

*This opinion is nonprecedential except as provided by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
A23-1758**

Maria Olson, et al.,
Appellants,

vs.

Hinshaw & Culbertson LLP,
Respondent.

**Filed August 12, 2024
Affirmed
Bratvold, Judge**

Hennepin County District Court
File No. 27-CV-21-9240

Wayne B. Holstad, Craig J. Beuning, St. Paul, Minnesota (for appellants)

Louise A. Behrendt, Timothy R. Schupp, Mark A. Bloomquist, Meagher & Geer, P.L.L.P.,
Minneapolis, Minnesota (for respondent)

Considered and decided by Bratvold, Presiding Judge; Larkin, Judge; and Jesson,
Judge.*

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

In this appeal from a final judgment for respondent Hinshaw & Culbertson LLP
(Hinshaw), appellants Maria Olson, Shannon Olson, and SSO LLC (collectively, the

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

Olsons) allege that the district court (1) erred by dismissing their fraudulent-concealment claim on summary judgment, (2) abused its discretion by excluding several exhibits during trial, and (3) abused its discretion when it gave a curative instruction after the Olsons' opening statement. We affirm.

FACTS

The Olsons owned “three adjoining commercial properties located in Cambridge”—653 Main Street (653 property), which included a ten-unit condominium; 807 Main Street (807 property), which included a health center; and a vacant lot (Lot 2) that lies between the 653 and 807 properties. The 653 property had an access easement over Lot 2; the 807 property did not. In 2010, the Olsons defaulted on their mortgages for the 653 property and Lot 2, and the Peoples Bank of Commerce (Cambridge Bank) served a summons and complaint to foreclose on those mortgages.

The Olsons hired Hinshaw to represent them and negotiate with Cambridge Bank. In October 2010, the Olsons and Cambridge Bank reached a settlement agreement in which the Olsons agreed to sell the 653 property to MN Silvercare Inc., which was owned by James Scott Kent.¹ The next month, the Olsons also sold the 807 property to Kent. The Olsons retained Lot 2. Kent signed promissory notes in relation to the two purchases, on both of which he later defaulted. In 2013, Kent initiated proceedings to obtain an access easement over Lot 2 for the benefit of the 807 property.

¹ This opinion will refer to MN Silvercare Inc. as “Kent.”

In November 2013, Peoples National Bank of Mora (Mora Bank), which held the mortgage on the 807 property, first foreclosed on the mortgage and then sued the Olsons, alleging that Kent “purchased [the 807 property] and [that] the Mora Bank approved a loan for the purchase based on the mistaken belief that the parking lot and driveway on Lot 2 were included in the sale.” Mora Bank’s complaint also alleged that “[t]his mistake was the result of repeated misrepresentations made by [the Olsons] . . . with the intended purpose of inducing . . . the sale.”

Hinshaw represented Mora Bank in its action against the Olsons and prepared the summons and complaint, to which the parties refer as the “47 complaint.”² The Olsons had not consented to Hinshaw’s representation of Mora Bank. Shortly after the 47 complaint was served, the Olsons’ attorney wrote to Hinshaw, stating that Hinshaw had a conflict of interest because it had represented the Olsons in the Cambridge Bank foreclosure action in 2010. Hinshaw withdrew one month after Mora Bank filed suit against the Olsons.

In March 2014, the Olsons filed a complaint against Hinshaw through the Minnesota Office of Lawyers Professional Responsibility (OLPR). The Fourth Judicial District Ethics Committee considered the complaint on October 29, 2014, and unanimously recommended a private admonition. The OLPR ultimately determined that discipline was not warranted on November 2, 2015.

² The 47 complaint refers to the court file number for Mora Bank’s lawsuit against the Olsons: 30-CV-14-47.

Meanwhile, in March 2015, Mora Bank and the Olsons settled. Among other things, the settlement released Kent from his obligations under the promissory notes, and the Olsons sold Lot 2 to Kent.

In September 2015, Kevin Slator, the senior assistant director of the OLPR, provided Maria Olson with internal emails that were exchanged among Hinshaw attorneys, were dated from June 2009, and involved Lot 2. The emails indicated that, before or during the Cambridge Bank foreclosure action, Hinshaw knew the 807 property lacked an access easement over Lot 2.

