STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1187

Robert F. Kramer, as Trustee for the Next of Kin of
Michael J. Kramer, deceased,
Appellant,

vs.

St. Cloud Hospital a Division of CentraCare Health System,
Respondent.

Filed February 6, 2012
Affirmed in part, reversed in part, and remanded
Larkin, Judge
Concurring in part, dissenting in part, Minge, Judge

Stearns County District Court
File No. 73-CV-09-12636

Joseph M. Crosby, Crosby Law Office, LLC, St. Paul, Minnesota; and

John D. Hagen, Jr., Minneapolis, Minnesota (for appellant)

Steven R. Schwegman, James S. McAlpine, Quinlivan & Hughes, P.A., St. Cloud, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Minge, Judge; and Wright, Judge.

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

LARKIN, Judge

Appellant challenges the district court's disposition of his medical-malpractice lawsuit, arguing that the district court erred by denying his request to amend the complaint to add a defendant, granting partial summary judgment, and dismissing his lawsuit for noncompliance with the expert-affidavit requirements under Minn. Stat. § 145.682 (2010). Because Minnesota does not recognize a medical-malpractice claim against a hospital based on the doctrine of apparent authority, we affirm in part. But because the proposed amendment to add a defendant relates back to the date of the original complaint and because appellant's expert affidavits are sufficient to establish a prima facie case of medical malpractice, we reverse in part and remand for further proceedings.

FACTS

On October 18, 2007, Michael Kramer sought medical treatment at West Central Internal Medicine for bruises and bleeding gums. Kramer saw a nurse and was advised to seek further medical treatment if the bleeding continued. On October 19, Kramer experienced additional bruising and bleeding, so he returned to West Central for medical care. John Stock, M.D., examined Kramer and ordered blood tests. The results of the blood tests indicated that Kramer had thrombocytopenia, meaning that he had no detectable platelets in his blood. Dr. Stock called St. Cloud Hospital to see if the hospital would accept Kramer as a patient. Dr. Stock spoke with Christopher Aronson, M.D., and informed him that two blood tests had confirmed that Kramer had no detectable platelets, that he was experiencing increased bruising and nosebleeds, and that Dr. Stock felt this was an emergency situation. Dr. Aronson agreed to accept Kramer as a patient, and Kramer was transported to the hospital by ambulance. West Central faxed Kramer's medical records to Dr. Aronson.

Kramer was admitted to the hospital around 1:35 p.m.; he was awake and coherent at that time. An updated set of blood tests confirmed that Kramer's platelet count was "undetectable." Around 2:45 p.m., Dr. Aronson indicated on Kramer's chart that Kramer had severe thrombocytopenia and that Dr. Aronson was trying to contact the on-call hematologist, Umesh Chitaley, M.D. At 4:15 p.m., Dr. Aronson ordered a transfusion of platelets as well as Coumadin, an anticoagulant drug that Kramer had been taking in connection with his prosthetic aortic valve. The Coumadin was administered at 5:15 p.m., and the administration of platelets began at 6:45 p.m. Dr. Chitaley examined Kramer; and at 7:35 p.m., he ordered the administration of a steroid drug and Intravenous Immunoglobulin (IVIgG) and cessation of the Coumadin. The steroid medication was not administered until 10:15 p.m., and the IVIgG was never administered. By 9:00 p.m., Kramer's neurological status began to deteriorate. A CT scan indicated that he had suffered a cerebral hemorrhage. At 10:50 p.m., Kramer experienced increased changes in his vision, severe headaches, and an inability to focus. Kramer was transferred to the Intensive Care Unit at 11:22 p.m., and at 11:30 p.m., Dr. Chitaley ordered vitamin K and additional platelets. During the overnight hours, Kramer was given additional vitamin K, more platelets, and fresh frozen plasma in an effort to prevent further bleeding, but Kramer's hemorrhage progressed. He died the next morning.

Appellant Robert J. Kramer was appointed trustee for Kramer's next of kin in June 2009. On November 12, 2009, appellant sued respondent "St. Cloud Hospital, a Division of CentraCare Health System"[1] alleging medical malpractice.[2] The complaint alleged that "St. Cloud Hospital's doctors allowed five and one half hours to pass before Mr. Kramer was administered any platelets" and that the "negligent failure to timely administer Vitamin K, [fresh frozen plasma] and sufficient platelets to prevent bleeding was a contributing factor to Mr. Kramer's cerebral hemorrhage and death." Appellant claimed that

> the health care providers at Defendant St. Cloud Hospital who provided care to Mr. Kramer on October 19 and 20, 2007 were at all times herein, employees, agents and/or partners of Defendant CentraCare Health System, and did not meet the standard of care relative to the diagnosis, care, treatment and monitoring of Michael Kramer.

The complaint did not identify the allegedly negligent actors by name, referring only generally to Kramer's "health care providers." In its answer, respondent denied

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[1] We note at the outset that it is not clear whether St. Cloud Hospital and CentraCare Health System are individual defendants in appellant's lawsuit. Appellant's complaint interchangeably refers to "St. Cloud Hospital" and "CentraCare Health System" as the defendant. Respondent therefore indicated in its memorandum of law in support of a motion for partial summary judgment that "the present motion is brought on behalf of St. Cloud Hospital and CentraCare Health System." Respondent later claimed that "there is only one Defendant, St. Cloud Hospital." The district court was never asked to resolve this dispute, and the issue is not before us on appeal. But because the summary-judgment award was based on a motion brought on behalf of CentraCare Health System, we treat CentraCare Health System as a named defendant in the district court and as a respondent in this appeal. And we refer to St. Cloud Hospital and CentraCare Health System, collectively, as respondent.

