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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1694**

Dorsey & Whitney, LLP,
Respondent,

vs.

Andrew Grossman, et al.,
Appellants.

**Filed July 25, 2011
Affirmed
Collins, Judge***

Hennepin County District Court
File No. 27-CV-08-28617

Perry M. Wilson III, James K. Nichols, Dorsey & Whitney, LLP, Minneapolis,
Minnesota (for respondent)

Daniel N. Rosen, Daniel N. Lovejoy, Parker Rosen L.L.C., Minneapolis, Minnesota (for
appellants)

Considered and decided by Kalitowski, Presiding Judge; Hudson, Judge; and
Collins, Judge.

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

UNPUBLISHED OPINION

COLLINS, Judge

In this appeal from summary judgment, appellants argue that the district court erred by: (1) denying their motion to disqualify the judge presiding over the summary-judgment hearing; (2) granting summary judgment on respondent's claim to foreclose its attorney's lien; and (3) granting summary judgment on respondent's breach-of-contract claim. On cross-appeal, respondent challenges the district court's interpretation of a contract term. We affirm.

FACTS

ABCO Research, LLC is a dental research and development company co-owned by Drs. Andrew Grossman and Robert Hasel (collectively, "appellants"). In 1999, ABCO retained respondent Dorsey & Whitney LLP (Dorsey) for the licensing and enforcement of a recently patented cavity-filling procedure. The representation agreement provided that ABCO would pay Dorsey 40% of all recovery from the licensing and enforcement of the patents.¹ Because the agreement was indefinite in duration, the agreement also addressed both possible endings of the attorney-client

¹ As defined in the agreement,

recovery means any income received by [appellants], at any time after the effective date of this agreement, whether through litigation or licensing, and whether through payment on a judgment, court order, settlement, contract, license agreement, or any other royalty mechanism, or any other means by which money is paid to or on behalf of [appellants] with respect to patent enforcement, exploitation, and patent license efforts.

relationship. Dorsey could withdraw from representation for any reason permitted under the Minnesota Rules of Professional Conduct or if Dorsey disagreed with a particular course of action that ABCO insisted upon taking. In the event of such withdrawal, the agreement provided that “[Dorsey’s] right to future payments for its attorneys’ fees [] shall be limited to 33 percent of [appellants’] recovery[.]” Similarly, ABCO could discharge Dorsey at any time and for any reason. Unlike Dorsey’s withdrawal provision, however, ABCO’s discharge of Dorsey would not automatically alter the fee-compensation terms of the agreement. No matter how the relationship ended, the agreement entitled Dorsey to a share of the appellants’ recovery in perpetuity.

Dorsey represented appellants for several years under this agreement, but the relationship soured in 2002. ABCO disagreed with the course of conduct advised by Dorsey, and Dorsey suspected that ABCO was withholding fees to which Dorsey was entitled under the agreement. In October 2005, Dorsey requested to audit the patent recovery, ABCO refused this request, and Dorsey withdrew from representation. Dorsey initiated an attorney’s lien action in November 2005. The district court granted Dorsey an attorney’s lien in the amount of \$712,544.43 against ABCO and against Dr. Grossman personally; the future fees owed under the agreement were not then at issue. Appellants challenged the judgment, arguing in part that the district court erred by awarding a personal judgment in a summary lien-establishing proceeding rather than simply awarding a security interest. *Dorsey & Whitney LLP v. Grossman*, 749 N.W.2d 409, 413 (Minn. App. 2008). This court agreed, affirming in part and reversing the personal judgment entered against Dr. Grossman as exceeding the scope of attorney’s lien

proceedings under Minn. Stat. § 481.13. *Id.* at 422. On remand, the district court clarified that the lien was established only against the patents held by ABCO and the pre-withdrawal profits derived there from, and the case was closed.

Dorsey initiated the present action in September 2008 seeking to foreclose on its lien against ABCO for the pre-withdrawal fees and alleging that appellants' refusal to pay Dorsey its allotted post-withdrawal fees constituted a breach of contract. ABCO asserted counterclaims for breach of contract and breach of fiduciary duty against Dorsey, arguing that Dorsey was not entitled to any share of recovery appellants received after Dorsey withdrew from representation. Dorsey moved for summary judgment and a hearing was held in February 2010.

