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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1232**

Anita J. Howard,
Appellant,

vs.

Shelly R. Svoboda, M. D., et al.,
Respondents.

**Filed June 12, 2017
Affirmed
Larkin, Judge**

Hennepin County District Court
File No. 27-CV-14-20381

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Considered and decided by Johnson, Presiding Judge; Larkin, Judge; and Bratvold,
Judge.

UNPUBLISHED OPINION

LARKIN, Judge

In this medical-malpractice action, appellant challenges the district court's denial of her request for judgment as a matter of law or a new trial, arguing that the district court

erred by allowing respondents' experts and a treating physician to testify regarding the growth rate of a spinal infection that caused appellant's paraplegia. We affirm.

FACTS

Appellant Anita J. Howard's history of back pain led her to seek treatment at respondent Noran Neurological Clinic (Noran) in 2009. Noran referred appellant to a neurosurgeon, Dr. Mahmoud Nagib. In August 2009, Dr. Nagib performed surgery on appellant to relieve back pain caused by nerve compression in her spine. In October 2009, Dr. Nagib transferred appellant's care back to Noran. Respondent Dr. Shelly Svoboda and Christopher Geisler treated appellant at Noran on October 26, 2009, November 23, 2009, February 25, 2010, and May 25, 2010.¹

On the morning of June 7, 2010, appellant was able to walk normally. After waking from a nap later that day, she was unable to move her legs. Appellant was admitted to Abbott Northwestern Hospital, where she reported that she had had a fever and chills for the past two days, as well as worsening back pain. Appellant also reported that she had been unable to move her legs for a period of time the night before she was admitted to the hospital. Appellant never regained her ability to walk after June 7.

¹ Although Geisler was named as a defendant in the underlying action, the district court granted summary judgment in his favor. The district court's grant of summary judgment is not challenged, and Geisler is not a respondent, in this appeal.

Appellant had an MRI, which revealed that two vertebrae in her spine had collapsed and caused paraplegia.² The collapse of the vertebrae was caused by a bone infection. Appellant was diagnosed with osteomyelitis and discitis based on the MRI results.

In May 2014, appellant sued respondents, alleging that they negligently failed to identify, diagnose, and treat the infection before it permanently damaged her spine. In January 2015, respondents moved to compel appellant to authorize an informal conference with Dr. Nagib under Minn. Stat. § 595.02, subd. 5 (2016). In response, appellant moved for a temporary injunction or order for protection, asking the district court to enjoin respondents from “[i]nquiring of Dr. Mahmoud Gamal Nagib or any other treating physician as to any standard of care owed to [appellant] by [respondents] and the causation of her injuries as a violation thereof.”

In April 2015, the district court granted respondents’ motion to compel in part, directing appellant to authorize respondents’ informal conference with Dr. Nagib and permitting respondents’ counsel to inquire as to “any ‘information or opinion in the possession’ of Dr. Nagib regarding . . . his treating relationship with her, including the time periods from August 20, 2009 to October 26, 2009 and from June 7, 2010 forward.” However, the district court issued a protective order precluding respondents’ counsel from requesting expert opinions from Dr. Nagib about “(a) the standard of care applicable to other medical providers who cared for [appellant] during periods of time when [appellant]

² Paraplegia is “[c]omplete paralysis of the lower half of the body.” *The American Heritage College Dictionary* 1010 (4th ed. 2007).

was not Dr. Nagib’s patient or (b) whether an alleged breach of the standard of care by medical providers other than Dr. Nagib caused injury to [appellant].”³

In July, appellant moved to depose her treating physicians and respondents’ experts. The district court denied appellant’s motions.

In September, appellant and respondents had the informal conference with Dr. Nagib. Dr. Nagib was not asked about any standard of care that respondents owed appellant, consistent with the district court’s protective order.

In November and December, appellant moved to exclude respondents’ proffered expert testimony regarding the timing of her infection, arguing that it would not be helpful to the factfinder and failed to meet the qualifications for admission as expert testimony under Minn. R. Evid. 702.⁴ The district court denied appellant’s motion, reasoning that “[t]he planned testimony and evidence from [respondents’] experts meet the standards for admissibility under Rule 702” and that respondents’ “experts do not offer novel scientific theories.”

