STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1848

State of Minnesota by its
Attorney General, Lori Swanson,
Respondent,

vs.

American Family Prepaid Legal Corporation,
d/b/a American Family Legal Plan, et al.,
Appellants,

Stanley Norman,
Defendant.

Filed July 2, 2012
Affirmed
Halbrooks, Judge

Hennepin County District Court
File No. 27-CV-07-4102

Lori Swanson, Attorney General, James W. Canaday, Benjamin J. Velzen, Assistant Attorneys General, St. Paul, Minnesota (for respondent)

Martin A. Carlson, Law Offices of Martin A. Carlson, Ltd., Minneapolis, Minnesota; and

Robert V. Espeset, Espelaw PLLC, White Bear Lake, Minnesota (for appellants)

Sean Burke, Legal Aid Society of Minneapolis, Minneapolis, Minnesota (for amicus curiae AARP)

Considered and decided by Halbrooks, Presiding Judge; Worke, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

In this legal-services and insurance-product consumer-fraud case, appellants American Family Prepaid Legal Corporation d/b/a American Family Legal Plan (AFLP), Heritage Marketing and Insurance Services, Inc. (Heritage), and Jeffrey Norman[1] challenge the judgment of the district court (1) finding them jointly and severally liable on all ten counts of consumer-fraud and insurance-law violations alleged in the state's amended complaint; (2) permanently enjoining appellants and Stanley Norman from selling or marketing any legal or insurance products or services in Minnesota; and (3) ordering appellants and Stanley Norman to pay restitution, sanctions, civil penalties, and attorney fees and costs. We affirm.

FACTS

Stanley and Jeffrey Norman are in business together. Stanley Norman is the president of AFLP and chief executive officer of Heritage, while Jeffrey Norman is the chief executive officer of AFLP and the president of Heritage. The Normans are the sole corporate officers and shareholders of AFLP and Heritage, each owning 50% of the shares of the respective companies. AFLP and Heritage are described by the Normans as

[1] Jeffrey Norman and his father Stanley Norman together own AFLP and Heritage. They both participated in this matter before the district court but Stanley Norman did not join in the appeal. References to AFLP, Heritage, Jeffrey Norman, and Stanley Norman will therefore hereafter be written as "Appellants and Stanley Norman."

"separate and distinct, but complementary companies." AFLP sells prepaid legal plans, marketed specifically to consumers over the age of 65, with a focus on estate-planning services. Heritage sells insurance products, almost always in the form of deferred annuities offered by third-party insurance companies, to AFLP plan members.

To begin the sales process, an AFLP sales agent meets with a consumer who has responded to direct mailings offering prepaid estate-planning services; the meetings typically take place in the consumer's home. Although the AFLP sales agents are not attorneys and are not trained in Minnesota probate law, trial testimony demonstrated that the sales agents convinced elderly potential plan members to purchase the prepaid legal services by stressing that probate is a prohibitively expensive process that is fraught with uncertainty. During the period relevant to this matter (2005-2007), 1,277 seniors purchased AFLP's prepaid legal plan; the average age of the plan members was approximately 75.

After an individual purchased the prepaid legal-services plan, at a typical price of approximately $2,000, the plan member's file was referred to a Michigan-based law firm that provided estate-planning services to the plan member; the service provided was almost always a living trust. The Michigan law firm received a flat fee of $275 for each plan member. At trial, an AFLP plan attorney and an attorney hired by an 82-year-old after AFLP sold her a trust testified that consumers were sold trusts that were either unnecessary or actually harmful to the consumer's financial situation. In one instance, a trust was sold to a senior who already had a viable estate plan. In addition, because the living-trust documents prepared by the AFLP plan attorneys tended to be generic,

standard-form trusts, they frequently contained errors, including references to Michigan law (presumably because the documents were frequently prepared by a Michigan law firm), as well as inaccuracies concerning the names of parties involved and the location of the property held in trust.

