STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0415, A08-0551

State of Minnesota, by its Attorney General, Lori Swanson,
Appellant (A08-415),

Barbara Shipp, et al.,
Appellants (A08-551),

vs.

Messerli and Kramer, P.A., et al.,
Respondents.

Filed April 21, 2009
Affirmed; motion denied
Toussaint, Chief Judge

Ramsey County District Court
File Nos. C7-04-12204, 62-C8-04-012194

Lori Swanson, Attorney General, Gary R. Cunningham, Assistant Attorney General, 1100 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2128 (for appellant State of Minnesota)

Galen Robinson, Law Offices of the Legal Aid Society of Minneapolis, 430 First Avenue North, Suite 300, Minneapolis, MN 55401-1780; and

Michael J. Persellin, Jeremy T. Carvell, Law Offices of the Legal Aid Society of Minneapolis, 2929 Fourth Avenue South, Suite 201, Minneapolis, MN 55408 (for appellants Barbara Shipp et al.)

Jeanne H. Unger, Michael A. Klutho, Christopher R. Morris, Bassford Remele, P.A., 33 South Sixth Street, Suite 3800, Minneapolis, MN 55402-3707 (for respondents)

Considered and decided by Toussaint, Chief Judge; Peterson, Judge; and Randall, Judge.*

U N P U B L I S H E D O P I N I O N

TOUSSAINT, Chief Judge

Appellants Barbara Shipp, Barbara Johnson, Joanne Taylor, Lynn Parkkila, Janice Sturges, Marlene Carter, and Melanie Fischer, on behalf of themselves and all others similarly situated (the Shipp appellants), brought an action alleging unlawful attorney-fee collection practices in debt-collection proceedings against respondents Messerli and Kramer, P.A., Derrick N. Weber, and Jefferson C. Pappas, a law firm and its employees that represented creditors of the Shipp appellants. Appellant State of Minnesota, by its Attorney General, Lori Swanson (the state) brought an action alleging unlawful attorney-fee collection practices and unlawful levy/garnishment practices in debt-collection proceedings against respondents. Respondents moved for summary judgment against the Shipp appellants and for judgment on the pleadings against the state. The district court granted both motions, and the Shipp appellants and the state now challenge those decisions. Because the Shipp appellants' claims and the state's claims are barred as impermissible collateral attacks on underlying judgments and because the state did not file suit pursuant to an independent cause of action, we affirm. We deny respondents' motion to strike.

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

D E C I S I O N

1. A08-551 – The Shipp Appellants' Case

Creditors of the Shipp appellants employed respondents to collect on the Shipp appellants' debts. Respondents brought actions against the Shipp appellants and, because the Shipp appellants did not answer the complaints, respondents obtained default judgments and attorney-fee awards for their clients against the Shipp appellants. After the time to appeal had lapsed, the Shipp appellants brought this action against respondents, arguing that the attorney-fee affidavits submitted by respondents did not comply with Minn. R. Gen. Pract. 119 and that their cover letters were misleading and unconscionable. Respondents moved for summary judgment; the district granted the motion on the grounds that the Shipp appellants' claims were barred as collateral attacks on the presumptively-valid underlying default judgments and attorney-fee awards.

On appeal from a grant of summary judgment, this court asks whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). We view the evidence in the light most favorable to the party against whom judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

The underlying default judgments and attorney-fee awards against the Shipp appellants are conclusive as to whether respondents' practices in collecting the attorney fees were lawful. Thus, the district court had no authority to overturn either the default judgments or the attorney-fee awards. "[P]ublic policy favors the finality of judgments and the ability of parties to rely on court orders." *Nussbaumer v. Fetrow*, 556 N.W.2d

595, 599 (Minn. App. 1996), *review denied* (Minn. Feb. 26, 1997). A "judgment of a court of competent jurisdiction, after the expiration of the time of appeal, cannot be impeached, either directly or indirectly, for mere errors or irregularities not going to the jurisdiction of the court." *Sache v. Wallace,* 101 Minn. 169, 171, 112 N.W. 386, 387 (1907).