³ In June 2015, respondents appealed the district court’s protective order. This court reversed, holding that “an ‘informal discussion’ with a treating physician who has examined or cared for a party allows inquiry into ‘any information or opinion’ the physician possesses, including opinions on the standard of care and causation relating to periods when the physician was not caring for the patient.” *Howard v. Svoboda (Howard I)*, 877 N.W.2d 562, 564 (Minn. App. 2016), *vacated*, 890 N.W.2d 111 (Minn. 2017). The supreme court vacated this court’s decision, holding that this court “lacked appellate jurisdiction over the district court’s interlocutory order.” *Howard v. Svoboda*, 890 N.W.2d at 116.

⁴ Appellant also argued that respondents’ proffered expert testimony regarding the timing of her infection did not meet the *Frye-Mack* standard for novel scientific evidence. The district court concluded that the *Frye-Mack* standard did not apply because respondents’ experts did not offer novel scientific theories. On appeal, appellant does not argue that the *Frye-Mack* standard applies.

In January 2016, appellant's case was tried to a jury. One of respondents' defenses at trial was that appellant's infection had developed between May 25, 2010, the last time she was treated at Noran, and her hospitalization on June 7, 2010. Dr. Nagib appeared as a witness for respondents, and testified that appellant's infection was "very recent" and developed in less than 13 days. Dr. Nagib did not testify regarding any standard of care that respondents owed appellant.

The jury returned a special verdict finding that Dr. Svoboda was not negligent in her care and treatment of appellant. The jury did not reach the issue of causation. Appellant moved for judgment as a matter of law (JMOL) or in the alternative, a new trial, arguing that the district court "failed to exclude the testimony of [respondents'] experts contrary to Rule 702 of the Minnesota Rules of Evidence" and erred by permitting "Dr. Nagib . . . to testify as a Rule 26 expert as to the speed of growth of the osteomyelitis bacteria contrary to [the district court's] Order of April 30, 2015."⁵

The district court denied appellant's motions, reasoning that "[w]hile [appellant's] experts testified to the contrary, the jury may reasonably have credited Dr. Svoboda's testimony, and that of [respondents'] experts who also testified that the standard of care did not require Dr. Svoboda to test for infection based upon [appellant's] reports of ongoing back pain." The district court noted that when both parties present evidence sufficient to sustain a verdict in their favor, the determination of negligence is a fact question for the

⁵ Appellant also moved for JMOL and a new trial on the ground that the district court erred by denying her the opportunity to depose her treating physicians and respondents' experts. Appellant does not appeal the district court's denial of her JMOL and new-trial motions on these grounds.

jury. The district court viewed the standard-of-care evidence in the light most favorable to the verdict and concluded that a reasonable jury could reach a verdict in Dr. Svoboda's favor. The district court also concluded that respondents' experts' testimony was admissible under Minn. R. Evid. 702, that "Dr. Nagib could testify as to his opinion about the infectious process as a treating physician," and that even if "Dr. Nagib can be considered to have testified improperly as a Rule 26 expert," appellant was not prejudiced because had "Dr. Nagib . . . not testified at all, there was sufficient evidence to uphold the verdict." Howard appeals.

DECISION

If a party moves for JMOL after a jury returns a verdict, the district court may "(1) allow the judgment to stand, (2) order a new trial, or (3) direct entry of judgment as a matter of law." Minn. R. Civ. P. 50.02. "The jury's verdict will not be set aside if it can be sustained on any reasonable theory of the evidence." *Longbehn v. Schoenrock*, 727 N.W.2d 153, 159 (Minn. App. 2007) (quotation omitted). "Courts must view the evidence in the light most favorable to the nonmoving party and determine whether the verdict is manifestly against the entire evidence or whether despite the jury's findings of fact the moving party is entitled to judgment as a matter of law." *Id.* (quotation omitted). "JMOL is appropriate when a jury verdict has no reasonable support in fact or is contrary to law." *Id.* An appellate court reviews a district court's decision to grant or deny JMOL de novo. *Id.*

