

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1218**

Washington Jimenez-Moncayo,
Appellant,

vs.

Ashley Davis, et al.,
Respondents.

**Filed May 10, 2021
Affirmed
Johnson, Judge**

Hennepin County District Court
File No. 27-CV-20-4009

Scott Wilson, Scott Wilson Law Firm, P.L.L.C., Minneapolis, Minnesota; and

Jordan A. Kolinski, Florin Roebig, P.A., Minneapolis, Minnesota (for appellant)

Robert H. Tennant, Meghan A. Cooper, Stringer & Rohleder, Ltd., St. Paul, Minnesota (for respondent)

Considered and decided by Hooten, Presiding Judge; Johnson, Judge; and Slieter, Judge.

NONPRECEDENTIAL OPINION

JOHNSON, Judge

The plaintiff commenced this negligence action by serving the summons and complaint on two individual defendants. But the plaintiff's attorney did not file the summons and complaint with the district court within one year, as required by rule 5.04(a)

of the rules of civil procedure. The district court denied the plaintiff's motion for relief under rule 60.02(a). We conclude that the district court did not abuse its discretion and, therefore, affirm.

FACTS

On the evening of September 23, 2017, a group of young adults planned to go out to a club in downtown Minneapolis. The group included twin sisters Amber Lind and Allison Lind. The group traveled in a car owned by Amber Lind or her mother, Christine Lind, or both of them. Amber Lind's friend Ashley Davis agreed to serve as the sober driver throughout the evening. Before going downtown, the group stopped at a house to drop off someone. As Davis began to drive away, Washington Jimenez-Moncayo, who was sitting in the right rear passenger seat, opened his door and began to step out of the car. The car's right rear tire ran over Jimenez-Moncayo's right foot, causing him injuries.

Jimenez-Moncayo sued Davis and Christine Lind. On February 5, 2019, Jimenez-Moncayo served the summons and complaint on Christine Lind. On March 12, 2019, Jimenez-Moncayo served the summons and complaint on Davis. Jimenez-Moncayo's attorney did not immediately file the summons and complaint with the district court. After confirming service of process on Davis, Jimenez-Moncayo's attorney made a note on his calendar that March 12, 2020, would be the one-year deadline for filing the summons and complaint pursuant to rule 5.04(a) of the rules of civil procedure.

In the months that followed, the case was not actively litigated. In March 2019, the defendants' attorney responded to three requests for admission. In July 2019, the defendants' attorney contacted Jimenez-Moncayo's attorney about a proposed discovery

plan. Jimenez-Moncayo's attorney did not respond. In November 2019, the defendants' attorney contacted Jimenez-Moncayo's attorney and asked whether he intended to move forward with the case and asked him to dismiss the case if he did not so intend. In January and February of 2020, the parties' attorneys exchanged correspondence about the proposed discovery plan.

On March 9, 2020, Jimenez-Moncayo filed the summons and complaint with the district court. On March 17, 2020, the defendants gave notice of their intention to move to dismiss the complaint. On March 27, 2020, the defendants moved to dismiss the case on the ground that Jimenez-Moncayo did not file the summons and complaint within one year of the commencement of the case against Christine Lind on February 5, 2019. On April 8, 2020, Jimenez-Moncayo moved for relief pursuant to rule 60.02(a) of the rules of civil procedure. He argued, in part, that the applicable caselaw "relieve[s] unwitting clients of the consequences of their attorney's unilateral errors."

In May 2020, the district court conducted a hearing on the motions. In July 2020, the district court filed a short written order granting the defendants' motion to dismiss the complaint on the ground that it was not filed within one year of the service of process on Christine Lind. The district court ordered entry of judgment. On August 20, 2020, the district court filed a written order denying Jimenez-Moncayo's motion for relief from judgment. Jimenez-Moncayo appeals.

DECISION

Jimenez-Moncayo argues that the district court erred by denying his motion for relief from judgment.

“On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment . . . and may order a new trial or grant such other relief as may be just” for any one of six reasons, including “[m]istake, inadvertence, surprise, or excusable neglect.” Minn. R. Civ. P. 60.02, 60.02(a). The supreme court twice has applied rule 60.02(a) to the present situation: a plaintiff’s failure to file the summons and complaint within the one-year period specified in rule 5.04(a). *See Gams v. Houghton*, 884 N.W.2d 611, 615-18 (Minn. 2016); *Cole v. Wutzke*, 884 N.W.2d 634, 336-39 (Minn. 2016). The supreme court stated that a district court must grant such relief if the plaintiff “affirmatively satisfies four requirements.” *Cole*, 884 N.W.2d at 637. The four requirements are:

(1) a debatably meritorious claim; (2) a reasonable excuse for the movant’s failure or neglect to act; (3) the movant acted with due diligence after learning of the error or omission; and (4) no substantial prejudice will result to the other party if relief is granted.

