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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1344**

Stephen L. Persons,
Appellant,
vs.

Dennis B. Johnson, et al.,
Respondents.

**Filed April 15, 2013
Affirmed
Ross, Judge**

Hennepin County District Court
File No. 27-CV-11-18008

Marshall H. Tanick, Teresa J. Ayling, Hellmuth & Johnson, PLLC, Edina, Minnesota (for appellant)

Kay Nord Hunt, Phillip A. Cole, Diane M. Odeen, Lommen, Abdo, Cole, King & Stageberg, P.A., Minneapolis, Minnesota (for respondents)

Considered and decided by Cleary, Presiding Judge; Ross, Judge; and Kirk, Judge.

UNPUBLISHED OPINION

ROSS, Judge

In this attorney-client dispute after an unfavorable decision in a marriage dissolution proceeding, the attorney claims that his client failed to pay him and the client claims that his attorney failed to reasonably represent him. Client Stephen Persons argues that the district court erred by granting summary judgment in favor of attorney Dennis

Johnson and the Chestnut & Cambronne law firm on Persons's claims that Johnson committed malpractice and on Johnson's counterclaim for the unpaid legal fees. Because Persons does not provide evidence that could lead a fact-finder to find that he has proven all elements of malpractice and because Persons failed to plead a breach-of-fiduciary-duty defense to Johnson's counterclaim, we affirm.

FACTS

Stephen Persons retained Dennis Johnson of Chestnut & Cambronne in 2005 to represent him in his marital dissolution action. Persons had just moved out of his marital home and into a house he had purchased and furnished with money from a deferred compensation account. Persons stated on the firm's "Client Information Questionnaire" that he purchased the new home and that he had received no assets from his previous marriage dissolution or any inheritance. Persons's disclosure was inconsistent with the fact that he had actually received an inheritance from his mother and that he received funds from his interest in a home that he was awarded in a previous dissolution action.

A significant property-division issue in the later dissolution depended on the value of the Personses' fifty-percent interest in Spin City, a laundromat business. The parties in this malpractice case disagree about how this valuation issue was addressed in the dissolution proceedings. Johnson alleges (and the district court agreed) that Persons had originated a \$300,000 estimated valuation of Spin City when he responded to an informal discovery request and that Persons stipulated to the \$300,000 valuation. But Persons argued to the district court, and he argues on appeal, that his handwritten estimated valuation of \$300,000 was not complete and that an attorney cannot reasonably rely on

his client's bare estimate for a binding stipulation. Persons insists that his eventual stipulation to \$300,000 resulted from Johnson's false representation to him. Johnson had told Persons that Michael Whalen (Persons's chosen expert and friend), had determined that \$300,000 accurately represented the value. Whalen had initially estimated that the net value of Spin City was \$287,148, but he indicated that, at the time, the value of the Persons's separate interests would be substantially reduced by a forced sale during a dissolution proceeding. Whalen testified by affidavit that he had estimated the value of the Persons's joint interest in Spin City at between \$30,500 and \$81,200 and that Johnson had called him to elicit his consent to the \$300,000 valuation, representing that Persons had already agreed to it. Persons and Whalen each asserted his having been surprised by Johnson's report that the other had come to such a high valuation.

Another disputed issue in the dissolution proceeding centered on the parties' contributions of nonmarital assets to the family home. Persons's wife claimed that she had contributed \$35,000 from a workers' compensation award, but Persons claimed that she had contributed only \$5,000. Persons asserted that he had contributed \$61,000 from an inheritance to him and from the sale of a home from his previous marriage, but he did not produce records to support it.

A referee conducted a bench trial in the dissolution case in April 2007 and found that Persons had dissipated marital assets when he purchased and furnished the second home. She also found that Persons's wife had a 6.76% nonmarital interest in the marital home, relying on Persons's admission that she had contributed \$5,000 of her nonmarital funds. Johnson did not pursue Persons's potential claim that he also had a nonmarital

interest in the home. Relying on the parties' stipulation, the referee found that the value of each of their combined fifty-percent interest in Spin City was \$150,000. The district court concurred. Persons appealed, and this court affirmed. Over the course of Johnson's representation, Persons incurred \$35,257.89 in attorney fees, which he did not pay.

Persons sued Johnson and his law firm, alleging a variety of defects in Johnson's representation. Relevant here, Persons alleged that Johnson had failed to assert that Persons had a nonmarital interest in the family home even after Persons gave Johnson "sufficient information and documentation"; that Johnson improperly stipulated to the value of Spin City on Persons's behalf; and that the district court's finding that Persons had dissipated marital assets resulted from Johnson's failure to properly advise and represent him. Johnson asserted a counterclaim for the unpaid attorney fees.

