STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1418

John O. Murrin, III, et al.,
Appellants,

vs.

Mathew S. Mosher, et al.,
Defendants,

Peder K. Davisson, et al.,
Respondents,

James Hoffman, et al.,
Respondents,

Teresa Hoffman, et al.,
Respondents,

Chlichelle Scott,
Respondent,

Glenn Smogoleski, et al.,
Respondents,

Colleen Turgeon,
Respondent,

Terri Hanson,
Respondent,

American Heritage Properties, Inc. (AHP), et al.,
Defendants,

Fred Blumenhagen,
Respondent,

Linda Blumenhagen,
Respondent,

Steven J. Mattson, et al.,
Respondents,

Toni Klatt,
Respondent.

Filed August 4, 2009
Affirmed
Larkin, Judge

Hennepin County District Court
File No. 27-CV-07-2974

Michael Milo, Michael Milo & Associates P.A., 7400 Metro Boulevard, Suite 250, Edina, MN 55439 (for appellants)

Josh Jacobson, The Law Office of Josh Jacobson, P.A., One Financial Plaza, 120 South Sixth Street, Suite 1515, Minneapolis, MN 55402 (for respondents Mathew S. Mosher, et al.)

Sean A. Shiff, Skolnick & Shiff, P.A., 2100 Rand Tower, 527 Marquette Avenue South, Minneapolis, MN 55402 (for respondents Peder K. Davisson, et al.)

James Hoffman, 11401 Neal Avenue South, Hastings, MN 55033 (pro se respondent)

Stanford P. Hill, Bassford Remele, P.A., 33 South Sixth Street, Suite 3800, Minneapolis, MN 55402 (for respondents Teresa Hoffman, et al.)

Chlichelle Scott, 10406 166th Street West, Lakeville, MN 55044 (pro se respondent)

Robert M. Smith, 220 South Sixth Street, Suite 2000, Minneapolis, MN 55402 (for respondents Glenn Smogoleski, et al.)

Patrick J. Neaton, Neaton & Puklich, PLLP, 7975 Stone Creek Drive, Suite 120, Chanhassen, MN 55317 (for respondent Colleen Turgeon)

Peter C. Brehm, Peter C. Brehm & Associates, P.S.C., 7825 Washington Avenue South, Suite 500, Bloomington, MN 55439 (for respondent Terri Hanson)

Fred Blumenhagen, 6 Squash Blossom Trail, Palm Coast, FL 32164 (pro se respondent)

Linda Blumenhagen, 6 Squash Blossom Trail, Palm Coast, FL 32164 (pro se respondent)

Kevin S. Sandstrom, Cameron R. Kelly, Eckberg, Lammers, Briggs, Wolff & Vierling, P.L.L.P., 1809 Northwestern Avenue, Stillwater, MN 55082 (for respondent Toni N. Klatt)

Considered and decided by Schellhas, Presiding Judge; Larkin, Judge; and Muehlberg, Judge.*

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

LARKIN, Judge

Appellants raise a variety of challenges to the district court's judgment dismissing their lawsuit with prejudice as to all but three defendants, granting summary judgment in favor of another three, and denying appellants' motion to amend their complaint. Appellants also assign error to certain post-dismissal actions by the district court. Because the district court's judgment was not erroneous, and because the court's post-dismissal actions did not result in prejudice to appellants, we affirm.

FACTS

Appellants John O. and DeVonna K. Murrin commenced this lawsuit after a company they invested in, respondent Avidigm Capital Group, Inc. (Avidigm), became insolvent and was unable to return appellants' principal investment of $600,000. Appellants made this investment in Avidigm in late August 2004. Appellants had made two previous investments in Avidigm in 2003 and early 2004, both of which were

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

returned to appellants with a profit. Appellants now allege that Avidigm was actually part of a far-reaching and complex Ponzi scheme.

Appellants filed their first amended summons and complaint in February 2007. On July 11, 2007, appellants filed a second amended complaint adding respondent Edina Realty, Inc. as a party after being granted leave to do so by the district court. Following the filing of the second amended complaint, the case was briefly removed to federal court but was remanded to the state court. Upon remand, the district court, in an order filed January 16, 2008 noted that various defendants in the case had argued that appellants' second amended complaint was vague and that it did not specify which counts were being alleged against which defendants. The district court, making reference to Minn. R. Civ. P. 8.01, agreed and ordered appellants to provide the defendants and the court with a chart "clearly delineating which claim is being pursued against which Defendant for each cause of action."

In an order filed February 19, 2008, the district court addressed, inter alia, appellants' motion for leave to file a third amended complaint[1] and Edina Realty's motion to dismiss for failure to state a claim. The district court denied appellants' motion to amend their complaint, finding that the defendants would be prejudiced by the numerous errors in statutory citation contained in the third amended complaint and by appellants' continued practice of "lumping numerous causes of action into a single count," which the district court found to be confusing both for the defendants and for the

[1] As the district court noted in its order, appellants actually filed their third amended complaint on October 3, 2007, but did not bring a motion to allow the amendment until January 9, 2008.

court. The district court also noted that appellants had failed to comply with the district court's January 16 order to provide a chart clearly delineating the claims. The district court found that the chart that appellants had provided "[did] not offer adequate clarification to Defendants or to the Court." Appellants had protested that producing a chart which identified which defendant was implicated in each numbered paragraph would be a laborious task, given that the second amended complaint contained some 542 paragraphs. But the district court rejected this argument, finding that any inconvenience associated with clarifying the pleading must fall to appellants as they alone were responsible for drafting the complaint. The district court also found that appellants' second amended complaint did not comply with the Minnesota Rules of Civil Procedure as it did not contain a short and plain statement of the claim; was not simple, concise, and direct; and did not limit each paragraph to a single set of circumstances. *See* Minn. R. Civ. P. 8.01, 8.05(a), 10.02.

In that same order, the district court granted Edina Realty's motion to dismiss, finding that appellants had failed to plead a legally sufficient claim against Edina Realty. The district court addressed nine separate theories that appellants had advanced against Edina Realty and found each to be legally insufficient.

Following the district court's February 19 order, appellants filed a motion to amend their complaint and file a fourth amended complaint. The district court addressed this motion, as well as several motions made by various defendants, at a May 2008 hearing. In its June 13, 2008 order following that hearing, the district court denied appellants' motion to amend their complaint, finding that appellants' proposed fourth

amended complaint, which was 272 pages long and contained 132 counts in 1,668 paragraphs, failed to remedy the problems present in appellants' second amended complaint, which was the operative pleading. The district court further found that appellants had not acted with due diligence in their attempt to amend, and that the defendants would be prejudiced by allowing an amendment at such a late stage in the litigation.[2]

Also in its June 13 order, the district court, on motion from several defendants, dismissed appellants' lawsuit as to all defendants for failure to comply with the district court's order to provide a more definite statement pursuant to Minn. R. Civ. P. 12.05. The district court also, sua sponte, dismissed appellants' lawsuit pursuant to Minn. R. Civ. P. 41.02(a) for failure to comply with the rules of civil procedure and orders of the court. This dismissal was made as to all defendants, and was with prejudice as to all except James Hoffman, Teresa Hoffman, and the Teresa Hoffman Revocable Trust. Included in this dismissal were respondents Mathew S. Mosher and MSM Enterprises, LLC, who had previously reached a stipulation for dismissal with appellants, and Edina Realty, which had been previously dismissed. Finally, the district court granted three motions for summary judgment against appellants and in favor of (1) respondent Terri Hanson; (2) respondent Colleen Turgeon; and (3) respondents Glenn and Robin Smogoleski, G.R.S, and The Furniture and More Store, Inc. (the Smogoleskis).