Gams, 884 N.W.2d at 620; *see also Cole*, 884 N.W.2d at 637. This court applies an abuse-of-discretion standard of review to a district court’s denial of a motion for relief under rule 60.02(a). *Gams*, 884 N.W.2d at 620; *Cole*, 884 N.W.2d at 637.

In this case, the district court determined that Jimenez-Moncayo satisfied the fourth requirement of *Gams* and *Cole* but did not satisfy the first, second, or third requirements. On appeal, Jimenez-Moncayo contends that he satisfied all four requirements. Respondents argue that Jimenez-Moncayo satisfied none of the four requirements. We will consider each of the four requirements in turn.

1.

Jimenez-Moncayo first contends that he has a “debatably meritorious” claim against respondents. A debatably meritorious claim “is one that, if established at trial, presents a cognizable claim for relief.” *Cole*, 884 N.W.2d at 638. To satisfy this requirement, “the movant generally must provide ‘specific information’ that clearly demonstrates the existence of the debatably meritorious claim.” *Id.* (quoting *Charson v. Temple Israel*, 419 N.W.2d 488, 492 (Minn. 1988)). “Conclusory allegations in moving papers are ordinarily insufficient.” *Id.*

The district court determined that Jimenez-Moncayo did not satisfy the first requirement because he relied on “conclusory allegations that the record in this matter does not support” and because he “offered no evidence or argued that Davis was a permissive operator of Lind’s vehicle.” Jimenez-Moncayo contends that the district court erred because Christine Lind gave Davis either express or implied consent to drive the Lind car and because Amber Lind’s consent is sufficient to impose vicarious liability on her mother. Neither party has cited any caselaw concerning whether Jimenez-Moncayo must have a debatably meritorious claim against only one defendant or against both defendants. We note that the supreme court’s caselaw uses the singular form of the noun phrase “debatably meritorious claim,” which indicates that Jimenez-Moncayo must establish only one debatably meritorious claim. *See Cole*, 884 N.W.2d at 637-38.

In any event, Jimenez-Moncayo submitted evidence supporting his claims against both defendants. He stated in an affidavit that, before he got out of the car, he expressed his intention to do so but that Davis drove forward nonetheless. That evidence tends to

support his negligence claim against Davis. Jimenez-Moncayo further stated in the affidavit that Amber Lind previously had told him the car at issue is co-owned by her and her mother, that the car is customarily used by Amber Lind and Ashley Lind, that the Lind sisters are good friends with Davis, that he heard Amber Lind ask Davis to be the sober driver that evening, that Davis has driven the car on many other occasions, and that Christine Lind is aware that Davis often has driven the car. Jimenez-Moncayo also points to Davis's handwritten, *pro se* answer, in which she states under oath that she drove the car on the evening in question with Amber Lind's permission. Jimenez-Moncayo argued to the district court that Christine Lind should be held vicariously liable pursuant to a statute that deems the driver of a vehicle to be an agent of the vehicle's owner if the driver drove with the express or implied consent of the owner. *See* Minn. Stat. § 169.09, subd. 5a (2020).

Jimenez-Moncayo's evidence is reasonably specific and not conclusory. The evidence indicates that he has debatably meritorious claims against both respondents. The district court abused its discretion by determining otherwise without expressly discrediting Jimenez-Moncayo's evidence or explaining why it is insufficient. Thus, Jimenez-Moncayo has satisfied the first requirement of *Gams* and *Cole*.

2.

Jimenez-Moncayo next contends that his attorney's mistake in not filing the summons and complaint before the one-year deadline is a "reasonable excuse" because the mistake is entirely attributable to his attorney.

In *Cole*, the supreme court provided lower courts with a thorough explanation of the second requirement:

As to “reasonable excuse,” we have long said that mistakes of law, as well as mistakes of fact, may afford grounds for relief. Additionally, our case law generally reflects a strong policy favoring the granting of relief when judgment is entered through no fault of the client. More specifically, we have held that even in those cases where a court has held the neglect of a client’s attorney to be inexcusable, if such neglect has been purely that of counsel, ordinarily courts are loath to punish the innocent client for the counsel's neglect.

We have cautioned, however, 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. Indeed, the right to vacatur is not absolute; rather, it is a matter largely within the discretion of the trial court. 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. 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.

