

IN THE NEBRASKA COURT OF APPEALS

**MEMORANDUM OPINION AND JUDGMENT ON APPEAL
(Memorandum Web Opinion)**

RICKER V. NEBRASKA METHODIST HEALTH SYSTEM

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KIMBERLY RICKER, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR
OF THE ESTATE OF ROBERT RICKER, DECEASED, APPELLANT,

v.

NEBRASKA METHODIST HEALTH SYSTEM, INC., AND DALE W. ORTON, APPELLEES.

Filed April 9, 2024. No. A-23-339.

Appeal from the District Court for Douglas County: JEFFREY J. LUX, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Justin W. Pritchett, Michael F. Coyle, Jordan W. Adam, and Karson S. Kampfe, of Fraser Stryker P.C., L.L.O., for appellant.

Robert M. Schartz and Julie M. Ryan, of Abrahams, Kaslow & Cassman, L.L.P., for appellees.

MOORE, ARTERBURN, and WELCH, Judges.

ARTERBURN, Judge.

I. INTRODUCTION

Kimberly Ricker, individually and as the special administrator of her late husband Robert Ricker's estate, brought a medical malpractice action alleging negligence on the part of Nebraska Methodist Health System, Inc. and Dale W. Orton, M.D. (collectively "appellees"), arising from Robert's visit to the emergency room. During the discovery phase, the case experienced several delays, some of which were outside the control of either party. Due in part to these delays, the Douglas County District Court granted appellees' motion to terminate Orton's deposition and denied Kimberly's motion to compel documents Orton reviewed prior to his deposition. After also declining to receive an affidavit from Kimberly's medical expert, the court sustained appellees'

motion for summary judgment. Upon our review, we affirm in part, and in part reverse and remand the cause for further proceedings.

II. BACKGROUND

As a preliminary matter, we note that the procedural history in this case spans over 4 years. Although our record is expansive, there are filings and events that occurred in this case that are not included in or detailed by the record. In each of the two district court orders that are the subject of this appeal, the court provides a comprehensive timeline of the case. The following factual background is based on our record as supplemented by the district court's timeline when necessary. Additional facts will be discussed, as necessary, in the analysis section.

1. FACTUAL BACKGROUND

On February 11, 2018, Robert, Kimberly's husband, visited the emergency room at Methodist Hospital in Omaha. Robert was experiencing pain in his left arm and on the left side of his head and neck. Robert had a history of coronary artery disease, having been previously treated with a cardiac stent placement in 2005 and coronary bypass surgery in 2006. Both procedures were performed at Methodist Hospital.

At the emergency room, Robert was treated by Orton. According to Robert's medical forms, Robert presented with a head injury caused by a heavy bar striking his face while at work. A CT scan of Robert's head was administered. Ultimately, he was diagnosed with abrasions, contusions, and a closed head injury. He was given home care instructions and discharged. The next morning, Kimberly discovered that Robert had passed away. An autopsy revealed that Robert died from coronary artery disease.

2. PROCEDURAL HISTORY WITH KIMBERLY'S PRIOR COUNSEL

On March 25, 2019, Kimberly filed a complaint against appellees alleging medical malpractice. The complaint's allegations of negligence are broad, alleging only a general violation of the required standard of care. After filing their answer, appellees served their first set of discovery requests in June 2019. Kimberly served her answers in August 2019.

In August 2019, a scheduling order was entered requiring that factual discovery be completed by November 2019. That same month, Kimberly served appellees with her first set of discovery requests. In December 2019, appellees served their answers. That same month, an amended scheduling order was filed extending the factual discovery deadline to March 2020. Our record reveals no objections to the entry of the extended deadlines. In February 2020, Kimberly filed two motions to compel discovery responses from each appellee, specifically requesting supplemental information to certain interrogatories. In March 2020, appellees served their supplemental discovery responses to Kimberly, which included Robert's medical records. The hearings on Kimberly's motions to compel were continued.

Throughout March and April 2020, the chief judge of the Douglas County District Court issued three consecutive orders continuing all jury trials due to the COVID-19 pandemic. The last order continued jury trials through June 2020. The record indicates that neither party pursued further discovery during this time. Pursuant to an order of the chief judge entered May 14, 2021, traditional scheduling of civil jury trials did not resume until July 6, 2021.

In July 2020, a second amended scheduling order was entered extending the factual discovery deadline to September 7, 2020. This order set the plaintiff expert designation deadline on September 28, 2020, and the defendant expert designation deadline on December 4, 2020. No objection appears in our record to the second amended scheduling order. Despite the scheduling order deadlines, both parties continued to conduct discovery through July 2021 without objection. After the September deadline had passed, both parties served supplemental responses to discovery requests and filed notices of intent to serve subpoenas to various medical facilities and other organizations. Kimberly identified a financial expert witness in July 2021. The parties also conducted depositions after the deadlines had passed. Kimberly's deposition was taken in May 2021, and Orton's deposition was taken in July 2021. Counsel for Kimberly was not personally present for Orton's deposition. Instead, he appeared by video conference. An employee of Kimberly's counsel was personally present. This person provided exhibits to Orton.

