STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0157

Kristen Glaros Hanson, et al.,
Respondents,

Midwest Investment Services, LLC,
Respondent,

vs.

CBS Construction Services, Inc., et al.,
Appellants,

Brandon M. Schwartz, et al.,
Appellants.

Filed January 11, 2021
Affirmed in part and remanded
Ross, Judge

Hennepin County District Court
File No. 27-CV-19-15999

Charles M. Austinson, Timothy D. Johnson, Smith Jadin Johnson, PLLC, Bloomington, Minnesota (for respondents Kristen Hanson, et al.)

Malcolm P. Terry, Rebecca F. Schiller, Bernick Lifson, PA, Minneapolis, Minnesota (for respondent Midwest Investment Services, LLC)

Zachary A. Wiegand, Gold Leaf Estate Planning, LLC, Burnsville, Minnesota (for appellants CBS Construction Services, Inc., et al.)

Brandon M. Schwartz, Michael D. Schwartz, Schwartz Law Firm, Oakdale, Minnesota; (for appellants Brandon M. Schwartz, et al.)

Considered and decided by Ross, Presiding Judge; Florey, Judge; and Bryan, Judge.

NONPRECEDENTIAL OPINION

ROSS, Judge

This case arises from a legal dispute in part between the two owners of a small investment business. The plaintiff owner (Kristen Hanson) has sued the defendant owner (Stuart Bestul) as well as a corporation that he mostly owned and that employed her, raising various legal and equitable theories premised generally on alleged discrimination and self-dealing. In this appeal, we address only whether the district court rightly disqualified Bestul's attorney (Brandon Schwartz) from representing Bestul in this lawsuit because he represented both of the now-disputing owners when they formed the business. Attorney Schwartz argues on appeal that Hanson waived her right to challenge his representation, failed to offer proof that Schwartz represented her, and did not establish that any prior representation was substantially related to the current lawsuit. We hold that the district court did not clearly err in its findings that Hanson did not waive her right to challenge, that Schwartz provided Hanson legal advice before telling her that he did not serve as her attorney, that it was reasonable for Hanson to rely on the advice, and that the scope of Schwartz's previous representation was substantially related to this lawsuit. The district court therefore did not abuse its discretion by disqualifying Schwartz from representing Bestul. But because the district court made no findings supporting its decision that Schwartz also could not represent Bestul's company that employed Hanson, we remand for additional findings.

FACTS

Stuart Bestul, president of CBS Construction Services Inc., hired Kristen Hanson to work for CBS in 2016. Hanson and Bestul then together founded Midwest Investment Services LLC to construct at least one senior-living complex, RSH. Bestul directed attorney Brandon Schwartz to draft the formation documents for Midwest Investment. Schwartz sent Bestul an email in April 2017 attaching the formation documents and a consent form to resolve potential conflicts of interest arising from his representing both Midwest Investment and CBS. Bestul forwarded Schwartz's email to Hanson, referring to Schwartz as "my attorney."

The next month Schwartz, Bestul, and Hanson spoke by telephone about Midwest Investment. According to Schwartz, the conversation was brief and included him telling Hanson that he did not represent her. Hanson maintains that the three instead had a long and detailed conversation in which she divulged confidential information about the future operations of Midwest Investment, corporate opportunities, deal financing, and participants. The next day, Schwartz sent an email to both Bestul and Hanson but addressing only Bestul, providing advice on completing a subscription agreement for Midwest Investment to purchase equity in RSH.

Hanson sent Schwartz an email in July 2017 asking to see all of the documents Schwartz prepared for Midwest Investment. Schwartz responded that he would provide the Midwest Investment operating agreement once he had reviewed the documents with Bestul. Schwartz later emailed Hanson the operating agreement, which included a provision stating that Schwartz represented only Bestul and expressly disclaiming any

attorney-client relationship between Schwartz and Hanson. Hanson did not sign this agreement and contends that her receiving it was the first occasion that Schwartz indicated that he did not represent her.

