STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0906

Fredrikson & Byron, P. A.,
Respondent,

vs.

Mark Saliterman,
Appellant.

Filed December 24, 2012
Reversed and remanded
Klaphake, Judge[*]

Hennepin County District Court
File No. 27-CV-09-24225

David R. Marshall, Leah C. Janus, Fredrikson & Byron, P.A., Minneapolis, Minnesota (for respondent)

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

Considered and decided by Stoneburner, Presiding Judge; Larkin, Judge; and Klaphake, Judge.

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

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

KLAPHAKE, Judge

In this attorney-fee dispute, appellant Mark Saliterman challenges the district court's order granting summary judgment in favor of respondent-law firm Fredrikson & Byron, P.A. (Fredrikson). Saliterman argues that the district court erred by granting summary judgment because (1) Saliterman is not personally and primarily liable for his corporation's attorney fees based on an engagement letter that he signed and (2) Saliterman is entitled to a trial to challenge the reasonableness of the attorney fees using his expert witnesses. Because we conclude that the engagement letter is ambiguous and the extrinsic evidence is inconclusive, and that the malpractice standard does not apply to the admissibility of Saliterman's expert witnesses, the district court erred by granting summary judgment. We therefore reverse and remand.

D E C I S I O N

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, 76-77 (Minn. 2002). And we view the evidence in the light most favorable to the party against whom judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

Genuine issues of material fact

"[T]he primary goal of contract interpretation is to determine and enforce the intent of the parties." *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 323 (Minn. 2003). We determine the intent of the parties from the plain

language of the instrument. *Dorsey & Whitney LLP v. Grossman*, 749 N.W.2d 409, 418 (Minn. App. 2008). We will not rewrite or modify a contract when the plain meaning is clear and unambiguous. *Id.*

Saliterman, as president and sole shareholder of The Lofts of Stillwater, Inc. (LOS), sought Fredrikson's assistance in an arbitration dispute with its contractor and subcontractors. Saliterman retained Fredrikson in the arbitration dispute, and received the following engagement letter from Fredrikson:

> Dear Mr. Saliterman:
>
> Thank you for selecting Fredrikson & Byron, P.A. to represent you in the litigation matter concerning the Lofts of Stillwater. We appreciate this opportunity to be of service.
>
> Attached is our Agreement for Legal Services-Standard Client Billing Policy ("Agreement") which, along with this letter, establishes our agreement with you. The terms set forth in the attached Agreement apply to our relationship with you except to the extent modified by this letter.
>
> . . .
>
> Please acknowledge your agreement to the terms of our engagement as set forth above, and in the attached Agreement for Legal Services, by signing and returning the enclosed copy of this letter to me.

Saliterman signed and dated this engagement letter without any designation next to his name.

In granting summary judgment to Fredrikson, the district court concluded that the engagement letter was unambiguous, and that Saliterman signed it as a "comaker," making Saliterman personally and primarily liable for LOS's attorney fees. An

individual may be personally liable as a comaker if the language of the contract shows an intent to be personally bound with the principal. *Twin City Co-op Credit Union v. Bartlett*, 266 Minn. 366, 369-71, 123 N.W.2d 675, 677-78 (1963). Saliterman argues that the engagement letter that he signed with Fredrikson is ambiguous. We agree.

A contract is ambiguous if it is "susceptible to more than one reasonable interpretation." *Caldas v. Affordable Granite & Stone, Inc.*, 820 N.W.2d 826, 832 (Minn. 2012). Here, the letter opens by stating, "Thank *you* for selecting Fredrikson & Bryon, P.A. to represent *you* in the litigation matter concerning [LOS]." It is not clear whether "you" refers to Saliterman or LOS. This ambiguity is compounded by the fact that Fredrikson never represented Saliterman personally during the arbitration—Saliterman retained separate counsel to represent his personal interests. And although the letter is addressed to Saliterman and signed by him, this does not clarify any ambiguities: Saliterman was the president and sole shareholder of LOS. Finally, the letter does not directly state Fredrikson's intention to hold both LOS *and* Saliterman personally and primarily liable for the attorney fees.

Because the plain language of the letter is reasonably susceptible to more than one interpretation, we conclude that it is ambiguous. Construction of an ambiguous contract is a question of fact unless the evidence is conclusive. *Empire State Bank v. Devereaux*, 402 N.W.2d 584, 587 (Minn. App. 1987).

Fredrikson argues that the extrinsic evidence conclusively establishes that Saliterman is personally liable for the attorney fees. We disagree. Some evidence shows that the parties intended for Saliterman to be personally liable. For example, a Fredrikson

attorney testified in his deposition that he drafted the engagement letter for Saliterman personally: "I drafted the fee agreement for [Saliterman] individually because in [our] conversations he had agreed to pay us, especially in view of this plan to, in his words, bankrupt [LOS] as one potential strategy for dealing with [the arbitration] claims." In addition, Saliterman testified at his own deposition that LOS lacked net assets, and that if Fredrikson were to be paid, it would have to come from his own personal funds. But some evidence shows that the parties did not intend for Saliterman to be personally liable. Saliterman testified in his affidavit that when he signed the letter, LOS had "sufficient financing available," and that Fredrikson "understood that their fees would be paid out of the project financing." Saliterman additionally testified that when he reviewed the engagement letter, he recognized that there was "no personal obligation" or "personal guarantee" by him to pay for the attorney fees. Moreover, Saliterman testified that he never had any discussions with anyone from Fredrikson in which he promised to pay the fees for LOS personally.

