STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1734
A13-1735

Yelena Kurdyumova,
Appellant (A13-1734),

Sergey Porada,
Appellant (A13-1735),

vs.

Mitchell A. Robinson,
Respondent.

Filed May 12, 2014
Affirmed
Chutich, Judge

Hennepin County District Court
File Nos. 27-CV-12-18089
27-CV-12-18065

Yelena Kurdyumova, Sergey Porada, Minneapolis, Minnesota (pro se appellants)

Mitchell A. Robinson, Minneapolis, Minnesota (attorney pro se)

Considered and decided by Connolly, Presiding Judge; Rodenberg, Judge; and Chutich, Judge.

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

CHUTICH, Judge

Appellants Yelena Kurdyumova and Sergey Porada appeal the district court's decision to grant respondent Mitchell Robinson's motions to dismiss their complaints and to deny their motions to compel discovery. Because the district court properly dismissed appellants' claims of legal malpractice, professional misconduct, and defamation, and properly denied their motions to compel discovery as moot, we affirm.

FACTS

In March 2005, Kurdyumova and Porada, husband and wife, were charged with crimes.[1] Porada was not arrested on the March 2005 charges until returning from abroad four years later in June 2009. Kurdyumova hired Robinson to defend her and Porada. Appellants each paid $10,000 as a retainer, and signed conflicts-of-interest waivers. In September 2009, appellants discharged Robinson because, according to appellants, he was pushing them toward trial, had jeopardized the case, and did not adequately communicate with them. In March 2010, appellants retained a different attorney who managed to obtain a dismissal of all criminal charges. In October 2011, the records relating to appellants' March 2005 criminal charges were expunged.

In August 2012, appellants filed separate complaints against Robinson, alleging (1) professional malpractice, (2) violations of the Minnesota Rules of Professional Conduct, and (3) defamation. On September 17, 2012, Robinson filed motions to dismiss

[1] The underlying criminal suits were dismissed, and the records were expunged. Thus, we make no reference to the facts or allegations giving rise to the charges.

appellants' complaints based on their failure to comply with Minnesota Statutes section 544.42 (2012), which mandates a certification of expert review in professional malpractice cases requiring expert testimony. Robinson, however, neglected to request a hearing date for the motions.

Appellants opposed the motions by contending that section 544.42 does not require that they use experts. They then served Robinson with requests for admissions and interrogatories. Robinson summarily denied each allegation set forth in the request, but provided no further detail in his answers. He then filed amended motions to dismiss and obtained a hearing date.

At the hearing, the district court heard arguments on appellants' discovery motions as well as on Robinson's motions to dismiss. The district court stated that it was not clear as to the details of the underlying criminal charges because the records had been expunged. The district court asked Robinson to clarify who he had represented, but told him not to reveal appellants' charges. Robinson provided a history of the charges and explained on the record that he represented both appellants.

The district court dismissed appellants' legal-malpractice claims based on their failure to comply with section 544.42. It reasoned that appellants were put on notice of this error in September 2012 when Robinson filed his initial motions to dismiss. The district court determined that appellants would not be able to establish claims of legal malpractice without expert testimony. The district court also concluded that the rules of professional conduct do not provide for private causes of action against an attorney. The

court further determined that appellants failed to establish prima facie claims for defamation. Appellants appealed, and their cases were consolidated on appeal.

D E C I S I O N

As a preliminary matter, Robinson did not submit a response brief, citing Minn. R. Civ. App. P. 128.01, subd. 2, which allows a party to submit a letter brief in which it can rely on trial court documents for its statement of the case. A party choosing to submit a letter brief must include with it a "short letter argument." *Id.* Because Robinson's brief only includes an appendix and no argument, he has not submitted an actual letter brief. Nevertheless, we review the case on the merits. *See* Minn. R. Civ. App. P. 142.03.

I. Robinson's Motions to Dismiss

"We review a district court's dismissal of an action for procedural irregularities under an abuse of discretion standard. But where a question of law is present, such as statutory construction, we apply a de novo review." *Brown-Wilbert, Inc. v. Copeland Buhl & Co.*, 732 N.W.2d 209, 215 (Minn. 2007) (citations omitted). We review de novo a district court's grant of a motion to dismiss based on Minn. R. Civ. P. 12.02 for failure to state a claim upon which relief can be granted. *Sipe v. STS Mfg., Inc.*, 834 N.W.2d 683, 686 (Minn. 2013). "In so doing, we consider only the facts alleged in the complaint, accepting those facts as true." *Id.* (quotation omitted).

A. Professional Malpractice

The district court concluded that expert testimony would be necessary to establish appellants' claims of legal malpractice. Appellants argue that their claims of legal

malpractice do not require expert testimony because they can be "evaluated adequately by a jury."

Section 544.42 requires that a plaintiff pursuing an action against a professional file two separate affidavits: an affidavit of expert review and an affidavit identifying experts, including a summary of the grounds for the expert's opinion. Minn. Stat. § 544.42 subds. 2-4. The affidavit of expert review is the only affidavit at issue in this case.

