STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1031

Patrick Forciea,
Appellant,

vs.

Dianne Lockman, et al.,
Respondents.

Filed February 2, 2010
Affirmed
Wright, Judge

Hennepin County District Court
File No. 27-CV-08-12327

Patrick T. Forciea, Florence, Colorado (pro se appellant)

Sally J. Ferguson, Kirsten J. Hansen, Arthur, Chapman, Kettering, Smetak & Pikala, Minneapolis, Minnesota (for respondents)

Considered and decided by Wright, Presiding Judge; Ross, Judge; and Schellhas, Judge.

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

WRIGHT, Judge

Appellant challenges the district court's entry of judgment dismissing his claims against respondent in this medical-malpractice action. Appellant argues that the district court erred by (1) requiring him to comply with Minn. Stat. § 145.682 (2004), which mandates a plaintiff in a medical-malpractice action to file an affidavit of expert review;

(2) denying his motion for a new trial based on newly discovered evidence; (3) denying his motion to vacate the judgment based on newly discovered evidence and fraud; and (4) denying his motion for a guardian ad litem ad prosequendam. We affirm.

FACTS

Respondent Dianne Lockman, a registered nurse and a clinical nurse specialist, treated appellant Patrick Forciea for a mental illness. In May 2008, Forciea sued Lockman and her employer, respondent Blackmore & Associates (collectively, respondents), alleging that, between 2001 and 2004, respondents committed medical malpractice by negligently failing to diagnose Forciea with bipolar disorder and by improperly prescribing Wellbutrin for his treatment. Forciea's complaint did not include an affidavit of expert review as required by Minn. Stat. § 145.682, subd. 2. Respondents answered and demanded that Forciea provide the statutorily required affidavit of expert review or an affirmation disclosing why expert review could not be reasonably obtained. Forciea failed to respond.

Respondents then served Forciea with interrogatories that requested Forciea to identify his experts and provide descriptions of their expected testimony as required by Minn. Stat. § 145.682, subd. 4. Forciea's response indentified his expert as Dr. Daniel J. Shrine, a staff psychiatrist with the Federal Medical Center in Rochester, and stated that Dr. Shrine would "provide a detailed overview of [appellant's] mental health history." Dr. Shrine did not sign Forciea's answers to interrogatories as required by Minn. Stat. § 145.682, subd. 4(c). Approximately three months later, respondents filed a demand for compliance with Minn. Stat. § 145.682. In his response, Forciea stated that, because the

Bureau of Prisons does not permit physicians to provide affidavits of expert review, "he is not in a position to locate or retain an expert witness, even though there is no question such witnesses exist in the field of bipolar disorder."

Respondents moved the district court to dismiss Forciea's complaint because Forciea failed to comply with the expert-affidavit requirements imposed by Minn. Stat. § 145.682. Forciea opposed the motion, arguing that "several exceptions exist as alternatives to the Affidavits of Expert Review required by Minn. Stat. § 145.682." The district court granted the motion to dismiss, finding that Forciea failed to provide the required expert affidavits and concluding that the exceptions cited by Forciea did not relieve him of the duty to provide the expert affidavits. Forciea filed several post-judgment motions, including a motion for a new trial based on newly discovered evidence and motions to vacate the judgment based on newly discovered evidence and fraud. The district court denied Forciea's post-judgment motions. This appeal followed.

D E C I S I O N

I.

Forciea asserts that the district court abused its discretion by granting respondents' motion to dismiss, arguing that obtaining the required expert affidavits "was not possible in this case." Forciea also argues for the first time in his reply brief that his failure to timely file the required expert affidavits is "excusable neglect." We review the dismissal of a medical-malpractice claim for noncompliance with the expert-review statute for an abuse of discretion. *Broehm v. Mayo Clinic Rochester*, 690 N.W.2d 721, 725 (Minn. 2005).

When a medical-malpractice claim requires expert testimony to establish a prima facie case, the plaintiff must serve two affidavits. Minn. Stat. § 145.682. The first affidavit must be served either with the summons and complaint or within 90 days after service of the summons and complaint. *Id.*, subds. 2(1), 3. This affidavit must indicate that plaintiff's counsel 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, one or more defendants deviated from the applicable standard of care and by that action caused injury to the plaintiff." *Id.*, subd. 3. The second affidavit must be filed within 180 days after the commencement of the lawsuit and

> must be signed by each expert listed in the affidavit and by the plaintiff's attorney and state the identity of each person whom plaintiff expects to call as an expert witness at trial to testify with respect to the issues of malpractice or causation, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion.

Id., subds. 2(2), 4(a). To satisfy the statutory requirements, the second affidavit must set forth "specific details concerning [the] experts' expected testimony, including the applicable standard of care, the acts or omissions that plaintiffs allege violated the standard of care and an outline of the chain of causation that allegedly resulted in damage . . . ." *Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 193 (Minn. 1990); *see also Maudsley v. Pederson*, 676 N.W.2d 8, 14 (Minn. App. 2004) (requiring that the affidavit "illustrate 'how' and 'why' the alleged malpractice caused the injury"). Answers to interrogatories that are served within 180 days and that state the required

information qualify as the second affidavit if they are signed by the plaintiff's counsel and by each expert who is identified in the answers to interrogatories. Minn. Stat. § 145.682 subds. 4(a), (c). But if the plaintiff fails to satisfy the statutorily required expert-affidavit requirements, dismissal is mandated. *Id.*, subd. 6. Although the statutory requirements may produce "harsh results" in some cases, they reflect "the legislative choice to implement the policy of eliminating frivolous medical malpractice lawsuits by dismissal." *Lindberg v. Health Partners, Inc.*, 599 N.W.2d 572, 578 (Minn. 1999).

