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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0756**

John Kalenberg, et al.,
Appellants,

vs.

Steingart, McGrath & Moore, P.A.,
Respondent,

Terrance W. Moore, et al.,
Respondents.

**Filed January 22, 2018
Affirmed
Ross, Judge**

Wright County District Court
File No. 86-CV-16-5427

Markus C. Yira, Yira Law Office, Ltd., Hutchinson, Minnesota; and

Julie Wacker Hanjani, Hutchinson, Minnesota (for appellants)

Kelly A. Putney, Uzodima Franklin Aba-Onu, Bassford Remele, P.A., Minneapolis,
Minnesota (for respondent Steingart, McGrath & Moore)

Mark A. Bloomquist, Jennifer M. Zwillling, Julia J. Nierengarten, Meagher & Geer,
P.L.L.P., Minneapolis, Minnesota (for respondents Hellmuth & Johnson and Terrence W.
Moore)

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Bratvold,
Judge.

UNPUBLISHED OPINION

ROSS, Judge

John and Linda Kalenberg sued their attorney and his law firms for legal malpractice alleging that the attorney's ineffective representation caused them to lose their lawsuit against a couple who allegedly breached an agreement to purchase their home. The district court dismissed the Kalenbergs' legal-malpractice suit based on Minnesota Statutes, section 544.42 (2016), because they failed to serve an affidavit of expert review within 60 days of the defendants' demand for one. We conclude that the Kalenbergs needed expert testimony to establish that their former attorney's representation constituted professional malpractice or negligence, and that the Kalenbergs gave the district court no evidentiary support for their assertion that the attorney and his firms had agreed to toll the expert-affidavit deadline. We therefore affirm the district court's decision to dismiss the Kalenbergs' suit for failing to timely provide an expert affidavit.

FACTS

Terrance Moore is an attorney who represented John and Linda Kalenberg in their unsuccessful breach-of-contract lawsuit against Thomas and Holly Klein for the Kleins' failure to purchase the Kalenbergs' home under a purchase agreement. The Kalenbergs brought this legal-malpractice suit against Moore and his current and former law firms, Steingart, McGrath & Moore, and Hellmuth & Johnson, alleging legal malpractice, negligence, and breach of contract. The Kalenbergs' August 2016 complaint asserts that Moore's representation was deficient in a number of ways. It asserts, for example, that Moore prematurely sought summary judgment and negligently failed to complete the

discovery necessary to defend against the Kleins' competing motion for summary judgment. It alleges that he requested no depositions, engaged no expert witnesses, posed no interrogatories, requested no admissions, and tardily asked the district court to allow for depositions only after the discovery deadline. It also alleges that Moore failed to provide the district court with documentary evidence that would have supported their legal position. And it maintains that he argued one erroneous point of law that he told the court was "absolutely dispositive" while he failed to argue the correct, favorably dispositive points of law. The complaint included no initial affidavit of expert review under Minnesota Statutes section 544.42, subdivision 2(1) (2016).

On September 9, 2016, the defendant law firms served answers expressly demanding that the Kalenbergs comply with section 544.42 and submit an affidavit of expert review. The Kalenbergs provided no affidavit. Counsel for the parties met in October and, according to written testimony of the Kalenbergs' attorney, Julie Hanjani, they "discussed the underlying case moving forward with informal discovery and set up a time to meet in early November to further our discussions." On November 15 and 16, the defendant firms moved the district court to dismiss for the Kalenbergs' failure to provide their initial expert affidavit and their failure to provide the affidavit within 60 days of the demand.

Two weeks later, the Kalenbergs' attorney wrote to counsel for the law firms to make them "aware of the fact that [she had] been out of the office for the most part of the last 5 weeks due to a serious health issue with [her] father" and that she felt "blindsided" by the motions to dismiss. She explained, "It was my belief at our discussions on

October 25, 2016, we agreed to hold off on experts, formal discovery and the like, including my affidavit of experts.” The Kalenbergs served their initial expert affidavit on December 1, 2016, and argued to the court that they had good cause for missing the statutory affidavit-serving deadline.

The district court found that the Kalenbergs failed to submit the affidavit within the statutory period and that the parties never agreed to extend the deadline. The district court therefore dismissed the complaint with prejudice.

The Kalenbergs appeal.

D E C I S I O N

The Kalenbergs ask us to reverse the district court’s decision granting Moore and his law firms’ motions to dismiss based on the Kalenbergs’ failure to comply with the expert-affidavit requirement of Minnesota Statutes section 544.42 (2016). Expert affidavits are required in every “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.” Minn. Stat. 544.42, subd. 2. We generally review dismissals under this section for an abuse of discretion, but we address any legal issues, like whether the statute requires expert testimony and a corresponding affidavit, de novo. *Brown-Wilbert, Inc. v. Copeland Buhl & Co., P.L.L.P.*, 732 N.W.2d 209, 215 (Minn. 2007). The Kalenbergs argue that the expert-affidavit deadlines are irrelevant because the statute does not require an expert affidavit in this case. They argue alternatively that the district court abused its discretion by dismissing the suit because the parties agreed to toll the expert-affidavit deadlines. Neither argument prevails.

