STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1619

Jeffrey Veches,
Appellant,

vs.

Officer Sean Majewski,
in his individual capacity,
Respondent,
Hennepin County Medical Center, et al.,
Respondents,
Joseph Clinton,
Respondent.

Filed June 18, 2012
Affirmed in part and reversed in part
Stauber, Judge

Hennepin County District Court
File No. 27CV105993

Jill Clark, Jill Clark, L.L.C., Golden Valley, Minnesota (for appellant)

Jon K. Iverson, Stephanie A. Angolkar, Iverson Reuvers, Bloomington, Minnesota (for respondent Majewski)

Michael O. Freeman, Hennepin County Attorney, Craig O. Sieverding, Assistant County Attorney, Minneapolis, MN (for respondents Hennepin County Medical Center, et al.)

Katherine A. McBride, Barbara A. Zurek, Meagher & Geer, P.L.L.P., Minneapolis, Minnesota (for respondent Clinton)

Considered and decided by Stauber, Presiding Judge; Cleary, Judge; and Toussaint, Judge.*

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

STAUBER, Judge

Appellant challenges a series of district court orders dismissing appellant's claims against respondents, denying appellant's motion to remove a judicial officer and vacate the orders issued by the judicial officer, and awarding attorney fees to one of the respondents for untimely service. Because the district court did not err by dismissing appellant's claims against the respondents and did not abuse its discretion by denying appellant's motion to remove the judicial officer, we affirm in part. But because an award of attorney fees was not authorized by the rules, we reverse in part.

FACTS

This appeal arises out of an incident that occurred between appellant Jeffrey Veches and respondents in the early evening hours of March 18, 2006. Appellant, who claims to suffer from a medical condition known as vasovagal syncope, was involved in a single-vehicle automobile accident when he swerved to avoid some children who were riding bikes in the road and lost control of his vehicle.

Respondent Officer Sean Majewski of the Richfield Police Department was the first officer to arrive on the scene following the accident. Appellant told Officer Majewski that he urgently needed medication for his syncope and had been on his way to

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

the pharmacy to fill a prescription when the accident occurred. The officer administered roadside sobriety tests and ultimately called for medical personnel. Despite appellant's request that he be taken to Fairview Southdale—where he had previously been treated for his condition—appellant was transported to respondent Hennepin County Medical Center (HCMC).

Upon arriving at HCMC, appellant allegedly was placed in four-point restraints "because of information imparted by the emergency medical technicians that he was uncooperative." According to appellant's complaint, Officer Majewski assaulted appellant by trying to hit him in the jaw while he was restrained; HCMC staff "did not respond appropriately to the assault," did not document the alleged physical injuries, did not offer appellant care, and prioritized Officer Majewski's request to obtain a urine sample (based on suspicions that appellant had been driving while under the influence) over documenting appellant's injuries from the alleged assault.

Appellant further alleges that respondent Dr. Jay Lin examined appellant and listened to his complaints, but did not offer any care and made inaccurate medical records. The complaint also alleges that respondent Dr. Joseph Clinton—Dr. Lin's supervisor at HCMC—failed in his supervision responsibilities and similarly failed to keep accurate medical records.

On March 5, 2010, appellant served Officer Majewski, HCMC, Dr. Lin, Dr. Clinton, respondent EMS Rebecca Kopka, and respondent EMS Kent Koellen with a summons and complaint that also named three John Does. The complaint asserted three counts: (1) violation of 42 U.S.C. § 1983 by all respondents; (2) negligence against the

medical-personnel defendants; and (3) fraudulent billing practices against HCMC and the doctors in violation of the Consumer Fraud Act (CFA), Minn. Stat. §§ 325F.68-.70 (2010). The case was assigned to Judge Robert A. Blaeser on March 29. On April 6, appellant exercised his right to remove Judge Blaeser without cause pursuant to Minn. R. Civ. P. 63.03. After a second district court judge recused on the case, the file was assigned to Judge Lloyd B. Zimmerman.

On September 9, 2010, appellant allegedly submitted a letter to the district court seeking either an extension of the 180-day deadline within which to file an expert affidavit in a medical-malpractice case as imposed by Minn. Stat. § 145.682 (2010) or a determination that an expert affidavit is unnecessary.[1] On October 1, the health-care-provider respondents filed a motion to dismiss for failure to comply with section 145.682. Appellant filed an amended motion seeking the above-stated relief on October 20. The district court then dismissed appellant's claims against the health-care-provider respondents for non-compliance with Minn. Stat. § 145.682.

