common-law indemnification or contribution.

In May 2017, the district court granted Frauenshuh’s rule 60.02 motion. The district court stated that its earlier decision “denying the motion of [Frauenshuh] for indemnity from Kraus-Anderson is vacated and reopened.” The district court also stated that Frauenshuh “is hereby granted leave to refile their motion seeking contractual indemnity, as well as common law indemnity.” Kraus-Anderson appeals.

DECISION

Kraus-Anderson argues that the district court erred by granting Frauenshuh's motion for relief under rule 60.02.

The rule on which Frauenshuh's motion is based provides as follows:

On motion and upon such terms as are just, the court may relieve a party or the party's legal representatives from a final judgment . . . , order, or proceeding and may order a new trial or grant such other relief as may be just for the following reasons:

(a) Mistake, inadvertence, surprise, or excusable neglect;

(b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial pursuant to Rule 59.03;

(c) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(d) The judgment is void;

(e) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(f) Any other reason justifying relief from the operation of the judgment.

Minn. R. Civ. P. 60.02. To the extent that an appellant challenges a district court's interpretation of a rule of civil procedure, this court applies a *de novo* standard of review. *Cox v. Mid-Minnesota Mut. Ins. Co.*, ____ N.W.2d ____, ____, 2018 WL 522831, at *3 (Minn. Jan. 24, 2018); *see also City of Barnum v. Sabri*, 657 N.W.2d 201, 204 (Minn. App.

2003) (reviewing ruling on rule 60.02 motion). To the extent that an appellant challenges a district court's exercise of discretion under rule 60.02, this court applies an abuse-of-discretion standard of review. *Cole v. Wutzke*, 884 N.W.2d 634, 637 (Minn. 2016); *In re Civil Commitment of Moen*, 837 N.W.2d 40, 44-45 (Minn. App. 2013), *review denied* (Minn. Oct. 15, 2013).

In the district court's memorandum accompanying its order granting Frauenshuh's rule 60.02 motion, the district court quoted paragraphs (e) and (f) of rule 60.02 and provided the following reasons for its ruling:

In *Jacobson v. Cty. of Goodhue*, 539 N.W.2d 623, 625 (Minn. Ct. App. 1995), the Court of Appeals explained that Rule 60.02(e) was to be "interpreted to provide a court broad equitable discretion to modify a judgment in light of changed circumstances." *System Fed'n No. 91 v. Wright*, 364 U.S. 642 (1961); *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932). In *City of Barnum v. Sabri*, 657 N.W.2d 201 (Minn. Ct. App. 2003) the Court of Appeals explained that under Rule 60.02(e), "the main objective is to determine whether changed circumstances exist and, if so, whether they render it inequitable for the judgment to have prospective application." *City of Barnum*, 657 N.W.2d at 207. "Whether it is equitable for a judgment to continue to have prospective application must be determined on a case-by-case basis and requires courts to strike a delicate balance between the sanctity of final judgments . . . and the incessant command of a court's conscience that justice be done in light of all the facts." *Id.* This court's January 23, 2015 JNOV Order and August 5, 2016 judgment were based on the prior July 10, 2014 judgment that found that [Frauenshuh] could not be liable for major construction defects due to lack of notice. When the Court of Appeals reached the opposite conclusion and reversed, the operative language of Rule 60.02(e) was immediately implicated:

The court may relieve a party or the party's legal representatives from a final judgment for the

following reasons . . . a prior judgment upon which it is based has been reversed or otherwise vacated”

Because the Court of Appeals’ opinion reversed this Court’s July 10, 2014 judgment, and this Court’s July 10, 2014 judgment established the very premise upon which its January 23, 2015 JNOV order and August 5, 2015 judgment were decided, Rule 60.02(e) is expressly implicated and provides the basis for the relief sought by [Frauenshuh].