[2] Appellant also brought a medical-malpractice claim against West Central Internal Medicine, but that suit was subsequently dismissed by stipulation.

liability on all of the allegations in appellant's complaint, with the exception of the fact that respondent "owns, operates and conducts hospital facilities" in St. Cloud.

Appellant deposed Dr. Aronson in July 2010. During the deposition, Dr. Aronson denied that he was an employee of St. Cloud Hospital. When counsel asked, "Are you employed by CentraCare," he replied, "CentraCare." Dr. Chitaley was also deposed around this time.

Respondent provided the following answers in response to appellant's interrogatories:

> INTERROGATORY 2: Identify each agent, representative, and/or employee of Defendant CentraCare Health System who was responsible for any aspect of the provided diagnosis, care, treatment or monitoring Michael Kramer from October 19, 2007 to October 20, 2007. . . .
>
> ANSWER: [T]he following medical personnel from St. Cloud Hospital treated and cared for Mr. Kramer. <u>October 19, 2007:</u> Christopher Aronson, MD; Umesh Chitaley, MD[.]
>
> . . . .
>
> INTERROGATORY 13. If you claim that the death of Michael Kramer or his medical conditions leading to his death were contributed to or caused by Plaintiff, or any person other than Defendant CentraCare, including any other physician, hospital, nurse, or other healthcare provider, please [provide that information].
>
> ANSWER: Investigation and discovery are continuing.
>
> . . . .
>
> INTERROGATORY 19: State in detail all information any physician, nurse, physician's assistant, employee and/or agent of Defendant CentraCare Health System discussed with Michael Kramer, his family, or anyone on his behalf, on October 19 and/or 20, 2007 relative to [his condition].
>
> ANSWER: Plaintiff is directed to the medical records of Michael Kramer.

Shortly before the expiration of the statute of limitations,[3] appellant disclosed his medical-expert affidavits, specifically alleging negligence by Dr. Aronson and Dr. Chitaley, as well as several unnamed nurses. After the statute of limitations expired, respondent moved for partial summary judgment, arguing that it was not responsible for the alleged negligence of Dr. Aronson and Dr. Chitaley because they were employed by CentraCare Clinic, not St. Cloud Hospital or CentraCare Health System. CentraCare Health System is a system of health-care providers that contains separate and distinct legal entities within its health-care system, including St. Cloud Hospital. CentraCare Clinic is a physician-led multi-specialty group that is a distinct legal entity from the hospital. Dr. Aronson and Dr. Chitaley had privileges at St. Cloud Hospital, but neither St. Cloud Hospital nor CentraCare Health System controlled the employment of either physician.

In its memorandum of law in support of partial summary judgment, respondent anticipated that appellant might propose an amendment to add the doctors or their employer, CentraCare Clinic, as defendants. Respondent argued that such an amendment would not relate back to the date of the original complaint. Appellant responded that because respondent perpetuated confusion regarding the separate legal identities of CentraCare Health System and CentraCare Clinic, he should be allowed to amend his

[3] Because Kramer died on October 20, 2007, the statute of limitations for Kramer's medical-malpractice action expired on October 20, 2010. *See* Minn. Stat. § 573.02 (2010) (stating that an "action to recover damages for a death caused by the alleged professional negligence of a physician, surgeon, dentist, hospital or sanitarium . . . shall be commenced within three years of the date of death").

complaint to add CentraCare Clinic as a defendant and that the amendment should relate back to the date of the original complaint.

The district court determined that appellant's proposed amendment to add CentraCare Clinic as a defendant would not relate back to the date of the original complaint. The district court therefore denied appellant's motion to amend.[4] The district court also rejected appellant's reliance on the doctrine of apparent authority as a basis for imposing liability on respondent and granted respondent's motion for partial summary judgment.

Before the district court ruled on respondent's summary-judgment motion, respondent moved for dismissal under Minn. Stat. § 145.682, arguing that appellant's medical-expert affidavits failed to establish a prima facie case of medical malpractice against Dr. Aronson, Dr. Chitaley, and the unnamed nurses referenced in the affidavits. Appellant provided amended medical-expert disclosures, alleging that three nurses and one pharmacist were negligent in caring for Kramer: Marsha Martinez, R.N., Brianna Eriksson, R.N., Jolene Archer, R.N., and Joseph Sauer, R.P.H. Respondent argued that the supplemental disclosures were also insufficient. The district court granted respondent's motion for dismissal after determining that appellant's expert affidavits failed to set forth a chain of causation between the alleged breaches of the standards of care and Kramer's death. This appeal follows.

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[4] Although appellant never formally moved the district court for leave to amend the complaint, the district court determined the issue as if he had.

D E C I S I O N

I.