During Orton's deposition, Kimberly's counsel asked Orton what documents he had reviewed in preparation for the deposition. Orton stated he had reviewed the medical records from Robert's emergency room visit and his past heart related procedures along with Kimberly's deposition. Kimberly's counsel then requested the production of all of the specific documents that Orton had reviewed prior to his deposition. Appellees' counsel refused this request, reasoning that the medical records reviewed had been previously produced in a discovery response and that since the specific copies of the documents reviewed by Orton had been written on by counsel and Orton, they were protected by attorney-client privilege and the work-product doctrine. Without receiving the documents, Kimberly's counsel continued with the deposition. As the deposition approached the 3-hour mark, counsel began arguing over the documents again, and the deposition was suspended.

In September 2021, Kimberly filed a motion to compel Orton to produce all documents he reviewed in preparation for his deposition. Appellees resisted the motion, requested a protective order, and filed a motion to terminate Orton's deposition. A hearing on these matters was initially scheduled for October 2021, but this hearing did not occur. In September 2021, a new judge was assigned to this case, and on its own motion, the court continued the pending motions.

In August 2021, the district court scheduled a hearing on appellees' motion for summary judgment in November 2021. Curiously, our record indicates that appellees did not file a summary judgment motion until January 2022. Nevertheless, this hearing was rescheduled five times. The first continuance rescheduled the motion for December 2021 and is attributable to the transition of judges in the case. The other continuances were requested by Kimberly's counsel and were granted by the court without objection from appellees. The last continuance in April 2022 was granted because Kimberly's counsel was in the hospital.

On April 21, 2022, a hearing on the motion for summary judgment was held. Unfortunately, Kimberly's counsel had passed away 2 weeks prior, and no one appeared for Kimberly. The court was aware of counsel's death and scheduled a status hearing in June 2022. Kimberly or any new counsel were ordered to attend. The court mailed a copy of this order to Kimberly's personal address, and she later acknowledged that she received this order in April 2022.

Kimberly's prior counsel was a solo practitioner who did not have a succession plan in place in the event of his death. The Nebraska Supreme Court appointed a trustee to prior counsel's

law practice and instructed the trustee to facilitate the transition of cases to new attorneys. In June 2022, the trustee was still searching for a new attorney to represent Kimberly and filed a motion to continue the status hearing. The court granted the motion and continued the hearing to September 2022.

Unbeknownst to the district court at the time, the trustee turned over Kimberly's case file to her soon-to-be new counsel in September 2022. The trustee believed that his duties were completed upon delivering the file. However, new counsel had not yet entered an appearance. Thus, at the September hearing, no one appeared on behalf of Kimberly. On the court's own motion, the status hearing was continued to November. In November, the trustee reappeared in the case and requested another continuance, which the court granted. The November hearing was continued to December. At the December hearing, Kimberly's soon-to-be new counsel appeared, but not on Kimberly's behalf. Counsel requested additional time to further consider whether his firm would accept the case. Kimberly was not present at this hearing. The court, on its own motion, continued the status hearing "one last time" to January 20, 2023.

3. PROCEDURAL HISTORY WITH KIMBERLY'S CURRENT COUNSEL

Kimberly's new counsel filed an entry of appearance on January 19, 2023. On January 20, both parties appeared at the status hearing. We do not have a record of this hearing, but in one of its subsequent orders, the court explained that during this hearing it informed Kimberly's counsel that they were "picking up the baton from prior counsel rather than starting over." The court scheduled a hearing for Kimberly's motion to compel and appellees' responsive motions on January 30 and a hearing for appellees' summary judgment motion on March 22, 2023.

On January 23, 2023, Kimberly filed a motion to amend the progression order and set a jury trial and a motion to order mediation. On January 26, 2023, Kimberly filed another motion to compel. All three motions included a notice that the motions would be heard on January 30. The court did not give Kimberly permission to schedule these motions for that date.

On January 30, 2023, the hearing on Kimberly's original motion to compel concerning the documents Orton reviewed prior to his deposition was held. Appellees' responsive motions requesting a protective order and the termination of Orton's deposition were also presented and submitted for decision. At the outset, appellees objected to hearing Kimberly's three most recently filed motions, arguing that they were untimely filed and premature. Kimberly's counsel responded that it believed the motions were filed with ample notice and that additional discovery was needed before appellees' summary judgment motion could be heard.

