STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1130

Proactive Imaging, LLC d/b/a Minnesota Radiology,
Plaintiff,

Dr. Gail Tasch, et al.,
Appellants,

vs.

Timothy J. Peters, et al.,
Respondents.

Filed May 6, 2019
Reversed
Jesson, Judge

Hennepin County District Court
File No. 27-CV-17-3924

Scott A. Johnson, Todd M. Johnson, Johnson & Johnson Law LLP, Minnetonka, Minnesota (for appellants)

Steven W. Kranz, Peters Law Firm, PLC, Minneapolis, Minnesota; and

Rhett A. McSweeney, McSweeney/Langevin, Minneapolis, Minnesota (for respondents)

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

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

JESSON, Judge

Appellants Dr. Gail Tasch and Clarence Ramsey challenge the district court's order awarding attorney fees to respondents Timothy J. Peters and Peters Law Firm, PLC as a discovery sanction under Minnesota Rule of Civil Procedure 37.01(d)(2). The district court denied appellants' motion to compel respondents to produce billing records related to a claim of aiding and abetting fraud, and it found that their request was not substantially justified. Because the district court clearly erred in finding that appellants' discovery request was not substantially justified, we conclude the district court's decision was an abuse of discretion and reverse.

FACTS

Appellants Dr. Gail Tasch and Clarence Ramsey purchased Proactive Imaging LLC (Proactive) in April 2013. Proactive is a diagnostic imaging service company previously owned by Physicians First Choice LLC (Physicians First), which was owned by Patrick Bartner and Angel Soto.[1]

During the three years before the sale, Proactive was a defendant in a civil lawsuit (the AAA litigation) in which it was accused by AAA Auto Club of participating in a Medicare and Medicaid insurance fraud scheme involving illegal kickbacks in exchange for patient referrals as well as theft by swindle. But the AAA litigation was settled on February 1, 2013. The settlement was acknowledged by the court on February 4, 2013,

[1] Bartner and Soto are not parties to this appeal.

and the parties signed a formal, written settlement agreement in late March 2013. The terms of the settlement required Proactive to pay the AAA plaintiffs $100,000 and waive its right to payment of all outstanding invoices.

Prior to purchasing Proactive in April 2013, appellants learned of the existence of the AAA litigation.[2] According to appellants, they were told that the lawsuit was not against Proactive, but instead against Bartner and Soto personally, and that all claims had been settled.

In March 2013, appellants and Physicians First executed a purchase agreement for all membership units of Proactive for $2.5 million. Respondents, attorney Timothy J. Peters and Peters Law Firm, PLC, represented Physicians First in the sale and finalized the amended purchase agreement after receiving a draft from appellants' attorneys. It is undisputed that respondents knew of the AAA litigation as of January 22, 2013 because on that day respondents received a disc from Proactive's AAA litigation counsel that included the pleadings, discovery, deposition transcripts, and court rulings in the AAA litigation.

Paragraph 16(k) of the amended purchase agreement, drafted by respondents, contained the following language:

> No litigation is pending, or has been threatened, against the Company and *no claims of a legal or equitable nature have been asserted* or, to their knowledge, threatened *against the Company* or any assets owned by the Company, nor are there any proceedings involving the Company threatened by or pending before any federal, state or municipal government, or any department, board, body or agency thereof.

[2] The sales packet about Proactive included a statement that a legal action was pending or threatened, with no further explanation.

(Emphasis added.)

Appellants contend that they interpreted this statement to be an assurance that no prior litigation had ever been asserted against Proactive. Respondents maintain that the representation was truthful and therefore did not constitute a breach of duty or a violation of disclosure laws.

The sale closed in late April 2013. Proactive's revenues declined after the sale, and in November 2014 appellants initiated a lawsuit against Bartner, Soto, and Physicians First alleging fraud and negligent misrepresentation in the sale of Proactive. Among other allegations, they asserted that Proactive's revenues were inflated by the fraud scheme outlined in the AAA litigation and that Proactive's owners had misrepresented the litigation as a personal lawsuit rather than a lawsuit against the company.

In April 2016, appellants settled their lawsuit against Bartner, Soto, and Physicians First. But a year later, they sued respondents for legal malpractice, fraud, breach of fiduciary duties, and negligent misrepresentation with regard to the sale of Proactive, contending that respondents knowingly assisted Bartner, Soto and Physicians First in misrepresenting and concealing the nature of the AAA litigation during the sale. Central to their claim was paragraph 16(k) of the amended purchase agreement. In July 2017, the district court dismissed all of appellants' claims against respondents except for the claim of aiding and abetting fraud.

During the pendency of this lawsuit appellants served discovery requests on respondents that asked for production of billing statements, invoices, time sheets, and descriptions of work respondents performed for Bartner, Soto, and Physicians First from

January 1, 2010 through June 1, 2014. Respondents objected to the production of such documents from before the sale of Proactive, claiming that the discovery sought was irrelevant or privileged. Appellants moved to compel discovery on a significantly narrowed portion of the documents, which consisted of just one year of billing statements related to the sale of Proactive.

