STATE OF MINNESOTA
IN COURT OF APPEALS
A10-0905
A10-1133

D.L.Z., individually and as parent and natural guardian of
B.L.Z., C.T.Z., A.T.Z., and S.V.Z.,
Appellant (A10-905),

R.D.,
Respondent (A10-1133),

vs.

Psychologist,
Respondent,

Hospital,
Respondent,

D.L.Z., proposed intervenor,
Appellant (A10-1133).

Filed February 1, 2011
Affirmed
Larkin, Judge

St. Louis County District Court
File No. 69DU-CV-08-4688

John M. Sheran, Jeffrey A. Ehrich, Leonard, Street and Deinard, P.A., Minneapolis, Minnesota (for appellant)

Carolin J. Nearing, Andrea P. Hoversten, Geraghty, O'Loughlin & Kenney, P.A., St. Paul, Minnesota (for respondent-Psychologist)

Tracy A. Schramm, Charles B. Bateman, Reyelts Bateman & Schramm, Ltd., Duluth, Minnesota (for respondent-Hospital)

Considered and decided by Larkin, Presiding Judge; Wright, Judge; and Stauber, Judge.

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

LARKIN, Judge

Appellant challenges the district court's dismissal of his intentional-infliction-of-emotional-distress claim for failure to state a claim upon which relief can be granted and its award of summary judgment in favor of respondents on, and statutory dismissal of, appellant's professional-malpractice claim. Because appellant seeks damages that flow from the alienation of his wife's affections and alienation of affections is no longer a permitted cause of action, we affirm the dismissal and award of summary judgment. We also affirm the district court's dismissal of appellant's professional-malpractice claim under Minn. Stat. § 145.682 (2010), because the district court did not abuse its discretion in concluding that appellant failed to submit a timely and substantively sufficient expert affidavit as required under the statute.

FACTS

Appellant D.L.Z.[1] married R.D.[2] in 1998. D.L.Z. and R.D. are the parents of minor children A.T.Z. and S.V.Z. D.L.Z. is also the parent of minor children B.L.Z. and C.T.Z.

[1] The district court issued a protective order directing that the parties be referenced by initial or identifier. Our identification of the parties is consistent with this order.

[2] R.D. was formerly known as "R.Z.," and the district court file often refers to her as "R.Z." We refer to her as R.D.

In early 2004, D.L.Z. and R.D. began to experience marital difficulties, partially attributable to R.D.'s psychological problems. In April, D.L.Z. sought marital counseling through respondent hospital and was referred to respondent psychologist. Between April and November, psychologist provided marital therapy to D.L.Z. and R.D., as well as individual therapy to R.D.[3] In October 2004, psychologist began a sexual relationship with R.D., which continued until April 2005. Psychologist discontinued R.D.'s therapy in November 2004.

R.D.'s psychological problems and behavior, and her marital relationship with D.L.Z., worsened during the course of psychologist's treatment. The couple ultimately divorced.

In July 2008, D.L.Z. sued psychologist and hospital, on behalf of himself and his children, asserting claims of professional malpractice, intentional infliction of emotional distress (IIED), respondeat superior, and sexual exploitation. R.D. did not join in D.L.Z.'s lawsuit. During the course of the litigation, the district court dismissed or entered summary judgment on all of D.L.Z.'s claims. Specifically, the district court dismissed D.L.Z.'s IIED claim for failure to state a claim upon which relief can be

[3] Hospital has occasionally denied, throughout these proceedings, that D.L.Z. was psychologist's patient. But we assume this fact to be true for the purpose of our review. *See Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003) (stating that when reviewing a dismissal under Minn. R. Civ. P. 12.02(e), "[t]he reviewing court must consider only the facts alleged in the complaint, accepting those facts as true and must construe all reasonable inferences in favor of the nonmoving party"); *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) ("On appeal [from summary judgment], the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted.").

granted.[4] Later, the district court granted summary judgment for respondents on D.L.Z.'s professional-malpractice claim. The district court's dismissal of the IIED claim and its award of summary judgment on the professional-malpractice claim are based on application of the "anti-heart-balm" statute, Minn. Stat. § 553.02 (2010), which abolished all civil causes for alienation of affections. The district court also dismissed D.L.Z.'s professional-malpractice claim under Minn. Stat. § 145.682, because D.L.Z. failed to submit a timely expert affidavit establishing causation. *See* Minn. Stat. § 145.682, subd. 2 (requiring expert affidavits in medical-malpractice cases).

While D.L.Z.'s lawsuit was pending, R.D. commenced her own lawsuit against hospital and psychologist. Psychologist and hospital moved to consolidate R.D.'s lawsuit with D.L.Z.'s. D.L.Z. objected, and the district court denied the motion. After the district court entered final judgment against D.L.Z., he moved to intervene in R.D.'s suit. D.L.Z.'s complaint in intervention asserts that respondents' conduct is the direct cause of his separation and divorce, and his loss of the "love, society and companionship of his wife." The district court denied the request for intervention.

