STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1766

Erich Pearson, et al.,
Appellants,

vs.

Oxford Property Advisors, LLC, et al.,
Defendants,

Dunlap and Seeger, P.A., et al.,
Respondents.

Filed May 16, 2011
Affirmed
Minge, Judge

Goodhue County District Court
File No. 25-CV-10-446

Richard M. Carlson, Morris Law Group, P.A., Edina, Minnesota (for appellants)

Lewis A. Remele, Jr., Kevin P. Hickey, Rachel B. Peterson, Bassford Remele, P.A., Minneapolis, Minnesota (for respondents)

Considered and decided by Minge, Presiding Judge; Larkin, Judge; and Crippen, Judge.*

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

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

MINGE, Judge

In this certiorari appeal, appellants Erich Pearson and Twin Rivers Development, LLC (TRD) (together Pearson) challenge the district court's decision to dismiss their professional-liability claims against respondents-attorney Dan Berndt and his law firm, Dunlap & Seeger, P.A. (together Berndt), for failing to comply with the expert-affidavit requirement of Minn. Stat. § 544.42 (2010). Specifically, Pearson argues that the expert-affidavit requirement is not applicable and that, even if it is, he complied. We conclude that appellants' claims are sufficiently complex to require an expert witness to establish a prima facie case, that the statutory expert-affidavit requirement applies to appellants' lawsuit, and that appellants' response to interrogatories and request for documents did not satisfy the expert-affidavit requirement. We affirm.

FACTS

Pearson organized TRD in 2002. In 2004, Pearson offered 13% minority-ownership interests in TRD to Bryan Schoeppner, Ed Lunn, and Joel Alberts (Partners) in exchange for loan guarantees from each of them. Berndt represented the Partners during the negotiation and transfer of ownership interests, including participating in the drafting of TRD's Member Control Agreement and Operating Agreement. The Member Control Agreement authorized Pearson, as Chief Manager, to enter into contracts in the ordinary course of business, but required a member vote and approval by 80% of the ownership interest before making any "Major Decisions."

In February 2008, due to TRD's financial struggles, Pearson negotiated and signed an agreement with Commercial Mortgage Fund (CMF) to purchase TRD's business assets for $8,000,000. Pearson asserts that with the CMF purchase, he and the Partners would have had the opportunity to have an ownership stake in the new entity formed with CMF to operate TRD's business. However, the Partners were not in favor of the CMF agreement. On behalf of the Partners, Berndt sent a letter to CMF canceling the purchase agreement. Around that same time, the Partners were negotiating an alternative sale of TRD assets which did not provide Pearson with an opportunity to retain ownership interests. Pearson alleges that Berndt negotiated the alternative sale, though Berndt denies negotiating the other sale of TRD or representing either TRD or Pearson in the matter. After consulting with independent legal counsel, Pearson executed documents approving and completing the alternative sale. Pearson alleges that he believed he had no choice but to sign after independent counsel suggested he may be liable to the other partners if he did not sign.

On November 5, 2009, Pearson sued the Partners, Berndt, and others. The claims for relief against Berndt alleged legal malpractice, breach of fiduciary duty, aiding and abetting tortious conduct, fraud and misrepresentation, and civil conspiracy. Pearson did not attach an affidavit of expert review pursuant to Minn. Stat. § 544.42. In his answer of December 3, 2009, Berndt demanded a statutory affidavit of expert review. Simultaneously, Berndt served interrogatories requesting the qualifications of any expert witness consulted, the facts and opinions to which the expert would be expected to testify, and a parallel request for production of documents. On January 12, 2010, Pearson

answered the interrogatories by identifying an attorney as an expert witness and stating that the expert's "curriculum vitae, written report and any required affidavits will be provided providing the information as requested herein . . . as part of Plaintiff's document response." After objecting to the document request generally on several grounds, Pearson's document response stated that he "will produce documents responsive to [the requests] at a mutually agreeable time and place." On May 26, 2010, Pearson furnished Berndt with a letter dated January 12, 2010 from the attorney who had been identified as an expert witness. The attorney's letter states that Berndt's conduct constitutes malpractice because Berndt acted to the detriment of the majority member of TRD. The letter was accompanied by a résumé for the attorney-expert.