While the summary-judgment motion was under advisement, the district court scheduled a hearing in early April to inform the parties of a potential conflict. The hearing judge disclosed that she had discovered that Dr. Grossman, in addition to his role with ABCO, was the chief-executive officer and majority owner of Ambient Consulting LLC (Ambient), where the judge's husband was employed from 2002 to June 2007. In April 2007, Ambient demoted the judge's husband from his salaried, managerial position to an hourly-wage, non-managerial position. Soon thereafter, the judge's husband was further demoted to a part-time position, leading him to resign, although appellants disclosed that the demotions were unrelated to his performance. Appellants requested that the judge recuse herself. She declined, prompting appellants to move for her

disqualification.² The judge denied the motion and appellants obtained review by the district's chief judge. On May 17, 2010, the chief judge denied the disqualification motion, reasoning that Ambient was not a party in the matter, the hearing judge's husband had resigned three years prior to the disqualification proceeding, and there was no concrete evidence that the judge's family had suffered financially.

The district court then granted Dorsey's summary-judgment motion on May 21, ordering foreclosure of Dorsey's attorney's lien for the pre-withdrawal fees. The district court dismissed appellants' breach-of-contract and breach-of-fiduciary-duty counterclaims, concluding that Dorsey was not obligated under the agreement to pursue objectives that Dorsey considered to be imprudent and that Dorsey was not charging an unreasonable fee for its services. The district court also granted summary judgment on Dorsey's breach-of-contract claim regarding the non-payment of the post-withdrawal fees. Finally, the district court rejected appellants' argument that the agreement provided Dorsey less than a 33% share of future recovery subsequent to withdrawal.

Following further hearing, the district court determined and ordered that Dorsey was entitled to 33% of post-withdrawal recovery under the terms of the agreement, not 40% as sought by Dorsey. The district court entered final judgments in favor of Dorsey against Dr. Grossman and ABCO in the amounts of \$519,419.60 plus interest earned during Dorsey's representation, and \$511,548 plus interest earned post-withdrawal. These appeals followed.

² Appellants could not remove the judge without cause because they had already exercised their removal of right against the originally assigned judge, who had presided over the previous case regarding the pre-withdrawal lien that was appealed to this court.

DECISION

1. Disqualification of judge

Appellants first challenge the chief judge's denial of their motion to disqualify the summary-judgment-hearing judge. In civil matters, a party may disqualify the initial judge assigned to a proceeding, as a matter of right, within ten days following the judicial assignment. Minn. R. Civ. P. 63.03. Once a party removes a judge as a matter of right, as appellants did here, a motion for disqualification must first be brought before the judge that the party is attempting to remove. Minn. R. Gen. Pract. 106. If the motion is denied, the chief judge of the district court may reconsider the motion. *Id.* The standard for disqualifying a judge in civil matters requires an "affirmative showing of prejudice," which includes "[a] showing that the judge . . . might be excluded for bias from acting as a juror in the matter." Minn. R. Civ. P. 63.03. The decision to deny a motion to disqualify a judge based on bias lies within the discretion of the district court and will be reversed only upon an abuse of this discretion. *Matson v. Matson*, 638 N.W.2d 462, 469 (Minn. App. 2002).

We first note that the chief judge relied on *State v. Burrell*, 743 N.W.2d 596 (Minn. 2008), in analyzing appellants' disqualification motion, and both parties cite to this decision on appeal. In *Burrell*, the supreme court addressed a disqualification motion in a criminal case and noted that: "In determining whether a judge should be disqualified under [Minnesota Code of Judicial Conduct] Canon 3D(1), the question is whether an objective examination of the facts and circumstances would cause a reasonable examiner to question the judge's impartiality." 743 N.W.2d at 601-02. In criminal cases such as

