STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0064

Christopher Christopherson,
Appellant,

vs.

Alpha Service Industries, Incorporated,
Respondent.

Filed December 2, 2019
Affirmed
Johnson, Judge

Hennepin County District Court
File No. 27-CV-18-6047

A.L. Brown, Capitol City Law Group, LLC, St. Paul, Minnesota (for appellant)

Cheryl Hood Langel, Brian J. Kluk, McCollum, Crowley, Moschet, Miller & Laak, Ltd., Minneapolis, Minnesota (for respondent)

Considered and decided by Cochran, Presiding Judge; Johnson, Judge; and Slieter, Judge.

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

JOHNSON, Judge

After being released from prison and placed on supervised release, Christopher Christopherson sought and received treatment from a clinic owned and operated by Alpha Service Industries, Inc. (doing business as Alpha Human Services). Christopherson signed a consent form that authorized Alpha to release information concerning his treatment to his

probation officer. Two years later, while still on supervised release, Christopherson informed Alpha that he wished to revoke his consent. Alpha later released information concerning Christopherson's treatment to his probation officer. Christopherson sued Alpha, alleging a violation of the Minnesota Health Records Act. The district court granted Alpha's motion for summary judgment. We conclude that Alpha did not violate the health-records act because the consent form that Christopherson signed expressly states that his consent may not be revoked until he has completed his term of supervised release. Therefore, we affirm.

FACTS

In 2013, Christopherson was convicted of a crime and sentenced by the St. Louis County District Court to 39 months of imprisonment with a five-year term of conditional release. While on conditional release, the department of corrections required Christopherson to undergo treatment. Christopherson chose Alpha as a provider and, on August 10, 2015, signed a one-page document entitled "Consent Form for Criminal Justice System Treatment Referrals." The consent form authorized Alpha and its affiliates to engage in "unrestricted communication with . . . [Christopherson's] parole or probation officer (and their supervisors)." Specifically, the document provides for the release of confidential information concerning Christopherson's progress and treatment by Alpha, "including but not limited to release of progress evaluations, psychological test results, case note summaries, attendance and participation reports, incident reports, and recommendations." In addition, the document contains the following paragraph concerning its duration:

> I understand that this consent shall expire 60 days after it is given or when there is a substantial change in my status, whichever is later. . . . If I have been sentenced at the time consent is given, a substantial change in my status occurs when the sentence has been fully executed.

Finally, the document contains the following paragraph concerning whether consent is revocable:

> I understand that since my participation in the Alpha program has been made a condition of release from confinement, the disposition or status of a criminal proceeding against me, or the execution or suspension of a sentence imposed upon me, federal law (42 C.F.R. § 2.39[1]) prohibits me from revoking this consent until there has been a formal and effective termination or revocation of my release from confinement, probation or parole.

In October 2017, Christopherson gave Alpha a handwritten note, which stated:

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[1]Because there is no such regulation in the current version of the Code of Federal Regulations, the district court referred to this citation as a "typographical error." We note, however, that such a regulation existed before August 10, 1987. *See* Confidentiality of Alcohol and Drug Abuse Patient Records, 52 Fed. Reg. 21796, 21811 (June 9, 1987). The regulation provided, in part:

> An individual whose release from confinement, probation, or parole is conditioned upon his participation in a treatment program may not revoke a consent given by him in accordance with paragraph (a) of this section until there has been a formal and effective termination or revocation of such release from confinement, probation, or parole.

42 C.F.R. § 2.39(c) (1986). On August 10, 1987, section 2.39 was deleted, and much of its content was transferred to a different section, which now provides, in part:

> The written consent must state that it is revocable upon the passage of a specified amount of time or the occurrence of a specified, ascertainable event. The time or occurrence upon which consent becomes revocable may be no later than the final disposition of the conditional release or other action in connection with which consent was given.

42 C.F.R. § 2.35(c) (2018); *see also* Confidentiality of Alcohol and Drug Abuse Patient Records, 52 Fed. Reg. at 21811.

> I, Christopher Christopherson, am retracting all release of information. Beginning today 10/26/17 at 2:15 pm. All communication to end as well. Except, for insurance and billing purposes, until processing is complete or 30 days from today 10/26/17. (This will be effective 10/26/17 at 2:15 pm.)