On June 4, 2010, six months after the initial demand for an affidavit of expert review, Berndt moved for dismissal of the claims for failure to comply with the expert-affidavit requirement in Minn. Stat. § 544.42. The district court granted the motion to dismiss, finding that the malpractice claim required an expert witness to establish a prima facie case and that Pearson and his counsel had failed to provide any affidavit of expert review. This appeal follows.

D E C I S I O N

I. NEED FOR EXPERT

The first issue is whether the district court erred when it determined that Pearson could not establish a prima facie case of legal malpractice without an expert. "Generally, whether a [legal-]malpractice claim requires expert testimony to establish a prima facie case is a question of law reviewed de novo on appeal." *Fontaine v. Steen*, 759 N.W.2d

672, 676 (Minn. App. 2009). "We review a district court's dismissal of an action for procedural irregularities under an abuse of discretion standard. But where a question of law is present, such as statutory construction, we apply a de novo review." *Brown-Wilbert, Inc. v. Copeland Buhl & Co.*, 732 N.W.2d 209, 215 (Minn. 2007).

Pearson argues that the actions of Berndt were so egregious and improper that expert testimony is not necessary to establish a prima facie case of legal malpractice. A legal-malpractice claim requires proof of four elements: (1) the existence of an attorney-client relationship; (2) attorney negligence or breach of contract; (3) that the attorney's negligence or breach of contract was the proximate cause of damages; and (4) that but for the attorney's conduct, the claimant "would have obtained a more favorable result in the underlying transaction than the result obtained." *Schmitz v. Rinke, Noonan, Smoley, Deter, Colombo, Wiant, Von Korff and Hobbs, Ltd.*, 783 N.W.2d 733, 738 (Minn. App. 2010), *review denied* (Minn. Sept. 21, 2010). Failure to provide sufficient evidence to meet any element is fatal to the whole claim. *Jerry's Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 816 (Minn. 2006). Expert testimony is generally required to establish an attorney's standard of care, breach of that standard, and causation. *Fontaine*, 759 N.W.2d at 677.

However, expert testimony is not required "when the matters to be proven are within the area of common knowledge and lay comprehension." *Hill v. Okay Constr. Co.*, 312 Minn. 324, 337, 252 N.W.2d 107, 116 (1977). The *Hill* decision preceded enactment of the expert-affidavit statute. *Hill* explained that no expert testimony was required where a lawyer failed to insulate one client from the debts of another client. *Id.*

at 337-38, 252 N.W.2d at 116-17. The *Hill* conclusion that no expert is required is a "rare" and "exceptional" case. *Fontaine*, 759 N.W.2d at 677 (quoting *Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 191 (Minn. 1990)).

Pearson relies on *Hill* to argue that expert testimony is unnecessary because even an untrained jury could understand that an attorney must communicate with his client regarding transactions and conflicts of interest, and that failure to do so is negligence. However, *Hill* differs from the present case. In *Hill*, the plaintiffs hired an attorney, and that attorney referred the plaintiffs to other clients as possible investors and partners in the plaintiffs' business. *Hill*, 312 Minn. at 327, 252 N.W.2d at 111. The attorney then negotiated the transaction between the plaintiffs and another client, representing both during the process and improperly exposing the other client to the liabilities of the plaintiffs. *Id.* at 327-30, 252 N.W.2d at 115-17. There was no question that the attorney in *Hill* engaged in dual representation. In the present case, there is nothing in the record, other than Pearson's allegations, establishing dual representation of Pearson and the Partners, or Berndt's referral of Pearson and the Partners to one another, or the preparation of a document that was defective on its face.

