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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A09-2063**

Richard McMullen and Susan McMullen,  
individually and as assignees of Anna Mae McMullen,  
Appellants,

vs.

South Central Electric Association,  
Respondent.

**Filed May 18, 2010  
Affirmed  
Stoneburner, Judge**

Cottonwood County District Court  
File No. 17CV08157

Richard I. Diamond, Richard I. Diamond, P.A., Minnetonka, Minnesota (for appellant)

Scott V. Kelly, Daniel J. Bellig, Farrish Johnson Law Office, Chtd., Mankato, Minnesota  
(for respondent)

Considered and decided by Ross, Presiding Judge; Stoneburner, Judge; and  
Harten, Judge.\*

**UNPUBLISHED OPINION**

**STONEBURNER**, Judge

Appellants challenge the dismissal of various claims based on the primary  
allegation that respondent's actions resulted in stray voltage that caused decreased milk

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

production on appellants' dairy farm and eventual destruction of appellants' dairy herd. Because the district court did not abuse its discretion in concluding that appellants failed to timely comply with the expert-disclosure requirements of Minn. Stat. § 544.42, subd. 4 (2008), we affirm.

## FACTS

In 1988, appellants Richard and Susan McMullen purchased and began operating a dairy farm in Comfrey, Minnesota. Unable to meet their production goal, the McMullens suspected that stray voltage<sup>1</sup> could be a cause of low milk production. In 1991, they contacted respondent South Central Electric Association (SCEA), the utility providing electricity to the farm, and requested testing for stray voltage.

SCEA did some testing and noted some voltage problems but, because SCEA could not find the cause, it had more extensive testing performed in January 1992 by electrician John Gagnon. Gagnon told the McMullens that there were high levels of voltage on the farm but that the cows were “naturally isolated,” and there should not be concerns about stray voltage affecting milk production. The McMullens took a number of steps to minimize the farm as a source of stray voltage, but the problems with milk production and overall health of the herd continued.

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<sup>1</sup> This court has differentiated between “neutral-to-earth” voltage, which may be a natural phenomena associated with power distribution systems, and “stray voltage,” quoting from evidence that “neutral-to-earth voltage is only correctly termed stray voltage when it appears in an animal environment at a magnitude that is problematic to animals,” and stating that “equating unavoidable, but relatively innocuous, neutral-to-earth voltage with stray voltage in the dairy barn is like equating a tiger loose on the street to one properly caged and controlled.” *ZumBerge v. N. States Power Co.*, 481 N.W.2d 103, 107 (Minn. App. 1992) (quotation marks omitted), *review denied* (Minn. Apr. 29, 1992).

In 2003, at the McMullens' request, SCEA did further stray-voltage testing but did not inform the McMullens of the results and did not take any other actions. In 2005, due to continuing low milk production and health problems with the herd, the McMullens terminated the dairy-farm operation and sold the herd for slaughter. The McMullens continued to research possible sources of the problems, hoping to reestablish a herd when those problems were corrected.

In 2006, the McMullens hired electrician Gary Cornwell to conduct independent stray-voltage testing on the farm. Cornwell reported high levels of stray voltage and advised the McMullens to contact SCEA to correct the problem. SCEA's agents conducted further testing. SCEA employees made some adjustments to the neutral line and tightened loose connections on the wires to the farm but advised the McMullens that the problem was on the farm, based on the barn-neutral reading being higher than the transformer-neutral reading during testing. Not trusting SCEA's honesty, Richard McMullen switched plugs on the neutrals so that what appeared to be a reading from the barn neutral was actually a reading from the transformer neutral. In further testings, SCEA continued to tell the McMullens that the barn-neutral reading was higher than the transformer-neutral reading, but SCEA was actually reading the transformer neutral as the barn neutral. McMullen never revealed his deception, but he lost all faith in SCEA reports.

