STATE OF MINNESOTA
IN COURT OF APPEALS
A23-0096

Susan Carol Sohn,
Appellant,

vs.

Dr. Paul Anthony Arbisi,
Respondent.

Filed July 17, 2023
Affirmed
Jesson, Judge

Hennepin County District Court
File No. 27-CV-22-5734

Susan Carol Sohn, Plymouth, Minnesota (pro se appellant)

Jessica J. Theisen, Cousineau, Van Bergen, McNee & Malone, P.A., Minnetonka, Minnesota (for respondent)

Considered and decided by Smith, Tracy M., Presiding Judge; Jesson, Judge; and Bryan, Judge.

NONPRECEDENTIAL OPINION

JESSON, Judge

Appellant Susan Carol Sohn appeals the dismissal of her multiple claims against respondent Dr. Paul Anthony Arbisi arising out of his conduct during an independent psychological examination. Because the district court did not err in its analysis, we affirm its decision to dismiss Sohn's statutory and common-law claims. Sohn also appeals the

district court's denial of her motion to amend her complaint. Because Sohn's motion to amend was not timely, the district court did not abuse its discretion when denying the motion. Accordingly, we affirm.

FACTS

Sohn filed a claim for workers' compensation in 2017 because of incidents between her and a coworker that caused her to quit her job as a critical care nurse.[1] Sohn was diagnosed with post-traumatic stress disorder as a result of this experience. As part of her workers' compensation claim, Sohn completed an independent psychological examination with Arbisi in April 2018. Arbisi released his report from the examination in May 2018, opining that Sohn did not meet the criteria for a posttraumatic-stress-disorder diagnosis and stating that Sohn's behavior was consistent with depression, anxiety, and paranoia.

On March 28, 2022, Sohn sued Arbisi, alleging that his actions during the psychological examination—including laughing at her, physically intimidating her, and yelling at her—retraumatized her. In response, on April 19, 2022, Arbisi filed a motion to dismiss, or in the alternative, for a more definite statement. Later that same day, Sohn submitted a self-described motion of resistance to Arbisi's motion to dismiss. Arbisi obtained a hearing date of May 23, 2022, for his motion to dismiss.

On April 30, 2022, Sohn submitted a motion for leave to file an amended complaint. But her motion was returned to her because the district court did not receive the filing fee.

[1] These facts come from Sohn's complaint. When reviewing a district court's grant of a motion to dismiss, we accept the facts alleged in the complaint as true. *Sipe v. STS Mfg., Inc.*, 834 N.W.2d 683, 686 (Minn. 2013).

On May 10, 2022, Sohn's motion for leave to file an amended complaint was filed, and she received a May 26, 2022 hearing date.

At the May 23 hearing on Arbisi's motion to dismiss, the district court granted Arbisi's motion. It also canceled Sohn's May 26 hearing because it was on a motion filed fewer than 21 days before the May 23 hearing. The district court thereafter issued a written order granting Arbisi's motion to dismiss and entered judgment on August 1, 2022. On August 15, Sohn submitted a motion to amend the district court's findings, which the district court denied on August 31, 2022. Arbisi never sent Sohn notice of filing of the district court's order denying Sohn's motion to amend findings.

On January 19, 2023, Sohn appealed from the resulting judgment dismissing her claims.

DECISION

The district court dismissed Sohn's complaint for failure to state a claim under rule 12.02(e) of the Minnesota Rules of Civil Procedure. When reviewing a case dismissed under rule 12.02(e), the question before this court is whether the complaint sets forth a legally sufficient claim for relief. *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008) (citation omitted). Our review is de novo. *Id.*

Sohn appeals the dismissal of all of her claims[2] against Arbisi, which include defamation, medical malpractice, two violations of the Minnesota Health Records Act (the

[2] Sohn raises several arguments before this court for the first time in her reply brief, including arguments on defamation, Minnesota Health Records Act violations, negligence, intentional infliction of emotional distress, perjury, and HIPAA violations. Usually, we

Health Records Act), intentional and negligent infliction of emotional distress, perjury, and violations of HIPAA and the Minnesota Board of Psychology's rules of conduct. Sohn also appeals the district court's denial of her motion to submit an amended complaint. We review the dismissal of each of Sohn's claims in turn.[3]

I. Sohn's defamation claim is barred by the two-year statute of limitations.

In her complaint, Sohn alleges that Arbisi defamed her by misrepresenting her character, harming her reputation, and attacking her Christianity. The district court dismissed Sohn's defamation claim for three reasons: (1) it is time-barred by a two-year statute of limitations, (2) per Minnesota caselaw, false statements in medical records do not constitute defamation, and (3) each of the 27 allegedly defamatory statements would

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would disregard these arguments because they were not raised in Sohn's principal appellate brief. *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 887 (Minn. 2010) (explaining that in general, issues not raised or argued in appellant's principal brief cannot be raised in a reply brief). But given Sohn's self-represented status, we nevertheless address those arguments.

