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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0226**

Dennis Lougee, et al.,
Appellants,

vs.

Craig Eugene Pehrson,
Respondent.

**Filed February 4, 2019
Affirmed
Smith, Tracy M., Judge**

Itasca County District Court
File No. 31-CV-14-1034

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Considered and decided by Johnson, Presiding Judge; Ross, Judge; and Smith,
Tracy M., Judge.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

Appellants Dennis Lougee and Proficient Cleaners Inc. (Lougee) sued respondent
Craig Pehrson for defamation and related torts based on statements about Lougee that
Pehrson made to police. That suit was dismissed under Minnesota's anti-SLAPP statute,

Minn. Stat. § 554.02 (2012). Thereafter, the supreme court held the anti-SLAPP statute unconstitutional as applied to tort claims. *See Leiendecker v. Asian Women United of Minn.*, 895 N.W.2d 623, 638 (Minn. 2017) (*Leiendecker II*). Based on that decision, Lougee moved the district court for relief from the judgment of dismissal under Minn. R. Civ. P. 60.02(e)-(f). The district court denied his motion, and Lougee appeals. We affirm.

FACTS

In early 2012, Pehrson reported to police that Lougee was engaged in various types of insurance fraud. Following a police investigation, the county attorney declined to prosecute. In 2014, Lougee sued Pehrson, alleging that Pehrson had defamed or slandered Lougee and had committed the torts of business disparagement and deceptive trade practices.

An understanding of the anti-SLAPP statute and recent supreme court decisions on the statute provides context for what happened next. Minnesota’s anti-SLAPP (Strategic Lawsuit Against Public Participation) statute immunizes public participation—defined as “speech or lawful conduct that is genuinely aimed in whole or in part at procuring favorable government action,” including reports to law enforcement—unless the participation is tortious or violates someone’s constitutional rights. Minn. Stat. §§ 554.01, subd. 6, .03 (2018). To save immune parties the time and expense of trial, the statute alters the procedural rules when a party claiming immunity under the statute brings a dispositive motion. *See* Minn. Stat. § 554.02. In 2014, the supreme court interpreted those procedural rules in *Leiendecker v. Asian Women United of Minn.*, 848 N.W.2d 224 (Minn. 2014) (*Leiendecker I*). It held that the statute shifts the burdens of proof, production, and

persuasion to the nonmoving party. *Leiendecker I*, 848 N.W.2d at 231; see Minn. Stat. § 554.02, subd. 2(2). If the nonmoving party fails to prove, by clear and convincing evidence, that the moving party's acts were not immune under section 554.03, the district court must dismiss the claim even if the nonmoving party shows that there are genuine issues of material fact. *Leiendecker I*, 848 N.W.2d at 231; see Minn. Stat. § 554.02, subd. 2(3). The supreme court remanded the case in *Leiendecker I* for further proceedings. *Id.* at 233.

In 2015, after the supreme court issued *Leiendecker I*, Pehrson moved for summary judgment under the anti-SLAPP statute. See Minn. Stat. § 554.02. Lougee opposed the motion, but did not challenge the constitutionality of section 554.02. In January 2016, the district court, following the standard set out in *Leiendecker I*, granted Pehrson's motion and dismissed Lougee's lawsuit with prejudice. This court affirmed in September 2016. *Lougee v. Pehrson*, A16-0404, 2016 WL 4723426, at *5 (Minn. App. Sept. 12, 2016), review granted (Minn. Nov. 23, 2016) and order granting review vacated (Minn. June 28, 2017).

In the meantime, *Leiendecker*'s litigation had continued following remand. The district court in that case ruled that section 554.02, as construed by the supreme court, violated *Leiendecker*'s right to a jury trial. *Leiendecker II*, 895 N.W.2d at 628. The supreme court granted accelerated review.

While *Leiendecker II* was pending before the Minnesota Supreme Court, Lougee petitioned for further review. The supreme court granted Lougee's petition and stayed proceedings "pending final disposition in" *Leiendecker II*.

In 2017, the supreme court issued its opinion in *Leiendecker II*, holding Minn. Stat. § 554.02 unconstitutional as applied to claims at law alleging torts. *Id.* at 628, 637-38. The supreme court noted that, under *Leiendecker I*, a district court’s ruling on anti-SLAPP immunity “necessarily decides the merits of the tort action itself.” *Id.* at 636. If the district court found that the nonmoving party had failed to prove that the moving party was not immune, it would dismiss the claim with prejudice. *Id.* If it found that the nonmoving party *had* met its burden, a jury trial would also be precluded because the court would have already determined by clear and convincing evidence that the moving party’s conduct was tortious. *Id.* Because the district court’s resolution of a motion under section 554.02 would determine the whole action, application of that section is unconstitutional when a party has the right to trial by jury. *Id.* Because the jury-trial right extends to tort actions seeking money damages, *id.* at 634, the court held section 554.02 unconstitutional as applied to those actions, *id.* at 638.