Once the living trusts were ready for delivery, they were given to insurance agents employed by Heritage, who, under the pretext of delivering the documents to each consumer, gained entry to each consumer's home and then attempted to sell long-term deferred annuities. The Heritage agents used financial information gleaned from the trust documents to determine the amount and terms of the annuity the agent would attempt to sell to each consumer. The Heritage training manual states that the legal plan provides Heritage a "significant pipeline" to sell insurance products such as annuities. The training manual further states that Heritage agents are not to disclose to the seniors that the purpose of the agent's visit is to sell annuities, and that the success of the annuity business depends on keeping the true purpose of the agent's visit secret for as long as possible. Several seniors testified at trial that they were unaware that, when the Heritage agent came to their home with the estate-planning documents, the agent would attempt to sell them an annuity. Agents were instructed to begin completing the application paperwork before the consumer had finished asking questions.

Of the 1,277 seniors who became AFLP plan members, 328 purchased a deferred annuity from Heritage. The average age of the Heritage customers was 75. The annuities sold by Heritage were often completely unsuitable for seniors. For instance, testimony reflected that Heritage sold many annuities that would tie up as much as 89% of a

consumer's assets for as long as 14 years; this amount of time is obviously impractical when considering that the average age of the Heritage clients was 75. In addition, Heritage either failed to notify consumers about withdrawal penalties or inaccurately told seniors that they could access their funds immediately without any penalty. Several seniors testified that they would not have purchased the annuities had they known about the penalties.

The state commenced this action against AFLP and Heritage in March 2007 and filed an amended complaint on May 13, 2008, adding direct claims against the Normans. The amended complaint alleged ten counts against appellants and Stanley Norman—all for violations of consumer-protection and insurance statutes. A bench trial took place in June, September, and December 2009. In a 55-page order filed April 9, 2010, the district court found appellants and Stanley Norman jointly and severally liable on all ten counts alleged in the amended complaint, permanently enjoined appellants and Stanley Norman from marketing or selling any legal or insurance products in Minnesota, and ordered appellants and Stanley Norman to pay restitution and a sanction to the state. In an order filed September 27, 2010, the district court ordered appellants and Stanley Norman to pay civil penalties and attorney fees and costs. The total judgment ordered against appellants and Stanley Norman exceeded $7,000,000.

The district court's order repeatedly stresses the fundamental deception at the heart of appellants' business model: appellants disguised the intent to make insurance sales by preceding it with a legal-services-plan sale and estate-plan preparation. The district court specifically found that the joint business plan was "developed primarily for

the creation of annuity sales leads via a profit-generating legal plan business." The district court also found that the business plan provided a "strikingly detailed admission of the true nature of [appellants'] operation" because it "viewed annuity sales as the primary purpose of both AFLP and Heritage." The district court made extensive findings concerning AFLP and Heritage's deceptive and incomplete presentations, which tended to make seniors first fear the probate process (which AFLP agents presented as burdensome and expensive) and later purchase annuities without the benefit of a suitability analysis or an honest explanation of the withdrawal penalties.

Appellants and Stanley Norman moved the district court for judgment as a matter of law or for amended findings of fact and conclusions of law or, alternatively, for a new trial. The district court denied appellants' motions, reasoning that substantial evidence in the record supports the findings and conclusions. This appeal follows.

DECISION

Appellants argue that (1) the district court's finding that they engaged in a pattern and practice of fraudulent behavior toward senior citizens is clearly erroneous and that the district court therefore erred by awarding restitution to all consumers; (2) the district court's finding that they violated Minnesota's Personal Solicitation of Insurance statute is clearly erroneous; (3) the district court's finding that they violated the fiduciary duty they owed to Minnesota consumers is clearly erroneous; (4) the district court's finding that they violated the Minnesota Home Solicitation Sales Act is clearly erroneous; (5) the district court erred in its interpretation of the term "deceive" as used in the Minnesota

consumer-protection statute; and (6) Minnesota's insurance-suitability statute is void for unconstitutional vagueness.