On December 28, 2010, appellant sent a letter to the district court requesting that Judge Zimmerman recuse himself from the case. The following day, the district court issued an order finding that the letter did not comply with the Minnesota Rules of General Practice and therefore declined to address the issue further. Appellant

[1] Appellant challenges the district court's classification of the filing as a letter. While appellant's appendix contains a document captioned "Plaintiff's Notice of Motion and Motion" dated September 9, 2010, that purports to seek such relief, no such document appears in the district court file received by this court; and the register of actions in this case does not list a motion filed by appellant on the issue until October 20, nearly three weeks after respondents filed their own motions on October 1.

challenged the order by seeking a writ of prohibition from this court, and we denied the petition. *Veches v. Majewski, et al.*, No. A11-168 (Minn. App. Feb. 15, 2011) (order). Appellant withdrew the motion on March 7, 2011.

On March 17, 2011, the district court dismissed appellant's remaining claims. Appellant subsequently re-filed her motion to remove Judge Zimmerman and vacate all orders he had issued in the case, and the district court denied the motion on June 17. The district court was later informed that it had inadvertently overlooked Dr. Clinton's motion for sanctions, and issued an amended order on June 22, which awarded Dr. Clinton sanctions against appellant and appellant's counsel under Minn. R. Gen. Pract. 115.06. This appeal follows.

D E C I S I O N

I. District court's denial of motion to remove judicial officer and vacate issued orders

"Any party or attorney may make and serve on the opposing party and file with the administrator a notice to remove [a judicial officer]." Minn. R. Civ. P. 63.03. "After a party has once disqualified a presiding judge or judicial officer as a matter of right that party may disqualify the substitute judge or judicial officer, but only by making an affirmative showing of prejudice." *Id.* "Whether to honor a request for removal based on allegations of actual prejudice is a matter for the [district] court's discretion." *Durell v. Mayo Found.*, 429 N.W.2d 704, 705 (Minn. App. 1988) (emphasis omitted), *review denied* (Minn. Nov. 16, 1988).

On April 18, 2011, appellant moved to disqualify the assigned judge and vacate all orders issued in the case. Because appellant had already removed a judge, the April 18 motion required an affirmative showing of prejudice. *See* Minn. R. Civ. P. 63.03 ("After a party has once disqualified a presiding judge or judicial officer as a matter of right that party may disqualify the substitute judge or judicial officer, but only by making an affirmative showing of prejudice."). The district court denied the motion.

Appellant argues that the district court abused its discretion by denying the removal motion on four bases: (1) the district court judge "showed that he was unable to handle any scrutiny or criticism"; (2) an email dated February 15 constituted impermissible ex parte communications that was not disclosed; (3) the district court "went onto the SOS website to pursue the 'Stepnes' issue"; and (4) the district court was biased against appellant's counsel. None of these bases is availing.

First, appellant's assertion that the district court judge "was unable to handle any scrutiny or criticism" is not supported by citations to the record. Appellant does not cite to any evidence that the district court judge was unable to handle any such scrutiny, and his argument is therefore unavailing.

Second, appellant fails to establish that the February 15 email was improper. The email was between two district court judges discussing both the removal in this case and in another case. Appellant argues that the email violated Canon 2.9(a) of the Minnesota Code of Judicial Conduct, which reads, in pertinent part:

> A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to

> the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:
>
> . . . .
>
> (3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.

Minn. Code Jud. Conduct, Canon 2.9(a) (2012). It is well settled that a judge may discuss potential issues with a judicial colleague in the absence of parties. *McKenzie v. State*, 583 N.W.2d 744, 748 (Minn. 1998). And despite appellant's argument to the contrary, the record does not indicate that the district court sought to receive any factual information not part of the record by the email. Appellant's argument regarding the district court "pursuing" the "*Stepnes* issue" fails for the same reason.

Finally, appellant's argument regarding the district court's "bent of mind" against appellant's counsel is unavailing. Appellant's basis for this bent-of-mind claim is that the district court displayed "a tendency to hold [appellant] to the minor, minor details of litigation." Reviewing the orders indicates that these "minor details" consisted of the court rules. And appellant cites to no authority that requiring a party to conform to court rules amounts to sufficient prejudice to justify a removal for cause.