Before receiving the agreement, in June 2017 Bestul and Hanson discussed Midwest Investment investing in other opportunities, such as senior-living development MSH. When Hanson asked Bestul about that opportunity in October 2017, Bestul said that he would not agree to Midwest Investment investing in it. But Hanson reported that, with Schwartz's help, Bestul formed a different company to invest in MSH without her.

Mediation and Suit

Hanson resigned from CBS in 2018 and initiated a sex-discrimination claim against CBS by filing a complaint with the Minnesota Department of Human Rights. Hanson withdrew that administrative complaint after mediation failed to resolve her claims, and she sued Bestul and CBS in district court. Her civil suit frames some of her claims individually and some derivatively on behalf of Midwest Investment. Her 11-count civil complaint rests on ten theories of liability, some against CBS, some against Bestul, and some against both. She alleges specifically that CBS failed to pay wages and commissions, violated the Minnesota Whistleblower Act, and discriminated against her. She alleges that Bestul breached fiduciary duties, violated the member-managed company-rules statute, and tortiously interfered with contractual and prospective economic relations. And she alleges that both CBS and Bestul breached contracts with her or engaged in inequitable conduct requiring damages for unjust enrichment and promissory estoppel. Schwartz

represented Bestul and CBS during the discrimination charge and continued to represent both in this lawsuit.

Motion to Disqualify Schwartz

Hanson's attorneys wrote to Schwartz four times between March and October 2019 asserting that his representation of CBS and Bestul may create a conflict of interest. Schwartz disagreed. Hanson moved to disqualify Schwartz from representing Bestul and CBS, contending that Schwartz's conduct created an implied attorney-client relationship with Hanson, that Hanson had shared confidential information with Schwartz, that Schwartz provided Hanson with legal advice, and that Schwartz is a necessary witness for the business-related claims. Bestul and CBS responded by moving the district court to sanction Hanson for making a frivolous and untimely motion to disqualify Schwartz.

The district court assessed three different theories of attorney-client-relationship formation: implied contract for services, tort, and third-party beneficiary. The district court found no implied contract. But it found that an attorney-client relationship existed under tort theory because, before Schwartz told Hanson he did not represent her, Bestul had retained Schwartz to assist both him and Hanson in forming Midwest Investment, Schwartz drafted a consent form on Hanson's behalf, and Hanson and Schwartz spoke about Midwest Investment during a May 2017 phone call. The district court found alternatively that an attorney-client relationship existed under third-party-beneficiary theory because Schwartz knew that Hanson, as a 50-percent owner of Midwest Investment, would benefit from the company-formation documents, the operating agreement, and the consent form. The

district court also determined that the factual issues between the formation of Midwest Investment and elements of the civil suit are substantially related. It granted Hanson's motion to disqualify Schwartz from representing Bestul or CBS and denied Bestul and CBS's motion for sanctions.

This appeal follows.

DECISION

Schwartz contests the district court's disqualification determination on three theories. He first contends that Hanson waived her right to seek his disqualification. He next argues that he never represented Hanson, or that, even if he did, his representation of her is not substantially related to the ongoing lawsuit between Hanson, Bestul, and CBS. And he argues that, even if he is disqualified from representing Bestul, he should be allowed to continue representing CBS. For the reasons that follow, we are unconvinced by Schwartz's contentions with respect to Bestul.

I

Schwartz maintains that Hanson waived her right to seek his disqualification because she waited more than 600 days after learning of Schwartz's representation before she moved to disqualify him. We uphold a district court's factual findings regarding waiving the right to seek to disqualify counsel unless they are clearly erroneous. *See State ex rel. Swanson v. 3M Co.*, 845 N.W.2d 808, 819 (Minn. 2014); *Prod. Credit Ass'n of Mankato v. Buckentin*, 410 N.W.2d 820, 822 (Minn. 1987) ("While this court has never specifically enunciated the review standard to be employed by appellate courts in reviewing dispositions of motions seeking attorney disqualification, we assume that

normally the 'clearly erroneous' standard will be applied in reviewing strictly factual findings."). Schwartz, as the party asserting waiver, bears the burden of establishing that waiver occurred. *See Swanson*, 845 N.W.2d at 819. A party may waive the right to disqualify counsel. *Id.* A valid waiver involves both knowledge of the right to be waived and the intent to waive it. *Id.* Waiver might be inferred from the circumstances, including the length of the delay before the party brought the motion, whether counsel represented the movant during the delay period, and the reason the party delayed bringing the motion. *Id*. Because the record includes at least three instances that suggest that Hanson repeatedly protested Schwartz's involvement, we are satisfied that the record supports the district court's finding that Hanson intended to dispute Schwartz's representation of CBS and Bestul rather than to waive the challenge.