Nearly six years later, in July 2021, the Olsons served Hinshaw with a complaint alleging four counts: (1) fraudulent concealment, (2) breach of fiduciary duties, (3) tortious interference with a contract and aiding and abetting tortious interference with a contract, and (4) slander of title. The district court granted Hinshaw's motion to dismiss the claim for slander of title and granted it summary judgment on the claim for fraudulent concealment but allowed the other claims to proceed to trial.

In preparation for trial, Hinshaw submitted several motions in limine. Relevant to this appeal, Hinshaw moved to “exclude evidence regarding Maria Olson’s complaint” to the OLPR and “preclude the Olsons from introducing the so-called ‘smoking gun’ or ‘exculpatory evidence’” that the Olsons received from Slator and had submitted along with an affidavit in opposition to Hinshaw’s summary-judgment motion. The “smoking gun” documents³ that Hinshaw moved to exclude included (1) “emails between Mora Bank and

³ The district court and the parties refer to these as the “smoking gun” documents. We do so as well.

[Hinshaw] about the Lot 2 easements” and (2) “an email from Mora Bank to [Hinshaw] stating, ‘Our legal counsel indicates to us that the [Small Business Association] has a case for fraud against the Olsons . . . and should use that angle to force the Olsons to deed over the parking lot parcel.’” This opinion refers to the Olsons’ OLPR complaint, the OLPR determination dated November 2, 2015, and the OLPR smoking gun documents collectively as the OLPR documents.

Hinshaw argued that the OLPR documents should be excluded under Minn. R. Evid. 402 and 403 because they related to an administrative determination involving “different legal and evidentiary standards than the standards applicable to litigated matters.” Hinshaw also argued that the smoking gun documents should be excluded under Minn. R. Evid. 403 because some of them “have nothing to do with Hinshaw” and introducing the documents would be “prejudicial and misleading.” The Olsons opposed Hinshaw’s motions in limine.

The district court issued an order on Hinshaw’s motion to exclude the OLPR documents. As to the OLPR complaint and determination, the district court acknowledged that “Hinshaw rightly argues that the issues” before the ethics committee and the OLPR “were only administrative matters and that administrative matters involve different legal and evidentiary standards than litigated cases.” The district court ruled that the Olsons “may not offer the OLPR investigation or any resulting reports as direct evidence of Hinshaw’s liability.” The district court also commented that the Olsons “rightly argue that lawyer discipline can still be admitted for a limited purpose, such as to impeach an attorney’s credibility as a witness.” Therefore, the district court deferred ruling “until it sees how [the Olsons] attempt to use this evidence at trial.”

As to the smoking gun documents, the district court also deferred ruling “until it sees how [the Olsons] attempt to use this evidence at trial.” The district court noted, however, that it would “not admit this evidence without foundation tying it to Hinshaw” and warned the Olsons “not to use this lawsuit as a proxy for claims it would have brought against Mora Bank absent the settlement agreement.”

At trial, the jury found for Hinshaw on all issues submitted by special verdict. The Olsons moved for a new trial, claiming that the district court erred by excluding (1) Slator’s testimony and related exhibits, (2) the OLPR documents, (3) the “documents disclosed to the [Olsons] pursuant to discovery,” and (4) “correspondence from Scott Kent to the Mora Bank.” The motion also argued that the district court erred by granting Hinshaw’s “motion in limine related to the allegations of fraud” in the 47 complaint and by giving a curative jury instruction related to the Olsons’ opening statement, which referred to the OLPR investigation. After a hearing, the district court denied the motion for a new trial.

This appeal follows.

DECISION

I. The district court did not err by granting Hinshaw’s motion for summary judgment on the Olsons’ claim for fraudulent concealment and granting Hinshaw’s related motion in limine.

The Olsons argue that the “claim for fraudulent concealment . . . should not have been dismissed in the summary judgment motion and testimony regarding the fraud allegations made in the complaint drafted by Hinshaw on behalf of Mora Bank should have been permitted.”