The Shipp appellants rely on three exceptions to the collateral-attack doctrine. First, they contend that the district court failed to recognize its inherent equitable power to enforce its procedural rules to prevent injustice. *See, e.g., State v. Erickson,* 589 N.W.2d 481, 485 (Minn. 1999) (stating that court has inherent power "to administer justice whether any previous form of remedy has been granted or not" quotation omitted)); *cf. Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244-45, 64 S. Ct. 997, 1000 (1944) (stating that courts may grant equitable relief to correct injustices where "enforcement of the judgment is manifestly unconscionable" (quotation omitted)). But the Shipp appellants have not shown that the attorney-fee awards are manifestly unconscionable. Because the attorney-fee awards have not been shown to be unreasonable, much less unconscionable, a collection agency's failure to comply with the express language of Minn. R. Gen. Pract. 119 does not constitute an injustice and does not warrant the court's intervention.

Second, the Shipp appellants rely on Minn. R. Civ. P. 60.02 (providing six grounds for relief from final judgment, but also stating that the rule "does not limit the power of a court to entertain an independent action . . . or to set aside a judgment for

fraud upon the court").[1] The phrase "an independent action" denotes "what had been historically known simply as an independent action in equity to obtain relief from a judgment." 11 Charles Alan Wright et al., *Federal Practice & Procedure* § 2868, at 396 (2d ed. 1995) (discussing equivalent federal rule). Again, equity did not require the district court to permit the Shipp appellants' impermissible collateral attack.

Third, the Shipp appellants contend that a collateral attack is permitted because defects on the face of the record, i.e. the nonconforming attorney-fee affidavits, establish that the underlying judgment was not authorized. But a "judgment alleged to be merely erroneous, or founded upon irregularities in the proceedings not going to the jurisdiction of the court, is not subject to attack." *Nussbaumer*, 556 N.W.2d at 599 (citing *Jones v. Wellcome*, 141 Minn. 352, 355, 170 N.W. 224, 226 (1919) (requiring that lack of jurisdiction affirmatively appear on face of record to permit collateral attack)). "Minnesota law does not permit the collateral attack on a judgment valid on its face." *Id.* The allegedly nonconforming affidavits are merely "irregularities in the proceedings not going to the jurisdiction of the court." Thus, the attorney-fee awards are not subject to collateral attack.

The district court correctly concluded that respondents were entitled to summary judgment against the Shipp appellants as a matter of law. Because collateral attack is a

[1] To obtain relief under the first three grounds ((1) mistake, inadvertence, surprise, or excusable neglect, (2) newly discovered evidence, or (3) fraud, misrepresentation, or other misconduct of the adverse party), a motion must be made within one year of entry of judgment. Minn. R. Civ. P. 60.02. The Shipp appellants did not meet this deadline, and the remaining grounds ((4) the judgment is void, (5) the judgment has been satisfied, released, or discharged, or (6) any other reason justifying relief) do not apply here. *See id.*

threshold matter, we do not address the Shipp appellants' other claims.

2. A08-415 – The State's Case

The state, on behalf of its citizens, brought an action against respondents to obtain a declaration of wrongdoing as well as civil penalties, restitution, and disgorgement. Respondents moved for judgment on the pleadings, arguing that the state's claims were barred as collateral attacks on final judgments and that the state lacked an independent cause of action to allege against respondents. The district court granted respondents' motion.

A district court's grant of a motion for judgment on the pleadings is reviewed de novo. *See Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). "All facts alleged in the complaint must be taken as true and all reasonable inferences drawn in favor of the nonmoving party." *Marchant Inv. & Mgmt. Co. v. St. Anthony W. Neighborhood Org.*, 694 N.W.2d 92, 95 (Minn. App. 2005). While this court focuses its consideration on the allegations in the pleadings, it "may also consider documents and statements that are incorporated by reference into the pleadings." *Id*.; *see also* Minn. R. Civ. P. 12.03.

As a threshold matter, the district court concluded that the state's claims, like the Shipp appellants' claims, are barred as collateral attacks. This conclusion was not erroneous; the district court could not have granted the relief requested by the state without overturning the underlying default judgments. "Minnesota law does not permit the collateral attack on a judgment valid on its face." *Nussbaumer*, 556 N.W.2d at 599.

