STATE OF MINNESOTA

IN COURT OF APPEALS

A25-1665

Jason L Gabbert,

Appellant,

vs.

Marshall Dental Excellence, et al.,

Respondents.

ORDER OPINION

Lyon County District Court
File No. 42-CV-24-850

Considered and decided by Ede, Presiding Judge; Harris, Judge; and Jesson, Judge.*

BASED ON THE FILE, RECORD, AND PROCEEDINGS, AND BECAUSE:

1. This is an appeal from a final judgment for respondents Marshall Dental Excellence (MDE), Dr. Andrew Frerich, and Kate Frerich following the district court's order dismissing appellant Jason L. Gabbert's claim for breach of contract and the covenant of good faith and fair dealing for failure to state a claim upon which relief could be granted.[1] Gabbert argues that the district court erred by: (1) failing to acknowledge a warranty of merchantability under Minnesota Statutes section 336.2-314 (2024) and

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to article VI, section 10 of the Minnesota Constitution.

[1] According to Gabbert's amended complaint against the respondents, Dr. Andrew Frerich was the owner and a practicing dentist at MDE, and Kate Frerich was MDE's office manager. Because these two respondents share the same last name, we refer below to Dr. Andrew Frerich as "Dr. Frerich" and Kate Frerich as "Frerich."

(2) requiring him to submit an expert affidavit in support of his breach-of-contract claim. We affirm.

2. In June 2022, Gabbert consulted with MDE about replacing a broken dental bridge.[2] Dr. Frerich recommended a permanent bridge that would cost $2,576.02, and Gabbert "agreed to the procedure." Gabbert paid the $2,576.02 cost and MDE installed a permanent bridge in August.

3. In late August, the permanent bridge became dislodged and broke. Dr. Frerich examined Gabbert, and a temporary bridge was installed in September. MDE informed Gabbert that it would order a replacement permanent bridge and scheduled an installation appointment for November.

4. After the temporary bridge became dislodged and broke in October, however, Gabbert "asked that he be scheduled immediately for installation of the [replacement] permanent bridge." In response to Gabbert's request, Frerich stated that "the dental laboratory . . . was backlogged and the [permanent] bridge would not be delivered until just prior to his scheduled appointment" in November. Gabbert then "requested that he be fitted with a temporary bridge until the permanent bridge could be installed, but . . . Frerich stated that [MDE] was experiencing a patient backlog and he would have

[2] Consistent with applicable law, our factual summary stems from the allegations set forth in Gabbert's amended complaint, which we accept as true and construe in the light most favorable to Gabbert, who was the nonmoving party before the district court. *See Halva v. Minn. State Colls. & Univs.*, 953 N.W.2d 496, 500 (Minn. 2021) (explaining that, in reviewing a district court's decision to grant a motion to dismiss under Minn. R. Civ. P. 12.02, appellate courts "must accept the facts alleged in the complaint as true and construe all reasonable inferences in favor of the nonmoving party" (quotation omitted)).

to wait until his scheduled appointment" in November. Frerich later informed Gabbert that MDE "had decided to terminate him as a patient," cancelled the order for the replacement permanent bridge, and would not refund the $2,576.02 that Gabbert had paid for the first permanent bridge MDE installed in August. Gabbert then sought treatment from a different provider, which gave him a temporary bridge in mid-October and installed a permanent bridge at the end of October.

5. After Gabbert commenced the underlying lawsuit against respondents claiming breach of contract and the covenant of good faith and fair dealing, respondents moved to dismiss under Minnesota Rule of Civil Procedure 12.02(e), asserting that Gabbert had failed to state a claim upon which relief could be granted. The district court granted respondents' motion, dismissed Gabbert's complaint and amended complaint with prejudice, and entered final judgment for respondents. Gabbert appeals.

6. Appellate courts "review de novo whether a complaint has stated a claim sufficiently to survive a motion to dismiss." *State of Minn. Off. of Att'y Gen. v. Madison Equities, Inc.*, 29 N.W.3d 700, 706 (Minn. 2026) (quotation omitted). Self-represented litigants are "generally held to the same standards as attorneys," but "some accommodations may be made for" them. *Fitzgerald v. Fitzgerald*, 629 N.W.2d 115, 119 (Minn. App. 2001). And "[a] reviewing court must generally consider only those issues that the record shows were presented [to] and considered by the [district] court. . . ." *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (quotation omitted). "Nor may a party obtain review by raising the same general issue litigated below but under a different theory." *Id.*

7. In his self-represented appellate brief, Gabbert first contends that "[t]he parties formed a contract for the purchase of a permanent dental bridge, for which the Appellant paid $2,576.02[,]" that "[t]he contract contained an implied warranty of merchantability, as required by Minn. Stat. [§] 336.2-314[,]" and that "[t]he district court's order to dismiss is rooted in a failure to acknowledge the warranty in the contract" because, "[w]hen the respondents failed to replace the bridge, the warranty was dishonored and the contract breached."

