STATE OF MINNESOTA
IN COURT OF APPEALS
A09-109
A09-841

Peter Szanto,
Appellant,

vs.
Target Corporation,
Defendant (A09-109),
Respondent (A09-841),

Efraim Duzman, et al.,
Respondents (A09-109),
Defendants (A09-841),

Altaire Pharmaceuticals, Inc.,
a New York corporation,

Defendant (A09-109),
Respondent (A09-841),

Teresa Sawaya, et al.,
Respondents (A09-109),
Defendants (A09-841),

Ocusoft, Inc.,
a Texas corporation, et al.,
Respondents (A09-109),
Defendants (A09-841).

Filed February 2, 2010
Affirmed in part, reversed in part, and remanded; motion denied
Wright, Judge

Hennepin County District Court
File No. 27-CV-08-5779

Peter Szanto, Newport Beach, California (pro se appellant)

Gregory P. Bulinski, Bassford Remele, Minneapolis, Minnesota (for respondents Efraim Duzman, Eran Duzman, Efraim Duzman, M.D., North State Eye Institute, Red Bluff Surgery Center, Victor Szanto, Daha Investments, Evye Szanto)

Louise A. Behrendt, James D. Knudsen, Stich, Angell, Kreidler & Dodge, Minneapolis, Minnesota (for respondents Teresa Sawaya, Michael S. Sawaya, Altaire Pharmaceuticals)

Kim M. Schmid, Monica K. Gould, William N.G. Barron IV, Bowman & Brooke, Minneapolis, Minnesota (for respondents Target Corporation, Ocusoft, Cynacon/Ocusoft, Cynthia Barratt, Sedgwick Claims Management Services)

Considered and decided by Wright, Presiding Judge; Peterson, Judge; and Crippen, Judge.*

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

WRIGHT, Judge

In these consolidated pro se appeals, appellant challenges the district court's dismissal of claims against respondents, arguing that the district court erred by granting certain respondents' motions to dismiss for lack of personal jurisdiction, improper service, and failure to state a claim on which relief could be granted. Appellant also argues that the district court erred by granting the remaining respondents' motions for summary judgment (1) for failure to make a prima facie showing of causation, (2) for failure to establish a duty to inspect or warn, (3) for failure to sufficiently demonstrate intent regarding the intentional tort claim, and (4) pursuant to Minn. Stat. § 544.41 (2008). Additionally, appellant contends that the district court abused its discretion by

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

denying appellant's motions to (1) add previously known defendants, (2) require the district court to recuse itself from the case, and (3) proceed in forma pauperis. Appellant also moves to strike a letter submitted to this court by certain defendants. We affirm in part, reverse in part, and remand. We also deny the motion to strike.

FACTS

In March 2008, appellant Peter Szanto, a California resident, filed a complaint in Hennepin County against several defendants regarding damages caused by using Target-brand eye drops purchased at a Target store in California. Target Corporation's (Target) headquarters are in Minnesota, but no other defendant is located in the state. The eye drops were manufactured by defendant/respondent Altaire Pharmaceuticals, Inc. (Altaire) and packaged for distribution by defendant/respondent Ocusoft, Inc. The package contained 70 single-use vials, of which Szanto used all but between 15 and 17 vials. Szanto stopped using the eye drops when he realized that the liquid in the vials was cloudy; and he has experienced redness, scratchiness, and pain in his eyes since that time. Szanto sent vials of the eye drops to several laboratories for testing, resulting in detection by one laboratory of a type of yeast in the eye drops. Szanto also was examined by an optometrist, who stated that the liquid shown to him was cloudy and should not be used. But the optometrist did not find any growth in Szanto's eyes and opined that Szanto's diminished vision could be the result of natural aging, diet, or exercise.

In July 2008, the district court granted the first of four motions to dismiss, dismissing claims against five defendants with prejudice for lack of personal jurisdiction. In August 2008, a hearing was held on Szanto's motions to present oral testimony, relax time limits, strike unnotarized declarations, and name previously unknown defendants. The district court denied the first three motions from the bench and denied the motion to name previously unknown defendants in a September 2008 order. A series of motions to dismiss, hearings, and orders granting the motions followed. The district court dismissed claims against all defendants except Target and Altaire based on a variety of defenses, including lack of personal jurisdiction, failure to state a claim on which relief can be granted, and improper service. In November 2008, the district court ordered immediate entry of judgment on the orders dismissing claims against the above defendants. Szanto's first appeal, case number A09-109, is taken from the entry of judgment on these orders.

The two remaining defendants, Target and Altaire, moved for summary judgment on the ground that Szanto had failed to make a prima facie showing of causation. Target also moved for summary judgment based on the failure to establish intent regarding the alleged intentional tort, the failure to establish a duty to inspect or warn, and Minn. Stat. § 544.41. The district court granted summary judgment in March 2009. Szanto's second appeal, case number A09-841, is taken from that judgment.

We consolidated the two appeals but ordered separate briefing. Szanto subsequently filed a motion to strike a letter submitted by certain defendants for an extension to file a reply brief and to allow oral argument. We issued an order addressing

the extension and oral-argument issues. But we deferred our ruling on the motion to strike, which we address herein.

D E C I S I O N

I.