Without deciding whether to hear the new motions, the court took up Kimberly's original motion to compel. This motion contained two issues for the court to consider: whether the specific documents Orton reviewed before testifying should be produced, and whether Orton's deposition should be resumed. Kimberly, through counsel, argued that the documents had to be produced because they were used to refresh Orton's recollection before his testimony. Kimberly contended that the earlier production of the documents in a 2,000-page discovery record did not satisfy this requirement because appellees were required to identify the specific documents Orton reviewed. Kimberly further argued that any mental impressions contained in these documents did not negate the production rule. Kimberly also alleged that Orton's deposition was incomplete due to the

breakdown in communication between prior counsel and appellees' counsel. Kimberly thus requested to continue the deposition.

Appellees asserted that the documents were provided to Kimberly's prior counsel but that he did not properly review them and failed to prepare for Orton's deposition. Appellees argued that they should not be required to produce these documents a second time because of a prior counsel's poor case preparation. Appellees also argued that the specific documents Kimberly sought contained counsel's mental impressions and were protected by attorney-client privilege and the work-product doctrine.

As for Kimberly's request to continue Orton's deposition, appellees argued that the deposition lasted almost 3 hours. Further, after Kimberly's prior counsel was denied access to the documents, he continued to depose Orton. Appellees noted that the deposition was only suspended after prior counsel became hostile toward Orton and opposing counsel. For these reasons, appellees concluded that it would be unfair to have Orton sit for another deposition.

Counsel and the court then engaged in a lengthy discussion over the delays in this case. Kimberly pointed out that both sides failed to follow discovery deadlines as set out in the scheduling orders. Appellees responded that they were not prosecuting the case and that they would not disclose defense experts without first receiving disclosure of plaintiff's experts. The court also took some responsibility for the delays, explaining that after the death of Kimberly's prior counsel, it wanted to give Kimberly enough time to hire a new attorney. However, the court noted that despite its efforts, multiple hearings were held where no one appeared on Kimberly's behalf. Ultimately, the district court took the motions under advisement.

On February 6, 2023, the court issued an order denying Kimberly's motion to compel and granting appellees' motion for a protective order and motion to terminate Orton's deposition. The court provided a timeline of the case's procedural background, noting that while case progression standards require 98 percent of civil jury cases to be disposed of in 18 months or less, this case was almost 4 years old at the time of the order's issuance. The court found that Kimberly's prior counsel had not diligently prepared for Orton's deposition. Specifically, the court found that prior counsel did not efficiently review the medical records he received during discovery, nor did he have them readily available during the deposition. In support of this finding, the court pointed out that during the deposition, prior counsel stated "[I]et the record reflect that *my staff* has gone through [the entirety of the medical records]." (Emphasis supplied.) The court read this as an admission that prior counsel did not review all the medical records himself. The court also concluded that because he was a solo practitioner at his firm, no other attorney representing Kimberly had reviewed these records prior to Orton's deposition.

The court found that the documents Orton reviewed prior to his deposition had been previously disclosed during discovery. The court also found that the copies Kimberly requested were protected under attorney-client privilege and the work-product doctrine. The court determined that given the inappropriate behavior exhibited by prior counsel during Orton's deposition, it was conducted in bad faith or a manner that unreasonably annoyed, embarrassed, or oppressed Orton.

On March 13, 2023, Kimberly filed a supplemental index of evidence in opposition to appellees' motion for summary judgment. Attached to this index was an affidavit from Gayle Peterson, M.D., which stated that in his expert opinion, he believed that appellees violated the

medical standard of care when treating Robert. Kimberly also filed a motion to continue the summary judgment hearing, but our record does not contain a copy of this motion.

On March 22, 2023, a hearing was held on the motion for summary judgment and Kimberly's motion to continue. In support of their motion, appellees provided an affidavit from Orton which stated that appellees had adhered to the standard of care when treating Robert. Appellees asserted that with Orton's affidavit, they had presented a prima facie case against any medical malpractice or negligence claims. They further argued that because Peterson's affidavit was untimely presented, the court should not consider it. Without Peterson's affidavit, appellees concluded that Kimberly failed to prove that they had deviated from the standard of care. Kimberly's counsel responded that appellees were also attempting to offer late expert testimony with Orton's affidavit and that one could not be soundly received without the other. The court took the matter under advisement. A ruling on the admissibility of the affidavits was held in abeyance pending the court's review of all evidence and arguments.

On April 11, 2023, the court issued an order denying Kimberly's motion to continue and granting appellees' motion for summary judgment. Due to the timing of its production, the court declined to receive Peterson's affidavit. However, the court received Orton's affidavit based in part upon its findings that Kimberly never served discovery requests on appellees regarding their experts and that her failure to adequately conduct discovery made it difficult for appellees to comply with the scheduling order deadlines. Consequently, the court found that appellees had made a prima facie case for summary judgment and that Kimberly failed to show a material issue of fact existed. The court, therefore, granted summary judgment for appellees. All remaining pending motions were declared moot, and Kimberly's claim was dismissed with prejudice.

Kimberly appeals.