Summary judgment may be granted if the moving party can establish that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. Minn. R. Civ. P. 56. “We review the grant of summary judgment de novo to determine whether there are genuine issues of material fact and whether the district court erred in its application of the law.” *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017) (quotation omitted). Appellate courts “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).

Count 1 of the Olsons’ complaint against Hinshaw is titled “fraudulent concealment” and alleges

- certain facts about easements over Lot 2 by quoting seven statements from the 47 complaint and reciting the relevant paragraph number;
- that Maria Olson learned of “exculpatory evidence” for the “first time” during a discussion with an OLPR investigator about documents and email correspondence that were “discovered” in Hinshaw files;
- that “claims made in the 47 complaint that the Mora Bank was unaware that easements over Lot 2 were not included” were “false at the time made”; and
- that Hinshaw had a “duty to disclose the evidence” of “its knowledge of Lot 2.”

Based on our review of the Olsons’ complaint and the summary-judgment arguments, we initially conclude that, although the district court and the Olsons refer to a “fraudulent concealment” claim, the Olsons’ complaint appears to assert fraudulent misrepresentation

and concealment. The arguments on appeal focus on fraudulent misrepresentation, the elements of which are

(1) a false representation of a past or existing material fact susceptible of knowledge; (2) made with knowledge of the falsity of the representation or made without knowing whether it was true or false; (3) with the intention to induce action in reliance thereon; (4) that the representation caused action in reliance thereon; and (5) pecuniary damages as a result of the reliance.

U.S. Bank N.A. v. Cold Spring Granite Co., 802 N.W.2d 363, 373 (Minn. 2011).

In response to Hinshaw’s summary-judgment motion, the district court determined that the Olsons’ fraud claim “fails as a matter of law because the claim cannot meet the first element of fraud—that Hinshaw made a false representation.” According to the district court, the Olsons’ complaint alleged that, when Hinshaw prepared the 47 complaint, it fraudulently concealed that “Mora Bank knew that Lot 2 was not included” in the sale of the 807 property to Kent and that the Olsons relied on the statements in the 47 complaint when they settled with Mora Bank and released Kent from his obligations under the promissory notes.

The district court observed that count 1 relied “entirely” on statements in the 47 complaint that Hinshaw drafted and that the Olsons “allege no other representation that Hinshaw made.” The district court then commented that it agreed with another district court’s determination in related litigation between the Olsons and Mora Bank: “Allegations in a complaint are not promises or representations to the defendant; they are accusations against the defendant.” The district court quoted the prior order and cited this court’s

subsequent opinion, which affirmed the district court's decision. *Olson v. Kent*, No. A16-0221, 2016 WL 7338751, at *5 (Minn. App. Dec. 19, 2016).

Returning to the Olsons' fraud claim against Hinshaw, the district court determined "that a statement in a complaint is an allegation, not an actionable representation, because no defendant in a legal proceeding could reasonably understand it to be anything else." The district court reasoned that both "[o]pinions and 'puffery' are not actionable representations because the person to whom such statements are made has no right to rely upon them and does so at her own peril," citing *Kennedy v. Flo-Tronics, Inc.*, 143 N.W.2d 827, 828 (Minn. 1966). The district court concluded that the allegations in a complaint are similar to opinions, citing the definition of an "allegation." See *Black's Law Dictionary* 93 (11th ed. 2019) (defining "allegation" as "[s]omething declared or asserted as a matter of fact, esp. in a legal pleading; a party's formal statement of a factual matter as being true or provable, without its having yet been proved"). Accordingly, the district court granted summary judgment for Hinshaw on fraudulent concealment.

Relying on its summary-judgment decision, the district court later granted Hinshaw's motion in limine to preclude the Olsons "from suggesting that the 47 complaint contained fraud claims or that Hinshaw committed fraud by drafting the 47 complaint." The district court reasoned that it had "previously dismissed" the Olsons' fraud claim, and therefore, "[t]here is no surviving fraud claim against Hinshaw, and any references to fraud in either instance will confuse and mislead the jury."

The Olsons argue in their brief to this court that the district court erred by granting summary judgment for Hinshaw on count 1 and, in turn, by granting Hinshaw's related

motion in limine. They argue that “[a]llegations in a pleading are representations of fact” and that Hinshaw made the representations to induce the Olsons into settling with Mora Bank.⁴ Hinshaw contends that the Olsons’ claim fails as a matter of law.