[3] Arbisi argues that Sohn's appeal is untimely because she did not file it until more than 60 days after the district court entered its order for judgment. But Sohn brought a motion to amend findings under rule 52.02 of the Minnesota Rules of Civil Procedure, which tolls her time to appeal. Minn. R. Civ. App. P. 104.01, subd. 2(b). Arbisi argues that Sohn could not bring a motion under rule 52.02 because the district court did not issue findings of fact that Sohn could appeal. But the Minnesota Supreme Court has held that the determining factor for whether a postjudgment motion tolls a deadline is whether, on the face of the document, the party has filed a motion that is expressly allowed under rule 104.01, subdivision 2. *Stern 1011 First St. S., LLC v. Gere*, 979 N.W.2d 216, 223 (Minn. 2022). Sohn filed a motion allowed under rule 104.01, subdivision 2, tolling the deadline for appeal. And Sohn has 60 days to file her appeal from "the service by any party of notice of filing of the order" denying Sohn's motion to amend findings. Minn. R. Civ. App. P. 104.01, subd. 2. Because Arbisi never served any notice of the filing of the district court's order denying Sohn's motion to amend findings, the 60-day period never started to run. Her appeal is thus timely.

be covered by quasi-judicial immunity, which protects the statements of independent medical examiners.

We need not address the second and third reasons for dismissal because the first is dispositive. Defamation's two-year statute of limitations begins to run when an allegedly defamatory statement is first published. Minn. Stat. § 541.07, subd. 1 (2022); *McGovern v. Cargill, Inc.*, 463 N.W.2d 556, 558 (Minn. App. 1990) ("In Minnesota, however, the statute of limitations for defamation begins to run on publication, not on discovery."). Arbisi's report was issued on May 29, 2018, and Sohn did not initiate her lawsuit until April 22, 2022. Because the date of Sohn's complaint falls outside the two-year period, Sohn's defamation action is barred by the statute of limitations.

II. Sohn's medical-malpractice claim fails because she was not in a patient-physician relationship with Arbisi.

Sohn next asserts a medical-malpractice claim in her complaint, alleging that Arbisi's actions during the psychological examination retraumatized her and caused her emotional damage, breaching his duty as a physician. The district court found that, because an independent psychological examination does not create a patient-physician relationship, Sohn could not state a claim for medical malpractice against Arbisi. In her appellate brief, Sohn argues that, because Arbisi gave her treatment recommendations and diagnosed her with paranoid delusions, he created a patient-physician relationship during the exam.

We disagree. We discern no fundamental difference between the psychological examination here and the workers' compensation examination in *Henkemeyer v. Boxall*, where we stated that a physician who examined the appellant to determine his eligibility

for a workers' compensation claim could not be held liable on a medical-malpractice claim for failure to diagnose the presence of acute aneurysm, as no patient-physician relationship existed on which to base such a claim. 465 N.W.2d 437, 439 (Minn. App. 1991), *rev. denied* (Minn. Mar. 27, 1991). The *Henkemeyer* court explained that, in the absence of a patient-physician relationship, a doctor's only duty is to conduct the examination so as to not cause harm to the patient. *Id.*

Sohn raises two arguments to attempt to distinguish this precedent. First, Sohn posits that a patient-physician relationship is not always necessary to bring a medical-malpractice claim, citing *Warren v. Dinter*, 926 N.W.2d 370, 375 (Minn. 2019). But while it is true that the Minnesota Supreme Court held in that case that in the absence of a patient-physician relationship, a duty can still exist when there is the foreseeability of harm, *Warren* is distinguishable from the facts here. *Warren*, 926 N.W.2d at 379. In *Warren*, the supreme court considered whether, absent any patient-physician relationship, a *hospitalist's*[4] decision not to admit a prospective patient may constitute medical malpractice. *Id.* at 372. Here, Arbisi was not a hospitalist tasked with whether to admit Sohn, and the supreme court decided "only that hospitalists, when they make such hospital admission decisions, have a duty to abide by the applicable standard of care." *Id.* at 380. Sohn's claim is distinguishable from *Warren*.