III. ASSIGNMENTS OF ERROR

Kimberly assigns, summarized and restated, that the district court erred in (1) granting appellees' motion to terminate Orton's deposition, (2) denying her motion to compel and examine the documents Orton reviewed prior to his deposition, (3) overruling her objections to Orton's affidavit, (4) sustaining appellees' objections to Peterson's affidavit, (5) sustaining appellees' motion for summary judgment; and (6) overruling her motion to continue the summary judgment proceedings.

IV. STANDARD OF REVIEW

Generally, the control of discovery is a matter for judicial discretion, and decisions regarding discovery will be upheld on appeal in the absence of an abuse of discretion. *Timothy L. Ashford, PC LLO v. Roses*, 313 Neb. 302, 984 N.W.2d 596 (2023). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id.* The party asserting error in a discovery ruling bears the burden of showing that the ruling was an abuse of discretion. *Podraza v. New Century Physicians of Neb.*, 280 Neb. 678, 789 N.W.2d 260 (2010).

When reviewing applicability of attorney-client privilege and/or work-product doctrine, an appellate court reaches its conclusion independent of the lower court's ruling. Neb. Rev. Stat.

§ 27-503 (Reissue 2016); Neb. Ct. R. Disc. § 6-326(b)(3); *Greenwalt v. Wal-Mart Stores*, 253 Neb. 32, 567 N.W.2d 560 (1997).

An appellate court independently reviews questions of law decided by a lower court. *Noland v. Yost*, 315 Neb. 568, 998 N.W.2d 57 (2023).

An appellate court affirms a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law. *Carrizales v. Creighton St. Joseph*, 312 Neb. 296, 979 N.W.2d 81 (2022).

An appellate court reviews the district court's grant of summary judgment de novo, viewing the record in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor. *Palmtag v. Republican Party of Neb.*, 315 Neb. 679, 999 N.W.2d 573 (2024).

V. ANALYSIS

1. CLAIMS REGARDING ORTON'S DEPOSITION

(a) Additional Background

During Orton's deposition, a breakdown in communication occurred between Kimberly's prior counsel and appellees' counsel. The dispute began early in the deposition when Kimberly's counsel, who appeared by video conference, was asking Orton questions about deposition exhibit 11. Exhibit 11 was created by Kimberly's counsel and consisted of 7 pages of Robert's medical records. Exhibit 11 did not include the Bates stamps from the discovery production. While reviewing exhibit 11, Orton stated that the exhibit was missing portions of Robert's chart.

Kimberly's counsel asked Orton if he had the missing chart with him, and Orton stated that he had the document in his car. When Kimberly's counsel requested that appellees retrieve the document, appellees' counsel refused, arguing that it had already been provided during discovery. Appellees' counsel also argued that because he and Orton had written their mental impressions on the copies in Orton's car, they were protected by attorney-client privilege and the work-product doctrine. Moreover, appellees' counsel could not cross-reference exhibit 11 with the many pages of documents produced in discovery because the Bates stamps were not included on any of the exhibit pages provided by Kimberly. This meant that appellees' counsel could not provide a page reference based on the Bates stamp for the "missing" chart Orton referenced because neither party knew where exhibit 11 was located in the voluminous discovery production. Kimberly's counsel never indicated any inability to access the medical records and other discovery documents provided to him prior to the deposition.

With the parties at an impasse, Kimberly's counsel resumed questioning Orton. The deposition lasted almost 3 hours. Toward the end, Kimberly's counsel revisited the issue of the missing chart and again requested that the documents located in Orton's car be produced. When appellees' counsel refused for a second time, Kimberly's counsel moved to continue the deposition. Appellees' counsel objected.

Thereafter, the deposition devolved into an unproductive and inappropriate argument with each attorney repeatedly interrupting the other. Kimberly's counsel stated that he found "[appellees' counsel's] stupidity funny" and declared that Orton had "killed someone." Appellees'

counsel responded that Kimberly's counsel had all the records at his disposal, but it was clear that he had not reviewed them, to which Kimberly's counsel responded, "[I]et the record reflect that my staff has gone through them." The exchange was so tumultuous that the court reporter ended the deposition, stating, "I'm done. I can't take this anymore." When Kimberly's counsel continued to argue, the court reporter told him "[counsel], I'm not reporting you anymore."

In September 2021, Kimberly filed her motion to compel Orton to produce all documents he reviewed in preparation for his deposition. Appellees resisted the motion, requested a protective order, and filed a motion to terminate Orton's deposition. Attached to appellees' motion for a protective order was appellees' counsel's affidavit which asserted that the documents Orton reviewed were privileged. After reviewing the opposing motions and hearing oral arguments, the court found that the documents were privileged and that Kimberly was not entitled to depose Orton for a second time.

(b) Terminating Orton's Deposition

Kimberly alleges that the district court erred when it terminated Orton's deposition. Section 6-326(c) provides that upon the motion by a party, the district court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including that discovery not be had.