Indeed, here, it is unclear what duty, if any, Berndt owed to Pearson. There was no contract between the two, Pearson did not pay Berndt, and Berndt denies providing legal advice to Pearson. In addition, during the sale to the alternate and ultimate purchaser, Pearson engaged independent legal counsel. Although Berndt did participate in drafting TRD's Operating Agreement and Member Control Agreement, it is not clear that he had a duty to ensure that the Partners, as clients, complied with the agreements. A

layman is unlikely to understand the intricacies of an attorney's duties, formation of the attorney-client relationship, or interpretation of contracts. *See Meyer v. Dygert*, 156 F. Supp. 2d 1081, 1091 (D. Minn. 2001) (interpreting Minnesota state law and finding conflict-of-interest disclosure outside the realm of laypeople).

In addition to duty, Pearson is required to establish causation. It is undisputed that Berndt drafted and sent the letter to CMF canceling the purchase agreement. But, it appears the purchase would not have occurred even had Berndt not sent the letter. Under TRD's Operating Agreement, at least 80% of the voting interests had to approve such a major decision. A sale of all assets is obviously a major decision. The Partners together owned 39% of the voting interests in TRD; Pearson owned 61%. Thus, the Partners were entitled to veto the sale of assets. Furthermore, we note that during oral argument, Berndt's counsel explained that TRD's lending bank disapproved of the agreement with CMF. Although Berndt clearly contributed to and probably precipitated the cancellation of the CMF purchase by drafting and sending the letter, Pearson still needed expert testimony to establish that, but for the conduct of attorney Berndt, neither the bank nor the Partners could or would have canceled the agreement.

We conclude that the district court did not err in deciding that an expert witness was necessary to establish a prima facie case that Berndt's actions constituted legal malpractice.

II. COMPLIANCE WITH STATUTE

The second issue is whether Pearson submitted a document complying with the expert-affidavit requirement. When expert testimony is necessary to establish a prima

facie case of professional malpractice, the plaintiff must serve two expert-witness disclosure affidavits on the defendants. Minn. Stat. § 544.42, subd. 2 (2010). The first, an affidavit of expert review, is to be signed by plaintiff's attorney and must state that the attorney has reviewed the facts of the case with a qualified expert, that the expert is qualified to testify as such at trial, that in the opinion of the expert the defendant deviated from the applicable standard of care, and that in the opinion of the expert the defendant's conduct caused plaintiff's injury. *Id.*, subds. 2(1), 3(a)(1). The second affidavit must identify the expert witness and provide the substance of the expert's opinion and the bases for that opinion. *Id.*, subds. 2(2), 4(a).

Failure to supply either of the required affidavits "results, upon motion, in mandatory dismissal of [the malpractice claim] with prejudice." *Id.*, subd. 6(a), (b), (c). If this first affidavit does not accompany the complaint, a defendant must demand the affidavit and wait 60 days before filing a motion requesting dismissal. *Id.*, subd. 6(a). "[F]ailure to strictly adhere to the requirements of expert review and disclosure undermines the legislature's procedural reforms in professional-malpractice actions . . . ." *Middle River-Snake River Watershed Dist. v. Dennis Drewes, Inc.*, 692 N.W.2d 87, 91 (Minn. App. 2005). A plaintiff's "good faith" attempt to comply with the requirements of the statute is not a reason for denying a motion to dismiss. *Brown-Wilbert, Inc.*, 732 N.W.2d at 216.

A. Adequacy of Demand

It is clear that Pearson did not provide an affidavit of expert review at the time the complaint was served. However, Pearson claims that Berndt did not properly demand the

affidavit prior to moving for dismissal. Berndt argues that he demanded an affidavit in his December 3, 2009 answer and interrogatories. Paragraph 40 of the answer "[a]ffirmatively allege[s] that Plaintiffs have failed to serve the affidavit of expert review required by Minn. Stat. § 544.42 and demand is hereby made for the same." In addition, interrogatory questions 11 and 12 request the name, address, occupation, title, field of expertise, educational background, work experience, and opinions of any expert consulted. Appellant argues that, because the answer and the interrogatories were not a separate demand and did not request the specific type of information required for the first affidavit, they did not constitute a proper demand for that affidavit within the meaning of the statute.