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[4] Although the district court's order disposing of the IIED claim is captioned, "Order for Partial Summary Judgment," the body of the order states that "[p]sychologist's motion to dismiss . . . D.L.Z.'s claims . . . of [IIED] for failure to state a claim upon which relief can be granted is GRANTED." Moreover, the memorandum accompanying the order sets forth the legal standard that is used to determine whether a claim should be dismissed for failure to state a claim upon which relief can be granted under Minn. R. Civ. P. 12.02(e) and concludes that the IIED claim must be dismissed because D.L.Z. "has not stated a legally sufficient claim." The memorandum does not reference or apply the summary-judgment standard. And there is no reference to entry of judgment within the body of the order. Accordingly, we conclude that D.L.Z.'s IIED claim was dismissed under rule 12.02(e) for failure to state a claim upon which relief can be granted notwithstanding the reference to partial summary judgment in the caption.

D.L.Z. initially appealed three of the district court's orders: the May 2009 order dismissing his IIED claim; a November 2009 protective order restricting the deposition of psychologist's supervisor; and the March 2010 order granting summary judgment and statutory dismissal of his professional-malpractice claim. D.L.Z. separately appealed the district court's order denying his motion to intervene in R.D.'s lawsuit. This court consolidated the appeals.

D E C I S I O N

We begin by identifying the issues that are properly before us for review. Even though D.L.Z. appeals the district court's protective order restricting the deposition of psychologist's supervisor and specifically asks this court to vacate the order, he does not offer any legal argument or analysis in support of his request. Accordingly, this issue is waived. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (stating that issues not briefed on appeal are waived). Similarly, D.L.Z.'s briefing does not address the district court's denial of his motion to intervene in R.D.'s suit. This issue is therefore also waived. *See id.* Thus, our review is limited to the district court's dismissal of D.L.Z.'s IIED claim, its award of summary judgment on D.L.Z.'s professional-malpractice claim under Minn. Stat. § 553.02, and its statutory dismissal of D.L.Z.'s professional-malpractice claim.

I.

We first address D.L.Z.'s assertion that the district court erred by determining that his IIED and professional-malpractice claims are precluded under Minn. Stat. § 553.02. Because the district court's dismissal of D.L.Z.'s IIED claim, as well as its award of

summary judgment on his professional-malpractice claim, are based, in whole or in part, on application of Minn. Stat. § 553.02, we will address those decisions together.

Standard of Review

The district court may dismiss a pleading for "failure to state a claim upon which relief can be granted." Minn. R. Civ. P. 12.02(e). "In reviewing cases dismissed for failure to state a claim on which relief can be granted, the only question . . . is whether the complaint sets forth a *legally sufficient* claim for relief. It is immaterial . . . whether or not the plaintiff can prove the facts alleged." *Elzie v. Comm'r of Pub. Safety*, 298 N.W.2d 29, 32 (Minn. 1980) (alteration in original) (quotation omitted). "All assumptions and inferences must favor the party against whom the dismissal is sought." *St. James Capital Corp. v. Pallet Recycling Assoc. of N. Am., Inc.*, 589 N.W.2d 511, 514 (Minn. App. 1999). When reviewing a case dismissed pursuant to Minn. R. Civ. P. 12.02(e) the standard of review is de novo. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003).

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. "On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). "We review de novo whether a genuine issue of material fact exists" and "whether the district court erred in its

application of the law." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). There is no genuine issue of material fact for trial "when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). A summary judgment will be affirmed if it can be sustained on any ground. *Winkler v. Magnuson*, 539 N.W.2d 821, 828 (Minn. App. 1995), *review denied* (Minn. Feb. 13, 1996).

Anti-Heart-Balm Statute

In 1978, the legislature abolished "[a]ll civil causes of action for breach of promise to marry, alienation of affections, criminal conversation and seduction," which are commonly referred to as "heart-balm" actions. 1978 Minn. Laws ch. 515, § 2, at 141. The common-law tort of alienation of affections arose out of a defendant's intentional and wrongful conduct that caused the loss of affections of another's spouse. *Pedersen v. Jirsa*, 267 Minn. 48, 54-55, 125 N.W.2d 38, 43 (1963). Because actions based on alienation of affections "have been subject to grave abuses, have caused intimidation and harassment . . . and have resulted in the perpetration of frauds," the legislature abolished alienation-of-affections claims as a matter of public policy. Minn. Stat. § 553.01 (2010).

In dismissing D.L.Z.'s IIED claim, the district court reasoned that "the essence of [D.L.Z.'s] claim for IIED is that [p]sychologist's conduct alienated [D.L.Z.'s] former wife's affections and ruined his marriage," and the district court concluded that these damages are prohibited by statute and precedent. The district court's award of summary

judgment on D.L.Z.'s professional-malpractice claim is based on the same reasoning: because D.L.Z.'s alleged damages stem from the alienation of R.D.'s affections, the damages are not recoverable. Although the district court concluded that Minn. Stat. § 553.02 was not intended to preclude actions for professional malpractice against therapists, it also concluded that "[d]amages related to 'heart-balm' actions, no matter how brought before the [c]ourt, cannot stand."

