STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1972

Deborah Harris, et al.,
Appellants,

vs.

Daren J. Wickum, M.D., et al.,
Respondents.

Filed August 6, 2018
Reversed and remanded
Halbrooks, Judge

Ramsey County District Court
File No. 62-CV-16-4567

Vincent J. Moccio, Bennerotte & Associates, P.A., Eagan, Minnesota (for appellants)

Richard J. Thomas, Chad J. Hintz, Burke & Thomas, PLLP, Arden Hills, Minnesota (for respondents)

Considered and decided by Jesson, Presiding Judge; Cleary, Chief Judge; and Halbrooks, Judge.

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

HALBROOKS, Judge

Appellants challenge the district court's dismissal of their medical-malpractice claim for failure to comply with the expert-disclosure requirements of Minn. Stat. § 145.682, subd. 4 (2016), arguing that the expert affidavits sufficiently set forth the

standard of care and deviation from that standard as required by the statute. We reverse and remand for trial.

FACTS

Appellant Deborah Harris received treatment from respondent Daren J. Wickum, M.D., for a left total knee replacement arthroplasty. During surgery, Dr. Wickum injected "an intraoperative cocktail of ropivacaine, epinephrine, toradol and morphine" into Harris's periarticular soft tissue in her left knee. Later in the day of her surgery, Harris developed a left foot drop. Harris alleged that the foot drop was caused by the intraoperative knee injection that blocked her peroneal nerve and resulted in weakness and numbness over the peroneal nerve distribution.

Appellants Deborah Harris and Victor Harris filed a complaint with the district court, alleging that respondents Summit Orthopedics, Ltd. and Dr. Wickum were medically negligent in the course of injecting an intraoperative solution used for her postoperative pain management. In support of their claim, appellants submitted an expert-witness affidavit from Philip Stiver, M.D., pursuant to Minn. Stat. § 145.682, subd. 4 (2016). Respondents moved to dismiss the case and for summary judgment, alleging that appellants failed to provide expert testimony that described the chain of causation linking respondents' alleged breach of the standard of care to Harris's claimed injury. In response to the motion, appellants submitted a supplemental affidavit from Dr. Stiver.

Respondents again moved to dismiss the complaint and for summary judgment, reasserting their argument that appellants failed to provide sufficient expert testimony that described how the alleged breach of care caused Harris's injury. The district court granted

respondents' renewed motion for summary judgment and dismissed the complaint with prejudice. This appeal follows.

D E C I S I O N

Appellants argue that the district court erred by dismissing their complaint with prejudice and by granting respondents' motion for summary judgment based on its conclusion that Dr. Stiver's expert affidavits do not satisfy the requirements of Minn. Stat. § 145.682, subd. 4(a). We review summary judgment decisions de novo, *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010), but review a district court's decision to dismiss a medical-malpractice claim for failure to meet the substantive requirements of Minn. Stat. § 145.682, subd. 4, for an abuse of discretion, *Maudsley v. Pederson*, 676 N.W.2d 8, 11 (Minn. App. 2004). To consider whether the district court erred, we must first determine the appropriate standard of review on appeal because the district court dismissed the complaint and granted respondents' motion for summary judgment.

In *Sorenson v. St. Paul Ramsey Med. Ctr.*, we considered whether we should analyze a district court's order involving the sufficiency of an expert's affidavit in a medical-malpractice claim under Minn. Stat. § 145.682 (1986) as a motion for summary judgment or as a motion to dismiss. 444 N.W.2d 848, 851 (Minn. App. 1989), *aff'd*, 457 N.W.2d 188 (Minn. 1990). We determined that although both parties and the district court referred to the order as a summary judgment, "an actual summary judgment was neither sought nor obtained" because "respondents argued that appellants failed to meet the statutory requirements of Minn. Stat. § 145.682, subds. 2 and 4 (1986), and that dismissal was

mandated under Minn. Stat. § 145.682, subd. 6 (1986)." *Id.* The supreme court agreed with our characterization of the district court's order. *Sorenson*, 457 N.W.2d at 189 n.1.

Here, respondents assert that the affidavits fail to meet Minn. Stat. § 145.682, subd. 4(a)'s requirements. Minn. Stat. § 145.682, subd. 6(c) (2016), provides that a failure to comply with the expert affidavit requirements "results, upon motion, in mandatory dismissal with prejudice of each action as to which expert testimony is necessary to establish a prima facie case." Because a motion to dismiss is the appropriate remedy, as in *Sorenson*, we review the district court's order for an abuse of discretion. *Maudsley*, 676 N.W.2d at 11.