The first protest occurred early on in the formal dispute. After Schwartz responded to Hanson's January 2019 discrimination charge with the Minnesota Department of Human Rights, Hanson contested his involvement by letter in March 2019. Hanson then referred to this letter by email in April and June 2019, repeating the challenge. And after Schwartz denied having a conflict of interest, Hanson sent Schwartz a meet-and-confer email in October 2019 about his purported conflict of interest. *See* Minn. R. Gen. Prac. 115.10 (requiring parties to confer to attempt to resolve an issue before bringing a motion). After her protests failed to convince Bestul or CBS to seek different counsel, in October 2019 Hanson moved formally to disqualify Schwartz. We conclude that the record contains a sufficient factual basis for the district court to conclude that Hanson did not intend to waive her right to contest Schwartz's participation.

Schwartz's related arguments are unpersuasive. He suggests that Hanson lost the right to contest his representation because she participated in mediation while Schwartz represented both Bestul and CBS without conditioning her participation on the right to disqualify Schwartz. But Schwartz cites no authority for the suggestion. A party who merely asserts error without citing authority waives the argument unless prejudicial error is apparent. *Schoepke v. Alexander Smith & Sons Carpet Co.*, 187 N.W.2d 133, 135 (Minn. 1971). Prejudicial error is not apparent because we are aware of no law establishing that an employee who participates in an administrative dispute-resolution proceeding with her allegedly discriminating employer abandons the right to raise a conflict-of-interest challenge in litigation proceedings. Schwartz also contends that Hanson did not have to wait until commencing the lawsuit to seek his disqualification because she could have filed a declaratory-judgment action earlier. Schwartz cites no circumstance where that sort of declaratory judgment proceeding has occurred, let alone authority establishing that a party must follow that approach.

II

We next consider Schwartz's contention that he never represented Hanson and that, if he did, he did not represent her for the same or substantially related matter. We review the district court's decision of whether to disqualify counsel for an abuse of discretion, which occurs when the district court bases its decision on a legal misinterpretation or when its decision is contrary to the record. *See Swanson*, 845 N.W.2d at 816. We also review a district court's factual findings underlying the disqualification of an attorney for clear error. *Prod. Credit Ass'n of Mankato*, 410 N.W.2d at 822. An attorney may not represent a party

against a former client "in the same or a substantially related matter." Minn. R. Prof. Conduct 1.9(a). Hanson had the burden of proving that a prior attorney-client relationship existed with Schwartz, that Bestul's interests are materially adverse to Hanson's, and that the present lawsuit is substantially related to a matter for which Schwartz represented Bestul. *See Swanson*, 845 N.W.2d at 816. Before we address whether the record supports the district court's findings, we respond to a preliminary contention.

Schwartz contends that the district court made no findings of fact at all on these issues or any other issue. The argument is not compelling. The district court directly asked both parties whether an evidentiary hearing was necessary to resolve the factual differences between the parties' contrasting affidavits on the matter of disqualification. Both parties maintained that no hearing was necessary. Having rejected the express offer for an evidentiary hearing, the parties essentially invited the district court to weigh the evidence and resolve credibility disputes on the basis of the competing affidavits and arguments alone. It is true that the district court's memorandum captions its factual section under the heading "background" rather than "factual findings," but this does not hinder our review or support Schwartz's contention. In that section, the district court recognized that the parties had submitted contrasting affidavits, and it analyzed email exchanges between Schwartz, Bestul, and Hanson and examined corporation documents that Schwartz prepared. Based on its review of the submitted documents and the parties' arguments, it concluded that Schwartz never informed Hanson that he did not represent her before sending her the July 2017 operating agreement. Despite the label, the "background" section and the corresponding statements framed as conclusions represent findings of fact. It is