Szanto argues that the district court erred by dismissing claims against various defendants for lack of personal jurisdiction.[1] Whether personal jurisdiction exists presents a question of law, which we review de novo. *Juelich v. Yamazaki Mazak Optonics Corp.*, 682 N.W.2d 565, 569 (Minn. 2004). When personal jurisdiction has been challenged, it is the plaintiff's burden to prove that the forum state has personal jurisdiction over the defendant. *Id.* at 569-70. When reviewing a decision on personal jurisdiction, we assume that the facts alleged to support personal jurisdiction are true; and, in doubtful cases, we resolve the jurisdictional question in favor of retaining personal jurisdiction. *Nw. Airlines, Inc. v. Friday*, 617 N.W.2d 590, 592 (Minn. App. 2000).

A Minnesota court can exercise personal jurisdiction over a nonresident defendant when personal jurisdiction is authorized by the Minnesota long-arm statute, Minn. Stat. § 543.19 (2008), and the nonresident defendant has certain "minimum contacts" with the

[1] In our consolidation order, we ordered separate briefing on the two appeals and clarified that Target and Altaire are the respondents in the A09-841 appeal. In his brief filed in appeal A09-841, Szanto challenges the district court's denial of his motions to present oral testimony and to strike unnotarized declarations. Because these two motions were relevant only to Szanto's arguments regarding jurisdiction in A09-109, they do not apply to Target and Altaire, the respondents in A09-841, neither of which challenged jurisdiction. Therefore, Szanto's arguments as to jurisdiction-related claims and orders that are not raised in A09-109 will not be considered here.

forum state as required by constitutional due-process guarantees. *Domtar, Inc. v. Niagara Fire Ins. Co.*, 533 N.W.2d 25, 29 (Minn. 1995). Minnesota's long-arm statute is coextensive with the constitutional limits of due process. *Valspar Corp. v. Lukken Color Corp.*, 495 N.W.2d 408, 410-11 (Minn. 1992).

Our constitutional due-process inquiry focuses on the relationship among the defendant, the forum, and the litigation. *Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S. Ct. 2569, 2580 (1977). The due-process standard requires the defendant's contacts with the forum state to be the type that permit a defendant to "reasonably anticipate being haled into court there." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 105 S. Ct. 2174, 2183 (1985) (quotation omitted). Minnesota courts employ a five-factor test to determine whether an exercise of personal jurisdiction over a nonresident defendant is consistent with these requirements, evaluating (1) the quantity of the defendant's contacts with the forum state; (2) the nature and quality of those contacts; (3) the connection between the plaintiff's cause of action and those contacts; (4) Minnesota's interest in providing a forum; and (5) the convenience of the parties. *Juelich*, 682 N.W.2d at 570.

Here, the district court applied the five-factor test to determine whether the parties challenging jurisdiction had the requisite minimum contacts with Minnesota to permit the constitutional exercise of jurisdiction. *See id*. Based on the parties' declarations, the district court found that only Efraim Duzman and Cynthia Barratt had any contact with Minnesota. Efraim Duzman had last been in Minnesota in 1990 and Barratt had been in

Minnesota twice.[2] Finding that Szanto failed to establish "(a) that the moving Defendants had a sufficient quantity of contacts with Minnesota; (b) the quality and nature of those contacts; or (c) the connection of their cause of action with any contacts within Minnesota," the district court concluded that Minnesota's exercise of jurisdiction over the defendants would violate the due-process guarantees of the Fourteenth Amendment to the United States Constitution and Article I, Section 7, of the Minnesota Constitution.

Szanto advances several arguments regarding the district court's dismissal of claims against various parties for lack of personal jurisdiction. We address each argument below. Szanto first contends that personal jurisdiction is justified by the "interconnected[ness]" the defendants have with Target, a Minnesota corporation, and the shared undertaking to produce and distribute the eye drops. But personal jurisdiction is based on an individual nonresident defendant's purposeful contacts with the forum state, not those of multiple defendants considered in aggregate. *See Hanson v. Denckla*, 357

[2] Szanto contends that the district court erroneously relied on unnotarized declarations from Victor Szanto, Evye Szanto, Eran Duzman, and Efraim Duzman. Victor and Evye Szanto submitted notarized affidavits in place of their signed declarations, and the district court denied Szanto's motion to strike from the bench. The district court is not necessarily precluded from considering technically deficient evidence. *See Lundgren v. Eustermann*, 370 N.W.2d 877, 881 (Minn. 1985) (holding that an unsworn letter that was untimely presented could be considered on summary judgment motion); *see also* 2 David F. Herr & Roger S. Haydock, *Minnesota Practice* 56.30 (1998) (advising against "[o]verly strict adherence to the demands" of rule 56.05). But our review of the record establishes that the district court did not erroneously consider unsworn declarations here. Szanto also argues that the district court improperly relied on hearsay evidence in the form of defense counsels' arguments. But arguments made by counsel are not evidence. *State v. McCoy*, 682 N.W.2d 153, 158 (Minn. 2004) (stating that "the questions and arguments of attorneys are not evidence"); *see also State v. DeVerney*, 592 N.W.2d 837, 847 (Minn. 1999) (holding that district court properly instructed jury that arguments of counsel are not evidence). The district court, therefore, did not erroneously rely on hearsay evidence by considering arguments of counsel regarding the motion.