Burrell, disqualification motions were governed by Minn. R. Crim. P. 26.03, subd. 13(3), which provided that “[n]o judge shall preside over a trial or other proceeding if that judge is disqualified under the Code of Judicial Conduct.” Hence, a disqualification motion in criminal cases is effectively governed by our judicial canons. *See, e.g.*, Minn. Code Jud. Conduct, Canons 3D(1) (providing a non-exhaustive list of conditions upon which a judge shall be disqualified), and 3F (defining “impartiality”) (2008) (version of code that would have applied in criminal case during time at issue here). But, our analysis here is governed by the affirmative-showing-of-prejudice standard in Minn. R. Civ. P. 63.03, discussed above, not the criminal standard applied by the district court and relied upon by the parties. *Cf.* Minn. Code Jud. Conduct, Canon 3(D)(1). However, while we observe that the district court employed a slightly different analysis than the applicable standard for this case, this alone is not dispositive of our review. *See Katz v. Katz*, 408 N.W.2d 835, 839 (Minn. 1987) (“[W]e will not reverse a correct decision simply because it was based on incorrect reasons.”); *Wibbens v. Wibbens*, 379 N.W.2d 225, 227 (Minn. App. 1985) (stating that a technical error does not require remand).

Appellants advance a strong argument that the chief judge abused his discretion by failing to disqualify the hearing judge from the summary-judgment proceeding. The judge’s husband was serially demoted over a three-month period, leading to his resignation from Ambient after five years of employment. Presumably, the judge was aware of her husband’s employment plight, and it is reasonable to project her aversion toward her husband’s former employer. The judge’s subsequent realization that the CEO of her husband’s former employer was also a defendant in a civil matter before her raises

fair questions as to her ability to remain impartial in the case. Appellants assert that, given these facts, there is a good argument that the judge might have been disqualified as a juror in this matter and, thus, an affirmative showing of prejudice could have been made.

But our analysis does not simply end upon a mere hypothetical assertion that a judge might have been removed if he or she was a potential juror; indeed, this court has previously addressed facts reasonably giving rise to a possibility that a judge would be struck from a case as a juror, and we have nevertheless concluded that no affirmative showing of prejudice was made. *See Roatsch v. Puera*, 534 N.W.2d 560, 563-64 (Minn. App. 1995) (affirming the denial of a disqualification motion brought under rule 63.03 upon the conclusion that a newspaper publishing a judge's comments about a case did not constitute a showing of affirmative prejudice); *Carlson v. Carlson*, 390 N.W.2d 780, 785-86 (Minn. App. 1986) (concluding that the district court did not abuse its discretion by denying a disqualification motion made by a party upon the allegations that the district court judge improperly engaged in ex parte communications about him and the case with the party's former lawyer), *review denied* (Minn. Aug. 20, 1986). Accordingly, we must extend our analysis.

Despite the power of appellants' argument, several salient questions remain unanswered. While Dr. Grossman acknowledged demoting the judge's husband, the record is otherwise silent as to what extent the two men associated with one another during the latter's tenure with Ambient. The fact that the judge had presided over the case for several months before connecting Dr. Grossman to Ambient intimates that her

knowledge of her husband's contact with Dr. Grossman was limited. Furthermore, there was no evidence presented as to whether Ambient's personnel decisions were due to legitimate economic considerations or whether other employees were similarly treated. And appellants indicated in the course of their disqualification motion that the judge's husband's demotions were unrelated to his performance. Finally, the record is devoid of evidence of any consequential hardship to the judge or her family; as the chief judge noted, the record does not show whether the judge's husband found comparable employment shortly thereafter. These open questions are material, and the chief judge rightly and thoroughly grappled with their abstract effect on the hearing judge's impartiality.

Given these uncertainties, the considerable time that elapsed between the resignation and the summary-judgment motion, and the fact that Ambient is not a party in the case, it is reasonable to conclude, as did the chief judge, that the hearing judge was able to remain impartial in the matter. Accordingly, while we view it as a close call, we conclude that appellants failed to make the requisite affirmative showing of prejudice, and the chief judge did not abuse his discretion by denying the disqualification motion.

2. Summary judgment

When reviewing a grant of summary judgment, this court determines whether there are genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). Summary judgment is appropriately granted when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that

there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citing Minn. R. Civ. P. 56.03). “We view the evidence in the light most favorable to the party against whom summary judgment was granted.” *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). Whether a genuine issue of material fact exists and whether the district court erred in its application of the law is reviewed de novo. *Id.* at 77. We may affirm summary judgment if it can be sustained on any ground. *Winkler v. Magnuson*, 539 N.W.2d 821, 827 (Minn. App. 1995), *review denied* (Minn. Feb. 13, 1996).

