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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A18-0027**

Larson Ventures, Inc.,  
Appellant,

vs.

Jason P. Hoffman,  
Respondent.

**Filed July 16, 2018  
Affirmed  
Johnson, Judge**

Goodhue County District Court  
File No. 25-CV-15-2480

Timothy J. Nolan, Timothy J. Nolan, PLLC, St. Louis Park, Minnesota; and

James T. Hanvik, Bassford Hanvik, PLLC, St. Louis Park, Minnesota (for appellant)

William S. Partridge, Joseph A. Gangi, Farrish Johnson Law Office, Chtd., Mankato,  
Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Johnson, Judge; and Klaphake,  
Judge.\*

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

## UNPUBLISHED OPINION

**JOHNSON**, Judge

The plaintiff in this case sued the defendant for legal malpractice. The defendant moved to dismiss the complaint on the ground that the plaintiff failed to serve an expert-disclosure affidavit before the statutory deadline. The plaintiff then moved to enlarge the statutory period for serving the expert-disclosure affidavit. The district court denied the plaintiff's motion to enlarge and granted the defendant's motion to dismiss. We conclude that the district court did not abuse its discretion by denying the plaintiff's motion to enlarge and, accordingly, did not err by granting the defendant's motion to dismiss. Therefore, we affirm.

### FACTS

This case is before the court of appeals for a second time. In the first appeal, the plaintiff, Larson Ventures, Inc. (LVI), appealed from the district court's denial of its motion to enlarge the statutory period for serving an expert-disclosure affidavit and the district court's grant of the motion to dismiss filed by the defendant, Jason P. Hoffman. We reversed and remanded for reconsideration of LVI's motion, including additional findings on each of the requirements relevant to a motion to enlarge. We need not repeat here the procedural history of the case, which is fully described in our prior opinion. *See Larson Ventures, Inc. v. Hoffman*, No. A16-1690, 2017 WL 1833318 (Minn. App. May 8, 2017).

On remand, the district court requested supplemental briefing. The district court then issued a written order that includes additional findings on all four requirements and that reflects a reconsideration of LVI's motion to enlarge. The district court again denied

LVI's motion to enlarge the statutory period for serving an expert-disclosure affidavit and again granted Hoffman's motion to dismiss. LVI has filed a notice of appeal, and Hoffman has filed a notice of related appeal.

## DECISION

LVI argues that the district court erred by denying its motion to enlarge the deadline for serving an expert-disclosure affidavit and by granting Hoffman's motion to dismiss.

To establish a *prima facie* case of legal malpractice, a plaintiff must allege and prove

(1) the existence of an attorney-client relationship; (2) acts constituting negligence or breach of contract; (3) that such acts were the proximate cause of the plaintiff's damages; [and] (4) that but for defendant's conduct the plaintiff would have been successful in the prosecution or defense of the action.

*Guzick v. Kimball*, 869 N.W.2d 42, 47 (Minn. 2015) (alteration in original) (quoting *Blue Water Corp., Inc. v. O'Toole*, 336 N.W.2d 279, 281 (Minn. 1983)). If the plaintiff needs expert testimony to satisfy any element of a legal-malpractice claim, the plaintiff must serve an expert-disclosure affidavit on the defendant "within 180 days of the commencement of discovery." *Id.* (citing Minn. Stat. § 544.42, subd. 2(2) (2014)). "If a plaintiff fails to serve an expert disclosure affidavit . . . within 180 days, the defendant may move for mandatory dismissal 'of each action with prejudice as to which expert testimony is necessary to establish a prima facie case.'" *Id.* (quoting Minn. Stat. § 544.42, subd. 6(c)).

A district court has authority under rule 6.02 of the rules of civil procedure to enlarge the 180-day period of section 544.42, subdivision 4. *Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458, 470-71 (Minn. App. 2006), *review denied* (Minn. Aug. 23, 2006); *see also Anderson v. Rengachary*, 608 N.W.2d 843, 849-50 (Minn.

2000) (considering motion under rule 6.02 to enlarge time for filing expert-identification affidavit pursuant to section 145.682, subdivision 4). The rule provides as follows:

When by statute, by these rules, by a notice given thereunder, or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion, (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

Minn. R. Civ. P. 6.02. If a party moves to enlarge a deadline under rule 6.02, a district court must apply a four-part test to determine whether the moving party has shown excusable neglect. *Lake Superior Ctr. Auth.*, 715 N.W.2d at 471; *see also Anderson*, 608 N.W.2d at 849-50.