Cole, 884 N.W.2d at 638-39 (quotations, citations, and alterations omitted).

The district court determined that Jimenez-Moncayo did not satisfy the second requirement because Jimenez-Moncayo’s attorney’s mistake “does not constitute a reasonable excuse.” On appeal, Jimenez-Moncayo reiterates his argument that his attorney made an inadvertent mistake for which he should not be held responsible.

In prior opinions, the supreme court and this court have expressed a general policy favoring relief for a client who has suffered an adverse judgment because of a mistake by his or her attorney. *See, e.g., Nguyen v. State Farm Mut. Auto. Ins. Co.*, 558 N.W.2d 487, 491 (Minn. 1997); *Safeco Ins. Co. v. Holmgren Bldg. Repair, Inc.*, 946 N.W.2d 638, 646

(Minn. App. 2020), *review denied* (Minn. Sept. 15, 2020). But the supreme court also has made clear that “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” and that “the decision is fact intensive.” *Cole*, 884 N.W.2d at 639. In addition, the supreme court has emphasized that “[t]he 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.” *Gams*, 884 N.W.2d at 620. Furthermore, the supreme court has stated that “the district court is in the best position to evaluate the reasonableness of the excuse.” *Id.* (quotation omitted).

Consequently, despite the general principle favoring rule 60 relief for an adverse judgment caused by an attorney’s mistake, we must give deference to a district court’s consideration of the reasonableness of the excuse in the context of the specific circumstances of a particular case. The record indicates that Jimenez-Moncayo’s attorney generally was aware of the one-year deadline but nonetheless missed the deadline because he was not aware that the one-year period begins when the first defendant (not the second defendant) is served. In addition, Jimenez-Moncayo’s attorney did not actively litigate the case during the one-year period. Given the facts and circumstances of this case, the district court did not abuse its discretion by determining that Jimenez-Moncayo’s attorney’s mistake does not constitute a reasonable excuse.¹ Thus, Jimenez-Moncayo has *not* satisfied the second requirement of *Gams* and *Cole*.

¹Since the supreme court’s opinions in *Gams* and *Cole*, this court consistently has affirmed the denial of rule 60.02(a) relief in cases in which a plaintiff’s attorney failed to file the summons and complaint before the one-year deadline. *See Fischer v. Fischer-Kinnunen P’ship, LLP*, No. A20-0510, 2020 WL 6846380, at *1-2 (Minn. App. Nov. 23,

3.

Jimenez-Moncayo contends that he acted with due diligence by moving for relief under rule 60 only 22 days after he received notice from respondents that the one-year period had lapsed before the filing of the summons and complaint.

The district court determined that Jimenez-Moncayo did not satisfy the third requirement because he filed his rule 60 motion “almost one month after filing the complaint, and almost two weeks after defendants filed their motion to dismiss.” The district court improperly referred to Jimenez-Moncayo’s filing of the complaint because due diligence must be measured from “the time that the movant learn[ed] of his . . . error or omission.” *See Cole*, 884 N.W.2d at 639. For the same reason, the district court improperly referred to respondents’ filing of their motion to dismiss, which occurred ten days after respondents gave notice to Jimenez-Moncayo of the untimely filing.

Jimenez-Moncayo moved for relief 22 days after receiving notice from respondents that the summons and complaint were filed too late. Jimenez-Moncayo acted more quickly

2020); *Curtin v. RS Eden*, No. A19-1205, 2020 WL 2116570, at *1-4 (Minn. App. May 4, 2020), *review denied* (Minn. July 23, 2020); *Luskey v. Eggum*, No. A18-0623, 2019 WL 178521, at *1-2 (Minn. App. Jan. 14, 2019), *review denied* (Minn. Apr. 16, 2019); *Siegle v. Karst*, No. A17-1360, 2018 WL 3014668, at *1-4 (Minn. App. Jun. 18, 2018). In the few cases in which we have reversed the denial of such relief, the district courts committed errors that are not present in this case. *See Olson v. Todd Jackson Trucking, LLC*, No. A16-1238, 2017 WL 1048138, at *1-3 (Minn. App. Mar. 20, 2017) (reversing and remanding because district court failed to consider all four requirements); *Orr v. Britten*, No. A15-0933, 2017 WL 393779, at *1-3 (Minn. App. Jan. 30, 2017) (reversing and remanding because district court applied *per se* rule that attorney’s mistake does *not* constitute reasonable excuse). We acknowledge that these opinions are unpublished and, thus, not binding precedent. Nonetheless, the opinions demonstrate that this court has consistently followed the supreme court’s caselaw concerning the second requirement.