We reject the Kalenbergs' argument that they needed no expert to establish legal-malpractice liability here. To establish a prima facie case of legal malpractice a plaintiff must show (1) the existence of an attorney-client relationship; (2) acts of the attorney constituting negligence; (3) that such acts proximately caused the plaintiff's damages; and (4) that but for the attorney's conduct, the plaintiff would have been successful in the prosecution of the action. *Guzick v. Kimball*, 869 N.W.2d 42, 47 (Minn. 2015). "Expert testimony is generally required to establish the 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." *Jerry's Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 817 (Minn. 2006) (quotation omitted). We are certain that, without expert testimony, no lay jury could possibly know the legal standard of care to apply to Moore's litigation conduct and assess whether his alleged deficiencies failed that standard. The complexity of the allegations confirms this. The Kalenbergs' claims against Moore depend on a jury being able to understand, for example, just how it is that "Moore failed to argue all elements of the Summary Judgment Motion and erroneously focused on statutory cancellation, providing to the Court incomplete and inaccurate information and incorrect rulings of case law." We do not suppose that a typical juror understands enough about the meaning and application of case law as applied to statutory cancellation in the context of a summary-judgment motion to decide whether Moore's decisions were professionally deficient. We have reviewed the many allegations in the complaint and are satisfied that none could stand without expert testimony.

We recognize that there are legal-malpractice cases that do not require expert testimony. For example, the supreme court held that no expert testimony was necessary to support one component of a complex claim of legal malpractice—the lawyer’s dissemination of financial documents that exposed his client to harm. *Hill v. Okay Const. Co., Inc.*, 312 Minn. 324, 337–38, 252 N.W.2d 107, 116–17 (1977). But this was because the lawyer’s alleged deficiency, unlike any of the alleged deficiencies here, was apparent to the jury without an expert:

The jury found as fact that Ranta approved the execution and dissemination of the financial profiles. The testimony was uncontradicted, and the court found that Okay had instructed Ranta to protect it from the claims of Romans’ creditors. The impact of the financial profiles is obvious to any layman. The Hills recognized, as did the suppliers who received the profiles, that the profiles meant Okay would share responsibility for the debts incurred with Romans. If that were not obvious, the profiles would not have been necessary. Expert opinion would add nothing to that conclusion.

Id. A jury might similarly need no expert to assess a simple claim that an attorney missed an appeal-filing deadline or misappropriated client funds. But we have found no case holding that an attorney’s allegedly inadequate legal argument or insufficient discovery efforts can be established without an expert’s explanation of the standard of care.

Because the Kalenbergs’ legal-malpractice claims needed expert testimony, we must decide whether the district court acted within its discretion by dismissing their complaint for failure to timely file an affidavit of expert review. The penalty for failing to provide expert affidavits “within 60 days after demand for the affidavit” is “mandatory dismissal of each cause of action with prejudice as to which expert testimony is necessary

to establish a prima facie case.” Minn. Stat. § 544.42, subd. 6. The Kalenbergs recognize that they missed this deadline, but they argue that the district court should not have dismissed their suit because they held a good-faith belief that the parties had agreed to delay the deadline. The argument fails.

It is true that parties may, by agreement, allow for extensions of the time limits for the service of expert affidavits required by section 544.42. Minn. Stat. § 544.42, subd. (4)(b). But we see no basis to reverse the district court’s determination that the parties made no delaying agreement here. The Kalenbergs’ only evidence purportedly challenging the district court’s determination is the affidavit prepared by their attorney, Hanjani. But that affidavit does not even allege that the parties agreed to delay the deadline; in fact, it speaks only of Hanjani’s own oral statements and her desires at the October 2016 meeting of attorneys. It says that Hanjani “made it clear to counsel” that she and her clients would “be open and provide any and all documentation they requested.” It says that “we wished to work toward resolution prior to the filing of the Complaint, discovery and other documents.” And it says that “[Hanjani] also informed proceeding with informal discovery that our intention not to file was in part, to not make public the Complaint, to spare the Defendants.” These statements do not establish that any agreement to toll the expert-affidavit deadline was even discussed, let alone achieved.

On brief to this court, the Kalenbergs maintain that their expert-affidavit omissions resulted from their “reliance on the representations made by Counsel,” but they cite no such representations anywhere in the record. They also assert, “It was understood that any filing requirements would be tolled pending settlement discussions.” But tolling “any *filing*

requirements” would not avoid the *service* requirements at issue here, and even if this were not so, we have seen no written communication or even alleged oral communication that would warrant the claimed tolling understanding. We similarly see nothing in the record implying that the respondents’ attorneys took any action manifesting their intent to waive the 60-day service period after they demanded compliance. To the contrary, they submitted their own affidavit flatly denying that they ever agreed to extend any deadline. So even though a district court’s decision regarding the extension of a procedural statute’s time limits is discretionary and will not be reversed absent an abuse of that discretion, *Lake Superior Ctr. Authority v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458, 471 (Minn. App. 2006), in this case the district court had no factual basis on which it could have even considered extending the deadline.

In sum, all of the Kalenbergs’ claims against Moore and his law firms require expert testimony to establish a prima facie case of negligence or malpractice, and the Kalenbergs did not timely provide the statutorily required expert affidavits. They also failed to provide evidentiary support for their assertion that the parties agreed to toll the statutory deadline after the respondents demanded compliance. The district court properly followed the statute and dismissed the suit.

Affirmed.