A plaintiff alleging medical negligence must serve the defendant with two affidavits. Minn. Stat. § 145.682, subds. 2-4 (2016); *Anderson v. Rengachary*, 608 N.W.2d 843, 856 (Minn. 2000). First, a plaintiff must serve an affidavit that states that the plaintiff's attorney reviewed the facts "with an expert whose qualifications provide a reasonable expectation that the expert's opinions could be admissible at trial and that, in the opinion of this expert, one or more defendants deviated from the applicable standard of care and by that action caused injury to the plaintiff." Minn. Stat. § 145.682, subd. 3(a). Second, a plaintiff must serve within 180 days of the commencement of discovery an affidavit that identifies the experts who will testify, the substance of their testimony, and a summary of the bases for their opinions. *Id.*, subds. 2, 4(a).

The expert affidavit must set forth specific details of the expert's testimony, including the standard of care, the acts or omissions that the plaintiff alleges violated the standard of care, and an outline of the chain of causation that resulted in the injury.

Maudsley, 676 N.W.2d at 13. A plaintiff can refer to affidavits or interrogatory answers to establish these requirements. *Id.* General or conclusory statements regarding either the standard of care, breach, or the causative chain linking its breach to the injury do not meet Minn. Stat. § 145.682, subd. 4(a)'s requirements. *See Sorenson*, 457 N.W.2d at 192-93. The district court determined that Dr. Stiver's affidavits under Minn. Stat. § 145.682, subd. 4(a), were insufficient.

A. Standard of Care and Breach

The district court concluded that Dr. Stiver's affidavits failed to establish the standard of care and that Dr. Wickum deviated from that standard. In reaching this conclusion, the district court compared Dr. Stiver's affidavits to the affidavit in *Anderson*, 608 N.W.2d at 843-46, a case in which the supreme court concluded that the affidavit was insufficient to establish the standard of care and a breach of that care. The expert's affidavit in *Anderson* stated that "esophageal trauma should be avoided during surgery of this type," and that "such trauma to the vagus nerve should not occur." 608 N.W.2d at 845. The supreme court reasoned that the expert's affidavit was insufficient because it "did not state what particular measures a physician should take to avoid such trauma" and "failed to describe the defendant's acts or omissions that allegedly violated the standard of care and caused [the] injury." *Id.* at 848. Similarly, the supreme court determined that an expert's affidavit that stated, "I am familiar with the standard and duty of care applicable to doctors, midwives, nurses and other medical personnel in the Twin Cities . . . ," insufficiently established the standard of care. *See Lindberg v. Health Partners, Inc.*, 599 N.W.2d, 572, 574-75 (Minn. 1999).

Here, Dr. Stiver, a board-certified orthopedic surgeon with 32 years of experience, discussed the standard of care and how Dr. Wickum deviated from that standard in the following statements in his affidavits:

> Orthopedic surgeons are trained as to the techniques for injection in and around the knee joint. The anatomy of the knee and the peroneal nerve and its location are known. Safe practice methods involve injecting solutions in the area around the nerve, but not directly into the nerve.
>
> . . . .
>
> Injection into the peroneal nerve represents a departure from the skill and learning normally possessed and used by orthopedic professionals in good standing in a similar practice and under like circumstances and constitute a breach of the standard of care.
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> . . . .
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> The peroneal nerve is in a specific anatomical location on the posterolateral aspect of the knee and is quite reachable by any postoperative injection technique for post-operative pain management. It would be very easy to inject directly into the nerve if one were not careful on needle placement during the injection. All orthopedic surgeons are aware of the nerve's location and how to avoid injection directly into the nerve by appropriate needle positioning. This is not a difficult or elusive technique. Here, this technique was not adhered to and the injury resulted.

This language does not simply state that a surgeon should avoid injury like the affidavit in *Anderson*, 608 N.W.2d at 848.

Instead, Dr. Stiver explains the standard of care by stating that a surgeon must avoid injecting solution directly into the nerve; that all orthopedic surgeons are aware of the nerve's location; and that a surgeon can avoid the injury by using appropriate needle

positioning. Dr. Stiver also describes *how* Dr. Wickum violated the standard of care by stating that Dr. Wickum did not adhere to proper needle positioning when injecting the solution. This is in sharp contrast to the cases noted above, in which conclusory statements in expert affidavits were held to lack sufficient detail to meet the requirements of Minn. Stat. § 145.682, subd. 4. We therefore conclude that the district court erred by concluding that Dr. Stiver's affidavits failed to sufficiently set forth the applicable standard of care or the acts by Dr. Wickum that violated that standard of care.

