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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0251**

Ann M. Firkus,
Appellant,

vs.

Dana J. Harms, MD,
Respondent.

**Filed December 9, 2019
Affirmed
Ross, Judge**

Hennepin County District Court
File No. 27-CV-17-874

Nicholas Henry, Nicholas Henry Law, LLC, Bloomington, Minnesota (for appellant)

Mark R. Whitmore, Amie E. Penny Sayler, Bassford Remele, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Slieter, Presiding Judge; Ross, Judge; and Kalitowski, Judge.*

UNPUBLISHED OPINION

ROSS, Judge

Ann Firkus sued Dr. Dana Harms alleging medical malpractice but failed to serve a timely, statutorily required expert affidavit. The district court dismissed the suit after it

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

refused to extend the deadline and, on appeal, we affirmed the district court's determination that the deadline lapsed but remanded for reconsideration of whether the excusable-neglect doctrine justified extending the deadline. The district court dismissed the case because Firkus's counsel continued to fail to make any observable effort to produce the affidavit. In this second appeal, Firkus argues that the district court erred by considering facts beyond those existing at the time of the first dismissal. We affirm because the district court correctly concluded Firkus's counsel failed to act with due diligence before the original dismissal.

FACTS

Dr. Dana Harms performed surgery on Ann Firkus's knees in 2012. Firkus sued Harms for medical malpractice in March 2016. Harms served his answer in April 2016. Later that month, Harms's counsel emailed Firkus's attorney to request medical authorizations. Firkus's attorney did not produce any signed authorizations but, on May 18, 2016, told Harms's counsel that he was still gathering information.

More than six months passed without Firkus's attorney producing any documents, and, on November 30, 2016, Harms's attorney contacted Firkus's attorney seeking a stipulation of dismissal because Firkus had not timely served a statutorily required affidavit under Minnesota Statutes section 145.682, subdivisions 2, 4(a) (2016) (requiring that, within 180 days after discovery commences, medical-malpractice plaintiffs relying on expert testimony to establish a prima facie case must serve defendants with an affidavit of expert identification that discloses the identity of experts expected to testify, the facts and opinions to which they will testify, and a summary of grounds for their opinions). Firkus's

counsel refused, asserting that the 180-day affidavit-service period had not yet even been triggered because the parties never commenced discovery.

Harms moved on January 31, 2017, to dismiss Firkus’s complaint under Minnesota Statutes section 145.682, subdivision 6(b) (2016), which provides that failure to serve an affidavit of expert identification results, upon motion, “in mandatory dismissal with prejudice of each cause of action as to which expert testimony is necessary to establish a prima facie case.” On February 17, Firkus’s attorney sent Harms’s counsel medical authorizations and a “preliminary expert report” prepared by Dr. Abigail Hamilton. Firkus opposed the motion to dismiss, arguing alternatively that the event that triggers the deadline had not occurred because discovery had not commenced and that, even if the deadline had passed, Firkus’s neglect in failing to meet it was excusable, warranting an extension.

The district court impliedly accepted that discovery had commenced, concluded that the statute mandated dismissal, and found that “[t]here is nothing in the record which would allow this Court to find there was excusable neglect.” Firkus appealed. We reasoned that section 145.682 is ambiguous in its reference to the commencement of discovery under Minnesota Rule of Civil Procedure 26.04(a). *Firkus v. Harms*, 914 N.W.2d 414, 418 (Minn. App. 2018). But we resolved the ambiguity by holding that the phrase “commencement of discovery” means “when discovery *should* commence under rule 26” *Id.* at 420. We therefore affirmed the district court in part, because Firkus failed to comply with the deadline under that definition. *Id.* at 421–22.

But we reversed on the excusable-neglect issue, remanding the case to the district court for further findings in light of our statutory-ambiguity determination:

[I]n light of this opinion’s discussion of the ambiguity regarding when the 180-day period began to run, this might provide a sufficient excuse for the failure to timely file the affidavit of expert identification. And because there are no findings by the district court on how the potential confusion over the statutory language may have delayed the filing of the affidavit of expert identification, we remand to the district court for findings on this element. If it finds that it was a reasonable excuse under the circumstances, then it must determine if the other elements of excusable neglect are similarly satisfied.

Id. at 422.

Harms moved for summary judgment on remand, arguing that the excusable-neglect doctrine did not excuse Firkus’s failure to file a timely affidavit. Firkus argued that she was not required to submit the affidavit immediately on remand because her case was “legally dead” such that the district court was required to make its excusable-neglect determination before determining “when the [e]xpert [w]itness affidavit must be turned over to [Harms].”

The district court concluded that Firkus’s counsel did have a reasonable excuse for failing to file a timely affidavit given his reasonable misunderstanding of the law. It also concluded that the mere passage of time was insufficient to substantially prejudice Harms. But on the remaining excusable-neglect elements, the district court rejected Firkus’s theory that she could not pursue or obtain an expert affidavit because her case was “legally dead.”

The district court determined that Firkus’s counsel failed to act with due diligence. It observed, “Here, even to this day, there is no expert affidavit” The district court reasoned that “Ms. Firkus’[s] attorney knew [the district court] would be reexamining the issue of excusable neglect” but that counsel made “no observable effort to obtain an expert witness affidavit” and instead chose to rely on Dr. Hamilton’s preliminary report. The

district court concluded that Firkus's counsel failed to act diligently even after our remand.

The district court also rejected Firkus's continued reliance on Dr. Hamilton's preliminary report because its contents were insufficient to satisfy the statute. The district court therefore granted summary judgment to Harms and dismissed the suit again.

Firkus appeals.

