STATE OF MINNESOTA
IN COURT OF APPEALS
A12-154

Joeffre Kolosky,
Appellant,

vs.

Dr. Mark Dahl,
Respondent,

Ian Johnson,
Respondent.

Filed September 10, 2012
Affirmed
Hooten, Judge

Washington County District Court
File No. 82-CV-11-3685

Joeffre Kolosky, Minneapolis, Minnesota (pro se appellant)

Richard J. Thomas, Bryon G. Ascheman, Burke & Thomas, PLLP, St. Paul, Minnesota (for respondent Dahl)

Barbara A. Zurek, Melissa Dosick Riethof, Meagher & Geer, P.L.L.P., Minneapolis, Minnesota (for respondent Johnson)

Considered and decided by Ross, Presiding Judge; Hooten, Judge; and Toussaint, Judge.[*]

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

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

HOOTEN, Judge

Appellant challenges the dismissal of his medical malpractice action, arguing that the district court improperly applied res judicata principles and erred in holding that his expert identification affidavit did not meet the requirements of Minn. Stat. § 145.682 (2010). We affirm.

FACTS

Respondent Dr. Mark Dahl performed "joint replacement surgery" on appellant Joeffre Kolosky's knee on March 5, 2007, at Woodwinds Hospital in Woodbury, Minnesota. Appellant claims that, after the surgery on March 5 and again on March 6, 2007, respondent Ian Johnson performed acupuncture while appellant was recovering from the surgery and that he developed an infection in his knee as a result. Appellant alleges that respondents failed to advise him that acupuncture engenders a risk of infection, "bleeding and trauma" and that both respondents failed to properly diagnose and treat the infection in a timely manner.

This is the second medical malpractice action involving these same allegations which appellant has filed, pro se, against respondents. The first action was filed against respondents, as well as Woodwinds Hospital and Northwestern Health Sciences University, on August 21, 2008. That action was dismissed with prejudice by the district court as to respondent Johnson, Woodwinds Hospital and Northwestern Health Sciences University because appellant failed to comply with the expert affidavit requirements of Minn. Stat. § 145.682. The district court also dismissed appellant's complaint against Dr.

Dahl without prejudice because there was no evidence that appellant had effectively served Dr. Dahl with the summons and complaint. In an appeal of the dismissal of appellant's first malpractice action against respondents, this court declined to exercise its jurisdiction to review the decision to dismiss appellant's complaint against Dr. Dahl, but affirmed the district court's dismissal with prejudice of Johnson, Woodwinds Hospital, and Northwestern Health Sciences University. *Kolosky v. Woodwinds Hosp.*, No. A09-667, 2009 WL 4251139 (Minn. App. Dec. 1, 2009), *review denied* (Minn. Feb. 16, 2010).

In June 2011, appellant filed a second complaint against respondents Dr. Dahl and Johnson. Johnson moved to dismiss the complaint under Minn. R. Civ. P. 12.02(e) for failure to state a claim because appellant's claim was barred by claim and issue preclusion. Johnson also moved for sanctions, asking for fees and a prohibition against future suits. In response, appellant filed a motion for summary judgment, arguing that default judgment should be awarded against Johnson because he had not answered his complaint. Appellant also argued that the prior dismissal with prejudice of Johnson was invalid and principles of res judicata could not apply because there was no evidence that Johnson was served relative to appellant's first medical malpractice complaint. A hearing was held on these motions.

After answering appellant's renewed complaint and engaging in discovery, Dr. Dahl moved to dismiss appellant's complaint for failure to comply with the expert affidavit requirements in Minn. Stat. § 145.682. A separate hearing was held on Dr. Dahl's motion.

The district court denied appellant's summary judgment motion and dismissed appellant's action against respondents with prejudice. As to Johnson, the district court ruled that appellant's claim was barred by res judicata and that appellant was barred from bringing any further legal action against Johnson on the same facts. As to Dr. Dahl, the district court dismissed appellant's complaint on the basis that the affidavit of expert review submitted by appellant did not satisfy Minn. Stat. § 145.682. This appeal follows.

D E C I S I O N

I. Dismissal of Appellant's Complaint against Respondent Johnson and Denial of Appellant's Summary Judgment Motion

Appellant argues that res judicata does not apply in this case because there was no evidence that Johnson was appropriately served in the previous action and that any prior dismissal of Johnson in the prior action is therefore invalid and non-binding on the parties in this action. Appellant also claims that he is entitled to summary judgment against Johnson because Johnson failed to provide a timely answer to his complaint in this second action.

