**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A18-1120**

Jason Rhoades,
Appellant,

vs.

Tony Lourey, et al.,
Respondents.

**Filed March 4, 2019**
**Affirmed**
**Florey, Judge**

Carlton County District Court
File No. 09-CV-17-2740

Jason Rhoades, Moose Lake, Minnesota (pro se appellant)

Keith Ellison, Attorney General, R.J. Detrick, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Florey, Presiding Judge; Schellhas, Judge; and John P. Smith, Judge.*

**U N P U B L I S H E D  O P I N I O N**

**FLOREY**, Judge

Appellant, a patient in the Minnesota Sex Offender Program (MSOP), challenges the district court's dismissal of his claims under the Minnesota Health Records Act

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

(MHRA), Minn. Stat. §§ 144.291-.298 (2018), and the Minnesota Government Data Practices Act (MGDPA), Minn. Stat. §§ 13.01-.90 (2018). We affirm.

## FACTS

Appellant Jason Rhoades is a patient committed to MSOP in Moose Lake. He must register as a predatory offender with the Bureau of Criminal Apprehension (BCA) using an address verification form. Appellant alleges that his BCA form was disseminated to MSOP patients and employees, in contradiction to MSOP policies on the handling of privileged mail.

Pursuant to the MHRA and MGDPA, he sued respondents Emily Johnson Piper, the former commissioner of the Minnesota Department of Human Services (DHS), and Nancy Johnston, the executive director of MSOP, in their official and individual capacities.[1] He alleged that they failed to draft and implement effective policies and failed to train employees on the handling of privileged mail.

Appellant claimed that the BCA form was mailed to him, but it was delivered to "a different patient" and "became unsecured within the MSOP facility for an extended period of time."[2] He claimed that agents of DHS and MSOP acted with indifference, minimized

[1] Tony Lourey replaced Emily Johnson Piper as commissioner. He is therefore substituted for her in appellant's official-capacity claims. *See* Minn. R. Civ. P. 143.04.

[2] Appellant argues that the district court misstated the factual record in its order by stating that appellant "opened the verification form." In his complaint, appellant alleged that the envelope was open when it was delivered to him. While the district court's finding that appellant opened the envelope is inconsistent with the allegation in the complaint and therefore erroneous, the finding is not germane to the bases for dismissal, and the error therefore is de minimis. *See Wibbens v. Wibbens*, 379 N.W.2d 225, 227 (Minn. App. 1985) (declining to remand for de minimis technical error).

the seriousness of the violation, and failed to report the incident, as required by MSOP policy. Appellant alleged that respondents failed to notify him of the data breach.

The BCA form included the following information: full name, current address, date of birth, height, weight, eye color, hair color, Minnesota driver's license number, Social Security number, place of employment, employer's address, Federal Bureau of Investigation (FBI) number, Minnesota prison offender identification number, and BCA number.

Respondents moved to dismiss appellant's MGDPA claims against Piper, in her official capacity, without prejudice, and moved to dismiss appellant's remaining claims with prejudice. Respondents asserted that appellant's MHRA claims were deficient because the MHRA does not permit a suit against respondents in their official capacities, and appellant alleged neither the release of a "health record," nor that respondents "personally" released the BCA form. Respondents asserted that the MGDPA does not allow for individual-capacity claims against them and allows for only an official-capacity claim against the commissioner. Respondents claimed that both appellant's MHRA and MGDPA claims are deficient because appellant failed to plead any damages.

The district court dismissed appellant's claims with prejudice. The court dismissed the MHRA claims because the BCA form is not a "health record," and, further, the MHRA does not allow for a cause of action against the state. The court dismissed the MGDPA claims because, although the MGDPA applies to state actors, appellant failed both to allege a sufficient injury and to properly plead punitive damages. This appeal followed.

## D E C I S I O N

A complaint must "contain a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment for the relief sought." Minn. R. Civ. P. 8.01. A party may move to dismiss a complaint for failure to state a claim upon which relief can be granted. Minn. R. Civ. P. 12.02(e). "We review de novo whether a complaint sets forth a legally sufficient claim for relief." *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 606 (Minn. 2014). We must accept the allegations contained in the complaint as true. *Id.* Whether the plaintiff can prove the alleged facts is immaterial to our analysis. *Elzie v. Comm'r of Pub. Safety*, 298 N.W.2d 29, 32 (Minn. 1980). We will not uphold a dismissal "if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 739-40 (Minn. 2000) (quotation omitted).

### I. Appellant's MHRA claims are deficient because the BCA form is not a "health record."

We begin with appellant's MHRA claims. The MHRA governs the release and disclosure of "health records" and imposes liability on "[a] person" who negligently or intentionally releases a health record in violation of MHRA guidelines. Minn. Stat. §§ 144.293, subd. 1-2, .298, subd. 2(1).

