STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1039

Walter A. Smith,
Appellant,

vs.

Kenneth Britton, et al.,
Respondents,

Mark Catlin, et al.,
Respondents.

Filed February 3, 2014
Affirmed
Hooten, Judge

Ramsey County District Court
File No. 62-CV-12-8599

Walter A. Smith, St. Paul, Minnesota (pro se appellant)

Donald Chance Mark, Jr., Peter A. T. Carlson, Tyler P. Brimmer, Fafinski Mark & Johnson, P.A., Eden Prairie, Minnesota (for respondents)

Considered and decided by Hudson, Presiding Judge; Stoneburner, Judge; and Hooten, Judge.

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

HOOTEN, Judge

Appellant challenges the dismissal of his complaint alleging defamation, denial of due process, and violations of privacy, and the denial of his motions for recusal and to

compel discovery. Because (1) appellant's complaint failed to state a claim on which relief can be granted; (2) there was no objective reason to question the district court judge's impartiality; and (3) the district court did not abuse its discretion by denying appellant's discovery motion, we affirm.

FACTS

Appellant Walter A. Smith filed a complaint in November 2012 against respondents Kenneth Britton, Mark Winkler, Daniel Ishman, Tiffany Brendle, Abbey Thomas, Lisa Williams, and Britton Center ("the Britton Center respondents") and respondents Mark Catlin, Jennifer Collins, Karla Walker, and MedTox Laboratories, Inc. ("the MedTox respondents"). He sought more than $1 million in damages and alleged that respondents defamed him, denied him due process, and violated the Health Insurance Portability and Accountability Act of 1996 (HIPAA),[1] the Minnesota Health Records Act (MHRA),[2] and the Minnesota Government Data Practices Act (MGDPA).[3]

According to his complaint, Smith began treating for chronic pain at Britton Center, a St. Paul physical rehabilitation clinic, in January 2011. Smith was prescribed oxycodone as a pain medication with the understanding that he was to have monthly follow-up visits through April 2011. Smith's oxycodone prescription was continued in February and March. At his April visit, Smith submitted a urine sample for a random drug test. The test did not detect oxycodone even though it had been prescribed.

[1] Pub. L. No. 104-191, 110 Stat. 1936.
[2] Minn. Stat. §§ 144.291–.298 (2012).
[3] Minn. Stat. §§ 13.0001–.99 (2012).

At Smith's next visit in June 2011, a doctor at Britton Center refilled Smith's oxycodone prescription, and Smith provided another urine sample. A portion of the sample was used in an on-site "dip test," and the remainder was delivered to MedTox for further testing. The record of Smith's visit provides that the dip test "verified medications consistent with the ones that [Britton Center was] prescribing." But the record also stated, "NO MEDS IN THE DIP TEST. HAS BEEN OUT OF TOWN THAT IS WHY HE HAS NOT BEEN TO FOLLOW UP APPOINTMENT SINCE 4/27."

MedTox's subsequent test was screened for a six-page list of substances. Smith's results were negative for nearly all of them, including oxycodone, but he tested positive for benzoylecgonine, a metabolite of cocaine. The test-result report provided that the presence of benzoylecgonine most often indicates illicit cocaine use but can also result from using certain anesthetic solutions. MedTox faxed a copy of the report to Britton Center. The paperwork incorrectly listed Smith's sex as female and used a patient number different than the April report.

Smith visited Britton Center again in July. When a Britton Center employee saw him enter the building, she notified Ishman, her supervisor. Ishman took Smith to an office restroom and directed him to provide another urine sample. Afterward, Ishman and Brendle, another Britton Center employee, informed Smith that he had tested positive for cocaine in June. Smith denied using cocaine or any other non-prescribed drugs.

The next day, Smith submitted a "grievance complaint" to Britton Center and MedTox. In it, he denied using cocaine, asked for information regarding MedTox's June

drug test, and requested a sample of the urine that was tested so he could have the results independently verified. One day later, he sent a request for medical and intake records. Neither Britton Center nor MedTox responded to Smith's correspondences.

Smith sued the Britton Center and MedTox respondents in November 2012. Smith attached to his complaint various medical records and correspondence from Britton Center, along with laboratory reports from MedTox. Smith also attached a copy of his grievance complaint, request for medical records and intake information, request for production of documents, and interrogatories. At the same time, he served the MedTox respondents with a separate "request for production of documents" and a series of interrogatories. The MedTox respondents did not respond to the requests or interrogatories.