Excusable neglect exists where the plaintiff (1) has a reasonable suit on the merits, (2) has a reasonable excuse for failure to comply with the time limit . . . , (3) acted with due diligence after receiving notice of the time limit, and (4) no substantial prejudice results to the defendant.

*Anderson*, 608 N.W.2d at 850.

In our prior opinion in this case, we applied rule 6.02 by looking to supreme court caselaw applying rule 60.02(a), which authorizes relief from a final judgment or order for, among other things, excusable neglect. *Larson Ventures, Inc.*, 2017 WL 1833318, at \*4 (citing and discussing *Gams v. Houghton*, 884 N.W.2d 611 (Minn. 2016), and *Cole v. Wutzke*, 884 N.W.2d 634 (Minn. 2016)). The supreme court's four-part test for rule 60.02(a) is "nearly identical" to the four-part test for rule 6.02. *Id.*; *compare Gams*, 884 N.W.2d at 619-20; *Cole*, 884 N.W.2d at 637, *with Anderson*, 608 N.W.2d at 850; *Lake*

*Superior Ctr. Auth.*, 715 N.W.2d at 471. In our prior opinion, we noted that, under the supreme court’s recent caselaw applying rule 60.02(a), “a district court must consider and make findings on all four factors to allow effective appellate review.” *Larson Ventures, Inc.*, 2017 WL 1833318, at \*4 (citing *Gams*, 884 N.W.2d at 619-21; *Cole*, 884 N.W.2d at 639). We also noted, “A district court’s failure to analyze all four factors is an abuse of discretion, requiring reversal and remand.” *Id.* (citing *Gams*, 884 N.W.2d at 621; *Cole*, 884 N.W.2d at 639). The underlying rationale for these principles is that “[t]he decision whether relief is warranted under Rule 60.02 is committed to the sound discretion of the district court and is based upon all the surrounding circumstances of each case.” *Cole*, 884 N.W.2d at 637.

The supreme court also stated that the party moving for relief under rule 60.02(a) “must establish all four requirements for relief to be warranted.” *Id.* “If the district court, in its sound discretion, determines that the movant has satisfied these four requirements, relief should be granted.” *Id.* (citing *Finden v. Klaas*, 268 Minn. 268, 271, 128 N.W.2d 748, 750 (1964)). The *Gams* and *Cole* opinions imply that, if a moving party has *not* satisfied all four requirements, the moving party is *not* entitled to relief under rule 60.02(a), so long as the district court has analyzed all four requirements and considered all relevant circumstances before reaching a conclusion as to whether the moving party has established excusable neglect. *See, e.g., Cornell v. Ripka*, 897 N.W.2d 801, 807 (Minn. App. 2017).

On remand in this case, the district court issued an order that includes an analysis of each of the four requirements. The district court found that LVI satisfied the first requirement because LVI’s expert-disclosure affidavits, including a supplemental expert

report, identify “the expert witness, relate the substance of the facts and opinions to which the expert is expected to testify, and provide a summary of the grounds for each opinion,” including sufficient opinions on the applicable standard of care and on causation. The district court found that LVI did *not* satisfy the second requirement because “there were no unusual or unique circumstances here preventing [LVI’s attorney] from timely submitting his affidavit of expert identification” and “no reasonable excuse was ever offered.” The district court found that LVI satisfied the third requirement because “as soon as [LVI’s] attorney learned of his failure to serve the affidavit of expert identification, . . . he served a formal affidavit of expert identification along with the expert report [that had been] previously served” within the statutory deadline. The district court found that LVI satisfied the fourth requirement because “there is no readily identifiable prejudice to” Hoffman. The district court concluded that LVI’s motion should be denied because LVI “failed to establish one of the four . . . factors,” namely, the second factor, whether LVI has a reasonable excuse for its failure to timely serve the expert-disclosure affidavit. As a consequence of its denial of LVI’s motion to enlarge, the district court granted Hoffman’s motion to dismiss.

LVI argues that the district court erred for three reasons. First, LVI contends that this court’s prior opinion required the district court to make a different finding with respect to the second requirement. To the contrary, this court’s prior opinion did not conclude that the district court erred in its prior order by finding that LVI had not satisfied the second requirement. Rather, this court reversed and remanded because the district court had

considered only the second requirement, not all four requirements. *See Larson Ventures, Inc.*, 2017 WL 1833318, at \*4.