Under Minn. R. Civ. P. 59.01(g), a district court may grant a motion for a new trial if "[t]he verdict . . . is not justified by the evidence, or is contrary to law." "On appeal from

a denial of a motion for a new trial, an appellate court should not set aside a jury verdict unless it is manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable to the verdict.” *Raze v. Mueller*, 587 N.W.2d 645, 648 (Minn. 1999) (quotations omitted). Although the new-trial standard is less rigorous than the standard for granting JMOL, it is still a demanding standard. *Clifford v. Geritom Med, Inc.*, 681 N.W.2d 680, 687 (Minn. 2004). Because the district court is in a better position to determine whether the verdict is justified by the evidence, this court will not reverse its decision to deny a motion for a new trial absent a clear abuse of discretion. *See Baker v. Amtrak Nat’l R.R. Passenger Corp.*, 588 N.W.2d 749, 753 (Minn. App. 1999).

Appellant challenges the district court’s denial of her JMOL and new-trial motions on the grounds that (1) the district court erred by failing to “exclude the testimony of respondents’ experts contrary to Rule 702 of the Minnesota Rules of Evidence” and (2) the district court erred by allowing “a treating physician, Dr. Nagib, to testify at trial as a [Minn. R. Civ. P.] 26 expert and render his opinion as to the speed of growth of the osteomyelitis bacteria.” As to the testimony of respondents’ experts, appellant argues, “If the evidence is excluded, . . . reasonable minds could only reach one conclusion, a judgment in favor of the Appellant.” As to the testimony of Dr. Nagib, appellant argues, “The admission of such improper evidence, giving an unfair and prejudicial advantage to the Respondents, in the battle of the experts, has deprived the Appellant of a fair trial, in light of the fact that the negligence and causation are totally and exclusively dependent upon expert testimony.”

Appellant’s challenge to the district court’s denial of her JMOL and new-trial motions hinges on her assertion that the district court erred by allowing respondents’ experts and Dr. Nagib to testify regarding the timing of her infection. We therefore focus our review on these evidentiary rulings and address each of the underlying assertions of error in turn. *See Doe v. Archdiocese of St. Paul*, 817 N.W.2d 150, 164 (Minn. 2012) (considering evidentiary ruling first because the district court’s grant of summary judgment hinged on that ruling).

I.

Appellant argues that the district court erred by failing to “exclude the testimony of respondents’ experts contrary to Rule 702 of the Minnesota Rules of Evidence.” Specifically, appellant objects to respondents’ expert testimony regarding when appellant’s infection began. At trial, appellant’s experts testified that the infection was likely seeded during her surgery with Dr. Nagib, that the infection progressed over several months, and that appellant’s continuing pain was a sign of infection. Respondents’ experts testified that the infection developed rapidly, likely from two to ten days prior to appellant presenting at the hospital with paralysis.

Minn. R. Evid. 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. The opinion must have foundational reliability. In addition, if the opinion or evidence involves novel scientific theory, the proponent must establish that the underlying scientific

evidence is generally accepted in the relevant scientific community.

For expert testimony to be admissible under Rule 702, a proponent must show that the testimony passes a four-part test: “(1) [t]he witness must qualify as an expert; (2) the expert’s opinion must have foundational reliability; (3) the expert testimony must be helpful to the trier of fact; and (4) if the testimony involves a novel scientific theory, it must satisfy the *Frye-Mack* standard.” *Doe*, 817 N.W.2d at 164. Appellant focuses on the second requirement, arguing that respondents’ experts’ opinions lack foundational reliability and thus were not helpful to the trier of fact. We review a district court’s ruling regarding foundational reliability for an abuse of discretion. *Id.*

The supreme court has outlined three steps that a district court must take in analyzing the foundational reliability of expert testimony. *Id.* at 167-68. “First, the district court must analyze the proffered testimony in light of the purpose for which it is being offered.” *Id.* “Second, the court must consider the underlying reliability, consistency, and accuracy of the subject about which the expert is testifying.” *Id.* at 168. Finally, “the proponent of evidence about a given subject must show that it is reliable in that particular case.” *Id.* “As long as the district court considered the relevant foundational reliability factors, [an appellate court] will not reverse its evidentiary finding absent an abuse of discretion.” *Id.*