Following the issuance of the district court's June 13 order, appellants contacted the district court to obtain a date on which they could argue a motion for a new trial

[2] The case was set for a bench trial in October 2008.

pursuant to Minn. R. Civ. P. 59 or for relief from the judgment pursuant to Minn. R. Civ. P. 60.02. The district court refused to schedule a hearing for appellants, stating that the proposed motions were procedurally improper. The district court did not elaborate as to its reasoning. Appellants did not actually file any motion. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion by dismissing appellants' action pursuant to Minn. R. Civ. P. 41.02(a).

The district court dismissed appellants' action pursuant to Minn. R. Civ. P. 41.02(a) for failure to comply with the Minnesota Rules of Civil Procedure and an order issued by the district court. Appellants argue that dismissal was in error because (1) they were not provided notice or an opportunity to be heard, or notice of the potential sanction, (2) dismissal is not a proper sanction for failure to comply with a procedural rule, (3) they did comply with the district court's order to produce a chart, (4) they followed the rules and orders of the court, (5) they did not act with willfulness and contempt for the authority of the court and respondents failed to show substantial prejudice if the case were not dismissed, and (6) less drastic alternative sanctions were available to the district court.

Minnesota Rule of Civil Procedure 41.02(a) provides as follows: "The court may upon its own initiative, or upon motion of a party, and upon such notice as it may prescribe, dismiss an action or claim for failure to prosecute or to comply with these rules or any order of the court." Unless otherwise specified by the district court, a dismissal pursuant to rule 41.02 for reasons other than lack of jurisdiction, forum non conveniens,

or failure to join a necessary party "operates as an adjudication upon the merits." Minn. R. Civ. P. 41.02(c); *see Bonhiver v. Fugelso, Porter, Simich & Whiteman, Inc.*, 355 N.W.2d 138, 144 (Minn. 1984) (explaining that dismissal under rule 41.02 is a severe sanction).

> Rule 41.02[(a)] is designed to let the [district] court manage its docket and eliminate delays and obstructionist tactics by use of the sanction of dismissal. If a party does not cooperate with the litigation process by failing to comply with the rules of procedure or an order of the court, the judge may dismiss the case with or without prejudice.

Lampert Lumber Co. v. Joyce, 405 N.W.2d 423, 425 (Minn. 1987). The rule "permits dismissal for trial management reasons, not for lack of substantive merits of a claim." *Id.* Involuntary dismissal pursuant to rule 41.02(a) "is infrequent and is within the sound discretion of the trial court." *Bonhiver*, 355 N.W.2d at 144; *see also Chahla v. City of St. Paul*, 507 N.W.2d 29, 32 (Minn. App. 1993) (stating that "[u]se of [r]ule 41.02(a) is within the sound discretion of the [district] court"), *review denied* (Minn. Jan. 20, 1994). "A dismissal under this rule is an exercise of discretionary authority which will be sustained on appeal absent a showing of clear abuse viewing the record in light most favorable to the [district] court's order." *Zuleski v. Pipella*, 309 Minn. 585, 586-87, 245 N.W.2d 586, 587 (1976). "The decision to dismiss necessarily depends upon the circumstances peculiar to each case, justice and equity to each party, and considered with reference to just, speedy, and inexpensive disposition of the case and the policy underlying the dismissal rules of preventing harassment and unreasonable delays in litigation." *Id.* (quotation omitted).

Appellants argue that they are entitled to de novo review because the district court improperly interpreted procedural rules. Appellants provide no explanation of how the district court improperly interpreted the rules of civil procedure and cite inapposite authority to support their argument. Instead, it is clear that appellants are challenging the district court's application of rule 41.02(a), which we review for an abuse of discretion. *See Zuleski*, 309 Minn. at 586-87, 245 N.W.2d at 587.

In dismissing appellants' action, the district court stated that it "has serious concerns regarding [appellants'] failure to plead their case . . . . However, the Court's decision to dismiss [appellants'] Second Amended Complaint pursuant to Rule 41.02(a) is based upon [appellants'] failure to abide by the Court's Orders and the Minnesota Rules of Civil Procedure." The district court noted that appellants had been advised on several occasions that the second amended complaint was deficient because it violated rules 8.01,[3] 8.05,[4] and 10.02[5] of the Minnesota Rules of Civil Procedure, as well as the holding in *Mumm v. Mornson*, 708 N.W.2d 475, 481 (Minn. 2006), that "[t]he complaint should put the defendant on notice of the claims against him."

Specifically, in its order of January 16, 2008, the district court informed appellants that the second amended complaint "is vague in that it does not specify which counts are

[3] Minn. R. Civ. P. 8.01 states, in relevant part, that a complaint "shall contain a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment for the relief sought."

[4] Minn. R. Civ. P. 8.05(a) states, in relevant part, that "[e]ach averment of a pleading shall be simple, concise, and direct."

[5] Minn. R. Civ. P. 10.02 states that all averments of a claim "shall be made in numbered paragraphs," which should be limited "as far as practicable to a statement of a single set of circumstances."

being alleged against which Defendants," and referred appellants to Minn. R. Civ. P. 8.01, and the holding in *Mumm*. Also in that order, the district court ordered appellants to provide the district court and opposing parties with "a chart clearly delineating which claim is being pursued against which Defendant for each cause of action contained in the Second Amended Complaint within 10 days."

In a subsequent order filed on February 19, 2008, the district court found that the chart that appellants had provided did not offer adequate clarification as it "does not 'clearly delineat[e] which *claim* is being pursued against each Defendant *for each cause of action*." The district court again stated that appellants' second amended complaint failed to meet the requirements of Minn. R. Civ. P. 8.01 and the holding in *Mumm*. The district court also found that appellants' second amended complaint failed to comply with rules 8.05(a) and 10.02 of the Minnesota Rules of Civil Procedure, and that the complaint failed to "put Defendants on notice of the claims alleged against them." The district court also found that appellants had not adequately cured these deficiencies in their proposed third amended complaint. The district court noted that appellants' second amended complaint is 144 pages in length, containing 542 individually numbered paragraphs, while the proposed third amended complaint is 187 pages in length and contains 777 individually numbered paragraphs, as well as numerous citation errors.

