**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A24-1077**

Joy Litke, et al.,
Respondents,

vs.

Home Heritage Holdings, LLC, et al.,
Respondents,

Larson Abstract Company, Inc.,
Respondent,

vs.

Wausau Homes, Inc.,
Appellant.

**Filed June 2, 2025**
**Affirmed**
**Larson, Judge**

Morrison County District Court
File No. 49-CV-24-120

Dawn L. Gagne, Mara Swanson, RGP Law, Ltd., St. Cloud, Minnesota (for respondents Joy Litke, et al.)

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Considered and decided by Larson, Presiding Judge; Slieter, Judge; and Florey, Judge.*

**NONPRECEDENTIAL OPINION**

**LARSON**, Judge

Appellant Wausau Homes, Inc. (Wausau) challenges the district court's decision to deny its motion to compel arbitration. Because the district court did not abuse its discretion when it denied the motion, we affirm.

**FACTS**

On January 26, 2024, respondents Joy and Michael Litke (the Litkes) filed a complaint and an amended complaint in district court. Both complaints included as defendants Wausau, Home Heritage Holdings, LLC d/b/a Wausau Homes Little Falls n/k/a Heritage Restoration and Construction, LLC (HHH), David Gruis, and Larson Abstract Company (Larson). Pursuant to a stipulation, the Litkes served and filed a second amended complaint, adding Heritage Restoration and Construction, LLC (Heritage Restoration) as a separate defendant.[1] The second amended complaint asserted five causes of action against Wausau: (1) promissory estoppel; (2) violation of Minn. Stat. § 325D.44 (2024);[2]

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

[1] HHH is no longer an active entity. According to the second amended complaint, "[HHH] is now operating under the name of [Heritage Restoration]. Alternatively, [Heritage Restoration] assumed liabilities and/or obligations of [HHH], including contractual obligations to [the Litkes]."

[2] The now-operative version of Minn. Stat. § 325D.44 was not in effect at the time of the challenged conduct. But the intervening amendments to Minn. Stat. § 325D.44 are not relevant to this appeal. *See* 2023 Minn. Laws ch. 57, art. 4, §§ 6-7, at 1840-41; 2024 Minn. Laws ch. 111, §§ 1-2, at 1346-48. Therefore, we apply Minn. Stat. § 325D.44 (2024). *See*

(3) negligence and/or breach of fiduciary duty; (4) negligent misrepresentation; and (5) common-law fraud/fraud in the inducement.[3]

In the second amended complaint, the Litkes alleged the following facts related to Wausau. Wausau is a custom-home construction company with its principal place of business in Wisconsin. Wausau allegedly "contracts with local business entities to provide home building services to local customers but requires these local business entities to represent to the public that they are affiliated with" Wausau. While Wausau "markets itself as a home builder and makes various representations and warranties regarding the building process, [Wausau] requires" the local businesses "to draft their building contracts . . . so as to exempt Wausau . . . from any liability for breach of contract or warranty." In doing so, Wausau allegedly "uses deceptive advertisements and trade practices to coerce potential customers into entering building contracts with entities that are not affiliated with [Wausau] itself."

HHH allegedly had such an arrangement, requiring HHH "to misrepresent its affiliation with Wausau." In July 2022, the Litkes met with Gruis, HHH's manager, to negotiate a contract to build a home on their property (the project). During negotiations, Gruis, on behalf of HHH, indicated that HHH was a branch of Wausau, "made various representations and warranties typical of the greater [Wausau] brand," and used Wausau trademarks—such as Wausau's logo, catch phrases, and email address. The Litkes

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*Interstate Power Co. v. Nobles Cnty. Bd. of Comm'rs*, 617 N.W.2d 566, 575 (Minn. 2000) (stating that, generally, "appellate courts apply the law as it exists at the time they rule on a case").

[3] The Litkes asserted other claims, but not against Wausau.

specifically noted representations that the project would have a "firm price" and a "precise move in date," "stay on budget" and "on schedule," and "be built 'to the highest building standards.'" The Litkes decided to contract with HHH for the project because of these representations.