No binding precedent guides our analysis of whether allegations in a complaint may be actionable under fraud. The Olsons rely on *Cohen v. Appert*, 463 N.W.2d 787 (Minn. App. 1990), *rev. denied* (Minn. Jan. 24, 1991), and *Wild v. Rarig*, 234 N.W.2d 775 (Minn. 1975), but both cases are inapt. *Cohen* involved an attorney’s false statements to a client during representation. 463 N.W.2d at 788-89. *Wild* considered whether to toll the statute of limitations for a fraudulent-concealment claim. 234 N.W.2d at 795. Neither case addresses whether an allegation in a complaint may be a false representation.

The Olsons’ argument here is very similar to the argument this court rejected in *Olson*, in which we affirmed the district court’s decision denying the Olsons’ motion to vacate their settlement with Mora Bank based on alleged fraudulent concealment in the 47 complaint. 2016 WL 7338751, at *5. We explained that the district court “examined the

⁴ The Olsons also argue that the district court’s decision in its order on the motion to dismiss, in which it declined to extend judicial-action privilege to the statements in the complaint, “should have been followed throughout the litigation,” and thus, the district court should have denied summary judgment on the fraud issue. We need not reach this issue for two reasons. First, the Olsons failed to raise this issue in district court at any point following the order on the motion to dismiss. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (“A reviewing court must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it.” (quotation omitted)). Second, the district court’s decision on summary judgment was narrower than its decision in its order on the motion to dismiss. In the summary-judgment order, the district court addressed whether the statements tended to prove a specific element of the Olsons’ fraud claim—false representation of a past or existing material fact—and did not address judicial-action privilege.

elements of fraud in relation to Maria Olson’s argument that [Mora Bank] concealed evidence that it knew Lot 2 was not included in the conveyances and that [Mora Bank’s] claims in the [47 complaint] were therefore false.” *Id.* The district court also reasoned that Maria Olson “did not rely on the ‘representations’ in any event, and that she specifically denied [Mora Bank’s] claims.” *Id.* We concluded that there was “no error” in the district court’s determination that the Olsons’ allegations were “not false representations, but were instead claims made in litigation.” *Id.*⁵

While our prior opinion is not precedent, it is persuasive. *See* Minn. R. Civ. App. P. 136.01, subd. 1(c) (stating that nonprecedential opinions may be cited as persuasive authority); *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. App. 1993) (stating that nonprecedential opinions “can be of persuasive value”). We agree with the district court that the allegations in the 47 complaint prepared by Hinshaw were litigation claims, not false representations. Also, as we noted in *Olson*, the Olsons’ answer to the 47 complaint expressly denied the allegations, which suggests that they did not rely on these statements. *See* 2016 WL 7338751, at *5.

We therefore conclude that the district court did not err by determining that the Olsons failed, as a matter of law, to present evidence that Hinshaw made “a false representation of a past or existing material fact.” *Cold Spring Granite Co.*, 802 N.W.2d at

⁵ *Olson* also cited *City of Barnum v. Sabri*, 657 N.W.2d 201, 205 (Minn. App. 2003), in which this court held that the burden to prove fraud is on the party seeking relief from a judgment. *Id.* at *4. We concluded accordingly in *Olson* that the district court did not err by determining “that appellants did not produce clear and convincing evidence of fraud inducing them to settle” and that “the district court acted within its discretion in denying relief.” *Id.* at *5.

373. The district court, therefore, did not abuse its discretion by granting summary judgment in Hinshaw’s favor on this issue or granting Hinshaw’s motion in limine to exclude arguments at trial that Hinshaw fraudulently drafted the 47 complaint.

