STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0262

Kyle William Brenizer,
Appellant,

vs.

The Law Office of Lauren Campoli, PLLC, et al.,
Respondents.

Filed October 17, 2022
Affirmed
Connolly, Judge

Hennepin County District Court
File No. 27-CV-21-6718

Kyle-William: Brenizer[1], Elk River, Minnesota (pro se appellant)

Richard J. Thomas, Chris Angell, Burke & Thomas, PLLP, Arden Hills, Minnesota (for respondents)

Considered and decided by Frisch, Presiding Judge; Ross, Judge; and Connolly, Judge.

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

Appellant challenges the dismissal of his claims against his former lawyer and her law firm, based on his failure to timely file an affidavit of expert review under Minn. Stat.

[1] We note that appellant's preferred spelling of his name does not correspond to the official title of this case.

§ 544.42, subd. 2(1) (2020). Appellant argues that the district court abused its discretion in dismissing his complaint because no expert testimony was required to establish a prima facie case of breach of contract and because appellant's affidavit of expert review was timely served when he handed it to a guard at the jail; he also argues that the district court abused its discretion by denying appellant's motion to amend the pleadings and the affidavit of expert review. Because we see no abuse of discretion, we affirm.

FACTS

In 2017 and 2018, five complaints were filed against appellant Kyle-William: Brenizer: two in Anoka County, for violation of predatory-offender registration requirements and for felony check forgery (the Anoka cases); two in Crow Wing County, both for felony theft by check (the Crow Wing cases); and one in Sherburne County, for identify theft, possession of stolen checks, and check forgery (the Sherburne case).

In April 2018, appellant entered into an agreement with respondents Law Office of Lauren Campoli and Lauren Campoli (collectively, respondent) whereby respondent agreed to represent appellant until the final resolution of each of the five cases, exclusive of any jury trial, and appellant agreed to pay respondent a flat fee of $35,000 "for pre-trial only in the above-referenced cases" and to cooperate and keep in contact with respondent. Appellant made the final payment on the $35,000 in May, 2018.

In October 2018, appellant agreed to admit to theft by check and to pay restitution in one of the Crow Wing cases in exchange for a stay of adjudication of conviction, unsupervised probation, and dismissal of the other Crow Wing case, thereby resolving both Crow Wing cases. Later in October, a district court provided notice that a pretrial

conference in the Anoka cases would be held on January 17, 2019, and a jury trial would begin on February 11, 2019. The last meaningful contact between appellant and respondent occurred at this time.

In December 2018, respondent moved to withdraw from representation of appellant in the Anoka cases and the Sherburne case; the motions were scheduled to be heard at the respective pretrial conferences. Ten minutes before the pretrial conference for the Sherburne case, respondent called appellant; appellant told respondent he would be late and did not know when he would arrive. Respondent advised the district court that her repeated attempts to meet with appellant prior to the conference were unsuccessful, and the district court granted her motion to withdraw. Appellant objected to the prosecutor's request that the $30,000 bond posted by appellant be forfeited because he had not appeared, and the district court ruled that it would be forfeited if appellant did not appear by January 31, 2019.

At the pretrial conference for the Anoka cases, respondent appeared but appellant did not appear, and the district court issued a bench warrant for him. At the time of this appeal, the Anoka cases were unresolved. The district court granted respondent's motion to withdraw.

In 2020, appellant was federally indicted on two counts of wire fraud and two counts of money laundering and detained pending trial. He has since pleaded guilty and is currently incarcerated.

In May 2021, appellant, acting pro se, brought an action against respondent alleging breach of contract, negligence, and legal malpractice, all based on respondent's withdrawal

from the representation of appellant, and seeking punitive damages, and an order suspending respondent from the practice of law, and an order for investigation of respondent by the Minnesota Lawyers' Professional Responsibility Board. Neither an affidavit of expert review as required with a malpractice complaint by Minn. Stat. § 544.42, subd. 2(1), nor an affidavit explaining the absence of such an affidavit was filed.

On July 1, 2021, respondent demanded an affidavit of expert review. Under Minn. Stat. § 544.42, subd. 6 (2020), the affidavit was due within 60 days, or by August 30, 2021. On September 20, 2021, respondent moved to dismiss appellant's complaint under Minn. Stat. § 544.42, subd. 6 (requiring dismissal with prejudice of any claim that requires expert testimony to establish a prima facie case). The hearing date for the motion was October 18, 2021.

On September 22, 2021, appellant mailed respondent an affidavit of expert review dated August 27, 2021. Respondent received this on September 24, 2021. On that day, appellant filed the affidavit with a certificate of service stating that he had mailed it to respondent's counsel on August 28, 2021, and a letter to the court, also dated August 28, 2021. Respondent was not served with the certificate of service or copied on the letter.

