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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0694**

Derby Construction,
Appellant,

vs.

Jade Lutzi Painting, LLC,
Respondent,

Expert Insulation, Inc.,
Respondent.

**Filed October 30, 2017
Affirmed
Connolly, Judge**

Olmsted County District Court
File No. 55-CV-16-3831

Melanie J. Leth, Weber, Leth & Woessner, PLC, Dodge Center, Minnesota (for appellant)

Francis M. Doherty, Hale, Skemp, Hanson, Skemp & Sleik, LaCrosse, Wisconsin (for
respondent Jade Lutzi Painting)

Steven E. Tomsche, Tomsche, Sonnesyn & Tomsche, P.A., Minneapolis, Minnesota (for
respondent Expert Insulation, Inc.)

Considered and decided by Connolly, Presiding Judge; Ross, Judge; and
Rodenberg, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

In this negligence action by appellant-contractor against respondent-painting-subcontractor, appellant argues that the district court erred by granting summary judgment to respondent because expert testimony was not necessary to establish the elements of negligence and abused its discretion by refusing to grant appellant a continuance to hire an expert. Because we see no error of law and no abuse of discretion, we affirm.

FACTS

In 2014, appellant Derby Construction, LLC, hired respondent Jade Lutzi Painting, LLC, as a subcontractor for work and services related to painting a home that appellant was constructing. Expert Insulation is also listed as a respondent, but takes no part in this appeal. On January 2, 2015, respondent's employee(s) applied lacquer to some of the home's windows and, in accordance with respondent's standard practice, left those windows *slightly open* to allow the lacquer to dry. On January 5, 2015, appellant learned that an interior pipe in the upper-level bathroom had burst, causing water damage to the home. The district court found that, during the weekend the window was left open, the outside "temperature ranged from the teens to low twenties degrees Fahrenheit." The home was then being heated by a furnace, which appellant's owner, David Derby, testified would probably have been set between 62 and 75 degrees Fahrenheit.

Appellant brought negligence claims against respondent and another subcontractor. In its complaint, appellant claimed that the pipe froze and broke either because respondent "negligently left the windows of the home open" or because the other subcontractor

“negligently installed insulation in the home.” Derby testified in his deposition that: (1) appellant hired respondent on projects both before and after the home at issue, (2) appellant knew that respondent’s standard practice for applying lacquer to windows was to leave those windows *slightly open* so the lacquer could dry, (3) appellant believed the thermostat for the home’s heating system would have been set between 62 and 75 degrees Fahrenheit, (4) appellant was not aware of a time when this process had caused similar harm, (5) a better method for applying lacquer to windows during cold months exists, (6) appellant believed the other subcontractor’s insulation failed, and (7) appellant had no first-hand knowledge about what caused the pipe to burst.

Respondent filed a motion for summary judgment, arguing that appellant failed to substantiate its negligence claim by establishing that respondent’s actions breached its duty of care and caused appellant’s injuries. The district court granted summary judgment for both respondent and the other subcontractor. In its order, the district court held that appellant failed to establish sufficient evidence of breach of duty. The district court further held that expert-opinion testimony was necessary to establish causation of the alleged negligence and appellant failed to designate any experts on this issue. Under the amended scheduling order, the deadline for appellant to disclose any expert witnesses had passed.

Appellant challenges only the district court’s dismissal of its negligence claim against respondent, asserting that expert-opinion testimony is not required. Appellant alternatively argues that, if such testimony is required, the district court abused its discretion by denying appellant’s motion for a continuance to obtain such an expert.

DECISION

I.

“We review a district court’s summary judgment decision de novo. In doing so, we determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment.” *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010) (citation and quotation omitted). Evidence must be viewed in the light most favorable to the party challenging the summary judgment order. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). But, “when the nonmoving party bears the burden of proof on an element essential to the nonmoving party’s case, the nonmoving party must make a showing sufficient to establish that essential element.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

A defendant in a negligence action is entitled to summary judgment if “the record reflects a complete lack of proof on any of the four essential elements of the claim: (1) the existence of a duty of care, (2) breach of that duty, (3) an injury, and (4) the breach of the duty being the proximate cause of the injury.” *Gradjelick v. Hance*, 646 N.W.2d 225, 230 (Minn. 2002). Speculation without some concrete evidence will not avoid summary judgment. *Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993). An award of summary judgment will be affirmed if there are no genuine issues of material fact and if the decision can be sustained on any ground. *Winkler v. Magnuson*, 539 N.W.2d 821, 828 (Minn. App. 1995), *review denied* (Minn. Feb. 13, 1996).