II. The district court did not abuse its discretion by excluding evidence.

The Olsons challenge the district court’s evidentiary rulings. For our analysis, we have grouped the arguments into three categories, which we address in turn: the OLPR documents, Slator’s testimony, and the Kent-Worden documents. To prevail on an evidentiary issue, an appellant must establish that the district court erred and that excluding evidence prejudiced the appellant at trial. *Uselman v. Uselman*, 464 N.W.2d 130, 138 (Minn. 1990). During review, appellate courts “afford the district court broad discretion when ruling on evidentiary matters, and . . . will not reverse the district court absent an abuse of that discretion.” *Doe 136 v. Liebsch*, 872 N.W.2d 875, 879 (Minn. 2015).

A. OLPR Documents

The Olsons broadly argue that the district court abused its discretion by excluding the OLPR documents. The Olsons’ brief to this court refers to these exhibits: 11, 12, 57, 70, 71, 80, 83, 87, 89, 90, 91, 92, 97, 98, 99, 100, 104, 146, 147, 148, 156, and 157.

The Olsons failed to preserve error on all but two of these exhibits for appellate review.⁶ We generally decline to consider matters not argued to and considered by the district court. *Thiele*, 425 N.W.2d at 582. “Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected,” and the rules

⁶ We address exhibits 104 and 156 in section C below.

of evidence require that (1) the party makes a “timely objection or motion to strike” stating “the specific ground of objection” or that (2) the party makes an offer of proof, meaning “the substance of the evidence was made known to the court by offer or was apparent from the context.” Minn. R. Evid. 103(a). “Once the court makes a definitive ruling on the record admitting or excluding the evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error.” *Id.* Finally, a party may need to raise the evidence issue in a motion for a new trial to preserve an evidentiary issue for appeal. *Sauter v. Wasemiller*, 389 N.W.2d 200, 202 (Minn. 1986). In *County of Hennepin v. Bhakta*, however, the supreme court held that the rule in *Sauter* “does not apply to pretrial orders on motions in limine.” 922 N.W.2d 194, 199 (Minn. 2019).

We conclude that the Olsons cannot seek appellate review for OLPR documents that the Olsons did not offer into evidence, exhibits that were admitted by stipulation, or exhibits that were withdrawn after objection and for which there was no definitive pretrial or trial ruling on their admissibility. We consider each of these preservation issues in turn.

First, the Olsons did not offer several of the exhibits into evidence. Based on our review of the record, exhibits 57, 70, 71, 83, 89, 91, 92, 98, and 100 were not offered into evidence, even though the Olsons argue that these exhibits were “excluded” in their brief to this court.

Second, the district court received by stipulation some exhibits referenced in the Olsons’ brief to this court. Exhibits 11, 12, and 148, which are called the smoking gun documents, were admitted by stipulation as part of exhibit 161. The parties also stipulated to the admission of exhibits 146, 147, and 157.

Third, the Olsons withdrew—during trial and after Hinshaw objected to their admission—several exhibits identified in the Olsons’ brief to this court. For example, the Olsons offered exhibit 80, an email from Maria Olson to the OLPR investigator, during the direct examination of Maria Olson. Hinshaw objected, arguing that the exhibit was addressed in the district court’s order in limine, in which the district court determined that the Olsons “may not offer the OLPR investigation or any resulting reports as direct evidence of Hinshaw’s liability.” The objection was sustained, and the Olsons’ attorney withdrew exhibit 80.

Also, Hinshaw requested to exclude exhibits 87, 90, 97, and 99 during trial and after the in limine ruling. Hinshaw argued that these documents were excluded by the district court’s order on the motions in limine. The district court stated that it would assess each exhibit individually to determine whether it fell under the in limine ruling. The Olsons’ attorney then stated that they would “cut this whole thing short” and withdrew exhibits 87, 90, 97, and 99. Based on our review of the record, the Olsons did not attempt to introduce these exhibits again. Thus, the Olsons withdrew exhibits 80, 87, 90, 97, and 99. Accordingly, the Olsons neither offered the exhibits nor secured a ruling on their admissibility.

To the extent that the Olsons intend to challenge the district court’s in limine ruling excluding the OLPR documents for the purpose of showing liability, their brief to this court is unclear. Still, we assume without deciding that the Olsons make this argument. We first acknowledge that the district court’s in limine order states that the OLPR documents may be admitted to impeach a witness. To the extent that the Olsons argue an OLPR document was relevant for this limited purpose, they needed to offer the document into evidence for

impeachment during trial before they could claim on appeal that the document was excluded by the district court. *See* Minn. R. Evid. 103(a) (stating that an offer of proof is needed to preserve error in the exclusion of evidence).

