

2015 WL 1070341 (Minn.) (Appellate Brief)  
Supreme Court of Minnesota.

Timothy GUZICK, as Personal Representative of the Estate of George  
J. Nyberg and as Trustee of the George Nyberg Trust, Respondent,

v.

Larry Alan KIMBALL, Kimball Law Office, and Kimball and Udem, Appellants,  
and  
Colleen BENETT, Defendant.

No. A14-0429.  
February 27, 2015.

**Respondent's Brief**

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**\*1 STATEMENT OF LEGAL ISSUES**

1. Does [Minn. Stat. § 544.42, subs. 2\(2\) and 4](#) require a plaintiff in a legal malpractice action to provide an expert witness disclosure and testimony to establish but-for causation where technical or specialized knowledge is not necessary to assist the trier of fact?

Appellants raised the issue of whether expert testimony was required in this legal malpractice action to the District Court in their Motion for Summary Judgment. (APP 053-057. <sup>1</sup>) The District Court concluded expert testimony was required with regard to causation because lay jurors lack knowledge about causation as it relates to legal malpractice. (ADD. 017.) The Court of Appeals held that expert testimony is necessary to establish the element of proximate cause but is not required to establish the element of but-for causation. (ADD 032.)

Apposite Cases:

[Jerry's Enters., Inc. v. Larkin, Hoffman, Dal. & Lindgren, Ltd.](#), 711 N.W.2d 811 (Minn. 2006)

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[First Bank of Minn. v. Olson](#), 557 N.W.2d 621 (Minn.Ct.App.1997), pet. for rev. denied (Minn. Mar. 18,1997)

2. Does [Minn. Stat. § 544.42, subds. 2\(2\) and 4](#) require a plaintiff in a legal malpractice action to provide an expert witness disclosure and testimony to establish an attorney-client relationship?

Appellants raised the issue of whether expert testimony was required in this legal malpractice action to the District Court in their Motion for Summary Judgment. (APP 053-057.) The District Court concluded expert testimony was required with regard to whether an attorney-client relationship was established because lay jurors have no basis upon which to answer questions as to same. (ADD 017.) The Court of Appeals held that “expert testimony is not required to establish the existence of an attorney-client relationship,” noting there is no legal authority requiring same. (ADD 028-029.)

\*2 Apposite Cases:

[Admiral Merchs. Motor Freight, Inc. v. O'Connor & Hannan](#), 494 N.W.2d 261 (Minn. 1992)

[Brown-Wilbert, Inc. v. Copeland Buhl & Co., P.L.L.P.](#), 732 N.W.2d 209 (Minn. 2007).

[Jerry's Enters., Inc. v. Larkin. Hoffman, Daly & Lindgren, Ltd.](#), 711 N.W.2d 811 (Minn. 2006)

3. Did the Court of Appeals correctly conclude that Respondent's Affidavit of Expert Review and interrogatory answers provided sufficient meaningful information to meet the minimum standards for an affidavit of expert disclosure pursuant to [Minn. Stat. § 544.42, subd. 4\(a\)](#)?

Appellants raised the issue of whether Respondent failed to comply with the requirements of [Minn. Stat. § 544.42](#) to the District Court in their Motion for Summary Judgment. (APP 054-057.) The District Court held Respondent's expert review affidavit and answers to interrogatories were “grossly deficient.” (ADD 019.) The Court of Appeals held, under an abuse of discretion standard of review, that Respondent's Affidavit of Expert Review and interrogatory answers were sufficient to satisfy the minimum expert disclosure requirements identified in *Brown-Wilbert*. (ADD 042.)

Apposite Cases:

[Brown-Wilbert, Inc. v. Copeland Buhl & Co., P.L.L.P.](#), 732 N.W.2d 209 (Minn. 2007).

### **\*3 STATEMENT OF THE CASE**

Appellants moved for summary judgment on all claims, which motion was granted in its entirety. (ADD 005.) The District Court dismissed the legal malpractice claim for Respondent's failure to comply with the expert disclosure requirements of [Minn. Stat. § 544.42, subd. 4\(a\)](#). (ADD 005.) In doing so, the District Court also denied Respondent the right to cure the disclosure under the safe harbor provisions of [Minn. Stat. § 544.42, subd. 6\(c\)](#). (ADD 005.) The negligence claim against Appellant Bennett was dismissed for lack of a professional duty of care on the part of Bennett since she was not licensed to practice law, and for lack of any other duty of care. (ADD 010-011.) An unauthorized practice of law aspect of the claim against her was also dismissed because the District Court determined she was acting in her role as legal secretary and her preparatory work was under the supervision of an attorney, thus merging into the work of the supervising attorney. (ADD 011-012.)

With respect to dismissal of the legal malpractice claims against Appellants Kimball and the law firms, the District Court initially concluded expert testimony was required to establish not only the applicable standard of care and whether the attorney's conduct deviated from the standard, but also to establish the attorney-client relationship and causation. (ADD 007.)

The District Court then concluded Respondent's expert disclosures, taking the form of an expert review affidavit pursuant to [Minn. Stat. § 544.42, subd. 3\(a\)\(1\)](#) and Respondent's answer to an expert interrogatory, “... do not set forth \*4 the standard of care, nor do they present an expert opinion that Kimball's violation of the standard of care directly caused injury to

Plaintiff.” (ADD 009.) The District Court further concluded the disclosures “... do not merely contain minor defects - they are grossly deficient and wholly fail to provide the information required by statute and case law.” (ADD 010.) The District Court also concluded the disclosure failed to even identify the expert expected to testify at trial. (ADD 008.)