The previous denial of the indemnity motions brought by [Frauenshuh] was made before the Court of Appeals’ opinion was entered. Had the law set forth by the Court of Appeals existed at the time of the JNOV motion and the entry of judgment on August 22, 2015, the court would have been facing an entirely new framework for this litigation. Regardless of the arguments of [Kraus-Anderson] regarding the finality of the judgment, which were made before the Court of Appeals opinion was issued, the court believes that it would simply be inequitable for [Frauenshuh] to be denied the opportunity to file their motions for indemnity and contribution in light of the Court of Appeals opinion, which radically altered the reason for the previous denial in the first place. This court has not passed upon the merits of the claim for contribution and indemnity for the precise reason that, until the issuance of the Court of Appeals opinion, it had no grounds to do so. That has now changed and the court will allow the filing of [Frauenshuh’s] motions.

Kraus-Anderson challenges the district court’s ruling on multiple grounds. We address each of Kraus-Anderson’s contentions in turn.

A.

Kraus-Anderson first contends that the district court erred by considering Frauenshuh’s rule 60.02 motion on the ground that Frauenshuh did not appeal from the district court’s earlier rejection of its cross-claim against Kraus-Anderson and that, as a consequence, the district court’s prior ruling is the law of the case. In response, respondents

contend that the rule 60.02 motion was timely and appropriate because the district court had not previously ruled on the merits of the cross-claim and that relief under rule 60.02 is not foreclosed, regardless of the finality of the prior judgment.

In support of its argument, Kraus-Anderson cites caselaw for the proposition that a party may not rely on rule 60.02 after having made “a considered choice not to appeal.” *See Ackermann v. United States*, 340 U.S. 193, 198, 71 S. Ct. 209, 211 (1950). Kraus-Anderson also cites caselaw for the proposition that a party may not rely on rule 60.02 to reopen a judgment because of judicial error. *See Sullivan v. Spot Weld, Inc.*, 560 N.W.2d 712, 716 (Minn. App. 1997), *review denied* (Minn. Apr. 24, 1997). These authorities do not apply in the circumstances of this case. After the August 4, 2015 judgment, Frauenshuh had no reason to perceive any judicial error with respect to the association’s claim against Frauenshuh for Kraus-Anderson’s defective construction, and Frauenshuh’s rule 60.02 motion is not based on a judicial error in the district court’s original ruling. Because Frauenshuh had successfully defended against that claim, the district court appropriately rejected Frauenshuh’s cross-claim because Frauenshuh had no liability for which indemnification or contribution was necessary. In general, a prevailing party may not file a notice of appeal. *Twin Cities Metro. Pub. Transit Area v. Holter*, 311 Minn. 423, 425, 249 N.W.2d 458, 460 (1977). Kraus-Anderson’s argument implies that Frauenshuh was obligated to file a notice of appeal in anticipation of the possibility that this court might reverse the district court’s ruling that Frauenshuh is not liable to the association for Kraus-Anderson’s defective construction. But this court has rejected that principle, stating, “A respondent who has prevailed in the trial court need not file a ‘contingent’ appeal or notice

of review to preserve the right to seek a remand if the trial court's decision is reversed.” *Andren v. White-Rodgers Co.*, 462 N.W.2d 860, 861 (Minn. App. 1990). Thus, Frauenshuh's decision to not appeal from the district court's rejection of its cross-claim does not foreclose a subsequent motion under rule 60.02.

“Law of the case applies when the appellate court has ruled on a legal issue and remanded for further proceedings on other matters. The issue decided becomes ‘law of the case’ and may not be relitigated in the trial court or reexamined in a second appeal.” *Sigurdson v. Isanti County*, 448 N.W.2d 62, 66 (Minn. 1989). The doctrine “‘applies only to litigated issues and does not reach issues which could have been but were not litigated.’” *Id.* (quoting *Lange v. Nelson-Ryan Flight Service, Inc.*, 263 Minn. 152, 156, 116 N.W.2d 266, 269 (1962)). The law-of-the-case doctrine does not apply in this case because Kraus-Anderson's argument relies on a district court decision, not an appellate decision. In addition, the district court decision did not consider the same issue that is presented by Frauenshuh's rule 60.02 motion because the underlying premise has changed. Furthermore, Kraus-Anderson has not cited any authority for the proposition that the law-of-the-case doctrine supersedes rule 60.02.