Because appellant has not made an affirmative showing of prejudice on the part of the district court, the denial of the removal motion was not an abuse of discretion. And because the denial was proper, analysis of the denial of the vacation motion is

unnecessary. *See also LeRoy v. Figure Skating Club of Minneapolis*, 281 Minn. 576, 577, 162 N.W.2d 248, 248 (1968) ("[A]n order denying a motion to vacate a judgment, whether summary or otherwise, is not appealable of right.").

II. District court's dismissal of appellant's claims for non-compliance with Minn. Stat. § 145.682

The district court granted respondents' motions to dismiss Counts I (civil-rights violation) and II (negligence) against the health-care-provider respondents. The court based its ruling on its conclusion that "an expert affidavit is required for Counts I and II of [appellant's] complaint pursuant to Minn. Stat. § 145.682, and that [appellant] has not demonstrated excusable neglect for his failure to provide an affidavit by the [statutory 180-day] deadline." Appellant challenges this order, arguing that the claims fall outside of the requirements of the medical-affidavit statute or, in the alternative, the district court should have granted his motion for an extension of the deadline.

A. Application of the statute

"In an action alleging malpractice . . . against a health care provider which includes a cause of action as to which expert testimony is necessary to establish a prima facie case, the plaintiff must . . . serve upon defendant . . . within 180 days after commencement of the suit an affidavit [identifying the expert witnesses who are expected to testify]."[2] Minn. Stat. § 145.682, subd. 2. Failure to comply with this requirement "results, upon motion, in mandatory dismissal with prejudice of each cause of action as to

[2] The term "health care provider," as used in the statute, includes all respondents relevant to the analysis in this section of our opinion. *See* Minn. Stat. § 145.682, subd. 1 (2010) (defining "health care provider").

which expert testimony is necessary to establish a prima facie case." *Id.*, subd. 6(b). "The Minnesota legislature enacted Minn. Stat. § 145.682 for the purpose of eliminating nuisance medical malpractice lawsuits by requiring plaintiffs to file [expert] affidavits verifying that their allegations of malpractice are well-founded." *Stroud v. Hennepin Cnty. Med. Ctr.*, 556 N.W.2d 552, 555 (Minn. 1996).

The supreme court has stated that "expert testimony is generally required to establish the standard of care and the departure from that standard for the conduct of [medical professionals]." *Tousignant v. St. Louis Cnty.*, 615 N.W.2d 53, 58 (Minn. 2000). Such affidavits are required for all causes of action alleging medical practice, unless "the acts or omissions complained of are within the general knowledge and experience of lay persons." *Id.* (quotation omitted); *see also Juetten v. LCA-Vision, Inc.*, 777 N.W.2d 772, 776 (Minn. App. 2010) ("[Plaintiff's] malpractice suit included a cause of action that required expert testimony to establish a prima facie case."), *review denied* (Minn. Apr. 28, 2010). Cases in which expert testimony is not necessary to establish a prima facie case are the most "exceptional" of medical-malpractice claims. *Tousignant*, 615 N.W.2d at 61.

Here, the district court concluded that Counts I and II of appellant's complaint—as to the health-care-provider respondents—focused on three decisions: "(1) the decision by the EMS paramedics to transport [appellant] to HCMC rather than Fairview Southdale . . . ; (2) the decision by HCMC and the medical staff to use restraints during [appellant's] hospitalization; and (3) the information placed in [appellant's] medical chart, or not, by the attending physicians." Appellant argues that "[t]he crux of [his] case

is whether the medical records are truthful," and therefore expert testimony is not necessary to establish a prima facie case and the requirements of Minn. Stat. § 145.682 need not be satisfied.

When analyzing whether or not expert testimony is necessary to establish a prima facie case, the manner in which a plaintiff styles his or claim is irrelevant; the analysis focuses on whether the claim sounds in medical malpractice. *D.A.B. v. Brown*, 570 N.W.2d 168, 171 (Minn. App. 1997). For example, in *D.A.B.*, the plaintiffs sued a doctor for breach of fiduciary duty based on an alleged kickback scheme between the doctor and the drug manufacturer and distributor. *Id.* at 169. This court held that "[a]ny breach of fiduciary duty that may have occurred during the doctor's prescription of medication to his patients arose while the doctor was examining, diagnosing, treating, or caring for his patients," and as such the gravamen of the complaint sounded in medical malpractice and the medical-malpractice statute of limitations applied. *Id.* at 172.