We agree with the district court's conclusion that the BCA form is not a "health record." We review the application of a statute to undisputed facts de novo. *Davies v. W. Publ'g Co.*, 622 N.W.2d 836, 841 (Minn. App. 2001), *review denied* (Minn. May 29, 2001); *see also Ill. Farmers Ins. Co. v. Glass Serv. Co.*, 683 N.W.2d 792, 803 (Minn. 2004).

A health record is defined as "any information . . . that relates to the past, present, or future physical or mental health or condition of a patient; the provision of health care to a patient; or the past, present, or future payment for the provision of health care to a patient." Minn. Stat. § 144.291, subd. 2(c).

The BCA form does not contain information relating to appellant's physical or mental health, the provision of health care, or payment for health care. Appellant acknowledges that the BCA form "does not constitute a 'health record,'" but argues that someone could "deduce" he is a patient at MSOP based upon his name and address. Appellant, in effect, seeks to expand the "health record" definition to include information from which a person's status as a patient could be inferred, but we will not read into a statute language that is not present. *See Reiter v. Kiffmeyer*, 721 N.W.2d 908, 911 (Minn. 2006) ("[W]e will not read into a statute a provision that the legislature has omitted, either purposely or inadvertently."). Under the plain language of Minn. Stat. § 144.291, subd. 2(c), appellant's BCA form is not a "health record."

## II. Appellant's MGDPA claims fail because he did not sufficiently plead "any damage."

We next address appellant's MGDPA claims. Appellant conceded below that he is only raising official-capacity claims against the commissioner. The district court found as much, and appellant does not challenge that finding on appeal. Therefore, we review only the official-capacity MGDPA claims against respondent commissioner. *See Walker v. Scott County*, 518 N.W.2d 76, 78 (Minn. App. 1994) (stating that the MGDPA "does not impose civil liability on individuals"), *review denied* (Minn. Aug. 24, 1994).

The MGDPA governs the dissemination of "government data," which is defined as "all data collected, created, received, maintained or disseminated by any government entity." Minn. Stat. § 13.02, subd. 7. The MGDPA offers civil remedies for persons who suffer damages due to a violation of its provisions:

> [A] responsible authority or government entity which violates any provision of this chapter is liable to a person . . . who suffers any damage as a result of the violation, and the person damaged . . . may bring an action against the responsible authority or government entity to cover any damages sustained, plus costs and reasonable attorney fees. In the case of a willful violation, the government entity shall, in addition, be liable to exemplary damages . . . .

Minn. Stat. § 13.08, subd. 1. The district court concluded that appellant's MGDPA claims were deficient because appellant failed both to plead an injury-in-fact entitling him to compensatory damages and to properly plead punitive damages. We begin with whether appellant pleaded an injury-in-fact, and more specifically, whether appellant pleaded "any damage."

Assuming that respondent commissioner qualifies as a liable party for failing to draft and implement effective policies and to train employees on the handling of privileged mail, under section 13.08, subdivision 1, appellant's MGDPA claim is sufficient if there is "any damage" resulting from the violation. This broad language permits recovery for emotional harm, but requires a claim of some injury-in-fact. *See Navarre v. S. Wash. Cty. Schs*, 652 N.W.2d 9, 30 (Minn. 2002); *see also Moubry v. Indep. Sch. Dist. 696, Ely, Minn.*, 9 F. Supp. 2d 1086, 1112 (D. Minn. 1998) (stating that a plaintiff "must establish that he has suffered some injury-in-fact").

Appellant pleaded that he "suffered, and may in the future suffer injury as a direct and proximate result of the public dissemination." He pleaded financial worry, mental anguish, and emotional suffering. He noted the potential for "future identity theft," that the data breach "may result in pecuniary liability," and claimed "mental anguish and emotional suffering due to grieving over the statutory deprivation of privacy rights." While we recognize that the broad language under section 13.08, subdivision 1, permits a claim for "any damage," we conclude that appellant has failed to state a legally sufficient claim for relief.

Although appellant claimed that he suffered injury and may in the future suffer injury, these are mere conclusory assertions. "A plaintiff must provide more than labels and conclusions." *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010). Appellant's claims of potential future identity theft and pecuniary loss do not support an MGDPA claim. "Damages which are remote and speculative cannot be recovered." *Jackson v. Reiling*, 249 N.W.2d 896, 897 (Minn. 1977).

Appellant pleaded that he suffered financial worry, emotional distress, anguish, and grief over the deprivation of his privacy rights, however, under appellant's theory of the case, he has failed to state a legally sufficient claim for emotional damages. "[H]urt feelings, anger and frustration are part of life [and are] not the types of harm that could support a mental anguish award." *Brady v. Fort Bend County*, 145 F.3d 691, 718 (5th Cir. 1998) (quotation omitted).