The district court summarized the basis for respondents’ experts’ testimony regarding the onset of appellant’s infection as follows:

Dr. Christian Schrock is an expert witness with a background as an epidemiologist evaluating infectious diseases. His

opinions are based on his training, expertise, generally accepted principles of science related to the care and treatment of patients with infections, [appellant's] medical records, and deposition transcripts. Dr. Schrock's opinion is that the *Streptococcus intermedius* bacteria causing [appellant's] infectious process is an organism that can cause serious infections very rapidly. He cited to an article as an example of organisms in the *Streptococcus milleri* family causing rapid clinical deterioration. Dr. Schrock's opinion was based only in part on the article. Dr. Schrock's opinions are supported by the testimony of [respondents'] other expert witnesses. These additional experts include: Dr. Amir Mehbod, whose opinion that the infection developed rapidly is based in part on [appellant's] medical records and his own experience; Dr. Frederick Strobl, whose opinion that the infection started shortly before June 7 is based in part on [appellant's] medical records; [and appellant's] treating surgeon Dr. Mahmoud Nagib, whose opinion that [appellant's] infection developed a few days before June 7 is based on his observations of [appellant] and short history of infection symptoms.

The district court reasoned that Dr. Schrock's testimony would be helpful to the jury in determining when appellant's infection began and that "[w]hat [appellant] asserts are flaws in Dr. Schrock's analysis go to the weight of his testimony and not its admissibility." The district court further reasoned that "[t]he jury will decide whether to credit Dr. Schrock's opinion, and will do so by evaluating not only his testimony but that of [respondents'] experts corroborating his testimony and that of [appellant's] experts opposing it." The district court concluded that the jury should "hear the conflicting opinions of both sides' experts regarding the pace of bacterial growth as it relates to the progression of [appellant's] infection" and held that the testimony of respondents' experts was admissible under Rule 702. The district court also concluded that "[t]he scientific theories underlying bacterial reproduction rates, infectious process, and diagnosis of

discitis and osteomyelitis are each well established,” and that respondents’ experts’ opinions do not involve novel scientific theories and therefore do not implicate the *Frye-Mack* standard.

Appellant contends that respondents’ experts “had no science to back up their theory that [the] bacteria grew so fast that in less than twelve (12) days it had caused such extensive destruction of the vertebral bodies that they collapsed and caused impingement of the spinal cord and [her] permanent paralysis.” Appellant argues that the district court allowed respondents’ experts to instead “testify as to their own personal experience,” which is “contrary to Rules 702 and 703 of the Minnesota Rules of Evidence.” Appellant relies on *Doe v. Archdiocese of St. Paul* and *Jacobson v. \$55,900 in U.S. Currency*. 817 N.W.2d at 167; 728 N.W.2d 510, 529 (Minn. 2007). Although both cases are relevant in that they describe the standards for determining foundational reliability, the circumstances of those cases are different than those in this case.

In *Doe*, the supreme court considered whether the district court had erred by finding that the “theory of repressed and recovered memory” was inadmissible as foundationally unreliable under the *Frye-Mack* standard. 817 N.W.2d at 166. In concluding that the district court did not err, the supreme court noted that the district court had “found that while there are hundreds of studies on the theory of repressed and recovered memory, it was unconvinced that any of the studies had proved the existence of, much less the accuracy or reliability of, repressed and recovered memories.” *Id.* at 169.

In *Jacobson*, the supreme court considered whether the district court had erred by admitting dog-sniff evidence to prove a connection between seized cash and drug

trafficking. 728 N.W.2d at 525. The supreme court stated that it agreed “with the reemerging view that a dog’s alert could meet the relatively low threshold for relevance on the question of whether cash is connected to drug trafficking.” *Id.* at 527-28. The supreme court found that the dog-sniff evidence was relevant, but concluded that the evidence lacked an adequate foundation because the proponent of the evidence (1) failed to provide evidence regarding the dog’s training, certifications, or accuracy and (2) failed to provide evidence establishing foundation that the specific dog sniff at issue was reliable. *Id.* at 529-30.

