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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0974**

Krenske Construction, Inc.,
Respondent,

vs.

Donald Draper,
Appellant,

Angela Draper,
Appellant,

AgStar Financial Services, FLCA,
Defendant.

**Filed April 23, 2018
Affirmed
Peterson, Judge**

Rice County District Court
File No. 66-CV-15-1485

Gary L. Voegele, Gary L. Voegele, P.A., Faribault, Minnesota (for respondent)

Donald Draper, Nerstrand, Minnesota (pro se appellant)

Angela Draper, Nerstrand, Minnesota (pro se appellant)

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

UNPUBLISHED OPINION

PETERSON, Judge

This pro se appeal arises from respondent contractor's action to foreclose a mechanic's lien and appellant homeowners' counterclaim for breach of contract. Appellants challenge the district court's enforcement of a settlement agreement and award of attorney fees to respondent, arguing that: (1) the district court (a) abused its discretion in excluding redacted attorney-client communications between appellants and their attorney and (b) erred in ruling that their attorney was authorized to settle the lawsuit for them; (2) venue was not proper; and (3) the underlying mechanic's lien was invalid. We affirm.

FACTS

Respondent Krenske Construction, Inc., brought this action to enforce a mechanic's lien in Rice County District Court for work performed on a new house constructed on property owned by appellants Donald and Angela Draper.¹ The Drapers asserted a counterclaim for breach of contract against Krenske.

Following a September 16, 2016 pretrial conference, the parties' attorneys conducted settlement negotiations. On September 20, 2016, the Drapers' attorney, Jennifer Thompson,² sent Angela Draper an email stating that the case had been settled for \$18,000.

¹ Krenske also named the Drapers' construction lender, AgStar Financial Services, FLCA, as a defendant because it had a construction loan and mortgage lien against the property. AgStar and Krenske stipulated that AgStar's mortgage is prior and superior to Krenske's mechanic's lien.

² In June 2016, the Drapers' previous attorney withdrew, and the Drapers retained Thompson.

A draft of the settlement agreement prepared by Thompson was attached to the email. The email stated that Thompson intended to send the agreement to Krenske's attorney, Gary Voegele, for review the next morning unless the Drapers objected. Also on September 20, Voegele notified the district court that the parties had settled the case. On September 21, Thompson sent Voegele a copy of the settlement-agreement draft.

During the next week, the attorneys for both parties finalized the language for release, confidentiality, and nondisparagement provisions in the settlement agreement. During the next month, the Drapers delayed the settlement process. On October 25, Voegele sent Thompson a notice of motion and motion to enforce the settlement and seeking rule 11 sanctions. On November 28, Thompson withdrew as the Drapers' attorney. On December 23, Krenske filed its motion in district court. In opposing the motion, the Drapers submitted email exchanges between Angela Draper and Thompson, some of which were redacted. The district court excluded this evidence under Minn. R. Evid. 106.

Following a hearing, the district court determined that "[t]he drafting edits proposed by Krenske, through its attorney Gary Voegele, never materially modified, expanded, or narrowed the essential terms of the Settlement Agreement and Release, as reflected in the initial draft prepared by Thompson on September 20, 2016." The district court ruled that the parties' "attorneys had the prerequisite legal authority from their respective clients to address fully all of the claims in the action encompassed and arising by the Drapers and Krenske against each other." The district court ordered the parties to sign and deliver to each other copies of the settlement agreement attached to the order. The attached agreement contained the recital and release language from the original draft prepared by

Thompson and did not contain a confidentiality or nondisparagement provision. The district court ordered the Drapers to pay Krenske \$18,000 under the settlement and awarded Krenske \$8,500 in attorney fees “for the delays and unnecessary litigation expenses incurred by [Krenske] to compel the settlement reached and agreed to by counsel for the parties on September 20, 2016.”

This appeal followed.

DECISION

I.

The Drapers argue that the district court erred in excluding from evidence redacted communications between them and Thompson. “Evidentiary rulings are within the district court’s sound discretion and will not be reversed absent an abuse of discretion.” *Blatz v. Allina Health Sys.*, 622 N.W.2d 376, 388 (Minn. App. 2001), *review denied* (Minn. May 16, 2001). “Reversible evidentiary error must be both an abuse of discretion and prejudicial.” *Id.*

“When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.” Minn. R. Evid. 106. The district court explained its ruling to exclude the emails under Rule 106 as follows:

The Drapers have submitted partially redacted communications between them and Attorney Jennifer Thompson to attempt to support their contention that she negotiated without authority to make a deal. The Court will not consider these incomplete communications as evidence.