Appellant relies primarily on *Doe v. Tsai*, 2008 WL 4949156 (D. Minn. Nov. 17, 2008), an unpublished federal district court opinion interpreting Minn. Stat. § 145.682. The plaintiffs in *Tsai* alleged that the defendants—doctors and nurses at HCMC—sedated a minor female child and subjected her to "an involuntary gynecological and rectal exam without the consent of her parent or guardian," acting in concert with a Minneapolis Police Officer. 2008 WL 4949156, at *1. Plaintiffs alleged violation of 42 U.S.C. § 1983 and intentional infliction of emotional distress. Defendants moved for dismissal for non-compliance with Minn. Stat. § 145.682. *Id.* The court denied the motion,

concluding that "even if viewed in the medical malpractice context, Plaintiffs' claim is one of medical battery for which no expert affidavit is required." *Id.* at *3.

Appellant's reliance on *Tsai* is unavailing. First, a federal district court's interpretation of a state statute is not precedential. *See Jendro v. Honeywell, Inc.*, 392 N.W.2d 688, 691 n.1 (Minn. App. 1986) (noting that although statutory construction of federal law by federal courts is entitled to due respect, this court is bound only by statutory interpretations of the Minnesota Supreme Court and United States Supreme Court), *review denied* (Minn. Nov. 19, 1986). Second, the court in *Tsai* found that the plaintiffs' claims fell within a very narrow range of cases in which expert testimony was not needed. *Tsai*, 2008 WL 4949156 at *3. The court based its holding on the Minnesota Supreme Court's differentiation of medical-battery cases (alleging nondisclosure of a procedure) and negligent-nondisclosure cases (alleging nondisclosure of risks of a procedure), in which the court held "[i]n battery cases, no expert testimony need be adduced, for the question is whether the physician, in fact, told the patient of the nature and character of the procedure and the patient consented to that procedure." *Id.* (quoting *Kohoutek v. Hafner*, 383 N.W.2d 295. 299 (Minn. 1986)).

We have held that medical-malpractice actions "typically involve negligent conduct that is connected to a person's professional licensure." *Paulos v. Johnson*, 597 N.W.2d 316, 320 (Minn. App. 1999), *review denied* (Minn. Sept. 28, 1999). As such, "an action involving medical negligence that necessarily flows from a therapeutic relationship, rather than administrative or policymaking functions," is considered to be within the scope of medical-malpractice laws. *Id.* For example, negligent actions by a

blood bank's physician-employees have been held to not constitute medical malpractice, even though committed by medical professionals, because the physician-employees were not performing functions that required a professional license, as the supreme court noted that a distinction exists "between malpractice by professionals acting pursuant to their professional licensure [and] negligence based upon conduct for which a professional license is not required." *Kaiser v. Memorial Blood Ctr.*, 486 N.W.2d 762, 767 (Minn. 1992).

Minnesota courts have applied the rule expressed in *Kaiser* in other cases. *See Henderson v. Allina Health Sys.*, 609 N.W.2d 7, 9 (Minn. App. 2000) (concluding that hospital employee's decision not to raise patient's bed rails required medical judgment and thus amounted to medical malpractice rather than ordinary negligence), *review denied* (Minn. June 13, 2000); *See also D.A.B.*, 570 N.W.2d at 171 (determining claim that physician breached fiduciary duty by taking kickbacks from drug companies for prescribing certain drugs was medical-malpractice claim because scheme was "dependent on the medical diagnosis, treatment, and care of the patients"); *Blatz v. Allina Health Sys.*, 622 N.W.2d 376, 385 (Minn. App. 2001) (concluding that when paramedics perform functions such as using an address to locate a home when responding to an emergency, professional judgment is not implicated and thus ordinary negligence principles apply), *review denied* (Minn. May 16, 2001).

