STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1514

Everest Stables, Inc.,
Appellant,

vs.

Foley & Mansfield, LLP, et al.,
Respondents.

Filed September 7, 2021
Affirmed
Worke, Judge

Hennepin County District Court
File No. 27-CV-18-8745

Mark V. Steffenson, Henningson & Snoxell, Ltd., Maple Grove, Minnesota (for appellant)

Charles E. Jones, Megan J. Renslow, Moss & Barnett, P.A., Minneapolis, Minnesota (for respondents)

Considered and decided by Worke, Presiding Judge; Cochran, Judge; and Slieter, Judge.

NONPRECEDENTIAL OPINION

WORKE, Judge

In this appeal from dismissal of a legal-malpractice action, appellant argues that the district court erred by (1) denying its motion to extend the expert-disclosure deadline; (2) granting in part respondents' motion to dismiss based on a deficient expert affidavit;

(3) determining on summary judgment that appellant could not recover a punitive-damages award allegedly vacated; and (4) granting summary-judgment dismissal of appellant's fraud claim. We affirm.

FACTS

Appellant Everest Stables Inc. (Everest) sued respondents Foley & Mansfield LLP and Thomas W. Pahl, alleging: (1) professional malpractice/negligence, (2) breach of contract, (3) breach of fiduciary duty, (4) fraud, and (5) negligent misrepresentation. Everest alleged that respondents mishandled their representation of Everest in two underlying lawsuits in federal court, causing millions of dollars in damages.

Crestwood litigation

The first underlying case was a lawsuit that Everest brought against Crestwood Farm Bloodstock LLC (Crestwood) in the Eastern District of Kentucky. Everest began boarding broodmares with Crestwood in 1993. In 1997, Everest boarded a stallion named Petionville with specific protocols for breeding. At trial, "Everest claimed that it rejected a $6.5 million purchase offer for Petionville based on Crestwood's alleged promise to take Petionville to "the next level."

In 2008, Everest transferred ownership of approximately 100 horses to Crestwood to sell. Everest maintained ownership of two horses boarded at Crestwood; one of them was named Island Fashion. In 2009, Crestwood offered Island Fashion for sale by auction, but Everest sent its own bidding agent who presented the highest bid amount at $900,000 and subsequently nullified the sale. Crestwood learned about this and kept $219,513.89 of

Everest's proceeds from other horses sold. This amounted to 25% of the failed Island Fashion bid plus auction fees.

Everest sued Crestwood alleging: (1) intentional breach of the implied covenant of good faith and fair dealing, (2) breach of expressed and implied contract, (3) intentional breach of fiduciary and agency duties, (4) civil conspiracy, (5) fraud, and (6) unjust enrichment. Crestwood claimed that Everest breached its implied covenant of good faith and fair dealing and breached the contract regarding the sale of Island Fashion. Both parties moved for summary judgment, and the federal district court granted summary judgment to Crestwood.

Canani litigation

Everest also sued Julio Canani, a California-based horse trainer that Everest used for several years, in the Central District of California for (1) fraud, (2) breach of fiduciary duty, (3) breach of implied contract, (4) unjust enrichment, (5) conspiracy, and (6) aiding and abetting. Everest alleged that Canani misrepresented the physical condition of Everest's horses so that he could buy them through a company that he secretly owned for far below their actual value.

The case proceeded to trial, but Everest did not disclose any expert witnesses. Canani moved to preclude the owner of Everest from offering lay testimony regarding the valuation of certain horses. The district court granted Canani's motion, noting that the owner explained that he gained his knowledge based on his 25 years of experience breeding and selling horses. The district court concluded that "[p]ermitting [the owner] to offer valuation testimony as a lay witness would do exactly what [Fed. R. Evid.] 701(c) prevents:

circumvent rule 702 by offering expert testimony as lay opinion." At trial, Everest attempted to prove damages by demonstrating the difference between what was received for the horses initially and what they were sold for later. The jury awarded Everest $48,750 in compensatory damages and $50,000 in punitive damages. The federal district court vacated the punitive-damages award because Everest did not provide evidence of Canani's personal finances, which was required for punitive damages under California law.