The district court found that:

[Kimberly's] prior counsel was woefully unprepared for the deposition of . . . Orton; that the medical records at issue were turned over to [Kimberly] through discovery prior to the deposition of Dr. Orton; that the medical records in Dr. Orton's car contained attorney-client and work-product doctrine protected information and as such were not proper to be disclosed to [Kimberly] and due to [Kimberly's] prior counsel being unprepared for the deposition and due [to] the nature of how the deposition devolved, the deposition was being conducted in bad faith or a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party.

Upon our review, we cannot say the district court abused its discretion in making this determination. Our record shows that after appellees' counsel refused to produce the specific medical records Orton had reviewed, Kimberly's counsel continued with the deposition. Had Kimberly's counsel refused to continue with the deposition until the district court ruled on the document dispute, the outcome on this issue may have been different. But as the record shows, Kimberly's counsel continued questioning Orton, and his deposition lasted for nearly 3 hours. Additionally, Kimberly received Robert's medical records prior to Orton's deposition. Kimberly thus had a fair opportunity to review the medical records and thoroughly question Orton using those records.

In addition, toward the end of the deposition, Kimberly's counsel became hostile toward Orton and his counsel. The comments that he found "[appellees' counsel's] stupidity funny" and declared that Orton had "killed someone" were made to annoy and embarrass both individuals. The dispute was so disruptive that the court reporter declared that she was no longer transcribing the session and was no longer reporting Kimberly's counsel's statements. We rarely if ever review such poor attorney conduct displayed on the record. Therefore, for the reasons above, we cannot

say that the district court abused its discretion in granting appellees' motion to terminate Orton's deposition.

(c) Documents Used to Refresh Recollection

Kimberly argues that the district court erred in granting appellees' motion for a protective order and denying her motion to compel and examine the specific documents Orton reviewed prior to testifying. She asserts that she has a right to examine these documents under Neb. Rev. Stat. § 27-612 (Reissue 2016).

Section 27-612 requires the production of documents used to refresh a witness' recollection while the witness is testifying as well as documents the witness reviewed prior to giving testimony. See *State v. McMillion*, 23 Neb. App. 687, 875 N.W.2d 877 (2016). If it is claimed that the document contains matters not related to the subject matter of the testimony, the trial judge shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. § 27-612. Any portion withheld over objections should be preserved and made available to the appellate court in the event of an appeal. *Id.*

Appellees admit that Orton reviewed Robert's medical records with counsel prior to his deposition. Specifically, they claim that Orton reviewed "certain medical records from [Methodist Hospital] that were pulled and tagged by counsel for Dr. Orton to discuss with him in preparation for his deposition." Nonetheless, appellees argue that they need not produce these documents under § 27-612 because the specific documents Orton reviewed were privileged and because the documents were already provided to Kimberly during discovery.

The party asserting the attorney-client privilege or work-product doctrine has the burden of proving that the documents sought are protected. *Greenwalt v. Wal-Mart Stores*, 253 Neb. 32, 567 N.W.2d 560 (1997). The Supreme Court has stated that:

In response to a motion to compel production, the asserting party must make out a prima facie claim that the privilege or doctrine applies. In order to fulfill this burden, the asserting party must submit a motion for protective order, in affidavit form, verifying the facts critical to the assertion of the privilege or doctrine. The motion for protective order must (1) verify that it accurately describes each of the documents in question; (2) list the documents and provide a summary that includes (a) the type of document, (b) the subject matter of the document, (c) the date of the document, (d) the author of the document, and (e) each recipient of the document; and (3) state with specificity, in a nonconclusory manner, how each element of the asserted privilege or doctrine is met, to the extent possible, without revealing the information alleged to be protected.

Id. at 40, 567 N.W.2d at 566-67 (citations omitted). If the district court determines that the party asserting the privilege or doctrine has failed to make out a prima facie claim, it shall order the asserting party to produce the documents. *Id.* Conversely, if the district court determines that the asserting party has made out a prima facie claim, then it takes additional steps to review the documents and determine whether the documents are protected. *Id.*

In response to Kimberly's motion to compel, appellees submitted a motion for a protective order in affidavit form. When describing the documents at issue, the affidavit states only that

[Counsel] . . . pulled specific [medical] records to discuss with [Orton] in preparation for his deposition. This compilation of records is what is sought by [Kimberly]. The identification of such documents would reveal [counsel's] mental impressions, defense trial strategy and would defeat the purpose of obtaining a protective order.

Based on this affidavit, the district court found that the documents were privileged. We disagree with the district court's conclusion.

As stated above, our review of the applicability of attorney-client privilege is independent of a lower court's ruling. § 27-503; § 6-326(b)(3); *Greenwalt v. Wal-Mart Stores, supra*. Having independently reviewed appellees' affidavit, we find that it is missing several components required by *Greenwalt v. Wal-Mart Stores, supra*. The affidavit does not list the documents at issue, identify the type of documents beyond the fact that they are medical records, identify the subject matter of the documents, identify the date of the documents, identify the author of the documents, or identify the recipient of each document. Further, the affidavit's assertion that "[t]he identification of such documents would reveal [counsel's] mental impressions, defense trial strategy and would defeat the purpose of obtaining a protective order" is the very type of conclusory statement *Greenwalt* prohibits. By failing to include the required information in their affidavit, appellees failed to make out a prima facie claim that the documents were privileged.