We conclude that the engagement letter's plain language is ambiguous and the extrinsic evidence is inconclusive. Summary judgment is not appropriate when there are genuine issues of material fact. Minn. R. Civ. P. 56.03. Thus, the district court erred by granting summary judgment.

Expert affidavit

A district court's evidentiary ruling on the admissibility of expert opinion is discretionary. *Gross v. Victoria Station Farms, Inc.*, 578 N.W.2d 757, 760 (Minn. 1998).

We will not reverse unless the district court erred in its application of the law or abused its discretion. *Id.*

In actions against attorneys for malpractice or breach of contract,

> the client has the burden of proving [1] the existence of the relationship of attorney and client; [2] the acts constituting the alleged negligence or breach of contract; [3] that it was the proximate cause of the damage; and [4] 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). And specifically in attorney malpractice cases, expert testimony is required to establish the standard of care and whether the conduct deviated from that standard. *Schmitz v. Rinke, Noonan, Smoley, Deter, Colombo, Wiant, Von Korff & Hobbs, Ltd.*, 783 N.W.2d 733, 739 (Minn. App. 2010), *review denied* (Minn. Sept. 21, 2010). Expert testimony is also needed to show causation when it is not within the common knowledge of laymen. *Id.* To qualify as an expert witness in a negligence or malpractice action against a professional, the witness must meet the requirements of Minn. Stat. § 544.42, subd. 3(a)(1) (2012),[1] which requires "a substantial showing of qualification in the particular field of inquiry" and "practical experience in the particular matter at issue." *Noske v. Friedberg*, 713 N.W.2d 866, 871 (Minn. App. 2006) (quotation omitted), *review denied* (Minn. July 19, 2006).

[1] "The affidavit . . . must be drafted by the party's attorney and state that . . . the facts of the case have been reviewed by the party's attorney with an expert whose qualifications provide a reasonable expectation that the expert's opinions could be admissible at trial and that, in the opinion of this expert, the defendant deviated from the applicable standard of care and by that action caused injury to the plaintiff. Minn. Stat. § 544.42, subd. 3(a)(1).

On the other hand, cases not sounding in malpractice need not meet the requirements of section 544.42, subd. 3(a)(1). Expert opinion is admissible if "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue," and "a witness qualified as an expert by knowledge, skill, experience, training 'or education' may testify thereto in the form of an opinion or otherwise." Minn. R. Evid. 702. "The knowledge requirement may be satisfied by either formal education or sufficient occupational experience." *Gross*, 578 N.W.2d at 761.

Here, the district court determined that Saliterman's breach-of-contract claim that Fredrikson charged excessive fees "sound[ed] in malpractice." Accordingly, it analyzed the admissibility of Saliterman's experts under the malpractice standard in section 544.42.[2] Saliterman argues that the district court erred as a matter of law because there is no requirement on a breach-of-contract claim that a plaintiff must comply with the expert-witness requirements of section 544.42. We agree.

The district court initially concluded that Saliterman's experts were inadmissible when it granted Fredrikson summary judgment against LOS. First, it ruled that Jack Marshall's expert affidavit was not submitted within 180 days of service of the complaint as required by section 544.42. Second, it ruled that Frederic Knaak's expert affidavit did not meet the requirements of section 544.42 because it was not supported by sufficient foundation to be admissible at trial. Moreover, the district court concluded that even if Knaak was qualified to testify as to the negligence of Fredrikson, Knaak's affidavit was

[2] Saliterman has withdrawn his claim of professional negligence against Fredrikson. All that remains is his claim for breach of contract.

legally insufficient. After the cases were consolidated, the district court again concluded that all of the claims by LOS and Saliterman sounded in malpractice. It therefore ruled on the admissibility of Saliterman's experts using section 544.42. The district court deferred to the district court's prior ruling that Knaak was not qualified as an expert. In addition, it found that Marshall was unqualified because he did not make a substantial showing of qualification in the particular field of inquiry. The district court further found that even if Marshall was allowed to testify, his opinion does not create a genuine issue of material fact on the issue of whether Fredrikson's fees were excessive.

While it is true that disputes over attorney fees can include negligence claims, questions of fee-padding and unreasonable fees do not necessarily sound in malpractice. Here, Saliterman's complaint alleges that Fredrikson breached its contract with him when it failed to provide legal services at a reasonable fee. This claim does not, unlike Saliterman's withdrawn negligence claim, allege that Fredrikson committed malpractice in the performance of its representation. Thus, the malpractice standard in section 544.42 used by the district courts here is not applicable. Fredrikson argues—by citing numerous unpublished cases—that breach-of-contract claims for excessive or unreasonable attorney fees are malpractice claims. But our unpublished cases are not precedential, and we do not consider them to be persuasive. Minn. Stat. § 480A.08, subd. 3 (2012). Accordingly, the district court erred in its application of the law when it applied section 544.42 to the admissibility of Saliterman's expert witnesses.

The district court erred by granting summary judgment based on its conclusion that the engagement letter unambiguously made Saliterman personally liable for the

attorney fees. And because Saliterman's breach-of-contract claim does not sound in malpractice, the district court erred in applying section 544.42 to Saliterman's expert witnesses. We therefore reverse the district court's summary judgment and remand for further proceedings consistent with this opinion.

Reversed and remanded.