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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0160**

Chadwick Banken, et al.,
Appellants,

vs.

G. Scott Hoke, et al.,
Respondents.

**Filed February 17, 2009
Affirmed
Collins, Judge***

Hennepin County District Court
File No. 27-CV-07-8211

Christopher M. Daniels, Jesse H. Kibort, Daniels & Wymore, 3165 Fernbrook Lane
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Considered and decided by Chief Judge Toussaint, Presiding Judge; Shumaker,
Judge; and Collins, Judge.

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals
by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

COLLINS, Judge

Appellants challenge the dismissal of their legal-malpractice action, arguing that (1) the district court erred by concluding that appellants' expert-interrogatory answer was not sufficient to satisfy the expert-disclosure requirements of Minn. Stat. § 544.42, subd. 4 (2008); (2) even if their expert-interrogatory answer was deficient, under the safe-harbor provision of the statute appellants are entitled to notice of the deficiencies and an additional 60 days to serve an amended affidavit; and (3) applying the mandatory-dismissal provision is a harsh consequence that ignores the legislative intent and violates public policy. We affirm.

DECISION

A district court's decision to grant or deny a motion to dismiss for failure to comply with statutory requirements regarding the submission of expert affidavits is reviewed under an abuse of discretion standard. *Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458, 468 (Minn. App. 2006), *review denied* (Minn. Aug. 23, 2006). Questions involving the applicability and construction of those statutes, however, are legal questions, which we review de novo. *Id.* at 468-69.

Affidavit of Expert Disclosure

In granting respondents' motion to dismiss, the district court ruled that "Plaintiffs' answer to the expert interrogatory does not contain the requisite level of detail to satisfy the § 544.42, subd. 4(a) requirement for an affidavit of expert disclosure as interpreted by *Brown-Wilbert . . .*." See *Brown-Wilbert, Inc. v. Copeland Buhl & Co.*, 732 N.W.2d 209,

215-16 (Minn. 2007). On appeal, appellants argue that their interrogatory answer, which incorporated both a demand letter and the complaint, satisfied the requirements for an affidavit of expert disclosure.

Under Minnesota law, “[i]n 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 plaintiff must serve on defendants two affidavits. Minn. Stat. § 544.42, subd. 2 (2008). The first affidavit, an affidavit of expert review, must confirm that an expert reviewed the case, leading to the opinion that the defendant deviated from the applicable standard of care and consequently caused the plaintiff’s injury.¹ *Id.*, subds. 2(1), 3(a)(1) (2008). The second affidavit, an affidavit of expert disclosure, must be served on all parties within 180 days after service of the pleadings and the expert-review affidavit. *Id.*, subds. 2(2), 4(a) (2008). This affidavit of expert disclosure must

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.

Id., subd. 4(a). Failure to comply with the affidavit requirements “results, upon motion, in mandatory dismissal of each action with prejudice as to which expert testimony is necessary to establish a prima facie case.” *Id.*, subd. 6(c) (2008).

¹ Neither party disputes that the affidavit of expert review was adequate in content and timely served.

The Minnesota Supreme Court specifically addressed the content requirements of the affidavit of expert disclosure in *Brown-Wilbert*. 732 N.W.2d at 215-19. There, the supreme court held:

[T]he minimum standards for an affidavit of expert disclosure, sufficient to satisfy the 180-day requirement, must be that the affidavit provide some meaningful information, beyond conclusory statements, that (1) identifies each person the attorney expects to call as an expert; (2) describes the expert's opinion on the applicable standard of care, as recognized by the professional community; (3) explains the expert's opinion that the defendant departed from the standard; and (4) summarizes the expert's opinion that the defendant's departure was a direct cause of the plaintiff's injuries.