Persons submitted affidavits from two experts. Jennifer Loeffler, an expert in financial consulting, opined that Johnson should have been more vigorous in helping Persons trace his nonmarital assets and that Johnson should have presented Persons's nonmarital-assets claim on testimony alone if bank records could not be found. Nancy Berg, a family law attorney, shared Loeffler's opinion, stating that Johnson did not diligently pursue Persons's nonmarital-assets claim. Berg also criticized Johnson's work on the Spin City valuation, maintaining that even if Johnson accurately claims that Persons originated the \$300,000 number, "simple reliance on a number pulled from the air by the client is malpractice." She characterized Johnson's representation as "chaotic and careless" and asserted that "the result would have been different had [Johnson] exercised ordinary skill, care and honesty." Berg called Johnson's presentation of

evidence regarding dissipation of marital assets “chaotic and disorganized.” She said that if Johnson had not been negligent, “the trial court would have ruled that a greater amount of the expenses [Persons] used from the ING account were for the necessities of life.”

The district court granted Johnson’s motions for summary judgment. It held that Johnson’s refusal to press Persons’s nonmarital assets claim was an exercise of his discretionary professional judgment and that Persons’s experts’ predictions of a better outcome were speculative. It rejected Persons’s asset-dissipation argument on similar grounds. It ruled that Persons could not prove the elements of a malpractice claim for three reasons: Persons’s arguments about the Spin City valuation were based on the opinions of an expert who would not be able to testify at trial; Berg’s conclusions were “conclusory and speculative;” and the referee had the discretion to disbelieve any alternative valuation. The district court also ruled that Persons had forfeited his defense on Johnson’s counterclaim by failing to plead a breach of fiduciary duty.

Persons appeals.

D E C I S I O N

Persons argues that the district court erred by granting summary judgment. We review the district court’s grant of summary judgment de novo, determining whether the district court properly applied the law and whether there are any issues of material fact that should preclude summary judgment. *Riverview Muir Doran, LLC v. JADT Dev. Co., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). We view the evidence in the light most favorable to the party against whom summary judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). But to survive summary judgment, a party must do

more than merely raise a metaphysical doubt or rest on averments. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). The nonmoving party must instead present evidence for each element of his claim sufficient to allow reasonable persons to find in his favor. *Id.*

I

Persons argues that the district court erred by failing to consider the evidence establishing the elements of his malpractice claims. We agree with the district court that Persons has identified no evidence of negligence as to two of his bases for the malpractice claim and that he fails on all three to establish that he would have achieved a better outcome but for his attorney's alleged negligence.

In a legal malpractice case involving alleged negligence that resulted in an inequitable distribution of marital assets, a plaintiff must prove the existence of an attorney-client relationship, acts of negligence or breach of contract by the attorney, and acts that were the proximate cause of harm to the plaintiff, and that, but for the negligent acts, the plaintiff would have achieved a more favorable result. *Schmitz v. Rinke, Noonan, Smoley, Deter, Columbo, Wiant, Von Korff & Hobbs, Ltd.*, 783 N.W.2d 733, 738–39 (Minn. App. 2010). Failure on any element defeats the claim. *Blue Water Corp. v. O'Toole*, 336 N.W.2d 279, 282 (Minn. 1983). The parties agree that an attorney-client relationship existed, but differ as to the other elements.

Nonmarital Assets

Persons argues that Johnson was negligent by failing to pursue a claim that he contributed nonmarital assets to improve the family home. The district court held that Johnson's decision not to pursue Persons's nonmarital-assets claim was an exercise of

professional judgment. Disagreement with an attorney’s trial strategy does not show negligence. *Noske v. Friedberg*, 713 N.W.2d 866, 874 (Minn. App 2006), *review denied* (Minn. July 19, 2006). Johnson highlights the weakness of the potential claim—and the reasonableness of the strategy not to pursue it—by pointing out that Persons produced no records supporting the claim. Persons had the burden to provide records to support any claim that he contributed nonmarital property. *See Olsen v. Olsen*, 562 N.W.2d 797, 800 (Minn. 1997) (requiring that nonmarital property be “readily traceable”). Johnson could have pursued a nonmarital-contribution claim for which his client lacked any documentary support, but we cannot say that it was malpractice not to. The military proposition—*never defend a weak position*—has been adopted as a trial strategy so as to avoid calling into question the credibility of the stronger positions.

Persons’s expert Berg explained plausibly that Persons’s testimony could itself have been evidence. Berg urged that the referee would have accepted Persons’s documentarily unsupported statements had they been offered, especially since the referee credited Mrs. Persons’s unsupported testimony that she contributed nonmarital assets to the family home. But the district court rejected Berg’s conclusion that “the court would have similarly accepted the limited proof” offered by Persons’s potential testimony and that the referee “could not have refused his claims while granting hers.” This conjecture overlooks the key factor in the referee’s decision to find that Mrs. Persons had made a nonmarital contribution: the referee credited *only* that part of Mrs. Person’s testimony that Persons expressly conceded (the contribution of \$5,000 of her nonmarital assets). The referee effectively rejected Mrs. Persons’s claim of \$35,000 in nonmarital

contributions to the extent the claim lacked an admission or documentary support. Mrs. Persons, by contrast, gave no admission about any of Persons's alleged nonmarital contribution. Based on our assumption that the referee would have treated the parties' testimony consistently, we conclude both that Johnson's decision not to pursue Persons's potential claim of alleged nonmarital contributions was strategically discretionary rather than negligent and that, separately, even if Johnson had made the claim, no evidence suggests that Persons would have achieved a more favorable result. Persons did not present evidence that could prove that Johnson's failure to bring the claim for nonmarital assets constitutes malpractice.