The Litkes entered an "Agreement for Custom Home Construction" (the agreement) with HHH. The Litkes and Gruis signed the agreement. The agreement listed the Litkes as "Customer" and HHH as "Builder." The agreement contained the following provision:

> All persons employed or retained by [HHH] in connection with its activities under this Agreement are employees, agents, or independent contractors of [HHH]. [HHH] is an independent contractor, separate and distinct from [Wausau]. [Wausau] is a supplier of building materials for this Custom Home and is not a party to this Agreement. [Wausau] Does not Guarantee performance of any contract by [HHH] or any subcontractor or material supplier.

The agreement also included an arbitration clause, which provided in relevant part: "Any dispute or controversy between [HHH] and [the Litkes] arising out of or related to this Agreement shall be decided through final and binding arbitration conducted pursuant to the Construction Industry Arbitration Rules of the American Arbitration Association, except that there shall be a single arbitrator."

The Litkes alleged that the project did not go as planned. There were numerous problems with construction, and HHH abandoned the project in early 2023. Ultimately, the Litkes had to hire a new contractor to complete the project. HHH is now an inactive company. HHH is allegedly "operating under the name of" Heritage Restoration or

Heritage Restoration "assumed liabilities and/or obligations of [HHH], including contractual obligations to [the Litkes]."

On February 22, 2024, Wausau filed a motion to stay litigation and compel arbitration or, in the alternative, for a more definite statement. The Litkes opposed this motion. After a hearing, the district court denied the motion to stay litigation and compel arbitration. The district court identified two circumstances wherein equitable-estoppel principles may apply to allow Wausau, a nonsignatory, to compel the Litkes into arbitration: (1) "when the signatory to a written agreement containing an arbitration clause relies on the terms of the written agreement when asserting its claims against the nonsignatory" (relies-on test) or (2) "when the signatory to a written agreement containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract" (concerted-misconduct test).

Applying the relies-on test, the district court determined that "some, but not all, of the Litkes' claims against Wausau" relied on the agreement. The district court specifically found that the Litkes' "claims of promissory estoppel, fraud, breach of fiduciary duty, and negligent misrepresentation related to Wausau's advertising practices [did] not rely on the terms of the Agreement," and, for that reason, determined the relies-on test did not apply.

The district court found that "[t]he Litkes' claims against each of the defendants [were] largely based on the same facts and [were] inherently inseparable," such that the concerted-misconduct test could apply. Ultimately, however, the district court decided not to compel arbitration. The district court noted that: (1) HHH, the "only other party in the

Agreement, [was] an inactive entity"; (2) its successor, Heritage Restoration, was not a party to the agreement or seeking to compel arbitration; and (3) Gruis and Larson were also not parties to the agreement or seeking to compel arbitration. As such, the remaining claims would not be subject to arbitration. Under such circumstances, the district court concluded that "it would be inherently inequitable to compel the Litkes" to litigate this dispute in two separate forums and denied Wausau's motion.

Wausau appeals.

## DECISION

Wausau challenges the district court's decision to deny its motion to compel arbitration on equitable-estoppel grounds.[4] To decide this case, we first address the proper standard of review and then address Wausau's arguments.

### I.

"We generally review a district court's decision on a motion to compel arbitration de novo." *Stern 1011 First St. S., LLC v. Gere*, 937 N.W.2d 173, 177 (Minn. App. 2020), *rev. denied* (Minn. Mar. 25, 2020). But there is a split in authority over the proper standard of review when the district court decides a motion to compel arbitration on equitable-estoppel grounds. Some courts have concluded a de novo standard applies. *Sunkist Soft*

[4] Wausau makes the alternative argument that agency principles should be applied to compel arbitration. But the district court did not address this basis for compelling arbitration. We will not address this issue for the first time on appeal. *See Hoyt Inv. Co. v. Bloomington Com. & Trade Ctr. Assocs.*, 418 N.W.2d 173, 175 (Minn. 1988) ("[A]n undecided question is not usually amenable to appellate review."); *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate courts generally address only those questions previously presented to and considered by the district court).

*Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993); *Bouriez v. Carnegie Mellon Univ.*, 359 F.3d 292, 294 (3rd Cir. 2004); *Donaldson Co. v. Burroughs Diesel, Inc.*, 581 F.3d 726, 731 (8th Cir. 2009); *Reeves v. Enter. Prods. Partners, LP*, 17 F.4th 1008, 1011 (10th Cir. 2021). Others have applied the abuse-of-discretion standard that is typically used when reviewing equitable claims. *Am. Bankers Ins. Grp., Inc. v. Long*, 453 F.3d 623, 629 (4th Cir. 2006); *Grigson v. Creative Artists Agency LLC*, 210 F.3d 524, 528 (5th Cir. 2000).

Here, we agree with our prior persuasive nonprecedential opinion, *ev3 Inc. v. Collins*, that the abuse-of-discretion standard applies when a district court decides a motion to compel arbitration on equitable-estoppel grounds. *See* No. A08-1816, 2009 WL 2432348, at *2 (Minn. App. Aug. 11, 2009), *rev. denied* (Minn. Oct. 20, 2009).[5] The Minnesota Supreme Court has consistently applied the abuse-of-discretion standard to similar equitable claims. *See, e.g.*, *City of North Oaks v. Sarpal*, 797 N.W.2d 18, 23-24 (Minn. 2011) (reviewing district court's equitable-estoppel decision after bench trial for an abuse of discretion); *Citizens State Bank v. Raven Trading Partners, Inc.*, 786 N.W.2d 274, 277 (Minn. 2010) (reviewing district court's equitable-subrogation decision for an abuse of discretion); *Nadeau v. County of Ramsey*, 277 N.W.2d 520, 524 (Minn. 1979) (reviewing district court's decision on motion for equitable relief for an abuse of discretion); *City of Cloquet v. Cloquet Sand & Gravel, Inc.*, 251 N.W.2d 642, 644 (Minn. 1977) ("The standard of review in nuisance cases and others involving equitable relief is whether the [district]

[5] This case is nonprecedential and, therefore, not binding. We cite nonprecedential cases as persuasive authority only. *See* Minn. R. Civ. P. 136.01, subd. 1(c).

court has abused its discretion."). And because "[t]he linchpin for equitable estoppel is equity—fairness," *Grigson*, 210 F.3d at 528, we conclude that abuse of discretion is the correct standard of review in this context, *see ev3*, 2009 WL 2432348, at *2.

**II.**

Wausau argues the district court abused its discretion when it denied the motion to compel arbitration on equitable-estoppel grounds. "A district court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *Thompson v. Schrimsher*, 906 N.W.2d 495, 500 (Minn. 2018) (quotation omitted).

"Generally, arbitration clauses are contractual and cannot be enforced by persons who are not parties to the contract." *Onvoy, Inc. v. SHAL, LLC*, 669 N.W.2d 344, 356 (Minn. 2003). But the Minnesota Supreme Court, drawing on federal precedent, has recognized that there are exceptions to this rule, including equitable estoppel. *Id.* (citing *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999)). "Equitable estoppel prevents a signatory from relying on the underlying contract to make his or her claim against the nonsignatory." *Id.* Under the precedent relied on by the supreme court, a nonsignatory may compel arbitration using equitable estoppel when: (1) the signatory "rel[ies] on the terms of the written agreement in asserting its claims against the nonsignatory" (relies-on test) or (2) the signatory "raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more"

signatories (concerted-misconduct test).[6] *Grigson*, 210 F.3d at 527 (emphasis omitted) (quoting *MS Dealer*, 177 F.3d at 947). Minnesota lacks any precedential cases applying either the relies-on test or the concerted-misconduct test. *See In re Wholesale Grocery Prods. Antitrust Litig.*, 707 F.3d 917, 922 (8th Cir. 2013). But in *Onvoy*, the supreme court cited *MS Dealer* favorably when discussing the equitable-estoppel exception. *See* 669 N.W.2d at 356-57. So, we look to the *MS Dealer* decision for guidance on the application of both tests.

### A. Relies-On Test

Wausau first argues the district court abused its discretion when it declined to compel arbitration by applying the relies-on test. Specifically, Wausau argues that all of the Litkes' claims against Wausau rely on or presume the existence of the agreement. The Litkes do not dispute that their claims against Wausau "have some abstract connection to the Agreement." Instead, the Litkes point to persuasive federal authority indicating that an abstract connection to an agreement is not sufficient to compel arbitration under the relies-on test. *See Murphy v. DirecTV, Inc.*, 724 F.3d 1218, 1230 (9th Cir. 2013); *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1047 (9th Cir. 2009).

