STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0816

Peter Gerard Lonergan,
Appellant,

vs.

Nancy Johnston, et al.,
Respondents.

Filed April 11, 2022
Affirmed
Cleary, Judge[*]

Ramsey County District Court
File No. 62-CV-20-1097

Peter Gerard Lonergan, Moose Lake, Minnesota (pro se appellant)

Keith Ellison, Attorney General, Drew Bredeson, Brandon Boese, Assistant Attorneys General, St. Paul, Minnesota (for respondents)

Considered and decided by Slieter, Presiding Judge; Connolly, Judge; and Cleary, Judge.

NONPRECEDENTIAL OPINION

CLEARY, Judge

Appellant, Peter Gerard Lonergan, challenges the district court's dismissal of his suit against respondents, multiple Minnesota Sex Offender Program (MSOP) officials, for

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

failure to state a claim upon which relief could be granted. Appellant argues the district court erred by dismissing his complaint because (a) it failed to liberally construe his pleadings; (b) it erred by determining Minn. Stat. § 144.651 (2020), the Patient Bill of Rights (PBR) does not create a private cause of action; and (c) appellant has the right to pursue recovery through a personal-injury tort claim. Appellant also argues the district court erred in denying his temporary restraining order (TRO) and makes a series of arguments in his reply brief. Because PBR does not create a private cause of action and appellant's complaint asserted no other legitimate cause of action, we affirm.

FACTS

Appellant is a civilly committed sex offender residing in an MSOP facility. MSOP has used a series of vendors, but now contracts with T.W. Vending to provide canteen items within the facility and Thrifty White Pharmacy to supply over the counter medications and other medical supplies. MSOP has policies that limit the approved vendors MSOP patients can purchase items from and contends these policies are meant "to maintain the therapeutic environment and ensure the safety and security of clients, staff, and the public."

Appellant started this case in February 2020, by filing a complaint in Ramsey County District Court against MSOP's executive director and other staff, and immediately seeking a TRO, because MSOP staff confiscated as contraband two mugs appellant bought from a non-approved vendor.

Appellant's complaint stated PBR gives him "the right to contract with any commercial or private vendor of his choosing" and each named respondent restricted this right. *See* Minn. Stat. § 144.651, subd. 24. Appellant argued this violation of PBR caused

a violation of a series of constitutional rights. In relevant part, appellant sought (1) for MSOP's unlawful conduct to be declared "illegal and in violation of Minnesota Statutory Law, the Minnesota Constitution, United States Constitution and common law basic human rights claims"; (2) for respondents to be "enjoined from engaging in the same or similar practices"; (3) for the repeal of policies restricting appellant's rights and privileges to select a vendor of his choice; and (4) an order requiring MSOP to permit appellant to purchase "necessary hygiene, over-the-counter medications, snack items, and other allowable property items through any reputable commercial company of his choice."[1] Simultaneously with filing the complaint, appellant petitioned for a TRO to enjoin enforcement of the vendor selection policy.

The district court denied appellant's TRO petition after applying the requisite five-factor test. *See Dahlberg Bros., Inc. v. Ford Motor Co.*, 137 N.W.2d 314, 321–22 (Minn. 1965) (providing the five-factor test). The district court determined "the application of the *Dahlberg* factors do not favor granting a [TRO]" and that "the most significant factor by far is the likelihood of success on the merits—which [appellant] has failed to demonstrate at this early stage."

After the district court denied the TRO, respondents moved to dismiss the complaint because *Favors v. Kneisel*, 902 N.W.2d 92 (Minn. App. 2017), foreclosed appellant's primary claim. Appellant argued his case is distinguishable from *Favors*, sought

[1] Appellant also sought to recover actual damages ($57.33), compensatory damages "in an amount to exceed $50,000.00," pre- and post-judgment interest, costs, and attorney fees, and all other relief allowed by law and equity.

permission from the district court to request reconsideration on its TRO decision, moved for special accommodations to have internet access to prepare for this case, and moved to strike statements from respondents and respondents' memorandum of law supporting dismissal because he claimed they were perjured. After oral arguments, the district court granted respondents' motion to dismiss, determining PBR does not create a private cause of action and appellant's claimed injuries did not rise to the level of constitutional violations. The district court also denied all of appellant's other motions determining there were "no compelling circumstances to allow a motion to reconsider the TRO denial." Granting respondents' motion to dismiss made appellant's request for special access and motion to strike moot.

This appeal follows.

DECISION

Appellant challenges both the district court's dismissal of his complaint and denial of his TRO, and also asserts several arguments in his reply brief. We address each issue in turn.

I. The district court did not err by dismissing appellant's complaint for failure to state a claim upon which relief could be granted.