In its June 13 order, the district court found that appellants were ordered to remedy the deficiencies identified in previous orders but had failed to do so. The district court found that appellants demonstrated "willfulness and contempt" for the court's authority

"in addition to prejudice to the parties involved." *See Asmus v. Ourada*, 410 N.W.2d 432, 435 (Minn. App. 1987).

A. Appellants had notice and opportunity to be heard.

Appellants argue that dismissal of their case was improper because the district court did not provide them with notice of its intent to dismiss or an opportunity to be heard. Citing *Chisholm v. Foley*, 427 N.W.2d 278 (Minn. App. 1988), appellants argue that, while rule 41.02(a) grants the district court discretion as to whether to dismiss and the type of notice to be given, the court cannot dismiss an action without any notice. In *Chisholm*, the plaintiff's case was dismissed pursuant to defendant's motion for dismissal under rule 41.02 for failure to prosecute. *Id.* at 280. Plaintiff was not given notice of the motion or the hearing, which was held ex parte. *Id.* This court reversed the district court's dismissal of the action, holding that a court may not dismiss a case without any notice to a party, and that Minn. R. Civ. P. 7.02 requires written notice of a motion to the parties and a hearing. *Id.* at 281.

This case is distinguishable from *Chisholm*. First, the dismissal here was not the result of a motion by a party of which appellants had no notice, as was the case in *Chisholm*. Rather, it was the result of the district court's exercise of its own initiative. No portion of the proceedings was held ex parte. Appellants were certainly on notice of the previous orders of the district court and of the deficiencies in the second amended complaint. Respondents Hanson, Turgeon, and the Smogoleskis had all filed motions to dismiss for failure to comply with the district court's order to provide a chart with a more

definite statement of the claims that put appellants on notice that the lawsuit could be dismissed.

Appellants implicitly concede that the motions to dismiss provided them with notice of possible dismissal. But, appellants argue that they had no notice or opportunity to be heard prior to the rule 41.02(a) dismissal as to all defendants except Hanson, Turgeon, and the Smogoleskis. Appellants do not argue that they were deprived of notice and a hearing on the motions to dismiss filed by Hanson, Turgeon, and the Smogoleskis. The only difference in the position of these three specific defendants and the remaining defendants is that these three filed motions for dismissal. We agree with the district court's statement that its reasons for dismissal "would apply equally to any Defendant wishing to bring a motion to dismiss for failure to comply with the Court's Order for a more definite statement . . . [but] [i]t would be unduly burdensome to require each Defendant to bring a separate motion to dismiss."

Moreover, "[t]he adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct." *Link v. Wabash R.R.*, 370 U.S. 626, 632, 82 S. Ct. 1386, 1389-90 (1962). In *Link* the United States Supreme Court upheld the sua sponte dismissal of a lawsuit for failure to prosecute, even though no notice had been given to the plaintiff, stating "[w]hether such an order can stand on appeal depends not on power but on whether it was within the permissible range of the court's discretion." *Id.* at 633, 82 S. Ct. at 1390. There is no doubt that the action taken here was within the district court's range of

discretion. Appellants were on notice of the possibility of dismissal of their lawsuit, and they were afforded a hearing on the pending motions for dismissal. And appellants had been on notice for months of the procedural deficiencies in their pleading.

B. The district court was not required to provide warning of dismissal as a potential sanction.

Appellants argue that dismissal was improper where they had no warning that a sanction of dismissal was possible. However, the cases relied upon by appellants are inapposite. Both *Beal v. Reinertson*, 298 Minn. 542, 543, 215 N.W.2d 57, 58 (Minn. 1974), and *Jadwin v. City of Dayton*, 379 N.W.2d 194, 196 (Minn. App. 1985), involved dismissals based on a party's failure to comply with a discovery order pursuant to Minn. R. Civ. P. 37.02. These cases are distinguishable from this case, where appellants failed to remedy procedural deficiencies in their complaint or to comply with the district court's order to provide a more definite statement of the claims being pursued against each party. Appellants have presented no authority to support their contention that a warning of the possibility of dismissal is required under rule 41.02(a), and no such requirement appears in the language of the rule. *See* Minn. R. Civ. P. 41.02.

C. Dismissal was a proper sanction.

Appellants argue that the district court's dismissal of their lawsuit was not done for the purposes of managing the court's docket, but was in response to a procedural ruling and therefore was improper. Appellants argue that "Rule 41.02(a) permits dismissal for trial management reasons and not for issues of procedure." This argument is meritless and directly contrary to the language of the rule. While a dismissal under

rule 41.02(a) can be done for trial management reasons, *Lampert Lumber Co.*, 405 N.W.2d at 425, the language of the rule specifically allows for dismissal of an action "for failure . . . to comply with these rules," or, put another way, issues of procedure. Minn. R. Civ. P. 41.02(a). To determine that the district court dismissed appellants' lawsuit based on the substantive merits of the claims rather than on appellants' failures to comply with procedural rules and the district court's order requires complete disregard of the district court's explicit findings.

D. Appellants failed to comply with the district court's order for a more definite statement and rules.

Appellants argue that they should not have been found in violation of the district court's order to provide a more definite statement because they timely served and filed a chart as ordered by the district court. But appellants assign no error to the district court's finding that the chart was deficient. Accordingly, any such assignment of error is waived. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (holding that issues not briefed on appeal are waived). Given that appellants do not assign error to the district court's determination that the chart did not comply with the requirements of the January 16 order, appellants cannot now argue they were in compliance with that order. Appellants also complain that the district court never ordered them to remedy the deficiencies in the second amended complaint or the chart. The district court has no obligation to repeatedly order deficiencies corrected once the district court has brought them to a party's attention.

Appellants also argue that the district court erred in its determination that they abused the litigation process and refused to follow the rules and directives of the court. But appellants do not, and cannot, argue that their second amended complaint complied with rules 8.01, 8.05(a), and 10.02 of the rules of civil procedure. The violation of these rules was one of the stated grounds for the district court's dismissal, and the violation was not remedied by appellants. And as previously discussed, appellants failed to comply with the district court's order to file a chart that clarified appellants' claims.

E. Appellants acted with willfulness and contempt for the district court, and respondents made a showing of prejudice.

Appellants argue that the district court improperly found that they had acted with willfulness and contempt for the authority of the court. "Since a dismissal with prejudice is a drastic form of relief, it should be granted only in exceptional circumstances where there are considerations of willfulness and contempt for the authority of the court or the litigation process, in addition to prejudice to the parties involved." *Peters v. Waters Instruments, Inc.*, 312 Minn. 152, 155-56, 251 N.W.2d 114, 116 (1977) (quotation omitted). The district court found that appellants' second amended complaint failed to put the respondents on notice as to the claims against them, and that appellants had "consistently and willfully failed to meet [that] standard." Quoting *Asmus*, 410 N.W.2d at 435, the district court found "[appellants] and their attorney have shown 'willfulness and contempt' for the authority of [the district court]," which resulted in "prejudice to parties involved." Appellants argue that they complied with the order to produce a chart. But, as discussed, appellants' compliance with the order for a chart was limited to timely

filing. The chart did not clarify the confusion inherent in their complaint. Appellants offer no other argument to rebut the district court's finding that their failure to remedy the deficiencies in the complaint demonstrated willfulness and contempt for the authority of the court.