We begin with the legal requirements for the relies-on test to apply. In *MS Dealer*, the Eleventh Circuit explained that the relies-on test applies if a signatory "rel[ies] *on the terms of the written agreement*" when it asserts its claims against the nonsignatory. 177 F.3d at 947 (emphasis added) (quotation omitted). The Eleventh Circuit further noted that

[6] Neither party has challenged the applicability of the relies-on test or the concerted-misconduct test. Thus, for purposes of this appeal, we simply apply these tests.

it is appropriate to apply the relies-on test "[w]hen *each of* a signatory's claims against a nonsignatory makes reference to or presumes the existence of the written agreement." *Id.* (emphasis added) (quotations omitted). Based upon this language, we agree with the Litkes that an abstract connection to an agreement is not sufficient to compel arbitration under the relies-on test; instead, the signatory's claims "must rely on the terms of the written agreement." *Id.* (quotation omitted).

Applying this understanding, we do not discern that the district court abused its discretion in its application of the relies-on test. While having a connection to the agreement, the claims against Wausau do not rely on the agreement's terms—they target "Wausau's advertising practices." Beginning with the promissory estoppel claim, the Litkes made the following allegations specific to Wausau:

> 94. [Wausau], with intent to induce reliance, made a *clear and definite promise* to provide [the Litkes] with a competent builder who was insured, among other things.
>
> 95. [Wausau], with intent to induce reliance, made *clear and definite promises* to [the Litkes] that their home would be constructed for a fixed price, on time, with a specific move-in date and that the home would be built to the highest building standards.
>
> 96. [Wausau] was aware, or should have been aware, that [HHH and/or Heritage Restoration] was/were incompetent and insolvent and, upon information and belief, uninsured, and would not or could not adhere to a budget, schedule, specific move-in date, or construct the home to the highest building standards.
>
> 97. [Wausau] was aware, or should have been aware, that [Heritage Restoration] either was not or may not have been associated with [Wausau] when it advised [the Litkes] to work with that builder.

> 98. Because [Wausau's] corporate reputation induced [the Litkes] to credit its misrepresentations and rely on them, justice requires enforcement of its promises.

(Emphases added.) The "clear and definite promises" referenced in these paragraphs do not relate to the terms of the agreement but, instead, to the representations Wausau made on its website. Earlier in the second amended complaint, the Litkes allege that Wausau's website made representations that homes would be built "for a firm price" with a "precise move in date," that builders had the ability to "stay on budget [and] on schedule," and that homes would "be built 'to the highest building standards.'" Thus, while these allegations presume an agreement exists, they are clearly targeted at Wausau's "advertising practices."

Moving to the claim regarding section 325D.44, the specific allegations against Wausau include:

> 101. [Wausau] engaged in deceptive trade practices and false advertising by intentionally: (a) passing off services of [HHH] as services of [Wausau]; (b) causing confusion and misunderstanding as to the source, sponsorship, approval, and certification of their residential building services; (c) causing confusion and misunderstanding with respect to [HHH's] relationship with [Wausau]; (d) causing confusion and misunderstanding with respect to [Heritage Restoration's] relationship with [Wausau]; and (e) representing [HHH] was competent, solvent, and insured when in fact it was none of those things.
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> 102. [Wausau] also engaged in deceptive trade practices and false advertising by *advertising* that it provided residential construction services with certain express warranties when it had no intention to provide any construction services at all.
>
> 103. Through various *advertisements*, *catch phrases*, its *website* and *trademarks*, [Wausau] represented that [HHH] was solvent and sufficiently capitalized, was insured, was

> competent and capable of performing the work for which it was contracted.
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> 104. Through various *advertisements*, *catch phases*, *trademarks* and its *website*, [Wausau] represented that [the Litkes'] home would be built on time and on budget, with a specific move-in date and firm price, and that it would be built to the highest building standards.
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> 105. [Wausau] . . . represented that [HHH] was a part of [Wausau] and that [HHH] and [Wausau] were otherwise one-and-the-same.
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> 106. [Wausau] and [HHH] made the aforementioned misrepresentations with the intent to induce [the Litkes] to *do business* with them, and [the Litkes] did *do business* with [HHH] and [Wausau] in reliance on their representations.