Even assuming that the Olsons preserved the district court's exclusion of the OLPR documents as liability evidence and that they have raised the issue on appeal, we conclude that the district court did not abuse its discretion. The Minnesota Rules of Professional Conduct "are intended to discipline attorneys, not provide a basis for civil liability." *L & H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 380 (Minn. 1989). Although the opinion in *L & H Airco* does not address an evidentiary ruling, it establishes that the OLPR documents were of minimal probative value to the Olsons' claims against Hinshaw. Hinshaw persuasively argues that the risk of confusing the jury by admitting the OLPR documents substantially outweighed their minimal probative value. Accordingly, the district court did not abuse its discretion by excluding the OLPR documents as evidence of Hinshaw's liability.

B. Slator's Testimony

Before the Olsons called their first witness at trial, Hinshaw objected to testimony from Slator, an OLPR employee who provided documents to Maria Olson. Hinshaw argued, first, that Slator's testimony should be excluded based on the district court's ruling in limine about the OLPR documents. Second, Hinshaw argued that the Minnesota Rules of Professional Conduct "prohibit [Slator] from testifying" and cited Minn. R. Prof. Conduct 20(a)(4). Hinshaw acknowledged during trial that it did not raise the rule 20 argument in its motion in limine. The Olsons urged that Slator should be allowed to testify.

Eventually, the parties stipulated to receive exhibit 161, which included exhibits 11, 12, and 148, “in lieu of Slator’s testimony.” So, Slator did not testify.

The Olsons argue in their brief to this court that the district court improperly excluded Slator’s testimony. They contend that Hinshaw’s motion to exclude Slator’s testimony was “untimely, extremely prejudicial[,] and erroneously decided.” The Olsons also urge that it was improper to exclude Slator’s testimony under rule 20 of the Minnesota Rules of Professional Conduct because (1) the rule 20 objection was raised for the first time at trial, (2) “[r]ule 20 does not exclude attorney investigation documents released to a client,” and, (3) even if rule 20 did apply, the testimony would fall under the “extraordinary circumstances” exception.

As Hinshaw points out, the record does not support the Olsons’ arguments. The Olsons’ attorney stated that they sought to call Slator “for foundational purposes” to admit exhibits 11 and 12.⁷ After extended discussion, the parties stipulated to admit exhibits 11 and 12 as part of exhibit 161, which accomplished the stated reason for calling Slator.

We conclude that the Olsons failed to preserve this issue for appeal. After the off-the-record discussion and agreement to admit exhibit 161, the Olsons did not call Slator as a witness or object to admitting exhibit 161 in lieu of his testimony. The district court did not rule that Slator could not testify; the reason Slator did not testify was the parties’ stipulation. Accordingly, the district court did not abuse its discretion in its handling of Slator’s testimony.

⁷ These exhibits included emails from November 21, 2013, June 22, 2009, and June 23, 2009.

In the district court's order denying the Olsons' motion for a new trial, it determined that Slator's testimony was properly excluded under rule 20. We need not consider this analysis, however, because as stated above, Slator did not testify because the parties agreed to receive exhibit 161 "in lieu of Slator's testimony."

C. The Kent-Worden Documents

The Olsons argue that they "are entitled to a new trial based on the exclusion of necessary testimony and documents from decedents Scott Kent and Rolfe Worden," contending that the evidence was admissible under an exception to the hearsay rule.

We first address documents written by Worden, an attorney at Hinshaw who passed away before this litigation. At trial, the Olsons attempted to introduce exhibit 156, an email written by Worden "in connection with the 47 lawsuit." The Olsons proposed to lay foundation for exhibit 156 by showing that "it was disclosed in discovery" and offered to call one of their attorneys, Craig Beuning. The district court did not allow the Olsons to call Buening for this purpose but determined that the Olsons could introduce exhibit 156 during their cross-examination of Hinshaw's expert or if they otherwise laid proper foundation.