Id. at 219. Based on the factors articulated, the supreme court determined that although the expert-interrogatory answer incorporated the detailed complaint, it “d[id] not identify or define any specific accounting standard of care, state how Accountants deviated from that standard of care, or allege how that deviation caused injury.” *Id.* On that basis, the supreme court held that appellants’ interrogatory response was not sufficient to satisfy the minimum statutory requirements. *Id.*

Here, respondents had been retained to provide legal advice to ensure appellants’ full compliance with the recently enacted provisions governing mortgage foreclosure purchasers. *See* Minn. Stat. § 325N.10-.18 (2008).² After defending numerous litigation matters and facing the prospect of additional lawsuits, appellants sent to respondents a

² In 2004, the Minnesota Legislature enacted law requiring purchasers of homes either in or near foreclosure to provide sellers with, among other things, a notice of cancellation and await the expiration of the seller’s statutory five-day cancellation period before completing the transaction. 2004 Minn. Laws ch. 263, §§ 1-18 at 953-67; Minn. Stat. §§ 325N.03, .10-.15.

detailed demand letter outlining the bases for their grievances and threatening legal action. After respondents failed to meet appellants' demands, appellants sued respondents, alleging professional negligence, breach of fiduciary duty, negligent supervision/respondeat superior, attorney deceit and collusion, and attorney misconduct. Together with the complaint, pursuant to Minn. Stat. § 544.42, subd. 3, appellants provided respondents with an affidavit of expert review.

Thereafter, respondents served appellants with their first set of interrogatories, asking in part:

For each expert retained or consulted by you, state the subject matter on which the expert has been retained, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each such opinion.

Appellants responded in due time, stating:

Plaintiffs state the facts of the case have been reviewed by Plaintiffs' counsel with Ferdinand Peters, Esq., of Ferdinand Peters Esq. Law Firm, an expert whose qualifications provide a reasonable expectation that his opinions will be admissible at trial. Furthermore, based upon the documents drafted by Defendants, advice and guidance provided by Defendants, the Demand Letter and Complaint in this matter, and the lawsuits commenced against Plaintiffs, it [is] the opinion of Ferdinand Peters, Esq., [that] the Defendants deviated from the applicable standard of care and by that action caused injury to Plaintiffs. Ferdinand Peters, Esq., is expected to testify at trial with respect to the issues of negligence, malpractice, and causation.

Additionally, but not until August 21, 2007, six days past the time limit under Minn. Stat. § 544.42, subds. 2(2), 4(a), for service of such affidavit, appellants served respondents with an affidavit of expert disclosure.

Just as in *Brown-Wilbert*, appellants' expert-interrogatory answer simply identifies an expert and reiterates in conclusory terms the factual statements and legal conclusions made in the complaint or demand letter. These reiterations are not statements of the expert's opinion but are merely averments and legal conclusions expressed by lawyers interested in the outcome of the case and which may be of little value to a party preparing to depose or cross-examine an expert witness. Most significantly, appellants' expert-interrogatory answer fails to specifically articulate the standard of care and how respondents deviated from that standard of care. In *Brown-Wilbert*, the supreme court denied relief based on a similarly deficient expert-interrogatory answer. 732 N.W.2d at 219-20.

Because appellants failed to timely serve their affidavit of expert disclosure and because the statutory requirements of such affidavit are not met by appellants' answer to respondents' expert-interrogatory, the district court did not abuse its discretion by determining that appellants failed to comply with Minn. Stat. § 544.42, subd. 4(a).³

³ Alternatively, respondents contend that even if appellants' expert-interrogatory answer satisfies the *Brown-Wilbert* requirements, it nonetheless fails to satisfy the statutory requirements because appellants' counsel signed the interrogatory responses as to objections only. Having concluded that the content of appellants' expert-interrogatory answer fails to meet the minimum standards for an affidavit of expert disclosure set forth in *Brown-Wilbert*, we decline to address this issue.

Safe-Harbor Provision

Appellants argue that even if their expert-interrogatory answer was deficient, they are entitled, under the safe-harbor provision in Minn. Stat. § 544.42, subd. 6(c), to notice of the deficiencies and an additional 60 days within which to serve an amended affidavit.