A. Attorney’s lien foreclosure

Appellants challenge the district court’s grant of summary judgment in favor of Dorsey on the enforcement of its attorney’s lien against the pre-withdrawal recovery. Attorneys’ liens are governed by Minn. Stat. § 481.13 (2010). Procedurally, Minn. Stat. § 481.13, subd. 1(c) provides that an attorney’s lien “may be established, and the amount of the lien may be determined, summarily by the court . . . on the application of the lien claimant.” But as we noted in the previous appeal involving these parties, Minn. Stat. § 481.13 “authorizes the district court only to summarily establish the lien. It no longer authorizes the district court to enforce the lien in the summary proceeding.” *Dorsey*, 749 N.W.2d at 422 (citation omitted). The lien must be foreclosed upon in a separate action, after the amount of the debt has been established. *Id.*

Appellants essentially argue that the district court improperly foreclosed on the lien because the amount was not correctly established: the pre-withdrawal lien covered

patent recovery earned as of June 30, 2006, yet Dorsey officially withdraw representation in October 2005. Because the district court determined that Dorsey was entitled to two different rates under the agreement—40% of recovery prior to withdrawal and 33% thereafter—appellants contend that the district court’s failure to use the actual date of withdrawal when awarding the pre-withdrawal lien results in an improperly established lien that cannot be foreclosed upon.

Appellants’ argument is flawed because the lien determination of pre-withdrawal recovery occurred in the previous case. *See id.* Accordingly, the appropriate time to challenge this lien determination would have been during the prolonged proceedings in that case. Because appellants failed to do so, their present argument is barred by the doctrine of res judicata. *See Dorso Trailer Sales, Inc. v. Am. Body & Trailer, Inc.*, 482 N.W.2d 771, 774 (Minn. 1992) (stating that a judgment on the merits is an absolute bar to a second suit on the same cause of action and is conclusive between the parties as to every issue that was or could have been litigated); *Nitz v. Nitz*, 456 N.W.2d 450, 452 (Minn. App. 1990) (stating that a change in theory cannot be used to avoid res judicata); *Boline v. Doty*, 345 N.W.2d 285, 289 (Minn. App. 1984) (“Once the amount of [a] lien has been fairly litigated . . . , it should not be relitigated because of traditional principles of res judicata and collateral estoppel.”). Accordingly, the district court did not err by granting summary judgment on Dorsey’s lien-foreclosure claim.

B. Breach of contract

Appellants also argue that the district court erred by granting summary judgment on Dorsey’s breach-of-contract claim by determining that the agreement provided for an

absolute entitlement to 33% of post-withdrawal recovery rather than a maximum of 33%. This is an issue of contract interpretation. “The construction and effect of a contract are questions of law for the court, but where there is ambiguity and construction depends upon extrinsic evidence . . . , there is a question of fact for the jury.” *Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 66 (Minn. 1979). “A contract is ambiguous if its language is reasonably susceptible to more than one interpretation.” *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998). Whether a contract is ambiguous is a question of law that this court reviews de novo. *Carlson v. Allstate Ins. Co.*, 749 N.W.2d 41, 45 (Minn. 2008).

Appellants contend that the representation agreement unambiguously provided that Dorsey’s share of all post-withdrawal recovery was subject to a *maximum* of 33%; thus, the district court erred by interpreting the limiting language as guaranteeing that rate to Dorsey in the event of withdrawal. They assert that the true intent of the agreement was to negotiate the rate to which Dorsey would be entitled post-withdrawal. They argue that this intent is evidenced by the fact that Dorsey is prohibited from accepting unreasonable fees for its services under the Minnesota Rules of Professional Conduct and a 33% contingency rate when Dorsey was no longer providing services for fees might be considered unreasonable under the rules. *See, e.g.*, Minn. R. Prof. Conduct 1.5(a). Appellants also assert that the language limiting Dorsey’s fees—“shall be limited to”—is significant because this is the only provision in the agreement where the fees are not articulated in definitive language. Finally, appellants assert that, at the very least, they

have demonstrated that the agreement is reasonably susceptible to two different interpretations and is thus ambiguous, and therefore, summary judgment is inappropriate.