There is no merit to either of appellant's claims. We have held that a party may waive insufficiency of service of process by invoking the jurisdiction of the court on the merits of a determinative claim. *Patterson v. Wu Family Corp.*, 608 N.W.2d 863, 868 (Minn. 2000); *Galbreath v. Coleman*, 596 N.W.2d 689, 691 (Minn. App. 1999). A party invokes the jurisdiction of the court by taking some affirmative step such as bringing a motion asking the court to rule on the merits of the action. *Patterson*, 608 N.W.2d at 869. "[M]oving for a decision on the merits of part of a claim invites the court to

exercise its authority on behalf of the moving party and implicitly acquiesces to the court's exercise of jurisdiction over that party." *Id.* "[O]nce a defendant affirmatively invokes the court's power to determine the merits of all or part of a claim, the defendant cannot then deny the court's jurisdiction over him based on defective service." *Id.*

In the previous action, Johnson brought a motion for dismissal based on appellant's failure to comply with the expert affidavit requirement for medical malpractice actions. By bringing the motion to dismiss, Johnson invoked the jurisdiction of the court and waived any defense he may have had for a defective service of process. Thus, Johnson's invocation of the court's jurisdiction bound both Johnson and appellant to the decisions of the district and appellate courts in that action.

Under these circumstances, appellant's claims in this action are barred by principles of res judicata. It is well settled that "[r]es judicata applies as an absolute bar to a subsequent claim when: (1) the earlier claim involved the same set of factual circumstances; (2) the earlier claim involved the same parties or their privies; (3) there was a final judgment on the merits; and (4) the estopped party had a full and fair opportunity to litigate the matter." *Rucker v. Schmidt*, 794 N.W.2d 114, 117 (Minn. 2011) (footnote omitted). "All four prongs must be met for res judicata to apply." *Id.* (quotation omitted). This court reviews the application of res judicata de novo. *Id.*

The first element is satisfied, in that the current action is based on the exact same set of circumstances. Appellant filed the same complaint and supporting documentation in both actions. In doing so, appellant does not argue that facts have changed or that new evidence has arisen since the dismissal of his prior action. The second element is

similarly satisfied because, as set forth above, both appellant and Johnson were parties in the prior action and are therefore bound by rulings of the district court and appellate courts.

The third element of res judicata is whether there was a final judgment on the merits in the previous action. "Unless the court specifies otherwise in its order, [an involuntary] dismissal [with prejudice] . . . operates as an adjudication upon the merits." Minn. R. Civ. P. 41.02(c). Appellant's first action against Johnson resulted in a dismissal with prejudice because appellant failed to comply with the affidavit requirements for medical malpractice actions. Judgment was entered on that dismissal, and appellant was unsuccessful in his appeal of that judgment. "[F]or res judicata purposes, a judgment becomes final when it is entered in the district court and it remains final, despite a pending appeal, until it is reversed, vacated or otherwise modified." *Brown-Wilbert, Inc. v. Copeland Buhl & Co., P.L.L.P.*, 732 N.W.2d 209, 221 (Minn. 2007). Thus, this third element was satisfied.

Finally, with regard to the fourth element, there are no concerns about procedural irregularities or an absence of a full and fair opportunity to litigate.

> The question of whether a party had a full and fair opportunity to litigate a matter generally focuses on whether there were significant procedural limitations in the prior proceeding, whether the party had the incentive to litigate fully the issue, or whether effective litigation was limited by the nature or relationship of the parties.

State v. Joseph, 636 N.W.2d 322, 328 (Minn. 2001) (quotation omitted). "Moreover, a litigant's disagreement with a legal ruling does not necessarily mean that the court denied

the litigant a full and fair opportunity to litigate a matter." *Id.* at 329. Appellant was presented with the same full and fair opportunity to litigate his claims as any other litigant.

Because the four elements of res judicata are satisfied, we conclude that the district court did not err in dismissing appellant's complaint against Johnson. Moreover, because appellant does not address the district court's prohibition against bringing future lawsuits on these facts, he has waived any challenge to that portion of the district court's order. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982).