The McMullens requested that the transformer be removed from the farm yard and a neutral isolator be installed. SCEA agreed to do this at the McMullens' expense, estimating the expense to be \$2,000. After the work was performed, voltage on the farm

was greatly reduced on the farm neutral. SCEA billed the McMullens \$3,035.90 for installation of the isolator. The McMullens then sued SCEA; two of SCEA's licensed-electrical-engineer employees, Blaine M. Strampe and Robert Emgarten; and SCEA general manager, Thomas Malone. The McMullens alleged 12 causes of action related to the delivery of electricity to their farm and sought damages allegedly caused by stray voltage. The individual employee-defendants were dismissed from the action on SCEA's motion.

Because the complaint alleged professional negligence, SCEA demanded compliance with the statutory requirements for disclosure of expert review and opinion under Minn. Stat § 544.42 (2008).<sup>2</sup> The McMullens provided a timely affidavit of expert review and relied on answers to expert interrogatories to meet the requirements of section 544.42, subdivision 4. SCEA concluded that the McMullens had failed to adequately address the statutory requirements, and moved for an order requiring the McMullens to cure the deficiencies in their expert disclosures. The district court granted the motion and issued an order detailing the deficiencies and directing the McMullens to cure the deficiencies within 60 days. The district court's order specifically required that supplemental answers to interrogatories address: (1) the standard of care, including the level at which stray voltage becomes harmful and unreasonable, and the materials, design and maintenance that a reasonably prudent electrical utility provider would have been

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<sup>2</sup> SCEA moved to dismiss the individually named employees from the action because all claims against the individuals involved actions within the scope of employment and SCEA concedes that it is responsible for the acts of these employees. Because SCEA does not contest its liability for the acts of the professionals sued, the McMullens do not contest the application of Minn. Stat. § 544.42 to this action.

expected to implement under similar circumstances; (2) the breach of the standard of care, explaining in detail that the design of the system or materials used subjected the dairy herd to an unreasonable risk of harm, or explaining that failure to identify and correct the harmful level of stray voltage violated the standard of care; (3) how the breach resulted in reasonably foreseeable injury, including expert-opinion conclusions that cow deaths and low milk production were proximately caused by SCEA's negligence; and (4) the factual grounds for the opinions, and information as to the qualifications of the experts.

The McMullens provided supplemental answers, in part identifying two treating veterinarians as experts who would opine about causation. SCEA was not satisfied that the McMullens had cured the deficiencies in their expert disclosures and moved for mandatory dismissal under section 544.42, subdivision 6(c). The district court declined to consider additional expert disclosures filed after the statutory deadline and concluded that McMullens had failed meet the disclosure requirements of section 544.42, subdivision 4, on the issue of causation and qualification of their causation experts. The district court granted SCEA's motion to dismiss all claims that depended on proving harmful effects of stray voltage on the dairy herd, for which the district court concluded that expert testimony was required. The district court dismissed the claims for negligence, professional negligence, breach of express warranties, breach of implied warranties, breach of fiduciary duty, nuisance, and equitable/promissory estoppel. The district court did not dismiss claims for damages not involving the herd's exposure to stray voltage. Those claims were later dismissed by stipulation. This appeal followed.

## DECISION

### I. Standard of review

A district court's decision to dismiss claims for failure to comply with the requirements of expert disclosure under Minn. Stat. § 544.42, subd. 4, will be reversed only on an abuse of discretion. *Lake Superior Ctr. Auth. v. Hammel*, 715 N.W.2d 458, 468–69 (Minn. App. 2006), *review denied* (Minn. Aug. 23, 2006). But questions of statutory construction are legal questions reviewed de novo. *Id.* at 468. The competence of a witness to testify on a particular matter is a question of fact within the province of the district court judge, whose ruling will not be reversed unless it is based on an erroneous view of the law or clearly not justified by the evidence. *Hagen v. Swenson*, 306 Minn. 527, 528, 236 N.W.2d 161, 162 (1975).