Current litigation

In the state-court litigation at issue on appeal, Everest submitted an affidavit of expert identification on the last day of the expert-disclosure deadline, as well as a motion to extend the deadline. The district court denied Everest's motion, noting that Everest "failed to demonstrate any good cause." The district court noted that Everest's affidavit of expert identification "obviates the need for an extended deadline. The motion effectively seeks permission to supplement its disclosure."

After the district court's order, respondents submitted a memorandum in support of their motion to dismiss that they filed after the expert-disclosure deadline. The district court granted respondents' motion in part on most of counts one, two, and three. Those claims were dismissed except to the extent that they related to: (1) intentional breach of the implied covenant of good faith and fair dealing in the *Crestwood* litigation, (2) deficient jury verdict in the *Canani* litigation, and (3) vacated punitive damages in the *Canani* litigation. The district court denied the motion on counts four and five (alleging fraud and negligent misrepresentation, respectively) entirely. Respondents then moved for summary judgment on the surviving claims.

In analyzing respondents' motion for summary judgment, the district court first concluded that Everest was precluded from offering expert-witness testimony at trial because its expert affidavit submitted on the disclosure deadline did not comport with Minnesota Rule of Civil Procedure 26. Because Everest would not have any expert witnesses, none of its claims survived summary judgment. This appeal followed.

DECISION

Motion to extend

Everest first argues that the district court abused its discretion in denying its motion to extend the expert-disclosure deadline and striking its subsequent expert reports.

The district court denied Everest's motion to extend the expert-disclosure deadline after finding that there was no good cause to do so. We review a district court's denial of an extension of the expert-disclosure deadline for an abuse of discretion. *Broehm v. Mayo Clinic Rochester*, 690 N.W.2d 721, 727 (Minn. 2005). A district court abuses its discretion when its ruling is based on an erroneous view of the law, against the facts in the record, or exercises its discretion in an arbitrary or capricious manner. *City of North Oaks v. Sarpal*, 797 N.W.2d 18, 24 (Minn. 2011).

"In an action against a professional alleging negligence or malpractice in rendering a professional service where expert testimony is to be used by a party to establish a prima facie case, the party must . . . serve upon the opponent within 180 days of commencement of discovery . . . an affidavit [of expert identification]." Minn. Stat. § 544.42, subd. 2(2) (2020). The district court may extend the 180-day deadline based on a showing of good cause. *Id.*, subd. 4(b) (2020).

Everest argues that it was greatly prejudiced by the district court's decision to deny an extension. Because the district court denied Everest's motion to extend, it also struck the expert reports that Everest submitted after the deadline that were required by the Minnesota Rules of Civil Procedure. *See* Minn. R. Civ. P. 26.01(b)(2) (requiring a party to submit written reports for experts that will testify at trial). Because Everest effectively did not submit the required expert reports, it was precluded from calling its expert witnesses to testify. *See* Minn. R. Civ. P. 26.01(b)(1). Everest argues that this contradicts the supreme court's holding in *Dennie v. Metro. Med. Ctr.*, 387 N.W.2d 401 (Minn. 1986). But *Dennie* was decided before Minn. Stat. § 544.42 (2020) was in effect. *See* 1997 Minn. Laws ch. 212, § 2, at 1917-19 (enacting Minn. Stat. § 544.42). The district court properly decided Everest's motion under the good-cause standard established by section 544.42. Everest's argument is without merit.

Order to dismiss

Everest next argues that the district court erred by granting in part respondents' motion to dismiss after determining that several of Everest's claims were not supported by the expert affidavit. Everest also argues that the district court erred by not letting Everest cure any defects under section 544.42's safe-harbor provision.

