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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2165**

Ben Lau,
Appellant,

vs.

Midwest Fence and Manufacturing Company,
Respondent.

**Filed July 16, 2012
Reversed
Halbrooks, Judge**

Hennepin County District Court
File No. 27-CV-10-22737

T. Joseph Crumley, Nicole L. Bettendorf, Bradshaw & Bryant, PLLC, Waite Park,
Minnesota (for appellant)

Robert E. Kuderer, Jenna M. Powers, Johnson & Condon, P.A., Minneapolis, Minnesota
(for respondent)

Considered and decided by Halbrooks, Presiding Judge; Worke, Judge; and
Bjorkman, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant challenges the district court's summary-judgment dismissal of his
personal-injury action, arguing that the district court erred by ruling that his expert's

opinions are inadmissible because they lack foundational reliability and were untimely disclosed. We reverse.

FACTS

On February 17, 2007, appellant Ben Lau, a bus driver for Bloomington Independent School District, drove students on a field trip and returned the bus to a secured parking lot. When walking out of the lot, Lau entered an access code to close an automatic sliding gate behind him. Due to heavy winds, the gate did not close securely. He entered the access code again and used his hand to guide the gate shut. In guiding the gate, Lau placed his thumb on one of the latching points. When the gate closed, it pinched his thumb, severing part of it.

On February 4, 2009, Lau sued respondent Midwest Fence and Manufacturing Company, the company that manufactured and installed the gate, for damages based on theories of negligence, strict liability, and breach of express and implied warranties. The district court ordered the parties to make all necessary disclosures about expert witnesses by June 1, 2011. The parties served and responded to each other's discovery. On June 1, 2009, in response to Midwest's Interrogatory #14, Lau stated the following:

INTERROGATORY #14: Identify by name, address, age, employer and occupation all persons who have any knowledge or information relating to the occurrence referred to in the complaint including expert witnesses, known to you, your counsel or associates, investigators, employees or agents, whether obtained in the course of investigation, preparation for trial or otherwise.

ANSWER: [Ben Lau]; Employees of Bloomington School District #271; Lance Beaulieu, Designer Decks and Fence,

Inc., 4415 East Skene Road, Elizabeth, IL 61028. Discovery is continuing.

There was a separate interrogatory that asked Lau to identify the experts he anticipated calling at trial. Beaulieu was not listed in response.

Two years later, on June 1, 2011, Lau disclosed that he planned to call Lance Beaulieu as an expert witness at trial. On June 2, 2011, Midwest moved for summary judgment on the ground that Lau's claims were not supported by expert testimony. On June 20, 2011, Lau provided Beaulieu's report, in letter form, to Midwest. Beaulieu opined that the fence was defectively designed and installed. The district court ruled that Beaulieu's testimony is inadmissible because it lacks foundational reliability and because it was disclosed past the discovery deadline. The district court granted Midwest's motion for summary judgment and dismissed Lau's claims with prejudice. This appeal follows.

DECISION

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. On appeal from summary judgment, this court asks whether there are any genuine issues of material fact and whether the district court erred in applying the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). The defendant is entitled to summary judgment on a claim if the plaintiff fails to make a showing sufficient to establish an essential element of the claim. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

I.

The district court excluded Lau's expert opinions on the ground that they lack foundational reliability. Under Minn. R. Evid. 702, expert testimony is admissible if: "(1) the witness is qualified as an expert; (2) the expert's opinion has foundational reliability; (3) the expert testimony is helpful to the jury; and (4) if the testimony involves a novel scientific theory, it must satisfy the *Frye-Mack* standard." *State v. Obeta*, 796 N.W.2d 282, 289 (Minn. 2011). A witness can be qualified as an expert based on "knowledge, skill, experience, training, or education." Minn. R. Evid. 702. The district court has considerable discretion in determining the admissibility of an expert opinion and the sufficiency of foundation laid for the expert opinion. *Gross v. Victoria Station Farms, Inc.*, 578 N.W.2d 757, 760-61 (Minn. 1998). We review a district court's evidentiary ruling for a clear abuse of that discretion. *Id.*

The Minnesota Supreme Court addressed the admissibility of expert opinions in *Gross*. *Id.* at 761-62. *Gross* involved a horse owner's claims against a boarding facility arising out of a horse's lameness. *Id.* at 759. The issue of medical causation was central to the claim. *Id.* at 758-59. The boarding facility produced evidence from three veterinarians, who had examined or treated the horse, to challenge the plaintiff's claims. *Id.* at 759. The plaintiff had no expert at the time of the summary-judgment hearing but was permitted to supplement the record with an affidavit from an expert with an M.S. in geology and a Ph.D. in biology/systematics and ecology (vertebrate paleontology). *Id.* at 760.

