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**STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1238**

Scott D. Augustine, M.D.,
Respondent,

v.

Arizant, Inc., et al.,
Appellants.

**Filed December 30, 2008
Affirmed and remanded
Toussaint, Chief Judge**

Hennepin County District Court
File No. 27-CV-04-018182

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Considered and decided by Kalitowski, Presiding Judge; Toussaint, Chief Judge; and Ross, Judge.

UNPUBLISHED OPINION

TOUSSAINT, Chief Judge

On remand from the supreme court after its reversal of our decision on indemnification, we now address several issues that we had found unnecessary to reach in our original opinion. Because the district court did not abuse its discretion or err as a matter of law in its evidentiary rulings, its jury instructions on the legal definition of good faith, or its award of attorney fees to respondent Scott D. Augustine, M.D. under Minn. Stat. § 302A.467 (2006), we affirm as to those issues. We remand to the district court for a new trial as provided in *Augustine I*.

DECISION

In this court's first decision in this appeal, we ruled that the district court erred in submitting respondent's claim for indemnification under Minn. Stat. § 302A.521, subd. 2(a) (2006), to a jury, which had found in favor of respondent. *Augustine v. Arizant, Inc.*, 735 N.W.2d 740, 744-45 (Minn. App. 2007) (*Augustine I*), *rev'd*, 751 N.W.2d 95 (Minn. 2008). We held that the district court should have granted summary judgment to appellants Arizant, Inc., Augustine Medical, Inc., and Arizant Healthcare, Inc. because respondent was unable as a matter of law to show good faith, an essential element of the indemnification claim. *Id.* We therefore did not reach appellants' challenges to the district court's evidentiary rulings and jury instructions concerning the indemnification issues. *Id.* at 745 n.2. We also concluded that respondent was not entitled to attorney

fees pursuant to Minn. Stat. § 302A.467 (2006), based on our determination that appellants did not violate Minn. Stat. § 302A.521, subd. 2(a). *Id.* at 745. As to respondent’s breach-of-contract claim regarding the appraisal issue, we held that the district court properly submitted the issue to the jury but that because the jury instructions did not fairly or correctly state the applicable law, a new trial was required on that issue. *Id.* at 745-46.

Respondent petitioned for review to the supreme court, which denied review on the appraisal issue but granted review on the indemnification issue. The supreme court reversed on the indemnification issue, holding that genuine issues of material fact exist on the good-faith issue, and remanded for further proceedings. *Augustine v. Arizant, Inc.*, 751 N.W.2d 95, 102 (Minn. 2008) (*Augustine II*).

I.

On remand, we first address appellants’ challenges to evidentiary rulings made by the district court during the jury trial. “The admission of evidence rests within the broad discretion of the [district] court and its ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of discretion.” *Kroning v. State Farm Auto Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997) (quotation omitted). “Entitlement to a new trial on the grounds of improper evidentiary rulings rests upon the complaining party’s ability to demonstrate prejudicial error.” *Id.* at 46 (quotation omitted); *see* Minn. R. Civ. P. 61 (providing that no error in exclusion of evidence is ground for new trial unless denial of new trial is “inconsistent with substantial justice” and that harmless errors not affecting substantial rights of parties must be disregarded). “Evidentiary error

is prejudicial if it might reasonably be said to have changed the result of the trial.” *Foust v. McFarland*, 698 N.W.2d 24, 33 (Minn. App. 2005), *review denied* (Minn. Aug. 16, 2005).

Appellants argue that the district court erroneously prohibited them from using respondent’s sworn testimony from his federal misdemeanor-plea hearing to impeach his testimony at trial. But the record shows that appellants did not seek to impeach respondent with respondent’s prior testimony; instead, appellants sought to impeach respondent using testimony that appellants’ national sales director gave at the sales director’s federal misdemeanor-plea hearing. But the sales director was not a witness at the indemnification trial, and the district court sustained a hearsay objection to appellants’ use of his plea testimony to impeach respondent.

