STATE OF MINNESOTA
IN COURT OF APPEALS
A10-852

Faegre & Benson, LLP,
Respondent,

vs.

Steven K. Lee,
Appellant.

Filed December 28, 2010
Affirmed
Kalitowski, Judge

Hennepin County District Court
File No. 27-CV-09-13602

Michael M. Krauss, Michael F. Doty, Faegre & Benson LLP, Minneapolis, Minnesota (for respondent)

John R. Neve, Evan H. Weiner, Neve Law, PLLC, Minneapolis, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Kalitowski, Judge; and Ross, Judge.

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

KALITOWSKI, Judge

Appellant Steven K. Lee retained respondent Faegre & Benson LLP to represent him in an employment dispute with two German companies. Respondent brought this action against appellant to recover unpaid legal fees based on the account-stated doctrine

and breach of contract. Appellant counterclaimed that respondent breached their contract, offsetting the fees owed. Respondent moved for summary judgment on its claims and appellant's counterclaim. The district court granted summary judgment in respondent's favor. Appellant challenges the grant of summary judgment, arguing that the district court erred by declining to apply German law. In the alternative, appellant contends that genuine issues of material fact exist with regard to respondent's account-stated claim and appellant's breach-of-contract counterclaim, precluding summary judgment. We affirm.

D E C I S I O N

I.

We first address the choice-of-law question. Appellant contends that the district court erred by determining that Minnesota law, not German law, applies to this fee dispute. We review de novo a district court's resolution of a choice-of-law issue. *Schumacher v. Schumacher*, 676 N.W.2d 685, 690 (Minn. App. 2004).

A choice-of-law analysis requires a court to make several preliminary determinations: (1) whether an actual conflict of law exists; (2) whether the law at issue is substantive; and (3) whether the law of both Minnesota and the other forum may be constitutionally applied. *See, e.g.*, *Jepson v. Gen. Cas. Co. of Wis.*, 513 N.W.2d 467, 469-70 (Minn. 1994); *Schumacher*, 676 N.W.2d at 689-90. If these conditions are met, the court analyzes five choice-influencing factors to determine which law governs: "(1) predictability of result; (2) maintenance of interstate and international order;

(3) simplification of the judicial task; (4) advancement of the forum's governmental interest; and (5) application of the better rule of law." *Jepson*, 513 N.W.2d at 470.

Substantive or procedural legal rules

If the law at issue is procedural, Minnesota law applies; if substantive, further analysis is needed. *Nesdalek v. Ford Motor Co.*, 46 F.3d 734, 737 (8th Cir. 1995) (applying Minnesota's conflict of law rules). The existence of a defense to nonpayment of legal fees by reason of the attorney's deficient representation is a matter of substantive law. *See id.* ("[S]ubstantive law is that part of law which creates, defines and regulates rights, as opposed to adjective or remedial law, which prescribes method[s] of enforcing legal rights or obtaining redress for their invasion." (quotation omitted)). This factor indicates that the case may require a choice-of-law determination.

Constitutional application of both bodies of law

"For [a forum's] substantive law to be selected in a constitutionally permissible manner, the [forum] must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Jepson*, 513 N.W.2d at 469 (quotation omitted). Here, significant contacts exist with both Minnesota and Germany; therefore, either body of law may be applied in a constitutionally permissible manner. *See Nodak Mut. Ins. Co. v. Am. Family Mut. Ins. Co.*, 590 N.W.2d 670, 672-73 (Minn. App. 1999) (concluding that either body of law may be applied in a constitutionally permissible manner where significant contacts exist with both fora), *aff'd*, 604 N.W.2d 91 (Minn. 2000).

Actual conflict between legal rules

An actual conflict exists if choosing the law of one forum over the law of the other would be "outcome determinative." *Id.* at 672 (quotation omitted). Citing the affidavit of his new attorney in his action against his former employers, appellant argues that respondent's representation in the dispute was deficient and that such deficient representation provides a defense to payment under German law. But neither appellant nor his new attorney cites any legal authority to support this assertion.