Under Minn. R. Gen. Prac. 115.03(b), appellant's response to respondent's motion to dismiss was due 14 days before the October 18 hearing, on October 4. No response was made. On October 5, appellant mailed a responsive memorandum of law to respondent's counsel. Respondent's counsel received the memorandum on October 15, 2021. It stated that appellant provided an affidavit of expert review on August 27, 2021, in an envelope

postmarked September 22, 2021, and that, in any event, expert testimony was not necessary for appellant's claims.

At the hearing on respondent's motion to dismiss, appellant requested the district court to allow him to amend the complaint and the affidavit of expert review as necessary, but made no formal motion to amend. Appellant argued that he gave the affidavit on August 28 to a guard on duty at the jail where he was incarcerated, but the guard did not mail it until September 22.

Following the hearing, the district court issued an order noting that appellant's complaint included "purportedly different claims [of negligence, breach of contract, and malpractice] . . . essentially constitute a claim for malpractice against [respondent]" and that leave to amend was requested, but no formal motion to amend was brought. The district court granted respondent's motion to dismiss appellant's complaint with prejudice on the ground that no affidavit of expert review had been timely provided.

Appellant challenges the dismissal of his complaint, arguing that the district court abused its discretion in dismissing the complaint, because no expert witnesses were necessary and because appellant timely filed his affidavit when he gave it to the guard at the jail, and in denying appellant's request for leave to amend his complaint and affidavit.

DECISION

I. The Dismissal of Appellant's Complaint

"A district court's decision regarding whether to dismiss a malpractice claim for noncompliance with statutory requirements regarding submission of expert affidavits will be reversed only upon an abuse of discretion." *Lake Superior Ctr. Auth. v. Hammel, Green*

& Abrahamson, 715 N.W.2d 458, 468 (Minn. App. 2006). Questions of statutory construction are reviewed de novo. *Id.*

When expert testimony is to be used by a plaintiff to establish a prima facie case of malpractice against a professional, the plaintiff must serve on the defendant, with the pleadings, an affidavit drafted by the plaintiff's attorney or the plaintiff pro se stating that the affiant has reviewed the facts of the case "with an expert whose qualifications provide a reasonable expectation that the expert's opinions could be admissible at trial and that, in the opinion of this expert, the defendant deviated from the applicable standard of care and by that action caused injury to the plaintiff." Minn. Stat. § 544.42, subds. 2, 3(a)(1), 5 (2020). Failure to comply within 60 days of an opponent's demand for such an affidavit will result in mandatory dismissal of any claim as to which expert testimony is necessary to make a prima facie case. *Id.*, subds. 5, 6(a) (2020). Appellant did not provide an affidavit of expert review to respondent with the complaint; respondent demanded an affidavit on July 1, 2021; appellant did not mail the affidavit to respondent until September 22, 2021, or 23 days after the August 30, 2021 deadline. Therefore, the dismissal of appellant's malpractice complaint was mandatory under the statute. *See id.*

The statute also provides that a claimant who believes expert testimony is unnecessary may seek a waiver or modification of the affidavit requirement by making an application that shows the district court that good cause exists for not requiring an affidavit. *Id*., subd. 3(c) (2020). Appellant made no such application. The district court's dismissal with prejudice of appellant's malpractice complaint for failure to comply with the statute was not an abuse of discretion.

Appellant challenges the dismissal with two alternative arguments: first, that the statutory expert-affidavit requirement does not apply because no expert testimony would be needed for a jury to determine whether respondent committed malpractice that damaged appellant; second, that appellant met the requirement by giving the expert affidavit to a guard at the jail.

A. Application of Minn. Stat. § 544.42

Appellant's argument that no expert testimony would be needed for a jury to address a legal malpractice claim was addressed by this court in *Fontaine v. Steen*, 759 N.W.2d 672, 677 (Minn. App. 2009) (addressing whether a party's claims "require[d] expert testimony to establish a prima facie case of malpractice").

> To recover in a legal-malpractice case, a plaintiff must establish (1) the existence of an attorney-client relationship; (2) attorney negligence or breach of contract; (3) that such acts were the proximate cause of damages; and (4) that but for the attorney's conduct, the claimant would have been successful in the prosecution of the action. If the plaintiff does not prove each element, the malpractice claim fails. Expert testimony is generally required to establish both the standard of care and its breach. Expert testimony also must demonstrate that the attorney's negligence was the proximate cause of damages.
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> . . . The purpose of requiring the affidavit is to avoid frivolous claims against professionals whose work is easily subject to after-the-fact criticism. It is recognition of the reality that just because an attorney is unsuccessful does not mean the attorney committed malpractice. The affidavits assure the legal system that malpractice claims are meritorious.