To the extent that appellees argue that the documents had been provided to Kimberly prior to Orton's deposition, we decline to address this argument based on our insufficient record. The documents in question were never produced, reviewed in camera, or preserved for purposes of appeal. Therefore, we have no means to assess whether the documents were previously provided to Kimberly.

Having found that there is insufficient evidence to make out a prima facie case that the records reviewed were privileged, we reverse the district court's order denying Kimberly's motion to compel. On remand, appellees must produce to Kimberly the documents Orton reviewed prior to his deposition.

2. CLAIMS RELATED TO SUMMARY JUDGMENT

(a) Additional Background

On March 22, 2023, a hearing was held on the motion for summary judgment. Kimberly filed a motion to continue this hearing on January 10, 2022, but our record does not contain a copy of this motion. Nevertheless, the court took up this motion at the hearing as well.

At the outset, appellees objected to Peterson's affidavit, arguing that it was previously undisclosed expert testimony that was being offered in an untimely manner. As stated in the second amended scheduling order, Kimberly was required to designate her experts by September 28, 2020, over 2 years prior to the hearing. Appellees' counsel argued that receiving this expert testimony at this point in the case would unfairly prejudice appellees. Kimberly's counsel responded that both parties routinely ignored the court's scheduling orders in this case and that appellees were also attempting to offer late expert testimony in the form of an affidavit from Orton.

Appellees' counsel disagreed and countered that Orton was a defendant physician, not a retained expert. The expert designation deadline thus did not apply to him, and he could submit an affidavit without an expert designation. Appellees' counsel also argued that it was difficult for

appellees to present any expert testimony without first receiving Kimberly's expert testimony and more detailed allegations of negligence.

Without Peterson's affidavit, appellees asserted that Kimberly failed to prove the standard of care, any deviation from that standard, causation, and damages. Appellees further asserted that with Orton's affidavit, they had presented a prima facie case against any medical malpractice claims. The court took all matters under advisement.

On April 11, 2023, the court issued an order denying Kimberly's motion to continue and granting appellees' motion for summary judgment. The court once again provided a timeline of the case's procedural background. The court overruled Kimberly's motion to continue, stating that no good cause had been shown and that Kimberly was given an "ample amount of time and a fair opportunity to conduct discovery."

The court declined to receive Peterson's affidavit. The court found that Kimberly did not designate a medical expert witness until March 13, 2023, which was "1,449 days after the filing of this lawsuit and 1,300 days after the initial answers by [Kimberly] to [appellees'] interrogatory requests." The court acknowledged that exigent circumstances in this case occurred due to the COVID-19 pandemic and the death of Kimberly's prior counsel. However, the court emphasized that while prior counsel was representing Kimberly, he was put on notice of appellees' motion for summary judgment, and at no point thereafter did he identify a medical expert. The court ultimately found that the delay in identifying a medical expert was due to prior counsel's failure to adequately conduct discovery. Thus, the court declined to receive Peterson's affidavit as a discovery sanction.

The court received Orton's affidavit, reasoning that Kimberly's failure to adequately conduct discovery and timely disclose medical experts made it difficult for appellees to comply with the scheduling order's discovery deadlines. With this affidavit, the court concluded that appellees had made a prima facie case for summary judgment as a matter of law. The burden then shifted to Kimberly to show an issue of material fact existed. Without Peterson's affidavit, the court concluded that Kimberly failed to do so. The court thus granted summary judgment for appellees.

(b) Expert Witness Affidavits

Kimberly alleges that the district court erred by receiving Dr. Orton's affidavit but excluding her medical expert's affidavit. Before we analyze these claims, we provide a brief overview of the discovery process.

The primary purpose of the discovery process is to explore all available and properly discoverable information to narrow the fact issues in controversy so that a trial may be an efficient and economical resolution of a dispute. *Nebraska Republican Party v. Shively*, 311 Neb. 160, 971 N.W.2d 128 (2022). The discovery process also provides an opportunity for pretrial preparation so that a litigant may conduct an informed cross-examination. *Eddy v. Builders Supply Co.*, 304 Neb. 804, 937 N.W.2d 198 (2020). Moreover, pretrial discovery enables litigants to prepare for a trial without the element of an opponent's tactical surprise, a circumstance which might lead to a result based more on counsel's legal maneuvering than on the merits of the case. *Id.* The liberal discovery of potential testimony of an expert witness is not merely for convenience of the court and litigants but exists to make the task of the trier of fact more manageable by means of an orderly presentation of complex issues of fact. *Id.*

Section 6-326(b)(4)(A) concerns trial preparation and expert witnesses. The rule provides for the liberal discovery of potential testimony of an expert witness, not just for convenience of the court and litigants, but also to make the task of the trier of fact more manageable by means of an orderly presentation of complex issues of fact. *Norquay v. Union Pacific Railroad*, 225 Neb. 527, 407 N.W.2d 146 (1987).