The Drapers cannot use an incomplete waiver of their attorney-client privilege to create a biased impression of their communications with their attorney. Fairness requires that the communications be submitted in their unredacted entirety, or not at all. Minn. R. Evid. 106. Because the complete, unredacted communications have not been presented to the Court, the Court will not consider the partially redacted copies submitted by the Drapers.

The district court's reasoning also applies to the Drapers' claim that the communications were relevant to the finality of the settlement. The district court did not abuse its discretion in excluding the redacted communications under Minn. R. Evid. 106.

II.

A settlement agreement "is contractual in nature." *Voicestream Minneapolis, Inc. v. RPC Props., Inc.*, 743 N.W.2d 267, 271 (Minn. 2008). Generally, a settlement agreement is enforceable "by motion in the original lawsuit." *Id.* at 272. The district court has "the inherent power to summarily enforce a settlement agreement as a matter of law when the terms of the agreement are clear and unambiguous." *Id.* (quotation omitted). A district court order enforcing a settlement agreement without an evidentiary hearing is similar to an order granting summary judgment. *See id.* at 272-73 (explaining procedures for enforcing a settlement agreement).

Summary judgment is appropriate when the record shows "that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. We review the district court's grant of summary judgment *de novo*, to determine whether there are genuine issues of material fact and whether the district court erred in applying the law. *Mattson Ridge, LLC v. Clear Rock Title, LLP*, 824

N.W.2d 622, 627 (Minn. 2012). “We view the evidence in the light most favorable to the party against whom summary judgment was granted.” *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). But inadmissible evidence must be disregarded on a summary-judgment motion. *Murphy v. Country House, Inc.*, 307 Minn. 344, 349, 240 N.W.2d 507, 511 (1976); *Blackwell v. Eckman*, 410 N.W.2d 390, 391 (Minn. App. 1987).

“The authority of an attorney to settle lawsuits for his or her client is set forth in Minn. Stat. § 481.08.” *Schumann v. Northtown Ins. Agency, Inc.*, 452 N.W.2d 482, 483 (Minn. App. 1990). Under that statute, “[a]n attorney may bind a client, at any stage of an action or proceeding, by agreement . . . made in writing and signed by such attorney.” Minn. Stat. § 481.08 (2016). To do so, the attorney must have the client’s express authority to enter into a settlement. *Schumann*, 452 N.W.2d at 483-84. But a written expression of authority is not required; a client’s grant of authority to settle can be expressed through conduct. *Rosenberg v. Townsend, Rosenberg & Young, Inc.*, 376 N.W.2d 434, 437 (Minn. App. 1985). Whether an attorney has authority to settle a case is generally a fact question. *Skalbeck v. Agristor Leasing*, 384 N.W.2d 209, 212 (Minn. App. 1986).

The district court ruled that the parties’ attorneys were authorized by “their respective clients to address fully all of the claims in the action encompassed and arising by the Drapers and Krenske against each other,” and the Drapers do not challenge this ruling on appeal. Also, the following evidence, which was not disputed by admissible evidence, establishes Thompson’s authority as a matter of law: (1) emails between Thompson and Voegele confirming the settlement and dividing the labor of drafting the

settlement agreement and other documents; (2) the initial draft of the settlement agreement was prepared by the Drapers' attorney; (3) emails between Thompson and Voegelé discussing release and confidentiality/nondisparagement terms; (4) the email from Thompson to Voegelé stating that the Drapers had questions about the revisions; and (5) the Drapers delayed two months before repudiating the settlement. *See Schumann*, 452 N.W.2d at 484 (concluding that attorney had authority to settle case for client when (1) the client's attorney sent the opposing party a letter accepting the settlement offer; (2) a copy of the letter was sent to the client; and (3) the letter indicated that the client's attorney had contacted the client and the client had authorized the settlement); *Rosenberg*, 376 N.W.2d at 437 (concluding that attorney had authority to settle case for client when record included (1) a letter from the opposing party confirming a settlement agreement reached during a telephone conversation; (2) the opposing party's oral representation to the court that the client's attorney had authority to settle; (3) a previous settlement agreement in the same amount; and (4) no immediate action by the client to repudiate the settlement).