Second, LVI contends that the district court erred by finding that LVI did not satisfy the second requirement. LVI contends that it provided an explanation for its failure to timely serve the expert-disclosure affidavit and that the district court's finding on the second factor is inconsistent with prior opinions of the supreme court and this court. LVI's contention does not fully appreciate the supreme court's recent opinion in *Gams*, in which the court stated, "The decision whether to grant Rule 60.02 relief is based on all the surrounding facts of each specific case, and is committed to the sound discretion of the district court." 884 N.W.2d at 620. LVI's contention also is inconsistent with the supreme court's recent opinion in *Cole*, in which the court elaborated on the second factor as follows:

We have cautioned . . . that not "all mistakes, whether of fact or of law, and whether committed by a party to an action or by his attorney, are . . . subject to relief." *Baxter [v. Chute]*, 50 Minn. [164,] 167, 52 N.W. [379,] 380 [(1892)]. Indeed, the right to vacatur is "not absolute"; rather, it is a matter "largely within the discretion of the trial court." *E.g., Kosloski v. Jones*, 295 Minn. 177, 180, 203 N.W.2d 401, 403 (1973). As such, it is generally for the district court to determine whether the excuse offered by the movant is true and reasonable under the circumstances. *Standard Oil Co. v. King*, 238 Minn. 81, 83, 55 N.W.2d 710, 712 (1952); *see also In re J.R., Jr.*, 655 N.W.2d 1, 4 n.3 (Minn. 2003) (explaining that the district court is in the best position to "evaluate the reasonableness of the excuse, the prejudice to the other party, and whether the party has a reasonable" claim or defense). Accordingly, there are no per se rules of law requiring either the grant or denial of a Rule 60.02(a) motion under the "reasonable excuse" requirement. Instead, the decision is fact intensive. *See Gams*, 884 N.W.2d at 620.

884 N.W.2d at 638-39. In short, the resolution of the second requirement depends on the particular circumstances of the case, and a district court has broad discretion in its determination whether the requirement has been satisfied. In this case, the district court considered the circumstances and exercised its discretion by concluding that LVI had not established a reasonable excuse for its failure to timely serve the expert-disclosure affidavit.

Third, LVI contends that the district court erred by not considering and implementing the general policy that relief should be granted if judgment was entered because of an attorney's mistake while the client was not at fault. The supreme court's caselaw "generally 'reflects a strong policy favoring the granting of relief when judgment is entered through no fault of the client.'" *Id.* at 638 (quoting *Nguyen v. State Farm Mut. Auto. Ins. Co.*, 558 N.W.2d 487, 491 (Minn. 1997)); see also *Charson v. Temple Israel*, 419 N.W.2d 488, 491 (Minn. 1988). We alluded to this general policy in our prior opinion in this case. *Larson Ventures, Inc.*, 2017 WL 1833318, at \*4 (citing *Cole*, 884 N.W.2d at 638). But the general policy is simply that: a general policy. A district court must consider the general policy in the course of its discretionary decisionmaking, but it is not a fixed rule of law that necessarily determines the resolution of the second requirement in every case. This is evident from the *Cole* opinion, in which the supreme court referred to the general policy reflected in *Nguyen* and *Charson* but immediately thereafter (as quoted above) reiterated that the resolution of the second requirement depends on the particular circumstances of the case and that a district court has broad discretion in determining

whether the second requirement has been satisfied. *See Cole*, 884 N.W.2d at 638-39. The supreme court also made clear in *Cole* that a district court should not rely on *per se* rules in such a determination. *Id.* at 639. In this case, the district court appropriately recognized that the general policy reflected in *Nguyen* and *Charson* “is not a trump card or a *per se* rule” but, rather, “must be analyzed in context.”

In sum, the district court properly followed this court’s remand instructions by considering all four requirements of relief under rule 6.02. The district court did not abuse its discretion in its resolution of any of the four requirements or in its ultimate determination that LVI did not establish excusable neglect. Because LVI has not challenged the district court’s dismissal of the complaint on any other ground, we conclude that the district court did not err by granting Hoffman’s motion to dismiss. In light of these conclusions, we need not consider or resolve Hoffman’s alternative argument for affirmance, which is the purpose of his notice of related appeal.

**Affirmed.**