(i) Orton's Affidavit

We turn first to Orton's affidavit. Kimberly argues that appellees identified Orton as a medical expert witness after the deadline to do so had passed. Appellees counter that Orton is a party defendant and that he was never retained as an expert witness.

At the summary judgment stage, it is well settled that a physician's self-supporting affidavit suffices to make a prima facie case that the physician did not commit medical malpractice. *Lombardo v. Sedlacek*, 299 Neb. 400, 908 N.W.2d 630 (2018). Appellees argue that in *Carrizales v. Creighton St. Joseph*, 312 Neb. 296, 979 N.W.2d 81 (2022), the Supreme Court held that for purposes of summary judgment, an expert designation of a defendant doctor is not required as a prerequisite to allow the admission of the doctor's self-supporting affidavit. We agree.

In *Carrizales*, during a summary judgment motion, the defendants offered a defendant doctor's affidavit. The affidavit stated that the defendants had met the applicable standard of care while treating the plaintiff. The plaintiff objected to this affidavit, arguing that the defendants failed to designate the doctor as an expert witness. The Supreme Court found no error in the district court's receipt of the affidavit. Although the plaintiff sent discovery requests seeking the identity of experts and persons the defendants retained or intended to call at trial, the Court found that these requests did not require the defendants to disclose an intention to rely on the defendant doctor for purposes of summary judgment. The Court reasoned that the defendants did not seek to call the defendant doctor as a witness at the trial, and there was no evidence that the defendant doctor, a party to the case, was retained as an expert witness.

Applied here, appellees were not required to designate Orton as an expert witness or disclose an intention to rely on Orton for purposes of summary judgment. Our record does not contain any evidence that Kimberly issued written discovery seeking identification of appellees' experts. However, even if she had sought this information, there is no evidence that appellees retained Orton, a party to the case, as an expert witness. Orton's affidavit was offered solely in support of appellees' motion for summary judgment. Therefore, we find no error in the district court's receipt of Orton's affidavit.

(ii) Peterson's Affidavit

We now turn to Peterson's affidavit and the court's decision not to admit it into evidence. The parties do not dispute that Peterson is a medical expert witness whose affidavit was excluded as a discovery sanction. In determining whether to exclude testimony of an expert witness called by a party who has failed to comply with a request for discovery, the trial court should consider the explanation, if any, for the party's failure to respond, or respond properly, to a request for discovery concerning an expert witness; importance of the expert witness' testimony; surprise to the party seeking preclusion of the expert's testimony; needed time to prepare to meet the testimony from the expert; and the possibility of a continuance. *Norquay v. Union Pacific*

Railroad, 225 Neb. 527, 407 N.W.2d 146 (1987). See, also, *Eddy v. Builders Supply Co.*, 304 Neb. 804, 937 N.W.2d 198 (2020). The issue of whether it is appropriate for a court to exclude a witness as a discovery sanction ultimately depends on the factual context of each case. See *Eddy v. Builders Supply Co.*, *supra*.

Applying the five *Norquay* factors, we find that the district court erred in excluding Peterson's testimony. Unfortunately, with the passing of Kimberly's prior counsel, we do not have a clear explanation for the failure to identify her expert witness earlier in the case. However, the record demonstrates that there was a long and established pattern where both parties conducted discovery well past court ordered deadlines. Three different scheduling orders were signed by counsel for the parties and approved by the court, the last of which was filed on July 13, 2020. This final scheduling order set the fact discovery deadline on September 7, 2020, set the plaintiff expert designation deadline on September 28, 2020, and set the defendant expert designation deadline on December 4, 2020. Despite these deadlines, both parties served and responded to discovery requests throughout 2021. There is no record of either party objecting to late discovery requests or to the extension of discovery deadlines.

The delays in 2022 are largely attributable to the illness and death of Kimberly's prior counsel and her subsequent search for new counsel. We note that during the January 30, 2023, hearing, counsel for appellees stated that he agreed to a number of continuances requested by prior counsel. He stated that prior counsel was sick and kept asking for continuances due to illness and "I went along with it." After prior counsel passed away, the status hearing was continued several times, sometimes due to Kimberly's failure to appear, but there is no evidence that appellees objected to these continuances. It was not until Kimberly obtained new counsel that appellees began objecting to any additional discovery or continuances.

It should not be a surprise to appellees that after Kimberly obtained new counsel, she continued to conduct discovery. During the January 2023 status hearing, the district court instructed both parties that Kimberly's new counsel was picking up the baton from her previous counsel. When her previous counsel died, this case was still in the midst of discovery.

