

*This opinion is nonprecedential except as provided by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
A24-1400**

Raymond Kvalvog,
Appellant,

vs.

Garth Unke, et al.,
Respondents.

**Filed August 11, 2025
Affirmed
Ross, Judge**

Otter Tail County District Court
File No. 56-CV-23-1466

Kevin T. Duffy, Duffy Law Office, Thief River Falls, Minnesota (for appellant)

Richard J. Thomas, Chris Angell, Burke & Thomas, PLLP, Arden Hills, Minnesota (for respondents)

Considered and decided by Ross, Presiding Judge; Wheelock, Judge; and Halbrooks, Judge.*

NONPRECEDENTIAL OPINION

ROSS, Judge

Two sons of Raymond Kvalvog were killed and others injured when a car driven by one of the sons rolled into a highway median. An injured crash survivor sued Kvalvog,

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

whose insurer appointed Garth Unke to serve as his defense counsel. Kvalvog's insurer settled the suit against Kvalvog's wishes, leading Kvalvog to sue Unke and his law firm, alleging attorney malpractice. Unke successfully moved for summary judgment because Kvalvog failed to allege compensable damages. Kvalvog appeals, arguing that he could recover nominal damages, forfeited attorney fees, damages from unexplored claims, and the costs of his insurance-premium increases. For each theory, Kvalvog either suffered no damage, forfeited the argument by not raising it in the district court, or failed to offer more than speculation in support. We therefore affirm.

FACTS

We base this review of the district court's grant of summary judgment against Raymond Kvalvog on the undisputed evidence and on any disputed evidence construed in the light most favorable to his claims. *See* Minn. R. Civ. P. 56; *Warren v. Dinter*, 926 N.W.2d 370, 375 (Minn. 2019). This case is a tertiary dispute, arising from two others that followed closer to the June 2015 Interstate 94 tragic collision detailed in *Kvalvog v. Lee*, No. A20-0693, 2021 WL 3027269, at *1 (Minn. App. July 19, 2021), *rev. denied* (Minn. Sept. 29, 2021). The collision involved teenagers Zachary and Connor Kvalvog, who were killed while they traveled to a high school basketball tournament with teammates. Zachary was driving his parents' pickup truck with Connor, Mark Schwandt, and Jimmy Morton as passengers, while other teammates convoyed in two other vehicles. The other two vehicles, one driven by the boys' coach Josh Lee, passed a semitruck, but as Zachary tried to pass, the semi began moving into his lane and Zachary lost control of the pickup, which rolled in the median. The collision killed the Kvalvog brothers and injured Schwandt and Morton.

Initial Litigation

Kvalvog and his wife sued Lee, their sons' school, the pickup's manufacturer, and their own insurer. Lee and the school filed a third-party complaint against the unidentified semi driver. Minnesota State Trooper Rod Eischens, who had prepared a crash-investigation report, testified that the semi's encroaching into Zachary's lane caused the crash. A jury found that the semi driver was solely negligent and caused the collision. The Kvalvogs later unsuccessfully moved for relief from judgment, alleging newly discovered personal connections between Trooper Eischens and people associated with the school, including the school's principal, Chris Nellermoe. The district court in that case did not allow the Kvalvogs to depose Trooper Eischens, and we affirmed both the decisions against the Kvalvogs. *Id.* at *8, *12.

Secondary Litigation

Schwandt later sued Kvalvog, Lee, his own insurer, and the school for injuries he suffered in the crash. He alleged that Zachary had been negligent and contributed to the accident, and that Kvalvog had negligently entrusted his pickup to Zachary. Kvalvog's insurer, Secura Supreme Insurance Company, appointed Garth Unke to defend Kvalvog in that suit. Kvalvog denied liability and asserted cross-claims against Lee and the school for contribution and indemnity. Unke allegedly had led Kvalvog to believe that his cross-claims could be amended to include additional claims against the school, Nellermoe, Lee, and Schwandt after obtaining the "crucial depositions" of Nellermoe's wife and Trooper Eischens.

Kvalvog wanted Unke to delay scheduled settlement mediation until he could add the other claims, but, at Unke's urging, Kvalvog agreed to the mediation. Unke and Kvalvog had no intention of settling, however, believing Schwandt's claim to be meritless. Although Unke assured Kvalvog that he would have an active role in the discussions, he mostly left Kvalvog out of them. Secura assigned its representative to participate in the mediation, and the representative settled the case on Kvalvog's behalf for \$250,000 to be paid by the insurance company, agreeing to a *Pierringer* release allowing the plaintiff to pursue claims against other defendants. According to Kvalvog, Unke "essentially" told him after the mediation that Secura was a good-paying client of his and he did not feel he could go against its wishes. He believes in essence that Unke tricked him into going forward with the mediation knowing that Secura intended to settle. Kvalvog complained that Unke should have advised him of Secura's plans to settle and that Kvalvog had the right to his own independent counsel and assuming uninsured liability for Schwandt's claims.

Kvalvog moved the district court to stay the settlement agreement so that he could pursue his claims. He said that he wanted "a little time to simply take the depositions . . . of Sergeant Eischens, so [he and his wife could] finally have some peace of mind." He added, "I am not trying to hold up any money or anybody's settlement." He emphasized, "It's not about the money. It's never been about the money." The district court denied his motion, and Kvalvog appealed, arguing that the district court should have stayed the settlement because Unke did not "live up to his fiduciary duty to Kvalvog when he agreed to settle . . . because the settlement caused Kvalvog to lose his cross-claims and planned depositions." *Schwandt v. Park Christian Sch.*, No. A23-0052, 2023 WL 6054270, at *5

(Minn. App. Sept. 18, 2023) (quotation marks omitted), *rev. denied* (Minn. Dec. 19, 2023).

We rejected the argument and affirmed, reasoning that Kvalvog had failed to show that the district court erred or establish that the alleged error harmed him. *Id.* at *6, *8. We observed that the settlement included a *Pierringer* release and that Kvalvog’s cross-claims for contribution and indemnity were therefore extinguished in the settlement. *Id.* at *7. And we concluded that Kvalvog’s inability to take the depositions did not prejudice him:

We acknowledge Kvalvog’s understandable anguish and desire for information about the accident that caused the deaths of his two sons. Still, “the only objective of the pretrial discovery rules is to allow a party to obtain all of the facts relative to a claim or defense.” . . . Because “[a]ll claims in this matter have resolved,” including any claims against Kvalvog and Kvalvog’s cross-claims, the depositions of the state trooper and the PCS principal’s wife are no longer “relevant to any party’s claim.” Minn. R. Civ. P. 26.02(b).

Id.

Tertiary Litigation

Kvalvog’s litigation persists in this action. Kvalvog, unrepresented by legal counsel, filed a civil complaint naming Unke and his law firm of Stich, Angell, Kreidler & Unke P.A. as defendants. The complaint alleges that Unke breached his duty of care to Kvalvog through his representation in the Schwandt action against him. This breach allegedly prevented Kvalvog from pursuing a counterclaim against Schwandt, from recovering on his cross-claim against the school, and from deposing Trooper Eischens and Nellerhoe’s wife.

Unke and his law firm moved for summary judgment on the ground that Kvalvog had not presented and could not present any evidence of compensable damages from

Unke's alleged malpractice. Kvalvog opposed the motion, naming various theories of damages, most stemming from potential claims he might rest on possible new evidence from the depositions. Kvalvog also maintained that he was harmed because he had lost insurance coverage because of the settlement and had trouble finding new coverage.

The district court granted the motion for summary judgment, dismissing Kvalvog's complaint. Kvalvog appeals.

