

*This opinion is nonprecedential except as provided by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
A22-0925**

David Loe,
Appellant,

vs.

Robert Landis,
Defendant,

Twin Express, Inc.,
Respondent.

**Filed March 6, 2023
Affirmed
Reilly, Judge**

Hennepin County District Court
File No. 27-CV-21-12484

Michael A. Bryant, Bradshaw & Bryant, PLLC, Waite Park, Minnesota (for appellant)

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P.A., Minnetonka, Minnesota; and

Andrew R. Brown, Reding & Pilney, LLC, Lake Elmo, Minnesota (for respondent)

Considered and decided by Bjorkman, Presiding Judge; Segal, Chief Judge; and
Reilly, Judge.

NONPRECEDENTIAL OPINION

REILLY, Judge

In this appeal following the summary-judgment dismissal of his vicarious-liability claim, appellant argues that the district court abused its discretion by determining that

appellant's expert was not qualified to opine on foreseeability, and therefore appellant failed to create a genuine issue of material fact as to a necessary element. We affirm.

FACTS

Respondent Twin Express hired defendant Robert Landis as a commercial truck driver in 2018. Before hiring Landis, Twin Express reviewed Landis's driving record and criminal history—both were clean. In May 2019, Landis drove Twin Express's tractor-trailer into a travel stop in Post Falls, Idaho to fill the gas tank. There were no open gas pumps, so Landis pulled up behind appellant David Loe whose tractor-trailer was parked at a gas pump. When a gas pump opened a few rows down, Landis moved his tractor-trailer to that pump to refuel. Landis and Loe dispute how an argument started between them, but they agree that Landis pushed Loe and that Loe fell and sustained injuries.

Loe sued Twin Express, alleging that Landis's conduct seriously and permanently injured Loe and that as the owner of the tractor-trailer and employer of Landis, Twin Express was vicariously liable to Loe for his injuries. Twin Express filed a motion for summary judgment arguing, in part, that the assault and battery of Loe was not foreseeable because assaults are not a well-known hazard within the trucking industry nor is the conduct related to Landis's job duties as a truck driver.

Loe opposed Twin Express's motion for summary judgment. He argued that Landis's actions were foreseeable because assaults are a well-known hazard in the trucking industry. To support his claim against Twin Express, Loe submitted an expert affidavit from a vocational consultant "with extensive expertise and knowledge pertaining to various occupations and fields of employment." According to the vocational consultant's

curriculum vitae, she is a certified rehabilitation counselor and her background includes assisting individuals with finding suitable employment, presenting nationwide educational training curriculums, and conducting statistical labor market research. In her affidavit, the vocational consultant stated that she reviewed the Twin Express Employee Handbook, an online summary report for truck drivers, a “SkillTran report” for truck drivers, and “various articles pertaining to road rage in truck drivers.” The vocational consultant concluded that “assaults by semi-truck drivers are foreseeable or should be foreseeable to employers of truck drivers” because assaults are a “well-known industry hazard of semi-truck driving.” The vocational consultant stated that the combination of stress and tight deadlines, “can push the employee to make a poor decision” such as “physically assaulting someone who is potentially slowing them down in order to get back on the road.”

The district court held a hearing on Twin Express’s summary-judgment motion. At the hearing, the district court asked why the vocational consultant was qualified to give an expert opinion on the foreseeability of Landis’s conduct. Counsel for Loe responded that the expert is qualified as a vocational consultant who “gives opinions in a number of fields of unemployment” and had “worked with a number of truckers.” He stated that her work with the commercial trucking industry involved providing opinions on whether individuals were employable in the field along with opinions on wage loss from being unable to work. He argued that the affidavit provided sufficient evidence to present a genuine issue of material fact to overcome a motion for summary judgment. Counsel for Twin Express argued that the vocational consultant was not qualified to provide an expert opinion because she had “never worked with the commercial trucking industry.”