We acknowledge that a significant time period has passed since this case was filed and that under normal circumstances, a delay of this magnitude would justify the exclusion of expert medical witnesses identified this late in the proceedings. However, we must review the timing of the identification here within the entire factual context of the case. The facts of this case are that both parties continued to conduct discovery long past established deadlines. Neither party timely identified a medical expert. Neither party asked the district court to enforce the deadlines set forth in the scheduling order until new counsel for Kimberly had entered their appearance. Had appellees objected to further discovery once the scheduling order deadlines had passed, the result in this case may have been different. But appellees did not object. Rather, they continued with discovery knowing that Kimberly had not yet identified an expert witness and would need to do so at some point in the future.

Peterson's testimony was essential to Kimberly's case. As explained in the district court's final order, without an expert witness, Kimberly could not prove that a genuine issue of material fact existed. We also acknowledge that as this was a late designation, appellees needed time to prepare to meet Peterson's testimony. A continuance would have been necessary to allow appellees time to prepare.

Many unfortunate and unseen circumstances contributed to the slow progression of this case. We do not assign blame for the delays caused by COVID-19, the transition of judges in the case, or the death of Kimberly's prior counsel. However, all of these factors contributed to the delays in this case. While the COVID-19 pandemic did not prevent discovery, no trial date was set due at least in part to the more than one year suspension of any civil jury trials taking place in the Douglas County District Court. Perhaps for that reason, there was a mutual acquiescence to late discovery. We cannot ignore both parties' role in this. We agree with Kimberly that it was unreasonable to sanction only one party when the record demonstrates that prior to her previous counsel's death, both parties bore responsibility for delays in the case. Moreover, appellees' counsel displayed grace and professionalism by agreeing to a number of continuances during the period that Kimberly's prior counsel was ill. That time cannot now be used as a sword to penalize Kimberly.

In sum, this case includes a perfect storm which included the pandemic, a changeover in judges, the illness and death of prior counsel, and the difficulty in retaining new counsel given the lack of a succession plan. The majority of these factors cannot be laid solely at Kimberly's feet. In addition, new counsel for Kimberly identified a medical expert less than 2 months after entering their appearance. While we are aware that new counsel had the file for several months prior to entering their appearance, we nonetheless find that counsel acted with reasonable diligence in identifying their medical expert. For all of these reasons, we find that the district court's decision to exclude Kimberly's expert witness' affidavit as a discovery sanction was an abuse of discretion.

(c) Motion for Summary Judgment

Kimberly asserts that the district court erred in sustaining appellees' motion for summary judgment. She specifically argues that if this Court reverses the district court's rulings on the admissibility of either party's expert testimony, then summary judgment must also be reversed. We agree.

To establish a *prima facie* case of medical malpractice, a plaintiff must show (1) the applicable standard of care, (2) that the defendant(s) deviated from that standard of care, and (3) that this deviation was the proximate cause of the plaintiff's harm. *Evans v. Freedom Healthcare*, 311 Neb. 336, 972 N.W.2d 75 (2022). In medical malpractice cases, expert testimony by a medical professional is normally required to establish the standard of care and causation under the circumstances. *Id.* Therefore, once the defendant medical provider in a malpractice case presents evidence that he or she has met the standard of care, the plaintiff must normally present expert testimony to show that a material issue of fact exists preventing summary judgment. *Id.*

As explained above, we find that the district court properly received Orton's affidavit. Therefore, appellees presented evidence that they had met the standard of care, and the burden shifted to Kimberly to show that a material issue of fact existed. Kimberly offered Peterson's affidavit to the court, but as a discovery sanction, the court declined to receive his affidavit. Because we have ruled that this sanction was an abuse of discretion, summary judgment was improper. On remand, the district court must receive Peterson's affidavit and ultimately determine whether it satisfies Kimberly's burden to show that a material issue of fact exists.

(d) Motion to Continue

Having found that summary judgment was inappropriate, Kimberly's assignment of error regarding her motion to continue is essentially moot. Upon remand, the district court can determine with the parties what additional time may be necessary for each party to adequately prepare and respond to the opposing party's evidence before completion of the summary judgment hearing. The court can then set a new hearing, receive any additional evidence offered, and then enter its ruling on the motion for summary judgment.

VI. CONCLUSION

The district court did not err by granting appellees' motion to terminate Orton's deposition. The court did, however, err in denying Kimberly's motion to compel and granting appellees' motion for a protective order. The court properly received Orton's affidavit for summary judgment purposes, but we find that the court abused its discretion when it declined to receive Peterson's affidavit. Summary judgment was, therefore, inappropriate. Accordingly, we affirm in part, and in part reverse the district court's order sustaining appellees' motion for summary judgment. We remand the cause for further proceedings.

AFFIRMED IN PART, AND IN PART REVERSED
AND REMANDED FOR FURTHER PROCEEDINGS.