[4] A hospitalist is a kind of physician who provides care for patients in the setting of a hospital. *Warren*, 926 N.W.2d at 372 n.2.

Next, Sohn argues that Arbisi did give treatment recommendations in his report because he misdiagnosed her with paranoid delusions and stated that she did not have post-traumatic stress disorder. Specifically, his report stated:

> Ms. Sohn should be followed by a psychiatrist who can address residual anxiety and mood symptoms, particularly her fear of fire, in addition to her fear that she will make a catastrophic mistake, as well as her misperception of reality and belief that she has been plotted against and that others would harm her. In addition, contact with a doctoral level therapist, who is well versed in cognitive behavioral therapy, particularly in the context of individuals with delusional disorders, would be appropriate.

But this statement was not provided as treatment. Rather, it was in response to a question intended to inform Sohn's workers' compensation claim.[5] And this court has stated that when a doctor examines an individual for discovery purposes only, not to give or recommend treatment, no patient-physician relationship is established. *Saari v. Litman*, 486 N.W.2d 813, 815 (Minn. App. 1992). Accordingly, this single paragraph in a nearly 30-page report does not create a patient-physician relationship. Sohn's medical-malpractice claim fails.[6]

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[5] The question asked: "If the employee is in need of any further medical treatment for her psychological condition at this time, what further medical care do you recommend for her?"

[6] Sohn maintains that, because Arbisi had a duty of care not to cause her injury during her examination, to disclose significant findings in a reasonable manner, and to maintain patient confidentiality, his breach of these duties supports a medical-malpractice claim. And while it is true that a physician owes a duty of care to a third party when the physician acts in a professional capacity and it is reasonably foreseeable that the third party will rely on the physician's acts and be harmed by a breach of the standard of care, it was not reasonably foreseeable that Sohn would rely on Arbisi's acts and be harmed because he was not treating her, only examining her as part of her workers' compensation claim. *Warren*, 926 N.W.2d at 371.

III. Both of Sohn's Health Records Act claims fail to state a claim upon which relief can be granted.

Sohn alleges two violations of the Health Records Act. First, that Arbisi provided her medical records to a third party without her consent, and second, that Arbisi would not provide her with her own medical records when she requested them. The district court held that the provision of the Health Records Act that prohibits the release of medical records does not apply to independent medical examinations requested or paid for by third parties. And it concluded that, because there is no private cause of action for underdisclosure of medical records, Sohn cannot state a claim under the Health Records Act for Arbisi's alleged failure to provide her with her own medical records. On appeal, Sohn repeats the same allegations. We address each argument in turn.

The Health Records Act regulates the use and disclosure of health records in Minnesota. This act centers on two requirements: first, health care providers must, with limited exceptions, obtain patient consent for the release of health records, and second, health care providers generally must supply a patient with their health records within 30 days of a written request. Minn. Stat. §§ 144.292, subd. 2; .293, subds. 2, 5 (2022). Violations of any of these requirements may be grounds for disciplinary action (taken by the relevant licensing board or agency) against the provider. Minn. Stat. § 144.298, subd. 1 (2022). But enforcement does not end there. If a provider negligently or intentionally releases a health record, alters a consent form, obtains consent under false pretenses, or accesses patient information without authorization, a patient may recover compensatory damages and attorney fees through a private cause of action. *Id.*, subd. 2 (2022).

Here, Sohn alleges that Arbisi violated the Health Records Act when he disclosed her health records to ExamWorks, a third party that works with employers to arrange independent medical examinations for workers' compensation cases. Sohn claims that she was never told that her health records would be disclosed to ExamWorks, and it was not written on the informed consent form that she signed.

While it is true that the informed consent form Sohn signed does not specifically say that her health records will be disclosed to ExamWorks, the form did state that Arbisi would "disclose his findings and opinions to [employer's attorney] in the form of a written report and through verbal communication." And Arbisi stated in his report that, "Before beginning the evaluation, it was explained to Ms. Sohn . . . [that] a copy of the reported findings would be sent directly to ExamWorks."

More fundamentally, Minnesota law states that, "Notwithstanding [the informed consent provision of the Health Records Act] a provider may release health records created as part of an independent medical examination to the third party who requested or paid for the examination." Minn. Stat. § 144.297 (2022). Sohn cites this provision herself in her original complaint, seemingly in support of her second Health Records Act claim. This provision bars Sohn's claim.