There is also no merit to appellant's claim that the district court erred in denying his summary judgment motion. Appellant claims that he was entitled to summary judgment because Johnson failed to serve and file a timely answer to his complaint and that he is entitled to judgment as a matter of law. However, the service of a motion to dismiss tolls the time for a defendant to provide an answer to the complaint. Minn. R. Civ. P. 12.01. "If the court denies the motion or postpones its disposition until the trial on the merits," the defendant has "10 days after service of notice of the court's action" in which to file an answer. *Id.* Therefore, Johnson's service of his motion to dismiss on June 30, 2011, tolled the requirement that he provide an answer to appellant's complaint until ten days after he had received notice from the court that his motion for dismissal had been denied. Because his motion to dismiss appellant's complaint was granted, Johnson was not required to answer appellant's complaint.

II. Dismissal of Appellant's Complaint against Respondent Dr. Dahl

Appellant challenges the district court's dismissal of his medical malpractice claim against Dr. Dahl for failure to comply with the expert affidavit requirement in Minn. Stat. § 145.682. Appellant's expert affidavit contains assertions that: (1) Dr. Dahl's pre-operative statements set forth the appropriate standard of care for an orthopedic surgeon; (2) the opinions of appellant's father, Dr. Robert Kolosky, a dentist, set forth the appropriate standard of care for an orthopedic surgeon; and (3) the opinions of appellant, based upon what he learned from his pre-operative information sessions with Dr. Dahl and others, describe the standard of care. Dr. Kolosky's affidavit indicates that appellant "explained a situation to [him] concerning dental care for people who have had joint replacement surgery" and describes what he would do as a dentist in that situation.

The district court correctly ruled that appellant's expert affidavit is insufficient. When filing a medical malpractice action for "which expert testimony is necessary to establish a prima facie case," the plaintiff must serve an affidavit stating that

> the facts of the case have been reviewed by the [pro se plaintiff] with an expert whose qualifications provide a reasonable expectation that the expert's opinions could be admissible at trial and that, in the opinion of this expert, one or more defendants deviated from the applicable standard of care and by that action caused injury to the plaintiff.

Minn. Stat. § 145.682, subds. 2, 3(a). The affidavit must be signed by the plaintiff, if pro se. *Id.*, subd. 5. Failure to provide this affidavit "within 60 days after demand for the affidavit results, upon motion, in mandatory dismissal with prejudice." *Id.*, subd. 6(a).

"The Minnesota legislature enacted Minn. Stat. § 145.682 for the purpose of eliminating nuisance medical malpractice lawsuits by requiring plaintiffs to file [expert] affidavits verifying that their allegations of malpractice are well-founded." *Stroud v. Hennepin Cnty. Med. Ctr.*, 556 N.W.2d 552, 555 (Minn. 1996). "So as not to undermine the legislative aim of expert review and disclosure, we have stressed that plaintiffs must adhere to strict compliance with the requirements of Minn. Stat. § 145.682." *Broehm v. Mayo Clinic of Rochester*, 690 N.W.2d 721, 726 (Minn. 2005). This court reviews a dismissal for violations of Minn. Stat. § 145.682 for an abuse of discretion. *Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 190 (Minn. 1990).

Appellant's expert affidavit is insufficient in many respects under Minn. Stat. § 145.682, subd. 3(a). First, Dr. Dahl's pre-operative conversations with appellant, as well as the standard pre-op written materials supplied by Woodwinds Hospital medical staff, while potentially admissible, do not constitute a review of the facts regarding a malpractice claim with appellant. Second, Dr. Kolosky, who is a dentist, is not an expert on the standard of care that would have applied to Dr. Dahl, an orthopedic surgeon. Therefore, his opinions would be inadmissible since he is not an expert in the practice of orthopedic surgery. Moreover, his testimony as to what he would do if he were providing dental care to appellant, or someone in appellant's circumstances, is speculative. Third, appellant's testimony regarding the applicable standard of care for an orthopedic surgeon is inadmissible at trial since he is not an expert in any medical field. In sum, appellant's expert affidavit does not indicate that the facts of the case were reviewed by an expert, that any opinions have been offered by an expert whose opinion might be admissible at

trial, or that any expert opined that Dr. Dahl "deviated from the applicable standard of care and by that action caused injury to the plaintiff." Minn. Stat. § 145.682, subd. 3(a).

Because appellant's affidavit of expert review failed to fulfill the statutory requirements and because the statute mandates dismissal with prejudice for that failure, the district court did not abuse its discretion by dismissing his complaint against Dr. Dahl with prejudice.

Affirmed.