Appellant first challenges the district court's refusal to grant leave to amend the complaint to add CentraCare Clinic as a defendant. Once a responsive pleading has been served, a party may amend a pleading only upon written consent from the opposing party or leave of the court. Minn. R. Civ. P. 15.01. "Ordinarily, amendments to pleadings should be freely granted except when prejudice would result to the other party." *Rhee v. Golden Home Builders, Inc.*, 617 N.W.2d 618, 621 (Minn. App. 2000). But the district court may properly deny a motion to amend when the "additional alleged claim cannot be maintained." *LaFee v. Winona Cnty.*, 655 N.W.2d 662, 668 (Minn. App. 2003), *review denied* (Minn. Mar. 27, 2003). "The district court has broad discretion to grant or deny leave to amend a complaint, and its ruling will not be reversed absent a clear abuse of that discretion." *State v. Baxter*, 686 N.W.2d 846, 850 (Minn. App. 2004) (citing *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993)). But whether a proposed amendment relates back to the date of the original complaint under Minn. R. Civ. P. 15.03 is a separate issue. *See Metro Bldg. Cos. v. Ram Bldgs., Inc.*, 783 N.W.2d 204, 210-12 (Minn. App. 2010) (separately analyzing whether the district court abused its discretion by permitting an amendment to the complaint and whether the district court erred by allowing the amendment to relate back to the original filing), *review denied* (Minn. Aug. 10, 2010). "Whether an amended pleading satisfies the requirements of Minn. R. Civ. P. 15.03, such that the amendment relates back to the original pleading, is a question of law subject to de novo review." *Id.* at 211.

The district court did not explain its analysis regarding whether to allow the amendment under rule 15.01. Instead, the district court's supporting memorandum of law emphasized its relation-back analysis under rule 15.03. We construe its decision as denying the motion to amend only because the proposed claim would not relate back to the date of the original complaint, which made the claim untimely under the statute of limitations. And we therefore focus our review on the relation-back issue.

Under Minn. R. Civ. P. 15.03, an amendment that adds a new defendant relates back to the date of the original complaint so long as:

> (1) the claim against the intended defendant arises out of the conduct or occurrence alleged in the original pleading; (2) the party to be added has received such notice of the institution of the action that he will not be prejudiced; (3) the intended party knows or should have known the action against the wrong party was a mistake and that the action was meant to be brought against him; and (4) such notice and knowledge were received by the intended defendant within the period provided by law for commencing the action against him.

Carlson v. Hennepin Cnty., 479 N.W.2d 50, 54 (Minn. 1992) (quotation omitted).

In this case, the first two factors support relation back. The conduct underlying appellant's proposed amendment is the same conduct alleged in the original complaint. And there is no showing of prejudice to CentraCare Clinic in having to now maintain a defense on the merits. *See Carlson*, 479 N.W.2d at 54 ("[T]he type of 'prejudice' contemplated by the rule is more than inconvenience.").

The main issue in this case deals with the third factor of the relation-back analysis: whether CentraCare Clinic knew or should have known that appellant made a pleading mistake and that CentraCare Clinic was an intended defendant. An intended defendant's knowledge of a pleading mistake may be established where the original and intended defendants share an identity of interest such that service on the original defendant imputes constructive knowledge of the lawsuit to the intended defendant. *Johnson v. Soo Line R.R.*, 463 N.W.2d 894, 896 (Minn. 1990) ("[A]n 'identity of interest' between the parties giv[es] the intended defendant either actual or constructive knowledge of the mistake in pleading."). "[T]wo entities have an identity of interest when they share such an intimacy in their business operations and organization that service on one imputes notice to the other." *Carlson*, 479 N.W.2d at 52. An identity of interest may also exist "when confusing facts or circumstances about the two entities might reasonably mislead a plaintiff to name the wrong defendant." *Id.*

For example, in *Carlson*, the plaintiff sued Hennepin County Medical Center (HCMC) for medical malpractice. *Id.* After expiration of the statute of limitations, the plaintiff learned that HCMC did not provide direct health-care services and that Hennepin Faculty Associates (HFA) provided the patient-care services at HCMC. *Id.* at 52-53. The supreme court concluded that an identity of interest existed between HCMC and HFA, relying on the fact that the two entities shared "an intimacy in their business operations because while HCMC has kept its name on the hospital doors, it has turned over health-care procedures and decisions to HFA." *Id.* at 54-55. The supreme court also recognized that HFA was the exclusive tenant of HCMC, that HFA used HCMC's name in dealings with the public, and that the arrangement could be confusing to a plaintiff because patients were billed by HCMC for the care provided by HFA. *Id.* at 55.

Applying this reasoning to the facts of this case, we conclude that an identity of interest exists between respondent and CentraCare Clinic such that the clinic should be charged with notice of appellant's lawsuit. First, CentraCare Health System and CentraCare Clinic "share . . . an intimacy in their business operations and organization." *See id.* at 52. The record shows that the boards of directors for CentraCare Health System and CentraCare Clinic have five individuals in common; they also have the same malpractice insurer; and the attorney who represents respondent also represented CentraCare Clinic's physicians during their depositions. *See Nelson v. Glenwood Hills Hosps., Inc.*, 240 Minn. 505, 512-13, 62 N.W.2d 73, 78 (1953) (noting that it was difficult to conclude that the intended defendant was "in the dark as to the true facts involved" after considering that the named defendant and the intended defendant shared an officer on the board, had the same accountant-attorney and liability insurer, and shared a working business and operational association).

The record also shows that respondent and CentraCare Clinic share a common interest in avoiding liability on appellant's medical-malpractice claim. *See Fore v. Crop Hail Mgmt.*, 270 N.W.2d 13, 14-15 (Minn. 1978) (permitting an amendment when two entities shared a "working association" and "the common interest in avoiding liability"); *Nelson*, 240 Minn. at 512-13, 62 N.W.2d at 78 (permitting an amendment based, in part, on the two entities' "same interest in avoiding liability on the claims as set forth in the complaints"). We observe that, because CentraCare Clinic was not a party to the lawsuit, it did not participate in the district court proceedings regarding the proposed amendment. Instead, respondent argued against the proposed amendment in what can only be described as advocacy on behalf of CentraCare Clinic. For example, respondent argued that "there is no evidence that CentraCare Clinic knew or should have known of the 'mistake' within the statute of limitations period" and that the district court "should deny [appellant's] proposed amended complaint to name CentraCare Clinic as a defendant in this case." Respondent's direct advocacy on behalf of CentraCare Clinic in district court is compelling evidence of a shared common interest in avoiding liability.