U.S. 235, 253, 78 S. Ct. 1228, 1240 (1958) (stating that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws" (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319, 66 S. Ct. 154, 160 (1945))). Szanto presents no evidence that the moving parties have purposefully established contacts with Minnesota.

Szanto cites the "stream of commerce" doctrine as authority for the proposition that by doing business, owning a corporation, or otherwise having some connection with Target or the eye drops, the defendants purposefully availed themselves of the laws of Minnesota because the eye drops traveled through Minnesota in the "stream of commerce," "even if only upon the record keeping ledgers of Target Corporation." But the "stream of commerce" theory addresses circumstances in which a nonresident party places products "into the stream of commerce with the expectation that they will be purchased by consumers *in the forum State*" and when it is not unreasonable to expect suit "if its allegedly defective merchandise has *there* been the source of injury." *Juelich*, 682 N.W.2d at 571 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98, 100 S. Ct. 559, 567 (1980)) (emphasis added). The harm alleged here occurred in California and involved a California resident who purchased a product from a store in California. Further, with the exception of Ocusoft, which apparently packaged the product for distribution, there is no evidence that the parties dismissed for lack of jurisdiction were involved in placing the eye drops into the stream of commerce. This jurisdictional theory, therefore, is inapposite.

Szanto next argues that he should have been granted leave to amend his complaint to provide further support for personal jurisdiction. A party may amend its complaint after a responsive pleading is filed if the party obtains leave of the court. Minn. R. Civ. P. 15.01. A district court has broad discretion in deciding whether to grant leave to amend a complaint, and its ruling will not be reversed absent a clear abuse of discretion. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). With the exception of his motion to add previously unknown defendants addressed below, Szanto did not request leave to amend his complaint before the district court. Rather, Szanto maintains that, because Minnesota is a "notice pleading" state, the district court should have "consider[ed] the possibility of amendment and allow[ed] appellant latitude and fairness to examine witnesses so as to put into evidence the true facts of jurisdiction." But because Szanto neither sought leave to amend his complaint, nor identifies how such amendment would be sufficient to support jurisdiction, the district court did not abuse its discretion by failing to "consider the possibility of amendment."

Szanto also contends that the district court abused its discretion by denying his motion to hear oral testimony on the personal-jurisdiction issue. Although the district court has discretion whether to hear oral testimony on a motion, ordinarily no oral testimony should be received. Minn. R. Civ. P. 43.05; *Saturnini v. Saturnini*, 260 Minn. 494, 496, 110 N.W.2d 480, 482 (1961). This discretion should be exercised only in exceptional cases, because "if parties were permitted, as a matter of course, to have every issue of fact in every action tried on oral testimony, . . . it would result in vexatious and burdensome delays, and in many cases in a miscarriage of justice." *Saturnini*, 260 Minn.

at 496, 110 N.W.2d at 482 (quoting *Strom v. Mont. Cent. Ry. Co.*, 81 Minn. 346, 349, 84 N.W.46, 47 (1900)).

Szanto maintains that he must be permitted to examine witnesses in order to demonstrate that they have made untrue statements. For example, Szanto contends that his brother, defendant Victor Szanto, was dishonest when he stated that he had not conducted business in Minnesota, which is demonstrated by evidence of a mortgage loan with Wells Fargo Home Mortgage in Eagan. The mortgagee in question, however, is Paul Szanto, not Victor Szanto. Although Victor Szanto initialed pages of the form on behalf of Paul Szanto, he was not a party to the transaction. As the district court determined, "that Victor Szanto *may* have sent documents to this address is not sufficient to satisfy the constitutional minimum contacts requirement." Based on our review of the record, Szanto has not adequately demonstrated that his is an exceptional case requiring oral testimony. The district court, therefore, did not abuse its discretion by denying Szanto's motion for oral testimony on the personal-jurisdiction issue.

Finally, Szanto argues that he should have been granted the opportunity to conduct additional jurisdictional discovery. Jurisdictional discovery generally is permitted before a court rules on a motion to dismiss for lack of personal jurisdiction. *Behm v. John Nuveen & Co., Inc.*, 555 N.W.2d 301, 305 (Minn. App. 1996). Such discovery is not mandated, however, and is unnecessary when the discovery is unlikely to lead to facts establishing jurisdiction. *Id*.

Szanto did not request an opportunity for jurisdictional discovery from the district court. And he fails to identify any evidence that may be found through further discovery

that would support exercising personal jurisdiction over the parties in question. Rather, Szanto argues that, by granting the motions to dismiss with prejudice, the district court denied him the ability to conduct the discovery necessary to establish jurisdiction. This argument is unavailing. It was Szanto's burden to establish jurisdiction, *Juelich*, 682 N.W.2d at 569-70, and he is not entitled to conduct indefinite discovery to do so. Szanto concedes that "there are no claims of precise knowledge of the methodology of contact between defendants" and only alleges that he "intends to pursue" investigation that may lead to such knowledge. Absent any evidence in the record to support a contention that further discovery is likely to lead to evidence that would establish personal jurisdiction, Szanto fails to establish that he is entitled to a remand for jurisdictional discovery.