The Court of Appeals held that expert testimony is not necessary to establish the elements of attorney-client relationship and but-for causation, but is required to establish the elements of negligence and proximate causation. (ADD 032.) The Court of Appeals also held that Respondent's Affidavit of Expert Review and interrogatory answers were sufficient to satisfy the minimum expert-disclosure requirements identified in *Brown-Wilbert*. (ADD 042.)

### STATEMENT OF THE FACTS

Appellant's initial complaint named Appellants Larry Alan Kimball (Kimball) and Kimball Law Office as defendants, asserting a legal malpractice claim against them. (APP 009.) An amended complaint also named Appellant Kimball and Udem, Kimball's former firm, Defendant Colleen Bennett, a 20-year legal secretary/assistant of the law firms, re-asserted the legal malpractice claims against Kimball and his law firms, and asserted a negligence claim against Bennett. (APP 020-034.)

\*5 The specific facts surrounding Respondent's [Minn. Stat. § 544.42, subd. 4\(a\)](#) expert disclosure are these. In an answer to Appellants' expert interrogatory (no. 7) that requested the identity of “... each expert witness whom you expect to call as a witness at trial”, and with respect to each, the substance of the facts and opinions to which the expert was expected to testify, and a summary of the grounds for each opinion, Respondent stated, “Susan E. Johnson-Drenth, a Certified **Elder** Law Attorney (CELA), has been retained as an expert by Tim Guzick.” (APP 281.) The interrogatory answer went on to state, “See the Affidavit of Expert Review.” (APP 281.)

The Affidavit of Expert Review, provided to Appellants earlier in the litigation pursuant to [Minn. Stat. § 544.42, subd. 3](#) and authored by Respondent's counsel Lori Beck, stated, in pertinent part, “I have reviewed the facts alleged in the Complaint in the above-entitled matter with Susan E. Johnson-Drenth, a Certified **Elder** Law Attorney (CELA), certified by the National **Elder** Foundation.” (APP 271.) The following is a summary of pertinent facts from the Complaint reviewed by counsel Beck with expert Johnson-Drenth.

Louis Nyberg Jr. (Tony) told Defendant Bennett, a legal assistant of Appellant Larry Kimball for over 19 years (APP 004,114), that his uncle, George Nyberg (George), wanted a power of attorney authorizing Tony to act as attorney-in-fact for his uncle, George. (APP 004, ¶17.) George was 94 years of age and recovering from a recent fall fracturing his neck, making it difficult to get around in the winter. (APP 006, ¶18.) George was the client of Kimball Law Office for \*6 whom the power of attorney was prepared, a contract and an attorney-client relationship between Kimball and Kimball Law Office being inferred, because Tony's request was made on behalf of George, and Bennett on behalf of Kimball and Kimball Law Office prepared it. (APP 006, ¶15.)

Bennett set up a time for George to call Kimball to discuss the power of attorney form but did not know if the call took place. (APP 005, ¶9.) Bennett went ahead anyway and prepared the power of attorney from a Minnesota Statutory Short Form Power of Attorney that was on the computer at Kimball Law Office. (APP 004-005, ¶8.) The form Bennett prepared was attached as Exhibit A to the Complaint, and the checkmarks on the form were electronically and automatically printed from the computer. (APP 005, ¶11.) The form offered two choices regarding authorization to transfer the principal's property to the attorney-in-fact, one authorizing same, one not; the form was pre-checked to authorize the attorney-in fact, here Tony, to transfer George's property to Tony. (APP 005, ¶12 & APP 016-017.) The form stated that it was drafted by Kimball Law Office. (APP 006, ¶14 & APP 016-017.)

On December 11, 2008, Bennett took the form (APP 016-017) to George's residence given the winter, George's age, and recent neck fracture (APP 006, ¶18). Bennett did not talk with George about his reasons for wanting a power of attorney, whether Tony was the appropriate person to be the attorney-in-fact, what authority George wanted to give Tony or which lines George wanted checked on the form (APP 004-005, ¶8 & 007, ¶20), nor did she discuss with \*7 him the breadth of authority granted to the

attorney-in-fact or the risks of such broad authorizations (APP 007, 1120). Bennett did not recall asking George whether he had read the form, and she did not see him read it, before he signed it. (APP 006-007, ¶19) She did not know and did not ask anyone about whether George had talked to an attorney at Kimball Law Office about the form, before he signed it. (APP 007, 21.) She showed George where to sign on the form, notarized his signature, and then left his residence with the original. (APP 007, ¶ 22.)

Bennett took the original signed power of attorney form back to Kimball Law Office, made copies, keeping one for the firm, and sent a copy to Tony to give to George. (APP 007, ¶ 23.) Kimball Law Office billed George for preparation of the power of attorney form. (APP 006, ¶16.)

George never intended for Tony to be a joint owner with a right of survivorship of Wells Fargo accounts owned by George, his Estate or his Trust, which was contrary to George's estate plan as expressed in his Will and Trust, and never intended for Tony to receive the \$226,524.39 taken by Tony from those accounts. (APP 013, 1 46.) George wanted an attorney-in-fact to handle his banking transactions because it was physically difficult for him to get to the bank. (APP 013, ¶48.) Had he known and understood the risks, he would never have signed such broad authorizations, which were not necessary for Tony to handle George's banking transactions. (APP 013, ¶ 48.)