The cases applying *Kaiser* and its progeny are instructive here. Appellant's Section 1983 claim against the health-care-provider respondents is based on the respondents' alleged failure to protect appellant from the alleged assault by Officer

Majewski and allegedly misrepresented information in appellant's medical records. The negligence claim against the health-care-provider respondents is based on the allegation that the doctors breached the duty of care they owed to appellant as their patient; failed to remove appellant's restraints; failed to take appellant to his requested care center; and misrepresented information in their reports. The claims based on the restraints, transportation, and security at HCMC implicate medical judgment, much as the decision not to raise bed rails in *Henderson*. Like the prescription decisions in *D.A.B.*, the question of what information to include in medical records depends on the medical diagnosis and treatment of patients. And unlike the act of locating an address that was at issue in *Blatz*, the acts of monitoring and securing patient safety involve professional judgment. Under the line of precedent applying the rule articulated in *Kaiser*, the decisions made and actions taken by the health-care-provider respondents here implicate medical and professional judgment, and therefore come under the purview of Minn. Stat. § 145.682.

B. Extension of time

When a plaintiff fails to serve a required affidavit within the 180-day deadline, the district court must, upon motion, dismiss the claims with prejudice. Minn. Stat. § 145.682, subd. 6(b). Minnesota courts strictly apply this requirement absent a showing of excusable neglect. *See Broehm v. Mayo Clinic of Rochester*, 690 N.W.2d 721, 726 (Minn. 2005) (stressing that plaintiffs must "adhere to strict compliance" with the statutory requirements "[s]o as not to undermine the legislative aim of expert review and

disclosure"); *Lindberg v. Health Partners, Inc.*, 599 N.W.2d 572, 578 (Minn. 1999) (noting that the statute "cuts with a sharp but clean edge").

However, a plaintiff may be allowed to extend the expert-disclosure deadline beyond the 180-day statutory limit by order of the court for "good cause." Minn. Stat. § 145.682, subd. 4(b). Here, appellant submitted a letter on September 9, 2010—after the statutory deadline had passed—requesting either a determination that an expert affidavit was not necessary or granting an extension of time to comply with the statute. The district court denied the request for an extension. An appellate court reviews the denial of an extension of the disclosure deadline for an abuse of discretion. *Broehm*, 690 N.W.2d at 727.

A plaintiff seeking an extension of time must establish excusable neglect. *Stern v. Dill*, 442 N.W.2d 322, 324 (Minn. 1989). To meet this standard, a plaintiff has the burden to show that: (1) he has a reasonable case on the merits; (2) he has a reasonable excuse for non-compliance with the statutory deadline; (3) he acted with due diligence; and (4) the defendant(s) would not suffer substantial prejudice if an extension of time is granted. *Anderson v. Rengachary*, 608 N.W.2d 843, 850 (Minn. 2000).

Here, the district court found that appellant failed to establish excusable neglect under each of the four factors articulated in *Anderson*. First, the court found that "without an expert affidavit, [appellant] cannot demonstrate a reasonable likelihood of success on the merits," and the fact that appellant "has not made any proffer to the Court that there is another expert available who could potentially give the opinion that Dr. Strote concluded was not appropriate for a medical opinion." Second, the district court

found that appellant's "neglect in waiting almost six months [between serving the affidavit and picking up communication with the expert], until the eve of the deadline, to determine that Dr. Strote could not provide an expert opinion is not excusable." Third, the district court found that, by not filing a motion for an extension of time until October 20, 2010—over a month after the deadline had passed—appellant had not acted with due diligence. Finally, the district court found that appellant's "inability to produce an expert opinion for a claim of medical malpractice, less than a month before discovery is due to close, is prejudicial" to respondents.

On appeal, appellant only argues that he "could not have predicted his expert would withdraw at the last minute" and states, without citation to authority, that "[t]he rational approach would have been to grant an extension." But an expert's last-minute withdrawal does not entitle a medical-malpractice plaintiff to ignore the requirements of the rule. *See* Minn. Stat. § 145.682, subd. 4(b) (stating that the district court may extend the timeline only for good cause). Appellant asserts, somewhat confusingly, that "a showing of good faith when the motion for more time was filed on the 181st day does not make sense." But such assertion is contrary to the language in the statute *requiring* good cause before an extension may be granted. And the Strote affidavit, on which appellant relies, simply indicates that appellant's expert "did not believe [he] could add anything as a doctor to [appellant's] case." We disagree that Dr. Strote's belief that he "could [not] add anything as a doctor," however sincere it may be, constitutes good cause warranting an extension of the 180-day deadline imposed by the statute.

Based on this record, appellant has not established that the district court abused its discretion by denying her motion for an extension of the 180-day deadline established by Minn. Stat. § 145.682.