Because Szanto has failed to demonstrate that the defendants granted dismissal for lack of jurisdiction had purposefully established the necessary contacts with Minnesota, further analysis of the personal-jurisdiction factors is not required for us to conclude that the district court did not err when it determined that Szanto failed to demonstrate that Minnesota's exercise of personal jurisdiction over the defendants would not violate due process.

II.

Szanto next challenges the district court's decision to grant the motions of Ocusoft and Barratt to dismiss for ineffective service of process. Szanto argues that Ocusoft and Barratt were effectively served by virtue of answering the complaint, thereby submitting

to the district court's jurisdiction.[3] "Whether service of process was effective, and personal jurisdiction therefore exists, is a question of law that we review de novo." *Shamrock Dev., Inc. v. Smith*, 754 N.W.2d 377, 382 (Minn. 2008). Service must comply strictly with statutory requirements. *Lundgren v. Green*, 592 N.W.2d 888, 890 (Minn. App. 1999), *review denied* (Minn. July 28, 1999). "A party may waive a jurisdictional defense, including insufficient service of process, by submitting itself to the court's jurisdiction and affirmatively invoking the court's power." *Shamrock*, 754 N.W.2d at 381. But "simple participation in the litigation . . . does not, standing alone, amount to a waiver of a jurisdictional defense." *Id.* (quotation omitted). A jurisdictional defense is waived only when a party invokes a court's jurisdiction on the merits of a determinative claim before giving the court an opportunity to address the jurisdictional defense. *Id.* Unless other circumstances demonstrate acceptance of jurisdiction, a jurisdictional defense is not waived when rulings on the merits and on the defense are sought simultaneously. *Id.*

The district court found that process had not been effectively served on Ocusoft or Barratt under Minn. R. Civ. P. 4; and Ocusoft and Barratt had not waived service by answering the complaint because they raised the defense of ineffective service in their answers. Szanto does not allege that service of process on Ocusoft or Barratt met the requirements of Minn. R. Civ. P. 4. Rather, Szanto relies on *Montgomery v. Minneapolis Fire Dept. Relief Ass'n*, 218 Minn. 27, 15 N.W.2d 122 (1944), for the proposition that, by

[3] Szanto also argues that Target was appropriately served. But this issue is not contested because the claims against Target were not dismissed for improper service.

answering the complaint, Ocusoft and Barratt voluntarily appeared, which is the functional equivalent of personal service. But *Montgomery*, which was decided prior to the enactment of the Minnesota Rules of Civil Procedure, is no longer a valid statement of Minnesota law. *See* Minn. R. Civ. P. 1 (indicating that the Minnesota Rules of Civil Procedure were enacted by the Minnesota Supreme Court to govern all Minnesota civil suits). Ocusoft and Barratt properly asserted their affirmative defenses, including that of improper service, in their answers. *See* Minn. R. Civ. P. 12.02 (setting forth process for asserting defenses in responsive pleadings). Consequently, the district court did not err by granting the motions to dismiss for ineffective service of process.

III.

Szanto next contends that the district court erred by dismissing his claims against the Sawayas, Barratt, and Sedgwick for failure to state a claim on which relief may be granted pursuant to Minn. R. Civ. P. 12.02(e). The district court dismissed claims against the Sawayas and Barratt for failure to state a claim, finding that Szanto failed to allege facts sufficient to support piercing the corporate veil or any other basis for imposing personal liability against the Sawayas or Barratt.

On a motion to dismiss for failure to state a claim on which relief may be granted under rule 12.02(e), the district court may consider only the complaint and the documents referenced therein. *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 739 n.7 (Minn. 2000). The facts as alleged in the complaint must be accepted as true, and all reasonable inferences must be construed in favor of the nonmoving party. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). The district court

must "review the complaint as a whole, including the documents upon which [plaintiffs] rely, to determine whether as a matter of law a claim has been stated." *Martens*, 616 N.W.2d at 740.

"Piercing the corporate veil is an equitable remedy that may be applied in order to avoid an injustice." *Equity Trust Co. Custodian ex rel. Eisenmenger IRA v. Cole*, 766 N.W.2d 334, 339 (Minn. App. 2009). We review a district court's exercise of its equitable powers for an abuse of discretion. *Id*. Factual findings made by the district court in support of the decision whether to pierce the corporate veil are reviewed for clear error. *Id.*

The shareholders of a corporation generally are not personally liable for the corporation's debts. Minn. Stat. § 302A.425 (2008). A court may pierce the corporate veil to hold a party liable for the acts of a corporate entity if the entity is used for a fraudulent purpose or if the party is the alter ego of the entity. *Victoria Elevator Co. v. Meriden Grain Co.*, 283 N.W.2d 509, 512 (Minn. 1979). "When using the alter ego theory to pierce the corporate veil, courts look to the reality and not form, with how the corporation operated and the individual defendant's relationship to that operation." *Hoyt Props., Inc. v. Prod. Res. Group, L.L.C.*, 736 N.W.2d 313, 318 (Minn. 2007) (quotation omitted).