I.

Appellants challenge the district court's finding that "[t]he evidence presented at trial demonstrated that [appellants] engaged in a pattern and practice of deceptive and misleading behavior that had a tendency or capacity to deceive and violated the [Uniform Deceptive Trade Practices Act], [Prevention of Consumer Fraud Act], and [False Statement in Advertising Act]." This court reviews findings of fact for clear error, Minn. R. Civ. P. 52.01, and will "view the record in the light most favorable to the judgment of the district court," *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999). Appellate courts do not "usurp[] the role of the trial court by reweighing the evidence," *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988), and the fact that the "record might support [different] findings . . . does not show that the [district] court's findings are defective." *Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. App. 2000). Appellants contend that because the state's witnesses did not present substantially identical testimony, there cannot have been a "pattern and practice" of fraud or deception. This argument is flawed for two reasons.

First, while it is true that not every consumer gave identical testimony, the overall testimony, which the district court carefully reviewed in its order, reflects that the general experience of the consumers was strikingly similar. Second, the district court's finding of systematic deception was based not on each consumer's experience, but on appellants' training manuals and internal documents, which make clear the nature of their business.

Witness after witness testified about the sales tactics that appellants' agents used to sell legal services and annuities. The district court stated that "[w]hile the testimony of consumer witnesses regarding their experiences with [appellants] was instructive, it was [appellants'] own training and sales presentation materials that most vividly revealed the nature of their operation." The district court's finding that appellants' real business objective was to sell long-term annuities and its findings concerning the many ways that appellants deceived consumers in order to hide their true objective are amply supported by testimony and documentary evidence. In addition, the district court's findings concerning the conduct of the AFLP plan advisors, who exaggerated the expense of probate, and the Heritage agents, who entered consumers' homes under the false pretense of delivering trust documents in order to give a misleading presentation of annuities, are supported. The record therefore supports the district court's determination that appellants engaged in a pattern and practice of deceptive and misleading behavior.

Appellants also challenge the district court's restitution award to all of the Minnesota victims of appellants' unlawful conduct, regardless of whether each victim joined the lawsuit or appeared in court, on the ground that there was insufficient evidence of a pattern or practice of deceptive behavior. Because we conclude that the district court's determination of a pattern and practice of deceptive behavior is supported by the record, we need not reach this argument. We nevertheless note that restitution is appropriate in this case. Restitution is an equitable remedy. *State v. Alpine Air Prods., Inc.*, 490 N.W.2d 888, 896 (Minn. App. 1992), *aff'd*, 500 N.W.2d 788 (Minn. 1993). The granting of equitable relief is within the sound discretion of the district court; only a clear

abuse of discretion will result in reversal. *Nadeau v. Cnty. of Ramsey*, 277 N.W.2d 520, 524 (Minn. 1979). The Minnesota Attorney General's authority to act on behalf of Minnesota citizens under the doctrine of parens patriae ("parent of the country") includes the power to seek restitution for all Minnesota consumers injured by a pattern and practice of fraudulent conduct. *See Alpine Air*, 490 N.W.2d at 896 n.4.

Here, the district court fashioned an appropriate equitable remedy by considering the broad remedial purpose of the consumer-protection statutes and calculating the losses suffered by the consumers, based on the number of prepaid legal plans and annuities purchased as a result of appellants' pattern and practice of deceptive conduct. The district court acted well within its discretion when it did so.

II.

Appellants argue that the district court's finding that the Heritage agents violated the personal-solicitation-of-insurance statute is clearly erroneous. Minn. Stat. § 60K.46, subd. 1(b) (2006), provides that before an "insurance producer" is permitted to personally solicit a person to purchase an insurance product, the producer must, "at the time of initial personal contact with the potential buyer, clearly and expressly disclose in writing: (1) the name of the person making the contact; (2) the name of the producer . . . that the person represents; and (3) the fact that the producer . . . is in the business of selling insurance."