Generally, "[a district] court's dismissal of an action for procedural irregularities will be reversed on appeal only if it is shown that the [district] court abused its discretion." *Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 190 (Minn. 1990). But here, the statute leaves no room for the district court to exercise its discretion. *See* Minn. Stat. § 145.682, subd. 6(b) (providing that a failure to serve affidavits within the statutory timeframe results in "mandatory dismissal" upon motion). The undisputed facts establish that the statutory deadline for the filing of the affidavit was September 1, 2010, and that appellant did not timely serve the affidavit.[3] Review of the district court's dismissal is therefore conducted de novo. *See Juetten*, 777 N.W.2d at 775 (outlining standard of review). And because appellant did not comply with the procedural requirements of the statute, the district court did not err by dismissing the claims. *See* Minn. Stat. § 145.682, subd. 6(b) (requiring dismissal of claims when procedural requirements are not met).

[3] The district court indicated that the affidavit was due on September 8, 2010. But the facts establish that HCMC was served with the summons and complaint "no later than March 5, 2010." The 180-day statutory deadline is triggered by the first or original service in a case, not by the serving of each individual defendant. *Juetten*, 777 N.W.2d at 777–78. The statutory deadline therefore expired no later than 180 days after March 5, which was September 1, 2010. But we note that appellant did not timely serve the required affidavit under either date.

III. District court's dismissal on summary judgment of appellant's remaining claims

An appellate court reviews a district court's summary-judgment decision de novo. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). A motion for summary judgment shall be granted when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. Summary judgment is also appropriate "when the record is devoid of proof on an essential element of the plaintiff's claim." *Cargill Inc. v. Jorgenson Farms*, 719 N.W.2d 226, 232 (Minn. App. 2006). "On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

The district court's order granted summary judgment in favor of respondents on two counts: violation of 42 U.S.C. § 1983 for excessive force and interfering with appellant's access to the courts against Officer Majewski (Count I), and improper billing practices against HCMC and Dr. Lin (Count III). We address the district court's analysis on each count in turn.

A. Count I

While the language of 42 U.S.C. § 1983 allows a plaintiff to sue "every person" who deprives the plaintiff of a federal right "under color of law," the statute must be construed in light of the common-law background against which it was enacted,

including common-law immunity defenses. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709, 728, 119 S. Ct. 1624, 1638, 1648 (1999). "The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 815 (2009) (quotation omitted). By focusing on "the objective reasonableness of an official's conduct, as measured by reference to clearly established law," the test for qualified immunity is intended to both avoid excessively disrupting government functioning and deter unlawful conduct. *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19, 102 S. Ct. 2727, 2738-39 (1982). Qualified immunity generally "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Burns v. Reed*, 500 U.S. 478, 494-95, 111 S. Ct. 1934, 1944 (1991) (quotation omitted).

In order to overcome a qualified-immunity defense, a plaintiff asserting an excessive-force claim must present sufficient facts to show that (1) the officer's conduct violated a constitutional right and (2) the constitutional right was clearly established. *Chambers v. Pennycook*, 641 F.3d 898, 904 (8th Cir. 2011). When determining whether an officer's actions are protected by qualified immunity, courts traditionally employ a two-step analysis: first, has a constitutional right been violated under the facts alleged by the plaintiff; second, whether that right was clearly established. *Saucier v. Katz*, 533 U.S. 194, 200, 121 S. Ct. 2151, 2155 (2001). The court has discretion in deciding which of

the two prongs should be addressed first in light of the circumstances of a particular case. *Pearson*, 555 U.S. at 236, 129 S. Ct. at 818.

With regard to appellant's First Amendment access-to-the-courts claim, the facts alleged by appellant do not establish a violation of a constitutional right. "Government action designed to prevent an individual from utilizing legal remedies may infringe upon the First Amendment right to petition the courts." *Whisman v. Rinehart*, 119 F.3d 1303, 1313 (8th Cir. 1997). To prevail on an access-to-the-courts claim, a plaintiff must prove actual injury or prejudice. *Lewis v. Casey*, 518 U.S. 343, 351-52, 116 S. Ct. 2174, 2180 (1996). Here, appellant was not denied access to the courts—in fact, the assertion that he was denied access to the courts is raised in conjunction with the very claim that he was allegedly prevented from filing (excessive force). *See Hassuneh v. City of Minneapolis*, 560 F.Supp.2d 764, 770 (D. Minn. 2008) ("[T]he Court finds it perplexing that Plaintiffs would argue that their right to access to the courts was restricted when they brought their suit against [the officer] in this very court."). Appellant has therefore not established a violation of his First Amendment right to access the courts, and the district court did not err by concluding that Officer Majewski was entitled to qualified immunity on appellant's claim on that ground. *See Stone v. Badgerow*, 511 N.W.2d 747, 750 (Minn. App. 1994) ("Whether an official's conduct is protected by qualified immunity is generally a question of law."), *review denied* (Minn. April 19, 1994).