Moreover, "confusing facts or circumstances about . . . two entities might reasonably mislead a plaintiff to name the wrong defendant." *Carlson*, 479 N.W.2d at 52. Such is the case here. The consent forms signed by Kramer's representative at the hospital reference "St. Cloud Hospital" as a division of CentraCare Health System, but do not mention CentraCare Clinic. And Kramer's medical records refer only to the hospital and CentraCare Health System—even those dictated by Dr. Aronson and Dr. Chitaley. *See id.* at 55 (recognizing that in using HCMC's name to the public, the arrangement "creates an identity of interest because of its potential for confusing a plaintiff"). Most notably, the two entities have very similar names, which could cause plaintiffs confusion when filing a medical-malpractice lawsuit. *See Krupski v. Costa Crociere*, 130 S. Ct. 2485, 2498 (2010) (noting that, for purposes of a relation-back analysis, it was relevant that the named defendant and the intended defendant were "related corporate entities with very similar names").

For all of these reasons, we conclude that respondent and CentraCare Clinic share an identity of interest such that service on respondent imputed constructive knowledge of the lawsuit to CentraCare Clinic. We must next determine whether, as a result of its constructive knowledge, CentraCare Clinic knew or should have known that appellant had made a pleading mistake and that CentraCare Clinic was an intended defendant. The district court reasoned that "there is no evidence CentraCare Clinic knew or should have known of [appellant]'s mistake within the statute of limitations period." Respondent agrees, arguing that appellant's "complaint was not 'clear' because [a]ppellant did not identify the alleged negligent actors."[5] We are not persuaded.

We first observe that, although the complaint does not identify Dr. Aronson and Dr. Chitaley by name, respondent's answer to one of appellant's interrogatories identified Dr. Aronson and Dr. Chitaley as the *only* doctors from St. Cloud Hospital who treated and cared for Kramer on October 19. And the language in appellant's complaint provides clear notice of his pleading theory: the health-care providers—including the doctors—who cared for Kramer at St. Cloud Hospital breached the applicable standards of care, thereby causing Kramer's death; and because the health-care providers were employees, agents, or partners of respondent, respondent is liable for any resulting damages. Once again, because respondent and CentraCare Clinic share an identity of interest, constructive knowledge of the complaint was imputed to CentraCare Clinic. And CentraCare Clinic knew that the doctors who treated Kramer at St. Cloud Hospital were its employees—not respondent's employees. CentraCare Clinic therefore had reason to know that appellant made a mistake regarding the proper defendant's identity, i.e., the identity of the doctors' employer.

[5] Appellant's expert affidavits identified Dr. Aronson and Dr. Chitaley by name, and the affidavits were provided to respondent one day before the expiration of the statute of limitations.

Moreover the record suggests that respondent was aware of appellant's pleading mistake, perpetuated appellant's confusion regarding the identity of the doctors' employer, and made no effort to correct appellant's mistake. *See Nelson*, 240 Minn. at 515-16, 62 N.W.2d at 79-80 ("It further appears that no effort was forthcoming at any time on the part of either hospital corporation or its officers and managing agents to correct the misnomer of which they must have been fully aware. There is little force to a claim of being misled or prejudiced under the circumstances."). In sum, because CentraCare Clinic had constructive notice of the lawsuit and knew, or should have known, that appellant was mistaken regarding the identity of Dr. Aronson's and Dr. Chitaley's employer and that it was an intended defendant, the third factor supports relation back.

We next consider the fourth factor: whether such notice and knowledge were received by CentraCare Clinic within the period provided by law for commencing an action against it. Respondent was served with the summons and complaint before expiration of the statute of limitations. Because respondent and CentraCare Clinic share an identity of interest, CentraCare Clinic had notice of the lawsuit and of appellant's pleading mistake once respondent was served. *See Carlson*, 479 N.W.2d at 56 (stating that "[s]ince the action is valid against the named defendant, there is no reason why it should not be valid against any entity sharing an identity of interest with the named defendant" and concluding that service on the named defendant provided the intended defendant "with timely notice of [plaintiff]'s lawsuit and pleading mistake"). Thus, the fourth factor supports relation back of appellant's proposed amendment.

We last consider whether, although all of the relevant factors support relation back, the district court's order should nevertheless be affirmed because, as reasoned by the district court, "nothing prevented [appellant] from suing CentraCare Clinic, or Dr. Aronson or Dr. Chitaley individually, within the timeframe provided by the statute of limitations." Respondent similarly suggests that the amendment does not relate back because appellant failed to exercise due diligence, arguing "there is no evidence that [a]ppellant or counsel relied upon or utilized any website relative to determining who to sue in this case" and that "had [a]ppellant bothered to use the website he would have discovered Dr. Aronson and Dr. Chitaley's employer, as well as the nature of the corporate structure of CentraCare Health System, were easily found."