Thus, the district court did not err by considering Frauenshuh's rule 60.02 motion despite the fact that Frauenshuh did not appeal from the district court's earlier rejection of its cross-claim.

B.

Kraus-Anderson next contends that, to the extent that the district court based its ruling on paragraph (e) of rule 60.02, the district court erred because paragraph (e) does not apply to the circumstances of this case.

Paragraph (e) of rule 60.02 may apply in three situations: (1) if a “judgment has been satisfied, released, or discharged”; (2) if “a prior judgment upon which it [*i.e.*, the challenged judgment] is based has been reversed or otherwise vacated”; and (3) if “it is no longer equitable that the judgment should have prospective application.” See Minn. R. Civ. P. 60.02(e). The parties agree that the first clause of paragraph (e) does not apply in this case because the judgment from which Frauenshuh seeks relief has not been satisfied, released, or discharged. See *650 North Main*, 885 N.W.2d at 500. The parties agree that the third clause of paragraph (e) does not apply in this case because that clause applies only to judgments that have prospective application, such as an injunction. See, *e.g.*, *Jacobson v. County of Goodhue*, 539 N.W.2d 623, 625-26 (Minn. App. 1995), *review denied* (Minn. Jan. 12, 1996). The parties disagree, however, about whether the second clause of paragraph (e) applies to the circumstances of this case.

Kraus-Anderson contends that the second clause of paragraph (e) does not apply because the judgment from which Frauenshuh seeks relief is not “based” on a “prior judgment” that was “reversed or otherwise vacated.” See Minn. R. Civ. P. 60.02(e). Kraus-Anderson contends that the “prior judgment” mentioned in the second clause must be a judgment that was entered *before* the judgment from which Frauenshuh seeks relief and must be the basis of the judgment from which Frauenshuh seeks relief.

The word “judgment” is defined in the rules of civil procedure to mean “the final determination of the rights of the parties in an action or proceeding.” Minn. R. Civ. P. 54.01. Frauenshuh seeks relief from the judgment that was entered by the district court administrator on August 4, 2015, following the district court’s ruling on the parties’ post-trial motions. The only “prior” judgment was entered by the district court administrator on July 10, 2014, following the jury’s verdict. The August 4, 2015 judgment is not “based on” the July 10, 2014 judgment. Rather, the July 10, 2014 judgment was based on the jury’s verdict, and the August 4, 2015 judgment was based on the district court’s rulings on the parties’ post-trial motions. In a sense, the August 4, 2015 judgment is contrary to the July 10, 2014 judgment because the district court granted the association’s motion for judgment *notwithstanding* the verdict. In reality, the district court’s earlier determination that Frauenshuh cannot prevail on its cross-claim against Kraus-Anderson was based on the district court’s *simultaneous* determination that the association did not prevail on its claim against Frauenshuh for Kraus-Anderson’s defective construction. Both of those decisions are explained in the district court’s August 4, 2015 order, and both of those decisions are incorporated into the judgment that was entered on the same date.

There is no Minnesota caselaw on the question whether paragraph (e) of rule 60.02 applies in these circumstances. But at least three federal courts have concluded that the corresponding federal rule applies in this situation. When interpreting our rules of civil procedure, “we consider federal cases ‘instructive’ where our rule is similar to a Federal Rule of Civil Procedure.” *Cox*, ____ N.W.2d at ____, 2018 WL 522831, at *3. Federal rule 60(b)(5) is very similar to Minnesota rule 60.02(e), so we interpret the Minnesota rule

to have a meaning similar to the meaning of the federal rule. *See Jacobson*, 539 N.W.2d at 625; *City of Barnum*, 657 N.W.2d at 206; *see also Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 603 (Minn. 2014).

In *Lowry Development, LLC v. Groves & Assocs. Ins., Inc.*, 690 F.3d 382 (5th Cir. 2012), a real-estate developer sued an insurance company to obtain insurance coverage and, alternatively, sued an insurance agent for its alleged negligence in failing to procure appropriate insurance coverage. *Id.* at 384. The district court granted summary judgment to the developer on its claim against the insurance company. *Id.* In light of that ruling, the district court dismissed the developer's claim against the insurance agent. *Id.* On appeal, however, the insurance company obtained a reversal of the district court's coverage decision. *Id.* at 384-85. Thereafter, the developer moved to reinstate its negligence claim against the insurance agent. *Id.* at 385. The district court construed the developer's motion as one for relief under rule 60(b)(5) and rule 60(b)(6) of the Federal Rules of Civil Procedure and granted the motion. *Id.*

In the second appeal, the insurance agent made an argument that is substantially similar to the argument made by Kraus-Anderson in this appeal. *See id.* at 386-87. The United States Court of Appeals for the Fifth Circuit affirmed. *Id.* at 387-89. The court of appeals reasoned that the district court's decision that the developer had insurance coverage was "a necessary premise" of the district court's dismissal of the developer's claim against the insurance agent. *Id.* at 387. The court noted, "It logically preceded the dismissal even if it did not temporally precede it." *Id.* The Fifth Circuit relied on a prior opinion of the United States Court of Appeals for the Fourth Circuit, which, in a similar situation,

reasoned that “when one judgment rests upon a contemporaneous judgment which has been reversed or otherwise vacated, . . . Rule 60(b)(5) should nevertheless apply if all the other conditions are met” on the ground that “the word ‘prior’ in Rule 60(b)(5) refers not only to prior in time but also to prior as a matter of legal significance.” *Id.* (quoting *Werner v. Carbo*, 731 F.2d 204, 208 (4th Cir. 1984)); *see also Gordon v. Softech Int’l Inc.*, No. 10 Civ. 5162, 2014 WL 7404066, at *1 (S.D.N.Y. Dec. 19, 2014) (granting relief under rule 60(b)(5) by vacating dismissal of defendant’s cross-claim, which was based on earlier dismissal of plaintiff’s claim against movant, which had been reversed on appeal).

In the absence of any Minnesota caselaw on point, we find the federal courts’ opinions in *Lowry*, *Werner*, and *Gordon* to be helpful and persuasive in resolving the present appeal. Accordingly, we conclude that the second clause of paragraph (e) applies to the circumstances of this case. This conclusion is sufficient to resolve Kraus-Anderson’s argument because Kraus-Anderson does not contend that the district court abused its discretion in the manner in which it applied the second clause of paragraph (e) to the circumstances of this case.

Thus, the district court did not err to the extent that it granted Frauenshuh’s motion for relief pursuant to the second clause of rule 60.02(e).

C.

Kraus-Anderson next contends that, to the extent that the district court based its ruling on paragraph (f) of rule 60.02, the district court erred on the ground that there are no exceptional circumstance to warrant relief under paragraph (f).

Paragraph (f) of rule 60.02 authorizes a district court to grant relief for “[a]ny other reason justifying relief from the operation of the judgment.” Minn. R. Civ. P. 60.02(f). Paragraph (f) is a “residual clause, designed to afford relief only under exceptional circumstances not addressed by clauses (a) through (e).” *City of Barnum*, 657 N.W.2d at 207. Kraus-Anderson acknowledges uncertainty as to whether the district court actually relied on paragraph (f) when granting Frauenshuh’s motion. We agree that the matter is not crystal clear. But it is notable that the district court quoted both paragraph (e) and paragraph (f). In the course of its reasoning, the district court used language that is consistent with paragraph (f) by stating that “it would simply be inequitable for [Frauenshuh] to be denied the opportunity to file their motions for indemnity and contribution in light of the Court of Appeals opinion, which radically altered the reason for the previous denial in the first place.” We construe that part of the district court’s memorandum to be based on paragraph (f) of rule 60.02 and, thus, to be an alternative ground for granting the motion in the event that paragraph (e) does not apply.