Appellant's complaint also asserts a violation of his Fourth Amendment rights. *See Cook v. City of Bella Villa*, 582 F.3d 840, 849 (8th Cir. 2009) (recognizing Fourth Amendment right to be free from excessive force). But while the right to be free from

excessive force was clearly established at the time of the incident here, it was not clearly established "that an officer violated the rights of an arrestee by applying force that caused only de minimis injury." *Chambers*, 641 F.3d at 908. Here, the district court found that appellant's injuries were de minimis.[4] And given the state of law at the time of the incident in question, a reasonable officer could have believed that, as long as his actions did not cause more than de minimis injuries to an arrestee, his actions did not violate the Fourth Amendment. *Id.* "A reasonable officer was permitted to assume that legal conclusion when determining how to proceed, and he is entitled to have his conduct judged according to that standard for purposes of qualified immunity." *Id.* While the proposition that the extent of a plaintiff's injuries is determinative of the issue going forward has since been rejected, the prevailing law at the time of the incident entitles Officer Majewski to qualified immunity, and the district court did not err by dismissing the claims against him on that basis. *See id.* at 908-909 ("We reject in this decision a constitutional rule that turns on the arrestee's degree of injury, but given the law prevailing at the time of the incident, we conclude that the officers are entitled to qualified immunity.").

[4] We recognize that appellant asserts that his injuries were not de minimis and he "reserves the right to address that issue if Officer Majewski briefs it." But argument based on mere assertions and not supported by argument or citation to legal authority is waived unless prejudicial error is obvious on mere inspection. *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997). And after performing a "detailed review" of respondents' briefs, appellant "determined that no reply brief is necessary." Because appellant's argument in his brief that his injuries were not de minimis is not supported by argument or citation to authority, and prejudicial error in the district court's determination is not obvious on mere inspection, we conclude that appellant has waived his challenge to the de minimis conclusion and do not address it further.

B. Count II

Appellant's complaint asserts a claim of fraudulent billing practices against HCMC and Dr. Lin in violation of the CFA. The CFA, in relevant part, provides:

> The act, use, or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise, whether or not any person has in fact been misled deceived, or damaged thereby, is enjoinable[.]

Minn. Stat. § 325F.69, subd. 1. The statute provides that such an injunction may be sought by the "attorney general or any county attorney." Minn. Stat. § 325F.70, subd. 1. Notwithstanding the limitations imposed by this subdivision, the legislature has allowed a private person to bring a civil action to enforce the CFA to "recover damages, together with costs and disbursements, including the costs of investigation and reasonable attorney's fees, and receive other equitable relief as determined by the court." Minn. Stat. § 8.31, subd. 3a (2010).

Section 8.31 applies "only to those claimants who demonstrate that their cause of action benefits the public." *Ly v. Nystrom*, 615 N.W.2d 302, 314 (Minn. 2000) (declining to apply the statute to a one-on-one transaction involving fraudulent misrepresentation). In addition to demonstrating that his or her cause of action benefits the public in order to state a claim under section 8.31, a plaintiff must establish that the defendant engaged in conduct prohibited by the CFA and that the plaintiff was damaged thereby. *Grp. Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2, 12 (Minn. 2001).

According to the complaint, appellant was taken to HCMC against his will and was inappropriately billed for services provided at the request of the police. The complaint alleges that appellant was being "dunned by HCMC, which is threatening to harm his credit by reporting non-payment of debt . . . to a collections agency, which will cause [appellant] to harm his credit." The district court dismissed the claim after finding that there was no record evidence that appellant had suffered damage as a result of the allegedly improper billing and therefore did not satisfy the condition precedent to maintain a claim under section 8.31. *See id.* (holding that a private citizen seeking to maintain a CFA claim must suffer damages).