"A district court's decision regarding whether to dismiss a malpractice claim for noncompliance with statutory requirements regarding submission of expert affidavits will be reversed only upon an abuse of discretion." *Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458, 468 (Minn. App. 2006), *review denied* (Minn. Aug. 23, 2006). "In an action against a professional alleging negligence or malpractice in

rendering a professional service where expert testimony is to be used by a party to establish a prima facie case," the party must serve an affidavit within 180 days of commencement of discovery that states (1) the identity of each expert witness, (2) "the substance of the facts and opinions to which the expert is expected to testify," and (3) "a summary of the grounds for each opinion." Minn. Stat. § 544.42, subds. 2(2), 4(a). The purpose of the expert-affidavit requirement is to provide early dismissal of frivolous malpractice claims. *Brown-Wilbert, Inc. v. Copeland Buhl & Co., P.L.L.P.*, 732 N.W.2d 209, 217 (Minn. 2007).

To prevail on a legal-malpractice claim, a plaintiff must establish four elements: "(1) the existence of an attorney-client relationship; (2) acts constituting negligence or breach of contract; (3) that such acts were the proximate cause of the plaintiff's damages; and (4) that but for defendant's conduct, the plaintiff would have been successful in the prosecution or defense of the action." *Jerry's Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 816 (Minn. 2006) (quotation omitted). A plaintiff's failure to meet any one of these elements is fatal to the whole claim. *Schmitz v. Rinke, Noonan, Smoley, Deter, Colombo, Wiant, Von Korff & Hobbs, Ltd.*, 783 N.W.2d 733, 739 (Minn. App. 2010), *review denied* (Minn. Sept. 21, 2010). "Expert testimony is generally required to establish the standard of care applicable to an attorney whose conduct is alleged to have been negligent, and further to establish whether the conduct deviated from that standard." *Jerry's*, 711 N.W.2d at 817. An expert witness is also required "when a claim involves complicated issues of causation and damages." *Schmitz*, 783 N.W.2d at 739 (quotation omitted). And "[b]ut-for causation cannot be established without the assistance

of an expert witness when the causal relation issue is not one within the common knowledge of laymen." *Id.* (quotation omitted).

Minn. Stat. § 544.42, subd. 6(c), allows for a 60-day safe-harbor period to cure deficiencies in an expert affidavit. However, the supreme court has "read a limitation into the safe-harbor provision" to "give life to the second affidavit requirement." *Guzick v. Kimball*, 869 N.W.2d 42, 47 (Minn. 2015). "[T]o qualify for the safe harbor, a disclosure must provide some meaningful information, beyond conclusory statements." *Id.* (quotation omitted).

Crestwood: breach of express contract (Petionville)

Everest first argues that the district court abused its discretion by determining that the affidavit did not meet the requirements for the express contract of the Petionville claim because it "not only states the terms of the failed interactions, but also how [respondents'] action (or lack thereof) resulted in Everest Stables losing the ability to succeed on its fraud claim in the Crestwood Litigation."

The district court concluded that the affidavit was deficient because it did not "offer an adequate explanation or summary regarding the non-existence of an express contract relating to Petionville." Everest relies on three paragraphs in its expert affidavit that state: (1) the elements for breach of contract under Kentucky law, (2) that respondents failed to produce evidence so the federal district court dismissed the claim, and (3) that respondents' failure resulted in Crestwood's expert testimony going unrebutted. The affidavit concludes that respondents "should have obtained and introduced evidence that the *Crestwood* defendants' marketing efforts were contrary to industry standards through the retention of

an expert to opine about the industry standards for marketing a stallion such as Petionville, but failed to do so."

But, as the district court noted, the affidavit did not explain what the contract was or present any evidence about the terms of that contract. The only alleged contractual term related to the Petionville claim is that Crestwood would take the horse "to the next level." Everest has not shown how the district court abused its discretion by concluding that the expert affidavit was not sufficient for this claim to survive. Because the affidavit also did not provide "meaningful information," the district court correctly concluded that it did not qualify for safe harbor. *See Guzick*, 869 N.W.2d at 47.