Nor are we persuaded by Sohn's claim that Arbisi violated the Health Records Act by not giving her a copy of her written consent form when she requested it. Simply put, the Health Records Act does not grant a private right of action for *underdisclosure* of health records. *Larson v. Nw. Mut. Life Ins. Co.*, 855 N.W.2d 293, 301-02 (Minn. 2014). Underdisclosure occurs when a patient receives fewer medical records than requested.

Id. at 302. That is what occurred here. We further observe that Sohn eventually did receive a copy of the informed consent form she asked for along with "a list of the locations where [her] medical records came from."

Because Arbisi permissibly released his report to ExamWorks and underdisclosure of medical records is not actionable under the Health Records Act, the district court did not err by dismissing Sohn's Health Records Act claims.

IV. The district court did not err by dismissing Sohn's emotional-distress claims.

Sohn further alleges claims for intentional infliction of emotional distress and negligent infliction of emotional distress. We address each below.[7]

Intentional Infliction of Emotional Distress

A successful claim for intentional infliction of emotional distress must meet four requirements: (1) the conduct must be extreme and outrageous; (2) the conduct must be intentional or reckless; (3) the conduct must cause emotional distress; and (4) the distress must be severe. *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 438-39 (Minn. 1983). The conduct Sohn alleges is not extreme or outrageous. By way of comparison, we note that the Minnesota Supreme Court found that making false police

[7] In her complaint, Sohn alleges that the same facts that give rise to her medical-malpractice claim also result in a negligence claim for improper assessment and evaluation. The district court dismissed Sohn's negligence claim because it found that it was based on the same factual allegations as her medical-malpractice claim, and this court has held that an attempt to bring a negligence claim on the same facts as an unsuccessful medical-malpractice claim is "unsustainable." *Henkemeyer*, 465 N.W.2d at 440. On appeal, Sohn states that she never brought a negligence claim, only a medical-malpractice claim. Therefore, the district court did not err in dismissing Sohn's negligence claim when Sohn herself does not allege that she brought one.

reports about an individual, shouting at them, using vulgar language, and invading their personal space do not rise to the level of outrage that is "utterly intolerable to the civilized community." *Langeslag v. KYMN Inc.*, 664 N.W.2d 860, 866, 868 (Minn. 2003) (quoting *Hubbard*, 330 N.W.2d at 439). Similarly, Sohn's allegations—that Arbisi shouted at her, laughed at her, and invaded her personal space—do not rise to the high level required for an intentional-infliction-of-emotional-distress claim.

Negligent Infliction of Emotional Distress

Sohn further maintains that she experienced clear, objective fear when Arbisi verbally and physically threatened her, which would place her in the zone-of-danger and allow her to recover emotional-distress damages. This theory is similar to a negligent-infliction-of-emotional-distress claim.

To recover damages for emotional distress when a defendant did not directly physically injure a plaintiff, that plaintiff must have been in some personal physical danger caused by the defendant's negligence. *See Stadler v. Cross*, 295 N.W.2d 552, 553-54 (Minn. 1980). Here, Sohn must show that she was within a zone of danger of physical impact, reasonably feared for her safety, and suffered severe emotional distress with accompanying physical manifestations. *Id.* at 553. In other words, a plaintiff presents a valid claim when she experiences a reasonable anxiety, with physical symptoms, "from being in a situation where it was abundantly clear that plaintiff was in grave personal peril for some specifically defined period of time. Fortune smiled and the imminent calamity did not occur." *K.A.C. v. Benson*, 527 N.W.2d 553, 558 (Minn. 1995). Due to concerns

about unintended and unreasonable results, Minnesota courts have deliberately limited the zone of danger to the threat of personal physical danger. *Id.* at 559.