Id. (citations omitted); *see also Thomas A. Foster & Assocs. v. Paulson*, 699 N.W.2d 1, 8 (Minn. App. 2005) (stating that litigation of attorney-malpractice claim required expert testimony on "complicated issues of causation and damage").

In his complaint, appellant sought a declaratory judgment that respondent committed legal malpractice, compensatory damages of $35,000 for breach of contract, general compensatory damages of $20,000 for negligence and legal malpractice, punitive damages of $35,000, and orders suspending respondent from the practice of law and demanding her investigation by the Minnesota Lawyers Professional Responsibility Board.

This court addressed a very similar situation in *Wells v. Mattox*, No. A15-1771 (Minn. App. June 13, 2016).[2] The plaintiff in *Wells* had paid his attorney $30,000 to defend him on child pornography charges, then asked the attorney to withdraw. *Wells*, 2016 WL 3223227, at *1. The attorney did so and, at the plaintiff's request, performed an accounting and returned an unearned $9,000 from the retainer. *Id.* The plaintiff argued that he was entitled to $3,500 in addition to the $9,000 and sued the attorney. *Id*. at *1-2. He did not submit an expert affidavit after the attorney demanded one, arguing that expert testimony was not needed because his malpractice claim was "a simple claim of breach of contract." *Id.* at *6. The attorney moved to dismiss on the ground that no expert affidavit had been submitted, and the motion was granted. *Id.* at *2. This court affirmed, concluding that "where accounting and ethical claims intermix, [such a] claim falls within the general rule that expert testimony is required in legal malpractice actions." *Id.* at *6. In *Wells*, the claimant, like appellant here, "chose a refund for the unearned portion of the flat fee, and that refund was based on an accounting. The resolution of the breach-of-contract claim

[2] While this opinion is nonprecedential, it is persuasive. Nonprecedential opinions may be cited as persuasive authority. Minn. R. Civ. App. P. 136.01, subd. 1(c).

requires an examination of that accounting, which implicates [the attorney's] performance in earning or incurring fees during his representation of [the claimant]." *Id.*

The district court here relied on *Wells* to support its determinations that "a layperson would . . . lack the training to determine whether communications or discussion between the parties breached an attorney's standard of care for communicating with a client" and that "[t]he propriety of a decision to withdraw as counsel, and the conditions of that withdrawal, also require[] knowledge beyond [that of] the average layperson." A jury could not, without expert evidence, determine whether respondent's standard of care had been met, whether the conditions for her withdrawal had been met, or how much of the fee appellant was entitled to have returned to him. The district court correctly concluded that Minn. Stat. § 544.42 applied and an affidavit of expert review was required.

B. Application of the Prison Mailbox Rule

Appellant argues here, as he argued at the hearing to the district court, that he had given the affidavit of expert review to a guard at the jail where he was then incarcerated and the guard failed to mail it. The district court found that:

> 32. . . . The last date for [appellant] to cure the [expert review affidavit] deficiency post-demand would therefore have been August 30, 2021.
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> 33. Though the Expert Review Affidavit itself, and the purported affidavit of service of that document, are dated August 27 and 28 respectively, the envelope in which the Expert Review Affidavit arrived to [respondent] is clearly post-marked for the date of September 22, 2021. . . . Even accepting [appellant's] assertion at the hearing that he handed the Expert Review Affidavit over to jail staff on August 28, 2021—and that he had no control over whether it was subject to "mail watch" procedures or restrictions—[appellant] admitted that he has no information to dispute that the Expert

> Review Affidavit was in fact physically mailed on September 22, 2021. This fact is supported by civil filing accepting [appellant's] mailed filing of the Expert Review Affidavit on the same day that it was received by [respondent].
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> 34. . . . [Appellant] noted his awareness that he was purportedly under "mail watch" and took no action to complete and mail the Expert Review Affidavit earlier in the sixty day window, nor [to] request a waiver or modification of the deadline from the opposing party or the Court prior to the deadline expiration based on his situation. It was incumbent upon [appellant] to ensure the Expert Review Affidavit was mailed to the opposing party by the service deadline. In this case that was not achieved until well after the sixty day deadline under Section 544.42.

