STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0557

Jay A. Soeffker,
Appellant,

vs.

McGrann Shea Carnival Straughn and Lamb, Chartered, et al.,
Respondents.

Filed December 27, 2021
Affirmed
Bryan, Judge

McLeod County District Court
File No. 43-CV-20-214

Jay A. Soeffker, Glencoe, Minnesota (pro se appellant)

Michael A. Klutho, Maria P. Brekke, Bassford Remele, Minneapolis, Minnesota; and

Kathleen M. Brennan, McGrann Shea Carnival Straughn & Lamb, Chartered, Minneapolis, Minnesota (for respondents)

Considered and decided by Frisch, Presiding Judge; Bryan, Judge; and Klaphake, Judge.*

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

NONPRECEDENTIAL OPINION

BRYAN, Judge

Appellant challenges the district court's decision to dismiss the complaint. Appellant also challenges the entry of default judgment against him on respondents' counterclaim. Because appellant did not comply with the requirements of Minnesota Statutes section 544.42 (2020) or respond to respondents' counterclaim, we affirm.

FACTS

In 2007, appellant Jay A. Soeffker hired an attorney, K.L., to handle his marital dissolution proceedings. After becoming dissatisfied with K.L.'s representation in January 2008, Soeffker retained an attorney from respondent McGrann Shea Carnival Straughn and Lamb, Chartered, et al (the firm) to represent him instead of K.L. in the dissolution case and to handle Soeffker's claim of breach of fiduciary duty against K.L. The firm represented Soeffker from 2007 to 2012 in various proceedings, including through two appeals in the dissolution case and a successful collection of judgment.

On February 21, 2019, Soeffker served, but did not file,[1] an action against the firm, alleging that the firm breached its fiduciary duty. According to the complaint, in December 2012, Soeffker met with his attorney and discussed "billing errors and mistakes and lack of communication," as well as Soeffker's concerns that the firm commenced work "without proper knowledge and consent." Soeffker further alleged that his attorney at the firm breached his fiduciary duty "by taking the position that [Soeffker] should be responsible to

[1] Soeffker filed his complaint with the district court on February 14, 2020.

pay fees in a letter from [the firm] to [K.L.]" Soeffker also alleged that the firm breached its fiduciary duty by filing a UCC financing statement against Soeffker for unpaid fees and for charging him for those filings. Soeffker also alleged that these actions violated the retainer agreement.

The firm answered Soeffker's complaint and served a counterclaim against him for breach of contract.[2] The firm alleged that it provided legal services to Soeffker for an appeal in 2009, a post-appeal matter in 2011, and a collection matter in 2011. In support of the counterclaim, the firm alleged that Soeffker failed to pay the amount owed for those services. The firm also moved to dismiss Soeffker's complaint because Soeffker failed to submit the affidavits required by Minnesota Statutes section 544.42. In his response to the firm's motion to dismiss the complaint, filed on March 11, 2020, Soeffker made several requests, including a request that the district court dismiss the firm's counterclaim. It is undisputed that Soeffker made no response to the firm's counterclaim from the date of service in April 2019 through March 11, 2020. Soeffker's memorandum of law accompanying the March 11, 2020 pleading only addressed Soeffker's theory of total fee forfeiture as a result of the firm's alleged breach of its fiduciary duty to him. It did not advance an argument regarding Soeffker's request to dismiss the firm's counterclaim.

In June 2020, the district court held a hearing on the firm's motion to dismiss. After hearing arguments from both parties, the district court dismissed Soeffker's claim with

[2] The firm obtained Soeffker's agreement, in writing, to extend the time to serve its answer and counterclaim until April 5, 2019. On that date, the firm timely served its answer and counterclaim, but did not formally file the answer and counterclaim until February 18, 2020.

prejudice for failing to comply with section 544.42. Soeffker appealed to this court. Because the district court had not addressed the firm's counterclaim against Soeffker, this court determined that the appeal was premature. Upon dismissal of the appeal, the firm moved the district court for default judgment against Soeffker on its counterclaim. The district court concluded that Soeffker never addressed the counterclaim in any of his pleadings and never addressed the merits of the firm's motion for default judgment in his response briefs. The district court granted the firm's request for default judgment. Soeffker appeals.

DECISION

I. Decision to Grant Respondents' Motion to Dismiss

Soeffker asserts that the district court erred by granting respondents' motion to dismiss the complaint, arguing that the affidavit requirements of section 544.42 do not apply to breach-of-fiduciary-duty claims. We disagree.

Under Minnesota Statutes section 544.42, legal malpractice claims must be accompanied by two supporting affidavits. The plaintiff must submit one expert affidavit opining that "the defendant deviated from the applicable standard of care and by that action caused injury to the plaintiff." Minn. Stat. § 544.42, subd. 3(a)(1). The plaintiff must also serve an affidavit disclosing "the identity of each . . . expert witness . . . , the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion." *Id.*, subd. 4(a). The requirements of section 544.42 are strictly enforced, *see Middle River-Snake River Watershed Dist. v. Dennis Drewes, Inc.*, 692

N.W.2d 87, 91 (Minn. App. 2005), and failure to comply compels dismissal, Minn. Stat. § 544.42, subd. 6(a), (c).