Asset-Dissipation Claim

Persons argues that the district court erred by granting summary judgment to Johnson on Persons's claim that Johnson negligently failed to advise him "that he would be accountable for the use of marital assets to pay household expenses if he did not bring a motion for temporary relief." But he was not held accountable for paying "household expenses" without first moving for temporary relief. He was held accountable for making unreasonable expenditures that dissipated marital property. The record shows that Johnson argued to the dissolution court that Persons's expenditures were "reasonable and necessary living expenses in light of the parties' circumstances." The district court rejected the argument, and Person's attorney cannot be liable for Persons's failure to make only reasonable and necessary expenditures.

Maintenance and Greater Child-Support Claim

Persons also argues that Johnson was negligent by failing to seek spousal maintenance and child support. Spousal maintenance may have been appropriate if, in addition to other things, Persons proved that he could not support himself. *See* Minn. Stat. § 518.552, subd. 1 (2006); *Napier v. Napier*, 374 N.W.2d 512, 514 (Minn. App. 1985). But the record shows that Persons was able-bodied and employed, and he gave the district court no evidence on which it could find that the dissolution court would have awarded him spousal maintenance. His experts do not suggest that he would have received more child support under a different approach. We see no evidence on which a trier of fact could find negligence on this theory.

Spin City Valuation

Persons argues that the district court erred by granting summary judgment on Persons's claim that Johnson mishandled the valuation of Spin City. The argument ultimately fails. It has some merit because we assume that Persons's allegations about Johnson's duplicitous maneuvering in the valuation are true, as we review summary judgment. *See Fabio*, 504 N.W.2d at 761. But Persons's malpractice claim can survive Johnson's summary judgment motion only if Persons can establish that he would have achieved a more favorable outcome but for the alleged malpractice. He cannot.

Determining whether Persons could have achieved a more favorable outcome but for Johnson's alleged negligence requires that we "envision what would have occurred but for the negligent conduct." *See Christians v. Grant Thornton, LLP*, 733 N.W.2d 803, 812 (Minn. App. 2007), *review denied* (Minn. Sep. 18, 2007). Persons must "introduce

concrete evidence of what [he] would have done but for [Johnson's] negligence and what those actions would have reasonably produced." *Id.* at 813. Persons argues that, but for Johnson's mischief, he could have argued for a lower Spin City valuation in his dissolution case. Recognizing that defending against a summary judgment motion requires actual evidence, he offers that Whalen is an expert available to provide it. This is where the plausibility of his malpractice contention ends.

As the district court observed, Whalen appears to be a mergers-and-acquisitions attorney, not a valuator qualified to appraise businesses. If Whalen has the experience or education to render his valuation opinion admissible, nothing in his affidavit shows it. Both in the district court and on appeal, Persons's counsel asserted that Whalen has experience with 250 business appraisals. This would be compelling if it were true. But Whalen's affidavit says that his experience actually involved only 250 business *transactions*, not business appraisals. The affidavit does not reveal Whalen's role in those transactions, leaving the district court and this court with the reasonable inference that he served the usual function of a transactional attorney, advising clients on the legal side of their transactions. It is difficult for us to construct a foundational argument justifying the admission of Whalen's business valuation testimony in this context, and Persons does not provide the argument or the raw material on which it might rest.

The record shows that Persons was aware of the potential problems with Whalen's alleged expertise, but he failed to obtain an alternate valuation from an admissible source during his malpractice case. Persons reasonably highlights the evidence that Johnson

misled him into relying on the \$300,000 valuation. But he does not provide any evidence on which a fact-finder could reasonably conclude that the valuation is wrong.

II

Persons alleges that the district court erred by granting summary judgment to Johnson on his counterclaim for unpaid legal fees. His argument does not persuade us. In his answer to Johnson's counterclaim, Persons pleaded the affirmative defenses of failure of consideration and accord and satisfaction. But his brief challenging Johnson's summary judgment motion relied solely on a breach-of-fiduciary-duty defense. The district court ruled that Persons had waived a breach-of-fiduciary-duty defense by failing to plead it, and it awarded summary judgment to Johnson on his counterclaim. Affirmative defenses are waived unless they are specifically pleaded. *Rhee v. Golden Home Builders, Inc.*, 617 N.W.2d 618, 621 (Minn. App. 2000). Persons did not allege breach of fiduciary duty either in his own complaint or in his answer to Johnson's counterclaim. The district court therefore did not err by finding that Persons had waived a breach-of-fiduciary-duty defense. We recognize that “[p]leadings may be amended to assert an affirmative defense” and that “amendments to pleadings should be freely granted except when prejudice would result to the other party.” *Id.* But we have no basis to reverse on these sort of procedural grounds because it does not appear from the record that Persons ever moved to amend his complaint.

Affirmed.