Appellants argue that they complied with the statute because, when the Heritage agents arrived to deliver the estate-planning documents, they presented the consumer with a form to sign that states that the agent works for Heritage, is licensed to sell

insurance, and may attempt to do so during the meeting. But as the district court found, the testimony of several consumers established that the agents did not identify themselves as insurance agents when they arrived at a consumer's home and that the consumers did not know that the agents were selling insurance. And the form contains the disclosure in the middle of a paragraph of fine-print legal disclaimers. We cannot say, on this record, that appellants made the statutory disclosure "clearly and expressly." The district court's finding that appellants violated the personal-solicitation-of-insurance statute is therefore not clearly erroneous.

III.

Appellants challenge the district court's finding that, by their business practices, they violated the fiduciary duty they owed to Minnesota consumers under Minn. Stat. § 45.026 (2006). Appellants contend that the statute does not apply to them and that they did not breach any duty. Whether appellants fit within the purview of the statute is a question of statutory interpretation, which we review de novo. *See Swenson v. Nickaboine*, 793 N.W.2d 738, 741 (Minn. 2011). Whether appellants breached any fiduciary duty they may have owed to the consumers is a finding of fact reviewed for clear error. *See* Minn. R. Civ. P. 52.01 (stating that findings of fact shall not be set aside unless clearly erroneous); *Miller Waste Mills, Inc. v. Mackay*, 520 N.W.2d 490, 496 (Minn. App. 1994) (holding that whether a fiduciary duty has been breached is generally a finding of fact), *review denied* (Minn. Oct. 14, 1994).

Under Minn. Stat. § 45.026, subd. 1(b), a person who, on advertisements, cards, or in any other manner, indicates that the person is a "financial planner," "financial

counselor," "financial consultant," or "financial advisor," or any similar designation is considered to be representing that the person is engaged in the business of financial planning. Under Minn. Stat. § 45.026, subd. 2, "persons who represent that they are financial planners have a fiduciary duty to persons for whom services are performed for compensation."

Appellants contend that the statute requires that the compensation be paid by the person for whom the services are performed and that because the Heritage agents were compensated by Heritage and not by the consumers, the statute does not apply to them. But the plain language of the statute does not specify that the act of providing compensation is determinative, and appellants do not cite to any authority in support of this assertion. We therefore hold that appellants were subject to Minn. Stat. § 45.026 subd. 2, and owed a fiduciary duty to the consumers of their products.

The district court found that appellants were in breach of their fiduciary duty to each of their Minnesota consumers by, among other things, failing to disclose their joint business relationship with its inherent conflicts of interest, employing deceptive sales and marketing tactics, failing to initially disclose their intent to sell insurance products upon delivery of trust documents, and engaging in other misrepresentations, deceptive practices, and omissions. Because these findings are supported by the record, we conclude that the district court's finding that appellants breached a fiduciary duty to the consumers is not clearly erroneous.

IV.

Appellants challenge the district court's conclusion that they violated the Minnesota Home Solicitation Sales Act, Minn. Stat. § 325G.08 (2006). The statute provides: "In addition to any other rights the buyer may have, the buyer has the right to cancel a home solicitation sale until midnight of the third business day after the day on which the home solicitation sale occurs." Minn. Stat. § 325G.07 (2006). The statute also provides that persons who sell goods or services as part of an in-home solicitation must provide a written disclosure describing the "type of goods or services purchased." Minn. Stat. § 325G.08, subd. 1(c).

Appellants claim that the district court had no basis to find that they violated these provisions, but accept the district court's finding that their written forms failed to describe the type of goods or services being sold. Rather, they contend that because "American Family Prepaid Legal Services" is printed on the cancellation form, there is no need to specify the type of service purchased, which is obvious from the name. We are not persuaded. Appellants' failure to provide a separate written description of the type of service is sufficient to support the district court's finding that they violated the statute.