The MedTox respondents answered, denying all liability and material factual allegations and asserting various affirmative defenses. The Britton Center respondents moved for dismissal. During the dismissal hearing, the district court judge disclosed that an attorney for the Britton Center respondents had completed an unpaid summer externship with him in 2003. The next day, the district court granted respondents' motion to stay discovery until the Britton Center respondents' motion for dismissal was decided. On the following day, Smith moved for the recusal of the district court judge. In April 2013, the district court granted the Britton Center respondents' motion to dismiss with prejudice and denied Smith's motion for recusal. The district court, in granting a subsequent motion to dismiss brought by the MedTox respondents, also dismissed Smith's complaint with prejudice for failure to state a claim on which relief can be

granted. In the same order, the district court denied Smith's motion to compel discovery responses from the MedTox respondents. This appeal follows.

D E C I S I O N

I.

On appeal of a case dismissed under Minn. R. Civ. P. 12.01(e) for failure to state a claim on which relief can be granted, we must determine whether the complaint sets forth a legally sufficient claim for relief. *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008). We review de novo, considering only the facts alleged in the complaint, accepting those facts as true, and construing all reasonable inferences in the nonmoving party's favor. *Id.* In his complaint, Smith alleges that respondents "violated the HIPAA and Privacy Laws and Act," "subjected [him] to Defamation of Character," and "represented false representation, and false statements of a material fact." He then states that respondents have "clearly violated State and Federal Laws and constitution." Smith claims that the district court erred in dismissing his complaint against respondents with prejudice. We disagree.

First, Smith's complaint makes no factual allegations relative to Britton Center respondents Thomas and Williams or any of the individual MedTox respondents. The complaint does not identify any of these individual respondents' relationship to Smith or his claims or how they are in any way involved in his claims. On appeal, Smith fails to explain the legal basis on which his complaint is sufficient to proceed against any of these individual respondents. Accordingly, the district court correctly dismissed them from the suit.

Second, as a matter of law, there is no merit to Smith's alleged claims that his privacy was violated under HIPAA, the MHRA, and the MGDPA. Smith's complaint alleged that these claims arise out of two reports of drug-test results from MedTox. One report listed Smith as a male patient with a particular identification number, and the other listed him as a female patient with a different identification number. Based on this discrepancy, Smith apparently asserts that he received someone else's report, which he argues violated HIPAA, the MHRA, and the MGDPA.

A person who violates HIPAA may be subject to criminal prosecution, 42 U.S.C. § 1320d-6(b) (2006) (providing fines and imprisonment for wrongful disclosure of individually identifiable health information); *Yath v. Fairview Clinics, N.P.*, 767 N.W.2d 34, 49 (Minn. App. 2009), or civil action by the state, 42 U.S.C. § 1320d-5(d) (2006) (Supp. V 2011) (providing that state attorneys general may bring a civil action on behalf of residents of the state). But there is no private cause of action under HIPAA for wrongful disclosure of an individual's medical records. *Dodd v. Jones*, 623 F.3d 563, 569 (8th Cir. 2010); *Yath*, 767 N.W.2d at 49. Therefore, Smith, as a private individual, cannot bring a claim against respondents for violating HIPAA.

The MGDPA, though, offers civil remedies for persons who suffer damages due to a violation of its provisions. Minn. Stat. § 13.08, subd. 1 (2012). The statute provides:

> [A] responsible authority or government entity which violates any provision of this chapter is liable to a person . . . who suffers any damage as a result of the violation, and the person damaged . . . may bring an action against the responsible authority or government entity to cover any damages sustained, plus costs and reasonable attorney fees.

Id. A "government entity" under the MGDPA is "a state agency, statewide system, or political subdivision." Minn. Stat. § 13.02, subd. 7a (2012). And "responsible authority" is defined as follows:

> (a) "Responsible authority" in a state agency or statewide system means the state official designated by law or by the commissioner as the individual responsible for the collection, use and dissemination of any set of data on individuals, government data, or summary data.
>
> (b) "Responsible authority" in any political subdivision means the individual designated by the governing body of that political subdivision as the individual responsible for the collection, use, and dissemination of any set of data on individuals, government data, or summary data, unless otherwise provided by state law. Until an individual is designated by the political subdivision's governing body, the responsible authority is:
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> (1) for counties, the county coordinator or administrator. If the county does not employ a coordinator or administrator, the responsible authority is the county auditor;
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> (2) for statutory or home rule charter cities, the elected or appointed city clerk. If the home rule charter does not provide for an office of city clerk, the responsible authority is the chief clerical officer for filing and record keeping purposes;
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> (3) for school districts, the superintendent; and
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> (4) for all other political subdivisions, the chief clerical officer for filing and record keeping purposes.

Id., subd. 16 (2012). Smith makes no claim in his complaint that any respondent is a government entity or responsible authority.[4] Accordingly, his MGDPA claim fails.