For the first time on appeal, appellant argues that the prison mailbox rule applies.[3] Appellant relies on *Houston v. Lack*, 487 U.S. 266, 275-76 (1988) (reversing as untimely the dismissal of an inmate's appeal after holding that notice of appeal due on February 6, given to prison authorities on February 3, and not received by the court until February 7 was timely filed). *Houston* holds that a pro se prisoner's notice of appeal is deemed filed when it is delivered to prison authorities for forwarding to the court (the prison mailbox rule). *Id.* at 269-71. "Because reference to prison mail logs will generally be a straightforward inquiry, making filing turn on the date the pro se prisoner delivers the notice to prison authorities for mailing is a bright-line rule, not an uncertain one." *Id*. at 275. But *Houston* is distinguishable; the prisoner in that case had evidence of when he deposited the notice of appeal with the prison authorities, *id.* at 268, while appellant had no evidence of when he handed his affidavit to the guard. Appellant provides no basis for

[3] Although the argument is not properly before the panel, *see Roby v. State*, 745 N.W.2d 354, 357 (Minn. 1996), we address it in the interest of completeness.

extending the prison mailbox rule to apply where there is no evidence of when the disputed item was delivered to prison authorities.

Moreover, this court has already rejected the prison mailbox rule.

> To be timely filed, a postconviction petition must be actually received by the district court before the expiration of the statute of limitations. This requirement applies to all postconviction petitioners, regardless [of] whether they are represented by counsel or [are] pro se and regardless [of] whether they are incarcerated.

Chang v. State, 778 N.W.2d 388, 389 (Minn. App. 2010). *Chang* distinguished *Houston* on the ground that it concerned a federal rule of procedure, noting that "[n]either the Minnesota Supreme Court nor this court has considered in a [precedential] opinion whether to apply the rationale of *Houston*'s so-called 'prison mailbox rule' to similar provisions of Minnesota law" and rejecting the application because "such a rule is inconsistent with our supreme court's opinion[] in . . . *Langer* [*v. Comm'r of Revenue*, 773 N.W.2d 77 (Minn. 2009)]". *Id.* at 391-92. *Langer* rejected the argument that a filing was timely when it was mailed before the filing deadline because the court "had to actually receive the . . . [documents] by the filing deadline for [an] appeal to be timely." *Langer*, 773 N.W.2d. at 81; *see also Greer v. City of Eagan*, 486 N.W.2d 470, 471-73 (Minn. App. 1992) (rejecting argument that filing was timely when notice that had to be filed within 10 days after its service was received by the court on the 11th day).

II. Denial of Appellant's Request to Amend Complaint and Affidavit

At the hearing, appellant said,

> I would just like the Court to consider that if there is a deficiency in the affidavit, that the Court allow me to amend

> . . . that affidavit as allowed by the rule. . . . [S]ome of these cases do outline. . . consistent with the Court's discretion in the matter, to allow the plaintiff to amend a complaint and or to refile or re-serve any expert testimony that may be needed. I don't think that the statute . . . prevents that from happening. . . .
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> . . . I would just request that the Court allows me to amend any complaint or to amend the affidavit if necessary.

The district court said in its order,

> 46. As to the request to amend the Complaint, no formal motion to do so has been brought before the Court. *See* Minn. R. Civ. P. 15.01 ("[After a responsive pleading is served, a] party may amend a pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.").
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> 47. As to the Expert Review Affidavit, the "safe-harbor" provision of Minnesota Statute Section 544.42, subdivision 6(a), may allow a plaintiff to submit a second affidavit of expert review where the district court ruled the initial affidavit *inadequate. Noske v. Friedberg*, 713 N.W.2d 866, 872-73 (Minn. App. 2006). This safe harbor, however, does not create a work-around for a plaintiff who failed to timely submit the expert review affidavit within the deadline in the first place. *Fontaine v. Steen*, 759 N.W.2d 672, 677 (Minn. App. 2009) ("Here, because appellant failed to provide any expert affidavits within 60 days after respondents' demand or seek such a waiver or modification, it is undisputed that, if any of appellant's claims demand or seek such a waiver or modification, her failure to supply the affidavits would require dismissal of those claims with prejudice."). The issue here is not whether a timely submitted affidavit was inadequate, but rather whether an affidavit was submitted timely at all**.**
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> 48. . . . [Appellant] has made no showing—or even argument—of good cause shown to extend the time limits required by Section 544.42, subdivision 3.

Appellant does not refute the finding of no good cause. He relies on *Stern v. Dill*, 442 N.W.2d 322, 324 (Minn. 1989) (holding that the time for serving affidavits under the

statute may be extended, even after the time limits have expired pursuant to Minn. R. Civ. P. 6.02, upon a showing of excusable neglect). But here, as the district court found, there was no showing of excusable neglect. The district court did not abuse its discretion in denying appellant's request to modify his complaint or affidavit.

Affirmed.