V.

Appellants argue that the district court erroneously interpreted the term "deceive" as it is used in the consumer-protection laws and that had the district court properly interpreted the term, it would have found that appellants are not liable for any deception. We review this issue de novo. *Swenson*, 793 N.W.2d at 741.

The district court stated that the standard for finding unlawful deception pursuant to Minnesota's consumer-protection laws is "the tendency or capacity to deceive." Consumer-protection laws in Minnesota are interpreted broadly by Minnesota courts in favor of consumers because of their remedial purpose. *See, e.g., State v. Philip Morris Inc.*, 551 N.W.2d 490, 496 (Minn. 1996). Statutory-fraud laws eliminate several elements of proof required under common-law fraud. Neither a defendant's intent to deceive nor the consumer's reliance on a defendant's conduct is required to prove statutory fraud. *See* Minn. Stat. §§ 325D.44, subd. 2; 325F.67; 325F.69, subd. 1 (2006) (prohibiting deceptive practices "whether or not any person has in fact been misled, deceived, or damaged thereby"); *see also Wiegand v. Walser Auto. Grps., Inc.*, 683 N.W.2d 807, 812 (Minn. 2004) ("We have recognized that the Consumer Fraud Act[] . . . eliminates elements of common law fraud, such as reliance on misrepresentations.").

Yet reliance is precisely what appellants contend the district court erroneously omitted from its definition of "deception." Appellants contend that to constitute deception, "a broad cross section" of consumers must be deceived by the defendant's conduct. In support of this proposition, appellants cite to a footnote in *Grp. Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2, 3 (Minn. 2001), that appears inapposite to the extent that Group Health concerns a private party bringing a claim that may be guided by federal law, and not, as respondents observe, the standards governing Minnesota consumer-protection law in a public enforcement action brought by the state. We conclude that the district court correctly interpreted and applied the term "deception" and accordingly found that appellants are liable under the consumer-protection laws.

VI.

Appellants argue that Minnesota's insurance-suitability statute, Minn. Stat. § 60K.46 (2006), is unconstitutional because it is void for vagueness. Appellants did not raise this argument until they submitted their proposed conclusions of law approximately two months after the end of trial. Because appellants did not raise this issue to the district court in a timely manner, they have waived the right to raise it on appeal. *See Grigsby v. Grigsby*, 648 N.W.2d 716, 726 (Minn. App. 2002) ("[A]n issue first raised in a post-trial motion is not raised in a timely fashion."), *review denied* (Minn. Oct. 15, 2002); *see also Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (issues not raised before the district court are waived on appeal).

But even if appellants had properly preserved this issue, their vagueness challenge lacks merit. The United States and Minnesota Constitutions require that statutes meet due-process standards of definiteness. *State v. Newstrom*, 371 N.W.2d 525, 528 (Minn. 1985).

> [T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.

Kolender v. Lawson, 461 U.S. 352, 357, 103 S. Ct. 1855, 1858 (1983), *quoted in Newstrom*, 371 N.W.2d at 528. But even if a statute could be considered vague in some applications, "a plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *State, City of*

Minneapolis v. Reha, 483 N.W.2d 688, 691 (Minn. 1992) (emphasis omitted) (quotation omitted).

Minn. Stat. § 60K.46, subd. 4, provides that when recommending the purchase of any life-insurance or annuity product, the producer "must have reasonable grounds for believing that the recommendation is suitable for the customer and must make reasonable inquiries to determine suitability." Minn. Stat. § 60K.46, subd. 4. Here, the district court specifically found that appellants did not conduct any meaningful inquiry into the suitability of the annuities they sold to the senior consumers. Because appellants engaged in conduct that is clearly proscribed under the statute, they cannot complain about vagueness.

Affirmed.