"We review a district court's grant of a motion to dismiss for failure to state a claim and a motion for judgment on the pleadings de novo to determine whether the pleadings set forth a legally sufficient claim for relief." *Abel v. Abbot Nw. Hosp.*, 947 N.W.2d 58, 68 (Minn. 2020) (citations omitted). "The reviewing court must consider only the facts alleged in the complaint, accepting those facts as true and must construe all reasonable inferences

in favor of the nonmoving party." *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). We also review the legal sufficiency of the claim de novo. *Graphic Commc'ns Loc. 1B Health & Welfare Fund A v. CVS Caremark Corp*., 850 N.W.2d 682, 692 (Minn. 2014).

a. The district court did not fail to liberally construe appellant's complaint.

Appellant claims the district court failed to liberally construe his pro se pleadings to identify his personal injury, and to identify his implication that the Minnesota Human Rights Acts (MHRA) functions with PBR to create a private cause of action.

We have recognized that pro se pleadings are to be liberally construed. *State ex rel. Farrington v. Rigg*, 107 N.W.2d 841, 841–42 (Minn. 1961) (stating "great liberality" is extended to pro se pleadings). Even so, "[p]ro se litigants are generally held to the same standards as attorneys." *Heinsch v. Lot 27, Block 1 For's Beach*, 399 N.W.2d 107, 109 (Minn. App. 1987). "The Minnesota Rules of Civil Procedure require that a civil complaint 'contain a short and plain statement of the claim showing that the pleader is entitled to relief.' A complaint should put a 'defendant on notice of the claims against him.'" *Dean v. City of Winona*, 868 N.W.2d 1, 8 (Minn. 2015) (quoting Minn. R. Civ. P. 8.01; *Mumm v. Mornson*, 708 N.W.2d 475, 481 (Minn. 2006)).

In its dismissal order, the district court stated it could not consider any claims under MHRA because appellant did "not make reference to [MHRA], nor common law torts, beyond '*Common Law* international Human Rights'" in his complaint. Like the district

court, we find no reference or argument based on MHRA in appellant's complaint. The district court did not fail to liberally construe appellant's complaint.[2]

b. PBR does not create an implied private cause of action.

Whether a statute creates a private cause of action is a question of statutory interpretation reviewed de novo. *Becker v. Mayo Found.*, 737 N.W.2d 200, 207 (Minn. 2007). A statute creates a private cause of action only if "the language of the statute is explicit or it can be determined by clear implication." *Id.* We consider the *Cort* factors to determine whether a statute creates an implied private cause of action: "(1) whether the plaintiff belongs to the class for whose benefit the statute was enacted; (2) whether the legislature indicated an intent to create or deny a remedy; and (3) whether implying a remedy would be consistent with the underlying purposes of the legislative enactment." *Favors*, 902 N.W.2d at 95 (citing *Flour Exch. Bldg. Corp. v. State*, 524 N.W.2d 496, 499 (Minn. App. 1994) (referencing the "*Cort* factors" and citing *Cort v. Ash*, 422 U.S. 66, 78 (1975)), *rev. denied* (Minn. Feb. 14, 1995)).

Appellant argues the legislature created a private cause of action by implication based on the special relationship between appellant and respondents, and PBR's language. PBR gives patients a "right to independent personal decisions and knowledge of available choices shall not be infringed." Minn. Stat. § 144.651, subd. 1. Appellant seems to argue

[2] Appellant also claims if his pleadings were unclear, the district court should have ordered him to amend the complaint. But appellant cites no authority supporting this contention, so we decline to address the issue. *See Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 919 n.1 (Minn. App. 1994) (stating the court of appeals declines to address allegations unsupported by legal analysis or citation).

this right to personal decisions combines with PBR subdivision 24 to create a right for patients to choose from any supplier or vendor to purchase goods. *See* Minn. Stat. § 144.651, subd. 24 (stating patients can buy goods not already provided "from the supplier of their choice unless otherwise provided by law"). Under his interpretation of the statute, appellant contends MSOP's failure to allow him his choice of vendors violates PBR and causes a personal injury, and because he alleged the necessary facts in his pleadings to show a personal injury, his claim should not have been dismissed.[3] Respondents, relying on *Favors*, contend that PBR does not create a private cause of action. *See* 902 N.W.2d at 92.

Favors is instructive and precedential. Favors, like appellant, was civilly committed to MSOP and filed a complaint against MSOP employees alleging they violated PBR by denying his request for a cassette recorder. *Id.* at 94. The respondents in *Favors* moved to dismiss the complaint for failure to state a claim upon which relief could be granted because PBR does not create a private cause of action. *Id.* After analyzing the *Cort* factors, we held "[t]he district court did not err in dismissing [Favor's] complaint . . . for failure to state a claim upon which relief may be granted because [PBR] does not create a private cause of action." *Id.*

The analysis we provided in *Favors* applies to appellant's case. First, appellant, "as a civilly committed patient at an inpatient facility for an indeterminate period of time,"

[3] Appellant's argument on this issue does not identify or address the *Cort* factors, the appropriate test. Instead, appellant conducted a more general statutory interpretation analysis.

belongs "to the class of people for whose benefit [PBR] was established, satisfying the first [private-cause-of-action] factor." *See id.* The first *Cort* factor is met.