In a January 2018 order, the district court denied appellants' motion to compel discovery, deeming the documents irrelevant to their claims based on Minnesota Rule of Civil Procedure 26.02. Specifically, the district court determined that the billing statements would not help prove that respondents had knowledge of the AAA litigation prior to closing the Proactive sale, and therefore could have little or no importance in resolving any issues in this case. The district court then found that the motion to compel was not substantially justified under Minnesota Rule of Civil Procedure 37.01(d)(2) and ordered appellants to pay respondents $5,739.50 in attorney fees and costs incurred in opposing the motion. This appeal follows.

D E C I S I O N

The sole issue before us is whether the district court abused its discretion when it found that appellants' motion to compel a year of respondents' billing records lacked substantial justification. We review a district court's decision to award attorney fees for an abuse of discretion. *Brickner v. One Land Dev. Co.*, 742 N.W.2d 706, 711 (Minn. App. 2007), *review denied* (Minn. Mar. 18, 2008). And we further note that "a district court abuses its discretion by making findings unsupported by the evidence, misapplying the law,

or reaching a clearly erroneous conclusion that is contrary to logic and the facts on record." *Johnson v. Johnson*, 902 N.W.2d 79, 84 (Minn. App. 2017).

Minnesota Rule of Civil Procedure 37 empowers district courts to issue orders compelling discovery and impose sanctions if those orders are not followed. Minn. R. Civ. P. 37.01, .02. And rule 37.01 requires the district court to award reasonable attorney fees to the nonmoving party for defending against a motion to compel discovery if the court denies the motion and finds that it was not substantially justified. Minn. R. Civ. P. 37.01(d)(2).[3] The rule states:

> If the motion is denied, the court . . . shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

Id.

Here, the district court's finding that appellants' request was not substantially justified, and its subsequent imposition of sanctions, hinged on its underlying ruling that the documents appellants sought—one year of billing statements—were not relevant. They were not relevant, the district court determined, because they were sought to prove respondents' *knowledge* of the AAA litigation but respondents had already admitted this was the case: before drafting paragraph 16(k) of the purchase agreement—which stated

[3] A discovery request is substantially justified when it is "justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S. Ct. 2541, 2550 (1988).

that no legal claims had been threatened or asserted—respondents knew of the AAA litigation.

This relevancy determination, which is at the heart of the district court's sanction, is based upon an erroneous view of the law. Minnesota Rule of Civil Procedure 26.02(b) allows parties to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401.

How are the billing records arguably relevant? We begin with the premise that appellants had a colorable claim for aiding and abetting fraud based upon the alleged misrepresentation in paragraph 16(k), which respondents drafted. That is why the district court dismissed appellants' other legal claims, but not this one.[4] And to establish a claim for aiding and abetting the tortious conduct of another, "(1) the primary tortfeasor must commit a tort that causes an injury to the plaintiff; (2) the defendant must know that the primary tortfeasor's conduct constitutes a breach of duty; and (3) the defendant must *substantially assist or encourage* the primary tortfeasor in the achievement of the breach."

[4] The district court further recognized in its order granting respondents' motion for summary judgment that appellants had a colorable argument regarding the meaning of the terms in the purchase agreement. The only language at issue was paragraph 16(k). While the district court concluded that appellants' interpretation of paragraph 16(k) was "not reasonable," it stated that this conclusion did not make the argument "frivolous." We note that appellants did not appeal the district court's grant of summary judgment and this appeal is limited to the assessment of attorney fees against them for seeking the billing records.

Witzman v. Lehrman, Lehrman & Flom, 601 N.W.2d 179, 187 (Minn. 1999) (emphasis added).

It is the third element necessary to prove aiding and abetting the tortious conduct of another—substantial assistance—that makes the billing records relevant. Did respondents "substantially assist or encourage" Bartner and Soto's alleged fraud? Appellants asserted before the district court that the billing records could lead to information about the number of times respondents met with Bartner and Soto during the drafting of paragraph 16(k); how many phone conferences they had; how long the calls lasted; and whether Bartner and Soto were billed for creating multiple drafts of the paragraph. This information could tend to prove, they asserted, whether respondents substantially assisted Bartner and Soto in the perpetration of the alleged fraudulent representation of the status of the AAA litigation.

We agree with appellants. The district court narrowly focused on the proof of respondents' knowledge of the AAA litigation. It did not address the potential relevance of the billing records to the element of providing substantial assistance to the alleged fraudulent behavior. Because the billing-statements request could reasonably have led to the admissibility of relevant evidence, it was substantially justified.

Still, respondents argue that the request for billing records was not substantially justified because respondents had already admitted to knowledge of the AAA litigation in deposition testimony. But this testimony wavered in respect to how much respondents knew about the AAA litigation. Specifically, respondent Peters admitted in a deposition to knowledge that "claims of a legal nature" had been asserted against Proactive prior to the April 2013 sale, but then later stated that "[n]o claims had been asserted" against

Proactive. Similarly, respondent Peters claimed in deposition testimony and in affidavits to the district court that no one at Peters Law Firm had reviewed the AAA litigation documents provided by Proactive's counsel in January 2013, but later admitted to reviewing the summary-judgment briefs.

But whether respondent Peters' testimony about his knowledge wavered is beside the point. Regardless of whether or not respondents had definitively admitted to knowledge of the existence and substance of the AAA litigation, and while the billing records would perhaps be cumulative evidence of such knowledge, they remain clearly relevant to proving the substantial assistance element of aiding and abetting fraud. Accordingly, the district court erred in awarding attorney fees based on a finding that appellants' request was not substantially justified.

Reversed.