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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1383**

Diane L. Sheehan,
Appellant,

vs.

Robert G. Suk,
Respondent,

Jeffrey E. Thompson,
Respondent.

**Filed May 25, 2010
Affirmed
Ross, Judge**

Olmsted County District Court
File No. 55-CV-08-2443

William G. Skemp, William Skemp Law Firm, S.C., La Crosse, Wisconsin (for appellant)

Charles E. Jones, Melissa Dosick Riethof, Meagher & Geer, P.L.L.P., Minneapolis, Minnesota (for respondent Suk)

Thomas P. Kane, Mark T. Berhow, Hinshaw & Culbertson, L.L.P., Minneapolis, Minnesota (for respondent Thompson)

Considered and decided by Ross, Presiding Judge; Stoneburner, Judge; and
Stauber, Judge.

UNPUBLISHED OPINION

ROSS, Judge

Diane Sheehan appeals from the district court's dismissal of her legal malpractice complaint against two attorneys who had represented her in her divorce. In the malpractice suit, Sheehan missed the 180-day deadline for serving the affidavit of expert disclosure required by Minnesota Statutes section 544.42, subdivision 2(2), and the defending attorneys moved for summary judgment. The district court granted their motion and held that Sheehan failed to disclose her expert's opinion as required by Minnesota Statutes section 544.42 and that her claimed damages were not supported by the record. Because section 544.42 required the district court to dismiss Sheehan's complaint for failing to comply with the expert witness affidavit obligations, we affirm.

FACTS

Diane Sheehan sued her former attorneys, Robert Suk and Jeffrey Thompson, for legal malpractice, with one claim of negligence against each attorney. Sheehan's allegations stem primarily from the quality of the attorneys' performance in drafting and reviewing a marriage termination agreement. The marriage termination agreement was incorporated into a divorce decree in December 2005. Sheehan hired a new attorney and in November 2006 filed a motion to reopen the divorce proceedings on various grounds, including excusable neglect, fraud, misrepresentation, and other misconduct. She alleged that the marital property division was inequitable, with her share worth only \$159,395 and her former husband's share worth \$1,312,664.

The district court reopened the divorce proceedings, and three months later Sheehan and her former husband settled on an amended decree. The amended judgment and decree awarded Sheehan a \$550,000 payment from her former husband, leaving Sheehan in an obviously more favorable financial condition than she faced under the arrangement that resulted from her alleged poor representation by Suk and Thompson.

Sheehan sued Suk and Thompson for malpractice in January 2008. She claimed that their negligence caused her severe emotional distress and over \$40,000 in attorney's fees to reopen her divorce case to achieve a fair settlement.

On July 29, 2008, Suk moved for summary judgment. On September 8, 2008, Sheehan served Suk and Thompson with "William P. Skemp's Affidavit of Expert Disclosure Pursuant to Minn. Stat. § 544.42." Suk and Thompson then filed a joint motion to dismiss and motion for summary judgment arguing for mandatory dismissal because, among other deficiencies, Sheehan did not disclose her expert witness's opinion within 180 days of serving the complaint as required by Minnesota Statutes section 544.42. The district court granted the motion and dismissed Sheehan's complaint. Sheehan appeals.

DECISION

Sheehan's appeal requires us to decide whether the district court erred by dismissing her suit for failure to disclose her expert's opinion as required by Minnesota Statutes section 544.42 (2008). Sheehan acknowledges what she calls "minor defects" in her disclosures, but she argues that she substantially complied with the statute's requirements. We review for abuse of discretion a district court's decision to grant or

deny a motion to dismiss for failure to comply with statutory requirements for submitting expert affidavits. *Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458, 468 (Minn. App. 2006), *review denied* (Minn. Aug. 23, 2006). But questions involving the applicability and construction of the statute are legal questions that we review de novo. *Id.*

A plaintiff suing professionals, including attorneys, for negligence or malpractice must serve two affidavits on the defendants. Minn. Stat. § 544.42, subd. 2. The first affidavit, an “affidavit of expert review,” must accompany the pleadings and state that the party’s current attorney has reviewed the facts with a qualified expert and that the expert believes that the defendants deviated from the applicable standard of care and injured the plaintiff. *Id.*, subds. 2(1), 3(a)(1). Sheehan served the affidavit of attorney John McDonald with the pleadings, and the respondents concede that Sheehan thereby met her obligation to provide the affidavit of expert review.

The second required affidavit is an “affidavit of expert disclosure.” Whether Sheehan failed to timely serve this affidavit is the central issue of this appeal. The affidavit of expert disclosure must be served within 180 days after commencement of the action. *Id.*, subd. 2(2); *Brown-Wilbert, Inc. v. Copeland Buhl & Co.*, 732 N.W.2d 209, 215 (Minn. 2007). The affidavit has specific requirements; it

must be signed by the party’s attorney and state the identity of each person whom the attorney expects to call as an expert witness at trial to testify with respect to the issues of negligence, 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.