Crestwood: breach of implied contract (Petionville)

Everest argues that the district court erred on this claim because the affidavit adequately describes but-for causation. According to the affidavit, but for respondents' failure to utilize a Uniform Commercial Code (UCC) statement proving that Crestwood breached its obligations with regard to Petionville, Everest would have likely prevailed on its claim.

This claim by Everest is that respondents should have submitted a UCC form that showed Crestwood used Petionville as collateral for a loan to show their incentive in lying to convince Everest not to sell the horse. The district court dismissed the claim because the affidavit only discusses the lack of damages, which was just one of the many reasons the federal court denied Everest's claim. The district court also noted that there was no summary of how the alleged failings were the but-for cause of Everest's injuries when both

the federal district and appellate courts concluded that there was a lack of clear and definite terms for an implied contract.

Everest has not shown how the district court abused its discretion. The federal district court dismissed the claim after determining that an implied contract was not formed, and the Sixth Circuit affirmed. The expert affidavit only discusses how using the UCC form would have shown Crestwood's motive to breach the alleged contract. The affidavit does nothing to address the formation of the contract. For that reason, the district court did not abuse its discretion in determining that the affidavit was deficient, and that it did not qualify for safe harbor.

Crestwood: fraud claim

Next, Everest argues that the district court abused its discretion in determining that the affidavit did not address but-for causation relating to Everest's fraud claim when the affidavit actually addressed it. Everest relies on a paragraph of the affidavit that explains that the UCC statement showing a possible motive to keep Petionville would have constituted evidence that Crestwood did not intend to perform on its purported promise to take Petionville to "the next level." Everest argues that this paragraph establishes that, but for respondents' alleged failings, its fraud claim against Crestwood would not have been dismissed.

The affidavit, however, only highlights a portion of the federal court's opinion. First, the analysis in the affidavit was based on the assumption that there was an implied contract, even though the federal court determined that a promise to take a horse to the next level was too vague to constitute a contract. Next, the federal court also stated that the

claim was deficient because there was no evidence that Crestwood's actions caused a drop in Petionville's seasons. Even assuming that the affidavit was sufficient to offer a motive, it did nothing to address malpractice for the other concerns raised by the federal court. Everest has not shown that the district court abused its discretion in determining that the affidavit did not support Everest's theory of fraud.

Crestwood: failure to amend

Everest also argues that the district court abused its discretion in dismissing Everest's claim that respondents committed malpractice by failing to amend the complaint before summary judgment to bring additional claims. The district court concluded that the affidavit was deficient because it merely asserted that an expert would testify that the claims respondents waited to bring until after summary judgment were viable. The affidavit was insufficient because it did not provide an explanation of the basis for the expert's testimony, and it did not address the federal district court's conclusion that the allegations that respondents attempted to bring in the fourth amended complaint were futile as a matter of law.

Everest claims that the expert's "willingness to testify on these issues itself essentially shows she has a basis for her opinion." But the statute clearly requires the affidavit to include "the substance of the facts and opinions to which the expert is expected to testify," and "a summary of the grounds for each opinion." Minn. Stat. § 544.42, subd. 4(a). The district court did not abuse its discretion in concluding that the affidavit was insufficient as to this claim and that it did not qualify for safe harbor.

Canani: Two Step Salsa

Everest next argues that the district court abused its discretion by dismissing its claim that respondents committed malpractice by failing to properly research, plead, and prosecute a claim against Canani related to a horse named Two Step Salsa.

The district court concluded that the affidavit was insufficient because it provided "no meaningful explanation as to how [respondents'] failure to obtain [a *Canani* defendant's] bank record departed from the standard of care," or how, "but for [respondent's] failure to obtain [the defendant's] records, it would have succeeded on the Two Step Salsa claims." The district court concluded that the affidavit relied on "implication and speculation."