D E C I S I O N

Firkus argues that the district court abused its discretion because it considered facts beyond those existing at the time of the first dismissal, because its due-diligence and reasonable-merits determinations were based on a legal impossibility, and because Firkus's proffered preliminary report established a reasonable case on the merits. We affirm because the district court did not abuse its discretion by rejecting Firkus's excusable-neglect argument.

We ordinarily review a grant of summary judgment for disputed genuine issues of material fact and proper legal application. *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008). But we review the district court's decision to apply the excusable-neglect doctrine for an abuse of discretion. *Firkus*, 914 N.W.2d at 422. "A district court abuses its discretion if its findings are unsupported by the evidence or its decision is based on an erroneous view of the law." *Kern v. Janson*, 800 N.W.2d 126, 133 (Minn. 2011).

There is no dispute that Firkus failed to timely serve an affidavit of expert identification. *See Firkus*, 914 N.W.2d at 421. Failure to timely serve an affidavit of expert identification generally requires dismissal. Minn. Stat. § 145.682, subd. 6(b). When the

statutory deadline is not met, the excusable-neglect doctrine may afford a client relief from her attorney's negligence. *Firkus*, 941 N.W.2d at 421. "To establish excusable neglect, there are four required elements: (1) there is a reasonable defense on the merits; (2) there is a reasonable excuse for the failure to file; (3) the party acted with due diligence after notice; and (4) no substantial prejudice results to other parties." *Id.*

Firkus contends that the district court improperly considered facts beyond those existing at the time it first dismissed Firkus's complaint, leading the district court to require a "legal impossibility" of her counsel. She posits that her counsel could neither obtain nor attempt to obtain the omitted affidavit after the first dismissal because her case was "legally dead," and in the absence of district-court supervision, she could not conduct the requisite discovery to secure the affidavit. We need not address Firkus's legal-impossibility theory. We resolve this appeal instead by accepting its essential premise, which is that the district court on remand should have considered only the facts as they existed when it first dismissed Firkus's complaint. That is, we merely assume Firkus is correct that the district court on remand should have addressed Firkus's counsel's diligence only up to the time of the original dismissal. But even working under that assumption, we affirm based on the district court's finding that counsel failed to act with due diligence at any time.

The district court found that Firkus's counsel "to this day . . . ma[d]e no observable effort to obtain an expert witness affidavit." Its finding of "no observable effort" applies to *all* periods, including the period before the first dismissal. The district court recognized that the deadline lapsed on October 24, 2016, and there is no dispute that Harms's counsel informed Firkus's counsel of the lapsed deadline on November 30, 2016. The district court

also found that Firkus “did not file anything resembling an expert affidavit” until two and a half months later, on February 17, 2017.

Firkus emphasizes that she produced Dr. Hamilton’s preliminary report. The district court rejected this report as proof of either the case’s reasonable merits (an issue we do not address here) or diligent action (the issue we address). As Firkus concedes, Dr. Hamilton’s report was neither intended to be, nor is sufficient to serve as, the statutorily required affidavit. Providing the preliminary report was not diligent action to accomplish the thing Firkus failed to do—serve Dr. Harms with a statutorily compliant affidavit of expert identification.

The record amply supports the district court’s finding that Firkus’s counsel made “no observable effort to obtain an expert witness affidavit,” including specifically in the time leading up to the original dismissal. This finding alone defeats Firkus’s excusable-neglect defense as a matter of law because it excludes one of the essential elements of the defense. We indicated in Firkus’s prior appeal that the statutory ambiguity might supply one element in the excusable-neglect analysis. *Firkus*, 941 N.W.2d at 422. And it is self-evident that when two attorneys maintain contradictory but reasonable views of what the law requires, diligent action by the potentially obligated attorney is due upon notice of this ambiguity. After an attorney receives notice of a reasonable statutory interpretation that would lead to the dismissal of his client’s malpractice lawsuit unless the attorney takes prompt action, only his prompt action can satisfy the due-diligence element in an excusable-neglect assessment. An attorney cannot rely instead entirely on the

possibility that a court will later adopt the interpretation that does not penalize his inaction by dismissal.

We are not persuaded otherwise by Firkus's contention that the district court "failed to fully consider the ramifications" of her counsel's reasonable mistake of law, and that it "affected every other decision that led up to Dr. Harms[']s motion to dismiss." Had Firkus believed that she were under a deadline, she contends, she would have "pushed to start discovery" and "pushed for documents from and [a] deposition of Dr. Harms." Firkus insists the district court ought to have "consider[ed] the effects" of the reasonable excuse on the other excusable-neglect elements. But the effect Firkus urges would excuse a due-diligence showing altogether, fundamentally altering the excusable-neglect doctrine. Again, excusable neglect *requires* a showing on all four elements. *Id.* at 421. And although Firkus also raises challenges to the district court's conclusions on the other excusable-neglect elements, our holding on this element is dispositive.

We are also unpersuaded by Firkus's public-policy argument. She cautions that affirming the dismissal will invite defense attorneys to run out the affidavit clock simply by refusing to participate in a discovery conference, thereby obstructing the plaintiff from seeking the discovery necessary to produce the required affidavit. But this argument is directed fundamentally at our holding in the previous *Firkus* appeal, and this is not the forum to challenge that precedent. And the argument is thin in substance. Formal discovery is not always essential to gather the information necessary to develop the affidavits, and, in any event, a plaintiff may engage in discovery before conferring and preparing a discovery plan by obtaining a court order to do so. *See* Minn. R. Civ. P. 26.04(a). Counsel

being subjected to improper gamesmanship are free to seek permission to begin discovery, and the disadvantaged attorneys in that situation would presumably have a compelling basis to obtain the order. The strategic-ploy argument is unconvincing.

Affirmed.