"[A] choice-of-law determination is made on an issue-by-issue, and not case-by-case, basis." *Zaretsky v. Molecular Biosys., Inc.*, 464 N.W.2d 546, 548 (Minn. App. 1990). Because appellant has failed to show that German law differs from Minnesota law on any issue decided on summary judgment, we conclude that no choice-of-law issue was presented and the district court did not err by determining that Minnesota law applies to this dispute. Moreover, even if appellant had shown an actual conflict, we would reach the same result after considering the choice-influencing factors.

Choice-influencing factors

The choice-influencing factors "were not intended to spawn the evolution of set mechanical rules but instead to prompt courts to carefully and critically consider each new fact situation and explain in a straight-forward manner their choice of law." *Jepson*, 513 N.W.2d at 470.

The first factor, predictability of result, "protect[s] the justified expectations of the parties to the transaction." *Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438, 454 (Minn. App. 2001). This factor is particularly important in analyzing contract cases.

Jepson, 513 N.W.2d at 470; *Jacobson v. Universal Underwriters Ins. Group*, 645 N.W.2d 741, 745 (Minn. App. 2002).

The issue here is whether the parties had a valid expectation that a certain body of law would govern any future dispute. The representation agreement between appellant and respondent does not contain a choice-of-law provision. The agreement is written in English and bears appellant's Edina address (although appellant appears to have signed the agreement in Switzerland). Appellant retained respondent based on the firm's reputation in Minnesota, respondent's principal place of business, and where appellant resides. But the agreement (1) involves legal representation by respondent's German office related to appellant's employment dispute with two German companies; (2) specifies that fees will be calculated in euros; and (3) mentions that "German professional rules" will apply to any conflict of interest. Because it is not clear from the circumstances which body of law the parties expected would apply, we conclude that the first factor is neutral.

The second factor, maintenance of international order, addresses whether Minnesota law manifests disrespect for Germany or impedes the international movement of people and goods. *Schumacher*, 676 N.W.2d at 690. Evidence of forum shopping indicates disrespect for the other sovereign and therefore frustrates the maintenance of international or interstate order. *Id.* at 690-91.

Appellant argues that respondent brought suit in Minnesota to avoid the defenses to payment available under German law. But the record indicates that there are legitimate reasons why respondent brought suit in Minnesota: appellant resides in Edina;

respondent's principal place of business is in Minneapolis; appellant retained respondent based on its reputation in Minnesota; and respondent no longer has an office in Germany. And appellant fails to explain how Germany has a more substantial concern than Minnesota over the resolution of this dispute, considering that appellant has not returned to Germany since March 2008 and respondent no longer does business there. We conclude that the second factor weighs in favor of applying Minnesota law.

The third factor, simplification of the judicial task, involves whether either body of law could be applied without difficulty. *Jepson*, 513 N.W.2d at 472. We conclude, and appellant essentially concedes, that this factor favors the application of Minnesota law because the district court would otherwise need to translate and apply unfamiliar German laws.

The fourth factor, advancement of the forum's governmental interest,

> goes to which law would most effectively advance a significant interest of the forum state. This factor is designed to ensure that Minnesota courts do not have to apply rules of law that are inconsistent with Minnesota's concept of fairness and equity. In considering [this factor], this court considers the public policy of both forums.

Schumacher, 676 N.W.2d at 691 (quotations and citations omitted). Appellant cites the fact that the attorney-client relationship arose in Germany and argues Germany has an interest in resolving a dispute arising in its territory and an interest in regulating the practice of law within its borders. But both parties have left Germany, attenuating its interest. And Minnesota has a significant interest in resolving a contractual dispute between a Minnesota-based law firm and a Minnesota resident. Because Germany's

interest has lessened and Minnesota's continues to be significant we conclude that this factor weighs in favor of applying Minnesota law.

The fifth factor, application of the better rule of law, "is to be exercised only when other choice-influencing considerations leave the choice of law uncertain." *Nesdalek*, 46 F.3d at 740 (quotation omitted); *see also Schumacher*, 676 N.W.2d at 691-92 (declining to reach this factor). Because three of the first four factors weigh in favor of applying Minnesota law and the other is neutral, we do not reach the fifth factor.