Appellants were seeking to impeach respondent with an out-of-court statement offered “to prove the truth of the matter asserted,” which is inadmissible hearsay under Minn. R. Evid. 801(c). Appellants did not show that any exception to the hearsay rule applied. “A party may not misuse [the evidentiary rule regarding impeachment] to introduce hearsay which is otherwise inadmissible in the guise of impeachment.” *State v. Hodges*, 384 N.W.2d 175, 184 (Minn. App. 1986), *aff’d as modified on other grounds*, 386 N.W.2d 709 (Minn. 1986). Appellants have not shown that the district court abused its discretion in sustaining the objection based on hearsay.

Next, we address appellants’ challenge to the district court’s ruling sustaining respondent’s objection on foundation grounds. Appellants asked respondent on cross-examination, “And at this point you don’t recall whether [the sales director] spoke to you

about that telephone conference or not, do you?” The court sustained an objection based on lack of foundation.

A party who wishes to impeach a witness must provide foundation showing that an inconsistency exists in the witness’s statements. *Hunt v. Regents of Univ. of Minn.*, 460 N.W.2d 28, 34 (Minn. 1990). When the inconsistency is “ambiguous and vague,” it is within the district court’s discretion to weigh the benefits of admission against possible prejudicial effect, and the decision will not be reversed absent an abuse of discretion. *State v. Vance*, 254 N.W.2d 353, 358 (Minn. 1977). The inconsistency appellants attempted to reveal was ambiguous and vague, and the district court did not abuse its discretion in ruling that appellants had not established foundation.

Next, appellants contend that the district court erred in sustaining objections to their attempts to use respondent’s deposition testimony to impeach his testimony that he had not been aware of the sales director’s August 16, 2000 meeting with Southern Medical Distributors, the federal undercover business front that was posing as a distributor of health-care products. “Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness for any purpose permitted by the Minnesota Rules of Evidence.” Minn. R. Civ. P. 32.01(a). But as discussed above, one who wishes to impeach a witness must lay a foundation showing that there is an inconsistency. *Hunt*, 460 N.W.2d at 34.

Here, the district court sustained objections to appellants’ cross-examination using respondent’s deposition based on improper impeachment and foundation. Again, appellants did not sufficiently demonstrate to the district court that there was an

inconsistency in respondent's testimony with which to impeach him, and the district court did not abuse its discretion in sustaining the objections.

Next, we review appellants' challenge to the district court's ruling that they were precluded from referring to transcripts of tape-recorded conversations, including the August 21, 2000 and the January 22, 2001 telephone calls at issue here. At trial, the district court ruled that these transcripts were irrelevant. *See* Minn. R. Evid. 402 (providing that irrelevant evidence is not admissible). In its denial of appellants' motion for a new trial, the court expanded on the basis for its decision, which had been discussed at length at trial outside of the hearing of the jury:

The Court properly excluded the Southern Medical audio recordings based on relevance: (1) because the recordings were excluded from the U.S. District Court criminal case against Plaintiff Augustine, they were not part of the factual basis for Plaintiff Augustine's misdemeanor plea, and therefore, could not be relevant to whether Plaintiff Augustine acted in good faith regarding the decision not to disclose the TriSpan letter; (2) the recorded conversations were related to a meeting between Augustine Medical, Inc. and a fiscal intermediary in Florida, and were not probative of whether Plaintiff Augustine acted in good faith regarding the decision not to disclose the TriSpan letter; and (3) the statements made by the agent pretending to be an employee of Southern Medical were scripted and, therefore, by definition, they were irrelevant. Minn. R. Evid. 401; *Bernhardt v. State*, 684 N.W.2d 465, 476 (Minn. 2004).

The district court explained that it also excluded the recordings because appellants (1) could not prove they were lawfully recorded, (2) could not lay proper foundation, and (3) the recordings contained inadmissible hearsay by an officer not available to testify at trial. Appellants have not shown that the district court abused its discretion in these rulings.