One month later, the supreme court vacated its prior order in Lougee’s case and denied further review. Lougee then moved the district court for relief from the final judgment under Minn. R. Civ. P. 60.02(e)-(f). The district court denied the motion.

This appeal follows.

D E C I S I O N

On a motion under rule 60.02, the district court has discretion to decide whether to grant relief, and this court reviews the district court’s decision for abuse of discretion. *Simington v. Minn. Veterans Home*, 464 N.W.2d 529, 530 (Minn. App. 1990), *review denied* (Minn. Mar. 15, 1991). The meaning of a rule of civil procedure is a question of

law that we review de novo. *City of Barnum v. Sabri*, 657 N.W.2d 201, 204 (Minn. App. 2003).

Lougee argues that the district court erred in declining to grant relief under Minn. R. Civ. P. 60.02. He contends that the supreme court's decision in *Leiendecker II* justifies relief from the operation of the judgment against him under either Minn. R. Civ. P. 60.02(e) or (f).

I. Rule 60.02(e)

Rule 60.02(e) permits a district court to relieve a party from a final judgment, order, or proceeding if “it is no longer equitable that the judgment should have prospective application.” Minn. R. Civ. P. 60.02(e). Lougee's claims were dismissed by the district court before the supreme court decided *Leiendecker II*. Lougee argues that, in light of *Leiendecker II*, his claims were unfairly dismissed on the basis of a law that was not constitutional. He asserts that the res judicata effect of the dismissal constitutes prospective application under rule 60.02(e).

Whether a judgment of dismissal has prospective application under Minn. R. Civ. P. 60.02(e) is a question about the meaning of a procedural rule and is reviewed de novo. *Sabri*, 657 N.W.2d at 204.

It is settled that injunctions are orders with prospective application. *See Jacobson v. County of Goodhue*, 539 N.W.2d 623, 625-26 (Minn. App. 1995) (affirming a district court's order vacating an injunction under Minn. R. Civ. P. 60.02(e)), *review denied* (Minn. Jan. 12, 1996). Similarly, an order that has a prospective effect comparable to an injunction is covered by rule 60.02(e). *Sabri*, 657 N.W.2d at 205. The order at issue in *Sabri* was

covered by rule 60.02(e) because it authorized the city, in the future, to tear down a building owned by Sabri. *Id.* Though not formally an injunction, the order applied directly to permit future conduct by the city and thus had prospective effect. *Id.*

Lougee argues that the judgment dismissing his lawsuit is comparable to an injunction because it has the effect of prohibiting Lougee from bringing his lawsuit in the future. However, Lougee’s argument overextends *Sabri*’s reasoning. Though Lougee is correct that dismissal has future effects—it serves as a bar to subsequent lawsuits based on the same facts—it does not determine the substantive rights of the parties in the future. Moreover, the future impact of the dismissal in this case is shared by all judgments; Lougee’s interpretation would make rule 60.02(e) a tool to vacate any judgment based on any law that was subsequently interpreted inconsistently with that judgment. And rule 60.02 is not intended as a tool for “general correction of judicial error.” *Sullivan v. Spot Weld, Inc.*, 560 N.W.2d 712, 716 (Minn. App. 1997) (quotation omitted), *review denied* (Minn. Apr. 27, 1997). Thus, interpreting res judicata effect as a prospective application is inconsistent with the limited nature of rule 60.02.

Further, Minnesota cases interpreting “prospective application” indicate that cases concerning the comparable federal rule of civil procedure—Fed. R. Civ. P. 60(b)(5)—can guide our interpretation of rule 60.02(e). *See Sabri*, 657 N.W.2d at 206; *Jacobson*, 539 N.W.2d at 625. The federal rule allows a court to reopen a final judgment when “applying it prospectively is no longer equitable.” Fed. R. Civ. P. 60(b)(5). Federal courts have held that the test for whether a judgment applies prospectively is whether the judgment requires the court “to supervise changing conduct or conditions that are provisional or tentative.”