The district court relied on *R.E.R. v. J.G.*, in which this court held that, because the legislature has "abolished actions for alienation of affections, a plaintiff can no longer seek tort damages based on the effects of marital discord caused by a third party." 552 N.W.2d 27, 28 (Minn. App. 1996). The facts of *R.E.R.* are strikingly similar to the facts here. R.E.R. and his wife sought marital counseling from their minister. *Id*. at 28. The minister and R.E.R.'s wife engaged in an extramarital affair. *Id*. Later, R.E.R. and his wife divorced. *Id*. R.E.R. sued the minister and the United Methodist Church of Minnesota alleging IIED and breach of fiduciary duty, among other claims. *Id*. The district court awarded summary judgment in favor of the minister on all of the claims, reasoning that the essence of the claims was that the minister alienated R.E.R.'s former wife's affections and ruined his marriage. *Id*.

We affirmed summary judgment because R.E.R.'s alleged losses, which were described as "severe mental and emotional distress as a result of the minister's actions," flowed from the alienation of his former wife's affections. *Id*. at 29. The court explained that, "[b]ecause these losses flow from the alienation of his former wife's affections, they generally are no longer recoverable because the legislature has outlawed heart balm

actions," and that "allowing recovery for damages relating to the alienation of a spouse's affections would defeat the legislature's stated purpose in abolishing the heart balm actions." *Id*.

Psychologist and hospital cite *R.E.R.* and assert that section 553.02 prohibits recovery for D.L.Z.'s damages because the damages flow from psychologist's alienation of R.D.'s affections. The record supports this assertion. In his amended complaint, D.L.Z. asserts that psychologist engaged in conduct that was designed to undermine D.L.Z. and R.D.'s marital relationship and to drive a wedge between them, including discussing D.L.Z. in disparaging and demeaning terms during R.D.'s individual therapy, recommending that R.D. move out of the family home, exchanging notes with R.D. in a journal, and, of course, engaging in a sexual relationship with R.D. These allegations overwhelmingly focus on psychologist's interference in D.L.Z.'s marital relationship. As a result of this behavior, D.L.Z. asserts that he has lost the "love of his life" and has "grief and loss issues pertaining to his divorce." D.L.Z. describes his loss as follows:

> I have lost my wife who is my best friend and my true love. . . . I have been going to counseling because of extreme depression. I have been hospitalized with exhaustion and mental fatigue because of the extra stress and work involved with caring for . . . our children, and our home. I have been unable to work at certain times because of this, and it has caused a financial burden on top of everything else.

D.L.Z. argues that his damages stem from psychologist's betrayal of his trust and that section 553.02 does not prohibit a professional-malpractice claim. The district court agreed with the latter assertion, as does this court. *See id*. at 31 (recognizing that the abolition of actions for alienation of affections may not directly prohibit a suit for breach

of a fiduciary duty). But D.L.Z. must establish compensable damages that flow from psychologist's alleged negligence toward D.L.Z., as opposed to psychologist's alienation of R.D.'s affections, in order to prevail on his professional-malpractice claim. *See K.A.C. v. Benson*, 527 N.W.2d 553, 561 (Minn. 1995) (stating that a breach of a legal duty without compensable damages is not actionable by law).

The record does not support D.L.Z.'s assertion that his damages stem from psychologist's betrayal of D.L.Z.'s trust instead of psychologist's sexual and emotional relationship with R.D. The vast majority of the allegations in D.L.Z.'s amended complaint concern psychologist's conduct toward R.D. as opposed to D.L.Z. and its impact on R.D.'s affections toward D.L.Z. D.L.Z. alleges that psychologist breached professional standards of care by engaging in a sexual relationship with R.D.; by failing to diagnose, disclose, and treat R.D.'s mental illness or otherwise refer R.D. for appropriate treatment; and by failing to competently provide marital and individual counseling to R.D.[5] D.L.Z. also alleges that psychologist manipulated R.D. for his own sexual purposes, withheld appropriate treatment from R.D. for his own sexual advantage, began a sexual relationship with R.D. without regard to the impact it would have on R.D.'s marital relationship, discontinued R.D.'s therapy by telling her that she was "healed" when in fact her condition was worsening, and failed to appropriately refer R.D. to another therapist when he discontinued her treatment. D.L.Z. asserts that, as a result of

[5] D.L.Z. alleges that hospital is vicariously liable for psychologist's breach of the standards of care. D.L.Z. also alleges that hospital was independently negligent in that it failed to properly supervise, educate, and monitor its psychological staff, including psychologist.

this behavior, psychologist drove a wedge between D.L.Z. and R.D., undermined their marital relationship, and encouraged their separation.