In its order denying the Olsons' motion for a new trial based on the exclusion of Beuning's testimony, the district court stated that Beuning "was not competent to provide foundation testimony for the admission of certain Hinshaw inter-office e-mails." The district court explained that Buening did not meet the standard to testify under Minn. R. Evid. 602, which requires that a witness have personal knowledge. The district court noted that the "only personal knowledge Mr. Beuning had was that he received the documents

from Hinshaw in discovery” and that he “did not have personal knowledge that the e-mails were authentic, i.e. that the e-mails were actually exchanged within Hinshaw.” The district court also noted that the Olsons “could have subpoenaed a custodian of records from Hinshaw or one of the individuals included on the e-mails” but failed to do so.

The Olsons argue in their brief to this court that they provided sufficient foundation “based on the fact the proffered evidence was in response to a discovery request” and that “Buening, the attorney who requested and received the documents through discovery, should have been allowed to testify” about these documents.

The district court did not abuse its discretion when it excluded Beuning’s testimony for the purpose identified. Under Minn. R. Evid. 602, a “witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” Receiving a document through discovery does not give an attorney personal knowledge to testify about a document’s foundation. Accordingly, the district court properly permitted the Olsons to introduce exhibit 156 only through the testimony of witnesses with personal knowledge about its foundation or during the cross-examination of Hinshaw’s expert.

Second, we consider exhibit 104, an email sent by Kent that related to Mora Bank and to which the parties refer as the “Scott Kent Letter.” In its order denying a new trial, the district court reiterated that it sustained Hinshaw’s objection to exhibit 104 because the letter “was not relevant to the claims at trial.” The district court added that “Hinshaw was not a recipient of Kent’s e-mail in 2015 and had withdrawn as Mora Bank’s counsel over two years earlier.” The district court also cited Minn. R. Evid. 403 and determined

that admitting exhibit 104 would have a “strong potential of prejudicing the jury” because the letter “alleged wrongdoing on behalf of Mora Bank, not on behalf of Hinshaw.”

In their brief to this court, the Olsons argue that the district court abused its discretion by excluding exhibit 104, relying on an exception to the hearsay rule. *See* Minn. R. Evid. 806 (stating that “[w]hen a hearsay statement . . . has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness”). Hinshaw counters that the district court did not abuse its discretion by excluding exhibit 104 under Minn. R. Evid. 403.

Rule 403 allows the district court to exclude evidence when it determines that the risk of prejudice or potential confusion for the jury substantially outweighs the probative value of the evidence. Here, the probative value of exhibit 104 was low because, as the district court pointed out, Hinshaw was not mentioned in exhibit 104, did not receive exhibit 104, and had withdrawn from the Mora Bank litigation two years before exhibit 104 was written. The risk of prejudice or confusion of the issues for the jury was high because exhibit 104 suggested wrongful conduct by Mora Bank, a nonparty to this action. Accordingly, the district court did not abuse its discretion by excluding exhibit 104, and we need not address the Olsons’ argument that the letter is admissible under a hearsay exception.

III. The district court did not abuse its discretion in giving a curative instruction after the Olsons' opening statement.

During opening statements, the Olsons' attorney referred to the OLPR investigation and stated that Maria Olson "did a complaint to the lawyers ethics board and said, 'Wait a minute here. They've got no right to do this.'" Hinshaw objected, arguing that "based on the court's order and the motions in limine, this isn't part of the case." The district court "grant[ed] the objection, allow[ed] the statement as made on the record to stand, and order[ed] no further discussion on the topic."

Hinshaw later asked the district court to give a curative instruction and offered the following instruction:

The Olsons' lawyer, in his opening statement to you, said that Maria Olson made a complaint about Hinshaw & Culbertson to the Office of Lawyers Professional Responsibility (OLPR), which is the state agency that enforces the ethical rules of lawyer conduct. You are advised that Maria Olson did make an ethical complaint to the OLPR, that the OLPR investigated the complaint, and that the OLPR determined that Hinshaw & Culbertson had not violated any ethical rule.