Moody v. Empire Life Ins. Co. (In re Moody), 849 F.2d 902, 906 (5th Cir. 1988). That test is satisfied by an injunction, as in *Jacobson*, and by an injunction-like order, as in *Sabri*, indicating that state courts and federal courts interpret their respective rules similarly. Moreover, federal courts have repeatedly held that judgments of dismissal are not prospective and cannot be reopened by invocation of rule 60(b)(5). See, e.g., *Tapper v. Hearn*, 833 F.3d 166, 171 (2d Cir. 2016) (“Numerous other circuits have considered issues substantially similar to the one before us today, and all have held that a judgment or order of dismissal . . . does not apply prospectively within the meaning of Rule 60(b)(5).”); *Comfort v. Lynn Sch. Comm.*, 560 F.3d 22, 28 (1st Cir. 2009) (stating that the plaintiffs’ argument for reopening a judgment “confuses prospective application with the res judicata effect that attaches to almost every final judgment”); *Coltec Indus., Inc. v. Hobgood*, 280 F.3d 262, 272 (3rd Cir. 2002) (holding that dismissal of a constitutional challenge did not have “prospective application,” even though it meant that Coltec could not assert its now-viable constitutional claims and defenses); *Kirksey v. City of Jackson*, 714 F.2d 42, 43 (5th Cir. 1983) (holding that a judgment of dismissal was not “prospective in effect” and that rule 60(b)(5) did not apply, even though the dismissed claims subsequently became supported by a statutory amendment).

Though these federal opinions do not bind this court, the consistency of their holdings and Minnesota courts’ past reliance on federal interpretations of rule 60(b)(5) for guidance in interpreting rule 60.02(e) makes them persuasive. The res judicata effect of a judgment is not a prospective application within the meaning of rule 60.02(e). The district

court therefore did not abuse its discretion by denying Lougee's motion for relief under clause (e).

II. Rule 60.02(f)

Lougee asserted to both the district court and this court that he was entitled to relief under rule 60.02(f), which permits relief from final judgment for “[a]ny other reason justifying relief from the operation of the judgment.” Minn. R. Civ. P. 60.02(f). But he did not present any argument or authority with respect to clause (f), and “[a]n assignment of error in a brief based on mere assertion and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection.” *Poeschel v. Comm’r of Pub. Safety*, 871 N.W.2d 39, 47 (Minn. App. 2015) (quotation omitted). Although Lougee likely forfeited his argument under clause (f), we address it and conclude that the district court did not abuse its discretion by denying relief under that clause.

Relief is not available under clause (f) where one of the other clauses of rule 60.02 is a more appropriate basis for relief. *Chapman v. Special Sch. Dist. No. 1*, 454 N.W.2d 921, 924 (Minn. 1990). The initial question is therefore whether some other clause specifically covers this situation. The first four clauses of rule 60.02 are obviously not applicable: Lougee does not allege any “mistake, inadvertence, surprise, or excusable neglect”; his argument is not based on new evidence; he does not claim fraud or misconduct by Pehrson; and the judgment is not void. See Minn. R. Civ. P. 60.02(a)-(d). And, as discussed above, clause (e) does not apply, because the judgment of dismissal does not have prospective application within the meaning of the rule. Because no other clause applies, we consider clause (f).

Relief under clause (f) is “reserved for extraordinary situations.” *Simington*, 464 N.W.2d at 531. In *Simington*, we evaluated whether a change in legal precedent was an extraordinary situation that compelled a district court to reopen judgment. *Id.* at 529. In that case, *Simington*’s federal discrimination claims had been dismissed as time-barred under then-governing caselaw holding that the statute of limitations was two years. *Id.* at 530. Thereafter, based on intervening United States Supreme Court decisions, we concluded that the statute of limitations under the federal statute was six years. *Id.* *Simington* moved to reopen judgment under rule 60.02(f). *Id.* In upholding the district court’s denial, we held that the change in law extending the statute of limitations was “not necessarily an extraordinary circumstance” that justified reopening the earlier judgment. *Id.* at 531. We so held even though, at the time the law changed, *Simington*’s claims were within the new six-year limitations period and would not have been time-barred had he sued then. *Id.* at 530. Here, had Lougee been opposing dismissal of his claims under the anti-SLAPP statute after the supreme court’s decision in *Leiendecker II*, he almost certainly would have succeeded. But, as *Simington* indicates, the fact that Lougee would have prevailed under new legal precedent is not necessarily extraordinary. *Id.* at 531.

We note that *Simington*’s procedural setting differs from this case. In *Simington*, the plaintiff did not appeal the adverse judgment against him and the judgment was final well before the law changed. Here, Lougee appealed the judgment against him (on grounds other than the constitutionality of the statute); he lost at the court of appeals, and the supreme court at first granted but eventually denied further review after deciding *Leiendecker II*. Thus, the supreme court’s decision that the anti-SLAPP statute is unconstitutional as

applied to tort claims took place before the judgment in Lougee’s case was final. *See U.S. Home Corp. v. Zimmerman Stucco & Plaster, Inc.*, 749 N.W.2d 98, 101 (Minn. App. 2008) (stating that a grant of summary judgment was not final while a timely appeal was pending), *review denied* (Minn. Aug. 5, 2008).