(Emphases added.) We agree with Wausau that the allegation regarding the Litkes' decision to "do business" with HHH presumes the existence of the agreement. But the Litkes plainly tailored their claim against Wausau to Wausau's "advertisements, catch phrases, trademarks and its website."

With respect to the negligence and/or breach of fiduciary duty claim, the Litkes made the following allegations against Wausau:

> 128. Through various *advertisements*, *catch phrases*, *trademarks* and its *website*, [Wausau] represented that [the Litkes'] home would be built on time and on budget, with a specific move-in date and firm price, and that it would be built to the highest building standards.
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> 129. [Wausau] provided improperly sized framing panels/materials.
>
> 130. The Litkes relied on . . . [Wausau] to construct their home according to acceptable building practices and according to building codes and industry standards, and approved plans.

> 131. The Litkes' reliance was justified.
>
> 132. As set forth herein, the Litkes' home has numerous construction defects and is incomplete.
>
> 133. . . . [Wausau's] negligence is a direct and proximate cause of the Litkes' damages.

(Emphases added.) Once again, we acknowledge that some of the alleged conduct arose from the agreement—particularly the allegations regarding the physical construction of the home. But the focus of the claim against Wausau relates to its advertising practices. Further, even if this claim relies on the terms of the agreement, the *MS Dealer* court counseled that "each of" the claims against the nonsignatory must rely on the agreement's terms, 177 F.3d at 947, and the negligence and/or breach of fiduciary duty claim is only one of the five claims alleged against Wausau.

Shifting to the negligent-misrepresentation claim, the Litkes made one allegation targeted solely at Wausau: "[Wausau] represented through its *advertisements*, *trademarks*, *advertising*, *catch phrases* and its *website* that the Litkes' house would be built on time, on budget and to the highest building standards." (Emphases added.) This plainly relates to advertising practices and has nothing to do with the terms of the agreement.

Finally, while the allegations in the second amended complaint regarding the common-law fraud/fraud in the inducement claim span several pages, the Litkes continually tie Wausau's conduct to its "advertisements," "catch phrases," "website," and "trademarks."[7]

[7] In the second amended complaint, the Litkes also allege that Wausau is vicariously liable for Gruis, but Gruis is not a party to the agreement.

In sum, the district court did not abuse its discretion when it denied the motion to compel arbitration based upon its application of the relies-on test. The second amended complaint supports the district court's conclusion that most of the causes of action against Wausau relate to Wausau's advertising practices, and the district court was well within its discretion when it declined to compel arbitration.

**B. Concerted-Misconduct Test**

Wausau argues second that the district court abused its discretion when it determined that, despite the alleged concerted misconduct between Wausau and HHH, principles of equity did not compel arbitration. In *MS Dealer*, the Eleventh Circuit explained that the purpose of the concerted-misconduct test is to enforce "the federal policy in favor of arbitration" because "arbitration proceedings between the two signatories would be rendered meaningless" if substantially interdependent claims were litigated in two different forums. 177 F.3d at 947 (quotation omitted).

Here, the district court did not need to compel arbitration using the concerted-misconduct test. The signatories to the agreement are the Litkes and HHH. HHH is an inactive company. Thus, arbitration between the two signatories (the Litkes and HHH) will not occur. And the claims arising out of the terms of the agreement—obligations allegedly taken on by Heritage Restoration—will be litigated in district court. There are therefore no arbitration proceedings that will be rendered meaningless by allowing the claims against Wausau to proceed in district court.

Further, we are in full agreement with the district court that "it would be inherently inequitable to compel the Litkes" into arbitration in this circumstance. "The linchpin for

equitable estoppel is equity—fairness." *Grigson*, 210 F.3d at 528. HHH—the only defendant that was a party to the agreement—is an inactive company. None of the other defendants were parties to the agreement. Thus, were the Litkes compelled to arbitrate, only the claims against Wausau—a nonsignatory—would be resolved in arbitration. In this circumstance, we agree with the district court that "[f]orcing the Litkes to litigate and arbitrate the same claims, in two separate forums, against different parties" would be fundamentally unfair.

For these reasons, we conclude that the district court did not abuse its discretion when it denied Wausau's motion to compel arbitration.

**Affirmed.**