Section 544.42, subdivision 2(1) requires that plaintiffs serve an affidavit of expert review on an opponent when they serve their pleadings. The affidavit must state that

> the facts of the case have been reviewed by the party's attorney 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, the defendant deviated from the applicable standard of care and by that action caused injury to the plaintiff.

Id., subd. 3(a)(1). The statute expressly states that pro se parties are "bound by [these] provisions as if represented by an attorney." *Id.*, subd. 5.

The parties do not dispute that an attorney-client relationship existed between appellants and Robinson. Thus, to prevail on their legal-malpractice claims, appellants must establish: (1) legal negligence or breach of the attorney-client contract; (2) that the negligence or breach was the proximate cause of the appellants' damages; and (3) but for the attorney's conduct, the appellants would have been successful in the prosecution or defense of an action. *Fontaine v. Steen*, 759 N.W.2d 672, 677 (Minn. App. 2009). These elements generally require expert testimony. *Id.*; *Admiral Merchs. Motor Freight, Inc. v.*

O'Connor & Hannan, 494 N.W.2d 261, 266 (Minn. 1992) ("Expert testimony generally is required to establish a standard of care applicable to an attorney whose conduct is alleged to have been negligent, and further to establish whether the conduct deviated from that standard.").

The rare exception when expert testimony is not necessary is if "the conduct complained of can be evaluated adequately by a jury in the absence of expert testimony." *Hill v. Okay Constr. Co.*, 312 Minn. 324, 337, 252 N.W.2d 107, 116 (1977). "[W]hether expert testimony is required depends on the nature of the question to be decided by the trier of fact and on whether technical or specialized knowledge will assist the trier of fact." *Blatz v. Allina Health Sys.*, 622 N.W.2d 376, 388 (Minn. App. 2001), *review denied* (Minn. May 16, 2001).

We must analyze whether expert testimony is required to establish appellants' legal-malpractice claims. Appellants base their legal-malpractice claims on two allegations: (1) that Robinson failed to request omnibus hearings thereby delaying the dismissal of their criminal charges; and (2) that Robinson did not establish adequate communication.

To establish legal-malpractice claims for Robinson's failure to request an omnibus hearing or for inadequate communication, appellants must prove (1) legal negligence (the standard of care of an attorney in requesting hearings and in communicating with clients and that Robinson breached that standard of care); (2) that the failure to request a hearing or to communicate adequately was the proximate cause of their injuries; and (3) that "but

for" Robinson's negligence, appellants would have been more successful in the outcome of their criminal case. *See Fontaine*, 759 N.W.2d at 677.

We agree with the district court's conclusion that appellants can only establish their legal-malpractice claims through expert testimony. Specialized knowledge is required to determine the applicable attorney standard of care in requesting hearings and whether failure to request an omnibus hearing is a breach of that standard of care. The decision not to request an omnibus hearing may have been attorney strategy or simply an error in judgment not rising to the level of malpractice. *See Noske v. Friedberg*, 713 N.W.2d 866, 875 (Minn. App. 2006) (concluding that an error in trial strategy does not rise to the level of malpractice), *review denied* (Minn. July 19, 2006). Similarly, specialized knowledge is necessary to determine what level of communication was adequate in Robinson's representation. A jury could not reasonably discern if Robinson's conduct violated the applicable standard of care through his allegedly inadequate contact with appellants without expert testimony.

In addition, the trier of fact could not determine, without the opinion of an expert, if Robinson was the proximate cause of the delay of the charges being dismissed and if the delay could be classified as a "proximate cause of the plaintiff's damages." *See Raske v. Gavin*, 438 N.W.2d 704, 706 (Minn. App. 1989) (affirming a grant of summary judgment because no evidence showed that attorney's lack of advice was the proximate

cause of appellant's injury), *review denied* (Minn. June 21, 1989).[2] The district court did not err in concluding that appellants needed an expert affidavit to establish prima facie cases for legal malpractice.

As discussed above, section 544.42, subdivisions 2 and 3 require that, in a case in which a plaintiff's claim requires expert testimony, the plaintiff must serve with her pleadings an affidavit certifying that she consulted with an expert who believes that the applicable standard of care was violated and that injury resulted. Subdivision 6 provides that a failure to comply with this expert-review requirement "within 60 days after demand for the affidavit results, upon motion, in mandatory dismissal of each cause of action with prejudice as to which expert testimony is necessary to establish a prima facie case." *Id.*, subd. 6(a). Robinson must have first "demanded" the affidavit of expert review, and appellants must have failed to file the affidavit within 60 days of that "demand." If Robinson did not "demand" the first affidavit, subdivision 6(a) has not been satisfied and the district court abused its discretion in granting his motions to dismiss on procedural grounds.