now axiomatic that "a fact found by the [district] court . . . will be treated upon appeal as a finding of fact" even if the fact is expressed under some other heading. *Graphic Arts Educ. Found., Inc. v. State*, 59 N.W.2d 841, 844 (Minn. 1953). And the finding implies a credibility determination that Hanson, not Schwartz, accurately recounted the contents of the May 2017 phone call. We defer to this credibility determination, *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988), and the determination can be implicit. *See Pechovnik v. Pechovnik*, 765 N.W.2d 94, 99 (Minn. App. 2009). Having invited the district court to render its decision without an evidentiary hearing and having failed to persuade us that the district court made no factual findings, we reject Schwartz's procedural contention.

We have no difficulty concluding that the district court did not clearly err in the key findings about the prior relationship. Although the record contains contrary affidavit testimony that might also support contrary findings, it supports the several findings essential to the district court's decision. The affidavit testimony supports the findings that Schwartz provided Hanson legal advice before informing her that he did not serve as her attorney and that it was reasonable for Hanson to rely on this advice. And it supports the determination that the scope of Schwartz's previous representation of Hanson substantially related to the lawsuit.

Attorney-Client Relationship under Tort Theory

One basis for the district court's decision was that Schwartz had a client relationship with Hanson under a tort theory. An attorney-client relationship arises under any of three theories: contract, tort, or third-party beneficiary. *See Admiral Merchs. Motor Freight, Inc. v. O'Connor & Hannan*, 494 N.W.2d 261, 265–66 (Minn. 1992). An attorney-client

relationship arises under tort theory if a person seeks and receives legal advice "which a reasonable person would rely on." *Pine Island Farmers Coop v. Erstad & Riemer, P.A.*, 649 N.W.2d 444, 448 (Minn. 2002). "[W]hether an attorney's advice could be relied upon to establish an attorney-client relationship is a question of fact." *In re Disciplinary Action against Severson*, 860 N.W.2d 658, 666 (Minn. 2015). For the reasons we have already discussed, the record supports the district court's finding here.

The record supports the conclusion that Hanson sought legal advice from Schwartz. Hanson and Schwartz discussed Midwest Investment during the May 2017 telephone call, and Hanson asked Schwartz in July 2017 to send her all of the documents Schwartz had prepared "regarding the joint business partnership" of Midwest Investment. The record also supports the district court's finding that Schwartz provided Hanson with legal advice before the July 2017 operating-agreement disclaimer, notwithstanding Schwartz's contrary factual contention. Schwartz included Hanson on three emails in which he provided legal advice about the formation and organization of Midwest Investment without telling Hanson that he did not represent her. Schwartz also spoke with Hanson during the May 2017 phone call regarding "details pertaining to [Midwest Investment]" without disclaiming his legal representation or expressly limiting it to Bestul.

The record also supports the finding that, because Schwartz did not disclaim his legal representation of Hanson until July 2017, it was reasonable for Hanson to rely on legal advice from Schwartz. She owned half of Midwest Investment and Schwartz was tasked with creating the legal documentation to formalize it. Again, given our deferential

review of factual findings and the competing testimony here, we have no difficulty affirming the finding that Hanson reasonably relied on legal advice that Schwartz provided.

We are not persuaded otherwise by Schwartz's reliance on *TJD Dissolution Corp. v. Savoie Supply Co., Inc.*, 460 N.W.2d 59, 62 (Minn. 1990). In *TJD*, the supreme court determined that tort-theory attorney-client relationships do not derive from circumstances "where the lawyer represented a client known by the plaintiff to have interests adverse to the plaintiff, where the lawyer's allegiance to the adverse party was clearly evident, [and] where the lawyer advised the plaintiff to retain his own counsel." *Id*. at 62. This case does not fit the *TJD* rule. Hanson and Bestul were equal owners of Midwest Investment, giving Hanson the reasonable belief that Schwartz's legal efforts to create and organize the company served her and Bestul equally. Schwartz contends that Bestul's email references to "my attorney" disabused Hanson of the notion that Schwartz might owe any allegiance to her. But this is a factual matter and, as the district court observed, Hanson's knowledge of Bestul and Schwartz's prior relationship at most creates some ambiguity about Schwartz's representation. That Schwartz was Bestul's attorney did not foreclose the idea that he was also serving as Hanson's attorney in a matter in which Bestul and Hanson had shared interests. And the email and phone communications occurred before Schwartz informed Hanson that he did not represent her. *TJD* does not undermine the district court's findings.