We find no support for the suggestion that the proposed amendment does not relate back to the date of the original complaint because appellant failed to exercise due diligence. The question to be answered under rule 15.03 is whether CentraCare Clinic "knew or should have known that, but for a mistake . . . the action would have been brought against [it]." Minn. R. Civ. P. 15.03. The focus is not on what the plaintiff knew or should have known during the statute-of-limitations period; the focus is on what the prospective defendant knew or should have known. In interpreting the analogous federal rule, the Supreme Court has held that relation back "depends on what the party to be added knew or should have known, not on the amending party's knowledge." *Krupski*, 130 S. Ct. at 2490; *see Soo Line*, 463 N.W.2d at 899 n.7 (noting that where Minnesota rules are modeled after federal rules, federal cases are "helpful and instructive" in interpreting the Minnesota rules). And even if appellant knew of the existence of

CentraCare Clinic, such knowledge alone "does not preclude [the plaintiff] from making a mistake with respect to that party's identity," and "it would be error to conflate knowledge of a party's existence with the absence of mistake." *Krupski*, 130 S. Ct. at 2494. The district court therefore erred in analyzing this factor based on appellant's failure to properly identify CentraCare Clinic as the doctors' employer.

In conclusion, we emphasize that "[t]he rules on amending pleadings are intended to be liberally construed so that cases are decided on the merits" and that "there are occasions when pleading mistakes will happen that in fairness deserve a relaxation of [a statute of limitations]." *Carlson*, 479 N.W.2d at 53, 54 (quotations omitted). We are presented with such an occasion in this case, where justice would not be served by allowing CentraCare Clinic to "use the rules of pleading to shield itself from a confrontation with the merits of appellant's claim." *Fore*, 270 N.W.2d at 14; *see Nelson*, 240 Minn. at 514, 62 N.W.2d at 79 ("[A]mendments shall be given freely when justice so requires."). As the Supreme Court has explained,

> [a] prospective defendant who legitimately believed that the limitations period had passed without any attempt to sue him has a strong interest in repose. But repose would be a windfall for a prospective defendant who understood, or who should have understood, that he escaped suit during the limitations period only because the plaintiff misunderstood a crucial fact about his identity.

Krupski, 130 S. Ct. at 2494. Because all of the factors under rule 15.03 support relation back and because allowing the amendment is consistent with policy favoring resolution of cases on the merits, we reverse the district court's denial of appellant's request for leave to amend its complaint and hold that the amendment relates back to the date of the original complaint.

II.

Appellant next challenges the district court's grant of partial summary judgment with respect to the actions of Dr. Aronson and Dr. Chitaley. "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 of material fact and that either party is entitled to a judgment as a matter of law." *Fabio*, 504 N.W.2d at 761. "We review a district court's summary judgment decision *de novo*. In doing so, we determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010) (citation omitted).

The district court granted summary judgment after concluding that the hospital is not vicariously liable for the doctors' alleged negligence as a matter of law, because they are not employees, agents, or partners of the hospital. Indeed, appellant does not assert that the doctors are the hospital's employees or partners. Instead, appellant relies on the doctrine of apparent authority.

The district court correctly noted that "[w]hether a plaintiff in a medical malpractice case can assert an apparent authority claim to defeat a defendant hospital's motion for summary judgment is an issue of first impression in Minnesota." Appellant concedes that there is no Minnesota caselaw directly recognizing an apparent-authority claim in this context, asking this court to "hold that apparent authority claims can be brought against hospitals for the acts of doctors working as independent contractors." Appellant relies on caselaw from other states to support his argument, arguing that the doctrine "has been applied by courts in other states to hold hospitals liable for doctors working as independent contractors." *See, e.g.*, *Wilkins v. Marshalltown Med. & Surgical Ctr.*, 758 N.W.2d 232, 237 (Iowa 2008) (stating that under the doctrine of apparent authority, "the mere fact that the emergency room doctors were not [hospital] employees is not dispositive" of the appellant's negligence claim); *Burless v. W. Va. Univ. Hosps., Inc.*, 601 S.E.2d 85, 92-96 (W. Va. 2004) (holding that a hospital may be held liable for the negligence of an independent-contractor physician under an apparent-agency theory).

But appellant also acknowledges that a decision of this court is inconsistent with his apparent-authority argument. In *McElwain v. Van Beek*, this court held that "a hospital can only be held vicariously liable for a physician's acts if the physician is an employee of the hospital." 447 N.W.2d 442, 446 (Minn. App. 1989), *review denied* (Minn. Dec. 20, 1989). Because the evidence demonstrated that the physician was an independent contractor, this court concluded that the hospital was "relieved of liability." *Id.* Appellant's efforts to characterize our statement of law in *McElwain* as dictum are unavailing. "[A] court's expressions that go beyond the facts before the court are dicta and are deemed to be merely the individual views of the author of the opinion and not binding in subsequent cases." *Dahlin v. Kroening*, 784 N.W.2d 406, 410 (Minn. App. 2010) (quotation omitted). But in *McElwain*, the plaintiff argued that a hospital was liable for the alleged negligence of a physician, leading to this court's statement that vicarious liability exists only when the physician is an employee of the hospital. 447 N.W.2d at 446. That expression did not go beyond the facts presented and, in fact, was in response to an argument made by the plaintiff. And the statement of law was central to this court's conclusion that the hospital was not vicariously liable for the physician's actions because he was an independent contractor.