The district court classified Robinson's September 2012 motions to dismiss as "demands" for the required affidavits. It concluded that appellants then had notice of the demand in September 2012 and did not cure the deficiency within 60 days of Robinson's "demand." The district court opined that, in the alternative, if the initial motions to

[2] We note that appellants state that the charges were eventually dismissed "on the request of the prosecutor." Thus, we do not know if the cases were dismissed for lack of probable cause or for some other reason.

dismiss were not demands, the exception in subdivision 6 "applies only where the plaintiff has filed a deficient affidavit."[3]

Robinson's September 2012 motions to dismiss satisfy the requirements of a "demand." The purpose of the demand requirement in subdivision 6(a) is to put plaintiffs on notice of their duty under section 544.42. *See Brown-Wilbert, Inc.*, 732 N.W.2d at 215 (concluding that defendant's motion to dismiss was a "demand" for an affidavit of expert review because it provided adequate notice that an affidavit of expert review was required). In this case, appellants were put on notice of their duty under section 544.42 because Robinson's motions to dismiss cited section 544.42 and the requirement for a "Certification of Expert Review." *See id.* Because we hold pro se plaintiffs to the same standard as parties represented by attorneys, as is explicitly required by this statute, we conclude that appellants knew or should have known of the relevant caselaw. *See* Minn. Stat. § 544.42, subd. 5. In addition, appellants' complaints acknowledge that they intend

[3] The district court's analysis relies on cases that discuss the procedure and standards for the second affidavit, the affidavit identifying experts and the substance of their testimony under subdivision 4 of section 544.42, and not the initial certification affidavit at issue in this case. In *Meyer v. Dygert*, 156 F. Supp. 2d 1081, 1091 (D. Minn. 2001), the court held that plaintiffs were not allowed the 60-day grace period in subdivision 6(c) for the affidavit identifying experts because the plaintiffs had failed to file it. Accordingly, the "initial motion to dismiss" was not "based upon claimed deficiencies," as required for the 60-day grace period in subdivision 6(c), but it was based on the complete absence of the second affidavit. Minn. Stat. § 544.42, subd. 6. *Sorenson v. St. Paul Ramsey Med. Ctr.* also discusses the requirements for the second affidavit. 457 N.W.2d 188, 191 (Minn. 1990). Although it is true neither appellant filed the second affidavit identifying an expert and the substance of the expert's opinion, a different procedure for dismissing the complaint for failure to do so is set forth in subdivision 6(c) of section 544.42, and the second affidavit is not at issue in this appeal.

to use expert-witness testimony. And importantly, appellants do not assert that Robinson failed to "demand" an affidavit; they contend only that they are not required to file one.

In conclusion, the district court properly concluded that appellants needed expert testimony to establish their claims of legal malpractice. After correctly concluding that Robinson's dismissal motions were "demands" that put appellants on notice of their failure to file affidavits of certification of expert review, the district court acted within its discretion in granting Robinson's motions to dismiss appellants' claims of legal malpractice.

B. Professional Misconduct

Appellants further allege that Robinson violated numerous rules of professional conduct. Even assuming that a violation occurred, it is well established that "an attorney's violation of the [Minnesota] Rules of Professional Conduct does not give rise to a private cause of action against an attorney." *In re Disciplinary Action against Montez*, 812 N.W.2d 58, 66–67 (Minn. 2012). Accordingly, the district court properly dismissed appellants' causes of action based on alleged violations of the rules of professional conduct.

C. Defamation

Appellants allege that Robinson and the district court defamed them by iterating the charges and some of the facts of their underlying criminal charges on the record in open court. "In Minnesota, the elements of defamation require the plaintiff to prove that a statement was false, that it was communicated to someone besides the plaintiff, and that it tended to harm the plaintiff's reputation and to lower him in the estimation of the

community." *Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 25 (Minn. 1996) (quotation omitted).

The information divulged at the hearing, as well as the information in the district court's order, relate to criminal records that have been expunged. None of the information divulged, however, is false because it accurately captures what the criminal proceedings involved. Further, appellants put their underlying charges into controversy and appended documents not under seal to their complaint that provide the same, if not more, information relating to their criminal charges. The record does not show that appellants moved to file under seal, and they did not object to Robinson's recitation of their criminal charges at the hearing. Moreover, the expungement order does not preclude statements about the case by the court or private persons; it covers the judicial district administrator, the county and city attorney, the attorney general, and state agencies. Neither the district court nor Robinson violated the terms of the expungement order.[4]

II. Motions to Compel Discovery

Appellants last argue that the district court erred in denying appellants' motions to compel discovery. A district court may dismiss an issue "as moot if an event occurs that resolves the issue or renders it impossible to grant effective relief." *Isaacs v. Am. Iron &*

[4] Appellants also argue that, by granting Robinson's motions to dismiss, the district court denied them their constitutional right to have a jury decide their case on the merits. The district court did not violate appellants' right to a jury because there were no longer pending claims on which a jury could make findings. *See Nexus v. Swift*, 785 N.W.2d 771, 780 (Minn. App. 2010) ("The constitutional jury-trial right in a civil suit protects the jury's findings—and right to make findings—on all facts material to a legal claim[.]").

Steel Co., 690 N.W.2d 373, 376 (Minn. App. 2004), *review denied* (Minn. Apr. 19, 2005). After the district court granted Robinson's motions to dismiss with prejudice, their motions to compel were moot because no pending case existed on which to compel discovery. Therefore, the district court properly denied appellants' motions to compel.

Affirmed.