STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1777

Michael R. Lange, et al.,
Appellants,

vs.

Mark A. Litman, et al.,
Respondents.

Filed June 30, 2014
Affirmed
Smith, Judge
Concurring specially, Connolly, Judge

Hennepin County District Court
File No. 27-CV-10-26558

Paul A. Sortland, Sortland Law Office, Minneapolis, Minnesota (for appellants)

Charles E. Lundberg, Jeffrey R. Mulder, Bassford Remele, P.A., Minneapolis, Minnesota (for repsondents)

Considered and decided by Chutich, Presiding Judge; Connolly, Judge; and Smith, Judge.

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

SMITH, Judge

We affirm the district court's denial of appellants' motion to vacate a previous order because the district court did not abuse its discretion by denying equitable relief from a dismissal without prejudice.

FACTS

In November 2010, appellant Michael Lange, owner of appellant Sky Robotics, Inc., filed a complaint in state district court alleging malpractice negligence, breach of fiduciary duty, and breach of contract by respondent Mark Litman, owner of respondent Mark A. Litman & Associates. Litman moved the state district court to dismiss for lack of subject matter jurisdiction or, in the alternative, for summary judgment. Lange opposed both motions. The state district court dismissed the case "without prejudice" in September 2011, citing federal courts' "exclusive jurisdiction over cases requiring the resolution of substantial questions of patent law."

After Lange filed a substantively identical complaint in federal district court, it granted Litman's motion for summary judgment, ruling that Lange had "not provided any evidence that, but for [Litman's] conduct, [Lange] . . . would have achieved a better result." Lange appealed to the Federal Circuit Court of Appeals. While that appeal was pending, the United States Supreme Court decided *Gunn v. Minton*, 133 S. Ct. 1059 (2013), which held that federal courts generally lack jurisdiction over legal malpractice claims arising from patent cases. The Federal Circuit court vacated the federal district court's decision, and remanded for the federal district court to dismiss the case for lack of jurisdiction.

Relying on Minnesota Rule of Civil Procedure 60.02, paragraphs (d), (e), and (f), Lange moved the state district court to vacate its September 2011 dismissal order. The state district court denied his motion in August 2013, stating that Lange had "offered no reason why [the federal district court's] analysis should be questioned, and concomitantly

why the [state district court] should exercise its equitable powers" to vacate the dismissal. It also noted that "a review of Minnesota case law demonstrates that Minn. R. Civ. Pro. 60.02(e) applies in injunction situations or to other judgments with prospective effect."

Lange appealed to this court in September 2013. By order of February 12, 2014, we directed the parties to submit additional briefing addressing the state district court's reference to the federal district court's summary-judgment ruling on the merits of Lange's claims. Although both parties submitted supplemental briefs, only Litman's brief was responsive to our order.[1] We therefore limit our analysis to the framing of the issues set forth in the parties' primary briefs.

D E C I S I O N

We review a district court's denial of a motion to vacate a judgment for an abuse of discretion. *Simington v. Minn. Veterans Home*, 464 N.W.2d 529, 530 (Minn. App. 1990), *review denied* (Minn. Mar. 15, 1991). "A district court abuses its discretion when its findings are not supported by record evidence or when it misapplies the law." *Ekman v. Miller*, 812 N.W.2d 892, 895 (Minn. App. 2012).

A district court may relieve a party from a final judgment, order, or proceeding when "it is no longer equitable that the judgment should have prospective application." Minn. R. Civ. P. 60.02(e). The purpose of this rule is to allow a district court to respond equitably to a change in circumstances. *See City of Barnum v. Sabri*, 657 N.W.2d 201,

[1] We also note with concern the statements made by Lange's counsel during the rebuttal portion of his oral argument, when he accused Litman of criminal behavior completely unrelated to this matter. *Cf.* Minn. Sup. Ct. R. Decorum 10 ("Lawyers are officers of the court and shall at all times uphold the honor and maintain the dignity of the profession, maintaining at all times a respectful attitude toward the court and opposing counsel.").

207 (Minn. App. 2003). "The provision principally applies to a judgment involving an injunction in which a significant change in circumstances makes the continued application of the judgment inequitable and turns the decree into an instrument of wrong." *Jacobson v. Cnty. of Goodhue*, 539 N.W.2d 623, 625 (Minn. App. 1995) (quotation omitted), *review denied* (Minn. Jan. 12, 1996).