Viewed in the context of the entire agreement, however, appellants' arguments are unconvincing. As Dorsey argues, and the district court determined, the remainder of the contract referenced Dorsey's fee rate as 40% of any recovery, including future recovery in the event that appellants terminated Dorsey. This consideration is important when reading the language relied upon by appellants in conjunction with its preceding sentence: "If [Dorsey] withdraws from further representation, it shall not be required to return any fees paid to it as of the time of the withdrawal. [Dorsey's] right to future payments for its attorneys' fees, however, shall be limited to 33 percent of [appellants'] recovery[.]" The agreement expressly states that Dorsey was not required to return any of the 40% of recovery paid at the time of the withdrawal. The limiting language in the following sentence is unambiguous as referring to this 40% rate, not as opening an evaluation process to determine the appropriate future-recovery rate at which that Dorsey should be paid below a maximum of 33%. *See Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 324 (Minn. 2003) ("Intent is ascertained, not by a process of dissection in which words and phrases are isolated from their context, but rather from a process of synthesis in which the words and phrases are given a meaning in accordance with the obvious purpose of the contract [] as a whole.").

Moreover, the evaluation purported by appellants as the intent of the parties would almost certainly require mediation or litigation; it would be unreasonable to expect the parties to amicably agree about future fees under such circumstances. The agreement

contains a mediation provision in the withdrawal section: “if [appellants] disagree that withdrawal is appropriate, the issue will be subject to mediation” by a specified retired district court judge. Assuming that the parties truly intended to negotiate an appropriate post-withdrawal fee rate as opposed to contractually providing for it, as appellants argue, it would seem odd not to submit the issue to an already agreed-upon mediator. Finally, in the previous case, appellants argued to this court that “their relationship with [Dorsey] constituted a joint venture and was, therefore, not governed by” the rules relating to attorneys’ liens. *See Dorsey*, 749 N.W.2d at 413. Given their previous contention that their association with Dorsey was a business deal as opposed to a traditional attorney-client relationship, it was not unreasonable for Dorsey to have bargained for a percentage-certain share of future recovery following a withdrawal from representation. The district court did not err by construing the contract as entitling Dorsey to 33% of the future patent recovery under the agreement, as a matter of law, and summary judgment was properly granted.

C. Rate of recovery

On cross-appeal, Dorsey challenges the district court’s final order awarding Dorsey 33% of post-withdrawal recovery rather than the rate of 40%. Dorsey argues that appellants forced it to withdraw from representation, thereby breaching the agreement. As such, Dorsey asserts that the post-withdrawal judgment should have been calculated at the 40% rate as the appropriate remedy for the breach of the agreement, not the 33% rate applied by the district court. Dorsey contends that the district court’s award of 33% of post-withdrawal recovery rewards appellants as the breaching party, potentially setting a

precedent allowing clients to refuse payment for legal services in order to save money on future services they bartered for, was error as a matter of law. *See Fontaine v. Steen*, 759 N.W.2d 672, 679 (Minn. App. 2009) (stating that when one party breaches a contract, the measure of damages is what the non-breaching party would have received if no breach occurred).

But Dorsey has not demonstrated that there are genuine issues of material fact showing that it was *forced* to withdraw from representation; the rules of professional conduct merely *permit* withdrawal in the instance where, as here, a client fails to promptly pay its bills. *See* Minn. R. Prof. Conduct 1.16(b)(5) (stating that “a lawyer *may* withdraw from representing a client if[] . . . the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled”) (emphasis added). Second, even if Dorsey felt compelled though not *forced* to withdraw, the representation agreement provided that, as discussed above, in the event of withdrawal, “[Dorsey’s] right to future payments for its attorneys’ fees [] shall be limited to 33 percent of [appellants’] recovery, but in no event more than two times the standard matter value of its time entries.” Because Dorsey was not forced to withdraw from representation, and because it had contractually negotiated its remedy in the event of withdrawal, Dorsey’s argument fails. The district court did not err in determining Dorsey’s post-withdrawal-fee rate.

Affirmed.