Although D.L.Z. asserts that his discovery of the "long-standing sexual relationship" between R.D. and psychologist was a "total violation of trust between [D.L.Z.] and psychotherapist," that "the humiliation and emotional upset created by discovery of this information was devastating to [D.L.Z.]," and that "this breach of trust . . . resulted in the couple's separation," D.L.Z. fails to identify which, if any, of his claimed damages flow from the psychologist's breach of D.L.Z.'s trust, as opposed to the alienation of R.D.'s affections. And our review of the record points to one conclusion: D.L.Z.'s damages flow from psychologist's alienation of R.D.'s affections.

We therefore agree that the essence of D.L.Z.'s claims is that psychologist alienated R.D.'s affections. We also agree that D.L.Z.'s alleged damages stem from this alienation of affections. But Minnesota law bars any claim for damages that is predicated on alienation of affections. *R.E.R.*, 552 N.W.2d at 28; *see also M.N. v. D.S.*, 616 N.W.2d 284, 285 (Minn. App. 2000) (explaining that "Minnesota Statutes, chapter 553 (1998), precludes an action if the claim and damages are predicated on a promise to marry, even if the claim is couched in terms of a tort"), *review denied* (Minn. Nov. 15, 2000). Because the legislature has outlawed alienation-of-affections actions, D.L.Z.'s damages are not recoverable. *See R.E.R.*, 552 N.W.2d at 29.

D.L.Z. attempts to distinguish *R.E.R.*, arguing that "it was the *R.E.R.* plaintiff's failure to cite a recognized duty of care that was fatal to his case, not the existence of

Minnesota's anti-heart-balm statute." D.L.Z. also argues that *R.E.R.* is inapplicable because this case involves a legally-cognizable cause of action: professional malpractice.

We are not persuaded. D.L.Z. relies on a section of the *R.E.R.* opinion in which this court addressed R.E.R.'s assertion that his losses flowed from the minister's breach of a fiduciary duty not to act against R.E.R.'s interests and not from the sexual and emotional relationship that precipitated the breakup of R.E.R.'s marriage. *Id.* at 29-30. This court concluded that even if R.E.R.'s complaint had stated a claim sufficiently distinct from that for alienation of affections, his action failed because he could not show the adequacy of available damages to redress his injuries, reasoning that because actions for breach of a fiduciary duty generally sound in equity, R.E.R. could not recover his requested emotional distress and economic losses. *Id*. at 30-31. Therefore we did not consider or determine whether R.E.R.'s damages flowed from the alleged breach of fiduciary duty instead of the extra-marital affair. *Id*. at 29-31. But here, we have concluded that D.L.Z.'s alleged damages flow from the alienation of his wife's affections and not from the breach of trust. Moreover, our holding in *R.E.R.* was two-fold: (1) "a plaintiff can no longer seek tort damages based on the effects of marital discord caused by a third party" and (2) "[i]n addition, a plaintiff may not proceed under a breach of a fiduciary duty when the complaint alleges only legal damages." *Id*. at 28. The first portion of the *R.E.R.* holding governs our decision.

D.L.Z. also argues that it is improper to equate a cause of action for alienation of affections, which is barred, with damages related to alienation of affections, which are not barred under the plain language of section 553.02. D.L.Z. argues that "[n]othing in

the language of [section 553.02] states or even implies that it abolishes *damages* sustained as a result of an independent, legally-cognizable cause of action." This argument is nothing more than a challenge to our holding in *R.E.R.* *See id*. (holding that losses flowing from the alienation of a spouse's affections are not recoverable because the legislature has outlawed alienation-of-affections actions). We will not disregard this precedent. *See State v. M.L.A.*, 785 N.W.2d 763, 767 (Minn. App. 2010) (stating, "[t]he district court, like this court, is bound by supreme court precedent and the published opinions of the court of appeals"), *review denied* (Minn. Sept. 21, 2010).

D.L.Z. further argues that interpreting section 553.02 to preclude all heart-balm-related damages is at odds with precedent from the Minnesota Supreme Court. D.L.Z. contends that "[b]y recognizing the validity of a husband's claim against his marital counselor for having sexual relations with his wife, the Minnesota Supreme Court in *Love* and *Odenthal* necessarily endorsed all elements of the cause of action, including damages." But D.L.Z. concedes that neither of these cases, which involved issues of excessive entanglement and insurance coverage, addressed the issue presented here. *See Odenthal v. Minn. Conference of Seventh-Day Adventists*, 649 N.W.2d 426, 428-29 (Minn. 2002) (holding, "[w]here statutes regulating unlicensed mental health practitioners provide neutral principles of law to apply in a negligence action against a member of the clergy, a court may adjudicate the claim without excessive entanglement with religion [and] [a]djudication of a negligence claim against a member of the clergy based on neutral standards of conduct set forth in statute does not violate Article I, Section 16 of the Minnesota Constitution"); *St. Paul Fire and Marine Ins. Co. v. Love*,

459 N.W.2d 698, 698-99 (Minn. 1990) (holding, "[w]hen a sexual relationship arises within a therapeutic alliance pervaded by the psychological phenomenon of transference, the patient's claim is within the coverage of the therapist's policy as resulting from professional services provided or withheld").