McElwain remains good law in this state. We decline to reject the *McElwain* rule in favor of the analysis of other jurisdictions. *See Lake George Park, L.L.C. v. IBM Mid-America Emps. Fed. Credit Union*, 576 N.W.2d 463, 466 (Minn. App. 1998) (stating that "[t]his court, as an error correcting court, is without authority to change the law"), *review denied* (Minn. June 17, 1998); *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987) ("[T]he task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court."), *review denied* (Minn. Dec. 18, 1987). Because *McElwain* expressly states that a hospital cannot be vicariously liable for the acts of a physician unless that physician is an employee and no appellate court of this state has approved imposition of liability on a hospital for the acts of a non-employee physician based on apparent authority, appellant's apparent-authority claim fails as a matter of law. Thus, we affirm the district court's grant of partial summary judgment.

III.

Appellant's last challenge is to the district court's dismissal of his lawsuit under Minn. Stat. § 145.682, based on its conclusion that appellant's medical-expert affidavits were insufficient to demonstrate a prima facie case of medical malpractice. Minn. Stat.

§ 145.682, subd. 6(c) (providing for "mandatory dismissal with prejudice of each action as to which expert testimony is necessary to establish a prima facie case" when the expert affidavit is deficient). We review the district court's dismissal of a medical-malpractice action based on the insufficiency of an expert affidavit for abuse of discretion. *Anderson v. Rengachary*, 608 N.W.2d 843, 846 (Minn. 2000).

The issue in this case concerns appellant's affidavits of expert identification. In an affidavit of expert identification, the plaintiff must set forth "specific details concerning their experts' expected testimony, including the applicable standard of care, the acts or omissions that plaintiffs allege violated the standard of care and an outline of the chain of causation that allegedly resulted in damage to them." *Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 193 (Minn. 1990). Section 145.682 requires expert affidavits to make "far more" than general disclosures. *Lindberg v. Health Partners, Inc.*, 599 N.W.2d 572, 578 (Minn. 1999). If the affidavits contain "nothing more than broad and conclusory statements as to causation," dismissal is mandated. *Id*. The purpose of requiring substantive disclosure is to enable early dismissal of "nuisance medical malpractice lawsuits" or "frivolous cases." *Stroud v. Hennepin Cnty. Med. Ctr.*, 556 N.W.2d 552, 555 (Minn. 1996); *Sorenson*, 457 N.W.2d at 191 (internal quotation marks omitted).

An expert affidavit must "set[] forth in detail the causal connection" between the defendant's conduct and the injury. *Stroud*, 556 N.W.2d at 556. "The gist of expert opinion evidence as to causation is that it explains to the jury . . . 'how' and . . . 'why' the malpractice caused the injury." *Teffeteller v. Univ. of Minn.*, 645 N.W.2d 420, 429 n.4

(Minn. 2002). We have explained that simply citing a delay in diagnosis is not enough, and that stating that earlier treatment generally results in better outcomes is conclusory and insufficient to make out a prima facie case. *Maudsley v. Pederson*, 676 N.W.2d 8, 14 (Minn. App. 2004). The supreme court has similarly concluded: "To state, as was done in this case, that the expert will testify that the defendants 'failed to properly evaluate' and 'failed to properly diagnose' is not enough. These are empty conclusions which, unless shown how they follow from the facts, can mask a frivolous claim." *Sorenson*, 457 N.W.2d at 192-93.

Appellant provided two expert-identification affidavits: one from a nurse practitioner and one from two physicians. Vickie Halstead, R.N. has been a registered nurse for 37 years and is certified as a critical care R.N., a certified emergency nurse, and a cardiovascular nurse specialist. Her affidavit describes the standards of care applicable to the nurses who cared for Kramer and the alleged breaches of those standards. Harry Jacob, M.D. is a board-certified internist who specializes in hematology and has practiced medicine for 49 years. He is currently a visiting professor at Harvard University and has written extensively on the diagnosis and treatment of thrombocytopenia. Robert Langer, M.D. is an internist and has been practicing medicine for 29 years. He has diagnosed and treated patients with thrombocytopenia. The affidavit of Dr. Jacob and Dr. Langer (the physicians' affidavit) describes the standards of care applicable to the physicians, the alleged breaches of these standards, and the chain of causation leading to Kramer's death.

Prima Facie Case Against the Physicians

Appellant challenges the district court's conclusion that although "[t]he physician affidavits allege several breaches of the standard of care, . . . these breaches are not constructed in a way to develop a clear chain of causation." The district court did not explain the reasoning behind this determination. Respondent argues that the district court's conclusion was correct and that appellant failed to establish a prima facie case of negligence against Dr. Aronson and Dr. Chitaley.

According to their affidavit, Dr. Jacob and Dr. Langer would testify that the standard of care required the physicians who cared for Kramer to administer platelets, a steroid medication, IVIgG, fresh frozen plasma, and vitamin K immediately upon Kramer's admission to the hospital. The affidavit explained why each treatment was necessary to correct Kramer's condition: platelets were necessary to repair Kramer's damaged vessels, the steroid medication and IVIgG were required to protect against the destruction of platelets, and fresh frozen plasma and vitamin K should have been administered to reverse the effects of the Coumadin that Kramer had been taking. Moreover, the standard of care required the physicians to discontinue administration of Coumadin instead of ordering additional doses of that medication.

As the physicians' affidavit explains,

> the negligence of Dr. Aronson, Dr. Chitaley and the nursing staff allowed the platelets to continue to be destroyed, the leaks were not repaired, the fibrin could not be manufactured to seal the leaks and the leaks continued. Due to the continuation of leaks within Michael Kramer's vessels, a leak occurred in his brain that could not be fixed. The necessary blood did not get to the brain cells and tissue. Michael

> Kramer's brain cells and tissue died. His brain swelled and could no longer provide the basic functions of breathing and pumping his heart, causing his death.