After reviewing the additional information, the district court granted summary judgment to the boarding facility, determining that the plaintiff's expert's opinion was inadmissible because the expert had no education or training in veterinary medicine and had never practiced in the area of equine lameness diagnosis. *Id.* at 761. While this court reversed the district court, the supreme court reinstated its ruling, stating that this court improperly applied a de novo standard of review. *Id.*

In this case, the district court ruled:

The expert report provided to support Lau's opposition to summary judgment lacks foundational reliability. Although the report makes clear Beaulieu's belief that the fence was improperly installed or otherwise defective, he cites no facts or data upon which his opinion is based. Instead, Beaulieu states in the first paragraph of his report that his opinion is based upon Midwest's responses to discovery in connection with this litigation and its memorandum in support of its motion for summary judgment and attached exhibits. The report does not identify any particular data, industry standards, guidelines, professional manuals, testing, etc. to support his opinion. Although Beaulieu's report does state that he has been a professional in the fence industry for over 35 years, that statement alone is not sufficient to lay foundation for his expert report. Lau's expert report lacks foundational reliability and is inadmissible.

Lau's theories for recovery include negligence, design defect, and improper installation. While the district court focused on Beaulieu's 35 years of experience, finding it to be insufficient, Beaulieu's curriculum vitae (CV) provides additional evaluative criteria. Although Beaulieu's educational training is not evident from his CV, he is currently the president and owner of Designer Decks and Fence, a company involved in designing, building, and installing all types of fencing, including electronic

operating gates. Beaulieu's practical experience has centered on the matters at issue in this case. And Beaulieu's report provides his assessment of the problems with the gate operation that resulted in Lau's injury. Beaulieu opined that there was a defect in the design of the cantilever gate and that the material piping for the gate frame was too light in wall thickness to accept a 30-foot cantilever gate. Alternatively, Beaulieu stated that the gate's saddle latching assembly was not correctly installed because it lacked heavy pipe and footings. While the strength of Beaulieu's opinions may be subject to challenge, we conclude that the record establishes that he has the relevant knowledge and training to qualify as an expert in this matter.

The district court's decision focused on what it perceived to be the inadequacies of the bases for Beaulieu's opinions. But the strengths and weaknesses of an expert's opinions are not properly determined on summary judgment, unless they are inadequate as a matter of law. Determinations of credibility and fact are for the jury to decide. *Carlson v. Sala Architects, Inc.*, 732 N.W.2d 324, 330 (Minn. App. 2007), *review denied* (Minn. Aug. 21, 2007). Because the district court's decision to suppress Beaulieu's opinions improperly weighed issues of fact, we conclude that this is one of the rare circumstances where the district court abused its discretion by determining that Beaulieu's opinions are inadmissible based on foundational reliability.

II.

The district court ruled that Beaulieu's report is inadmissible because it was untimely. "Trial courts have discretion to determine the appropriate sanction for a violation of the discovery rules." *Norwest Bank Midland v. Shinnick*, 402 N.W.2d 818,

823 (Minn. App. 1987). “[E]xpert testimony should be suppressed for failure to make a timely disclosure of the expert’s identity only where counsel’s dereliction . . . is inexcusable and results in disadvantage to his opponent.” *Id.* (quotations omitted). “The crucial question is whether the late disclosure resulted in any appreciable degree of prejudice.” *Id.*

In an amended scheduling order issued on December 15, 2010, the district court stated: “The parties shall complete discovery [and] make all necessary disclosures regarding expert witnesses . . . no later than June 1, 2011.” The case was assigned to the district court’s civil trial block beginning October 31, 2011.

Midwest provided the report of its expert on May 31, 2011. On the discovery deadline of June 1, Lau disclosed Beaulieu as an expert witness. On June 2, Midwest moved for summary judgment on the ground that Lau failed to include an expert who could identify a manufacturing or design defect. On June 20, Beaulieu issued his report.

The district court ruled:

It appears that Mr. Beaulieu’s expert opinion was sought only after Midwest brought its Motion for Summary Judgment, and . . . he was not timely disclosed. Because Lau has offered no acceptable explanation for his failure to timely disclose this expert, this court determines that his testimony is inadmissible and thus does not consider it as part of the record in ruling on Midwest’s motion.

It is undisputed that the district court has broad discretion to manage its cases and must be able to control its calendar. *See McIntosh v. Davis*, 441 N.W.2d 115, 119 (Minn. 1989). But we also note that the primary objective of the law is to dispose of cases on the merits. *Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 192 (Minn. 1990).

Here, five months remained before the beginning of the district court's trial block. While Midwest asserted that Beaulieu's report was late, it did not argue that it suffered any prejudice by the late disclosure. The district court found that Lau failed to provide an acceptable explanation as to why the report was late. But the district court did not make any finding that Midwest was somehow prejudiced by the timing. Nor did the district court cite any inconvenience or hardship to the court as a result of the late disclosure. Because there was no finding of prejudice to Midwest, we conclude that the district court abused its discretion by its ruling that Beaulieu's opinions are inadmissible based on untimely disclosure. The district court's grant of summary judgment to Midwest is reversed.

Reversed.