STATE OF MINNESOTA
IN COURT OF APPEALS
A14-0499

Laura Tollefson,
Appellant,

vs.

Robert Keck, D.D.S., M.S., et al.,
Respondents,

Charles C. Reichert, D.D.S.,
Defendant,

Erik D. Langsjoen, D.D.S., M.S.,
Respondent.

Filed November 24, 2014
Reversed and remanded
Chutich, Judge

Stearns County District Court
File No. 73-CV-12-8654

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Considered and decided by Chutich, Presiding Judge; Halbrooks, Judge; and Ross, Judge.

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

CHUTICH, Judge

Appellant Laura Tollefson challenges the district court's dismissal of her dental malpractice claims against respondents Dr. Robert Keck and Centrasota Oral and Maxillofacial Surgeons, P.A. The district court dismissed Tollefson's claims because it concluded that Tollefson's expert, Dr. Mark Johnson, lacked the practical experience to qualify as an expert witness and that his affidavit did not comply with Minnesota Statutes section 145.682 (2012), which states the requirements for an expert affidavit in a malpractice claim. Because Dr. Johnson is qualified to be an expert witness and his affidavit satisfies the statutory requirements of section 145.682, we reverse and remand.

FACTS

In June 2008, 20 year-old appellant Laura Tollefson visited her orthodontist, Dr. Erik Langsjoen. Dr. Langsjoen took a panoramic x-ray of Tollefson's mouth, and the x-ray revealed that Tollefson had three impacted third molars,[1] also known as "wisdom teeth," located at sites 1, 16, and 17. Tollefson lacked a fourth wisdom tooth, which would have been located at site 32 (on the lower right side of her jaw). Dr. Langsjoen

[1] Molars are "impacted" when they are unable to fully enter the mouth. This impaction generally results when molars do not have enough room to break through the gums.

sent Tollefson's x-ray to her dentist, Dr. Charles Reichert, but Dr. Langsjoen failed to include a right-left orientation marker on the x-ray. Based on the x-ray, Dr. Reichert recommended removing all three third molars and referred Tollefson to an oral surgeon, Dr. Keck. Dr. Reichert's written referral incorrectly stated that Tollefson required removal of her third molars at sites 1, 16, and 32, when in fact she required removal at sites 1, 16, and 17.

In August 2008, Dr. Keck performed oral surgery to remove Tollefson's three impacted molars. During the procedure, Dr. Keck opened space 32 and discovered no impacted molar. Dr. Keck continued to search for the molar, and as a result of his cutting, he severed the right lingual nerve in Tollefson's mouth with his scalpel.

After the surgery, Tollefson had persistent numbness and no taste sensation on the back right two-thirds of her tongue. Dr. Keck referred Tollefson to Dr. James Q. Swift, the head of oral and maxillofacial surgery at the University of Minnesota School of Dentistry, to correct the problem. Dr. Swift diagnosed Tollefson with a right lingual nerve injury. He told Tollefson that she could elect to have further surgery, with no guarantee that it would repair the damaged nerve, or she could leave the problem untreated. Tollefson opted for the additional surgery, and in October 2008, Dr. Swift performed surgery to repair the damaged right lingual nerve.

In August 2012, Tollefson sued Dr. Keck and his clinic, Centrasota Oral and Maxillofacial Surgeons, P.A.; Dr. Langsjoen and his clinic, Central Minnesota Orthodontics, P.A.; and Dr. Reichert for dental malpractice. Tollefson served on all named defendants an expert affidavit from Dr. Johnson, a general dentist with 27 years of

experience, within 180 days after she filed suit, in compliance with Minnesota Statutes section 145.682, subdivision 2(2).[2]

Respondents moved to dismiss under Minnesota Statutes section 145.682, subdivision 6, claiming that Dr. Johnson, as a general dentist, was not qualified to render an expert opinion on the standard of care for an oral surgeon, and that Dr. Johnson's affidavit failed to specify any standard-of-care breach by Dr. Keck that more likely than not caused Tollefson's damages. Within the 45-day safe-harbor period of Minnesota Statutes section 145.682, subdivision 6, Tollefson filed a second expert affidavit authored and signed by Dr. R. Bruce Templeton, an oral surgeon. Respondents argued that Dr. Templeton's affidavit could not be considered because it was submitted outside the 180-day window and was not an "amended" affidavit under subdivision 6.

On July 9, 2013, the district court granted respondents' motion to dismiss.[3] The district court found that although Dr. Johnson met the educational requirements to qualify as an expert, he lacked practical experience handling referrals and his affidavit did not establish a prima facie case of dental malpractice against Dr. Keck and Centrasota under Minnesota Statutes section 145.682. The district court also found that the 45-day safe-harbor period did not allow Tollefson to use Dr. Templeton's new expert affidavit in place of Dr. Johnson's original expert affidavit.