Appellants also argue that the burden was on the respondents to demonstrate prejudice, and that the respondents failed to so demonstrate. The district court specifically found that the respondents had demonstrated prejudice. The record shows that the respondents had, on several occasions, complained to the district court, both in written memoranda and during oral argument, that appellants' second amended complaint was unintelligible and failed to put them on notice of what was being alleged against them. Appellant DeVonna Murrin's attorney acknowledged the prolonged discussions regarding the deficiencies of the complaint at the May 2008 hearing, stating, "we've heard for it seems like months about the unintelligible Complaint." Contrary to appellants' assertion, the record documents complaints of prejudice experienced as a result of the deficiencies in appellants' second amended complaint. The district court's finding on this point is not clearly erroneous.

F. The district court was not required to pursue less drastic alternatives.

Appellants argue that the district court's failure to consider alternatives less drastic than dismissal was error. Citing *Firoved*, appellants argue that a district court should exhaust all other less drastic alternatives before dismissing a case with prejudice. Appellants, however, misread *Firoved*. In that case, our supreme court stated that a dismissal with prejudice is the "most punitive sanction which can be imposed for

noncompliance with the rules or order of the court" and therefore should be "granted only under exceptional circumstances," and noted, in a footnote, that courts frequently find less drastic alternatives to avoid barring a party from a trial on the merits because of errors by counsel. *Firoved v. General Motors Corp.*, 277 Minn. 278, 283 n.8, 152 N.W.2d 364, 368 n.8 (1967). But the *Firoved* court did not hold that a district court must consider all other less drastic alternatives before dismissing a case with prejudice. Moreover the district court had previously utilized a less drastic remedy, when it ordered appellants to produce a chart clarifying their pleadings. And that less drastic remedy failed to bring appellants into compliance with the applicable rules and orders.

The district court did not abuse its discretion by granting a dismissal pursuant to rule 41.02(a), after appellants repeatedly failed to comply with the rules of civil procedure and the order of the district court. Accordingly, we affirm the dismissal under rule 41.02(a) as to all respondents except Turgeon, the Smogoleskis, and Hanson. While these three respondents are entitled to dismissal under the district court's order pursuant to rule 41.02(a), we instead affirm the awards of summary judgment entered in favor of these parties. Because we affirm the dismissal under rule 41.02(a), we do not review the dismissal under rule 12.05.

II. The district court did not err by granting summary judgment in favor of respondents Colleen Turgeon, Terri Hanson and the Smogoleskis.

"On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district court] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990).

> A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law. On appeal, the reviewing court must 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) (citations omitted). No genuine issue for trial exists "where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party.'" *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (quotation omitted). "[W]hen 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." *Id.* at 71 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986)); *see also Schroeder v. St. Louis County*, 708 N.W.2d 497, 507 (Minn. 2006) (describing *substantial evidence* as "incorrect legal standard" and clarifying that "summary judgment is inappropriate if the nonmoving party has the burden of proof on an issue and presents *sufficient evidence* to permit reasonable persons to draw different conclusions").

As a preliminary matter, appellants argue that the district court improperly disregarded non-notarized documents that appellants titled "Affirmations" and submitted in lieu of sworn affidavits, in opposition to Turgeon's and Hanson's motions for summary judgment. Appellants attempted to file properly notarized affidavits following the summary judgment hearing, which the district court refused to accept. Appellants do not challenge the district court's refusal on appeal, but argue instead that their original submissions were sufficient. We disagree. *See* Minn. R. Civ. P. 56.05 (requiring that

supporting and opposing affidavits "shall set forth facts as would be admissible in evidence" and that all parts or papers thereof shall be sworn or certified).

Appellants argue that an affirmation is an acceptable substitute for an oath for the purposes of testimony. *See* Minn. R. Civ. P. 43.04 (stating that an affirmation may be accepted in lieu of an oath). Appellants are correct insofar as a witness may affirm the truth of his or her testimony rather than swearing an oath. However, appellants present no authority to support their claim that a document that purports to be an "Affirmation," but which was not sworn and subscribed to before a notary, is acceptable as competent evidence in summary judgment proceedings. In fact, in a prior case in which Mr. Murrin served as plaintiff's counsel, he raised the same argument before the United States District Court for the District of Minnesota, and it was rejected. In rejecting the affidavit, the court said, "A document that purports to be an 'affidavit' but is not in fact sworn to and subscribed before a notary is not competent evidence on summary judgment." *Boyer v. KRS Computer & Bus. Sch.*, 171 F. Supp. 2d 950, 960 (D. Minn. 2001). Appellants' affirmations submitted in opposition to the summary judgment motions were not competent evidence and were properly disregarded by the district court. *See* Minn. R. Civ. P. 56.05 (setting forth requirements for affidavits in summary judgment motions).

A. The district court properly awarded summary judgment in favor of respondent Colleen Turgeon.

Appellants argue that the district court improperly awarded Turgeon summary judgment on appellants' state securities-law claim. The district court concluded that

Turgeon was not a controlling person under the law, and therefore, was not liable to appellants.

In Minnesota:

> Every person who directly or indirectly controls a person liable under subdivision 1 or 2 [of this section], every partner, principal executive officer or director of such person, every person occupying a similar status or performing a similar function, every employee of such person who materially aids in the act or transaction constituting the violation, and every broker-dealer or agent who materially aids in the act or transaction constituting the violation, are also liable jointly and severally with and to the same extent as such person.

Minn. Stat. § 80A.23, subd. 3 (2006).[6]

Appellants argue that the district court's conclusions supporting its grant of summary judgment failed to consider appellants' affirmations. We have already determined that appellants' affirmations were properly disregarded by the district court. Appellants did not present any competent evidence in opposition to Turgeon's motion for summary judgment. Therefore, appellants failed to demonstrate the existence of a genuine issue of material fact and summary judgment was appropriate.

But even if we were to consider appellants' affirmations, appellants have failed to demonstrate error entitling them to relief. Appellants ignore the two-prong test that must be used to determine whether a defendant is a controlling person subject to liability under Minn. Stat. § 80A.23, subd. 3. *See Semrad v. Edina Realty, Inc.*, 493 N.W.2d 528, 532-

[6] Minn. Stat. § 80A.23 applied at the time of judgment but has since been repealed. The current version of the statute addressing joint and several liability is at Minn. Stat. § 80A.76(g) (2008).