\*8 On January 3, 2009, Tony took George to the hospital in a confused and disoriented state. (APP 007, ¶ 24.) On January 4, 2009, using the power of attorney, Tony went to the local Wells Fargo bank and added his name as joint owner with right of survivorship on two of George's accounts, and transferred money into the two joint accounts from other accounts owned by George and George's Trust. (APP 008, ¶ 25.)

George died on January 7, 2009. (APP 008, ¶26.) Before and after his death, Tony transferred from the joint accounts a total of \$226,524.39, which was all of George's money that Tony had combined in the two joint accounts, to accounts owned by or for the benefit of Tony and his wife Kathleen Lausche. (APP 008, ¶26.)

Respondent, in his capacity here, commenced a conversion action against Tony and his wife for conversion in Hubbard County District Court, following which the two filed bankruptcy (APP 008,127), staying the Hubbard County case (APP 008-009, ¶ 28). Respondent then commenced an adversarial proceeding in the bankruptcy case, which was tried to conclusion, and in which Respondent was awarded a non-dischargeable judgment in the amount of the entire \$226,524.39 converted, docketed in Hubbard County. (APP 008-009, ¶ 28, 29.) The judgment remains unsatisfied. (APP 009, ¶29.) Respondent also commenced a lawsuit against Wells Fargo to recover the money Tony converted from George's Wells Fargo accounts using the power of attorney. (APP 009, ¶30.) Respondent incurred legal fees of \$168,852.00 and costs of \$21,618 in the \*9 three legal proceedings attempting to recover the converted funds. (APP 009, ¶ 31.)

In light of the Complaint facts incorporated into the [Minn. Stat. § 544.42, subd. 3\(a\)\(1\)](#) expert review affidavit, in turn incorporated into Respondent's answer to expert interrogatory no. 7, the affidavit further stated:

4. In the opinion of Susan E. Johnson-Drenth, Defendant Larry Kimball deviated from the applicable standard of care, and by that action caused damages to Tim Guzick. In Susan E. Johnson-Drenth's opinion, Larry Kimball breached his duty to use a reasonable degree of professional skill and learning possessed by attorneys in a similar practice and in like circumstances, and failed to use reasonable care, causing damages to Plaintiff Tim Guzick, when he:

- a. failed to supervise Colleen Bennett, his legal assistant at Kimball Law, in the drafting of the Minnesota Statutory Short Form Power of Attorney that she provided to George Nyberg;
- b. failed to have in effect measures, including internal policies and procedures, designed to provide reasonable assurance that the conduct and work of its employees, including Colleen Bennett, were compatible with the professional obligations of Larry Kimball and Kimball Law;

- c. failed to meet and talk with George Nyberg to assess his reasons for needing or wanting an attorney-in-fact;
- d. failed to meet and talk with George Nyberg to assess his legal capacity and competency to make choices in regard to the authority to be given to the attorney-in-fact and to understand and sign the subject Minnesota Statutory Short Form Power of Attorney;
- e. failed to meet and talk with George Nyberg to be assured that George Nyberg was not acting under undue influence or duress;
- f. failed to explain the meaning and scope of the authority that would be given to the attorney-in-fact, according to [Minnesota Statute §523.24](#), if the powers listed in the subject Minnesota Statutory Short Form Power of Attorney were granted to the attorney-in-fact;
- g. failed to discuss the risks of granting the attorney-in-fact the broad powers that could be granted with the form;
- \*10 h. failed to assess whether Tony Nyberg was the appropriate person to name as George Nyberg's attorney-in-fact;
- i. failed to discuss in detail George Nyberg's wishes as to which lines should be checked on the Minnesota Statutory Short Form Power of Attorney (Making checkmarks on the lines on the form was how the principal gave authority to the attorney-in-fact to do various things, such as acting for the principal in gifting and banking transactions and transferring the property of the principal to the attorney-in-fact. In this case, the lines on the subject power of attorney form were pre-checked for all clients of Kimball Law without regard for the particular circumstances or consequences.); and
- j. failed to send the draft of the Minnesota Statutory Short Form Power of Attorney to George Nyberg's residence to be assured that he received it unaltered (rather, Colleen Bennett sent the form to her friend, Tony Nyberg, to present to George Nyberg).

4. [sic] The acts and omissions of Larry Kimball and Kimball Law described above caused damages to Tim Guzick in the amount of \$226,524, which is the total amount Tony Nyberg took from accounts owned by George Nyberg, his Estate, and his Trust using the subject Minnesota Statutory Short Form Power of Attorney that was provided to him by Colleen Bennett of Kimball Law; \$168,852 in attorney's fees and \$21,618 in costs incurred in Tim Guzick's lawsuits against Tony Nyberg in Hubbard County District Court and United States Bankruptcy Court and against Wells Fargo Bank in Beltrami County District Court.

(APP 272-274.)

The record below further reflects that Respondent's expert considered the entirety of the Complaint in connection with Respondent counsel's consult with her and corresponding preparation of the expert review affidavit. In this regard, the Complaint identifies a number of very case-specific duties owed by Appellant Kimball in paragraphs 35, 36, 40, 41, and 43, and corresponding case-specific breaches of said duties in paragraphs 35, 38, 40, 41, 42, and 43. (APP 010-012.) In addition, the Complaint, from the standpoint of the expert's review of the \*11 same, identifies case-specific allegations in paragraphs 33 and 37 concerning the attorney-client relationship between Appellant Kimball and George in the preparation of the power of attorney for George, and case-specific allegations of causation in paragraphs 34, 44, and 48. (APP 009-010, 012-013.)