Thereafter Christopherson sought and received treatment from another provider.

In November 2017, Alpha released information concerning Christopherson's treatment to his assigned probation officer. Based on that release of information, Christopherson commenced this action against Alpha in March 2018. His complaint alleges one claim of a violation of the Minnesota Health Records Act, Minn. Stat. §§ 144.291-.34 (2018).

Within the time allowed for answering the complaint, Alpha moved to dismiss the complaint for failure to state a claim upon which relief can be granted. *See* Minn. R. Civ. P. 12.02(e). In July 2018, the district court conducted a hearing on the motion. In September 2018, the district court issued an order in which it converted Alpha's motion to dismiss into a motion for summary judgment. *See* Minn. R. Civ. P. 12.02. The district court ordered the parties to submit evidence concerning Christopherson's probation officer and whether Alpha was served with the complaint. The district court also instructed the parties to identify "whether there is any other genuine issue of material fact relating to Plaintiff's claim." Christopherson filed an affidavit with exhibits, and Alpha filed an affidavit with exhibits and a supplemental memorandum of law.

In November 2018, the district court granted Alpha's motion. Christopherson appeals.

D E C I S I O N

Christopherson argues that the district court erred by granting Alpha's motion for summary judgment.

A district court must grant a motion for summary judgment "if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01. A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the nonmoving party. *Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 564 (Minn. 2008). This court applies a *de novo* standard of review to the district court's legal conclusions on summary judgment and views the evidence in the light most favorable to the party against whom summary judgment was granted. *Commerce Bank v. West Bend Mut. Ins. Co.*, 870 N.W.2d 770, 773 (Minn. 2015).

The Minnesota Health Records Act governs the release of a patient's health-related records by a health-care provider. *See* Minn. Stat. § 144.293, subd. 1 (2018); *see also Larson v. Northwestern Mut. Life Ins. Co.*, 855 N.W.2d 293, 301-02 (Minn. 2014); *Expose v. Thad Wilderson & Assocs., P.A.*, 863 N.W.2d 95, 102-03 (Minn. App. 2015), *aff'd*, 889 N.W.2d 279 (Minn. 2016). The act protects the privacy of a patient's health-related records by limiting the circumstances in which a health-care provider may release health-related records:

> A provider . . . may not release a patient's health records to a person without:

> (1) a signed and dated consent from the patient or the patient's legally authorized representative authorizing the release;
>
> (2) specific authorization in law; or
>
> (3) a representation from a provider that holds a signed and dated consent from the patient authorizing the release.

Minn. Stat. § 144.293, subd. 2. A patient's consent "is valid for one year or for a period specified in the consent or for a different period provided by law." *Id*., subd. 4.

In this case, it is undisputed that Alpha released Christopherson's health records to Christopherson's assigned probation officer in November 2017. The question on appeal is whether Alpha was authorized to release Christopherson's health records because of the consent form that he signed in August 2015 or, on the other hand, whether Alpha was not authorized to do so because of his subsequent handwritten note expressing his intention to revoke his consent.

In the district court, the parties approached this issue in various ways. In its initial memorandum of law, Alpha argued that Christopherson consented to the release of his health records and that he was precluded by both state and federal law from withdrawing his consent. Alpha relied in part on a federal regulation that provides that consent may not be revoked until "the final disposition of the conditional release or other action in connection with which consent was given." *See* 42 C.F.R. § 2.35(c). In opposition, Christopherson argued that section 144.293, subdivision 4, of the Minnesota Statutes does not prevent him from revoking his consent, that his consent expired one year after it was given, that his sentence was "fully executed" on the day that he was sentenced, and that a

federal regulation allows him to revoke his consent at any time. In reply, Alpha argued that Christopherson could not revoke his consent because there was no "substantial change" in his "status."