In the physicians' opinion, the failure to provide all of the necessary treatments before 7:30 p.m. was the cause of Kramer's death. Under this theory, the affidavits set forth a clear chain of causation as to both doctors. The experts would testify that each of the doctors should have ordered all necessary treatments; that each doctor had the opportunity and should have ordered all treatments before 7:30 p.m.; and that if either doctor had ordered all of the treatments, such that the treatments could have been administered before 7:30 p.m., Kramer would have survived.

According to Kramer's medical records and the affidavit, neither doctor ordered all of the necessary treatments. Dr. Aronson's order at 4:15 p.m. was apparently timely but inadequate: he only ordered platelets and also ordered additional Coumadin. Although Dr. Chitaley examined Kramer between 6:30 p.m. and 7:00 p.m., he did not issue his orders until 7:35 p.m., which according to the experts, was too late. Moreover, Dr. Chitaley only ordered the steroid medication and IVIgG. He did not order vitamin K and fresh frozen plasma until hours later, after Kramer's fatal brain bleed began.

In summary, the physicians' expert affidavit "outline[s] specific details explaining how and why" the doctors' breaches of the standard of care caused Kramer's death, and it does not rest on conclusory statements. *See Maudsley*, 676 N.W.2d at 14. The affidavit demonstrates that appellant's negligence lawsuit is not frivolous and has evidentiary support. *See id.* at 12 (noting that section 145.682 was enacted "to eliminate frivolous medical-negligence lawsuits"); *Hempel v. Fairview Hosps. & Healthcare*

Servs., Inc., 504 N.W.2d 487, 492 (Minn. App. 1993) (stating that an expert affidavit is required to "weed out actions without evidentiary support"). Finally, the jury will not be left to "speculate as to possible causes of [Kramer's death] or whether different medical treatment could have resulted in a more favorable prognosis." *Leubner v. Sterner*, 493 N.W.2d 119, 121 (Minn. 1992). Thus, the district court abused its discretion by concluding that the physicians' affidavit did not set forth a clear chain of causation.

Prima Facie Case Against the Nurses

Appellant also argues that the district court erred in concluding that his expert affidavit was insufficient as to the nurses.[6] According to Halstead's affidavit, the nurses who treated Kramer breached the standard of care by failing to timely administer the platelets that Dr. Aronson ordered at 4:15 p.m.; by following Dr. Aronson's order to administer Coumadin; by failing to timely administer the steroid medication that Dr. Chitaley ordered at 7:35 p.m. and failing to administer the IVIgG altogether; and for not possessing adequate knowledge regarding Kramer's condition and the necessary treatment.

First, we agree with the district court that the law is clear regarding the allegation that a nurse was negligent in following Dr. Aronson's order for Coumadin: a nurse must follow a doctor's order unless it is obviously negligent. *Mesedahl v. St. Luke's Hosp. Ass'n of Duluth*, 194 Minn. 198, 206, 259 N.W. 819, 822 (1935) (stating that in general,

[6] In district court, appellant alleged that the pharmacist who filled the order for Coumadin was also negligent, and Halstead offered her opinion on the standard of care for pharmacists. The district court determined that Halstead was not qualified to offer an opinion regarding the standard of care for pharmacists, and appellant does not challenge this determination on appeal.

nurses have a duty to "obey and diligently execute the orders of the physician or surgeon in charge of the patient" unless those orders are obviously negligent or in cases of an emergency). Halstead's affidavit states that a nurse breached the standard of care by "failing to possess knowledge that Coumadin would interfere with the body's function to make fibrin." If the nurse did not have this knowledge, there was no basis for the nurse to conclude that Dr. Aronson's order was obviously negligent. In the absence of such a conclusion, she was required to comply with the doctor's order and was not negligent as a matter of law.

Second, although it is permissible to look to the physicians' affidavit to determine whether the nurses' alleged breaches of the standards of care caused Kramer's death, the alleged breaches must be assessed in light of the physicians' causation theory: failure to order and provide all necessary treatments before 7:30 p.m. *See Hempel*, 504 N.W.2d at 491-92 (concluding that the statute was satisfied when the plaintiff submitted one affidavit detailing the standard of care and a second affidavit discussing the chain of causation). Under this causation theory, a jury could not conclude that a nurse's failure to timely implement a post-7:30 p.m. order caused Kramer's death. Instead, only pre-7:30 p.m. failures are relevant.

Halstead alleged only one breach of the standard of care before 7:30 p.m.: nurse Martinez's failure to timely administer the platelets that Dr. Aronson ordered at 4:15 p.m. Martinez did not administer the platelets until 6:45 p.m., nearly two and one-half hours later. The physicians' affidavit states that this breach worsened Kramer's condition and was a contributing factor to his death. This statement of causation is not as strong as the chain of causation outlined with regard to Dr. Aronson and Dr. Chitaley. But the assertion that Martinez's delay was a contributing factor in Kramer's death satisfies the requirements of section 145.682 and demonstrates that appellant's medical-malpractice claim against the hospital based on the conduct of its employee-nurse is not frivolous. *See id.* at 492 ("[The expert]'s opinion that the restraint was a 'participating' factor in cardiac arrest, combined with [the second expert]'s testimony regarding standard of care and breach, satisfy the statute's purpose of ensuring the legitimacy of this lawsuit.") Thus, the district court abused its discretion by dismissing appellant's lawsuit based on the insufficiency of the affidavit.