Szanto advances a theory for piercing the corporate veil as it relates to the Sawayas and Barratt. As to the Sawayas, Szanto contends that they are "owners" of Altaire and, therefore, are alter egos of the corporation. And Barratt, Szanto maintains, is the alter ego of Ocusoft and Cynacon/Ocusoft. Szanto further argues that Sedgwick is an

agent of Target because it has participated in Target's efforts to avoid culpability.[4] According to Szanto's theories, each is personally liable for Szanto's injury. Szanto's claim against the Sawayas and Barratt relies solely on his contention that they are personally liable for the actions of the respective corporations because they are "owners" of Altair and Ocusoft, respectively. But there is no evidence in the record that their involvement in the companies reaches the level necessary to pierce the corporate veil. An ownership interest in a corporation is insufficient to demonstrate that an individual is an "alter ego" of that corporation. *See id.* (examining the reality of the individual's relationship to the corporation). Because Szanto does not allege that Barratt or the Sawayas are personally liable apart from their alleged liability for the actions of Ocusoft and Altaire, the district court did not err by granting this motion to dismiss for failure to state a claim on which relief may be granted.

Szanto's argument challenging the grant of Sedgwick's motion to dismiss is founded on Sedgwick's personal liability as an agent of Target. Szanto does not cite any legal authority in support for the proposition that an agent may be held liable for the acts of its principal in circumstances such as those alleged here. Indeed, Minnesota law supports the converse conclusion. *See Harding v. Ohio Cas. Ins. Co.*, 230 Minn. 327, 334, 41 N.W.2d 818, 823 (Minn. 1950) (holding that an agent is personally liable for his or her own separate torts, but is not liable for acts authorized by the principal). Even if

[4] Szanto also argues that Sedgwick is a subsidiary of Target but did not raise this issue before the district court. The issue, therefore, is waived. *See Thiele v. Stitch*, 425 N.W.2d 580, 582 (Minn.1988) ("A reviewing court must generally consider only those issues that the record shows were presented and considered by the [district] court in deciding the matter before it." (Quotation omitted)).

Szanto had sufficiently demonstrated that Sedgwick was Target's agent, his argument that Sedgwick may be held liable due to this agency fails. Accordingly, the district court did not err by granting Sedgwick's motion to dismiss for failure to state a claim.

IV.

Szanto argues that the district court erred by granting Target and Altaire summary judgment based on Szanto's failure to make a prima facie showing of causation. On appeal from summary judgment, we determine whether genuine issues of material fact exist and whether the district court erred as a matter of law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). In doing so, we view the evidence in the light most favorable to the party against whom summary judgment was granted. *Fabio*, 504 N.W.2d at 761. We will affirm a district court's grant of summary judgment if it can be sustained on any ground. *Horton v. Twp. of Helen*, 624 N.W.2d 591, 594 (Minn. App. 2001), *review denied* (Minn. June 19, 2001).

Summary judgment is appropriate when the nonmoving party bears the burden of proof and fails to establish the existence of an element essential to its case, *Bersch v. Rgnonti & Assocs., Inc.*, 584 N.W.2d 783, 786 (Minn. App. 1998), *review denied* (Minn. Dec. 15, 1998), or when "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).

"For a products liability claim, the plaintiff must demonstrate that a product was defective at the time it left the defendant's control and that the defect caused injury to the plaintiff." *Duxbury v. Spex Feeds, Inc.*, 681 N.W.2d 380, 387 (Minn. App. 2004), *review*

denied (Minn. Aug. 25, 2004). In Minnesota, products-liability law imposes liability on the distributor of a defective product as well as the seller. *Id.* Expert opinion is required to establish causation when the issue is "outside the realm of common knowledge." *Gross v. Victoria Station Farms, Inc.*, 578 N.W.2d 757, 762 (Minn. 1998). "Where a question involves obscure and abstruse medical factors such that the ordinary [lay person] cannot reasonably possess well-founded knowledge in the matter and could only indulge in speculation . . . there must be expert testimony." *Id.* (quoting *Bernloehr v. Cent. Livestock Order Buying Co.*, 296 Minn. 222, 225, 208 N.W.2d 753, 755 (1973)). Expert testimony is particularly important in personal injury cases involving pharmaceuticals because they involve "complex questions of medical causation beyond the understanding of a lay person." *In re Baycol Prods. Litig.*, 321 F. Supp. 2d 1118, 1126 (D. Minn. 2004).

Szanto contends that the district court erred by granting Target and Altaire's motion for summary judgment based on its determination that Szanto had not made a prima facie showing of causation. Causation would be proved, Szanto maintains, by his own testimony because the nature of the case is not so technically or scientifically complicated that expert testimony is necessary. We disagree. This case involves complex questions of causation of the kind that require an expert opinion. Here, when viewing the evidence in the light most favorable to Szanto, the evidence is that yeast was found in the eye drops and that Szanto experienced diminished vision, irritation, pain, and eye fatigue after putting the eye drops in his eyes. But determining that the yeast caused the alleged injuries requires an understanding of whether inserting a liquid containing

yeast, at the concentration and of the type involved here, could cause these kinds of injuries.