The following additional facts were disclosed in the balance of the interrogatory answers that accompanied Respondent's answer to expert interrogatory no. 7. Tony's mother, Geraldine Nyberg ("Geraldine"), also **elderly**, requested of Kimball a power of attorney granting attorney-in-fact powers relating to her **financial** affairs. (APP 239.) While in Kimball's office making that request, Geraldine advised him that George, Geraldine's brother-in-law, and with whom Geraldine resided, also requested a power of attorney granting attorney-in-fact power to conduct banking transactions for him. (APP 239.)

When Bennett scheduled the phone conference for Kimball and George to discuss the power of attorney (a fact alleged in the Complaint), she put the conference on Kimball's calendar. (APP 211.) Kimball did not recall looking at his calendar and

therefore did not recall having the phone conference with George, though he said he looked at the calendar daily. (APP 244, 293-294.) When Bennett prepared the power of attorney forms for Geraldine and George, she put them in the client file. (APP 213.) In a discovery response, Kimball stated, “Colleen Bennett prepared a statutory short form power of attorney for George Nyberg, as principal, at the direction of Larry Kimball based on a request by \*12 Geraldine Nyberg.” (APP 133.) Bennett assumed George was the client of the law firm (with respect to George's form). (APP 286-287, 213-214.)

Geraldine, Tony, and Tony's wife were also present when Bennett arrived with the forms for execution, and Tony introduced Bennett as, “Colleen from the lawyer's office with the power of attorney forms ....” (APP 214.) George and Geraldine signed their respective forms, and Bennett notarized them. Kimball had not discussed with George the power of attorney form George signed. (APP 241, 247-248.) The bill Bennett sent for George's power of attorney was paid by Tony, and George reimbursed him. (APP 286-287.)

George had an amended estate plan prepared for him in March 2006, with a trust in place, and neither named Tony as a beneficiary. (APP 288-292.) He simply wanted his attorney-in-fact to do his banking for him. (APP 288-292.)

See also Appellant's Memorandum of Law in Opposition to Respondent's Summary Judgment Motion for a detailed recitation of facts germane to the claim. (APP 164-308.)

### \*13 STANDARD OF REVIEW

On appeal, a district court's dismissal of an action for procedural irregularities is reviewed under an abuse of discretion standard, but “where a question of law is present, such as statutory construction, we apply a de novo review.” *Brown-Wilbert, Inc. v. Copeland Buhl & Co., P.L.L.P.*, 732 N.W.2d 209, 215 (Minn. 2007). Dismissal of a malpractice claim for noncompliance with statutory requirements relating to expert affidavits will be reversed only upon an abuse of discretion. *Broehm v. Mayo Clinic Rochester*, 690 N.W.2d 721, 725 (Minn.2005) (reviewing dismissal of complaint for noncompliance with expert disclosure). Questions of statutory construction and applicability are legal questions reviewed de novo. *Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 190 (Minn.1990).

### \*14 ARGUMENT

#### **I. The Court of Appeals Correctly Held Respondent Satisfied the Element of Proximate Causation and Did Not Need Expert Testimony for the Element of But-For Causation**

To recover in a legal-malpractice case, a plaintiff must establish a prima facie case as follows: (1) the existence of an attorney-client relationship; (2) attorney negligence or breach of contract; (3) that such acts were the proximate cause of damages; and (4) that but for the attorney's conduct, the claimant would have been successful in the prosecution of the action. *Jerry's Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 816-17 (Minn.2006). When a plaintiff claims that an attorneys negligence causes harm by some means other than damaging a cause of action, Minnesota courts have altered the fourth element (the but-for causation element) to fit the facts of that particular case. See *First Bank of Minn. v. Olson*, 557 N.W.2d 621,623 (Minn.Ct.App.1997), pet. for rev. denied (Minn. Mar. 18,1997); see also *Hill v. Okay Constr. Co.*, 312 Minn. 324,338, 252 N.W.2d 107,117 (1977) (explaining that where the attorneys alleged negligence has caused the loss of or damage to the clients existing cause of action, the client asserting malpractice must also prove that but for the attorneys negligence, “he had a meritorious cause of action originally.”) Thus, the but-for element does not apply to cases that concern merely negligent advice by an attorney and that do not arise from a foregone claim or defense in an underlying cause of action. *Fiedler v. Adams*, 466 N.W.2d 39,42 (Minn. Ct. App. 1991) pet. for rev. denied (Minn. Apr. 29,1991), reconsideration denied \*15 (Minn. May 23,1991). In such cases, causation is shown if an attorneys negligent advice is a substantial factor in the damages. *Id* at 43.

In *Fiedler*, an attorney with numerous, undisclosed conflicts of interest, provided **financial** and tax planning advice to the plaintiffs. *Id* at 41. After sustaining heavy losses and incurring high tax penalties, they sued their attorney for malpractice.