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[2] The current version of the statute requires submission of the expert affidavit within 180 days after commencement of discovery, but this change only applies to actions commenced on or after April 4, 2014. *See* 2014 Minn. Laws ch. 153, § 1.

[3] The claims against Dr. Reichert, Dr. Langsjoen, and Central Minnesota Orthodontics, P.A. were not dismissed.

Tollefson moved for reconsideration and in her motion raised two new issues: whether expert testimony was required to establish her prima facie case of malpractice and whether the common law doctrine of res ipsa loquitur[4] applied. The district court reaffirmed its dismissal, determining that expert medical testimony was required and that res ipsa loquitur did not apply. This appeal followed.

D E C I S I O N

A district court's decision to dismiss a malpractice claim for noncompliance with Minnesota Statutes section 145.682 is reviewed under an abuse of discretion standard. *Broehm v. Mayo Clinic Rochester*, 690 N.W.2d 721, 725 (Minn. 2005); *Anderson v. Rengachary*, 608 N.W.2d 843, 846 (Minn. 2000). This court will reverse a district court's decision if it is based on an erroneous view of the law or is against the facts in the record. *City of N. Oaks v. Sarpal*, 797 N.W.2d 18, 24 (Minn. 2011).

To establish a prima facie case for malpractice, the plaintiff must show (1) the standard of care in the medical community that applies to the defendant's conduct, (2) the defendant's departure therefrom, (3) how the defendant's departure was a direct cause of the plaintiff's injuries, and (4) damages. *Tousignant v. St. Louis Cnty.*, 615 N.W.2d 53, 59 (Minn. 2000). When a plaintiff brings a tort action against a healthcare provider and expert testimony is necessary to establish the plaintiff's prima facie case, the plaintiff must submit an expert affidavit to the defendants within 180 days after the complaint is filed. Minn. Stat. § 145.682, subd. 2(2).

[4] Res ipsa loquitur is a Latin term meaning "the thing speaks for itself," and it applies when "the mere fact of an accident's occurrence raises an inference of negligence." *Black's Law Dictionary* 1424 (9th ed. 2009).

Failure to meet the affidavit requirements results in mandatory dismissal with prejudice for any of the plaintiff's claims that require expert testimony. *Id.*, subd. 6. But plaintiffs also have a 45-day safe-harbor period to cure any alleged deficiencies in the expert affidavit. *Id.* In the rare instance where "'the acts or omissions complained of are within the general knowledge and experience of lay persons, expert testimony is not necessary to establish a standard of care, even in cases of alleged medical malpractice.'" *Tousignant*, 615 N.W.2d at 58 (quoting *Atwater Creamery Co. v. W. Nat'l Mut. Ins. Co.*, 366 N.W.2d 271, 279 (Minn. 1985)).

When expert testimony is required, the expert must be qualified to testify on the subject matter. Minn. Stat. § 145.682, subd. 3(a). An expert witness is qualified if the witness has practical experience and "the reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of the medical profession under similar circumstances." *Cornfeldt v. Tongen*, 262 N.W.2d 684, 692 (Minn. 1977) (quotation omitted). In other words, the competency of an expert witness's medical testimony is based on the witness's educational credentials and practical experience regarding the subject matter. *Reinhardt v. Colton*, 337 N.W.2d 88, 93 (Minn. 1983).

A. Expert Qualifications

The district court determined that Dr. Johnson was not a qualified expert on Dr. Keck's handling of the referral because he lacked the necessary degree of practical experience in receiving referrals for impacted third molar patients. But an expert witness need not have "a specialty, experience, or a position identical to a [] defendant." *Koch v. Mork Clinic, P.A.*, 540 N.W.2d 526, 529 (Minn. App. 1995), *review denied* (Minn. Jan.

12, 1996). An expert need only have "'sufficient scientific knowledge' and '*some* practical experience' with the subject matter of the proposed testimony." *Id.* (emphasis added) (quoting *Cornfeldt*, 262 N.W.2d at 692). And most importantly, the pool of qualified experts is not limited to the one or few persons who are *most* qualified to give an expert opinion. *Broehm*, 690 N.W.2d at 734 (Anderson, Paul H., J., concurring) (citing *Christy v. Saliterman*, 288 Minn. 144, 167, 179 N.W.2d 288, 303 (1970)).

Dr. Johnson has 27 years of experience running a solo dental practice, and he is experienced in both performing third molar extractions and referring patients for third molar extractions. While Dr. Johnson may not be the *most* qualified expert to speak on referrals for impacted third molar patients, the record does not suggest that the referral process is an area of complex dentistry that requires highly specialized practical experience. Here, Dr. Keck received a written referral instructing him to remove three third molars. He relied on that referral, which misstated the location of Tollefson's congenitally missing third molar, and he severed Tollefson's right lingual nerve.