DECISION

Kvalvog argues that the district court erred by granting the respondents summary judgment. The district court should enter summary judgment when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.01; *Warren*, 926 N.W.2d at 374. We review a challenge to summary judgment *de novo* based on the undisputed evidence and viewing any disputed evidence in the light most favorable to the nonmoving party. *See Warren*, 926 N.W.2d at 374–75. Kvalvog contends that his complaint should survive summary judgment because his damages might be measured from his lost claims as well as his potential success in other actions. He also argues that, under a breach-of-fiduciary-duty theory, the district court could award him fee-forfeiture or nominal damages. And he maintains that he might obtain a damages award based on his increased insurance costs. We address each argument.

Kvalvog alleges harms stemming from the Schwandt settlement. We adopt our previous reasoning in the Schwandt suit and our conclusion that Kvalvog was not harmed by the loss of his cross-claims and depositions. Kvalvog's claims in the Schwandt action included contribution and indemnity, seeking to shift the burden of his liability. We held

that because Kvalvog, the school, and Lee settled with Schwandt on a *Pierringer* basis, each tortfeasor was obligated to pay only his proportionate share of liability. *Schwandt*, 2023 WL 6054270, at *7. We recognized that contribution or indemnity claims brought by any nonsettling defendant against the settling defendants are barred and that no party could bring a claim against Kvalvog, Lee, or the school for contribution or indemnity. *Id.* We observed that pretrial discovery is designed only to reveal facts that bear on a claim or defense. *Id.* And we concluded that, because the settlement resolved all the claims in the matter, including Kvalvog's, no facts remained to be discovered relevant to any claim or defense. *Id.* Our reasoning resolved the questions central to Kvalvog's alleged harm in that case and here to the extent he alleges harms based on contribution or indemnity.

We must address Kvalvog's contention that he might have discovered evidence through the hoped-for depositions to build claims beyond contribution and indemnity, or to pursue claims in other actions. The district court here construed Kvalvog's potential claims as malicious prosecution, defamation, fraud, misrepresentation, and intentional infliction of emotional distress. Kvalvog does not contest this characterization on appeal, and we limit our review to these potential bases of recovery.

Kvalvog faces a central problem in basing his present litigation on the theory that Unke's alleged malpractice cost him the opportunity to find evidence to support these yet-unasserted claims: Unke's alleged malpractice did not impair Kvalvog's ability to pursue these claims. These claims are all tort claims. *See Leiendecker v. Asian Women United of Minn.*, 731 N.W.2d 836, 841 (Minn. App. 2007) (defamation), *rev. denied* (Minn. Aug. 7, 2007); *G.A.W., III v. D.M.W.*, 596 N.W.2d 284, 286–87 (Minn. App. 1999) (fraud and

intentional infliction of emotional distress), *rev. denied* (Minn. Sept. 28, 1999); *Kellar v. VonHoltum*, 568 N.W.2d 186, 192 (Minn. App. 1997) (malicious prosecution), *rev. denied* (Minn. Oct. 31, 1997); *M.H. v. Caritas Fam. Servs.*, 488 N.W.2d 282, 287 (Minn. 1992) (misrepresentation). And tort claims are not compulsory, meaning that a party who fails to assert them in one action is not precluded from doing so in a later action. *See* Minn. R. Civ. P. 13.01; *Leiendecker*, 731 N.W.2d at 840. Likewise, “[c]ross-claims are not mandatory or compulsory in Minnesota.” *Denzer v. Frisch*, 430 N.W.2d 471, 475 (Minn. App. 1988); *see* Minn. R. Civ. P. 13.07. Kvalvog therefore did not lose the ability to pursue these claims and presumably undertake discovery because of the settlement of Schwandt’s suit. We add that, relatedly, one would have to speculate to conclude that the untaken depositions would have revealed evidence favorable to any unasserted tort claim, or any claims Kvalvog might make to re-open the initial litigation; and speculation is an insufficient ground on which to establish a genuine issue of material fact to avoid summary judgment. *Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993). For these reasons, Kvalvog’s unmade tort claims provide no reason to reverse the district court’s summary-judgment decision.