D.L.Z. also argues that interpreting section 553.02 as prohibiting damages that flow from alienation of a spouse's affections is inconsistent with precedent allowing loss-of-consortium damages, which are necessarily related to the breakdown of the marital relationship. "'Consortium,' as a general description, represents reciprocal rights inherent in the marital relationship of husband and wife, including such undefined elements as comfort, companionship, and commitment to the needs of each other." *Thill v. Modern Erecting Co.*, 284 Minn. 508, 510, 170 N.W.2d 865, 867-68 (1969). Although loss-of-consortium damages relate to the breakdown of the marital relationship, such damages arise in a variety of causes of action. *See McDevitt v. City of St. Paul*, 66 Minn. 14, 14-15, 68 N.W. 178, 178-79 (1896) (allowing a husband to recover "damages sustained by him in the loss of the services of his wife on account of injuries received by her by reason of a defective sidewalk"); *Beukhof v. Minn. Mut. Fire and Cas. Co.*, 502 N.W.2d 223, 224-26 (Minn. App. 1993) (affirming [district] court's calculation of damages against insurer for a loss-of-consortium claim resulting from a car accident), *review denied* (Minn. Aug. 6, 1993). Our holding in *R.E.R.* does not prohibit loss-of-consortium damages; it merely prohibits loss-of-consortium damages that flow from an alienation-of-affections claim.

The district court assessed whether D.L.Z. has any compensable loss-of-consortium damages and concluded that, although D.L.Z. may have a loss-of-consortium claim, the claim is derivative and that R.D.'s claim would have to be adjudicated before D.L.Z.'s loss-of-consortium damages, if any, could be determined. *See Thill*, 284 Minn. at 513, 170 N.W.2d at 869 (stating that a spouse's right of action for loss of consortium based on injury resulting from the negligent act of a third party is derivative). D.L.Z. assigns error to this conclusion, arguing that because he has a direct, and not a derivative, malpractice claim, he can bring a direct, instead of derivative, loss-of-consortium claim.[6] But D.L.Z. does not cite binding authority to support this argument. And our review of Minnesota precedent leads us to conclude that a loss-of-consortium claim is, by definition, derivative. *See Kohler v. Fletcher*, 442 N.W.2d 169, 173 (Minn. App. 1989) (stating that "a husband's claim for loss of consortium is derivative only, if his wife's underlying tort claim fails, his claim for loss of consortium also fails"), *review denied* (Minn. Aug. 25, 1989).

Moreover, allowing D.L.Z. to proceed with a direct claim for loss of consortium where his alleged damages actually flow from the alienation of R.D.'s affections would defeat the legislature's purpose in abolishing heart-balm actions. *See Thill*, 284 Minn. at 511, 170 N.W.2d at 868 (explaining, under the law as it existed prior to the enactment of Minn. Stat. § 553.02, that a spouse had a direct right of action against a third party who

[6] When asked at oral argument, D.L.Z. confirmed that he wants to pursue only an independent loss-of-consortium claim based on psychologist's breach of the duty of care to D.L.Z., and not a derivative loss-of-consortium claim based on R.D.'s injuries. D.L.Z.'s position sheds light on his failure to provide any argument or briefing in support of his appeal of the district court's refusal to allow him to intervene in R.D.'s lawsuit.

intentionally invaded his or her right of consortium, "as in the case of alienation of affections"). D.L.Z. cannot pursue an independent loss-of-consortium claim where his alleged loss-of-consortium damages stem from the alienation of R.D.'s affection. *See R.E.R.*, 552 N.W.2d at 28 (stating, "[b]ecause Minn. Stat. § 553.02 abolished actions for alienation of affections, a plaintiff can no longer seek tort damages based on the effects of marital discord caused by a third party"). The district court therefore did not err by concluding that D.L.Z.'s loss-of-consortium damages, if any, may only be pursued derivatively.[7]

In sum, because D.L.Z.'s damages flow from psychologist's alienation of R.D.'s affections, they are barred under section 553.02, as applied by this court in *R.E.R.* We therefore affirm dismissal of D.L.Z.'s IIED claim and summary judgment for psychologist and hospital on D.L.Z.'s professional-malpractice claim.

Emotional-Distress Damages

Despite its conclusion that all of D.L.Z.'s damages are barred because they flow from the alienation of R.D.'s affections, the district court analyzed whether D.L.Z.'s claimed emotional distress damages are otherwise compensable and determined that they are not. *See Lickteig v. Alderson, Ondov, Leonard & Sween, P.A.*, 556 N.W.2d 557, 560 (Minn. 1996) (describing the three circumstances in which emotional distress may be an

[7] Because D.L.Z. cannot pursue an independent loss-of-consortium claim, and because he has waived review of the district court's refusal to allow him to assert a derivative claim via his motion to intervene, we do not consider D.L.Z.'s argument that the district court erred by "ruling" that "[w]hether D.L.Z. could prove the loss of consortium claim is speculative based on the fact that the reason R.D. went to [p]sychologist in the first place was due to marital difficulties."

element of damages in tort cases). D.L.Z. assigns error to the district court's finding that psychologist's conduct was willful solely towards R.D. and not D.L.Z. *See id.* (explaining that a plaintiff may recover emotional distress damages when there has been a "direct invasion of the plaintiff's rights . . . or other like willful, wanton, or malicious conduct" (quotation omitted)). D.L.Z. argues that he presented more than enough facts to present a jury question regarding whether psychologist directly invaded his rights as a patient. Even if the district court erred in this regard, the error would not necessitate reversal because all of D.L.Z.'s alleged damages—including any emotional distress damages—are barred under section 553.02. *See* Minn. R. Civ. P. 61 (requiring harmless error to be disregarded).