The need for expert testimony here is demonstrated by Szanto's evidence regarding the optometrist he intended to call at trial. The optometrist, Dr. Darren Brown, stated in his affidavit that he had "conducted a thorough and complete examination" of Szanto's eyes and that Szanto had shown him sealed, single-dose eye-drop vials that appeared to contain a cloudy liquid. It was Brown's expert opinion that supplying such eye drops to a patient would "deviat[e] from the reasonable standard of care." But, Brown noted in Szanto's medical chart that there was no evidence of an infection in Szanto's eyes; and Szanto testified that Brown told him that natural aging, diet, exercise, and other diseases were possible causes of Szanto's eye condition. Szanto also testified that Brown stated that "you would need a much better scientist than he was . . . and to quantify [the facts] on any meaningful level would take a battery of physicians working round the clock at a research center to come up with some causal effect." Szanto's own expert's testimony and statements to Szanto clearly establish that expert testimony would be necessary for a jury to reach a nonspeculative conclusion about causation. Because Szanto failed to present any expert testimony supporting the claim that the eye drops were the cause of Szanto's alleged eye injuries, the district court's conclusion that Szanto did not make a sufficient showing on the issue of causation was legally sound.

Szanto also asserts that causation is proved under a theory of res ipsa loquitur, the elements of which are:

> (1) The event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.

Stelter v. Chiquita Processed Foods, L.L.C., 658 N.W.2d 242, 247 (Minn. App. 2003) (citations and quotations omitted).

The district court concluded that the res ipsa loquitur doctrine was not applicable. The res ipsa loquitur doctrine does not apply if causes beyond the exclusive control of the defendant are equally likely to have produced the injury. *See Spannaus v. Otolaryngology Clinic*, 308 Minn. 334, 337, 242 N.W.2d 594, 596 (1976) (holding that plaintiff "failed to establish that all possible causes of the alleged injury were under the control of a single defendant"). Thus, under a res ipsa loquitur theory, Szanto must make a prima facie showing regarding causation and exclusive control. But there is no evidence in the record that would support such a showing. Rather, Szanto has presented evidence that his own expert would testify that he could not determine the cause of Szanto's eye problems and that various factors could have caused the alleged injuries. Szanto's argument that the doctrine of res ipsa loquitur applies, therefore, fails.

In sum, because Szanto failed to present sufficient evidence to prove that the eye drops caused his injuries, the district court did not err by granting this motion for summary judgment based on the failure to make a prima facie showing of causation.

V.

Szanto next argues that the district court erred by granting Target's motion for summary judgment pursuant to Minn. Stat. § 544.41. "The seller's-exception statute, Minn. Stat. § 544.41 . . . permits dismissal of strict-liability claims against a seller of a defective product who certifies the correct identity of the manufacturer." *In re Shigellosis Litig.*, 647 N.W.2d 1, 6 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002). But dismissal is permitted under the statute only after a complaint is filed against the manufacturer. *Id*. "Once the plaintiff has filed a complaint against a manufacturer and the manufacturer has or is required to have answered or otherwise pleaded, the court shall order the dismissal of a strict liability in tort claim against the [seller.]" Minn. Stat. § 544.41, subd. 2.

Szanto first contends that Target's motion was untimely because it should have been filed when answering Szanto's complaint. Although the seller's-exception statute mandates when a claim against a seller will be dismissed, the statute does not include a deadline by which the seller must file for that dismissal. *See* Minn. Stat. § 544.41. The statute merely provides that the claim shall be dismissed once a complaint has been filed against the manufacturer and the manufacturer has answered or is obligated to do so. *Id.*, subd. 2. Contrary to Szanto's arguments, Target's motion for summary judgment pursuant to Minn. Stat. § 544.41 was timely.

Szanto next contends that Target's argument regarding this statute relies on "bizarre logic." The retailer shall not be dismissed if the plaintiff can demonstrate that the retailer exercised significant control over the design or manufacture of the product;

provided instructions or warnings to the manufacturer about the defect in question; or had actual knowledge of or created the defect in question. *Id.*, subd. 3. The district court found that the requirements of Minn. Stat. § 544.41 had been met and granted Target's motion for summary judgment as to Szanto's strict liability claim pursuant to this statute.

Other than reference to Target's logo being on the box, Szanto does not allege that Target had control over the eye drops. He does not argue that Target provided instructions or warnings to Altaire regarding the defect or that Target had actual knowledge of, or created, the defect. And there is a dearth of evidence in the record to support such allegations. Thus, because the statutory requirements have been met, the district court properly granted summary judgment in favor of Target pursuant to Minn. Stat. § 544.41.

VI.

Szanto also challenges the district court's entry of summary judgment in favor of Target based on Szanto's failure to establish under his negligence claim that Target had a duty to inspect and warn regarding the eye drops.

"The essential elements of a negligence claim are: (1) the existence of a duty of care; (2) a breach of that duty; (3) an injury was sustained; and (4) breach of the duty was the proximate cause of the injury." *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995). A manufacturer has a duty to warn of dangers when it knew or should have known of the risk or hazard involved. *Germann v. F.L. Smithe Mach. Co.*, 395 N.W.2d 922, 924-25 (Minn. 1986). Whether a duty to warn exists is a question of law, which we review de novo. *Id*. at 924.