Kvalvog’s arguments center on damages he could secure under a breach-of-fiduciary-duty theory in the form of nominal damages or Unke’s forfeiting his attorney fees. But “[p]laintiffs are not entitled to recover on a theory neither plead[ed] nor voluntarily litigated.” *Folk v. Home Mut. Ins. Co.*, 336 N.W.2d 265, 266 (Minn. 1983). Professional-negligence and breach-of-fiduciary-duty claims against attorneys are distinct, in that successful professional-negligence claims involve an attorney’s breaching a

standard of care and successful fiduciary-duty claims involve an attorney's breaching a standard of conduct. *Mittelstaedt v. Henney*, 969 N.W.2d 634, 639 (Minn. 2022). Kvalvog concedes—seemingly contrary to the record—that he did not reference a fiduciary-duty claim during the summary-judgment proceedings. But Kvalvog's complaint focuses on Unke's allegedly breaching a standard of care rather than a standard of conduct. Under this state's notice-pleading standard, *see Halva v. Minn. State Colls. & Univs.*, 953 N.W.2d 496, 500 (Minn. 2021), Kvalvog never put respondents on notice that he was making a fiduciary-duty claim and does not allege that they consented to litigate it. And he also failed to make the attorney-fee-forfeiture and nominal-damages arguments that he now asserts arise from a fiduciary-duty claim. Under *Thiele v. Stich*, we decline to decide these damages arguments as they were not argued to or considered by the district court. 425 N.W.2d 580, 582 (Minn. 1988). Although Kvalvog insists that his nominal-damages and fee-forfeiture arguments were implicit in his alleged fiduciary-duty claim and urges us to address the issue in the interests of justice, *see Minn. R. Civ. App. P. 103.04*, we decline to do so.

Kvalvog argues too that he suffered harm from being left to pay increased insurance premiums and from spending time searching for a new insurance company after Secura dropped his coverage allegedly because of the settlement. The district court rejected this argument in part because Kvalvog failed to submit specific evidence to support it. Damages that are remote and speculative cannot be recovered. *Jackson v. Reiling*, 249 N.W.2d 896, 897 (Minn. 1977). Because there is no general test for determining whether damages are remote or speculative, we generally defer to the district court's assessment. *Id.*; *Bryson v.*

Pillsbury Co., 573 N.W.2d 718, 722 (Minn. App. 1998) (applying this principal to a district court’s granting summary judgment on damages). Kvalvog’s cited evidence here is meager. He did not offer any evidence showing the difference in premiums between his former and new insurance policies or specifically showing the extent of time and effort he spent seeking a new insurer. Although “uncertainty as to the amount [of damages] is not” always fatal to a claim, *Olson v. Aretz*, 346 N.W.2d 178, 183 (Minn. App. 1984) (quotation omitted), “[m]ere speculation, without some concrete evidence, is not enough to avoid summary judgment,” *Bob Useldinger & Sons*, 505 N.W.2d at 328. Affording the district court deference in this damages determination, we hold that Kvalvog’s evidentially unsupported generalizations about damages from his change of insurance are too speculative to survive respondent’s summary-judgment motion.

Kvalvog cursorily asserts that the district court erred in its conclusions on each type of harm he argued to the district court. He bears the burden on appeal of showing prejudicial error. *Loth v. Loth*, 35 N.W.2d 542, 546 (Minn. 1949). Without citing the record or legal authority in support, he does not lead us to conclude that he was prejudiced by the district court’s treatment of his arguments that we have not otherwise addressed. And our *de novo* review satisfies us that the district court properly entered summary judgment favoring Unke and his law firm.

We emphasize, as we have in prior cases arising from the underlying crash, that we know the death of Kvalvog’s sons was tragic and that we are not the least unsympathetic

to the ongoing quest for answers and the effort to properly assign fault. Our affirmance speaks only to the legal questions presented in this appeal.

Affirmed.