Forciea does not dispute that he failed to satisfy the expert-affidavit requirements of Minn. Stat. § 145.682. Rather, Forciea argues that Minn. Stat. § 145.682 is unjust because it precludes an indigent individual access to justice. This argument, however, is unavailing in light of the clear statutory mandate. Because the record supports the district court's determination that Forciea failed to satisfy the expert-affidavit requirements, the district court did not abuse its discretion by dismissing Forciea's medical-malpractice action.

Forciea's excusable-neglect argument, raised for the first time on appeal in his reply brief, is likewise unavailing. Forciea did not move the district court for an extension of the 180-day time limit or otherwise raise the issue of excusable neglect before the district court. Thus, we decline to consider the issue on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988); *see also Fontaine v. Steen*, 759 N.W.2d 672, 679 (Minn. App. 2009) (declining to consider issue raised for first time in appellant's reply brief).

II.

Forciea next argues that the district court erred by denying his motion for a new trial based on newly discovered evidence pursuant to Minn. R. Civ. P. 59.01(d), stating that, because "it is clear [that] there was a trial," his motion "was denied on grounds that do not exist." Ordinarily, we will not disturb the district court's denial of a new trial based on newly discovered evidence absent a clear abuse of discretion; but when the district court's denial of a new trial is founded on an application of law, we review the decision de novo. *See Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990) (noting exception when new trial is granted by district court based on an error of law). The district court held that, because there was not a trial, rule 59.01 does not apply. The district court dismissed Forciea's medical-malpractice lawsuit on a pretrial motion because Forciea failed to comply with the expert-affidavit requirements of Minn. Stat. § 145.682. Under these circumstances, the district court correctly concluded that Forciea is not entitled to relief under rule 59.01. *See Parson v. Argue*, 344 N.W.2d 431, 431-32 (Minn. 1984) (holding that if there was never a trial, motion for new trial is "an anomaly"). Accordingly, denial of the motion for a new trial was proper.

III.

Forciea next asserts that the district court erred by denying his motions to vacate the judgment based on newly discovered evidence and fraud under Minn. R. Civ. P. 60.02(b), (c). We review a district court's denial of a motion to vacate the judgment under rule 60.02 for an abuse of discretion. *Safeco Ins. Co. of Am. v. Dain Bosworth Inc.*, 531 N.W.2d 867, 873 (Minn. App. 1995), *review denied* (Minn. July 20, 1995).

A.

Forciea contends that copies of medical records that prison policy prohibited him from seeing until 15 days after dismissal comprise the newly discovered evidence at issue here. But Forciea asserted in district court that he obtained the medical records on December 18, 2008, well before the hearing on the motion. As the district court concluded, such evidence does not qualify as newly discovered evidence warranting vacation of the judgment. Moreover, because Forciea now asserts a different theory on appeal, relief is improper. *See Thiele*, 425 N.W.2d at 582.

B.

Alternatively, Forciea contends that the district court erred by denying his motion to vacate the judgment based on fraud, arguing that respondents concealed documents that would have established that they changed his diagnosis in 2004. Forciea also maintains that, because respondents had a "legal and professional duty" to provide "his doctors with complete and accurate medical records, there was never a need to re-order duplicate copies." To prevail on a motion to vacate the judgment based on fraud, the movant must demonstrate by clear and convincing evidence that an adverse party engaged in fraud. *Turner v. Suggs*, 653 N.W.2d 458, 466 (Minn. App. 2002); *Regents of Univ. of Minn. v. Med. Inc.*, 405 N.W.2d 474, 480 (Minn. App. 1987). Forciea failed to do so here.

In denying Forciea's motion to vacate, the district court held that, because Forciea "never requested the documents [which he maintains support his claim of fraud], it is

unclear . . . how [respondents] could have fraudulently withheld the documents." The district court's analysis is sound. Because there is no evidence of fraud, the district court did not err by denying Forciea's motion to vacate the judgment on this ground.

IV.

Forciea maintains that the district court erred by denying as moot his motion for a guardian ad litem ad prosequendam, arguing that "[t]he appointment of a guardian ad litem ad prosequendam is just and proper." Whether an issue is moot presents a question of law, which we review de novo. *See Isaacs v. Am. Iron & Steel Co*., 690 N.W.2d 373, 376 (Minn. App. 2004), *review denied* (Minn. Apr. 4, 2005).

In contrast to federal law, which authorizes the appointment of counsel to civil litigants proceeding in forma pauperis in some circumstances, Minnesota law does not authorize such appointment. *Compare* 28 U.S.C. § 1915 (2006) *with* Minn. Stat. § 563.01 (2008). Therefore, the district court was without legal authority to grant Forciea's motion for a guardian ad litem ad prosequendam. Moreover, because Forciea's motion was filed after dismissal for failing to comply with the requisite expert affidavits, the district court correctly determined that Forciea's motion was moot.

Affirmed.