If paragraph (e) does not apply, the circumstances of this case satisfy the “exceptional circumstances” requirement of paragraph (f). *See City of Barnum*, 657 N.W.2d at 207. As described above, the jury and the district court determined that Frauenshuh was not liable to the association for Kraus-Anderson’s defective construction. Based on that determination, there was no legal basis and no factual basis for Frauenshuh to recover on its cross-claim against Kraus-Anderson. But this court later determined that Frauenshuh is liable to the association for Kraus-Anderson’s defective construction. Frauenshuh has not yet had an opportunity to assert its cross-claim based on the latest

determination, which is final. Accordingly, we conclude that the circumstances of this case are “exceptional” enough to warrant the application of paragraph (f) of rule 60.02, if paragraph (e) does not apply. This conclusion is sufficient to resolve Kraus-Anderson’s argument because Kraus-Anderson does not contend that the district court abused its discretion in the manner in which it applied paragraph (f) to the circumstances of this case.

Thus, the district court did not err to the extent that it granted Frauenshuh’s motion for relief pursuant to rule 60.02(f).

D.

Kraus-Anderson next contends that the district court erred by not analyzing the factors articulated in *Finden v. Klass*, 268 Minn. 268, 128 N.W.2d 748 (1964), before granting Frauenshuh’s rule 60.02 motion. Kraus-Anderson further contends that a proper application of the *Finden* factors would show that Frauenshuh’s rule 60.02 motion should have been denied. In response, respondents argue that the *Finden* factors do not apply in this case because they apply only to a motion based on paragraph (a) of rule 60.02 and, in the alternative, that a proper application of the *Finden* factors would show that the rule 60.02 motion was properly granted.

We begin by considering whether the *Finden* factors apply in this case. In *Finden*, the supreme court reviewed a district court’s denial of a defendant’s motion to vacate a default judgment based on rule 60.02. *Id.* at 271-73, 128 N.W.2d at 750-51. In determining whether the defendant should be relieved from the consequences of his attorney’s neglect, the supreme court considered whether the defendant “(a) is possessed of a reasonable defense on the merits, (b) has a reasonable excuse for his failure or neglect to answer,

(c) has acted with due diligence after notice of the entry of judgment, and (d) [shows] that no substantial prejudice will result to the other party.” *Id.* at 271, 128 N.W.2d at 750 (quotation omitted). It appears that the supreme court has applied the *Finden* factors only in appeals concerning paragraph (a) of rule 60.02, which authorizes relief from a judgment based on “[m]istake, inadvertence, surprise, or excusable neglect.” See Minn. R. Civ. P. 60.02(a); see also *Gams v. Houghton*, 884 N.W.2d 611, 619-20 (Minn. 2016); *Cole*, 884 N.W.2d at 637-38; *Nelson v. Siebert*, 428 N.W.2d 394, 395 (Minn. 1988); *Charson v. Temple Israel*, 419 N.W.2d 488, 490 (Minn. 1988). It appears that the supreme court never has applied the *Finden* factors in an appeal concerning paragraph (e) or paragraph (f) of rule 60.02. Cf. *Chapman v. Special Sch. Dist. No. 1*, 454 N.W.2d 921, 923-24 (Minn. 1990).

Kraus-Anderson cites *Carter v. Anderson*, 554 N.W.2d 110 (Minn. App. 1996), review denied (Minn. Dec. 23, 1996), for the proposition that the *Finden* factors also apply to a motion based on paragraph (f). In *Carter*, the plaintiff moved for relief in the district court under paragraphs (a) and (f) of rule 60.02, and the district court granted the motion. *Id.* at 112. On appeal, this court focused on paragraph (f). See *id.* at 113-14. This court’s opinion does not reveal whether the parties agreed or disagreed as to whether the *Finden* factors should apply, but we suggested that the district court had “fail[ed]” to apply them. See *id.* at 115. We proceeded to apply the factors for the first time on appeal and concluded that the plaintiff had “made no showing warranting relief under Rule 60.02.” *Id.*