There is an exception to these requirements that applies when "the conduct complained of can be evaluated adequately by a jury in the absence of expert testimony." *Fontaine v. Steen*, 759 N.W.2d 672, 677 (Minn. App. 2009) (quoting *Hill v. Okay Contr. Co.*, 252 N.W.2d 107, 116 (Minn. 1977)). Such cases are rare and exceptional. *See Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 192 (Minn. 1990). Whether expert testimony is required depends on the nature of the questions that the trier of fact must decide and on whether specialized or technical knowledge will assist in that decision. *Fontaine*, 759 N.W.2d at 677. We review this legal question de novo. *Guzick v. Kimball*, 869 N.W.2d 42, 46-47 (Minn. 2015). However, this court reviews a district court's ultimate decision to dismiss a complaint based on section 544.42 for an abuse of discretion. *Id.* at 46.

In this case, Soeffker argues that the requirements of section 544.42 do not apply for the following two reasons: (1) the requirements of section 544.42 only relate to claims alleging legal malpractice, not claims alleging a breach of fiduciary duty; and (2) the affidavit requirements of section 544.42 do not apply because the conduct alleged is within the common knowledge of most jurors. We are not convinced by either argument. First, Soeffker's initial argument is contrary to a recent holding from this court. *Mittlestaedt v. Henney*, 954 N.W.2d 852, 862 (Minn. App. 2021) (concluding that section 544.42 applies

to claims alleging a breach of fiduciary duty against one's attorney), *rev. granted in part* (Minn. Mar. 30, 2021).[3]

Second, we conclude that expert affidavits are necessary given the nature of the allegations in the complaint. An attorney owes a fiduciary duty "to represent the client with undivided loyalty, to preserve the client's confidences, and to disclose any material matters bearing upon the representation of these obligations." *Rice v. Perl*, 320 N.W.2d 407, 410 (Minn. 1982) (emphasis omitted) (quotation omitted). A claim for breach of fiduciary duty is closely related to a claim of professional negligence, and requires a plaintiff to demonstrate a fiduciary duty, breach of that duty, causation, and damages. *See Padco v. Kinney & Lange, et. al.*, 444 N.W.2d 889, 891 (Minn. App. 1989) (holding that a complaint alleging the elements of a legal malpractice claim sufficiently alleged the elements of a breach of fiduciary duty claim), *rev. denied* (Minn. Nov. 15, 1989).

Soeffker asserts that the firm breached its fiduciary duty when his attorney at the firm took the position that Soeffker would not request reimbursement from K.L. for additional fees incurred and would forgo a claim for treble damages if K.L. reached an agreement with the firm. Soeffker also asserts that the firm breached its fiduciary duty when his attorney at the firm filed a UCC financing statement against Soeffker.[4] Both

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[3] The Minnesota Supreme Court granted review in *Mittlestaedt*, but this court's decision binds our analysis unless and until reversed by the Minnesota Supreme Court. *See State v. Chauvin*, 955 N.W.2d 684, 689 (Minn. App. 2021), *rev. denied* (Minn. Mar. 10, 2021).

[4] Soeffker also argues that this conduct constitutes a breach of the retainer agreement. The relevant portion of the retainer agreement reads, "We will not make any settlements without your consent, nor will any proceedings be filed in court without your approval." Soeffker contends that breaching the retainer agreement is a breach of fiduciary duty. Because this argument derives from the others, we need not address it separately.

allegations require expert testimony. Whether the letter to K.L. fell below the expected standard of care depends on an understanding of the circumstances surrounding the potential claims against K.L., as well as an understanding of the implications of any statements that were made by or to Soeffker regarding the language in the letter. Similarly, because the need for UCC financing statements and their significance are outside the common knowledge of the jury, this allegation would require expert testimony to explain the standard of care, the disputed amounts in the lien, and whether the firm's conduct fell within the standard of care. Therefore, the requirements of section 544.42 apply, and because Soeffker did not submit the necessary affidavits, the district court did not abuse its discretion by granting the motion to dismiss the complaint.

II. Decision to Grant Respondents' Motion for Default Judgment

Soeffker contends that the district court erred by granting the firm's motion for default judgment on its counterclaim. Given Soeffker's inaction after being served with the counterclaim, however, we discern no abuse of discretion by the district court.

Default judgment is appropriate when a party has failed to timely answer a claim. *See* Minn. R. Civ. P. 55.01 (providing that "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend within the time allowed therefor by these rules or by statute, and that fact is made to appear by affidavit, judgment by default shall be entered against that party."). We review the entry of default judgment for an abuse of discretion. *Laymon v. Minn. Premier Props., LLC,* 903 N.W.2d 6, 17 (Minn. App. 2017), *aff'd*, 913 N.W.2d 449 (Minn. 2018).

The firm timely served Soeffker with its answer and counterclaim on April 5, 2019. After being served with the counterclaim, Soeffker failed to respond until March 11, 2020. At that time, Soeffker responded to the firm's motion to dismiss the complaint. Although Soeffker requested that the district court dismiss the counterclaim in his March 11, 2020 response to the firm's motion to dismiss the complaint, he did not advance any argument to support the request at that time, or at any time prior to this court's decision to dismiss the initial appeal.[5] Because Soeffker did not timely answer the firm's counterclaim, the district court did not abuse its discretion when it granted the firm's motion for default judgment.

Affirmed.

[5] Soeffker asserts that the firm should not be permitted to make a motion for default judgment after this court dismissed the initial appeal. He does not provide any authority for this argument, and we decline to reach the issue in the absence of adequate briefing. *State Dep't of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997) (declining to address issue not adequately briefed); *Waters v. Fiebelkorn*, 13 N.W.2d 461, 464-65 (Minn. 1944) ("[O]n appeal error is never presumed. It must be made to appear affirmatively before there can be reversal. . . . [T]he burden of showing error rests upon the one who relies upon it.").