To summarize, because the district court correctly determined that Minnesota does not recognize the apparent-authority doctrine as a means of imposing vicarious liability on a hospital for the alleged negligence of non-employee physicians, we affirm the district court's grant of partial summary judgment. But because the district court abused its discretion by concluding that appellant's expert affidavits did not establish a prima facie case of medical malpractice, we reverse the district court's order for dismissal. And because we determine, as a matter of law, that appellant's proposed amendment adding CentraCare Clinic as a defendant relates back to the date of the original complaint, we reverse the district court's denial of appellant's request for leave to amend. Finally, we remand for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

Dated: ____________________________

Judge Michelle A. Larkin

MINGE, Judge (concurring in part and dissenting in part)

I join in parts I and III of the opinion of the court and with the decision to reverse and remand. I dissent with respect to part II, which deals with apparent authority. The issue in part II is whether the district court erred in granting summary judgment on appellant's apparent authority claim. As a result of our decision in parts I and III, appellant's cause of action is remanded for further proceedings and the claims against the physicians and St. Cloud Hospital for the nurses' action will go forward, presumably to trial. It does not appear, and there is no claim, that recovery is somehow handicapped or limited in the absence of the hospital's liability for the doctors' actions on the basis of apparent authority.

In this setting and circumstance, it is unnecessary for us to decide the apparent authority issue or to discuss it, and I would not do so. But because the majority analyzes and decides the issue, I comment. First, I note that no reported Minnesota court decision has addressed the issue of the apparent authority of a hospital for the actions of a separately employed physician. This court has addressed vicarious liability. *McElwain v. Van Beek*, 447 N.W.2d 442 (Minn. App. 1989).

In the first part of the *McElwain* opinion, we held a physician was not liable for the injuries of the sister of a patient who fainted while observing treatment being provided to the patient in the emergency room. In addressing the hospital's liability for the sister's injuries, the appellant in *McElwain* advanced two arguments: (1) the hospital was vicariously liable; and (2) the hospital had an independent duty to maintain safe premises. Without any analysis except a citation to an earlier decision of the Minnesota

Supreme Court, the panel in *McElwain* concluded that because the physician was an independent contractor with staff privileges at several hospitals, the hospital was relieved of liability. *Id.* at 446. The *McElwain* court dismissed the claim of independent liability of the hospital on the grounds that the issue was not raised to the district court and that "if the physician is not liable [to the fainting sister] as a matter of law the medical center cannot be found liable." *Id.* at 447. Neither the principle of apparent authority nor any relationship between apparent authority and vicarious liability was ever mentioned. There perhaps was no credible basis for arguing or finding apparent authority and the result may have been different if apparent authority had been present.

McElwain relied on the prior decision of the Minnesota Supreme Court in *Moeller v. Hauser*, 237 Minn. 368, 54 N.W.2d 639 (1952) in rejecting vicarious liability. *Id.* at 446. *Moeller* discusses at some length the liability of a hospital for negligent care by staff nurses, interns, and residents and acknowledges limits on hospital liability for the negligence of its staff when the hospital staff is working under the direct supervision of a physician who is an independent contractor. *Id.* at 378–79, 54 N.W.2d at 645–46. The *Moeller* court indicates that in those settings the independent physician is liable for staff negligence. *Id.* at 379, 54 N.W.2d at 646. Although *Moeller* implies that the hospital is not liable for the malpractice of the independent physician, that issue was not before the *Moeller* court and the court did not consider apparent authority.

It is noteworthy that most jurisdictions have taken the position that in appropriate circumstances hospitals are liable for the negligence of independent-contractor physicians under the common law of apparent authority. *See* 1 Steven E. Pegalis, *American Law of*

Medical Malpractice § 6:21 (3d ed. 2011). Such determinations often refer to the Restatement (Second) of Agency § 267 (2011). *Id.* Although no published Minnesota case law has accepted or rejected that section of the Restatement, commentators have pointed out that pre-restatement case law based liability in such situations on apparent authority. *See* Daniel S. Kleinberger & Peter Knapp, *'Apparent Servants' and Making Appearances Matter*, 28 Wm. Mitchell L. Rev. 1527, 1534 (2002) (citing *Jewison v. Dieudonne*, 127 Minn. 163, 149 N.W. 20 (1914)); *cf. Conover v. N. States Power Co.*, 313 N.W.2d 397, 403–04 (Minn. 1981) ("The general rule . . . that the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants . . . is now primarily important as a preamble to the catalog of its exceptions." (quotations and citations omitted)).

Here, the record indicates that the nursing staff at the Morris clinic called the St. Cloud Hospital emergency room to arrange a referral to that institution and that the physician in Morris spoke to Dr. Aronson, the emergency room physician at St. Cloud Hospital. There is no indication that Dr. Aronson, as a part of an independent-practice group, identified himself as an independent contractor or that he has staff privileges at any hospital other than St. Cloud Hospital. At least in settings in which the physicians are the regular staff of hospital emergency rooms and treat patients admitted through referrals directed to the emergency room, the basis for finding apparent authority is strong. It is factually different from situations in which the physician and patient have a prior relationship and the hospital admission is a function of the physician's and possibly patient's choice of hospital.

Although I would not decide the apparent authority issue here, I would not reject it on the basis of the *McElwain* decision. Any decision by this court with regard to apparent authority constitutes an expansion of Minnesota common law. Rejection of apparent authority as a basis for recovery expands Minnesota law for the benefit of the hospitals. Recognition of apparent authority expands Minnesota law for the benefit of patients. Reference to this court's error-correcting role is a thumb on the scale.