### II. Requirement of expert disclosure

#### A. Application of section 544.42

Statutory requirements for expert review and disclosure apply to “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.” Minn. Stat. § 544.42, subd. 2. The statute defines “professional” as “a licensed attorney or an architect, certified public accountant, engineer, land surveyor, or landscape architect licensed or certified under chapter 326 or 326A.” Minn. Stat. § 544.42, subd. 1(1). In this case, the parties agree that because SCEA has stepped into the shoes of the professionals who were originally sued, the statute, at a minimum, applies to the McMullens’ claim for “professional negligence.” SCEA contends, and the district court

agreed, that because expert testimony on causation is required to establish a prima facie case for all of the other dismissed claims, section 544.42 applies to all of those claims. The McMullens argue that expert testimony was not required to establish negligence, trespass, or nuisance. But all of these causes of action arise out of the claimed defects in the design of the electricity-delivery system to the farm and SCEA's alleged failure to correct design problems. And all require expert testimony to establish that any problems with the electricity-delivery system caused the injuries and damages to the herd asserted by the McMullens. We conclude that the district court did not err in holding that failure to fulfill the requirements of section 544.42 requires dismissal of all claims for which expert testimony is necessary to prove that stray voltage caused the alleged damages.

**B. Disclosure required by section 544.42, subdivision 4**

Within 180 days of commencement of an action to which section 544.42 applies, a claimant must identify each expert expected to be called, the substance of the facts and opinions to which each is expected to testify, and a summary of the grounds for each opinion. Minn. Stat. § 544.42, subd. 4(a). This information may be provided by an affidavit signed by the party's attorney or by answers to interrogatories, if signed by the party's attorney. *Id.*

The minimum standards for expert disclosure were established by the supreme court in *Brown-Wilbert, Inc. v. Copeland Buhl & Co.*, 732 N.W.2d 209, 215–19 (Minn. 2007), an action against accountants asserting breach of contract, breach of fiduciary duty, accounting malpractice, and restitution. The supreme court stated that:

minimum standards for an affidavit of expert disclosure, sufficient to satisfy the 180-day requirement, must be that the affidavit provide some meaningful information, beyond conclusory statements, that (1) identifies each person the attorney expects to call as an expert; (2) describes the expert's opinion on the applicable standard of care, as recognized by the professional community; (3) explains the expert's opinion that the defendant departed from that standard; and (4) summarizes the expert's opinion that the defendant's departure was a direct cause of the plaintiff's injuries.

*Id.* at 219.

The McMullens' claim for professional negligence asserts that "SCEA held itself out as [an] expert competent to perform electrical and testing services in the field of electrical engineering and detection and correction of stray voltage according to the standards of engineering practice in the community, . . . [that SCEA] provided negligent engineering and electrical advice and services," and that the McMullens have been directly and proximately damaged by SCEA's negligence "as alleged." Damages alleged in the McMullens' negligence claims were "loss of income, death of numerous cows and calves, and loss of milk production."

The district court concluded that the McMullens failed to establish that their identified causation witnesses are competent to testify as causation experts in a stray-voltage case and that, even if qualified, the McMullens failed to disclose more than conclusory statements about causation, which do not meet the requirements of the statute. The McMullens appear to concede the deficiencies in their timely disclosure of a competent causation expert, but nevertheless argue that, for various reasons, the district court should not have dismissed the claims requiring expert causation-testimony.

### III. Standard of proof

The McMullens first assert that the district court abused its discretion by requiring them to provide more proof than is required to satisfy the requirements of section 544.42, subdivision 4. Specifically, the McMullens assert that the statute does not require them to explain the qualifications of their causation experts.<sup>3</sup> We disagree.

“Expert testimony cannot be given by a witness who is not an expert—that is, someone who is not qualified or competent to give an expert opinion.” *Teffteller v. Univ. of Minn.*, 645 N.W.2d 420, 427 (Minn. 2002) (in the context of expert disclosure required for a medical-malpractice action, rejecting the assertion that the requirement for expert disclosure does not require disclosure from an expert whose qualifications provide a reasonable expectation that the expert’s opinions could be admissible at trial). In the context of medical malpractice, in order for a witness to be competent to testify as an expert, the witness must have both sufficient scientific knowledge of and practical experience with the subject matter of the offered testimony. *Cornfeldt v. Tongen*, 262 N.W.2d 684, 692 (Minn. 1977). The language in Minn. Stat. § 145.682, subd. 4 (2008) (requiring expert disclosure in medical-malpractice cases) and Minn. Stat. § 544.42, subd. 4, is identical and the holdings of *Teffteller* and *Cornfeldt* are authority for the rule that section 544.42, subdivision 4, requires a showing that the identified expert is competent to testify on the issue involved.