The district court granted Twin Express’s motion for summary judgment. The district court determined that the vocational consultant is not qualified to give an expert opinion and thus Loe could not prove Twin Express was vicariously liable for Landis’s assault because “there is no evidence that Landis[] could be expected to engage in assault or that his kind of actions were foreseeable in the trucking industry.” This appeal follows.

DECISION

Loe argues that the district court erred in granting Twin Express’s motion for summary judgment because the submission of an expert affidavit created a genuine issue of material fact.¹ Summary judgment is appropriate if “there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.” Minn. R. Civ. P. 56.01. On appeal from a grant of summary judgment, this court reviews the evidence in the light most favorable to the nonmoving party to determine whether there are any genuine issues of material fact and whether the district court correctly applied the law. *Minn. Sands, LLC v. County of Winona*, 940 N.W.2d 183, 191 (Minn. 2020). Although we review de novo the grant of a motion for summary judgment, we review the district court’s evidentiary ruling on expert witness qualifications for an abuse of discretion. *Gross v. Victoria Station Farms, Inc.*, 578 N.W.2d 757, 760 (Minn. 1998); *see also State v. Loving*, 775 N.W.2d 872, 877 (Minn. 2009); *Maethner v. Someplace Safe, Inc.*, 929 N.W.2d 868, 874 (Minn. 2019).

¹ The district court also granted summary judgment dismissing Loe’s claims against Landis based on the applicable statute of limitations. Loe did not appeal that decision.

Loe's theory is that Twin Express is liable for Landis's tortious conduct under the doctrine of respondeat superior. Under that doctrine, "an employer is vicariously liable for the torts of an employee committed within the course and scope of employment." *Schneider v. Buckman*, 433 N.W.2d 98, 101 (Minn. 1988). "[A]n employer may be held liable for even the intentional misconduct of its employees when (1) the source of the attack is related to the duties of the employee, and (2) the assault occurs within work-related limits of time and place." ² *Fahrendorff v. N. Homes, Inc.*, 597 N.W.2d 905, 910 (Minn. 1999) (quotations omitted). Courts consider whether a tortious act was foreseeable when analyzing whether the act relates to the duties of the employee. *Hagen v. Burmeister & Assocs., Inc.*, 633 N.W.2d 497, 504 (Minn. 2001). "[T]o survive summary judgment on a claim that an employer is liable for an employee's intentional tort under the doctrine of respondeat superior, the plaintiff must present sufficient evidence to raise an issue of fact with respect to the foreseeability of such misconduct by the employee." *Frieler v. Carlson Mktg. Group, Inc.*, 751 N.W.2d 558, 584 (Minn. 2008).

Evidence in the form of an expert affidavit generally creates a genuine issue of material fact precluding summary judgment. *Fahrendorff*, 597 N.W.2d at 912-13. Expert opinions are admissible "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue" and the expert is "qualified as an expert by knowledge, skill, experience, training, or education." Minn. R.

² For purposes of the summary-judgment motion and this appeal, the parties agree that Landis committed an intentional tort against Loe while employed by Twin Express such that Twin Express could be held vicariously liable.

Evid. 702. In other words under Minnesota rule of Evidence 702, “expert testimony is admissible if: (1) the witness is qualified as an expert; (2) the expert’s opinion has foundational reliability; (3) the expert testimony is helpful to the jury; and (4) if the testimony involves a novel scientific theory, it must satisfy the *Frye-Mack* standard.” *State v. Obeta*, 796 N.W.2d 282, 289 (Minn. 2011). “All expert testimony must satisfy the first three parts of the Rule 702 test.” *Doe v. Archdiocese of St. Paul*, 817 N.W.2d 150, 164 (Minn. 2012). “The knowledge requirement [of Rule 702] may be satisfied by either formal education or sufficient occupational experience.” *Gross*, 578 N.W.2d at 761. Ultimately, the determination of whether an expert is qualified by knowledge, skill, experience, training, or education to testify on a subject rests within the sound discretion of the district court and we will not reverse absent a clear abuse of discretion. *Id.* at 760-61; Minn. R. Evid. 702. “A district court abuses its discretion when its decision is based on an erroneous view of the law or is inconsistent with the facts in the record.” *In re Stisser Grantor Tr.*, 818 N.W.2d 495, 508 (Minn. 2012).