[4] Smith asserts for the first time in his appellate brief that MedTox is a subordinate of and contractor with state and federal governments. He asserts that MedTox "engage[s] in urine Testing for the State and Federal Agencies with minimum standards." This argument is beyond the scope of our review because it was not raised in the district court. *See Rochon Corp. v. City of St. Paul*, 831 N.W.2d 651, 654 (Minn. App. 2013) ("Generally, an appellate court will not address matters not presented to, and considered

The MHRA also provides a private action. It states:

> A person who does any of the following is liable to the patient for compensatory damages caused by an unauthorized release or an intentional, unauthorized access, plus costs and reasonable attorney fees:
>
> (1) negligently or intentionally requests or releases a health record in violation of sections 144.291 to 144.297;
>
> (2) forges a signature on a consent form or materially alters the consent form of another person without the person's consent;
>
> (3) obtains a consent form or the health records of another person under false pretenses; or
>
> (4) intentionally violates sections 144.291 to 144.297 by intentionally accessing a record locator service without authorization.

Minn. Stat. § 144.298, subd. 2 (2012). "Patient" means:

> [A] natural person who has received health care services from a provider for treatment or examination of a medical, psychiatric, or mental condition, the surviving spouse and parents of a deceased patient, or a person the patient appoints in writing as a representative, including a health care agent acting according to chapter 145C, unless the authority of the agent has been limited by the principal in the principal's health care directive.

Minn. Stat. § 144.291, subd. 2(g) (2012). Accordingly, the person who has a private action under the MHRA is the patient whose records have been improperly released—not the person to whom the records were released. Because Smith makes no allegation that MedTox or Britton Center unlawfully released *his* records to a third person or that he was

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by, the district court."). Even if Smith had made the argument in the district court, he fails to present any convincing reason why MedTox is a state actor. MedTox tested his urine sample at the direction of Britton Center, a private company that Smith at no point has argued is related to the government.

the patient whose rights were violated, his MHRA claim is insufficient. The district court did not err by dismissing Smith's privacy claims.

Smith claims that respondents defamed him in several ways. He states that they "placed into his medical records that he is a Drug addict and falsified that he was offered treatment," "class[ified] [him] as a chemical Dependency," "falsified and deposited . . . that [he] will immediately go on 1 week prescriptions," and "deposited that [he] was abusing his medications."[5] Smith appears to offer two reasons why these actions were defamatory. First, he states that he has never used illegal drugs or tested positive for use of illegal drugs. Second, he asserts that the statements were "drafted, written, and deposited with malice and that it was done and prepared knowingly that it was false and with a reckless disregard as to whether it was true or false." Even assuming the allegations are true, Smith has failed to present a sufficient claim for defamation.

In a defamation case, the plaintiff "must prove that the defendant made: (a) a false and defamatory statement about the plaintiff; (b) in unprivileged publication to a third party; (c) that harmed the plaintiff's reputation in the community." *Weinberger v. Maplewood Review*, 668 N.W.2d 667, 673 (Minn. 2003). Simply asserting that false and defamatory statements were made in his medical records is not enough to survive a motion for dismissal. The plaintiff must specify which statements were defamatory and to whom the statements were made. *See id.* Smith fails to do so in his complaint.

[5] Smith also alleges that respondents "[d]efamed his family members and friends, that he issued his medications to them" and that he "sold his medications and [had] not used them at all." The district court correctly decided that these claims must be dismissed because Smith lacks standing to sue on others' behalf.

Furthermore, Smith's pleadings are insufficient to establish that respondents' statements were false.

Furthermore, as MedTox respondents point out, respondents' statements are privileged, and Smith has not overcome that privilege. Communications are protected by qualified privilege if they are made on a proper occasion and from a proper motive and are based on reasonable or probable cause. *Dunn v. Nat'l Beverage Corp.*, 729 N.W.2d 637, 653 (Minn. App. 2007), *aff'd on other grounds* (Minn. Mar. 6, 2008). Respondents made the statements in Smith's medical records to document the results of his visits to Britton Center and his drug tests. They were therefore protected by qualified privilege. *See Strauss v. Thorne*, 490 N.W.2d 908, 911–12 (Minn. App. 1992) (holding that doctor's notations were subject to qualified privilege), *review denied* (Minn. Dec. 15, 1992).

Smith could overcome the qualified privilege by alleging that the privilege was abused and that respondents acted with malice. *See id.* at 912. He alleges malice in his complaint, but he fails to support that assertion with sufficient factual allegations. "Malice may be proven by extrinsic evidence of personal ill feeling or by intrinsic evidence such as exaggerated language or extent of publication." *Karnes v. Milo Beauty & Barber Supply Co.*, 441 N.W.2d 565, 568 (Minn. App. 1989), *review denied* (Minn. Aug. 15, 1989). Smith makes no such allegations in his complaint. Therefore, the district court did not err in dismissing Smith's defamation claims.