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<sup>3</sup> The McMullens do not argue that they have disclosed information demonstrating that any of their disclosed experts is qualified to testify regarding causation in this case.

We also find no merit in the McMullens' assertion that because another district court found that one of the McMullens' identified experts had adequate *foundation* to testify about causation in a stray-voltage case, that expert must be deemed qualified as an expert in this case. That district court decision is not binding in this case, and it did not involve the application of section 544.42 or the issue of the expert's qualifications.

#### **IV. Timing of motion to dismiss**

The McMullens argue that the district court erred by failing to deny SCEA's motion as premature because the district court's scheduling order established June 1, 2009, as the deadline for identification of experts and production of expert reports, implicitly extending the statutory deadline for expert review. The McMullens rely on canons of statutory construction to argue that because the scheduling order was a "specific" provision that should prevail over the "general" provision of section 544.42, subdivision 4. *See* Minn. Stat. § 645.26, subd. 1 (2008) (stating that when a general provision in a law is in conflict with a special provision in the same or another law and the conflict is irreconcilable, the special provision prevails unless the general provision was later enacted and the legislature manifested an intention that the general provision should prevail). But the McMullens' authority is inapposite, and the supreme court has previously rejected a claim that a scheduling order implicitly extended the time limits for expert disclosure in a medical-malpractice action. *See Lindberg v. Health Partners, Inc.*, 599 N.W.2d 572, 575 (Minn. 1999) (reinstating dismissal of medical-malpractice claims, concluding that it was not reasonable to assume that a routine scheduling order that did not reference the statutory expert-disclosure deadline implicitly extended that deadline).

The McMullens also assert, without citing any legal authority or analysis, that SCEA's failure to give them timely notice of the inadequacy of their disclosures should have resulted in denial of SCEA's motion to dismiss. This court declines to address arguments unsupported by legal authority or analysis. *Ganguli v. Univ. of Minn.*, 512, N.W.2d 918, 919 n.1 (Minn. App. 1994). But we note that section 544.42 does require timely notice of inadequacy of expert disclosures.

**V. Failure to review untimely disclosures**

Two days before the 60-day cure deadline was set to expire, the McMullens identified Dr. Winter as an additional expert in their supplemental answers to interrogatories. More than three months after the 60-day cure deadline passed, the McMullens submitted a "detailed report" from Dr. Winter. The district court declined to review these disclosures. The McMullens argue that the district court erred by failing to consider Dr. Winter's report because SCEA did not voice any objections to the merits of Dr. Winter's report as supplemental and adequate disclosures.

The McMullens rely on Minn. Stat. § 544.42, subd. 4(b) (stating that "[n]othing in this subdivision prevents any party from calling additional expert witnesses or substituting expert witnesses") and the interpretation of that subdivision in *Noske v. Friedberg*, 713 N.W.2d 866, 872–73 (Minn. App. 2006), *review denied* (Minn. July 19, 2006), to support their argument that the district court should have considered Dr. Winter's report. But there is no language in Minn. Stat. § 544.42, subd. 4(b), indicating that a plaintiff may avoid the 60-day cure deadline, established under subdivision 6, by simply identifying additional experts within the deadline and then

providing corresponding supplemental disclosures after the deadline has passed. And, in *Noske*, although this court concluded that subdivision 4(b) “provides the [district] court with discretion to permit a second affidavit of expert review that identifies a new expert,” and “appl[ies] to both affidavits of expert review and expert identification;” it explicitly determined that such is the case “*as long as the other provisions of the statute are satisfied.*” *Id.* at 872–73 (emphasis added). In *Noske*, all other provisions of section 544.42 were satisfied. *Id.* Here, the McMullens failed to cure their inadequate disclosures within 60 days. The district court did not err by failing to consider Dr. Winter’s untimely report. Furthermore, even if Dr. Winter’s report had been considered by the district court, the report failed to establish that Dr. Winter is competent to testify as an expert on causation. The report merely made conclusory statements about causation and, therefore, did not cure the deficiencies identified by the district court in meeting the requirements of expert review.

**Affirmed.**