Even if appellant proved that an actual conflict of law exists we conclude that the district court did not err in determining that Minnesota law applies to this dispute.

II.

Appellant argues that the district court erred by granting summary judgment to respondent on its account-stated claim. On appeal from summary judgment, we review de novo whether a genuine issue of material fact exists and whether the district court erred in its application of the law. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). This court views the evidence in the light most favorable to the party against whom judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

The account-stated doctrine is an alternative means of establishing liability for a debt other than recovery pursuant to a contract claim. *Am. Druggists Ins. v. Thompson Lumber Co.*, 349 N.W.2d 569, 573 (Minn. App. 1984). An account stated is a manifestation of an agreement between a debtor and a creditor that a stated amount is an accurate computation of an amount due. *Cherne Contracting Corp. v. Wausau Ins. Cos.*,

572 N.W.2d 339, 345 (Minn. App. 1997), *review denied* (Minn. Feb. 19, 1998). It constitutes prima facie evidence of the debtor's liability and can be challenged only by a showing of fraud or mistake. *Erickson v. Gen. United Life Ins. Co.*, 256 N.W.2d 255, 259 (Minn. 1977). "A party's retention without objection for an unreasonably long time of a statement of account rendered by the other party is a manifestation of assent." *Lampert Lumber Co. v. Ram Constr.*, 413 N.W.2d 878, 883 (Minn. App. 1987).

Objection to the invoices

We must first determine whether there is a genuine issue of material fact as to when appellant first objected to respondent's invoices. It is undisputed that appellant objected to the validity of the invoices in his answer to respondent's complaint. Appellant contends that there is a genuine issue of material fact as to whether he objected as early as April 2008. We disagree.

Between February 22 and December 16, 2008, respondent performed legal services for appellant. Respondent sent monthly itemized invoices to appellant, who paid some of these invoices but made no payments for work done by respondent from June 1 to December 16, 2008. The record indicates that appellant stated he could not afford to pay. The record also indicates that the parties discussed "the quality and the direction and the strategy of the representation" during the attorney-client relationship, but that appellant did not object to the amounts stated in the invoices until after respondent commenced the collection lawsuit against him.

Appellant argues that he protested the invoices based on respondent's "poor performance." In his December 2009 affidavit, appellant avers that: (1) he informed

respondent several times between April and July 2008 that he was unable to pay; (2) he did not comply with respondent's November 2008 request for a €60,000 payment; (3) he disputes the validity of numerous specific invoice entries "as either excessive, unnecessary or unauthorized"; and (4) he disputes the "overall validity of all the invoices." But this affidavit does not specify *when* appellant first disputed either the "overall validity" of the invoices or specific entries. And at his November 2009 deposition, appellant testified that he did not object to the amounts stated in the invoices before respondent commenced the collection lawsuit against him; he also admitted this in his statement of undisputed facts to the district court.

We conclude that the statements in appellant's December 2009 affidavit are insufficient to raise an issue of genuine material fact as to whether appellant objected to the invoices before the collection lawsuit was commenced. *See Erickson*, 256 N.W.2d at 258 (holding that plaintiff's averment that he "continuously objected to the statements and accountings of defendant" was "general in nature" and "insufficient to oppose a motion for summary judgment"); *Mountain Peaks*, 778 N.W.2d at 388 (holding that defendant could not rely on her self-serving affidavit that contradicted other testimony to create a fact issue for trial on account-stated claim).

Appellant also argues that his nonpayment and his discussions with respondent about his inability to pay constitute objection to the invoices. But nonpayment does not constitute objection if the refusal to pay "is based solely on the ground of inability to pay." 1A C.J.S. *Account Stated* § 19 (2005); *see Kenyon Co. v. Johnson*, 144 Minn. 48, 50-51, 174 N.W. 436, 437 (1919) (concluding that defendants did not object to invoices

by telling plaintiff that "they did not have the money to pay for the [goods]"). Nor do general complaints about billing constitute objection; instead, a debtor must specifically object to the correctness of the account rendered. *See Lampert*, 413 N.W.2d at 883 (concluding that appellants failed to object to the interest rate on a debt by making "complain[ts] about the billing generally"); *Kenyon Co.*, 144 Minn. at 51, 174 N.W. at 437 (holding that defendants failed to object because they did not timely "challenge the correctness of the account").

The record demonstrates that appellant first objected to the accuracy of specific invoice entries and the overall validity of the invoices in his answer. Appellant failed to show that a genuine issue of material fact exists as to whether he objected prior to the start of this collection action.

Retention of invoices for an unreasonable length of time

We now turn to the question of whether appellant's retention of the invoices without objection beginning in June 2008 until his answer in February 2009 constituted an unreasonable length of time. If so, this would establish a prima facie case for recovery on an account stated. *See Joseph V. Edeskuty & Assocs. v. Jacksonville Kraft Paper Co.*, 702 F. Supp. 741, 748 (D. Minn. 1988) (*Edeskuty*) (applying Minnesota law). Appellant argues that his failure to object to the invoices before being sued was reasonable because he was "unaware of material facts and circumstances" and that "one and a half months without objection" is not an unreasonable length of time. We disagree.

It has long been the law in Minnesota that when a debtor receives a statement rendered and retains it without objection "beyond a reasonable time under the

circumstances," the debtor is considered to have acquiesced to the correctness of the debt. *W. Newspaper Union v. Segerstrom Piano Mfg. Co.*, 118 Minn. 230, 236, 136 N.W. 752, 754 (1912).

> What constitutes a reasonable time within which objection must be made to . . . prevent [an account rendered] from becoming an account stated, depends on the particular factors of each case, such as the nature of the transaction, the relation of the parties, the parties' distance from each other and the means of communication between them, and the parties' business capacity, intelligence, and the usual course of their business.

1 Am. Jur. 2d *Accounts & Accounting* § 40 (2005) (footnotes omitted). This question is usually determined by the jury. *Id.* "However, where the facts are undisputed, the question is exclusively for a court . . . ." *Id.* (footnotes omitted); *see also Am. Druggists*, 349 N.W.2d at 573 (upholding summary judgment granted on account-stated claim).

Here, appellant received six monthly invoices from respondent for legal services performed in June through November 2008. Appellant did not pay these invoices, but he did pay previous invoices. The first of the unpaid invoices in the record is dated July 11, 2008; the last is dated December 16, 2008. Appellant did not object to these invoices—except on grounds of inability to pay—until February 27, 2009, when he filed his answer. That is, he made no objection until more than seven months after he received the first unpaid invoice and more than two months after the final unpaid invoice. From July to December 2008, respondent continued to represent appellant in the employment dispute, and e-mails from this period indicate that the work was done at appellant's request.

These facts are comparable to those of *Kittler & Hedelson v. Sheehan Props., Inc.*, 295 Minn. 232, 203 N.W.2d 835 (1973). In *Kittler*, a law firm sued two of its former clients to recover unpaid attorney fees. 295 Minn. at 233, 203 N.W.2d at 837. The clients were experienced businessmen. *Id.* at 234, 203 N.W.2d at 837. The law firm had sent these clients monthly billing statements, some of which the clients paid. *Id.*, 203 N.W.2d at 838. The clients admitted that they did not express to their attorney that his work was unsatisfactory before the law firm commenced the collection suit. *Id.* at 234-35, 203 N.W.2d at 838. The Minnesota Supreme Court held that the clients had acquiesced to the amount set forth in the billing statements, noting that the clients had failed to object to the "amount or manner of charging" set forth in the statements and had continued to request services of the attorney after receiving the statements, and that the statements "were itemized and sufficiently specific to inform [the clients] and enable them to make independent computation." *Id.* at 238, 203 N.W.2d at 840.

Here, appellant—an experienced businessman—received itemized billing statements that set forth the date, number of hours, hourly rate, name of the attorney, and description of the work performed. Appellant claimed inability to pay but did not immediately challenge the amount of the debt set forth in the invoices. He continued to request that respondent perform work for him. He did not object to the quality of the representation, including allegedly "unnecessary, unauthorized, and excessive work" until late February 2009. We conclude that appellant retained the invoices without objection an unreasonable length of time. On these facts, respondent has established a prima facie case of account stated and appellant did not rebut this by showing fraud or

mistake. The district court therefore did not err by granting summary judgment to respondent on its account-stated claim. *See Edeskuty*, 702 F. Supp. at 748-49 (granting summary judgment when plaintiff showed defendant's failure to object to invoice amounts for more than a year).

Because we affirm summary judgment on respondent's account-stated claim, we do not reach the issue of whether respondent was also entitled to summary judgment on its breach-of-contract claim.

III.

Appellant's breach-of-contract counterclaim alleges that respondent performed excessive, unnecessary, and unauthorized work. Appellant contends the district court erred by granting summary judgment to respondent, on the ground that appellant had ratified respondent's work and was therefore estopped from claiming breach of contract. We affirm the district court's grant of summary judgment, but on different grounds. *See Winkler v. Magnuson*, 539 N.W.2d 821, 828 (Minn. App. 1995), *review denied* (Minn. Feb. 13, 1996) (stating that a summary judgment will be affirmed if it can be sustained on any ground).

Minnesota law recognizes several legal theories of recovery related to attorney misconduct, including breach of contract. *Noske v. Friedberg*, 713 N.W.2d 866, 875 (Minn. App. 2006), *review denied* (Minn. July 19, 2006).

> In an action against an attorney for negligence or breach of contract, the client has the burden of proving the existence of the relationship of attorney and client; the acts constituting the alleged negligence or breach of contract; that it was the proximate cause of the damage; and that but for such

> negligence or breach of contract the client would have been successful in the prosecution or defense of the action.

Christy v. Saliterman, 288 Minn. 144, 150, 179 N.W.2d 288, 293-94 (1970). "Failure to provide sufficient evidence to meet any element is fatal to the whole claim." *Schmitz v. Rinke, Noonan, Smoley, Deter, Colombo, Wiant, Von Korff & Hobbs, Ltd.*, 783 N.W.2d 733, 739 (Minn. App. 2010) (affirming grant of judgment as a matter of law as to legal-malpractice claim at close of plaintiff's case in chief), *review denied* (Minn. Sept. 21, 2010).

Expert testimony is generally required to prove these elements, except where the issues of the standard of care, the attorney's conduct, and the causation of damage are within the common knowledge of laypersons. *Id.*; *see also Meyer v. Dygert*, 156 F. Supp. 2d 1081, 1091 (D. Minn. 2001) (stating that legal-malpractice claims involving obviously missed deadlines or theft of client funds do not require expert testimony, unlike claims involving information not within the jury's common knowledge, such as conflicts of interest). This exception applies only to the "rare" and "exceptional" case. *Fontaine v. Steen*, 759 N.W.2d 672, 677 (Minn. App. 2009).

Here, appellant alleges that respondent breached the representation agreement because some of respondent's work was excessive, unnecessary, and unauthorized. At his deposition, appellant testified that he believed certain items in the invoices were "duplicative." He explained that, in his opinion, respondent "ke[pt] reviewing the things that [it] should know how to do in the first place and do appropriately in the first place." Appellant's breach-of-contract counterclaim is a challenge to the sufficiency of the

representation provided by respondent in an employment dispute involving German law. Expert testimony on the elements of the counterclaim is therefore required. *See, e.g.*, *Meyer*, 156 F. Supp. 2d at 1091 (stating that claims against an attorney involving information not within the jury's common knowledge require expert testimony).

The record includes the affidavit of appellant's new attorney in the employment dispute. In this affidavit, the attorney sets forth several examples of allegedly deficient representation by respondent and avers that respondent wasted appellant's resources. But the attorney does not address whether appellant's employment action would have been successful but for any breach of contract by respondent. Nor does the attorney mention the amount of damages caused by respondent or explain how respondent's conduct proximately caused these damages. And our review of the record yields no other expert testimony on the elements of appellant's breach-of-contract counterclaim.

Because expert testimony was necessary for appellant to establish a prima facie case of breach of contract, and because there is not sufficient expert testimony on every breach-of-contract element, we conclude that the district court did not err by granting summary judgment to respondent on this counterclaim.

Affirmed.