33 (Minn. 1992) (setting forth elements of test). Under that test, appellants must prove that (1) "the defendant actually participated in (i.e., exercised control over) the operations of the violator in general" and (2) "the defendant possessed the power to control the specific transaction or activity upon which the primary violation is predicated, but [appellants] need not prove that this later power was exercised." *Id.* (quotations omitted). Appellants argue that Turgeon engaged in negotiations, signed legal documents, had power of attorney for the CEO, and was a vice-president for the company. These facts could establish Turgeon's control over the general operations of Avidigm. But none of these facts establish Turgeon's power to control the specific loan transaction upon which appellants' claim is based.

Appellants argue that Turgeon's involvement in the loan transaction is a question of fact, again based on facts set forth in appellants' unsworn affirmations. But such facts establish only that Turgeon had some involvement in preparing documents for the loan transaction at issue here. They do not establish any genuine issue of material fact with regard to whether Turgeon possessed the power to control the specific loan transaction between appellants and Avidigm, as would be required to hold Turgeon liable as a controlling person under Minn. Stat. § 80A.23, subd. 3. Moreover, appellants failed to establish the predicate liability of any of the defendants in this case under Minn. Stat. § 80A.23, subds. 1 and 2 (2006), which is a prerequisite to a finding that any party is liable under subdivision three of that section. *See* Minn. Stat. § 80A.23, subd. 3 (extending liability for securities actions to "[e]very person who directly or indirectly controls a person liable under subdivision 1 or 2").

Because appellants did not submit any competent evidence in opposition to Turgeon's motion for summary judgment, appellants failed to establish the existence of a genuine issue of material fact. *See* Minn. R. Civ. P. 56.05 (stating that a party opposing a motion for summary judgment may not rest on mere averments or denial, but must present specific facts showing that there is a genuine issue for trial). And even if the facts that appellants argue on appeal are taken as true, appellants still failed to establish a genuine issue of material fact regarding Turgeon's alleged power to control the loan transaction at issue.

B. The district court properly awarded summary judgment in favor of respondent Terri Hanson.

1. Federal Racketeering Influenced and Corrupt Organizations Act (RICO) claim

Appellants argue that the district court erred by granting summary judgment on their federal RICO claim without considering evidence submitted in appellants' affirmations. As previously addressed, appellants' affirmations were not competent evidence and were properly disregarded by the district court. Therefore, appellants failed to demonstrate the existence of a genuine issue of material fact and summary judgment was appropriate.

But even if we take the facts in appellants' affirmations as true, they still do not demonstrate a genuine issue of material fact sufficient to sustain appellants' federal RICO claim.

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or

> participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). "In order to participate, directly or indirectly, in the conduct of such enterprise's affairs, one must have some part in directing those affairs." *Reves v. Ernst & Young*, 507 U.S. 170, 179, 113 S. Ct. 1163, 1170 (1993) (quotation omitted). A pattern of racketeering activity "requires at least two acts of racketeering activity." 18 U.S.C. § 1961(5). "To establish a RICO pattern it must also be shown that the predicates themselves amount to, or that they otherwise constitute a threat of, continuing racketeering activity." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 240, 109 S. Ct. 2893, 2901 (1989). "What a plaintiff or prosecutor must prove is continuity of racketeering activity, or its threat." *Id.* at 241, 109 S. Ct. at 2902.

Appellants argue that Hanson was the "Director of West Central Region" as well as a project manager for Avidigm and that she had stated an intention to work with other Avidigm employees to develop a market for Avidigm in Detroit Lakes, Fargo, and Moorhead. These facts, if taken as true, could establish a genuine issue of material fact as to Hanson's direction of Avidigm's affairs. But they do not establish Hanson's participation in a pattern of racketeering activity.

2. Liability under Minn. Stat. § 80A.23, subd. 3

Appellants argue that the district court improperly granted summary judgment in favor of Hanson because genuine issues of material fact exist as to whether Hanson was a controlling person liable under Minn. Stat. § 80A.23, subd. 3. Again, appellants fail to apply the two-prong test to establish whether Hanson was a controlling person under the

statute. *See Semrad*, 493 N.W.2d at 532-33 (stating that a defendant must have exercised control over the operations of a violator and possessed the power to control the specific transaction at issue to be liable as a controlling person). If the evidence appellants advance on appeal is taken as true, Hanson could be seen as the person exercising control over Avidigm's general operations, but appellants presented no evidence that she possessed the power to control the loan transaction at issue in this case. Moreover, appellants have failed to establish the predicate liability of any of the defendants in this case under Minn. Stat. § 80A.23, subds. 1 or 2. Hanson was entitled to summary judgment on appellants' claim under Minn. Stat. § 80A.23, subd. 3.

3. Conspiracy claim

Appellants attempt to raise an issue relating to a claim of conspiracy against Hanson by making reference to their memorandum of law in opposition to Hanson's motion. But appellants failed to adequately brief this issue on appeal. This issue is therefore waived. *See In re Application of Olson for Payment of Servs.*, 648 N.W.2d 226, 228 (Minn. 2002) (stating that an issue must be substantively addressed in the argument portion of the primary brief to obtain review); *Melina*, 327 N.W.2d at 20 (stating that issues not briefed on appeal are waived).

C. The district court properly awarded summary judgment in favor of respondents the Smogoleskis.

1. Fraudulent-transfer claim

The district court's June 13 order did not specifically grant summary judgment in favor of the Smogoleskis on appellants' fraudulent-transfer claim. The district court

noted appellants' argument that the Smogoleskis were liable under, among other counts, count VI (Disgorgement/Fraudulent Conveyances/Restitution/Excessive Fees/ Misappropriation/Conspiracy). But the district court correctly found that the Smogoleskis were not named in any of the paragraphs of count VI. Count VI of the second amended complaint is the only count which makes reference to Minn. Stat. § 513.45 (2008) (defining transfers fraudulent as to present creditors). The Smogoleskis are named, and transfers of funds from Avidigm to the Smogoleskis are discussed, in count XXIV, but that count makes no reference to a fraudulent transfer of funds as defined by Minn. Stat. § 513.45(a).

As the district court stated, "[t]he Smogoleski[s] . . . are not named in any paragraph of [count VI] and this Court is loath to ascribe a cause of action to a defendant when [appellants] themselves have not done so." Appellants make no argument that the Smogoleskis are included in the fraudulent-transfers claim. Accordingly, there is no award for us to review as to Count VI.

2. Joint venture/joint enterprise

Appellants argue that there are genuine issues of material fact as to whether the Smogoleskis' involvement with Avidigm constituted a joint enterprise or joint venture. Appellants argue that (1) the Smogoleskis entered into three separate land development deals with Avidigm and (2) the Smogoleskis located and purchased three properties and worked to increase the value of those properties. Appellants also argue that a real estate expert opined that the Smogoleskis operated as part of a joint venture or enterprise.