The district court held, based on the undisputed facts, that Target did not have a duty to inspect or warn related to the eye drops, granting Target summary judgment on the negligence claim on this basis as well as for failure to demonstrate causation. Szanto contends that Altaire had been convicted of dumping toxic waste and that Target's duty to inspect and warn was created when Target "learn[ed] or should have learned, that one of its suppliers has been convicted of an . . . environmental felony." But there is no evidence that the allegedly tainted eye drops had any connection to the manufacturer's dumping of toxic waste. Further, the earliest evidence in the record regarding the toxic waste is a New York Department of Environmental Conservation press release dated October 5, 2007. Szanto testified that he used the tainted eye drops between February and April 2006, and the record contains no evidence that information about the toxic waste was available to Target prior to Szanto's use of the eye drops. On this record, Szanto has failed to demonstrate that Target should have been aware of its supplier's "environmental felony" such that a duty to inspect or warn was created for Target. As the district court determined, "the undisputed facts are that the single-use sterile lubricant eye drops at issue arrived pre-sealed and packaged," and there is no evidence that Target was aware of an obvious defect or had reason to know the product was dangerous such that Target had a duty to inspect or warn. The district court did not err by granting Target summary judgment on this claim.

VII.

Szanto does not make specific arguments regarding the district court's conclusion that he failed to demonstrate intent relevant to Szanto's intentional-tort claim, but rather

contends that the question of whether there was intentional conduct is a question for the jury. Again, when the record lacks proof of any essential element of a claim, summary judgment is properly granted for the moving party. *Hous. & Redev. Auth.*, 663 N.W.2d at 547.

Szanto asserted an intentional-tort claim of "[p]ersonal injury caused by wanton, callous and reckless acts known to be dangerous for which reasonable care was intentionally avoided." As an intentional tort, this claim necessarily requires evidence of intent. But as part of his complaint or in other submissions to the district court, Szanto failed to present any evidence of intent regarding the acts of Target and Altaire. Thus, the district court properly concluded that Target and Altaire were entitled to summary judgment on the intentional-tort claim.

VIII.

Szanto argues that he was improperly denied the right to name previously unknown defendants and that Minn. R. Civ. P. 9.08 does not require judicial approval to add such defendants. When the name of an opposing party is unknown, the "opposing party may be designated by any name and when that opposing party's true name is discovered the process and all pleadings and proceedings in the action may be amended by substituting the true name." Minn. R. Civ. P. 9.08. Although a party may amend a pleading by leave of the court, "[a] motion to amend a complaint is properly denied when the additional claim could not survive summary judgment." *Bebo v. Delander*, 632 N.W.2d 732, 740 (Minn. App. 2001) (citations omitted), *review denied* (Minn. Oct. 16, 2001).

The district court determined that Szanto's motion must be construed as a motion to add parties rather than a motion to name previously unknown defendants because Szanto failed to include any reference to or claim against any of the "Doe defendants" addressed in the caption of the complaint. Because Szanto failed to comply with the scheduling order regarding the deadline for joinder of additional parties, the district court denied Szanto's motion to amend. The district court also held that, even if it were to address the merits of the motion, "it must be denied for futility."

Szanto included "John Does 1-500, Jane Roes 1-500" in the list of defendants in the caption of his complaint. However, Szanto does not make any allegations against any of these "Doe defendants" in the body of the complaint. Although Minn. R. Civ. P. 9.08 provides for the designation of unknown defendants by any name, the rule is meant to permit the use of a placeholder name when the plaintiff "is ignorant of *the name* of an opposing party." Minn. R. Civ. P. 9.08 (emphasis added). Once the true name of the defendant is discovered, the complaint is amended by substituting that name for the placeholder. *Id.* The rule's purpose is not to permit the inclusion of "Doe defendants" as a general placeholder that would essentially permit the addition of new defendants in the future. Consequently, the district court's treatment of the motion as one to amend rather than to name previously unknown defendants was proper. And denial of the motion to amend because the deadline for such amendment had passed was within the district court's sound discretion.

The district court's analysis of the merits of permitting amendment of the complaint also is correct. Szanto argued for the addition of the following parties:

(1) Assad Sawaya because he is the president of Altaire, stating that Assad Sawaya's personal liability would "depend[ ] on the extent of his knowledge of the defective eye drops," which Szanto has not yet been able to discover; (2) Sawaya Holding Company because it was the means by which "Michael Sawaya was able to avoid criminal liability for dumping [toxic waste]"; (3) Martin Dalsing and Medvice Consulting because they are "related companies," although Szanto later concedes that he requested the addition of Martin Dalsing, a representative of Altaire, "not so much for Martin Dalsing's culpability," but rather to demonstrate the "multi-state breadth of this whole matter"; and (4) Marina Marketplace 1 and Marina Marketplace 2 because they are the alter egos of Victor and Evye Szanto. Szanto did not indicate in his motion or in oral argument before the district court how any of these parties may have specifically contributed to his injuries in such a way that they would be liable, and Szanto's broad assertions are not sufficient to demonstrate personal liability, even if taken as true. Consequently, the district court's denial of Szanto's motion to add these parties was not erroneous, both because the motion was untimely and because the allegations were not sufficiently definite, even if undisputed, to survive a motion to dismiss or a motion for summary judgment.