than the plaintiff in *Thomas v. Ross*, 412 N.W.2d 358 (Minn. App. 1987), who moved for rule 60 relief 35 days after receiving notice of the dismissal of his action but was deemed to have acted with due diligence. *Id.* at 360; *see also Black v. Rimmer*, 700 N.W.2d 521, 528 (Minn. App. 2005) (concluding that defendant acted with due diligence by moving to vacate default judgment five weeks after entry); *Orr*, 2017 WL 393779, at *3 (concluding that plaintiff acted with due diligence by moving for relief 25 days after discovery of mistake). We are not aware of any precedential Minnesota opinion in which a party was deemed to have *not* acted with due diligence after moving for rule 60 relief within 22 days of becoming aware of its mistake.

Given the district court's errors of law in measuring the time period in which Jimenez-Moncayo took action, as well as the absence of any precedential opinion demonstrating that a time period as short as 22 days is inconsistent with due diligence, the district court abused its discretion by determining that Jimenez-Moncayo did not act with due diligence. Thus, Jimenez-Moncayo has satisfied the third requirement of *Gams* and *Cole*.

4.

The district court determined that respondents would not be substantially prejudiced if Jimenez-Moncayo's rule 60.02(a) motion were granted because the parties had engaged in some discovery. On appeal, Jimenez-Moncayo contends that the district court properly determined that he satisfied the fourth requirement. In their responsive brief, respondents contend that they would be prejudiced if Jimenez-Moncayo's motion were granted and that the district court erred by making a determination to the contrary. In his reply brief,

Jimenez-Moncayo contends that respondents may not argue that the district court misanalyzed the fourth requirement without filing a notice of related appeal.

A respondent “may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, even though the argument may involve an attack upon the reasoning of the lower court.” *Matter of RS Eden/Eden House*, 928 N.W.2d 326, 333 (Minn. 2019) (quoting *Hunt by Hunt v. Sherman*, 345 N.W.2d 750, 753 n.3 (Minn. 1984)). Because respondents’ argument concerning the fourth requirement is asserted for the purpose of affirming the district court’s ultimate ruling, a notice of related appeal is unnecessary. Thus, respondents are not foreclosed from arguing on appeal that Jimenez-Moncayo did not satisfy the fourth requirement.

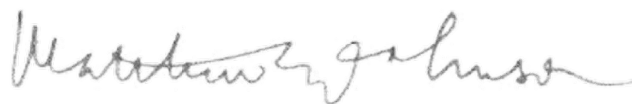
A party seeking relief from the dismissal of a complaint under rule 60.02(a) must show that “no substantial prejudice will result to the other party.” *Cole*, 884 N.W.2d at 637 (quotations omitted). Substantial prejudice “should not be presumed [or] inferred from the mere fact of delay”; rather, there must be “some particular prejudice of such a character that some substantial right or advantage will be lost or endangered if relief is granted.” *Id.* at 639 (quotations omitted). “In general, when the only prejudicial effect of vacating a judgment is additional expense and delay, substantial prejudice of the kind necessary to keep a judgment from being reopened does not exist.” *Black*, 700 N.W.2d at 528 (quotation omitted).

Jimenez-Moncayo submitted evidence that respondents and their attorney were well aware of the pending lawsuit and that respondents’ attorney engaged in some discovery by responding to requests for admission and communicating with Jimenez-Moncayo’s

attorney about a discovery plan. Respondents contend that they would be prejudiced by rule 60 relief due to confusion in 2019 with respect to whether Davis was represented by counsel. But the events of 2019 are unrelated and irrelevant to Jimenez-Moncayo's failure to timely file the summons and complaint in 2020. Respondents have not identified any particular reason why substantial prejudice would have arisen if the district court had reinstated Jimenez-Moncayo's action. Because the district court's determination is supported by the record, the district court did not abuse its discretion by determining that Jimenez-Moncayo satisfied the fourth requirement of *Gams* and *Cole*.

In sum, Jimenez-Moncayo has satisfied the first, third, and fourth requirements of *Gams* and *Cole*. But he has not satisfied the second requirement. The supreme court has made clear that a plaintiff is not entitled to relief in this situation unless he "affirmatively satisfies" all four requirements. *Cole*, 884 N.W.2d at 637. Thus the district court did not abuse its discretion by denying Jimenez-Moncayo's motion for relief under rule 60.02(a) of the rules of civil procedure.

Affirmed.

A handwritten signature in dark ink, appearing to read "Matthew J. Johnson". The signature is fluid and cursive, with the first name "Matthew" and last name "Johnson" clearly distinguishable.