Id. The trial court granted summary judgment because the plaintiffs failed to show that but for the attorneys negligence, they “would have taken specific action and those actions would have had specific results in the underlying commercial transactions.” [Id. at 41-42](#). The Court of Appeals held the “case within a case” requirement was inapplicable because the plaintiffs “did not assert the destruction of a cause of action.” [Id. at 42](#). Instead, the plaintiffs claimed their attorney “negligently withheld information material to their decision to take a specific course of action, and [he] should be liable for the losses suffered as a result of the action taken without the benefit of the undisclosed information.” Id. The Court of Appeals held the plaintiffs sufficiently produced expert testimony on the required issues of standard of care and damages, thus the trial court improperly granted summary judgment. [Id. at 43](#). The Petition for Review of this decision and a reconsideration of the denial was declined by this Court. Id

In the present case, the Court of Appeals found that Respondents Affidavit of Expert Review sufficiently established the element of proximate causation by outlining the ten breaches by Appellant Kimball. The Affidavit of Expert Review \*16 sufficiently provided the explanation of how Appellants' negligence was a “substantial factor” in bringing about the damages. The Court of Appeals found, consistent with caselaw, that but-for causation was not necessary in the present case. Here, as in *Fiedler*, Respondents claims are not based on the damage done to the cause of action, but instead are based on Appellants' negligent advice, or lack thereof, regarding the power of attorney form.

Appellants mistakenly argue that the Court of Appeals made a blanket ruling that “expert testimony is not required to prove but-for causation in any legal malpractice case.” (Appellants' Brief, p. 12) (emphasis added). However, this argument ignores the Court of Appeals recognition that but-for causation is a requirement in cases “not involving a failed cause of action.” (ADD 030.) In reaching its decision that but-for causation is not required in the present case, the Court of Appeals explained that “an expert cannot answer the question of whether George would have signed or limited the power-of-attorney form if [Appellants] had provided him with more information.” (ADD 031.) This is the very reason why Minnesota courts modified the required elements in cases where the claim does not involve the alleged destruction of a cause of action. An expert can easily testify as to the merits of the underlying case and the potential of success had the attorney's negligence not destroyed a cause of action. But in cases such as the present one, where negligent advice (or lack thereof) causing damage is the claim, the “case-within-a-case” element is inapplicable and a modified application of whether Appellants' negligence was the proximate cause of \*17 Respondent's loss is appropriate. *See Jerry's Enterprises, Inc.*, 711 N.W.2d at n. 2 (recognizing but-for cause not eliminated, but instead merged with the proximate cause element). The Court of Appeals' holding is consistent with caselaw and the realities of the different kinds of legal malpractice claims and should be affirmed.

## **II. The Court of Appeals Correctly Held that Expert Testimony Is Not Required On the Issue of Whether There Is an Attorney-Client Relationship**

The existence of an attorney-client relationship is “usually a question of fact dependent upon the communications and circumstances.” *Admiral Merchs. Motor Freight, Inc. v. O'Connor & Hannan*, 494 N.W.2d 261, 265 (Minn.1992). An attorney-client relationship may be established under either a contract or a tort theory. *Pine Island Farmers Coop. v. Erstad & Riemer. P.A.*, 649 N.W.2d 444, 448 (Minn.2002). Brown-Wilbert does not require an expert disclosure relating to the existence of the attorney-client relationship. [732 N.W.2d 209](#). A logical and reasonable explanation for this is the idea that an experts opinion on this issue is not necessarily helpful for a jury to adequately evaluate whether the relationship existed for purposes of the claims made. This Court has held expert testimony is generally required to establish the prima facie elements relating to standard of care and its breach, but has not held expert testimony is necessary to establish an attorney-client relationship existed. *Jerry's Enters.*, [711 N.W.2d at 816-17](#).

Here, the existence of an attorney-client relationship is clear where “Bennett prepared the statutory short form power of attorney for George Nyberg, \*18 as principal, at the direction Larry Kimball based upon a request by Geraldine Nyberg.” (APP 133.) Based on this fact alone, a jury is fully capable of understanding this direction created an attorney-client relationship. In addition, as described below, a jury is fully capable, in its application of the particular facts of this case to contract law, without the benefit of expert testimony, of adequately evaluating whether or not the relationship existed.

Under a contract theory, an agreement must be shown based on the circumstances, relationship, and conduct of the parties.” [High v. Supreme Lodge of the World](#), 210 Minn. 471, 473, 298 N.W. 723, 725 (1941). The agreement may be express or implied. [In Re Perry](#), 494 N.W.2d 290,295 (Minn. 1992).

In the instant case, George's sister-in-law Geraldine brought George's need for a power of attorney to Appellant Larry Kimball's attention while in his office making a request for her own power of attorney. George's need for a power of attorney was to conduct ordinary banking transactions and was driven by the fact he was 94 years of age and recovering from a recent fall fracturing his neck, making it difficult for him to get around in the winter. Tony also brought George's need for a power of attorney to the attention of Kimball's assistant Bennett. Bennett responded by setting up a time for Kimball and George to discuss George's power of attorney over the phone, and also put the phone conference on Kimball calendar. She then prepared the power of attorney form and left it for Kimball's review. Without confirming whether George and Kimball had talked, she took the powers of attorney she had drafted for both George and \*19 Geraldine to their joint residence, where they were signed by them and notarized by Bennett. She took George's original power of attorney back to the office, made a copy for the office, prepared a bill on Kimball Law Office letterhead for preparation of the document, and sent it to George. Tony paid the bill and George reimbursed him for it.