A joint venture has four elements: "contribution of money, property, time, or skill to the enterprise"; "joint proprietorship and control such that each party has a proprietary interest and the right of mutual control over the enterprise"; "an express or implied agreement to share the profits, but not necessarily the losses, from the enterprise"; and "an express or implied contract." *Duxbury v. Spex Feeds, Inc.*, 681 N.W.2d 380, 390 (Minn. App. 2004), *review denied* (Minn. Aug. 25, 2004). "[W]here no competent evidence will support a finding of joint venture, the district court may decide the issue as a matter of law." *Id.*

Appellants' evidence,[7] if taken as true, does not satisfy the elements of a joint venture. Appellants failed to present any evidence that the Smogoleskis had a proprietary interest in, or a right of control over, the enterprise's land-development activities. At best, appellants' characterization of the Smogoleskis' involvement with the enterprise could be seen as an agency or vendor-vendee relationship, as the Smogoleskis sought out, purchased, and improved land on behalf of and pursuant to agreements with Avidigm.

Appellants also failed to demonstrate that the Smogoleskis had a right to a share in any profits Avidigm would experience as a result of these land developments. Appellants argue that Mr. Smogoleski testified the Smogoleskis were to get 10% of the purchase prices of the properties. But the deposition does not make clear whether that figure refers to a payment to the Smogoleskis of 10% of the price paid for the property as a finder's fee, or a payment of 10% of the sale price upon the sale of the property by Avidigm after

[7] Appellants submitted properly notarized affidavits in opposition to the Smogoleskis' motion, rather than the unsworn affirmations they submitted in opposition to Hanson's and Turgeon's motions.

its development. Some testimony in the deposition seems to suggest that the percentage figure differed based upon the property in question, and could have been based on the appraised value of the property. But the record does not establish that the Smogoleskis were entitled to a share of Avidigm's profits.

To establish a joint enterprise, a plaintiff must show that the defendants had "(1) a mutual understanding for a common purpose, and (2) a right to a voice in the direction and control of the means used to carry out the common purpose." *Mellett v. Fairview Health Servs.*, 634 N.W.2d 421, 424 (Minn. 2001) (quotation omitted). "The second requisite, a right to a voice in the direction and control, has been held to require the legal right to control the means used to carry out the common purpose." *Olson v. Ische*, 343 N.W.2d 284, 288 (Minn. 1984). Appellants fail to present any legal authority to support an argument that the Smogoleskis' act of purchasing properties pursuant to agreements with the enterprise gave the Smogoleskis a legal right to control the means of carrying out the enterprise's purpose. The facts, again, establish that the Smogoleskis acted as merely buyers for Avidigm, rather than as controlling parties in a joint enterprise.

As to appellants' expert's opinion that the Smogoleskis were operating as part of a joint venture or joint enterprise, it is unclear how this would be admissible expert testimony, as legal analysis by an expert is ordinarily inadmissible. *See Behlke v. Conwed Corp.*, 474 N.W.2d 351, 359 (Minn. App. 1991), *review denied* (Minn. Oct. 11, 1991). "Evidence offered to support or defeat a motion for summary judgment must be such evidence as would be admissible at trial." *Hopkins by LaFontaine v. Empire Fire & Marine Ins. Co.*, 474 N.W.2d 209, 212 (Minn. App. 1991).

3. Liability under Minn. Stat. § 80A.23, subd. 3

Appellants argue that the district court erred by granting summary judgment because genuine issues of material fact exist related to the Smogoleskis' liability under Minn. Stat. § 80A.23, subd. 3. Again, appellants fail to apply the two-prong test to establish whether the Smogoleskis were controlling persons under the statute. *See Semrad*, 493 N.W.2d at 532-33 (stating that a defendant must have exercised control over the operations of a violator to be liable as a controlling person). Appellants allege only that the Smogoleskis were involved in Avidigm's activities as purchasers of certain parcels of land. This does not satisfy the requirement that appellants must prove that the Smogoleskis exercised control over Avidigm's operations. Nor did appellants make any showing that the Smogoleskis possessed the power to control the loan transaction at issue in this case. *See id*. (stating that a plaintiff must also prove that a defendant possessed the power to control the specific transaction at issue). Moreover, appellants failed to establish the predicate liability of any of the defendants in this case under Minn. Stat. § 80A.23, subd. 1 or 2. The Smogoleskis were entitled to summary judgment on appellants' claim under Minn. Stat. § 80A.23, subd. 3.

4. Conspiracy claim

Appellants attempt to raise an issue relating to a claim of conspiracy against the Smogoleskis by making reference to appellants' memorandum of law in opposition to the Smogoleskis' motion for summary judgment. This is not sufficient to preserve the issue on appeal. *See In re Application of Olson*, 648 N.W.2d at 228 (stating that an issue must

be substantively addressed in the argument portion of the primary brief to obtain review); *Melina*, 327 N.W.2d at 20 (stating that issues not briefed on appeal are waived).

D. Because appellants provided a limited record, we cannot say that the district court abused its discretion by denying appellants' request for a continuance.

Finally, appellants argue that the district court abused its discretion by refusing to grant them a continuance before granting the summary judgment motions.

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present, by affidavit, facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Minn. R. Civ. P. 56.06.

> Given the presumption in favor of such continuances, a reviewing court focuses on two questions: (1) has plaintiff been diligent in seeking or obtaining discovery and (2) is plaintiff seeking further discovery in the good-faith belief that material facts will be uncovered, or is plaintiff merely engaging in a 'fishing expedition?'

Lewis v. St. Cloud State Univ., 693 N.W.2d 466, 473 (Minn. App. 2005), *review denied* (Minn. June 14, 2005). "A district court's decision to deny a motion for a continuance to conduct discovery is reviewed under an abuse-of-discretion standard." *Id.*

Appellants requested a continuance in their memorandum of law in opposition to each of the motions for summary judgment, but no motions for continuance were filed. The record does not indicate why appellants' request for a continuance was denied. The request is not addressed in the district court's June 13 order, nor is there any discussion of

the request in the transcripts of the May 22 hearing. We note that the length and content of the May 22 transcript was limited, at the request of appellants' counsel on appeal. Given appellants' limitation of the record on appeal, we cannot conclude that the district court abused its discretion by denying appellants' request for a continuance. *See Mesenbourg v. Mesenbourg*, 538 N.W.2d 489, 494 (Minn. App. 1995) (holding that appellant has the burden to provide an adequate record).

III. The district court did not err by dismissing respondents Mathew Mosher and MSM Enterprises, LLC, along with the other named respondents in light of the existing stipulation and agreement to dismiss.

Appellants argue that the district court improperly dismissed respondents Mathew Mosher and MSM Enterprises, LLC, because appellants previously reached a stipulation to dismiss these respondents.