The facts alleged in Sohn's complaint, taken as true, cannot meet the zone-of-danger standard. Arbisi's actions that Sohn alleges—that he yelled at her, laughed at her, and physically intimidated her—do not come close to the conduct required to put Sohn in "grave personal peril." *Id.* at 558. Sohn alleges that she "went into complete panic and flight mode" and was "re-traumatized" by Arbisi's actions. But whether a plaintiff is within a zone of danger is an *objective* inquiry, not a subjective inquiry. *Id.*

This case is distinguishable from cases in which Minnesota courts have found grave personal peril sufficient to allow a plaintiff to recover damages for emotional distress. In *Okrina v. Midwestern Corp.*, the Minnesota Supreme Court allowed a plaintiff to recover damages from resulting emotional distress she experienced after she was nearly crushed by a collapsing wall but escaped without being physically struck by debris other than dust. 165 N.W.2d 259, 261 (Minn. 1969). And this court held that a plaintiff stated a prima facie case for emotional-distress damages when an airplane he was a passenger in suddenly rolled over and plunged downward for 40 seconds, the pilots regained control about five seconds before it would have struck ground, and as a result, he now experiences anxiety, adrenaline surges, and elevated blood pressure when he flies in airplanes. *Quill v. Trans World Airlines, Inc.*, 361 N.W.2d 438, 440-41, 443 (Minn. App. 1985) , *rev. denied* (Minn. Apr. 18, 1985). Because Sohn's experience does not match the level of grave

personal peril of these experiences, her potential claim for negligent infliction of emotional distress fails.[8]

V. The district court did not err by holding that Sohn's amended complaint was not filed within the 21-day filing deadline.

Finally, Sohn contends that the district court erred by not allowing her to amend her complaint.[9] The district court ruled that because its decision whether to grant leave to amend a complaint is within its discretion and Sohn's motion was filed within 21 days of the hearing, she missed the deadline and could not amend her complaint. On appeal, Sohn argues that she has the absolute right to amend her pleading once as a matter of course before a responsive pleading has been served. But Sohn did not amend her pleading before a responsive pleading—Arbisi's motion to dismiss—was filed and served, and the right to amend a pleading as a matter of course only applies "at any time before a responsive pleading is served." Minn. R. Civ. P. 15.01.

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[8] In her complaint, Sohn further alleges a cause of action for perjury, violation of HIPAA, and violation of the Minnesota Board of Psychology's rules of conduct. Because none of these claims invoke a statute that grants a private right of action, the district court did not err in dismissing these claims. *See, e.g.*, *Becker v. Mayo Found.*, 737 N.W.2d 200, 209 (Minn. 2007) (explaining that Minnesota courts grant motions to dismiss when a claim is premised upon a statute without an express or implied private cause of action).

[9] Sohn also seems to allege that Arbisi's motion to dismiss was filed late and therefore, the district court should issue a default judgment in her favor. The district court held that because Arbisi had 21 days from the date of the motion-to-dismiss hearing to serve his motion to dismiss, he was within that timeframe. A motion to dismiss is a dispositive motion under rule 115.01(a)(1) of the Minnesota Rules of General Practice that must be served and filed at least 28 days before a hearing. Minn. R. Gen. Prac. 115.03(a). Arbisi filed and served a motion to dismiss on April 19 and an amended motion to dismiss on April 25. The hearing on the motion to dismiss was on May 23. Because both the original motion and the amended motion were filed at least 28 days before the hearing, they were timely.

Additionally, as the district court determined, Sohn's motion was untimely. Under the Minnesota Rules of General Practice, a party may file a nondispositive motion, which includes a motion to amend a pleading, at least 21 days before the hearing. Minn. R. Gen. Prac. 115.04(a). Sohn filed her original complaint on March 28, 2022. Arbisi filed a motion to dismiss Sohn's complaint on April 19, 2022, and received a hearing date on that motion of May 23. Sohn then submitted a motion for leave to file an amended complaint on April 30, but it was not filed until May 10. Because May 10 is not at least 21 days before the May 23 hearing, Sohn's motion to amend her complaint was not timely.[10]

In sum, because the district court did not err in its analysis, we affirm its decision to dismiss Sohn's claims. And because Sohn's motion to amend was not timely, we affirm the district court's decision denying Sohn's motion to amend.

Affirmed.

[10] In her appellate brief, Sohn also requests us to direct the district court to address a harassment claim she filed with the judicial branch against Arbisi. She requests that this court "have a representative of the court review my report of harassment in my case per the Minnesota Judicial Branch Policy and Minnesota Law of zero tolerance to violence." Sohn also appears to allege claims against Arbisi's attorney for violating rules of professional conduct. She states: "I have disclosed [Arbisi's attorney's] multiple false statements, misrepresentation of the facts and laws which I have asked the Court of Appeals to address with a referral to the Office of Lawyers Professional Responsibility as it has negatively affected a fair judicial process." While this court takes allegations of harassment and professional misconduct seriously, Sohn has provided us with neither statute nor caselaw that allows this court to grant her the relief that she seeks.