8. We conclude that Gabbert has forfeited any contention about the implied warranty of merchantability because he did not present such an argument to the district court and the court did not consider the issue in the underlying proceedings. Gabbert failed to allege a breach of warranty of merchantability in his initial and amended complaints, and he did not maintain that assertion in opposing respondent's motion to dismiss. Instead, Gabbert raised the implied warranty of merchantability only in a September 18, 2025 letter requesting leave to file a motion for reconsideration of the district court's order granting respondents' motion to dismiss. *See* Minn. Gen. R. Prac. 115.11 1997 comm. cmt. ("Motions for reconsideration are not opportunities for presentation of . . . arguments available when the prior motion was considered."); *see also State v. Allwine*, 963 N.W.2d 178, 190 (Minn. 2021) (citing with approval Minn. Gen. R. Prac. 115.11 1997 comm. cmt. for the above proposition). Because the district court neither considered nor ruled on the merits of Gabbert's belated implied-warranty-of-merchantability argument, and because

Gabbert did not raise the issue before the entry of the order underlying the appeal now before us, it is forfeited. *See Thiele*, 425 N.W.2d at 582.[3]

9. Gabbert next argues that "[t]he district court's dismissal of the claim on the grounds that no expert affidavit was submitted is an error." In other words, Gabbert maintains that the district court erred by determining that, to the extent his amended complaint asserted negligence or malpractice by the respondents, he was required to provide an expert affidavit. The district court's memorandum explaining its dismissal order states: "Insofar as [Gabbert's] claims incorporate or imply malpractice or negligence, [Gabbert] has failed to file the required expert affidavits[,] and [those] claim[s] would also fail as a matter of law warranting dismissal."

10. Because "courts are to construe pleadings liberally" and the amended complaint could be read as asserting negligence or malpractice claims, we conclude that the district court correctly considered whether such claims fail as a matter of law. *Home Ins. Co. v. Nat'l Union Fire Ins. of Pittsburgh*, 658 N.W.2d 522, 535 (Minn. 2003); *see also* Minn. R. Civ. P. 8.06 ("All pleadings shall be so construed as to do substantial justice."). Moreover, the district court expressly distinguished its analysis of Gabbert's breach-of-contract claim from its consideration of any implicit claims of malpractice or

[3] We also note that the implied warranty of merchantability does not apply here because the predominant purpose of the parties' contract was for non-goods. *See Vermillion State Bank v. Tennis Sanitation, LLC*, 947 N.W.2d 456, 469 (Minn. App. 2020) (concluding that the implied warranty of merchantability did not apply when the predominant purpose of the parties' contract was for non-goods), *aff'd*, 969 N.W.2d 610 (Minn. 2022). Indeed, Gabbert alleges in the amended complaint that "[t]his lawsuit arises from . . . [respondents'] failure to render the services for which . . . [Gabbert] paid and . . . [respondents'] unlawful and unethical actions relating to it."

negligence by acknowledging that Gabbert "is not specifically claiming malpractice or negligence." And the district court addressed the expert-affidavit requirement only "to the extent that such . . . claim[s] [(i.e., malpractice or negligence claims)] [are] implied in the amended complaint." Because Gabbert's only claim before the district court and on appeal is breach of contract and the covenant of good faith and fair dealing, and because the district court's reasoning about the lack of expert affidavits did not justify dismissing that claim, Gabbert's expert-affidavit challenge cannot be a ground for reversing the district court's dismissal decision. In short, Gabbert has established no error by the district court.

IT IS HEREBY ORDERED:

1. The district court's judgment is affirmed.

2. Pursuant to Minnesota Rule of Civil Appellate Procedure 136.01, subdivision 1(c), this order opinion is nonprecedential, except as law of the case, res judicata, or collateral estoppel.

Dated: April 28, 2026

BY THE COURT

Keala C. Ede

Judge Keala C. Ede