On May 12, 2008, the district court filed an order for dismissal with prejudice of Mosher and MSM, pursuant to the stipulation of the parties. But the order filed by the district court did not include language instructing that judgment be entered immediately. *See* Minn. R. Civ. P. 54.02. Consequently, a partial judgment had not been entered based on the stipulation and order for dismissal. Because the order dismissing Mosher and MSM adjudicated fewer than all claims against all the parties involved in this lawsuit, and because the order did not specifically direct that judgment be entered in favor of Mosher and MSM, the order did not terminate appellants' action against Mosher and MSM, and the order remained subject to revision until entry of final judgment adjudicating all claims against all parties. *See* Minn. R. Civ. P. 54.02. Accordingly, the district court did not err in dismissing appellants' claims as to Mosher and MSM.

IV. The district court did not err by determining that respondent Edina Realty should be dismissed pursuant to Minn. R. Civ. P. 12.02(e) because appellants' complaint failed to state a claim upon which relief could be granted.

Appellants argue that the district court erred when it dismissed respondent Edina Realty pursuant to Minn. R. Civ. App. 12.02(e).

> In reviewing cases involving dismissal for failure to state a claim upon which relief can be granted under Minn. R. Civ. P. 12.02(e), we consider whether the complaint sets forth a legally sufficient claim for relief. Our review accepts the facts alleged in the complaint as true and construes all reasonable inferences in favor of the nonmoving party.

Nelson v. Prod. Alternatives, Inc., 696 N.W.2d 841, 845-46 (Minn. App. 2005) (citation omitted), *review denied* (Minn. Aug. 16, 2005). It is immaterial whether the facts alleged could actually be proven at trial. *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 739 (Minn. 2000). "An appellate court reviews a dismissal on the pleadings under Minn. R. Civ. P. 12.02(e) de novo." *Krueger v. Zeman Constr. Co.*, 758 N.W.2d 881, 884 (Minn. App. 2008) (citing *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003)).

The district court found that Edina Realty was identified in the complaint only by reference to Turgeon. The court noted and addressed the nine separate theories appellants had advanced against Edina Realty. Appellants' arguments here relate only to a vicarious-liability theory. Accordingly, all other arguments related to the other theories dismissed by the district court are deemed waived. *See Melina*, 327 N.W.2d at 20 (stating that issues not briefed on appeal are waived).

In dismissing appellants' claims against Edina Realty, the district court relied on *Semrad*, 493 N.W.2d at 528. In *Semrad*, an Edina Realty sales associate, using his Edina Realty office space and publishing a newsletter bearing Edina Realty's name, solicited investments in various security interests from investors. *Id.* at 530-31. In many cases, the securities were backed by mortgages that were never recorded. *Id.* at 530. Also in many cases, the purported mortgagor, the sales associate, held no interest in the mortgaged property. *Id.* The Semrads brought suit against Edina Realty, making claims similar to those of appellants in this case. *Id.* at 529. Our supreme court stated that "[t]he pivotal issue presented here is whether [the sales associate] had authority, either actual or apparent, to hold himself out as representing Edina Realty." *Id.* at 534. "Generally speaking, a principal is liable for the act of an agent committed in the course and within the scope of the agency and not for a purpose personal to the agent." *Semrad,* 493 N.W.2d. at 535. "Liability, however, follows only upon a finding that the act causing injury was within the scope of the agency. Thus, this court has held that a principal is not liable for the unauthorized intentional tort of its agent." *Id.* The conduct of an employee is within the scope of the employment only if it is of the type that the employee is employed to perform. *Kasner v. Gage*, 281 Minn. 149, 152, 161 N.W.2d 40, 42 (1968).

Appellants' stated reliance upon Turgeon's association with Edina Realty is insufficient to support a vicarious-liability theory. As the district court stated, appellants' complaint does not (1) allege that they purchased property through Edina Realty, (2) claim they thought they were investing in Edina Realty or that Edina Realty guaranteed appellants' investments, (3) allege that Turgeon claimed Avidigm was

affiliated with Edina Realty or that Edina Realty knew what Turgeon did in her capacity as an employee of Avidigm, or (4) set forth any facts showing that Turgeon's actions as a vice president of Avidigm were within the scope of her employment or agency relationship with Edina Realty.

Appellants argue that they were denied the benefit of full discovery as to the alleged agency relationship between Turgeon and Edina Realty. This argument is without merit. By definition, a dismissal pursuant to Minn. R. Civ. P. 12.02(e) is a judgment on the pleadings based on a determination of whether the pleadings set for a legally sufficient claim. Minn. R. Civ. P. 12.02(e); *Nelson*, 696 N.W.2d at 845-46. Any consideration of matters outside the pleadings transforms the motion into one for summary judgment. *Defenders of Wildlife v. Ventura*, 632 N.W.2d 707, 711 (Minn. App. 2001), *review denied* (Minn. Oct. 24, 2001). The record does not demonstrate that any matters outside the pleadings were considered by the district court when it dismissed Edina Realty. The scope of discovery conducted is, therefore, irrelevant.

Appellants argue that *Semrad* is factually distinguishable and that *Bedow v. Watkins*, 552 N.W.2d 543 (Minn. 1996), is more apposite. Appellants argue that the issue in *Bedow* was whether a plaintiff could recover against a supervising real estate broker for the intentional torts of its agent. But appellants misread the case. At issue in *Bedow* was whether the plaintiffs' efforts to recover their misappropriated funds met the "diligent pursuit" requirements of the Minnesota Education, Research, and Recovery Fund. 552 N.W.2d at 545-46. *Bedow* did not involve a claim of vicarious liability. *See id.* at 545 ("The Bedows' lawsuit was directed only at Watkins and did not include any

claims against" the supervising broker.). The *Bedow* court did reaffirm the principle that "a principal is liable for the acts of an agent committed in the course and within the scope of agency and not for a purpose personal to the agent." *Id.* at 547. But this still requires a demonstration that the agent's acts were within the scope of employment, and not for purposes personal to the agent.

The second amended complaint alleges that Turgeon's participation, acts, or conduct were committed "in the course and scope of her agency for Edina Realty and/or was foreseeable and/or known, or constructively known or permitted by Edina Realty, all of which is alleged to have happened here." Appellants did not allege any facts to support this claim. Appellants alleged that Edina Realty was liable for misrepresentations made to appellants regarding the properties which allegedly secured appellants' investment because Turgeon allegedly controlled or manipulated those properties. But appellants did not allege that any manipulation or control by Turgeon, as an employee of Avidigm, was within the scope of her employment with Edina Realty.

The factual allegations in the second amended complaint make it clear that appellants knew they were investing in Avidigm, not Edina Realty. Appellants made no allegations of any representation by Turgeon or Edina Realty that was intended to secure appellants' investment. Appellants state that their involvement with Avidigm began following a meeting with Steven Mattson and Mathew Mosher. Appellants did not allege that Turgeon was even present at that meeting. Even if appellants' allegation that Turgeon had significant involvement in Avidigm's fraudulent real estate transactions is true, appellants have not alleged a factual basis, other than the fact that Turgeon was an

agent with Edina Realty, to assert that Turgeon's involvement was in the scope of her employment with Edina Realty, rather than her employment with Avidigm.