Nor did the district court err in concluding that the state lacked an independent cause of action to maintain claims against respondents under the Minnesota Debt Collections Agencies Act, the Minnesota Uniform Deceptive Trade Practices Act, Minn. R. Gen. Pract. 119, or the levy and garnishment statutes. To argue that no independent cause of action was needed, the state relies on Minn. Stat. § 8.31, subd. 3(a)-(b) (2008) (providing that state has authority to sue for and obtain injunctive relief or a civil penalty) and on *Head v. Special Sch. Dist. No. 1*, 288, Minn. 496, 503, 182 N.W.2d 887, 892 (1970) ("It is clear that the attorney general may commence an action whenever, in his opinion, the interests of the state require it. He possesses such power pursuant to both common law and statute."), *overruled on other grounds by Nyhus v. Civil Serv. Bd.*, 305 Minn. 184, 186 n.1, 232 N.W.2d 779, 780 n.1 (1975). But, while the state may have standing to bring suit in the interests of its citizens, its claims against respondents require an independent cause of action.

A. The Minnesota Collection Agencies Act

The district court concluded that the Minnesota Collection Agencies Act did not provide the state with an independent cause of action against respondents because respondents, as lawyers engaged in the practice of law, are not liable as a collection agency. "The term 'collection agency' shall not include persons whose collection activities are confined to and are directly related to the operation of a business other than that of a collection agency such as . . . lawyers . . . ." Minn. Stat § 332.32 (2008).

The state argues that the exclusion of lawyers applies only when their collection activities are directly related to the operation of a business other than a collection agency.

But this argument refutes the plain language of the statute. The best method of determining the legislature's intent is to rely on the plain language of the statute. *State v. Iverson*, 664 N.W.2d 346, 350-51 (Minn. 2003). When the language is clear, we are bound to give effect to that language. *Id.* at 351. We must construe a statute according to the plain and ordinary sense of its words. Minn. Stat. § 645.08(1) (2008).

The legislature specifically identifies lawyers as among those "whose collection activities are confined to and are directly related to the operation of a business other than that of a collection agency." Minn. Stat § 332.32. The legislature could have imposed conditions on the exclusion of lawyers, as it did on the exclusion of banks, for example. *See id.* (excluding "banks when collecting accounts owed to the banks and when the bank will sustain any loss arising from uncollectible accounts"). But the legislature did not make the exclusion of lawyers from the collection agencies act conditional, and the state's argument would impose a condition. The district court did not err in finding that the collection agencies act did not provide the state with an independent cause of action.

B. The Minnesota Uniform Deceptive Trade Practices Act

The state has provided no authority establishing that respondents are subject to liability under the Minnesota Uniform Deceptive Trade Practices Act, and, as the district court noted, the legislative history of that act does not reveal any legislative intent to broaden its application beyond the offering of goods and services. Thus, the district court did not err in finding that the deceptive trade practices act did not provide the state with an independent cause of action.

C. Minn. R. Gen. Pract. 119

Minn. R. Gen. Pract. 119 sets forth the procedure for obtaining attorney fees after entry of a default judgment. Rules of procedure are to be enforced by the district court overseeing a proceeding and do not create a separate cause of action. *See* Minn. Stat. § 480.051 (2008) (stating that procedural rules "shall not abridge, enlarge, or modify the substantive rights of any litigant). The district court did not err in finding that rule 119 does not provide an independent cause of action to support a separate lawsuit against attorneys who allegedly violated the rule in underlying proceedings.

D. Levy and Garnishment Statutes

The Minnesota levy and garnishment statutes create no independent cause of action to institute subsequent litigation outside of the original proceedings. *See* Minn. Stat. §§ 551.04, 551.05, 571.72 (2008). The district court did not err in concluding that the state did not have an independent cause of action under the levy and garnishment statutes.

Although the state had standing to institute litigation to challenge respondents' practices in the public interest, it did not possess an independent cause of action to do so. The district court did not err in granting judgment on the pleadings in favor of respondents.

3. Motion to Strike

Respondents move this court for an order striking pages of the state's reply brief that address an issue not addressed in the initial brief. Generally, issues not raised or argued in an appellant's brief cannot be revived in a reply brief. *McIntire v. State*, 458

N.W.2d 714, 717 n.2 (Minn. App. 1990), *review denied* (Minn. Sept. 28, 1990). But this court has discretion to address any issue as justice requires. Minn. R. Civ. App. P. 103.04.

Respondents claim that they will be "substantially prejudiced" if we consider the issue not briefed in the state's opening brief because they will be "deprived of an opportunity to respond." But the state's case has been consolidated with the Shipp appellants' case, and the Shipp appellants briefed the issue in their initial brief. Thus, respondents were not deprived of an opportunity to respond in these consolidated appeals. Their motion to strike is denied.

Affirmed; motion denied.