In a related argument, D.L.Z. asks this court to recognize a basis for recovering emotional distress damages where, as here, the defendant assumed an independent duty to not harm the plaintiff's emotional well-being. D.L.Z. seeks a "narrowly-defined" independent-duty rule as follows: "[W]here a psychotherapist undertakes to provide psychological or marital counseling services, a special relationship develops where emotional distress is almost a per se foreseeable consequence of malpractice." Adoption and application of the proposed independent-duty rule would establish damages as a "per se foreseeable consequence of malpractice," and would perhaps enable D.L.Z. to establish that his damages flow from psychologist's breach of D.L.Z.'s trust, as opposed to psychologist's alienation of R.D.'s affections. D.L.Z. argues that courts across the country are recognizing a duty to avoid negligently inflicting emotional harm when the defendant is in a special relationship with the plaintiff involving intensely emotional

subjects or where emotional distress is the foreseeable consequence of the conduct undertaken, citing foreign jurisdictions, a tentative draft of Restatement (Third) of Torts § 46(b), and a law review article.

We decline to adopt the rule for several reasons. First, "[t]he function of the court of appeals is limited to identifying errors and then correcting them." *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). Second, "the task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court." *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987), *review denied* (Minn. Dec. 18, 1987). Third, it is not the function of the court of appeals to establish new causes of action, even when such actions appear to have merit. *Stubbs v. N. Mem'l Med. Ctr.*, 448 N.W.2d 78, 80-81 (Minn. App. 1989), *review denied* (Minn. Jan. 12, 1990). We also recognize that the Minnesota Supreme Court has "not been anxious to expand the availability of damages for emotional distress" because of "the concern that claims of mental anguish may be speculative and so likely to lead to fictitious allegations that there is a potential for abuse of the judicial process." *Lickteig*, 556 N.W.2d at 560. Finally, we disagree with D.L.Z.'s contention that failure to adopt the proposed independent-duty rule has the practical effect of denying D.L.Z. a recovery for psychologist's negligence and provides the psychologist with blanket immunity. D.L.Z. is denied recovery in this case because he fails to establish that his damages flow from psychologist's negligence toward D.L.Z. as opposed to psychologist's alienation of R.D.'s affections.

In summary, we find no reversible error in the district court's decisions to dismiss D.L.Z.'s IIED claim, and to award summary judgment on his professional-malpractice

claim, based on application of the anti-heart-balm statute, as applied by this court in *R.E.R.*

II.

We next address the district court's statutory dismissal of D.L.Z.'s professional-malpractice claim under Minn. Stat. § 145.682.

Statutory Requirements

"In a medical malpractice case where expert testimony is necessary to establish a prima facie case the plaintiff must meet two requirements." *Anderson v. Rengachary*, 608 N.W.2d 843, 846 (Minn. 2000) (quotation omitted). First, the plaintiff must serve an affidavit of expert review with the summons and complaint. Minn. Stat. § 145.682, subd. 2. The plaintiff must serve a second affidavit, the expert-disclosure affidavit, within 180 days after the lawsuit begins. *Id.* The expert-disclosure affidavit

> 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. Answers to interrogatories that state the information required by this subdivision satisfy the requirements of this subdivision if they are signed by the plaintiff's attorney and by each expert listed in the answers to interrogatories . . . .

Id., subd. 4(a).

"Failure to comply with [Minn. Stat. § 145.682,] subdivision 4 because of deficiencies in the affidavit . . . results, upon motion, in mandatory dismissal with

prejudice of each action as to which expert testimony is necessary to establish a prima facie case . . . ." *Id*., subd. 6(c).

"The purpose of expert testimony is to interpret the facts and connect the facts to conduct which constitutes malpractice and causation." *Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 192 (Minn. 1990). Plaintiffs are

> expected to set forth, by affidavit or answers to interrogatories, specific details concerning their 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 to them.

Id. at 193.

Standard of Review

The supreme court has repeatedly stated that the district court's dismissal of a medical malpractice action for failure to comply with Minn. Stat. § 145.682 is reviewed for an abuse of discretion. *See Anderson*, 608 N.W.2d at 846 (stating, "[w]e will reverse a district court's dismissal of a suit pursuant to Minn. Stat. § 145.682 only if the district court abused its discretion); *Stroud v. Hennepin Cnty. Med. Ctr.*, 556 N.W.2d 552, 555 (Minn. 1996) (reviewing district court's dismissal of a medical malpractice action for failure to provide a legally sufficient affidavit on the issue of causation for an abuse of discretion); *Sorenson*, 457 N.W.2d at 190 (applying the abuse-of-discretion standard when reviewing the substantive disclosure requirements of section 145.682).