Appellants rely on several points from an expert opinion in support of their vicarious liability claim against Edina Realty. But this opinion is beyond the pleadings, and therefore is not properly considered on a motion for judgment on the pleadings. *See* Minn. R. Civ. P. 12.02. Appellants also argue that they should have been freely granted leave to amend their complaint, without the need for a motion. Appellants cite no authority in support of this argument, and we reject it. *See Melina*, 327 N.W.2d at 20 (holding that issues not adequately briefed on appeal are waived).

The district court properly dismissed appellants' claims against Edina Realty for failure to state a claim upon which relief could be granted. Moreover, Edina Realty was also entitled to dismissal pursuant to the district court's order under Minn. R. Civ. P. 41.02(a).

V. The district court did not abuse its discretion by denying appellants' motion for leave to file a fourth amended complaint.

Appellants claim that the district court abused its discretion by denying their motion to amend their complaint and to file a fourth amended complaint.[8]

After the filing of a responsive pleading by an adverse party, "a party may amend a pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Minn. R. Civ. P. 15.01. "The district court has broad discretion to grant or deny leave to amend a complaint, and its ruling will

[8] In its February 19, 2008 order, the district court denied appellants' motion to file a third amended complaint. Appellants do not challenge this denial.

not be reversed absent a clear abuse of that discretion." *State v. Baxter*, 686 N.W.2d 846, 850 (Minn. App. 2004) (citing *Fabio*, 504 N.W.2d at 761).

Appellants argue that they acted diligently in prosecuting their case, and promptly filed a motion to amend their complaint upon learning from the February 19, 2008 order that their complaint did not comply with the rules of civil procedure and that it impermissibly aggregated multiple causes of action.[9] Appellants argue that the district court improperly found that the defendants would be prejudiced by allowing the amendment at such a late stage in the proceedings and that no defendant proffered evidence of any prejudice.

In denying appellants' motion to amend, the district court noted that appellants' proposed fourth amended complaint was 272 pages long and contained 1,668 paragraphs alleging 132 counts against 43 defendants, including respondents Toni Klatt and Bernice Barber, who had previously been identified as "Doe" defendants, and had not previously participated in the litigation. The district court also noted that appellants had previously been given opportunities to clarify the nature of their claims, which appellants failed to do. The district court found that appellants would be prejudiced by allowing the amendment of the complaint.[10]

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[9] The January 16, 2008 order put appellants on notice of the deficiencies in their complaint. Appellants had previously argued that the defendants should bear the burden of calling to appellants' attention any incorrect statutory citations or other errors, which the court explicitly rejected.

[10] The district court cited the late stage of the proceedings as one reason the defendants would be prejudiced. Appellants' motion to amend the complaint was heard on May 22, 2008, and the court trial was scheduled for October.

The record demonstrates that several of the defendants complained of prejudice if the amendment were allowed. Klatt, in her memorandum opposing the amendment, argued that she had been identified as a "Doe" defendant in the lawsuit prior to the motion to allow the fourth amended complaint, and consequently had not attended depositions or scheduling conferences, and had not participated in any of the voluminous correspondence or discovery to date.

Turgeon opposed appellants' motion to amend, arguing that she had already exchanged written discovery with appellants and had sat for her deposition in the case, and that her attorney had already taken appellants' depositions. Turgeon stated that she would be prejudiced if the amendment were allowed because it would "necessitate a great deal of work . . . in responding [to the amendment], and will necessitate additional discovery." Turgeon noted that the fourth amended complaint included her in claims not asserted against her in the second amended complaint, but that no new facts were alleged to support her inclusion in those claims.

In their memorandum opposing appellants' motion to amend, respondents Peder Davisson and Dennis Desender complained that appellants' fourth amended complaint had another 100 pages and nearly three times the number of paragraphs as the second amended complaint. Davisson and Desender stated that it would be "manifestly prejudicial to the Defendants to have to defend against a new complaint at this late stage in the litigation." Davisson and Desender also alleged prejudice due to the confusing and lengthy nature of appellants' pleadings, stating that "the Defendants would be prejudiced by having to defend against a new and larger, yet still unintelligible pleading."

Appellants' argument that no defendant proffered evidence of prejudice is flatly contradicted by the record.

The district court found that appellants had not acted with due diligence in attempting to amend their complaint. *See Meyer v. Best W. Seville Plaza*, 562 N.W.2d 690, 694 (Minn. App. 1997) (holding that justice did not require allowance of amendment where appellants failed to act with reasonable diligence), *review denied* (Minn. June 26, 1997). The district court properly found that defendants would be prejudiced if appellants were allowed to amend their complaint. The district court did not abuse its discretion by denying appellants' motion to amend.

VI. The district court did not commit prejudicial error by finding that appellants have already been fully compensated for their damages.

Appellants argue that the district court erroneously found that they have been fully compensated for their injuries in this case. The district court found that appellants admitted they expected to receive or had already received $707,000 in settlement payments on claims related to their $600,000 investment. This amount was in addition to the $187,000 appellants previously received as interest payments on the same investment. It is clear from the district court's order that the dismissal of appellants' lawsuit in no way depended upon this finding. Even if the district court's finding is erroneous, any such error had no effect on the disposition of the lawsuit. "The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Minn. R. Civ. P. 61. Accordingly, there is no basis for reversal.

VII. Any error resulting from the district court's refusal to give appellants a hearing date on a yet-to-be-filed motion was not prejudicial.

Following the district court's June 13, 2008 order, appellants contacted the district court to schedule a motion for a new trial pursuant to Minn. R. Civ. P. 59 or for relief from the judgment pursuant to Minn. R. Civ. P. 60.02. The district court refused to schedule appellants' proposed motion, stating that it would not schedule procedurally improper motions. *See Parson v. Argue*, 344 N.W.2d 431, 431 (Minn. App. 1984) (stating that a motion for a new trial is an anomaly where no trial was held). Appellants made no attempt to actually file any such motion with the district court. Appellants now argue that the district court erroneously refused to provide a hearing date on their rule 60.02 motion.

It is unclear from the language of rule 60.02 that the proposed motion for relief from the judgment would have been procedurally improper.[11] Nothing in the record indicates that appellants characterized their proposed motion as one for reconsideration, which would have been procedurally improper under Minn. R. Gen. Pract. 115.11. But since no motion was ever filed with the district court, the district court cannot be said to have refused to hear any proper motion. *See* Minn. R. Civ. P. 61 (stating that courts at every stage of a proceeding must disregard any error that does not affect substantial rights

[11] A motion for new trial pursuant to Minn. R. Civ. P. 59, however, would have been improper.

of the parties). On this issue, there is no district court decision for us to review, and thus, no basis for reversal.

Affirmed.

Date:

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The Honorable Michelle A. Larkin