The inference is clear that Bennett assumed George and Kimball had talked, and that George was a client of the firm. The District Court dismissed the various claims against Bennett concluding in so many words that Bennett was working for Kimball in a legal capacity as opposed to practicing law herself, her work thus merging with the work of Kimball, her supervising attorney. (ADD 020-022.) The District Court's conclusion in this regard was actually consistent with the existence of an attorney-client relationship.

In this regard, and at a minimum, an implied oral contract was created between Appellants and George for preparation of the power of attorney. George had requested a power of attorney, Kimball himself was aware of it, and Bennett, at the direction and supervision of Kimball, prepared the document, delivered it, obtained George's signature on it, notarized it, billed George for it on Kimball Law Office letterhead, and Kimball Law Office accepted payment for the services. The services requested were accepted and performed by the firm. A jury is certainly capable of understanding, without expert testimony, these facts created an attorney-client relationship.

\*20 Expert testimony is certainly not necessary under these particular factual circumstances for a jury to evaluate the existence of at least an implied oral contract for an attorney-client relationship. A jury under these circumstances is fully capable of listening to this evidence and adequately evaluating, with the benefit of the law alone, whether or not a contract for an attorney-client relationship indeed existed. Juries are called upon routinely to make fact determinations without the benefit of expert testimony on contract facts more complex than the facts surrounding the contract at issue here. The mere fact the contract concerns an attorney-client relationship does not in and of itself compel expert testimony.

The Court of Appeals correctly held there is no legal authority requiring expert testimony as to the existence of an attorney-client relationship. (ADD 028.) While Appellants claim the Court of Appeals' ruling creates a “new relaxed rule” which will allow basically any plaintiff to bring a legal malpractice claim (Appellant's Brief, p. 22), this argument undermines the jury's role and unnecessarily puts the facts of the case in the hands of experts, regardless of whether expert testimony would be helpful on the issue.

The Court of Appeals appropriately recognized “expert testimony in this case would not assist a jury in understanding whether George and Kimball formed an attorney-client relationship.” (ADD 029.) The existence of an attorney-client relationship does not entail “scientific, technical, or other specialized knowledge” See [Minn. R. Evid. 702](#). While the underlying litigation of this case \*21 may seem complex, the actual facts of how George failed to receive adequate legal advice are not. Appellants directed Bennett to prepare the power of attorney form, supervised same, and then billed George for the services. There is little an expert could add to help the jury understand these facts. The Court of Appeals correctly held the straightforward facts of the

case clearly imply the formation of a contract for legal services, and therefore “technical or specialized knowledge” in the form of expert testimony is not required to establish the existence of an attorney-client relationship. (ADD 029.)

### III. The Court of Appeals Correctly Held that Respondent's Affidavit and Interrogatory Answers Were Sufficient to Satisfy the Requirements of [Minn. Stat. § 544.42, subd. 2\(2\) and 4](#)

[Minn. Stat. § 544.42, subd. 4\(a\)](#) provides as follows:

The affidavit required by subdivision 2, clause (2), must be signed by the party's attorney and 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. *Answers to interrogatories that state the information required by this subdivision satisfy the requirements of this subdivision if they are signed by the party's attorney and served upon the opponent within 180 days after commencement of the action against the defendant or within 180 days after service of the affidavit required by subdivision 3, paragraph (a), clause (2) or (3).*

[Minn. Stat. § 544.42, subd. 4\(a\)](#) (emphasis added).

Pursuant to [Minn. Stat. § 544.42, subd. 2\(2\)](#), Respondent served upon Appellants an answer to Appellants' expert interrogatory that: (a) identified \*22 Respondent's expert; and (b) and specifically referenced the initial expert review affidavit (which also identified the expert). Assuming the initial expert review affidavit was sufficient to accomplish the substantive purposes of subdivision 4(a) of the statute, Respondent's expert interrogatory answer lacked nothing with respect to the required form or substance of the disclosure to be provided. Appellants' position that no expert disclosure was made from a procedural standpoint is without merit.

With respect to the required substance of the subdivision 4(a) disclosure, in *Brown-Wilbert*, this Court set forth the minimum standard for an affidavit of expert disclosure as an affidavit that provides:

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 that standard; and (4) summarizes the experts opinion that the defendants departure was a direct cause of the plaintiffs injury.

[732 N.W.2d at 219](#). This Court explained it “is undoubtedly true that an affidavit may be sufficient to satisfy the 180-day requirement even though it contains minor deficiencies.” *Id. at 217*. The central question before the District Court was whether the disclosure met the minimum standards entitling the party making the disclosure to the safe harbor, or was so grossly deficient in failing to provide anything other than the attorneys conclusory statements without meaningful information that dismissal was warranted.

\*23 The District Court here not only overlooked the prospect that the disclosure in question, in the form of an expert interrogatory answer incorporating the expert review affidavit, contained only minor deficiencies, let alone no deficiencies, but concluded without due consideration the disclosures were “grossly deficient and wholly fail to provide the information required by statute and case law.” (ADD 019.) Appellants argue “Respondent's initial Affidavit of Expert Review was never intended to fulfill the requirements of the second 180-day affidavit required by [Minnesota Statute § 544.42, subd. 4](#).” (Appellants' Brief, p. 40.) This argument ignores the fact that Respondent specifically referenced the Affidavit of Expert Review in his Answers to Interrogatories. (APP 281.) This argument also ignores the fact that even a cursory review of the Affidavit of Expert Review

reveals the Affidavit provided much more information than is required under [Minn. Stat. § 544.42, subd. 3](#) (APP 083-086) and that answers to interrogatories are explicitly allowed to satisfy the requirements of [Minn. Stat. § 544.42, subd. 4](#), which method Respondent utilized.