A party's failure to provide the required affidavit of expert disclosure "results, upon motion, in mandatory dismissal of each action with prejudice as to which expert testimony is necessary to establish a prima facie case." Minn. Stat. § 544.42, subd. 6(c). But "[a]n initial motion to dismiss an action . . . based upon claimed deficiencies of the affidavit or answers to interrogatories 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.*, subd. 6(c). This safe-harbor provision is availing only when an expert-disclosure affidavit or an answer to interrogatory which satisfies the requirements of the expert-disclosure affidavit has been filed. *See House v. Kelbel*, 105 F. Supp. 2d 1045, 1051 (D. Minn. 2000) ("The additional 60 days are provided for the purpose of avoiding harsh consequences arising from inadvertent drafting errors of which a party might otherwise be unaware, and is available only when an [affidavit of expert disclosure or an answer to interrogatory which satisfies the requirements of the expert-disclosure affidavit] is in fact filed within 180 days."); *Brown-Wilbert*, 732 N.W.2d at 219-20 (affirming dismissal of accountant malpractice case and not extending benefit of 60-day safe-harbor provision when answer to expert interrogatory failed to satisfy statutory requirements for expert-disclosure affidavit); *Middle River-Snake River Watershed Dist.*

v. Dennis Drewes, Inc., 692 N.W.2d 87, 90-91 (Minn. App. 2005) (holding that safe-harbor provision is unavailable when expert affidavit has not been filed).

In creating a safe-harbor provision, the Minnesota Legislature clearly sought to preclude the dismissal of meritorious claims. Moreover, by allowing a 60-day cure period, it appears that the legislature created the safe harbor to provide opportunity to alleviate deficiencies requiring more time than is necessary to correct mere scrivener errors. However, while the full reach of the safe-harbor provision may yet to be defined, caselaw amply supports the district court's conclusion that the safe-harbor provision does not permit a party the opportunity for a complete do-over. As analyzed above, appellants' expert-interrogatory answer did not satisfy the statutory requirements of an affidavit of expert disclosure. Therefore, neither an expert-disclosure affidavit nor a qualifying answer to expert interrogatory was timely filed, and the district court did not abuse its discretion by failing to afford appellants the benefit of the 60-day safe-harbor provision.

Public Policy

Finally, appellants argue that applying the mandatory-dismissal provision produces a harsh consequence that ignores the legislative intent and violates public policy.

The object of statutory interpretation is to ascertain and effectuate the legislature's intent. Minn. Stat. § 645.16 (2008). The legislature's intent may be ascertained by considering, among other things, the need for the law, the circumstances under which it was enacted, the consequences of an interpretation, contemporaneous legislative history,

the object to be attained, and other statutes concerning the same subject matter. Minn. Stat. § 645.16; *Minn. Life & Health Ins. Ass'n v. Dep't of Commerce*, 400 N.W.2d 769, 774 (Minn. App. 1987). But if the statute's language is unambiguous, we must apply its plain meaning. Minn. Stat. § 645.16; *Molloy v. Meier*, 679 N.W.2d 711, 723 (Minn. 2004). We apply other canons of construction to discern the legislature's intent only if a statute is ambiguous. See Minn. Stat. §§ 645.08, .16, .17 (2008); *Gomon v. Northland Family Physicians, Ltd.*, 645 N.W.2d 413, 416 (Minn. 2002).

Appellants' argument is flawed for at least two reasons. First, the plain language of the statute requires dismissal when an affidavit of expert disclosure is not served within 180 days after the commencement of the action. Minn. Stat. § 544.42, subd. 6(c). Here, because appellants' expert-interrogatory answer does not satisfy the *Brown-Wilbert* minimum standards, appellants failed to provide their expert-disclosure affidavit within the specified time. We are mindful that the difference was only six days; nevertheless, the plain language of the statute mandates dismissal. Second, we are guided by precedent under remarkably similar circumstances in *Brown-Wilbert* that neither legislative intent nor public policy prohibits the dismissal of actions in which the plaintiff failed to comply with the specific statutory requirements. Thus, the district court did not abuse its discretion by dismissing appellants' lawsuit for appellants' failure to comply with the statutory requirements.

Affirmed.