STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1489

Barry H. Nash,
Appellant,

vs.

James D. Gurovitsch,
Respondent.

Filed April 5, 2011
Affirmed in part and reversed in part
Ross, Judge

Hennepin County District Court
File No. 27-CV-10-6522

Joseph M. Hoffman, Minneapolis, Minnesota (for appellant)

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

Considered and decided by Lansing, Presiding Judge; Ross, Judge; and Connolly, Judge.

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

ROSS, Judge

Barry Nash sued his divorce attorney, James Gurovitsch, for legal malpractice in the drafting of an affidavit and failing to provide necessary legal advice. The district court dismissed Nash's complaint as barred by the statute of limitations after it construed the two counts as predicated on the same act—Gurovitsch's failure to advise Nash to

include a *Karon* waiver in Nash's divorce decree. Because the first count involves an independent and discrete act of alleged negligence occurring only three years before Nash's suit and well within the six-year limitations period, we reverse in part. Because the second count involves the allegedly negligent failure to counsel Nash to include a *Karon* waiver in a stipulation that was incorporated into the dissolution decree more than six years before Nash filed the suit, we affirm the district court's dismissal of that count.

FACTS

In 2002 Barry Nash hired James Gurovitsch to represent him in his divorce. With Gurovitsch's help, Nash and his wife, Cheryl Nash, negotiated a Marital Termination Agreement (MTA), which the district court incorporated into its judgment and decree filed on October 14, 2003. In that MTA, Nash agreed to pay $750 in monthly child support until the couple's daughter graduated from high school and $250 in monthly temporary spousal maintenance until she turned 18. Gurovitsch and Nash ended their attorney-client relationship regarding the MTA in April 2004.

In May 2007, Cheryl Nash moved to modify spousal maintenance. Nash again hired Gurovitsch to represent him. Cheryl Nash sought $1,000 in permanent monthly maintenance, claiming a substantial change in circumstances because Nash's income had increased, she could not maintain employment, and she would never be able to support herself. The district court found that a substantial change in circumstances justified maintenance modification. It based this finding largely on Nash's statement in a 2007 affidavit that he had believed his wife would be self-sufficient by the time their daughter graduated from high school. Against that fact, the district court held that because Cheryl

Nash never actually earned income that would make her self-sufficient, a substantial change in circumstances had occurred. It also reasoned that because Nash had not secured a *Karon* waiver,[1] he "knew that an extension [of spousal maintenance] was possible." The district court therefore granted Cheryl Nash's motion and ordered Nash to pay her $1,000 in permanent monthly spousal maintenance. This court affirmed. *See Nash v. Nash*, No. A07-2284, 2008 WL 4909436, at *4 (Minn. App. Nov. 18, 2008).

Nash then sued Gurovitsch for malpractice on March 8, 2010, in a two-count complaint. Count I alleged that Gurovitsch had departed from the accepted standard of legal care by drafting Nash's 2007 affidavit that enabled Cheryl Nash to sustain her burden of proof in her motion for spousal-maintenance modification. Count II alleged that Gurovitsch had breached his duty to inform Nash about the benefits of a *Karon* waiver, which, if included in the 2003 stipulation, would have prevented Cheryl Nash from successfully moving to modify maintenance. The district court dismissed the action for failure to state a claim, holding both counts barred by the six-year statute of limitations. Nash appeals.

D E C I S I O N

We must decide how the statute of limitations applies to Gurovitsch's two allegedly negligent acts. A motion to dismiss under Minnesota Rule of Civil Procedure 12.02(e) should be granted when it is clear from the face of the complaint that the statute of

[1] A *Karon* waiver is a private agreement between parties to a divorce waiving their statutory right to seek modification of the terms of a spousal maintenance order. *See Karon v. Karon*, 435 N.W.2d 501, 503–04 (Minn. 1989); *see also* Minn. Stat. § 518.552, subd. 5 (2010) (expressly permitting these agreements).

limitations has run on all of the claims asserted. *Jacobson v. Bd. of Trs. of the Teachers Ret. Ass'n*, 627 N.W.2d 106, 109 (Minn. App. 2001), *review denied* (Minn. Aug. 15, 2001). We review de novo the application of a statute of limitations to undisputed facts. *Antone v. Mirviss*, 720 N.W.2d 331, 334 (Minn. 2006).

The district court reasoned and Gurovitsch asserts that because both of Nash's allegations involve spousal-maintenance modification there was only a single, two-part cause of action stemming from Gurovitsch's failure to include a *Karon* waiver in the MTA. Under this theory, both counts fail because the principal negligent act is outside the limitations period. Nash maintains that the district court erroneously treated both parts as one indivisible claim governed by the same period of limitations.