An analysis of the record here reveals Respondent sufficiently satisfied each of the four prongs set forth in *Brown-Wilbert* entitling him to survive Appellants' motion to dismiss and at a minimum, entitling him to the safe harbor provisions permitted by [Minn. Stat. § 544.42, subd. 6\(c\)](#).

The interrogatory answer and the expert review affidavit provided Appellants with the identity of the expert, and meaningful information about the \*24 expert's opinion on the standard of care, how Appellants departed from that standard of care, and that this departure was a direct cause of Respondent's injuries<sup>2</sup>. Appellants argue the Court of Appeals erred by following the wrong standard of review and reversing the District Court's Order<sup>2</sup> because it was “neither based upon an erroneous view of the law, unsupported by the facts in the record, nor a misapplication of the law.” (Appellants' Brief, p. 28.) However, this argument is based on Appellants' view that “the District Court's decision was not unsupported by the facts.” (Appellants' Brief, p. 36.) As explained below and by the Court of Appeals in its opinion, by examining the facts applicable to each prong of *Brown-Wilbert*, the evidence shows Respondent sufficiently satisfied the minimum requirements, therefore, the District Court's decision was unsupported by the facts and the Court of Appeals properly reversed the erroneous decision.

#### **A. Respondent satisfied the first prong of *Brown-Wilbert* by identifying his expert**

The District Court's failure to fully recognize the disclosure Respondent provided is demonstrated by the broad conclusion that Respondent's disclosure was grossly deficient and the finding that, “Plaintiff also fails to disclose the identity of the expert to be called at trial.” (ADD 018.) The interrogatory in question begins, “Identify each expert witness whom you expect to call as a \*25 witness a trial.” The answer states: “Susan E. Johnson-Drenth, a Certified **Elder** Law Attorney (CELA), has been retained as an expert by Tim Guzick. See the Affidavit of Expert Review.” (APP. 281.) The affidavit in turn states near the beginning, “I have reviewed the facts alleged in the Complaint in the above-entitled matter with Susan E. Johnson-Drenth, a Certified **Elder** Law Attorney (CELA), certified by the National **Elder** Law Foundation.” (APP. 271.) The District Court's conclusion that the expert identification requirement of the statute was not met is obviously erroneous and the Court of Appeals agreed the District Court erred. The Court of Appeals held while the interrogatory answer “does not explicitly state that he intends to call Susan Johnson-Drenth as an expert witness, he offered her name in response to a question asking only for information about experts he expects to call at trial; the implication is clear.” (ADD 038-039.) It is disingenuous of Appellants to now claim they had no idea Susan Johnson-Drenth would be Respondent's expert (Appellants' Brief, p. 44) when the Affidavit of Expert Review and expert interrogatory answer specifically identified her.

#### **B. Respondent sufficiently satisfied the second and third prongs of *Brown-Wilbert* by specifically identifying ten separate ways Appellants departed from the standard of care**

It is readily apparent the expert review affidavit went beyond the [Minn. Stat. § 544.42, subd. 3 \(a\)\(1\)](#) requirements relating to the purposes of that initial affidavit, and actually addressed the subd. 4(a) requirements relating to the purposes of that disclosure. (APP 271-74.) The affidavit in this regard specifically stated Ms. Johnson-Drenth reviewed the facts alleged in the 25 \*26 Complaint (which facts are stated in detail above), and then specifically addressed the second and third prongs required by *Brown-Wilbert* in her description of the standard of care and Appellants' deviation from the standard of care. The affidavit does so as follows:

In Susan E. Johnson-Drenth's opinion, Larry Kimball breached his duty to use a reasonable degree of professional skill and learning possessed by attorneys in a similar practice and in like circumstances, and **failed to use reasonable care, causing damages** to Plaintiff Tim Guzick, **when he:**

- a. failed to supervise Colleen Bennett, his legal assistant at Kimball Law, in the drafting of the Minnesota Statutory Short Form Power of Attorney that she provided to George Nyberg;
- b. failed to have in effect measures, including internal policies and procedures, designed to provide reasonable assurance that the conduct and work of its employees, including Colleen Bennett, were compatible with the professional obligations of Larry Kimball and Kimball Law;
- c. failed to meet and talk with George Nyberg to assess his reasons for needing or wanting an attorney-in-fact;
- d. failed to meet and talk with George Nyberg to assess his legal capacity and competency to make choices in regard to the authority to be given to the attorney-in-fact and to understand and sign the subject Minnesota Statutory Short Form Power of Attorney;
- e. failed to meet and talk with George Nyberg to be assured that George Nyberg was not acting under undue influence or duress;
- f. failed to explain the meaning and scope of the authority that would be given to the attorney-in-fact, according to [Minnesota Statute §523.24](#), if the powers listed in the subject Minnesota Statutory Short Form Power of Attorney were granted to the attorney-in-fact;
- g. failed to discuss the risks of granting the attorney-in-fact the broad powers that could be granted with the form;
- \*27 h. failed to assess whether Tony Nyberg was the appropriate person to name as George Nyberg's attorney-in-fact;
- i. failed to discuss in detail George Nyberg's wishes as to which lines should be checked on the Minnesota Statutory Short Form Power of Attorney (Making checkmarks on the lines on the form was how the principal gave authority to the attorney-in-fact to do various things, such as acting for the principal in gifting and banking transactions and transferring the property of the principal to the attorney-in-fact. In this case, the lines on the subject power of attorney form were pre-checked for all clients of Kimball Law without regard for the particular circumstances or consequences.); and
- j. failed to send the draft of the Minnesota Statutory Short Form Power of Attorney to George Nyberg's residence to be assured that he received it unaltered (rather, Colleen Bennett sent the form to her friend, Tony Nyberg, to present to George Nyberg).