Rule 60.02(e) is inapposite here because the state district court's dismissal did not have prospective application. Because the state district court, in 2011, dismissed "without prejudice," it did not rule on the merits of Lange's claims. Although the state district court, in 2013, opined on the merits of those claims by referencing the federal district court's summary-judgment analysis, its assessment related solely to its decision whether to invoke its discretionary equitable power to vacate. Because the state district court did not modify its prior "without prejudice" ruling or otherwise give its assessment of the merits of Lange's claim any prospective application, Lange suffered no harm requiring redress under rule 60.02(e).[2] *See, e.g.*, *Unbank Co., LLP, v. Merwin Drug Co., Inc.*, 677 N.W.2d 105, 109 (Minn. App. 2004) (declining to treat dismissal without prejudice as preclusive of successor suit absent an adjudication on the merits). We

[2] Lange asserts that he has already served Litman with a successor suit in state district court. He urges us to rule on the application of Minn. Stat. § 541.18 (2012) and the relevant statute of limitations as each relates to this successor suit. We decline to address these questions, however, because they have not been considered by the district court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). We also reaffirm the basic principle in American law that "[t]his court does not issue advisory opinions or indicate probable views even on issues clearly on the horizon." *State v. Hanson*, 532 N.W.2d 598, 601 (Minn. App. 1995), *aff'd*, 543 N.W.2d 84 (Minn. 1996).

therefore hold that the district court did not abuse its discretion by denying Lange's rule 60.02(e) motion.

Although Lange also invoked two other provisions of rule 60 in his state district court motion to vacate, he offers no argument and cites no authority relating to these provisions on appeal. We therefore decline to address the issue. *See, e.g.*, *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) ("This issue was not argued in the briefs and accordingly must be deemed waived.").

Affirmed.

CONNOLLY, Judge (concurring specially)

I agree with the majority that there is no basis to vacate the district court's order dismissing appellants' claims. I write separately to express my further agreement with this court's statement in its February 12, 2014 order that "the district court specifically adopted the federal court's reasoning in ruling for respondents" and with the district court's well-reasoned conclusions that "it would not be equitable to vacate [the dismissal of appellants' claims] because the merits of [those] claims were addressed in [the federal district court's opinion]" and that "if the [District] Court were to reopen the case as [appellants] request, the same claims and arguments which were presented . . . in the United States District Court would be presented to this [District] Court." I believe that the district court in effect granted summary judgment sua sponte against appellant and would affirm on that basis. *See Modern Heating & Air Conditioning, Inc. v. Loop Beldon Porter*, 493 N.W.2d 296, 299 (Minn. App. 1992) ("A trial court has inherent authority . . . to grant summary judgment sua sponte . . . .").

Appellants have informed this court that "[p]ursuant to [the district court's] dismissal without prejudice, [they] have already commenced a separate action, along identical facts, now pending in Hennepin County District Court, having recently been reassigned to [a different judge]." But "a district court's designation of 'with prejudice' or 'without prejudice' must be viewed in light of the basis for the dismissal." *Unbank Co.*

v. Merwin Drug Co., 677 N.W.2d 105, 109 (Minn. App. 2004).[3] Here, the basis for the dismissal was undoubtedly the lack of merit in appellants' claims as established by the federal district court. Appellants' original brief and supplemental briefs provide no refutation of the federal district court's conclusion that appellants failed to show either that respondents' acts were the proximate cause of appellants' damages or that appellants would have had a more favorable result but for respondents' acts. *See Jerry's Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 816 (Minn. 2006) (listing among the four elements of a legal-malpractice claim that (1) the attorney's acts must have been the proximate cause of the plaintiff's damages and (2) but for the attorney's acts, the plaintiff would have obtained a more favorable result in an underlying action); *Noske v. Friedberg*, 670 N.W.2d 740, 743 (Minn. 2003) (holding that failure to provide sufficient evidence of any one element is fatal to a legal malpractice claim).[4]

Consequently, I believe that we should affirm the grant of summary judgment because, as two judges in two different forums have concluded, the undisputed material facts show that appellants have failed to prove two of the elements of a legal malpractice cause of action.

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[3] While *Unbank* holds that a dismissal without prejudice does not preclude a subsequent suit, 677 N.W.2d at 109, that case did not involve an adjudication that the claims were without merit. Here, the federal district court has made such an adjudication.

[4] I assume for the purposes of argument the existence of an attorney-client relationship, the first element of a legal malpractice claim, *see Jerry's Enters.*, 711 N.W.2d at 816, notwithstanding the federal district court's view that the existence of such a relationship was "unlikely."