Second, the statutory language in PBR has not substantially changed since the *Favors* decision in 2017, so there still "is no indication, based upon a review of the plain statutory language of the PBR, that the legislature intended to create a private cause of action for civilly committed patients at an inpatient facility." *See id.* The second *Cort* factor is not met.

Finally, PBR still provides a specific grievance procedure for patients to use when a facility does not comply with PBR. *See* Minn. Stat. 144.651, subd. 20 (providing PBR's grievance procedure). "Implying a remedy would be inconsistent with [PBR's] underlying purpose," because "[c]ourts are reluctant to imply a private cause of action where a statute has explicitly provided for an alternative remedy." *See Favors*, 902 N.W.2d at 94 (citing *Becker*, 737 N.W.2d at 207 ("[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.")). Additionally, as we explained in *Favors*, the legislature demonstrated that it did not intend to create a private cause of action "[b]y providing that the commissioner of health has exclusive authority to enforce [PBR] and that the issuance of such a correction order does not expand the patient's right to seek redress beyond the grievance procedures set forth in [PBR] subdivision 20." *See id.* at 96. The third *Cort* factor is not met.

Appellant suggests his situation differs from Favors' because, unlike the denial of a cassette recorder, the denial of appellant's mugs involves "personal care" and PBR

provides a right to appropriate personal care. Appellant's argument is not persuasive because it fails to recognize that our analysis of the *Cort* factors is not impacted by the different underlying factual situation that caused appellant to sue MSOP staff. Instead, application of the *Cort* factors shows PBR does not create an implied private cause of action.[4] The district court did not err by determining PBR does not create a private cause of action.

c. Appellant cannot seek redress through a personal injury tort.

Appellant argues that as a civilly committed patient, he has the same rights as a pretrial detainee, so respondents owe him a duty not to punish, harm, or hold him in unsafe conditions. Appellant contends MSOP, in denying him personal hygiene items for over a year, violated these duties, making respondents liable for his injury. Appellant did not present this argument, and it was not considered by the district court, so it is not amenable to appellate review, and we decline to address this argument. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) ("A reviewing court must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it." (quotation omitted)).

[4] Before *Favors* no precedential case law on this issue existed, but there are multiple nonprecedential cases holding PBR does not create a private cause of action for inpatients. *See, e.g.*, *Kunshier v. Minnesota Sex Offender Program*, No. A09-0133, 2009 WL 3364217, at *7 (Minn. App. Oct. 20, 2009); *Semler v. Ludeman*, No. A08-1477, 2009 WL 2497697, at *3 (Minn. App. Aug. 18, 2009) *Woodruff v. Ludeman*, No. A06-1659, 2007 WL 4390446, at *2 (Minn. App. Dec. 18, 2007).

In sum, appellant included no arguments about a cause of action arising under the MHRA or a personal injury tort in his complaint and PBR does not have an implied private cause of action. Appellant's complaint included no claim upon which relief could be granted, so the district court did not err in dismissing appellant's complaint.

II. The district court did not err by denying appellant's petition for a TRO.

We review a district court's decisions about a TRO for abuse of discretion. *Carl Bolander & Sons Co. v. City of Minneapolis*, 502 N.W.2d 203, 209 (Minn. 1993). We review the decision "as favorably as possible to the party who prevailed below." *Hvamstad v. City of Rochester*, 276 N.W.2d 632, 632–33 (Minn. 1979). "A district court abuses its discretion when its decision is contrary to the record or is based on an erroneous view of the law." *In re Estate of Nelson*, 936 N.W.2d 897, 910 (Minn. App. 2019).

Appellant contends the district court erred by denying the TRO because respondents' actions harmed him, so he has "standing" because of an injury-in-fact.[5]

[5] Appellant also argues the district court relied on false information from respondents in making its determination, but appellant fails to address the district court's explicit statement that neither the order denying the TRO nor the order dismissing the complaint "cite[] to anything in the record that [appellant] contends is factually inaccurate." Appellant provides no factual or legal argument contradicting this explicit statement from the district court, so we decline to address the issue. *Schoepke v. Alexander Smith & Sons Carpet Co.*, 187 N.W.2d 133, 135 (Minn. 1971) (stating an assignment of error in a brief based on "mere assertion" and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection).

Appellant also claims the district court abused its discretion by "ignoring" his offer of proof in requesting reconsideration and denying him the chance to request reconsideration. Appellant provides no legal support for his claim that the district court abused its discretion by denying his request to move for reconsideration of the TRO denial, so we decline to address the issue. *See Ganguli*, 512 N.W.2d at 919 n.1 (stating the court of appeals declines to address allegations unsupported by legal analysis or citation).