The respondents undoubtedly will challenge Dr. Johnson's expert opinion. But they must do so at trial, cross-examining Dr. Johnson for the jury to weigh the value of his testimony. *See Christy*, 288 Minn. at 167, 179 N.W.2d at 303 ("It is usually held that any person whose profession or vocation deals with the subject at hand is entitled to be heard as an expert, while the value of his evidence is to be tested by cross-examination and ultimately determined by the jury."). Dr. Johnson's 27 years of practical experience with general dental referrals and third molar extractions qualify him to offer expert

testimony and establish a prima facie case as to whether Dr. Keck's reliance on the referral was negligent.

B. Standard of Care and Breach

The district court also concluded that Dr. Johnson's affidavit did not comply with Minnesota Statutes section 145.682 because it was vague and overbroad regarding the standard of care and breach regarding Dr. Keck's handling of the referral and performance during the surgery. After careful consideration of Dr. Johnson's affidavit, we conclude that it meets the level of specificity that section 145.682 and caselaw require.

An expert affidavit must include "the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion." Minn. Stat. § 145.682, subd. 4(a). Subdivision 4 "requires far more information than simply identification of the expert intended to be called at trial or a 'general disclosure.'" *Lindberg v. Health Partners, Inc.*, 599 N.W.2d 572, 578 (Minn. 1999). At a minimum, an expert's affidavit must set forth "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). The *Sorenson* requirements have been consistently applied in malpractice cases to evaluate expert affidavits. *See, e.g.*, *Broehm*, 690 N.W.2d at 726 (quoting the *Sorenson* requirements); *Lindberg*, 599 N.W.2d at 577 (applying the *Sorenson* requirements).

As a general rule, expert affidavits are insufficient if they merely contain broad, sweeping statements regarding the applicable standard of care. *See Anderson*, 608 N.W.2d at 848; *Stroud v. Hennepin Cnty. Med. Ctr.*, 556 N.W.2d 552, 556 (Minn. 1996). For example, in *Anderson*, the expert's proffered standard of care was that "esophageal trauma should be avoided during surgery of this type." 608 N.W.2d at 848. The supreme court found this statement too vague to set a standard of care because it did not describe what measures a physician should take to avoid esophageal trauma or describe how the defendant's acts or omissions violated the standard and caused the plaintiff's injury. *Id.*

Similarly, in *Lindberg*, the expert's stated standard of care was simply, "I am familiar with the standard and duty of care applicable to doctors, midwives, nurses and other medical personnel . . . ." 599 N.W.2d at 574-75. The supreme court found that this description of the standard of care was "nothing more than broad and conclusory statements as to causation." *Id.* at 578. While the affidavit indicated that the expert was familiar with an applicable standard of care, it did not identify a specific standard of care or describe how the defendant departed from that standard. *Id.*

Here, respondents contend that Dr. Johnson's affidavit was impermissibly vague in setting a standard of care for the referral process because the affidavit stated that accepted standards of practice required Dr. Keck and Centrasota to be "cautious when relying on a referral slip requesting the extraction of three third molars."

But unlike the expert affidavits in *Anderson* and *Lindberg*, Dr. Johnson's affidavit next specifically explains what a "cautious" standard of practice includes:

> Dr. Keck and Centrasota Oral and Maxillofacial Surgeons were given the original panorex x-rays to review. In reviewing the films, it should have been clear that there was one impacted mandibular third molar that needed to be extracted and that Ms. Tollefson's other mandibular third molar was congenitally missing. With no right-left identification marker present on the x-rays and, upon personal examination of Ms. Tollefson, no fillings or other markers to accurately determine the correct right and left sides of the panorex, Dr. Keck failed to exercise due care to determine which were the correct third molars that needed to be extracted. Upon opening the third molar site at #32 and not finding an impacted molar, Dr. Keck continued to search for an impacted molar that was not present and transected Ms. Tollefson's lingual nerve.

Dr. Johnson's affidavit meets all three *Sorenson* requirements. The affidavit first establishes a standard of care—when an oral surgeon receives a referral, and the x-ray has no right-left identifier, and it is impossible to orient the x-ray with fillings or markers in the patient's mouth, the surgeon has to independently verify the locations of the molars to be removed. The affidavit next describes how Dr. Keck's acts and omissions violated this standard of care—Dr. Keck did not take any steps to independently verify the location of Tollefson's congenitally missing molar. And finally, the affidavit outlines the chain of causation—because Dr. Keck did not independently verify the location of Tollefson's congenitally missing molar, he cut where no impacted molar existed and continued to cut in search of the absent molar, eventually severing Tollefson's lingual nerve.