“[W]hether expert testimony is required to establish a prima facie case is a question of law that [appellate courts] review de novo.” *Guzick v. Kimball*, 869 N.W.2d 42, 46-47

(Minn. 2015). “The test of whether expert testimony is required is whether the matter to be dealt with is so esoteric that jurors of common knowledge and experience cannot form a valid judgment as to whether the conduct of the parties was reasonable.” *Radel v. Bloom Lake Farms*, 553 N.W.2d 109, 111 (Minn. App. 1996) (quotation omitted), *review denied* (Minn. Oct. 29, 1996). Expert testimony based on adequate factual foundation is required to prove causation if the issue involves matters outside of ordinary lay knowledge. *Gross v. Victoria Station Farms, Inc.*, 578 N.W.2d 757, 762 (Minn. 1998).

Appellant argues that it presented sufficient evidence of breach of duty and causation because it is within a juror’s common knowledge that opening windows in winter could cause a pipe to freeze. Although the district court granted summary judgment in favor of respondent, respondent argues the district court erroneously considered hearsay in reaching its decision. The admission of evidence is 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). The district court considered several alleged conversations between Derby and the homeowner, in which Derby claimed the homeowner stated he went to the home on January 3, 2015, found six windows left open and closed all but one of the windows; the window left open was located within a few feet of the pipe that broke. The district court did not expressly rule on respondent’s hearsay objection, but it included these statements in its order granting summary judgment for respondent.

“‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Minn. R.

Evid. 801(c). Hearsay is inadmissible unless one of several exceptions applies. Minn. R. Evid. 802. The statements the homeowner allegedly made to Derby were made outside court and were offered by appellant to prove the truth of the matters asserted; thus, they were inadmissible hearsay. The person challenging the admission of evidence “bears the burden of demonstrating that an improper evidentiary ruling caused prejudicial error.” *Citizens for a Safe Grant v. Lone Oak Sportsmen’s Club, Inc.*, 624 N.W.2d 796, 808 (Minn. App. 2001). This district court error was not prejudicial to respondent, since respondent’s motion for summary judgment was granted. Appellant relies on Derby testifying that the homeowner allegedly told him that, when he visited the home on January 3, 2015, six windows were more than slightly open and the house was freezing. Appellant cannot now use this inadmissible evidence to challenge the district court’s order granting summary judgment.

Thus, when considering only the admissible evidence in reviewing the district court’s grant of summary judgment, we cannot say that it is within the province of a lay person to know that leaving a window *slightly open* in a heated home on a cold day would cause a pipe in an interior wall to freeze and burst. Expert testimony was therefore required to establish causation. None was provided, so summary judgment was properly granted.

II.

Appellant alternatively argues that the district court abused its discretion in denying it a continuance to obtain an expert witness. A party may move for summary judgment “at any time after the expiration of 20 days from the service of the summons.” Minn. R. Civ. P. 56.01. But “a party opposing a summary judgment motion may request that the district

court deny or continue the motion on the ground that the non-moving party should be permitted to conduct additional discovery.” *Molde v. CitiMortgage, Inc.*, 781 N.W.2d 36, 45 (Minn. App. 2010). “Continuances should be liberally granted under [r]ule 56.06, especially when the party seeking more time is doing so because of insufficient time to conduct discovery.” *Bixler by Bixler v. J.C. Penney Co., Inc.*, 376 N.W.2d 209, 216 (Minn. 1985). But, “[a] district court’s decision to deny a motion for a continuance to conduct discovery is reviewed under an abuse-of-discretion standard.” *Lewis v. St. Cloud State Univ.*, 693 N.W.2d 466, 473 (Minn. App. 2005), *review denied* (Minn. June 14, 2005).

Appellant appears to have requested a continuance in its motion opposing summary judgment. However, appellant did not support this request with a proper affidavit. “A rule 56.06 affidavit must be specific about the evidence expected, the source of discovery necessary to obtain the evidence, and the reasons for the failure to complete discovery to date.” *Alliance for Metro. Stability v. Metro. Council*, 671 N.W.2d 905, 919 (Minn. App. 2003). A district court does not abuse its discretion when it denies a continuance motion that is unsupported by affidavit or when the affidavit does not meet these requirements. *See Molde*, 781 N.W.2d at 45-46.

Moreover, appellant asserted that a continuance was appropriate only because it would not substantially prejudice respondent. Appellant did not make any specific statements concerning the evidence expected to be obtained through additional discovery, the source of discovery necessary to obtain that evidence, or the reasons it failed to complete discovery to date. The district court did not abuse its discretion.

Affirmed.