In light of *Carter*, we cannot agree with respondents that the *Finden* factors do not apply to a motion based on paragraph (f). The *Carter* opinion is a published opinion and,

therefore, is binding on this court. *See, e.g., State v. Peter*, 825 N.W.2d 126, 129 (Minn. App. 2012), *review denied* (Minn. Feb. 27, 2013); *State v. M.L.A.*, 785 N.W.2d 763, 767 (Minn. App. 2010), *review denied* (Minn. Sept. 21, 2010). Respondents do not provide us with any reasons to distinguish *Carter*. We note that the *Finden* factors do not seem pertinent to the grounds on which Frauenshuh’s motion was based. Nonetheless, even if Kraus-Anderson is correct that the *Finden* factors apply, we do not necessarily reverse and remand. Rather, as Kraus-Anderson concedes, it is appropriate in such a situation for this court to apply the *Finden* factors for the first time on appeal. *See id.*

Accordingly, we proceed to apply the *Finden* factors. First, it appears that Frauenshuh “is possessed of a reasonable [claim] on the merits.” *See Finden*, 268 Minn. at 271-72, 128 N.W.2d at 750-51. This court’s opinion expressly states that Frauenshuh is liable to the association for Kraus-Anderson’s defective construction. *650 N. Main Ass’n*, 885 N.W.2d at 488-89. Second, Frauenshuh “has a reasonable excuse for his failure or neglect to” take any other action to pursue its cross-claim against Kraus-Anderson. *See Finden*, 268 Minn. at 271-72, 128 N.W.2d at 750-51. Frauenshuh was not neglectful because it previously moved for JMOL on its cross-claim, but the district court denied the motion because Frauenshuh was not liable to the association for Kraus-Anderson’s defective construction. As stated above, Frauenshuh reasonably declined to appeal the district court’s denial of its motion for JMOL on its cross-claim because Frauenshuh had prevailed on the underlying claim. Third, Frauenshuh “has acted with due diligence after notice of” this court’s opinion. *See id.* Frauenshuh moved for relief under rule 60.02 within three months after the clerk of appellate courts entered judgment. Fourth and finally, “no

substantial prejudice will result to” Kraus-Anderson due to the district court’s grant of Frauenshuh’s rule 60.02 motion. *See id.* Kraus-Anderson may assert any and all defenses and arguments to the cross-claim. In sum, all four *Finden* factors lean in favor of Frauenshuh’s rule 60.02 motion.

Thus, the district court did not commit reversible error by not analyzing the *Finden* factors.

E.

Kraus-Anderson last contends that, for two reasons, the district court erred by granting Frauenshuh leave to file a motion for relief on its cross-claim against Kraus-Anderson.

Kraus-Anderson first contends that Frauenshuh’s cross-claim is beyond the scope of this court’s remand. But Frauenshuh did not argue to the district court that further consideration of its cross-claim is required by this court’s opinion. Frauenshuh filed its rule 60.02 motion *after* the remand but not *pursuant to* the remand. There is nothing in this court’s opinion that forbids Frauenshuh from reasserting its cross-claim, either under a contractual theory or a common-law theory.

Kraus-Anderson also contends that relief under rule 60.02 is barred by the doctrine of *res judicata*. The doctrine of *res judicata* may preclude a party from relitigating a cause of action if, among other requirements, “there was a judgment on the merits” and “the party against whom *res judicata* is applied has had a full and fair opportunity to litigate the matter in the prior proceeding.” *Schober v. Commissioner of Revenue*, 853 N.W.2d 102, 111 (Minn. 2013). Neither of those requirements is satisfied in this case because the district

court's prior ruling on Frauenshuh's cross-claim was not based on the merits of the parties' claims and defenses as they are presently framed. In addition, Frauenshuh has not had a full and fair opportunity to litigate its cross-claim since this court determined that Frauenshuh is liable to the association for Kraus-Anderson's defective construction. Furthermore, by its very nature, rule 60.02 may operate to create case-by-case exceptions to the doctrine of *res judicata*. See generally *Kern v. Janson*, 800 N.W.2d 126 (Minn. 2011); *Jorissen v. Miller*, 399 N.W.2d 82 (Minn. 1987); *Mattsen v. Packman*, 358 N.W.2d 48 (Minn. 1984).

Thus, the district court did not err by granting Frauenshuh leave to pursue its cross-claim against Kraus-Anderson.

In sum, the district court did not err in its May 11, 2017 order granting Frauenshuh's motion for relief under rule 60.02.

Affirmed.