Here, the district court found that the vocational consultant was not qualified under the standards in Minnesota Rule of Evidence 702 to provide an expert opinion about the foreseeability of assaults in the trucking industry. The district court determined that the vocational consultant’s knowledge came from “some internet research” including “articles on road rage in the trucking industry,” but that the vocational consultant had no specialized knowledge or experience in the commercial trucking industry. The district court therefore declined to consider her affidavit and gave no evidentiary weight to it. *See Fahrendorff*, 597 N.W.2d at 912 (stating that affidavits that state bare legal or factual conclusions

without showing a basis for the affiant's knowledge and competency to testify may be insufficient to raise a question of material fact). As a result, the district court determined that there was no genuine issue of material fact about the foreseeability of Landis's tortious conduct.

Loe asserts that an expert affidavit presented in response to a motion for summary judgment creates a sufficient issue of material fact to thwart a motion for summary judgment. *See id.* at 910-11 (holding that an expert affidavit stating that sexual abuse in group homes is a "well-known hazard" raised a question of fact about whether the wrongful act was foreseeable); *Marston v. Minneapolis Clinic of Psychiatry & Neurology, Ltd.*, 329 N.W.2d 306, 311 (Minn. 1982) (holding that expert testimony stating that sexual relations between a psychologist and a patient is a "well-known hazard" created a question of fact); *L.M. v. Karlson*, 646 N.W.2d 537, 543 (Minn. App. 2002) (holding that an expert affidavit stating that sexual abuse of children by day-care workers was a "well-known hazard" raised a genuine issue of material fact), *rev. denied* (Minn. Aug. 20, 2002). But the experts' qualifications to provide an opinion about foreseeability was not challenged in any of these cases. When an expert's qualifications are challenged, the district court's evidentiary ruling on the admissibility of the expert opinion rests within the sound discretion of the district court. *Gross*, 578 N.W.2d at 760.

Here, the district court applied the rules of evidence and determined that the vocational consultant was not qualified to offer an expert opinion on the foreseeability of assaults in the commercial trucking industry because she "has no specialized knowledge or experience in the field of trucking and the behaviors of truck drivers." Based on our careful

review of the record, we discern no abuse of discretion in the determination that the vocational consultant was not qualified to opine about the foreseeability of assaults in the commercial trucking industry. The vocational consultant's qualifications did not show any specialized knowledge, experience, or education in the field of commercial trucking. The district court's evidentiary ruling is not inconsistent with the record or contrary to the law.

Loe also argues that the district court usurped the role of the jury by making a credibility determination about his expert. We disagree with Loe's characterization of the district court's order. The district court did not make a finding about the *credibility* of the vocational consultant. Rather, the district court analyzed her *qualifications* to provide an expert opinion. And, as stated above, the district court's evidentiary ruling on the admissibility of the expert opinion "rests within the sound discretion of the [district] court and will not be reversed unless it is based on an erroneous view of the law or it is an abuse of discretion." *Id.* When expert testimony is necessary and *no* expert testimony or affidavits are presented, Minnesota appellate courts uphold the district court's grant of summary judgment. *See Frieler*, 751 N.W.2d at 583-84 (concluding that the submission of an employer's sexual harassment policy without other relevant evidence was insufficient evidence to survive a motion for summary judgment); *P.L. v Aubert*, 545 N.W.2d 666, 668 (Minn. 1996) (concluding that summary judgment was proper when the plaintiff failed to produce relevant evidence such as "expert testimony or affidavits").

Based on the summary judgment record before us, viewed in a light most favorable to Loe, we cannot conclude that the district court abused its discretion in excluding the vocational consultant's affidavit. Loe presented no other evidence that assaults are a

foreseeable hazard in the commercial trucking industry. Because the district court did not abuse its discretion in its evidentiary ruling and because Loe failed to produce other evidence to create a genuine issue of material fact as to foreseeability, the district court did not err in granting summary judgment for Twin Express.

Affirmed.