(APP. 272-273, emphasis added.)

The affidavit sets forth Appellants' standards of care and Appellants' deviation from those standards. The expert's opinion on duty and breach of duty could not be made more explicit and linked to the specific factual circumstances surrounding the claim. The District Court's broad-sweeping conclusions that the "answers and expert review affidavit say nothing about why Kimball's actions constitute negligence or malpractice..." (ADD 018), and like conclusion that the "expert review affidavit and answers to interrogatories do not set forth the standard of care..." (ADD 019) defy explanation. The Court of Appeals held the affidavit satisfies the second and third prong of Brown-Wilbert because the standard of care was clearly identified by the detailed list of actions taken or not taken by Kimball that allegedly constitute a breach of the standard of care. (ADD \*28 039-040.) Appellants again argue, based on the information contained in the Affidavit of Expert Review, they would have to "cobble together a defense" based on the subjective assumption of what Ms. Johnson-Drenth may testify. (Appellants' Brief, p. 45.) Once again, it is disingenuous of Appellants to argue they have no idea how to prepare a defense when the Affidavit of Expert Review specifically outlined ten ways in which Kimball failed to use reasonable care causing damages to Respondent.

**C. Respondent sufficiently satisfied the fourth prong of *Brown-Wilbert* by describing how Appellants' breaches directly caused damages to Respondent**

*Brown-Wilbert* requires the affidavit or interrogatory to “summarize the expert's opinion that the defendant's departure was a direct cause of the plaintiff's injuries.” 732 N.W.2d at 219. The Court of Appeals recognized this prong is most concerned with the expert's opinion on proximate cause and not on but-for causation. (ADD 040.) This is consistent with the recognition that but-for causation is an element not always required unless the claim involves the destruction or damage to an underlying cause of action. See *First Bank of Minn.*, 557 N.W.2d at 623; *Hill*, 312 Minn. at 338, 252 N.W.2d at 117; *Fiedler*, 466 N.W.2d at 42.

The expert review affidavit summarized the expert's opinions relating to causation and damages by stating the following:

The acts and omissions of Larry Kimball and Kimball Law described above [the 10 departures from the standard of care] caused damage to Tim Guzick in the \*29 amount of \$226,524, which is the total amount Tony Nyberg took from accounts owned by George Nyberg, his Estate, and his Trust using the subject Minnesota Statutory Short Form Power of Attorney that was provided by Colleen Bennett of Kimball Law, \$168,852 in attorney's fees and \$21,618 in costs incurred in Tim Guzick's lawsuits against Tony Nyberg in Hubbard County District Court and United States Bankruptcy Court and against Wells Fargo Bank in Beltrami County District Court.

(APP 0273-274.)

The damages caused by Appellants' ten departures from the applicable standards of care are specifically articulated in the affidavit. Each component of damage is itemized to the dollar in terms of both the conversion itself (\$226,524 taken from the Bank) and mitigation efforts (\$168,852 in fees and \$21,618 in costs). Also obvious is how the loss was sustained; as to the loss, Tony took \$226,524 from George's Bank accounts using the power of attorney form, as to the mitigation efforts, said fees and costs were incurred attempting to recover the converted funds. Nothing is lacking in terms of a meaningful understanding of how the power of attorney form was used, how it led to said damages, and the nature of said damages.

Appellants' primary position here appears to be the lack of an expert opinion George would not have signed the version of the power of attorney form he signed had Appellants acted in accordance with the standards of care specifically and factually enumerated in the affidavit. However, if any component of cause need be addressed by an expert in this case, it was addressed by \*30 Respondent's expert here by disclosure of her opinion that Tony's use of the power of attorney caused the specific damages alleged, and how that came to be. The record is more than sufficient for a jury to find George would not have signed the power of attorney form had Appellants exercised their duties of professional care.

### CONCLUSION

The District Court erred in granting Appellants summary judgment. Expert testimony is not necessary to establish the existence of an attorney-client relationship in a case such as this. Expert testimony is also not necessary to establish but-for causation in this case because the alleged negligence did not result in the destruction of a cause of action. In the present case, the minimum standards outline by this Court in *Brown-Wilbert* were exceeded, or at the very least met. The Court of Appeals decision followed caselaw and *Minn. Stat. § 544.42* and must be affirmed.

#### Footnotes

1 The Appendix referenced was filed with the Clerk of Appellate Courts with Respondent's appeal to the Court of Appeals.

- 2 Given the specific facts of this case, if anything is arguably insufficient about the information provided, it is certainly not grossly deficient, warranting application of the safe harbor provisions of the statute, namely, specific (not general) findings by the District Court identifying the deficiencies and 60 days notice with opportunity to satisfy the disclosure requirements.

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