Everest argues that the affidavit's statement that Everest would have succeeded had respondents followed up on their discovery request for bank records was sufficient to establish a prima facie case, and the district court's opinion was subjective. But the district court is correct that the expert failed to explain why the bank records would have proved Everest's claim. Further, Everest did not address the district court's other reason for finding the affidavit insufficient—the affidavit did not explain how respondents departed from the standard of care. Everest did not meet its burden in showing how the district court erred.

Miscellaneous allegations of professional negligence

Finally, Everest argues that the district court erred in determining that the affidavit was insufficient regarding certain miscellaneous allegations of professional negligence in the amended complaint. The district court dismissed the claims because the affidavit was

"almost silent" on the allegations, and that "[t]here was no discussion of the proper standard to evaluate any of these miscellaneous issues."

Everest argues that "[w]hile a standard is not explicitly stated in the Affidavit, it can be ascertained that such a standard would simply be to actually perform all the duties that [respondents] failed to perform, all of which can be generally recognized as standard protocols and requirements to properly represent a client." But "[e]xpert testimony is generally required to establish the standard of care applicable to an attorney whose conduct is alleged to have been negligent, and further to establish whether the conduct deviated from that standard." *Jerry's*, 711 N.W.2d at 817 (quotation omitted). Everest's claim fails because its expert affidavit failed to establish the applicable standard of care.

Safe-harbor arguments

Finally, Everest makes several arguments about how the district court erroneously applied the safe-harbor provision. We review a district court's application of a law de novo. *See Harlow v. State, Dep't of Human Servs.*, 883 N.W.2d 561, 568 (Minn. 2016). But we review the application of the law to the facts for an abuse of discretion. *See Lake Superior Ctr. Auth.*, 715 N.W.2d at 468.

Everest first argues that the district court abused its discretion because a less-extensive affidavit was previously determined sufficient for the safe-harbor provision in *Wesely v. Flor*. 806 N.W.2d 36 (Minn. 2011). But *Wesely* is distinguishable because it was interpreting the safe-harbor provision of Minn. Stat. § 145.682 (2010). *Id*. at 41 n. 4 ("[T]here are differences between the affidavit requirement found in [section 544.442 and 145.682]"); *cf. DeMartini v. Stoneberg, Giles & Stroup, P.A.*, No. A11-649, 2011 WL

5026392, at *2 n.1 (Minn. App. Oct. 24, 2011) (dismissing an identical argument, noting that "*Wesley* is not controlling here because in *Wesley*, the supreme court distinguished between Minn. Stat. § 145.682 and Minn. Stat. § 544.42"). Everest's argument is without merit.

Everest next argues that section 544.42 "does not contain a distinction or reference a distinction between 'minor' and 'major' deficiencies." But the supreme court explicitly provided restrictions on the safe-harbor provision. *Guzick*, 869 N.W.2d at 47-48. We are an error-correcting court bound by supreme court precedent. *State v. Curtis*, 921 N.W.2d 342, 346 (Minn. 2018). Everest has not shown how the district court erred in its application of the safe-harbor provision.

Punitive damages

Everest argues that the district court erred by dismissing, at summary judgment, its claims to recover the $50,000 punitive damages that the California federal district court struck in the *Canani* litigation because respondents did not provide evidence of the defendant's personal finances in accordance with California state law.

"We review the grant of summary judgment de novo to determine whether there are genuine issues of material fact and whether the district court erred in its application of the law." *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2007) (quotation omitted). But the function of this court "is limited to identifying errors and then correcting them." *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). It is the appellant's burden to show how the district court erred. *Loth v. Loth*, 35 N.W.2d 542, 546 (Minn. 1949).

"[W]e may affirm a grant of summary judgment if it can be sustained on any grounds." *Doe 76C v. Archdiocese of St. Paul*, 817 N.W.2d 150, 163 (Minn. 2012).