Respondents contend the district court did not err by denying the TRO because appellant failed to establish a likelihood of success on the merits and failed to establish a harm the TRO could prevent, both of which are dispositive of the issue.

We consider five factors when reviewing a trial court's decision on a preliminary injunction: "(1) the relationship of the parties; (2) the relative harm to the parties if the injunction is or is not granted; (3) the likelihood of success on the merits; (4) public policies expressed in statutes; and (5) the administrative burdens in supervising and enforcing the decree." *Sanborn Mfg. Co. v. Currie*, 500 N.W.2d 161, 163 (Minn. App. 1993) (citing *Dahlberg*, 137 N.W.2d at 321–22 (*Dahlberg* factors)). If a plaintiff shows no likelihood of prevailing on the merits, the district court errs as a matter of law in granting a temporary injunction. *Metrop. Sports Facilities Com'n v. Minn. Twins P'ship*, 638 N.W.2d 214, 226 (Minn. App. 2002).

The district court considered all five *Dahlberg* factors and determined the factors supported denying appellant's requested TRO. As a part of the district court's analysis of the five *Dahlberg* factors, it completed a full analysis of each of appellant's discernable legal claims in the complaint and determined "[t]here does not appear to be the possibility of success on the merits of [appellant's] claims." This determination required the district court to deny the TRO. *See Metrop. Sports Facilities Com'n*, 638 N.W.2d at 226 (stating a court errs as a matter of law by granting a TRO when it has determined there is no likelihood of success on the merits). The only authority and argument appellant gives on the TRO is to support his claim that he suffered an injury-in-fact but even if appellant could show an injury-in-fact, it would not be enough to survive a lack of success on the merits.

While appellant provides no other argument about the remaining *Dahlberg* factors, his entire brief reads as an argument that he could succeed on the merits if PBR created an implied private cause of action. As we have discussed, PBR does not create a private cause of action and appellant failed to make a claim under MHRA or through a personal injury tort in his complaint. There are no grounds on which appellant could succeed on the merits of his TRO application because he has not alleged a cause of action on which he could be granted relief. Appellant failed to show a claim that could succeed on the merits, so the district court did not err by denying appellant's TRO petition.

III. Appellant's reply brief arguments are unsupported.

Appellant claims respondents failed to object to his allegations of perjury in his principal brief, and this failure to respond constitutes a waiver of argument on the issue. Appellant asks this court to strike the perjured statements from the record, and remand to district court to determine the extent of the perjury and to establish a truthful record. But appellant provides no legal support for the contention that we can strike perjured statements from the district court's record, therefore we decline to address the issue. *See Ganguli*, 512 N.W.2d at 919 n.1 (stating the court of appeals declines to address allegations unsupported by legal analysis or citation).

Appellant also claims respondents addressed none of the issues he raised in his principal brief, and that this lack of response constituted a waiver of argument on the issues and this court must reverse. Appellant cites *Clark v. Peterson* to support this contention, which holds that failure to brief an issue for the court of appeals constitutes a waiver of the issue. 741 N.W.2d 136, 139 n.1 (Minn. App. 2007).

First, appellant contends respondents waived argument on his claim that opposing counsel perjured himself in writing in its brief to the court of appeals. Appellant did not raise this issue in his principal brief, so respondents had no reason to address the issue in their brief. *See Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 887 (Minn. 2010) (stating issues not raised or argued in appellant's principal brief generally cannot be raised in a reply brief).

Second, appellant contends respondents waived argument on whether the district court failed to liberally construe his pleadings. Respondents addressed this issue in their brief by arguing the district court does need to liberally construe complaints, but it need not insert non-existent arguments into the plaintiff's complaint.

Third, appellant contends respondents waived argument on whether the district court erred by not granting the TRO. Respondents addressed this issue in their brief by arguing the district court did not err in denying the TRO or reconsideration of the TRO because appellant failed to show a likelihood of success on the merits and failed to establish a harm the TRO could prevent, both of which are dispositive to granting a TRO.

Finally, appellant contends respondents waived argument on whether appellant can seek redress through a personal injury tort because of the special relationship between respondents and appellant. Respondents addressed this issue in their brief by arguing appellant failed to make the claim about a personal injury court before the district court, so the issue is not amenable to appellate review.

In sum, appellant's claims that respondent failed to address the issues he raised in his principal brief are inaccurate and appellant has failed to show grounds for reversal based

on respondents' supposed waivers, so we decline to address the issues. *See 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 . . . [and] the burden of showing error rests upon the one who relies upon it."); *Schoepke*, 187 N.W.2d at 135 (stating an assignment of error in a brief based on "mere assertion" and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection).

Affirmed.