IX.

Szanto argues that the district court judge is anti-Semitic and abused his discretion by denying Szanto's recusal motion due to bias. We review a district court's decision to deny a motion to recuse for an abuse of discretion. *Carlson v. Carlson*, 390 N.W.2d 780, 785 (Minn. App. 1986), *review denied* (Minn. Aug. 20, 1986). A party may move to remove a judge for cause. Minn. R. Civ. P. 63.03. The motion must be first brought

before the judge who is the subject of the motion and then, if the motion is denied, may be reconsidered by the chief judge. Minn. R. Gen. Pract. 106. A judge who has presided at a motion or other proceeding may not be removed except upon an affirmative showing of prejudice on the part of that judge. Minn. R. Civ. P. 63.03. "[A] judge who feels able to preside fairly over the proceedings should not be required to step down upon allegations of a party which themselves may be unfair or which simply indicate dissatisfaction with the possible outcome of the litigation." *Carlson*, 390 N.W.2d at 785 (quotation omitted). When there is no evidence to support a claim of prejudice or bias, we will not find an abuse of discretion in denying a motion to remove. *Id*.

The district court found that, although Szanto disagreed with some of its rulings, the district court had done nothing "to cause [its] impartiality to be questioned." The district court judge acknowledged that he had been a partner at one of the law firms representing some of the defendants but stated that his professional relationship with the firm ended approximately ten years earlier. As a result, he did not "believe that anyone could reasonably question [his] impartiality based upon that matter." Szanto sought reconsideration by the chief judge, who also denied Szanto's motion to recuse, finding that (1) "adverse rulings do not constitute a showing of bias," (2) Szanto had offered no evidence of anti-Semitism or that the district court was aware of Szanto's unavailability when it scheduled a hearing on Yom Kippur, and (3) Szanto presented no evidence that the district court judge's former association with defense counsel's firm would cause the judge to "form an opinion based on anything other than his participation in the case."

Szanto argues that the district court's bias is demonstrated by its adverse rulings. But adverse rulings are not sufficient to demonstrate bias for the purpose of the removal of a judge. *Olson v. Olson*, 392 N.W.2d 338, 341 (Minn. App. 1986). And "a petitioner's subjective belief that the judge is biased does not necessarily warrant removal." *Hooper v. State*, 680 N.W.2d 89, 93 (Minn. 2004). Szanto states that he was "surprised that the matter was assigned to a judge who was a founder of the law firm representing Target," but he does not present any evidence that the district court was biased based on any past affiliation with the firm. Nor does Szanto present evidence, beyond his personal impression, that the district court judge is anti-Semitic. Thus, Szanto has failed to demonstrate that the district court was biased against him or that denial of the motion to recuse was an abuse of discretion.

X.

Szanto next argues that the district court abused its discretion by denying his requests to proceed in forma pauperis. "[A]ny court . . . may authorize the commencement or defense of any civil action . . . without prepayment of fees." Minn. Stat. § 563.01, subd. 3 (2008). "Upon a finding by the [district] court that the action is not of a frivolous nature, the [district] court shall allow the person to proceed in forma pauperis if the affidavit is substantially in the language required . . . and is not found by the [district] court to be untrue." *Id.* "Persons meeting the requirements of this subdivision include, but are not limited to, a person . . . who has an annual income not greater than 125 percent of the poverty line." *Id.* Whether to grant a motion to proceed in forma pauperis is discretionary with the district court, and its decision will not be

reversed absent an abuse of that discretion. *Thompson v. St. Mary's Hosp*., 306 N.W.2d 560, 563 (Minn. 1981).

The district court denied, without explanation, Szanto's two requests to proceed in forma pauperis. But at the hearing on Szanto's motion to recuse, the district court commented as follows:

> I believe that a combination of the nature of the case and the fact that the income noted on the petition was very close to the guidelines and that I could assist Mr. Szanto in saving money by, for instance, allowing him to appear by telephone and given the very difficult current budget condition that we face here in court, balancing all those, I believe that was the – certainly the appropriate determination. And this is a matter that is given to the court and is within the court's discretion.

Section 563.01 requires the district court to make a finding regarding whether the action is frivolous and whether the application information is untrue. Even assuming that the district court's comments during the recusal hearing could be construed as findings regarding the in forma pauperis motion, the district court did not make the statutorily required findings regarding whether the action is frivolous or whether the affidavit claiming income below 125 percent of the federal poverty line is untrue. Because the requests to proceed in forma pauperis were denied without findings addressing the statutorily required factors, thereby precluding our review on the merits, we remand solely for findings pursuant to Minn. Stat. § 563.01. The decision to reopen the record on remand is discretionary with the district court.

XI.

Szanto also moves to strike a letter filed with this court on August 28, 2009, in which counsel for some of the respondents in the first appeal, A09-109, indicated that they are not respondents in the second appeal, A09-841, and would not be submitting a respondents' brief, even though Szanto's brief in the second appeal contained additional arguments on issues previously briefed in the first appeal. Counsel indicated, however, that these parties did not intend to concede any of these issues. Because Szanto has failed to establish any basis for striking this letter, we deny his motion to do so.

Affirmed in part, reversed in part, and remanded; motion denied.