The district court also found that Dr. Johnson's affidavit was vague regarding the standard of care that Dr. Keck should have exercised during surgery. The affidavit states,

> Upon initially opening the gum tissue at the #32 site and not finding an impacted molar, accepted standards of care required Dr. Keck to stop the procedure and confirm that he was searching for an impacted molar at the correct location. The failure to stop the procedure before transecting the lingual nerve was a departure from accepted standards of dental practice.

Dr. Johnson's affidavit meets the three *Sorenson* requirements. The affidavit establishes the requisite standard of care—upon opening the gum and not finding an impacted molar, an oral surgeon should have stopped to verify the location of the congenitally missing molar. Dr. Johnson describes the standard of care in greater detail than the expert affidavit in either *Anderson* or *Lindberg.* And the affidavit next describes how Dr. Keck's actions violated that standard of care—Dr. Keck did not stop to verify the location of the molar but continued cutting.

C. Causation

Regarding the final *Sorenson* requirement, the district court determined that Dr. Johnson's affidavit did not provide enough detail to show the chain of causation between Dr. Keck's breach and Tollefson's injury. Specifically, the district court found that Dr. Johnson's affidavit created more questions than answers because it did not specify how deeply Dr. Keck should have dug and whether one could know how deep an impacted tooth lies.

Expert affidavits that contain broad, sweeping statements to outline the chain of causation do not satisfy the substantive requirements of Minnesota Statutes section

145.682. *See Anderson*, 608 N.W.2d at 848; *Stroud*, 556 N.W.2d at 556. In other words, a chain of causation cannot contain empty conclusions that "mask a frivolous claim." *Teffeteller v. Univ. of Minn.*, 645 N.W.2d 420, 428 (Minn. 2002). For example, in *Teffeteller*, the expert stated the chain of causation in a single sentence: "[T]he departures from accepted levels of care, as above identified, were a direct cause of Thad Roddy's death." *Id.* at 429 (alteration in original). The supreme court found that the affidavit was insufficient because it treated the cause of death summarily, provided only broad, conclusory statements as to causation, and did not connect the defendants' failure to treat with the patient's death. *Id.* (citing *Sorenson*, 457 N.W.2d at 192-93).

Likewise in *Stroud*, the expert's affidavit stated that "there was a failure to diagnose and treat a subarachnoid hemorrhage which ultimately resulted in a complicated hospital course and death of the Plaintiff." 556 N.W.2d at 554. The court found that the affidavit was insufficient because it provided only broad, conclusory statements regarding causation and did not connect the decedent's cause of death to the defendant's alleged negligent act. *Id.* at 556.

Here, Dr. Johnson's affidavit outlines the chain of events that led to Tollefson's injury: Dr. Keck cut open Tollefson's gum, he continued to cut into Tollefson's gum despite finding no impacted third molar, and because he did not stop cutting, Dr. Keck severed Tollefson's right lingual nerve. Unlike the single, conclusory causation statements in *Stroud* and *Teffeteller*, Dr. Johnson's affidavit explains the standard of care and outlines how Dr. Keck's deviation from that standard resulted in the injury to Tollefson.

Moreover, Minnesota Statutes section 145.682 does not require a plaintiff to try her case on the merits of an expert affidavit; the statute simply requires expert testimony to establish a prima facie case. *See Demgen v. Fairview Hosp.*, 621 N.W.2d 259, 265 (Minn. App. 2001) (stating that an expert affidavit is not supposed to be a trial on the merits), *review denied* (Minn. Apr. 17, 2001). Again, the respondents can cross-examine Dr. Johnson at trial and let the jury weigh his testimony. *See Christy*, 288 Minn. at 167, 179 N.W.2d at 303. Because Dr. Johnson's affidavit properly outlines the chain of causation, it meets the statutory requirements.

Section 145.682 was not passed to prevent meritorious cases from being determined by a factfinder; the statute was passed to identify and to aid the dismissal of *meritless* lawsuits in the early stages of litigation when a plaintiff cannot demonstrate that a qualified expert believes that the alleged malpractice directly caused the plaintiff's injury. *Broehm*, 690 N.W.2d at 725. Because Dr. Johnson's affidavit complies with Minnesota Statutes section 145.682 and caselaw, the district court's rejection of his affidavit and dismissal of the claim against respondents was an abuse of discretion.

D. Tollefson's Additional Arguments

Tollefson argues in the alternative that she can amend Dr. Johnson's affidavit with Dr. Templeton's affidavit because she served Dr. Templeton's affidavit on respondents within the 45-day safe-harbor period of Minnesota law. *See* Minn. Stat. § 145.682, subd. 6. Tollefson also argues that the district court improperly relied on Minnesota Statutes section 145.682 to dismiss her claim because her claim does not require expert testimony

or, in the alternative, that res ipsa loquitur applies. Given our conclusion above, we need not address Tollefson's remaining arguments.

Reversed and remanded.