We are convinced by Nash's proposition that his complaint alleges two separate causes of action. The complaint asserts two distinct acts of negligence arising from two separate events. *See Capitol Supply Co. v. City of St. Paul*, 316 N.W.2d 554, 555 (Minn. 1982) (noting separate statutes of limitations apply to alleged negligent change in road grade and alleged negligent design and construction of storm sewer system). Count I states that "[t]he Defendant departed from the accepted standards of care and practice by drafting an affidavit for the Plaintiff in connection with the defense of the motion of Plaintiff's former spouse . . . which enabled Plaintiff's former spouse to sustain her burden of proof." And Count II alleges that Gurovitsch "deviated from his fiduciary obligation to the Plaintiff by failing, throughout his representation of the Plaintiff, to advise the Plaintiff of the existence[, purpose, and effect] of a *Karon* Waiver." Under Nash's theory, he was damaged separately by his attorney's failure to inform him about a

Karon waiver and his later negligent drafting of the affidavit. The first act (actually an omission) exposed him to a modification motion and the second caused him to lose the motion. The second negligent act might not have occurred without the first, but it also might have; the two acts occurred at different times, are not necessarily causally connected, and arose in legal representation concerning different proceedings. The alleged incidents and the supporting legal theories asserted are materially distinct.

We next address whether the statute of limitations bars either count. The limitations period for a legal malpractice claim is six years. Minn. Stat. § 541.05, subd. 1(5) (2010); *May v. First Nat'l Bank of Grand Forks, N. Dakota*, 427 N.W.2d 285, 288 (Minn. App. 1988), *review denied* (Minn. Oct. 26, 1988). Nash's claim under Count I easily falls within the limitations period. He filed the suit on March 8, 2010, and the allegedly negligent drafting of the affidavit occurred just three years earlier in 2007. The district court should not have applied the statute of limitations to dismiss this count of Nash's complaint. Limiting our holding to timeliness and offering no opinion about its merits, we reverse the judgment dismissing that count.

But Nash's claim as stated in Count II leads us to a different result. Count II is based on Gurovitsch's actions in 2003 when he initially represented Nash. The supreme court has held that a plaintiff can sue an attorney who negligently drafted an MTA as soon as the MTA is incorporated into a dissolution decree. *Gunufson v. Swanson*, No. C4-95-1446, 1996 WL 686121, at *1 (Minn. Nov. 20, 1996) (order); *see also State v. Allinder*, 746 N.W.2d 923, 925 (Minn. App. 2008) (holding that this court follows even unpublished supreme court precedent). Nash's Count II therefore could have been

asserted after October 14, 2003, as soon as the district court incorporated the *Karon*-waiver-free MTA into the dissolution decree. So the district court correctly applied the statute of limitations to dismiss Count II because that count asserts a claim that accrued more than six years before the March 2010 suit.

Nash counters that because Count II is really a claim that his attorney failed to properly communicate, the failure tolls the running of the limitations period because it constitutes a "continuing obligation, repeatedly breached" essentially every moment that the attorney, by his silence, fails to correct the original failure to advise. We are not persuaded.

Nash's continuing-negligence theory runs headlong into contrary supreme court precedent. In *Herrmann v. McMenomy and Severson*, 590 N.W.2d 641, 642 (Minn. 1999), the plaintiffs alleged that their attorneys had failed to advise them that engaging in certain business transactions would subject them to increased tax liability. They began engaging in prohibited transactions in 1987, but years passed before they learned that their actions were unlawful. The supreme court held that the plaintiffs' claim accrued after the first prohibited transaction that resulted from their reliance on the attorneys' failure to advise, despite the fact that their attorneys had continually failed to advise them that the transaction was prohibited. *Id*. at 633–34. *Antone* similarly involved an attorney's alleged failure to inform a client about a mistake made in drafting a premarital agreement. 720 N.W.2d at 332. The supreme court held that the claim accrued after the marriage—the event that was prejudicially affected by the plaintiff's reliance on his lawyer's advice. *Id*. at 337. For statute-of-limitations purposes, an attorney's alleged

negligent failure to advise a client accrues as a malpractice claim when that failure results in the legally significant event that the omitted advice would have prevented. In this case, as in *Gunufson*, that event was the incorporation of the purportedly defective MTA into the dissolution judgment.

Affirmed in part and reversed in part.