Smith claims that respondents "denied him Due Process" under the Fourteenth Amendment by not responding to his grievance complaint, request for medical records

and intake information, request for production of documents, and request for interrogatories. These constitutional claims fail because respondents are private parties. "[T]he conduct of private parties generally lies beyond the scope of the United States Constitution," and only state action can trigger the protections of the Minnesota Constitution. *State v. Beecroft*, 813 N.W.2d 814, 837 (Minn. 2012). As discussed earlier, Smith makes no claim in his complaint that Britton Center or MedTox are state actors. Accordingly, the district court did not err by dismissing his constitutional claims.

II.

Smith next argues that the district court erred by denying his recusal motion. Smith moved for the district court judge to recuse himself because an attorney representing the Britton Center respondents completed an unpaid, summer externship with the judge about ten years prior to this lawsuit. We review the district court's denial of a motion for recusal for an abuse of discretion. *See Matson v. Matson*, 638 N.W.2d 462, 469 (Minn. App. 2002) (holding that district court's denial of request and motion for recusal was not an abuse of discretion). A judge must be disqualified if a reasonable examiner would question the judge's impartiality based on an objective examination of the facts and circumstances. *In re Jacobs*, 802 N.W.2d 748, 752 (Minn. 2011). "Litigants are entitled to an unbiased judge; not to a judge of their choosing." *Id.* at 755 (quoting *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988)). Adverse rulings are not sufficient to demonstrate bias for the purpose of the removal of a judge. *Olson v. Olson*, 392 N.W.2d 338, 341 (Minn. App. 1986). And a party's

"subjective belief that the judge is biased does not necessarily warrant removal." *Hooper v. State*, 680 N.W.2d 89, 93 (Minn. 2004).

After reviewing the record here, we conclude that a reasonable person would not question the district court judge's impartiality. The judge, in open court and on the record, volunteered the fact that an attorney for the Britton Center respondents had briefly served as an extern with him a decade earlier. The judge further stated that he had no continued relationship with the attorney after his externship and would not be influenced by the attorney's involvement. A judge's familiarity with a party or a party's attorney alone is not sufficient to show prejudice. *See State v. Yeager*, 399 N.W.2d 648, 652 (Minn. App. 1987) (holding that the familiarity of a judge with a defendant was not sufficient to show prejudice). The record provides that the judge in this case had not contacted—and certainly had not maintained a significant relationship with—his former extern since the externship ended a decade earlier. *See Powell v. Anderson*, 660 N.W.2d 107, 118 (Minn. 2003) (holding that we should consider "the frequency, volume and quality of contacts between the judge and the attorney" when reviewing impartiality). Smith made no objection when the judge raised the issue. Rather, it was not until the judge, over Smith's objection, issued an order staying discovery that Smith first brought a motion for the judge to recuse himself. Under these circumstances, the district court did not abuse its discretion by denying Smith's motion for recusal.

III.

Smith also argues that the district court should have enforced his discovery requests. He states, "[I]t was very essential and important that [respondents] adhere to

discovery Rules; and the court should have recognized compelling discovery rules, and confer requirement." We review rulings on discovery matters for abuse of discretion. *EOP-Nicollet Mall, L.L.C. v. Cnty. of Hennepin*, 723 N.W.2d 270, 275 (Minn. 2006). A district court has "wide discretion to issue discovery orders and, absent clear abuse of that discretion, . . . its order with respect thereto will not be disturbed." *Shetka v. Kueppers, Kueppers, Von Feldt & Salmen*, 454 N.W.2d 916, 921 (Minn. 1990). Until such time as the dispositive issues have been "sufficiently litigated," the district courts have the authority to stay or limit discovery. *See Baskerville v. Baskerville*, 246 Minn. 496, 507, 75 N.W.2d 762, 770 (1956) (holding that district court's decision to "defer a final ruling" on discovery requests "until the merits of the [divorce] action had been sufficiently litigated" was proper); *see also* Minn. R. Civ. P. 26.03 (allowing a stay of discovery to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense").

The district court denied Smith's motion to compel discovery and granted respondents' motion to stay discovery pending its ruling on respondents' motion to dismiss. Once respondents moved to dismiss Smith's complaint, the district court did not err by putting discovery on hold because if the motions were granted, discovery would be unnecessary. There was no prejudice to Smith by delaying discovery until after the district court ruled on the dismissal motions. The only material the district court needed to consider respondents' motions was Smith's complaint. Accordingly, the district court did not err in denying Smith's motions to compel discovery.

Affirmed.