Appellant's claims of injury are qualitatively different from other claims that have survived dismissal. In *Shqeirat v. U.S. Airways Group, Inc.*, for example, an MGDPA

claim was allowed to proceed where the plaintiff claimed to have suffered emotional harm after his Social Security number was released through the Internet. 515 F. Supp. 2d 984, 991, 997-98 (D. Minn. 2007). Unlike the dissemination in *Shqeirat*, appellant's BCA form never left the MSOP system, and appellant acknowledges in his complaint that designated MSOP staff were obligated by policy to open privileged mail "in the client's presence, removing and scanning the contents and envelope to ensure [there is] no contraband." In other words, even if the MSOP mail policies had been rigorously followed, appellant's BCA form would not have remained completely private.

In *Navarre*, the supreme court held that there was sufficient evidence for a jury determination on an emotional-damage claim based upon conclusory testimony unsubstantiated by any medical testimony. 652 N.W.2d at 30. But, unlike here, the disclosures received media coverage. *Id.* at 17-18. And the testimony at trial indicated that the *media coverage* caused the plaintiff-teacher emotional distress and fear of reputational harm. *Id.* at 19. Here, again, the BCA form did not escape the confines of the MSOP system.

The *Navarre* court expressed its hesitation about expanding the availability of emotional-distress damages because of concerns over speculative and fictitious allegations. *Id.* at 30. The supreme court noted that such damages are only available "to those plaintiffs who prove that emotional injury occurred under circumstances tending to guarantee its genuineness." *Id.* (quotation omitted). Appellant's claims lack the necessary "circumstances" referenced in *Navarre*, and we conclude that no evidence could be produced consistent with appellant's theory of emotional damage to entitle him to relief.

*See Martens*, 616 N.W.2d at 739-40. Therefore appellant has failed to sufficiently plead "any damage." *See* Minn. Stat. § 13.08, subd. 1.

We next address the district court's finding that appellant failed to properly plead punitive damages. In addition to compensatory damages, exemplary or punitive damages are permitted under the MGDPA for "willful violation[s]." *Id.* It is unclear whether section 13.08, subdivision 1, permits exemplary damages in the absence of "any damage." "Generally, in Minnesota, outside a defamation context, punitive damages are permitted only when actual or compensatory damages are also present." *Kohler v. Fletcher*, 442 N.W.2d 169, 173 (Minn. App. 1989), *review denied* (Minn. Aug. 25, 1989). Regardless, we conclude that appellant forfeited any challenge to the dismissal of his punitive-damages claim.

The district court concluded that appellant failed to follow the pleading guidelines for seeking exemplary damages set forth in Minn. Stat. § 549.191 (2018). Under section 549.191:

> Upon commencement of a civil action, the complaint must not seek punitive damages. After filing the suit a party may make a motion to amend the pleadings to claim punitive damages. The motion must allege the applicable legal basis under section 549.20 or other law for awarding punitive damages in the action and must be accompanied by one or more affidavits showing the factual basis for the claim. At the hearing on the motion, if the court finds prima facie evidence in support of the motion, the court shall grant the moving party permission to amend the pleadings to claim punitive damages.

The district court relied upon *Backlund v. City of Duluth*, in concluding that appellant was obligated to comply with the pleading requirements of section 549.191, but the *Backlund*

court specifically noted that it did not reach the issue of whether a plaintiff "could originally plead a claim for punitive damages without first obtaining leave" from the district court. 176 F.R.D. 316, 323 n.5 (D. Minn. 1997). Still, appellant does not challenge the district court's application of section 549.191, but merely asserts on appeal that he sought, not only exemplary damages, but also compensatory damages. Because appellant does not challenge the district court's application of section 549.191, and appellant has not briefed the issue on appeal, the issue is forfeited. *See Dep't of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997) (declining to address inadequately briefed issue); *Middle River-Snake River Watershed Dist. v. Dennis Drewes, Inc.*, 692 N.W.2d 87, 91-92 (Minn. App. 2005) (concluding that challenge to district court's legal conclusion was waived because the issue was not briefed); *DLH, Inc. v. Russ*, 544 N.W.2d 326, 330 (Minn. App. 1996) (ruling that issue not raised on appeal was waived), *aff'd*, 566 N.W.2d 60 (Minn. 1997). Appellant failed to sufficiently plead "any damage," and to the degree that he was permitted to seek punitive damages in the absence of actual damages, he forfeited any challenge to the dismissal of that claim.

## III. The district court did not abuse its discretion by dismissing appellant's claims with prejudice.

Lastly, appellant argues that the district court abused its discretion by dismissing his claims with prejudice. We review a dismissal with prejudice for an abuse of discretion. *Mercer v. Andersen*, 715 N.W.2d 114, 120 (Minn. App. 2006). "Where a complaint fails to state a claim upon which relief can be granted for purposes of [r]ule 12.02(e) . . . , dismissal with prejudice and on the merits is appropriate." *Martens*, 616 N.W.2d at 735.

Given that dismissal with prejudice has been specifically directed by our supreme court for claims that "fall far short of the established [pleading] requirements," the district court did not abuse its discretion. *See id.* at 748.

**Affirmed.**