The Olsons responded and argued that a "more accurate rendering of [their] situation [w]ould be" the following instruction:

During his opening, Plaintiff's counsel stated that Ms. Olson had filed an ethical complaint. The Office of Lawyers Professional Responsibility, which is charged with making determinations on matters related to alleged misconduct by lawyers in Minnesota, investigated the complaint and found

that discipline against Hinshaw & Culbertson was not warranted.

The Olsons also asked the district court to add language stating, “The trial (district) court is, in general, in a better position than the Director in a disciplinary proceeding to determine whether a party’s allegations in a pleading had a basis in law and fact.”

The district court noted that it “believe[d] the parties reached a neutral and even-handed curative instruction” and accepted the stipulated instruction “as it was offered.” The district court then read the jury instruction proposed by the Olsons after both parties had rested, although the district court did not include the extra language about the district court being in a better position than the OLPR director. The Olsons did not object, and the district court denied the Olsons’ motion for a new trial on this issue.

On appeal, the Olsons argue that the curative instruction was “erroneously given, untimely, [and] misleading.” “The district court has broad discretion in determining jury instructions and [appellate courts] will not reverse in the absence of abuse of discretion.” *Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 147 (Minn. 2002). “District courts are allowed considerable latitude in selecting language used in the jury charge and determining the propriety of a specific instruction.” *Morlock v. St. Paul Guardian Ins. Co.*, 650 N.W.2d 154, 159 (Minn. 2002).

The Olsons claim that they objected to the curative instruction before it was given, “during the May 6, 2023 Zoom conference occurring after all parties had rested.” The Olsons also argue that the instruction “was a misleading portrayal of what the [OLPR] stated” because the instruction stated that the OLPR found that “discipline against Hinshaw

was not warranted” but “the District Ethics Committee did not find that Hinshaw did nothing wrong” and made an “18-0 decision recommending sanctions.” The Olsons acknowledge that the director “decided that sanctions [should] not be imposed [and] the matter [should] be decided in district court.” Finally, the Olsons contend that the curative instruction was prejudicial because it “inform[ed] the jury of an [OLPR] decision not to discipline [Hinshaw], while not allowing [the Olsons] to present any evidence or context concerning the investigation and conclusions of the OLPR.”

Hinshaw argues that the district court properly determined that the Olsons did not object to the curative instruction. Hinshaw also emphasizes that the curative instruction used language that the Olsons urged was “more accurate.” Finally, Hinshaw argues that the curative instruction was not prejudicial to the Olsons.

In the district court’s order denying a new trial, the court noted that the Olsons “never objected to the Court’s curative instruction” and that “[t]o the extent [the Olsons] raised an objection at the Zoom conference . . . as counsel well knew, there was no court reporter present and so no objection was recorded.” The district court also noted that the Olsons’ attorney “admitted” at the hearing on the motion for a new trial that the Olsons “did not subsequently put an objection to the curative instruction on the record.”

“A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds of the objection.” Minn. R. Civ. P. 51.03(a). Parties “preserve[] an objection for appeal by asserting a proper objection pursuant to rule 51.03.” *Poppler v. Wright Hennepin Co-op Elec. Ass’n*, 834 N.W.2d 527, 550 (Minn. App. 2013) (citing Minn. R. Civ. P. 51.04(a)). When a party

does not object to a jury instruction, appellate courts may review the instruction for plain error. *Id.* (citing Minn. R. Civ. P. 51.04(b)). Still, “the doctrine of invited error . . . precludes a party from asserting error on appeal which he invited or could have prevented in the court below.” *In re Hibbing Taconite Mine & Stockpile Progression*, 888 N.W.2d 336, 344 (Minn. App. 2016) (quotation omitted).

The Olsons not only failed to object to the curative instruction on the record, but they also suggested the language that the district court used in the curative instruction. The Olsons do not claim that any error was plain or fundamental. Therefore, the Olsons failed to preserve this issue for appeal both by inviting the district court to give the instruction and by failing to object. Accordingly, we need not determine whether the curative instruction was prejudicial to the Olsons.

Given that we reject each of the Olsons’ three issues on appeal, we need not consider Hinshaw’s alternate motion for judgment as a matter of law based on arguments that the Olsons’ claims are barred by the statute of limitations and that the Olsons failed to present a *prima facie* case.

Affirmed.