Notably absent from appellant's brief is any challenge to the district court's finding that the record was devoid of any evidence that he had been damaged by HCMC's allegedly fraudulent billing.[5] *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (stating issues not briefed on appeal are waived). Appellant has therefore failed to meet his burden to show that he has suffered damage. And because actual loss is an essential element of appellant's ability to maintain a CFA claim under section 8.31, the district court did not err by granting respondents' motions for summary judgment on the claim. *See* Minn. Stat. § 8.31, subd. 3a (allowing "any person *injured* by a violation of [the CFA]" to seek an injunction and "recover *damages*" (Emphasis added.)); *Estate of Riedel v. Life Care Retirement Communities, Inc.*, 505 N.W.2d 78, 82 (Minn. App. 1993)

[5] Appellant's challenge to the district court's award of summary judgment on this claim focuses on whether a two-year or six-year statute of limitations applied to a CFA claim. But the district court rejected respondents' argument that the two-year statute applied to CFA claims and instead based its award of summary judgment on the lack of evidence establishing damages.

(holding that CFA "does not impose an arbitrary monetary penalty, but rather allows recovery *only by persons injured by a violation*, and then only recovery of probable damages along with certain costs" (quotation omitted) (Emphasis added.)).

IV. District court's imposition of sanctions under Minn. R. Gen. Pract. 115.06

The district court held appellant and his counsel subject to sanctions under Minn. R. Gen. Pract. 115.06 in the form of attorney fees and costs to reimburse Dr. Clinton the fees and costs incurred in resisting appellant's removal-and-vacation motion. Appellant challenges this award arguing that (1) service was sufficient and (2) "the sanctions award impairs the integrity of the justice system."

This court will not disturb a district court's findings or decision on sanctions absent an abuse of discretion. *Gibson v. Coldwell Banker Burnet*, 659 N.W.2d 782, 787 (Minn. App. 2003) Attorney fees awarded pursuant to sanctionable conduct must be reasonably based on the expenses a party incurs by opposing the misconduct. *Mears Park Holding Corp. v. Morse/Diesel, Inc.*, 426 N.W.2d 214, 219–20 (Minn. App. 1988). "As long as the record reflects a reasonable correlation between the final amount of the sanctions imposed, the expenses incurred by the party defending the unfounded claims, and the basis of the court's imposition of sanctions, there will be no abuse of discretion by the [district] court." *Id*.

Here, the district court awarded sanctions based on appellant's non-complaince with Minn. R. Gen. Pract. 115.03. *See also* Minn. R. Gen. Pract. 115.06 (allowing, in instances of a dispositive motion, the court to allow reasonable attorney fees for noncompliance). Under the rule, a party bringing a dispositive motion must serve

opposing counsel and the court administrator with certain documents "at least 28 days prior to the hearing." Minn. R. Gen. Pract. 115.03(a). For non-dispositive motions, the documents must be served "at least 14 days prior to the hearing." Minn. R. Gen. Pract. 115.04(a). The relevant hearing in this case was on May 11, 2011. The evidence shows that appellant did not serve Dr. Clinton's counsel with the motion documents until April 18, which was 23 days before the hearing.

Here, the motion in question sought to remove the district court judge and vacate the orders he had issued in the case. The district court order classifies the motion as dispositive. We disagree. "Dispositive" is defined as "bringing about a final determination." *Black's Law Dictionary* 540 (9th ed. 2009). Because the motion, if granted, would not have resulted in "a final determination" of a claim—but rather would have reopened the case—the district court misapplied the law in classifying the motion as dispositive. And because the motion is non-dispositive and the rules set up a 14-day timeframe for service of non-dispositive motions, we conclude that Dr. Clinton received timely service of the motion. Furthermore, Minn. R. Gen. Pract. 115.06 only authorizes an award of attorney fees for non-compliance with regard to dispositive motions.

Because Dr. Clinton was timely served and the rule does not provide for attorney fees with regard to non-dispositive motions, the district court abused its discretion by imposing sanctions under rule 115.06. *See Pechovnik v. Pechovnik*, 765 N.W.2d 94, 98 (Minn. App. 2009) (stating that the district court abuses its discretion if it misapplies the law). We therefore reverse the sanction award against appellant and appellant's counsel.

Affirmed in part and reversed in part.