Even if the procedural setting here presents the sort of “extraordinary situation” in which relief under rule 60.02(f) could be available, Lougee did not raise the argument that the anti-SLAPP statute is unconstitutional in the initial proceeding and “failure to defend on all possible theories is not a basis for vacating a judgment.” *See Midway Nat’l Bank of St. Paul v. Bollmeier*, 474 N.W.2d 335, 339 (Minn. 1991) (affirming denial of relief under 60.02(f)). Lougee makes four arguments why forfeiture should not apply in the circumstances of this case.

First, Lougee contends that he is not arguing that the anti-SLAPP statute is unconstitutional but is instead seeking relief based on the fact that the statute has since been ruled unconstitutional. This is a distinction without a difference. At bottom, Lougee’s argument for relief from judgment is that application of the anti-SLAPP statute violated his constitutional right to trial by jury. *See Leiendecker II*, 895 N.W.2d at 634-35. This is a constitutional argument. Lougee’s assertion that his rule 60.02 motion does not raise a constitutional argument is incorrect.

Second, Lougee contends that failure to raise a constitutional argument does not result in forfeiture. But Lougee’s sole citation in support of this proposition is to a concurring opinion stating that waiver of certain constitutional rights should not be “lightly presumed.” *See Onvoy, Inc. v. SHAL, LLC*, 669 N.W.2d 344, 358-59 (Minn. 2003)

(Anderson, Paul H., J., concurring) (“[W]aiver of [the right of access to the courts and the right to trial by jury] is not to be lightly presumed.”). The waiver mentioned in that concurrence was not procedural waiver but was waiver by contractual agreement to arbitrate disputes. *Id.* at 357. In fact, failure to raise ripe constitutional claims forfeits those claims. *See State v. Osborne*, 715 N.W.2d 436, 441 (Minn. 2006) (“[E]rrors—even those affecting constitutional rights—can be forfeited for purposes of appeal by failure to make a timely objection . . .”).

Third, Lougee argues that his claim was not subject to forfeiture because it was not a viable claim until *Leiendecker II* held the anti-SLAPP law unconstitutional. He bases this argument on the principle that statutes are entitled to a presumption of constitutionality. *See In re Tveten*, 402 N.W.2d 551, 556 (Minn. 1987) (“[A] duly enacted statute carries with it a presumption in favor of its constitutionality.”). But *Leiendecker II* held that challenges to Minnesota’s anti-SLAPP statute became ripe once *Leiendecker I* was decided. *Leiendecker II*, 895 N.W.2d at 632 (“Thus, only after we reversed the court of appeals did the Leiendeckers’ [constitutional] claim . . . become viable.”). *Leiendecker I* was decided in June 2014, over a year before Pehrson moved for summary judgment based on Minnesota’s anti-SLAPP statute. *See Leiendecker I*, 848 N.W.2d at 224. Thus, the argument that Minnesota’s anti-SLAPP statute is unconstitutional was viable when Lougee opposed Pehrson’s motion for dismissal under that statute. Lougee’s failure to raise it therefore cannot be attributed to lack of viability.

Finally, Lougee argues that the supreme court’s decision in *Leiendecker II* “is to be given full retroactive effect.” This retroactivity, he argues, extends to reopening final

judgments. In support of his argument, Lougee cites to *Hoff v. Kempton*, 317 N.W.2d 361 (Minn. 1982), as well as a pair of criminal cases, *State v. Mullen*, 577 N.W.2d 505, 512 (Minn. 1998) and *State v. Neely*, 604 N.W.2d 120, 123 (Minn. App. 2000). Assuming that Lougee is correct and *Leiendecker II* is to be given retroactive effect, that fact does not require the district court to reopen a final judgment. “Rule 60.02 reflects a balance between the need for finality in judgments and the need for relief from judgments under very specific circumstances.” *Carter v. Anderson*, 554 N.W.2d 110, 113 (Minn. App. 1996), review denied (Minn. Dec. 23, 1996). Clause (f) is intended to cover “unforeseen contingencies.” *Id.* (quoting *Anderson v. Anderson*, 179 N.W.2d 718, 722 (Minn. 1970)). Judicial error is foreseeable. Even if the dismissal of Lougee’s claims was judicial error, the district court was not compelled under rule 60.02(f) to reopen the judgment to correct that error.

In sum, Lougee fails to show that the district court abused its discretion in denying relief under either clause (e) or clause (f) of rule 60.02.

Affirmed.