“[A] written agreement is not a prerequisite to the enforcement of a settlement.” *Schumann*, 452 N.W.2d at 483. For a valid settlement agreement, “there must be a definite offer and acceptance with a meeting of the minds on the essential terms of the agreement.” *TNT Props., Ltd. v. Tri-Star Developers LLC*, 677 N.W.2d 94, 100-01 (Minn. App. 2004). But “[a] binding contract can exist despite the parties' failure to agree on a term if the term is not essential or can be supplied.” *Id.* at 101. An agreement may be affirmed “despite some incompleteness and imperfection of expression,” if the parties' intent can be discerned. *Id.* (quotation omitted).

The release in the original draft stated: “Krenske and the Drapers hereby unconditionally mutually release and forever discharge each other, and their respective insurers, successors, parents, affiliates, assigns, agents, employees, dealers and distributors and the officers, directors and assigns of each from any and all claims that were made or could have been made in the Action” The revision included compulsory counterclaims under Minn. R. Civ. P. 13.01. Including compulsory counterclaims would not broaden or limit the original release. *See* Minn. R. Civ. P. 13.01 (requiring that a pleading “state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction that is the subject matter of the opposing party’s claim and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction”).

Regarding the confidentiality provision, the district court concluded:

The initial draft prepared by Jennifer Thompson of the terms of the settlement also contained a confidentiality provision inserted into the draft, which was not either germane or material to the essential and complete terms of the settlement agreement reached by legal counsel for the Drapers and counsel for Krenske. In fact, counsel for Drapers described the pending action in one of her emails to Voegelé as a “payment dispute.” The fact is that this term was not discussed or agreed upon by counsel between them for inclusion in the draft of the Settlement Agreement prepared by Jennifer Thompson and submitted to counsel for Krenske on September 21, 2016. This fact was pointed out to Thompson by Voegelé promptly in his e-mail to her on September 21, 2016. There has not been any evidence submitted by either Krenske or the Drapers that this “confidentiality provision” was or is essential or material to the settlement agreement reached between them.

The district court also stated:

The drafts of the Settlement Agreement and Release attempted and sought to document and merely to clarify and encompass, and not negate or narrow, the actual and essential terms of the agreement that had been previously reached. At no time was there, or has there been, any effort on the part of either party to rescind or revoke the essential terms of the settlement reached on September 20, 2016, by counsel for the parties and their efforts to craft the language of its provisions, including the general mutual release for it, which seems to be the primary point of contention.

The district court did not err in concluding that (1) Thompson was authorized to settle the case for the Drapers; (2) the Drapers had the opportunity to review the initial draft of the settlement agreement prepared by Thompson before it was sent to Voegele; (3) there was no attempt by either the Drapers or Krenske to “rescind or revoke the essential terms of the settlement reached on September 20, 2016”; (4) the settlement agreement was a “full and final settlement of all claims” that were or could have been raised in this lawsuit; and (5) the edits proposed by Krenske did not alter the essential terms of the initial draft prepared by Thompson.

III.

Venue

The Drapers argue that venue was improper because their property is located in Rice County but the hearings occurred in Steele County. The remedy for improper venue is a change of venue, and failure to request a change waives that objection. *Rosnow v. Comm’r of Pub. Safety*, 444 N.W.2d 591, 592 (Minn. App. 1989), *review denied* (Minn. Oct. 13,

1989). The Drapers raised the objection to venue for the first time on appeal. Therefore, their objection is waived by acquiescence.

Validity of lien

The Drapers argue that the district court erred by determining that the mechanic's lien was valid and converting it into a "judgment for two separate monetary awards against [them]." This argument mischaracterizes what occurred. Because the parties reached a settlement, the validity of the lien was not an issue before the district court. The judgment was the settlement amount plus \$8,500 in attorney fees.

The Drapers' assertion that the district court erred in denying their request "to allow evidence regarding the estimate/meaning of the contract following two separate motions" also relates to the validity of the lien.

Other issues

The Drapers make other assertions in their brief that are not supported by any argument or authority. An assignment of error that is based on mere assertion and unsupported by argument or legal authority is waived unless prejudicial error is obvious. *See State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997). Because no prejudicial error is obvious on mere inspection, any other assignments of error are waived.

Affirmed.