In granting Alpha's summary-judgment motion, the district court noted that the health-records act does not expressly state that a patient's consent is either revocable or irrevocable. The district court reasoned that, "by omitting a revocability provision . . . , the Legislature did not intend to restrict the revocability or irrevocability of . . . consent agreements." The district court next reasoned that, in light of the statutory provision that the duration of a patient's consent may be fixed for "a period specified in the consent," *see* Minn. Stat. § 144.293, subd. 4, Christopherson's consent is "valid . . . for the duration of the period for which consent is made irrevocable under the consent agreement." The district court concluded that the consent form makes Christopherson's consent irrevocable until he has served all of his term of conditional release.

On appeal, Christopherson makes two arguments. First, he argues that the district court erred by stating that a patient's consent "once given, cannot be withdrawn, but can only expire" and that his consent must be deemed revocable "unless the statute expressly says that it is irrevocable." This argument does not accurately describe the district court's order. The district court did not say categorically that a patient's consent may not be withdrawn or revoked. Rather, the district court stated that the revocability or irrevocability of a patient's consent is determined by the terms of the written consent form signed by the patient. The district court relied on the statutory provision that states that a patient's consent is valid for "a period specified in the consent," *see* Minn. Stat. § 144.293,

subd. 4, and reasoned that the statutory period includes "a period during which the consent of a patient is made irrevocable by the agreement." In essence, the district court reasoned that Christopherson's consent could not be revoked because the consent form that he signed specified that consent could not be revoked until the occurrence of one of the events described in the form. The district court's reasoning reflects a proper interpretation of the applicable statute and the consent form.

Christopherson relies on *Brekke v. THM Biomedical, Inc.*, 683 N.W.2d 771 (Minn. 2004), for the proposition that it is "presumed that statutes are consistent with the common law" and that a statute may abrogate the common law only "by express wording or necessary implication." *Id.* at 776. In *Brekke*, the supreme court held that section 181.79 of the Minnesota Statutes, which creates a cause of action in favor of an employee against an employer that failed to pay earned wages, did not supersede or abrogate the employer's equitable defenses of waiver and estoppel. 683 N.W.2d at 775-77. *Brekke* is distinguishable because the statute at issue in that case made no reference whatsoever to the concepts of waiver or estoppel. *Id.* at 775. In this case, however, the health-records act governs the revocability of a patient's consent by providing that a patient's consent is valid "for a period specified in the consent." Minn. Stat. § 144.293, subd. 4. The district court interpreted that part of the act to govern the revocability of a patient's consent, and Christopherson has not challenged the district court's reasoning on that point. In any event, even if we were to apply the quoted passage of *Brekke*, we would conclude that section 144.293, subdivision 4, *has* superseded or abrogated the common law concerning the

revocability of consent, if not "by express wording," then by "necessary implication." *See* 683 N.W.2d at 776.

Second, Christopherson argues that, if it was proper for the district court to look to the signed consent form to determine whether his consent is revocable, the district court erred by enforcing the consent form rather than deeming it unenforceable on the ground that his consent was "gratuitous." This argument is based on the legal premise that, if a person gives consent gratuitously, the consent is ineffective because it is not supported by consideration. For this premise, Christopherson cites *Baehr v. Penn-O-Tex Oil Corp.*, 104 N.W.2d 661 (Minn. 1960), as well as two unpublished opinions of this court and one opinion from another jurisdiction.

Christopherson did not make this argument to the district court. Indeed, in the district court, he did not challenge the enforceability of his consent in any way. Rather, he assumed that his consent is valid and enforceable and argued that it is nonetheless revocable and was revoked. Because he made no argument to the district court concerning whether his consent was gratuitous, he presented no evidence on that issue. Consequently, the district court did not consider the issue. Because Christopherson did not preserve this argument by presenting it to the district court, we will not consider it for the first time on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988); *Doe 175 v. Columbia Heights Sch. Dist.*, 842 N.W.2d 38, 42 (Minn. App. 2014).

In sum, the district court did not err by reasoning that Christopherson's written consent is irrevocable until he has completed his term of conditional release. Accordingly, the district court did not err by granting Alpha's motion for summary judgment.

Affirmed.