Despite the supreme court's clear and consistent statement that a dismissal for failure to comply with the substantive requirements of section 145.682 is reviewed for an

abuse of discretion, D.L.Z. asserts that our review of the substance of his expert's affidavits should be de novo, arguing that such review is, "[n]o different than ruling on a motion for a directed verdict[;] the district court's only role when performing this function is to ensure that the plaintiff has made a prima facie case of malpractice . . . This function leaves nothing to the discretion of the district court, and thus should be reviewed de novo."

D.L.Z. argues that this court should differentiate between the threshold determination that an affidavit is insufficient and the subsequent discretionary decision whether to dismiss because the affidavit is insufficient. D.L.Z. further argues that we should only apply the abuse-of-discretion standard to the second decision. This approach is inconsistent with supreme court precedent. *See Stroud*, 556 N.W.2d at 555 (reviewing district court's dismissal of a medical malpractice action for failure to provide a legally sufficient affidavit on the issue of causation for an abuse of discretion); *Sorenson*, 457 N.W.2d at 190 (applying the abuse-of-discretion standard when reviewing the substantive disclosure requirements of section 145.682). The supreme court has never drawn this distinction, and this court is not at liberty to depart from supreme court precedent. *See Tereault*, 413 N.W.2d at 286 (stating, "the task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court"). We therefore review the district court's decision for an abuse of discretion.

The Affidavits

D.L.Z.'s lawsuit began on July 2, 2008, when D.L.Z. served a summons and complaint on hospital and psychologist. *See Stroud*, 556 N.W.2d at 553 (stating that suit

was commenced on the date of service of the summons and complaint on defendants). Dr. Patricia J. Aletky's initial affidavit was included with the summons and complaint and states, "It is my opinion that D.L.Z. has sustained significant psychological injury as a direct result of the negligence and breach of the required professional conduct attributable to [psychologist]. The injuries sustained by D.L.Z. have, and continue to, require psychological care." On August 24, 2009, D.L.Z. served a supplemental affidavit of Dr. Aletky, which states, "It is my opinion that D.L.Z. has sustained significant psychological and physical symptoms as a direct result of the [p]sychologist's and [h]ospital's negligence and breach of the required professional conduct. The injuries sustained by D.L.Z. have, and continue to, require psychological care." Respondents do not challenge the timeliness of these affidavits.

On February 16, 2010, D.L.Z. served the affidavit of licensed psychologist, Gary R. Schoener. On February 26, 2010, D.L.Z. served the affidavit of licensed psychologist, Katrina Tobey.

The district court concluded that Dr. Aletky's affidavits were substantively insufficient because they fail to establish a causal connection between the alleged malpractice and injuries. *See Sorenson*, 457 N.W.2d at 192 (stating, "[t]he purpose of expert testimony is to interpret the facts and connect the facts to conduct which constitutes malpractice and causation"). The district court refused to consider the affidavits of Schoener and Tobey as untimely. *See* Minn. Stat. § 145.682 subd. 2 (2) (requiring the expert-disclosure affidavit to be served within 180 days after commencement of the suit).

D.L.Z. asserts that the district court erred by concluding that Dr. Aletky's expert affidavits are insufficient. We disagree. The district court reasoned that Dr. Aletky's statements on causation bear a "striking" similarity to statements that the supreme court has found insufficient in the past. *See Stroud*, 556 N.W.2d at 554, 556 (finding expert's statement that "as a result of the breach of the standard of care . . . there was a failure to diagnose and treat a subarachnoid hemorrhage which ultimately resulted in a complicated hospital course and death of the [p]laintiff" too conclusory to comply with statutory requirements).

Dr. Aletky provided only broad, conclusory statements regarding causation and did not outline the chain of causation that allegedly resulted in D.L.Z.'s injuries. The district court did not abuse its discretion by concluding that these affidavits are insufficient under section 145.682. *See Anderson*, 608 N.W.2d at 848 (finding expert's statement that "'there was a deviation from the standard of care provided to this patient which caused the patient to have postoperative dysphasia [sic] of undetermined etiology'" to be insufficient); *Lindberg v. Health Partners, Inc.*, 599 N.W.2d 572, 577-78 (Minn. 1999) (finding expert's statement that "'failure to instruct Ms. Lindberg to seek prompt medical attention . . . caused the death of L. Lindberg'" too broad and conclusory to be sufficient).