B. Causation

In addition to establishing the standard of care and a breach of that standard, an expert's affidavit must outline the chain of causation that resulted in the injury. *See Maudsley*, 676 N.W.2d at 14 ("The primary purpose of an expert affidavit is to illustrate 'how' and 'why' the alleged malpractice caused the injury."). Again, the affidavit must do more than merely allege that the physician's acts caused the injury. *Mercer v. Andersen*, 715 N.W.2d 114, 122 (Minn. App. 2006).

In *Anderson*, the supreme court determined that the expert affidavit insufficiently established causation when the affidavit stated that "there was a deviation from the standard of care provided to this patient which caused the patient to have postoperative dysphasia of undetermined etiology." 608 N.W.2d at 848. The supreme court explained that "[t]he phrase 'undetermined etiology' suggests that the cause of [the plaintiff's] injury is unknown and perhaps unrelated to the surgery performed by [the physician]. Thus, [the expert] failed to adequately describe the alleged negligence on the part of [the physician] and its relationship to [the plaintiff's] injury." *Id.; see also Teffeteller v. Univ. of Minn.*,

645 N.W.2d 420, 429 (Minn. 2002) (determining that an affidavit's statement that "the departures from accepted levels of care, as above identified, were a direct cause of [plaintiff's] death" did not sufficiently outline causation); *Mercer*, 715 N.W.2d at 123 (holding that an affidavit stating that "the departure from the standard of care was a direct cause of [the plaintiff's] second degree burns" insufficiently established causation).

Although the district court chose not to reach the issue of causation because it determined that the affidavits failed to establish the other two elements of a prima facie case of medical negligence, we conclude that Dr. Stiver's affidavits sufficiently establish a chain of causation. The affidavits explain how Dr. Wickum's injection caused Harris's injury in a step-by-step manner. Dr. Stiver explains: "[I]t is clear from the record and to a reasonable degree of medical certainty that, at the time of surgery for the left total knee arthroplasty, the peroneal nerve was inadvertently injected with an intra-operative solution used for post-operative pain management." Dr. Stiver's affidavit further states:

> Injection in the area around the nerve would not cause injury to the nerve. . . . If the nerve is injured by injection it is because the injection was into the nerve and not in the surrounding tissue. This can occur one of three ways. Direct injection into the nerve can damage the nerve by the needle tip cutting individual nerve fascicles that make up the nerve bundle. Another method of injury by direct injection is the distention pressure created by injection of the volume of anesthetic cocktail into the nerve separating fascicles and damaging individual nerve fascicles or nerve sheath and its blood supply. A third way for injury by injection into the nerve is a result of direct chemical irritant/damage caused by the various chemicals making up the injection cocktail and or their preservatives contained therein.

The affidavits then discuss that a surgeon can avoid injury through appropriate needle positioning and conclude "[that] technique was not adhered to and the injury resulted." The affidavits previously identified the resulting injury as "a foot drop on the operative side" that included "symptoms of weakness and numbness over the peroneal nerve distribution" and "diminished sensation in both the sural and superficial peroneal nerve distribution."

Dr. Stiver's affidavits do not simply allege that Dr. Wickum's departure from the standard of care caused Harris's injury or that the cause of the injury was unknown. *Cf. Anderson*, 608 N.W.2d at 848; *Mercer*, 715 N.W.2d at 123. Instead, Dr. Stiver opines specifically that Dr. Wickum's negligence in injecting the medication into Harris's peroneal nerve caused her foot drop. This specificity distinguishes Dr. Stiver's opinions from the insufficiently detailed affidavits in other cases.

Respondents argue, however, that the affidavits do not satisfy the causation standard because they fail to eliminate all other possible causes of Harris's injury. We disagree with this reasoning. A plaintiff is not required to rule out all other possible causes of injury in order to establish causation in a negligence action. *See Bauer v. Friedland*, 394 N.W.2d 549, 554 (Minn. App. 1986) ("[A] person is not required to prove her theory of negligence by testimony so clear as to exclude every other possible theory.").

We further note that our conclusion that Dr. Stiver's affidavits satisfy Minn. Stat. § 145.682, subd. 4(a), is consistent with the statute's purpose, which is "to eliminate frivolous medical-negligence lawsuits by requiring that plaintiffs file affidavits verifying that their alleged claims are well founded." *Maudsley*, 676 N.W.2d at 12. The affidavits

in this case describe a prima facie case of medical negligence with sufficient detail to ensure that Harris is not bringing a meritless claim. Because we conclude that Dr. Stiver's affidavits satisfy the expert affidavit requirements of Minn. Stat. § 145.682, subd. 4(a), we reverse the district court's order dismissing Harris's complaint with prejudice and remand for trial.

Reversed and remanded.