Unlike *Jacobson*, this case does not involve a failure to establish an expert witness’s qualifications or the reliability of a particular test. And unlike *Doe*, this case does not involve a novel scientific theory or a question regarding whether a particular phenomenon exists. The parties do not dispute that a *Streptococcus milleri* bacteria caused the infection that ultimately resulted in appellant’s paraplegia. Instead, they dispute the growth rate of that infection. In doing so, each side relies on scientific evidence.

Appellant argues that respondents’ experts’ opinions are not reliable because they are based on personal experience, and not on repeated clinical trials. However, appellant’s own evidence supports respondents’ expert testimony regarding the timing of her infection. Appellant presented a peer-reviewed study of “64 patients of vertebral osteomyelitis bacteria growth” in support of her negligence claim at trial. In that study, the mean duration of symptoms before hospital admission was “48 +/- 40 days,” meaning that the longest duration that any of the patients experienced symptoms before hospital admission was 88 days and the shortest duration was eight days. Because at least one of the patients in the

study experienced symptoms only eight days prior to hospital admission, the peer-reviewed study on which appellant relied shows that it is possible that her infection developed between her last examination with respondents on May 25 and her admission to the hospital on June 7. Although the study indicates that it is rare for patients to experience symptoms for such a brief period of time, the likelihood that appellant's infection developed quickly goes to the weight of respondents' expert-witness testimony, and not its foundational reliability.

On this record, the district court did not abuse its discretion by allowing the jury to hear the opinions of respondents' experts regarding the timing of appellant's infection.

II.

Appellant argues that the district court erred by allowing "a treating physician, Dr. Nagib, to testify at trial as a [Minn. R. Civ. P.] 26 expert and render his opinion as to the speed of growth of the osteomyelitis bacteria." This court reviews a district court's evidentiary rulings for an abuse of discretion. *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997). "In the absence of some indication that the [district] court exercised its discretion arbitrarily, capriciously, or contrary to legal usage, the appellate court is bound by the result." *Id.* at 46.

"An improper evidentiary ruling resulting in the erroneous admission of evidence will only compel a new trial if it results in prejudicial error to the complaining party." *George v. Estate of Baker*, 724 N.W.2d 1, 9 (Minn. 2006). "An evidentiary error is prejudicial if it might reasonably have influenced the jury and changed the result of the

trial.” *Id.* For the reasons that follow, appellant cannot show that Dr. Nagib’s testimony was prejudicial.

To establish a claim of medical malpractice based on negligent treatment, a plaintiff must demonstrate “(1) the standard of care recognized by the medical community as applicable to the particular defendant’s conduct; (2) that the defendant departed from that standard; (3) that the defendant’s departure from that standard was a direct cause of the patient’s injuries; and (4) damages.” *Reinhardt v. Colton*, 337 N.W.2d 88, 94 (Minn. 1983) (quotation omitted). The special-verdict form submitted to the jury in this case asked the jury to answer the following questions: (1) whether Dr. Svoboda was negligent; (2) if Dr. Svoboda was negligent, whether her negligence was a direct cause of appellant’s injury; and (3) if her negligence was a direct cause of appellant’s injury, what amount of damages would fairly and adequately compensate appellant. The first question on the verdict form regarding negligence encompasses the standard-of-care and breach-of-standard-of-care elements of the medical-malpractice claim. The jury found that Dr. Svoboda was not negligent, and therefore did not make findings regarding causation or damages.

Because the jury based its verdict for respondents on appellant’s failure to prove that Dr. Svoboda breached the recognized standard of care and Dr. Nagib did not testify regarding the standard of care or any attendant breach, Dr. Nagib’s testimony did not prejudice appellant. Thus, the purported evidentiary error is not a basis for appellate relief. Appellant’s arguments that the district court erred in allowing Dr. Nagib’s testimony are therefore inconsequential, and we do not address them.

Conclusion

Appellant's challenge to the district court's denial of her JMOL and new-trial motions is based on her assertion that the district court erred by allowing respondent's experts and Dr. Nagib to testify regarding the timing of her infection. Appellant does not argue that she was entitled to JMOL or a new trial even if this testimony was properly admitted. Because appellant fails to establish reversible error stemming from the district court's admission of the testimony and her challenge to the district court's denial of her JMOL and new-trial motions is based solely on that admission, we affirm.

Affirmed.