D.L.Z. also asserts that the district court erred by refusing to consider the Tobey affidavit because it was untimely. D.L.Z. relies on the safe-harbor provision under Minn. Stat. § 145.682, subd. 6(c), which provides:

> Failure to comply with subdivision 4 because of deficiencies in the affidavit or answers to interrogatories results, upon motion, in mandatory dismissal with prejudice of each action as to which expert testimony is necessary to establish a prima facie case, provided that:
>
> (1) the motion to dismiss the action identifies the claimed deficiencies in the affidavit or answers to interrogatories;
>
> (2) the time for hearing the motion is at least 45 days from the date of service of the motion; and
>
> (3) before the hearing on the motion, the plaintiff does not serve upon the defendant an amended affidavit or answers to interrogatories that correct the claimed deficiencies.

It is undisputed that D.L.Z. did not serve the Tobey affidavit within 180 days of beginning his lawsuit. The district court reasoned that D.L.Z. could not substitute a new expert as a means of avoiding the 180-day time limit and that the only way to increase the time limit is by agreement of the parties or by a finding of reasonable excuse by the court. *See* Minn. Stat. § 145.682 subd. 4(b) (providing that time limits may be extended by agreement of the parties or the court for good cause). D.L.Z. challenges this reasoning, arguing that the statute allows him to correct the alleged deficiency in Dr. Aletky's affidavits with "an amended affidavit" and that the statute does not limit the amendment to "an affidavit from the same expert."

But this court has recently concluded that "a second expert-disclosure affidavit, which identified and was signed by a different expert than [plaintiff] identified in her first affidavit, was not an amended affidavit that corrected the deficiencies in the first affidavit." *Wesely v. Flor*, __ N.W.2d __, __, 2010 WL 5071323, at *3 (Minn. App. Dec. 14, 2010). This court reasoned that

> [b]ecause a valid affidavit must be sworn to or affirmed by the affiant, a statement in a valid affidavit cannot be amended by the affidavit of another affiant; a second affiant cannot swear or affirm that the changes in an affidavit are the truthful testimony of the first affiant. Consequently, one expert cannot amend the affidavit of another expert, and the affidavit of [the] second expert is not an amended affidavit of [the] first expert.

Id.

Tobey could not "amend" Dr. Aletky's affidavits and her affidavit is not an "amended affidavit" that "correct[s] the claimed deficiencies" in Dr. Aletky's affidavits. *See* Minn. Stat. § 145.682, subd. 6(c). And we disagree with D.L.Z.'s contention that this reasoning contradicts section 145.682, subd. 4(b), which provides that "[n]othing in this subdivision may be construed to prevent either party from calling additional expert witnesses or substituting other expert witnesses." Section 145.682, subd. 4(b) must be construed as limiting the addition or substitution of experts to situations in which plaintiff has complied with the 180-day affidavit requirement in the first instance. Any other interpretation would render the 180-day time limit in section 145.682, subd. 2(2) meaningless. *See Juetten v. LCA-Vision, Inc.*, 777 N.W.2d 772, 777 (Minn. App. 2010) (stating, "[w]e are satisfied that [section 145.682] provides a single deadline for serving expert affidavits," where the plaintiff attempted to extend the 180-day deadline by adding defendants after the deadline had passed), *review denied* (Minn. Apr. 28, 2010).

Finally, D.L.Z. argues that the district court abused its discretion by ordering dismissal as the proper remedy for his failure to comply with the substantive

requirements of section 145.682. D.L.Z. cites the following language from *Sorenson* as support:

> In deciding whether a procedural dismissal should be granted, the [district] court should carefully evaluate the degree of prejudice to the defendant caused by the inadequate disclosures. In borderline cases where counsel for a plaintiff identifies the experts who will testify and gives some meaningful disclosure of what the testimony will be, there may be less drastic alternatives to a procedural dismissal. In these instances, the court may authorize a deposition of the expert at the plaintiff's expense or limit the expert's testimony to those matters adequately disclosed.

Sorenson, 457 N.W.2d at 193 (citation omitted).

D.L.Z. contends that because the district court did not analyze the degree of prejudice suffered by respondents, the materiality of D.L.Z.'s disclosures, or the potential alternatives to procedural dismissal, the district court failed to conduct a proper analysis or otherwise exercise any degree of discretion or judgment in dismissing D.L.Z.'s lawsuit. We disagree. We first note that the supreme court has since referred to the above-quoted language from *Sorenson* as dictum. *See Anderson*, 608 N.W.2d at 848 ("In *Sorenson*, we stated in dicta that borderline cases may require a remedy less drastic than dismissal with prejudice." (quotation omitted)). Moreover, this is not a "borderline" case. Dr. Aletky's affidavits do not attempt to establish a causal connection between the alleged malpractice and D.L.Z.'s injuries. Finally, recent caselaw interprets section 145.682 as requiring automatic dismissal when the expert affidavit requirements are not met. *See Lindberg*, 599 N.W.2d at 578 (stating, "[d]ismissal is mandated under Minn. Stat. § 145.682, subd. 6 when the disclosure requirements are not met and while we

certainly recognize that the statute may have harsh results in some cases, it cuts with a sharp but clean edge").

The district court did not abuse its discretion by granting statutory dismissal based on D.L.Z.'s failure to comply with the requirements of Minn. Stat. § 145.682.

Affirmed.

Dated:

Judge Michelle A. Larkin