Schwartz presents a related argument, but it too misses the mark. He contends that Hanson has not shown that she actually relied on any of his advice and therefore does not meet the *Pine Island* reasonable-reliance standard. But the test is framed as an objective

one; to establish representation under tort theory, the putative client must identify advice that a reasonable person *would* rely on, not advice that the putative client *did* rely on. *Pine Island*, 649 N.W.2d at 448. Because the record supports the district court's findings that Hanson sought and received legal advice and its legal conclusion that a reasonable person would have relied on the advice, we hold that tort theory supports the conclusion that an attorney-client relationship existed between Schwartz and Hanson.

Substantial Relationship to Present Suit

Schwartz contends that the documents he drafted to form Midwest Investment, the consent agreement, and the subscription agreement for Midwest Investment to invest in RSH, are not substantially related to the current litigation. He bases the argument on the idea that Hanson's claims do not raise an issue about Midwest Investment's formation or its investment in RSH. We review for an abuse of discretion the district court's conclusions about whether the circumstances relate to a potential overlap in representation. *See Swanson*, 845 N.W.2d at 816. And we will conclude that matters are substantially related "if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." Minn. R. Prof. Conduct 1.9, cmt. 3. The record supports the district court's determination that Schwartz's involvement with forming and organizing Midwest Investment is substantially related to Hanson's current lawsuit.

The district court found that Schwartz drafted Midwest Investment's formation documents and operating agreement, both of which reflected the scope and purpose of the

company. Hanson's lawsuit alleges, among other things, that Bestul's conduct after formation undermined that purpose and usurped Hanson's business opportunity. The district court also found that Schwartz was privy to Midwest Investment's other development opportunities and aided Bestul in forming a different company that potentially competed with Midwest Investment concerning those opportunities. Midwest Investment's operating agreement identifies Midwest Investment's purpose as "investment in real estate and construction projects," and Hanson's current suit asserts that Hanson, Bestul, and Schwartz discussed the potential for Midwest Investment "to invest in RSH and other senior living facilities and projects." The interaction between client and counsel to form Midwest Investment and any interaction between Bestul and Schwartz to form the company allegedly to compete against Hanson's interests are substantially related to each other. For our purposes, nothing in the record so undermines the reasonable conclusion that they are substantially related so as to justify reversing the district court's conclusion.

We do not suggest in affirming the district court that we believe Schwartz acted unethically. Nor do we believe that the facts supporting the finding of an attorney-client relationship between Hanson and Schwartz are any more than barely sufficient to support the district court's finding. But caselaw directs us to tilt toward protecting a party against even apparent conflicts of interest. *Nat'l Texture Corp. v. Hymes*, 282 N.W.2d 890, 895 (Minn. 1979). We do so based on the findings here.

III

Schwartz distinguishes between his representation of Bestul and that of CBS and argues that the district court failed to say why he should be disqualified from representing

CBS. Because the district court made no factual findings and offered no analysis of why Schwartz cannot represent CBS, we will not speculate about the rationale. We do not suggest that the conclusion is in error, but we remand to allow the district court to issue relevant findings and provide its reasoning. We do so disagreeing with Hanson's contention that Schwartz waived this issue by failing to raise it in the district court, because the record reveals that Schwartz did contest the disqualification motion as to his representation of CBS and Bestul in his opposing memorandum.

IV

We need not address Schwartz's concern that the district court failed to justify its legal conclusion that, because Schwartz drafted the incorporation documents and is listed as the registered agent, he represents Midwest Investment. We do observe that an attorney other than Schwartz has filed an appearance on behalf of Midwest Investment in this litigation. But because the appropriateness of Schwartz's representation of Midwest Investment appears to be irrelevant to the issues raised on appeal, we do not address it.

Affirmed in part and remanded.