Minn. Stat. § 544.42, subd. 4a. Failing to serve this affidavit leads to “mandatory dismissal of each action with prejudice as to which expert testimony is necessary to establish a prima facie case.” *Id.*, subd. 6(c). But the statute contains a safe-harbor provision: “[A]n initial motion to dismiss an action . . . based upon claimed deficiencies of the affidavit . . . shall not be granted unless, after notice by the court, the nonmoving party is given 60 days to satisfy the disclosure requirements in subdivision 4.” *Id.*

Because she served the summons and complaint on January 14, 2008, under the 180-day deadline, Sheehan was required to serve her affidavit of expert disclosure by July 14, 2008. But she did not serve her affidavit of expert disclosure until September 8. Sheehan suggests that the 180-day deadline is not enforceable because the statute is poorly written and confusing. Sheehan points out that subdivision 2(2) states that a party must “serve upon the opponent within 180 days an affidavit as provided in subdivision 4,” but it does not state a commencement event from which the 180 days begins to run. We do not think the statute is confusing as to the triggering event. Subdivision 2, as a whole, provides that a party must serve the second affidavit within 180 days after her service of the complaint:

Subd. 2. **Requirement.** In an action against a professional alleging negligence or malpractice in rendering a professional service where expert testimony is to be used by a party to establish a prima facie case, the party must:

(1) unless otherwise provided in subdivision 3, paragraph (a), clause (2) or (3), serve upon the opponent with the pleadings an affidavit as provided in subdivision 3; and

(2) serve upon the opponent within 180 days an affidavit as provided in subdivision 4.

Minn. Stat. § 544.42, subd. 2. The commencement of the “action” is plainly the triggering event. And “action” here means lawsuit. *See Black’s Law Dictionary* 32 (9th ed. 2009) (defining an “action” as a “civil or criminal judicial proceeding”). There is also ample caselaw confirming that the 180-day deadline runs from the commencement of the lawsuit. *See, e.g., Brown-Wilbert*, 732 N.W.2d at 215 (“Section 544.42, subdivision 2(2), requires that an affidavit of expert disclosure be served within 180 days after commencement of the action.”); *Lake Superior Ctr. Auth.*, 715 N.W.2d at 470 (“[T]his court has upheld the district court’s dismissal of a complaint for failure to serve an expert-identification affidavit within 180 days after initiating its claim.”). Sheehan missed the clearly stated 180-day deadline by failing to serve her affidavit of expert disclosure until September 8.

Sheehan has two fallback arguments that the untimely serving of her affidavit should not have resulted in mandatory dismissal: the 60-day safe-harbor provision extended her deadline to file the affidavit, and the initial affidavit that she served with her complaint satisfied both her duty to serve an affidavit of expert review and her duty to serve an affidavit of expert disclosure. Neither argument is convincing.

The 60-day safe-harbor provision does not apply.

The 60-day safe-harbor provision does not help Sheehan. Sheehan argues that because the defending attorneys did not demand expert disclosure until they filed their motion to dismiss in late July 2008, her affidavit of expert disclosure filed on September 8, 2008 (less than 60 days later) survives the statutory deadline. Sheehan

implicitly characterizes the July 2008 motion for summary judgment as a “motion to dismiss an action . . . based upon claimed deficiencies of the affidavit” as described by Minnesota Statutes section 544.42, subdivision 6(c), and she therefore asserts that she should have been allowed 60 days more to satisfy the disclosure requirements under the safe-harbor provision.

The district court determined that Sheehan “cannot rely on the safe-harbor provision because she never filed an affidavit of expert disclosure within the 180-day requirement.” Caselaw squarely supports this determination. *See Brown-Wilbert*, 732 N.W.2d at 216 (recognizing that an “absurd result” would occur if plaintiff could disregard the 180-day deadline and be granted an additional 60 days once the defendant moved to dismiss); *Middle River-Snake River Watershed Dist. v. Dennis Drewes, Inc.*, 692 N.W.2d 87, 90–91 (Minn. App. 2005) (listing reasons why a plaintiff who fails to serve any affidavit of expert disclosure within the 180-day deadline is not entitled to the safe-harbor provision). The district court correctly held that the safe-harbor provision did not prevent the dispositive effect of the 180-day deadline.

The McDonald affidavit was not an affidavit of expert disclosure.

Sheehan’s second fallback argument also fails. She argues that the first affidavit—the affidavit of attorney John McDonald that was served with the complaint—contained all the information necessary also to qualify as an expert-disclosure affidavit required by section 544.42, subdivision 4. The district court concluded that dismissal was appropriate because it determined that although the McDonald affidavit may have satisfied the requirements for the affidavit of expert review, it could not also serve as the

affidavit of expert disclosure because the statute specifically refers to two separate affidavits.

We reach the same conclusion but on different grounds. Neither the statute nor interpretive caselaw expressly prohibits a single affidavit served at the commencement of the lawsuit from serving as both the affidavit of expert review and the affidavit of expert disclosure required by section 544.42, subdivision 2(1) and 2(2), respectively. We need not and do not determine whether the statute can be satisfied by a single affidavit that encompasses all the elements of both described affidavits because Sheehan gave no indication that she intended the McDonald affidavit to serve also as the affidavit of expert review until long after the 180-day deadline had passed. This is critical because even assuming a single affidavit could satisfy both requirements, a party intending to rely on a single affidavit must clearly indicate the affidavit's dual purpose. Without a requirement that the plaintiff indicate an affidavit's dual purpose, a plaintiff filing a single affidavit could leave the defendants uncertain whether to exercise their statutory right to challenge inadequate affidavits. And she must also ensure that it meets the substantive requirements of both subdivisions 3 and 4.

Sheehan's single affidavit fails on both fronts. The single affidavit neither purports to comprise the required elements of both subdivisions nor actually comprises all necessary elements. Sheehan clearly did not intend the McDonald affidavit to serve as her affidavit of expert review because once she learned that she had missed the 180-day deadline, she served "William P. Skemp's Affidavit of Expert Disclosure Pursuant to Minn. Stat. § 544.42." And the McDonald affidavit fails to meet even the basic

requirements of subdivision 4; it is not signed by Sheehan's attorney, William Skemp, and it does not state whom Skemp intended to call as an expert witness at trial.

The district court properly dismissed Sheehan's complaint because of her failure to comply with subdivision 4. Because we affirm the dismissal of Sheehan's complaint, we do not review the district court's conclusion that her damages claims were unsupported by the record.

Affirmed.