The Minnesota Supreme Court has previously held that for interrogatories to constitute a proper demand they should either refer to Minn. Stat. § 544.42, or use words such as "expert review," or request the information that the affidavit is to contain. *Brown-Wilbert, Inc.*, 732 N.W.2d at 215. Here, Berndt specifically referred to the statute and affidavit of expert review in his answer. This is an adequate demand. Berndt did not have to specifically request the type of information that is to be addressed in the first affidavit. We note that the interrogatories reference the statute and request the subject matter, grounds, and the substance and source of the facts and opinions on which any expert may testify. Although there is not a specific reference to the "standard of care," "breach," or "causation," the other elements of the demand leave no ambiguity that Berndt had demanded the first statutory affidavit. We conclude that the answer and

interrogatory questions constituted a valid demand and that because it was made on December 3, 2009, Pearson had 60 days, or until about February 3, 2010, to comply.

B. Adequacy of Response

Pearson then argues that he complied with the first affidavit requirement when he submitted his interrogatory answers. Pearson's interrogatory answers provide the expert witness's name and address but do not represent that his counsel reasonably expected that the opinion of the witness would be admissible at trial or that the expert had determined that Berndt's conduct deviated from the applicable standard of care and that that conduct caused Pearson's loss. In addition, the interrogatory answers include no indication that the answers were made under the penalties of perjury, an essential requirement of an affidavit. *See* Minn. Stat. § 358.08 (2010) (stating that an affirmation is a statement made under the penalty of perjury); *Norton v. Hauge*, 47 Minn. 405, 406, 50 N.W. 368, 368 (1891) (stating that an affidavit is a sworn oath or affirmation). Instead, Pearson stated in the interrogatory answers that documents meeting the affidavit requirement were available as part of Pearson's document response and would be produced at a mutually agreeable time and place. Ironically, Pearson's attorney signed the response to acknowledge that sanctions may be imposed. However, the letter which was apparently intended to comply with the affidavit-of-expert-review requirements was not produced until May 2010, well past the deadline for submitting the first affidavit of expert review, and even then it was not in affidavit form.

The statutory requirement was enacted to "avoid the waste of time and money spent on defending against frivolous actions that will ultimately be the subject of a

directed verdict." *Brown-Wilbert, Inc.*, 732 N.W.2d at 219. The statute specifically states that the plaintiff must serve the affidavit of expert review on the defendant at an early stage in the litigation. This enables the professional defendant to avoid the expenses of discovery unless the plaintiff has a viable claim. Pearson's failure to comply with the statute directly violates the statute and requires dismissal.

Finally, Pearson argues that dismissal is too harsh a result because he acted in good faith. But the expert-affidavit statute describes objective requirements "that can be measured on the face of any document that is claimed to be such an affidavit, without inquiry into counsel's intent." *Id.* at 216. Whether Pearson and his counsel acted in good faith is irrelevant. There was no compliance with the affidavit requirement. Berndt waited six months, until June 4, 2010, for compliance and then filed a motion for dismissal. We conclude that the district court properly dismissed Pearson's legal-malpractice claim.[1]

III. OTHER CLAIMS

Pearson argues that his alternative claims against Berndt are independent of the legal-malpractice claim and were improperly dismissed by the district court. In addition to legal malpractice, Pearson alleged breach of fiduciary duty, aiding and abetting tortious conduct, fraud and misrepresentation, and civil conspiracy. When asked in the interrogatories to describe the facts surrounding his alternative claims, Pearson simply

[1] Berndt argues that Pearson failed to comply with the requirements for the second affidavit within six months of serving his complaint, a separate violation of the statute. Because we conclude that Pearson did not comply with the first-affidavit requirement, we do not consider the second-affidavit requirement.

referred to his answers to the interrogatory questions regarding legal malpractice. Neither Pearson's appellate brief nor the memorandum in opposition to summary judgment discusses the alternative claims except to list them as differently worded alternatives to the legal-malpractice claim. An assignment of error in a brief based on mere assertion and not supported by argument, analysis, or authority is waived unless the district court's alleged prejudicial error is obvious. *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997). Because allowing a plaintiff to simply list multiple alternative claims without fleshing out the logic or merits of those claims would create a significant loophole in Minn. Stat. § 544.42, we conclude the district court did not err in dismissing Pearson's alternative claims.

Affirmed.

Dated: