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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2165**

Ben Lau,
Appellant,

vs.

Midwest Fence and Manufacturing Company,
Respondent.

**Filed February 25, 2013
Affirmed
Halbrooks, Judge**

Hennepin County District Court
File No. 27-CV-10-22737

T. Joseph Crumley, Nicole L. Bettendorf, Bradshaw & Bryant, PLLC, Waite Park,
Minnesota (for appellant)

Robert E. Kuderer, Jenna M. Powers, Johnson & Condon, P.A., Minneapolis, Minnesota
(for respondent)

Considered and decided by Halbrooks, Presiding Judge; Worke, Judge; and
Bjorkman, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

This appeal is before us on remand from the Minnesota Supreme Court following our reversal of the district court's determination that the testimony of appellant's expert witness is inadmissible due to lack of foundational reliability and untimely disclosure.

The supreme court vacated our decision with respect to the issue of foundational reliability and remanded the matter to us for reconsideration in light of *Doe v. Archdiocese of St. Paul*, 817 N.W.2d 150 (Minn. 2012). After such reconsideration, we affirm the district court's foundational-reliability determination and summary-judgment dismissal of appellant's claims.

FACTS

Appellant Ben Lau commenced a product-liability suit against respondent Midwest Fence and Manufacturing Company (Midwest) after he severely injured his thumb on an automatic gate that Midwest installed and manufactured. Lau disclosed Lance Beaulieu, owner of Designer Decks and Fence, Inc., as an expert witness he planned to call at trial. Midwest moved for summary judgment, arguing that Lau's claims lack evidentiary support. In response, Lau filed a letter prepared by Beaulieu in which Beaulieu opined that the gate and fence that injured Lau were defectively designed and installed. After holding a hearing on Midwest's motion, the district court deemed Beaulieu's opinion inadmissible due to its lack of foundational reliability and untimely disclosure. The district court granted summary judgment to Midwest and dismissed Lau's claims with prejudice.

We reversed the district court on appeal. *Lau v. Midwest Fence & Mfg. Co.*, No. A11-2165, 2012 WL 2874036 (Minn. App. July 16, 2012). On the issue of foundational reliability, we concluded that the district court improperly weighed the strength of Beaulieu's proffered opinions and that, given Beaulieu's extensive background in the fencing industry, his opinions were sufficiently reliable. We also

reversed the district court's determination that Beaulieu's report was inadmissible on timeliness grounds, reasoning there was no finding that Midwest was prejudiced as a result of the late disclosure.

The supreme court granted Lau's petition for review, vacated our decision on the issue of foundational reliability, and remanded the matter to us for reconsideration in light of *Doe*, 817 N.W.2d 150. The parties filed supplemental briefs addressing the applicability of *Doe* to this matter.

DECISION

I.

As a threshold matter, we address the relevance of *Doe* with respect to the district court's discretion to admit or exclude expert testimony. Minn. R. Evid. 702 governs the admissibility of all expert testimony and provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. The opinion must have foundational reliability. In addition, if the opinion or evidence involves novel scientific theory, the proponent must establish that the underlying scientific evidence is generally accepted in the relevant scientific community.

Expert testimony satisfies rule 702 only if it meets a four-part test: "(1) the witness is qualified as an expert; (2) the expert's opinion has foundational reliability; (3) the expert testimony is helpful to the jury; and (4) if the testimony involves a novel scientific theory,

it must satisfy the *Frye–Mack* standard.” *State v. Obeta*, 796 N.W.2d 282, 289 (Minn. 2011).

Doe reiterates and clarifies a number of issues with respect to the rule 702 test.¹ First, “[a]ll expert testimony must satisfy the first three parts” of the test to be admissible. *Doe*, 817 N.W.2d at 164. The fourth part applies only when novel or scientific theories are proffered. *Id.* at 164-65. Second, the foundational-reliability aspect of rule 702 “requires a district court to consider [(1)] the purpose for which the expert testimony is being offered, [(2)] the reliability of the underlying theory, and [(3)] the reliability of the evidence in the particular case.” *Id.* at 169. Provided the district court considers these factors, a reviewing court will not reverse its evidentiary determination absent an abuse of discretion. *Id.*

The parties maintain, and we agree, that the admissibility of Beaulieu’s proffered report is subject to rule 702. We therefore must determine whether the district court considered the requisite factors before deeming the report inadmissible for lack of foundational reliability. If such consideration was made, we will affirm the district court absent a finding of abuse of discretion.

As to the foundation of Beaulieu’s report, the district court concluded:

The expert report provided to support Lau’s opposition to summary judgment lacks foundational reliability. Although the report makes clear Beaulieu’s belief that the fence was improperly installed or otherwise defective, he cites no facts [or] data upon which his opinion is based. Instead, Beaulieu’s states in the first paragraph of his report

¹ *Doe* addresses other issues that are irrelevant here, such as the foundation required of novel scientific evidence under the *Frye-Mack* standard.

that his opinion is based upon Midwest’s responses to discovery . . . and its memorandum in support of its motion . . . and attached exhibits. The report does not identify any particular data, industry standards, guidelines, professional manuals, testing, etc. to support his opinion. Although Beaulieu’s report does state that he has been a professional in the fence industry for over 35 years, that statement alone is not sufficient to lay foundation for his expert report.

Factor 1—The purpose of the proffered testimony

In its order, the district court explained that, because “[s]uch matters are outside the general knowledge of the public, and expert testimony would be required to establish whether, in fact, the fence and gate were defective. Without the Beaulieu report, Lau has provided no expert testimony to establish [the] elements of any of his claims.” The district court recognized that Lau offered Beaulieu’s report in an effort to survive Midwest’s motion for summary judgment by arguing that “a fact issue exists” and “that the fence was improperly installed or otherwise defective.” These statements reveal that the district court understood and considered why Lau sought to admit Beaulieu’s report.

Factor 2—The reliability of the subject matter about which the expert is testifying

The district court’s decision also reflects that it considered whether there exists underlying reliability and consistency of the subject matter of Beaulieu’s testimony—the proper design and installation of gates and fences. Specifically, the district court noted its concern about Beaulieu’s failure to cite industry-related standards, data, and professional manuals in support of his opinions. This concern shows that the district court evaluated whether there exists reliable, uniform standards for fence installation upon which Beaulieu could have formed his opinions.

Factor 3—The reliability of the proffered evidence in this particular case

The district court also considered Beaulieu’s extensive, 35-year background in the fencing industry and, more specifically, whether that experience alone is sufficient to establish foundational reliability. This statement coupled with the district court’s concerns about the extent to which Beaulieu’s opinions are consistent with industry standards is relevant to the determination of whether the proffered report alleging a defective fence in this particular case would have been reliable.

In ruling on the admissibility of Beaulieu’s report, the district court conducted the proper analysis. It was within the district court’s discretion to exclude that report on the ground that its foundation was not proven to be reliable. We therefore affirm the district court’s summary-judgment dismissal of Lau’s claims.

Affirmed.