We acknowledge that Minnesota law is unclear as to whether a plaintiff in an attorney malpractice case can recover lost punitive damages. But we do not need to resolve this issue because the district court correctly found that the punitive-damages award was speculative. The jury in the *Canani* litigation did not have all of necessary information to calculate the appropriate damages. Therefore, Everest cannot show how the district court abused its discretion by dismissing their claim for lost punitive damages against respondents.

Fraud claims

Finally, Everest argues that the district court erred in dismissing its fraud claims on summary judgment because the district court incorrectly concluded that (1) expert testimony was required, and (2) certain statements by respondents were statements of opinion.

We articulated our standard of review of the grant of summary judgment in the previous section. To establish common-law fraud, a plaintiff must prove

> (1) a false representation of a past or existing material fact susceptible of knowledge; (2) made with knowledge of the falsity of the representation or made without knowing whether it was true or false; (3) with the intention to induce action in reliance thereon; (4) that the representation caused action in reliance thereon; and (5) pecuniary damages as a result of the reliance.

U.S. Bank N.A. v. Cold Spring Granite Co., 802 N.W.2d 363, 373 (Minn. 2011).

Everest challenges the district court's granting of summary judgment in regards to five statements by respondents that purportedly constitute fraud: (1) that the UCC statement was unnecessary and did not need to be filed, (2) that damages claimed related to additional facts learned during discovery were before the court and viable, (3) that the case was ready for trial, (4) that respondents would admit fault to the court in order to vacate the order, and (5) that the parties entered into a fee contract with certain requirements that respondents had no intention of fulfilling.

Everest relies on *Hoyt Props., Inc. v. Prod. Res. Grp., L.L.C.*, to support its general argument that expert testimony was not needed to prevail on its claim and that Pahl's statements were fraudulent and not statements of opinion. 736 N.W.2d 313 (Minn. 2007). But *Hoyt* is distinguishable because it involved incorrect factual assertions that one attorney made to another in order to enter a settlement agreement. *Id.* at 316, 319. Everest does not allege that respondents made inaccurate statements of fact to convince Everest to enter into a contract.

Everest first challenges the district court's determination that it needed expert testimony to survive summary judgment on its fraud claim about the UCC statement. The district court concluded that an expert was required to explain to a jury of common knowledge "the importance of the UCC document to [Everest's] fraud claim in *Crestwood* and whether or not [respondents'] statement that it was too late to introduce the UCC document to the court was an accurate reflection of procedural law." Everest argues that "[t]he fact that the document could have been filed and was not timely is . . . an element of common knowledge that an expert is unnecessary to explain." But this is not true. The

rules of evidence, rules of civil procedure, and when documents can be submitted to a court are not common knowledge. Everest has not shown how the district court erred in dismissing this claim for lack of expert testimony.

Everest makes a similar argument for its fraud allegation that respondents intentionally led them to believe that additional facts had been pleaded in the *Crestwood* litigation by using them during a mock trial when respondents had not actually moved the court for leave to add those claims. The district court dismissed the claim because, without an expert, "a jury of ordinary knowledge would not understand if and/or how [respondents'] conduct caused the damages [Everest] alleges because the significance of that decision would require an explanation of how and when a lawyer can amend a complaint and what happens if they fail to do that in the requisite time." Everest argues here that "the fraud is straightforward and easy to understand." But again, this is not within the realm of common knowledge. Everest needed an expert to testify about the rules of procedure and the viability of the additional claims. Everest has not shown how the district court erred.

Finally, Everest argues that the district court erred by dismissing its claim that respondents committed fraud by entering into a fee agreement that required monthly billing statements while never intending to send the statements. Everest implies that it was damaged by not accurately knowing the state of the case going into trial because the billing statements were its way of knowing the work respondents were doing. But to prevail on a fraud claim, the plaintiff must show pecuniary damages. *U.S. Bank N.A.*, 802 N.W.2d

at 373. Everest has not shown how it was financially harmed. The district court correctly granted summary judgment on this claim.

Affirmed.