Finally, even if the district court abused its discretion, which it did not, appellants have failed to show that any of these alleged errors were prejudicial or how any of the excluded impeachment evidence would have changed the result of the trial. *See Faust*, 698 N.W.2d at 33 (addressing requirement that prejudice be shown). Because appellants have failed to show that the district court’s evidentiary rulings were an abuse of discretion, let alone that the court committed prejudicial error, we affirm the district court’s rulings.

II.

Second, we address appellants’ argument that the district court erred by failing to adequately instruct the jury as to the definition of good faith. An appellate court will review the district court’s selection of jury instructions for an abuse of discretion. *Peterson v. BASF Corp.*, 711 N.W.2d 470, 484 (Minn. 2006), *cert denied*, 127 S. Ct. 579 (2006). Where a jury instruction fairly and correctly states 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).

Appellants claim that the district court did not instruct the jury as to the legal definition of good faith. The district court, however, instructed the jury: “Good faith means honesty in fact in the conduct of the act or transaction concerned.” This is consistent with the statutory definition of good faith: “‘Good faith’ means honesty in fact in the conduct or the act or transaction concerned.” Minn. Stat. § 302A.011, subd. 13 (2006).

In their reply brief, appellants explained in a footnote that they do not dispute that the district court instructed the jury as described above but argue that the district court's error was in its "refusal to instruct the jury on the definition of good faith as it relates specifically to intentional fraud and with respect to the definition of 'honesty,' which was necessary." "[I]ssues not raised or argued in an appellant's brief are waived and cannot be revived in a reply brief." *Zimmerman v. Safeco Ins. Co. of Am.*, 593 N.W.2d 248, 251 (Minn. App. 1999), *aff'd*, 605 N.W.2d 727 (Minn. 2000). Consequently, we decline to address this latter argument, and we find no abuse of discretion regarding the definition of good faith in the jury instructions.

III.

Lastly, appellants challenge the district court's award to respondent of attorney fees under Minn. Stat. § 302A.467 (2006). Statutory construction is a question of law subject to de novo review. *Metro. Sports Facilities Comm'n v. County of Hennepin*, 561 N.W.2d 513, 515 (Minn. 1997). "Attorney fees are not recoverable unless authorized by statute or contract, and we will not disturb a district court's decision regarding an award of attorney fees absent an abuse of discretion." *Bolander v. Bolander*, 703 N.W.2d 529, 548 (Minn. App. 2005), *review dismissed* (Minn. Nov. 15, 2005).

Respondent sought and was awarded attorney fees under Minn. Stat. § 302A.467, which provides:

If a corporation or an officer or director of the corporation violates a provision of this chapter, a court in this state may, in an action brought by a shareholder of the corporation, grant any equitable relief it deems just and reasonable in the circumstances and award expenses, including attorneys' fees and disbursements, to the shareholder.

The current statute gives courts broad discretion:

This section recognizes that situations in which equitable relief may be appropriate are not readily definable in advance, as they often present novel fact situations, and it therefore adopts the broad rule which gives the court complete discretion in ordering whatever relief it deems just and reasonable in the circumstances.

Minn. Stat. Ann. § 302A.467, 1981 reporter's notes, gen. cmt. (West 2004).

Section 302A.467 requires a corporate violation of chapter 302A. Appellants' failure to indemnify respondent under section 302A.521 violated his right to indemnification. Section 302A.467 requires that the action be brought by a shareholder of the corporation. It is undisputed that respondent was a shareholder. While appellants argue that section 302A.467 applies only to claims brought by a shareholder in his or her capacity as a shareholder, there is no statutory basis for this argument. Further, as discussed in the commentary, the court is given "complete discretion" to order just and reasonable relief, even in "novel fact situations." *Id.* Respondent is entitled to attorney fees under the plain language of the statute. Appellants have not demonstrated that the district court abused its discretion or erred as a matter of law in awarding respondent attorney fees under section 302A.467.

We remand the matter to the district court for a new trial on the appraisal issue, as indicated in *Augustine I*, 735 N.W.2d at 746.

Affirmed and remanded.