STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0304

Phillip Musselman, et al.,
Appellants,

vs.

Target Corporation, et al.,
Respondents.

Filed October 12, 2020
Affirmed
Bratvold, Judge

Hennepin County District Court
File No. 27-CV-18-15659

Douglas E. Schmidt, Stephanie J. Schommer, Schmidt & Salita, Minnetonka, Minnesota; and

Adam J. Almen, Gilbert Alden PLLC, Burnsville, Minnesota (for appellants)

William L. Davidson, Brian A. Wood, Michael T. Burke, Lind, Jensen, Sullivan & Peterson, P.A., Minneapolis, Minnesota (for respondents)

Considered and decided by Bratvold, Presiding Judge; Cochran, Judge; and Slieter, Judge.

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

BRATVOLD, Judge

Following the dismissal of negligence claims and entry of judgment for respondents Target Corporation and Paula Elaine Jones, appellants Phillip and Christine Musselman

seek reversal of the district court's summary-judgment order. Appellants claim that respondents negligently dispensed the higher of two prescribed doses of an antidepressant medication to Musselman causing damages.[1] The district court determined that, when viewing the evidence in the light most favorable to appellants, the negligence claims cannot survive summary judgment because appellants' medical evidence fails to generate a genuine issue of material fact on two elements: breach of the standard of care and causation.

Because appellants produced no medical evidence that taking the higher dose for 11 days in 2014 caused Musselman's injuries, we conclude that summary judgment is appropriate. Appellants' medical evidence on causation provided only speculation and general conclusions. On this record, appellants failed to offer evidence from which the jury could determine that respondents' negligence was a substantial factor in causing appellants' damages. We thus affirm and do not consider the alternative ground for summary judgment.

FACTS

This summary rests on the evidence offered on summary judgment, viewed favorably to appellants. In June 2014, Musselman, age 40, visited his doctor and discussed, among other things, his symptoms of depression. His doctor prescribed bupropion, an antidepressant medication, and explained that he should start with a two-week dose of 150 milligrams once a day. Then, if Musselman responded positively, he would take an increased dose of 300 milligrams once a day.

[1] For clarity and ease of reference, this opinion refers to Phillip Musselman, individually, by his last name, and refers to Christine Musselman individually, by her first name.

Musselman's doctor electronically transmitted two prescriptions, one for each dose, to a pharmacy in Bemidji operated by Target. It is undisputed that Target received both prescriptions and that the two prescriptions did not include instructions about how long to take either dose or when to start the 300-milligram dose. Musselman testified in his deposition that he did not know that the doctor transmitted both prescriptions at the same time. Musselman also testified that he expected to check in with his doctor before he would start taking the increased dose.

Target filled and dispensed one prescription, the 300-milligram dose. When Musselman picked up his prescription, he talked to Jones, a pharmacist, who said, "Oh, this is a new one for you. This is Wellbutrin 150." Musselman testified that he asked how the new medication would interact with his other medications and Jones responded that she saw no problem. Musselman also testified that Jones told him to start taking the new medication the next morning because it keeps some people awake at night.

Musselman discarded the pharmacy bag, medication insert, and other materials without reading them and took the 300-milligram dose once a day starting the morning after his doctor appointment. He described feeling increased energy, comparable to drinking several cups of coffee, but also stated that he felt agitated and nervous. Musselman continued taking the medication and did not discuss his side effects with anyone.

About two days later, Target notified Musselman that they had filled another prescription. He picked up the 150-milligram dose of bupropion from Target the next day. While at the pharmacy counter, he briefly talked to a pharmacist. Musselman later testified

he continued to take the first-filled prescription, the 300-milligram dose. He also testified that he experienced increasing insomnia, paranoia, sweating, shaking, and major anxiety; he also felt waves of "raw emotion" and withdrew from family and friends.

Eleven days after starting the medication, Musselman experienced suicidal thoughts. First, he felt extreme anxiety and had the urge to jump from a moving car while he and his family drove home from brunch. Second, while in the garage packing for a fishing trip, Musselman felt panicked, loaded a shotgun, and then considered how to position the gun so he could pull the trigger. His wife, Christine, entered the garage moments later. They discussed Musselman's recent feelings and side effects. After their conversation, Musselman realized he had been taking 300 milligrams of bupropion instead of 150 milligrams, as he had discussed with his doctor.

Suspecting that the medication had caused the adverse side effects, Musselman contacted his doctor's office. A nurse practitioner advised him to take the 150-milligram dose of bupropion once daily, as originally prescribed to him in an extended-release tablet. About one week later, Musselman's doctor modified the prescription to a 150-milligram dose taken once every 12 hours in a sustained-release tablet. Musselman's side effects subsided and he continued taking 150 milligrams of bupropion twice a day for two years. In August 2016, his doctor prescribed a different antidepressant after Musselman had a seizure.

In March 2016, almost two years after he first starting taking bupropion, Musselman complained in writing to the Minnesota Board of Pharmacy that Target's pharmacy had

"given [him] an incorrect dosage" of his antidepressant medication. Musselman's letter generally stated the events described above. The letter also claimed that Target had dispensed the medication "in direct and deliberate contradiction to [his] doctor's orders."

The board investigated and prepared a report, which found that the computer system in Target's pharmacy was "functioning erratically" during the relevant period and some prescriptions "appeared in the system" several hours apart, despite being transmitted at the same time. The board report attached a written statement from Target's pharmacy staff that described the circumstances in June 2014: pharmacy staff was "overwhelmed, understaffed, and untrained considering the volume of prescriptions" and "several thousands behind" in filling prescriptions; there were "hundreds of unmade doctor calls"; "patients were unhappy with having to wait for an unacceptable time for their prescriptions"; and "the staff was stressed with unhappy patients."

In fall 2018, appellants sued respondents, attaching the board report as an exhibit, along with other documents. The complaint includes more than 15 causes of action, alleging various theories of negligence. The complaint also alleges that, as a result of respondents' negligence, Musselman suffered permanent injury, including emotional distress and posttraumatic stress disorder (PTSD) and that Christine suffered from loss of consortium. Musselman testified that he remains withdrawn from his family and struggles to take care of the family home and finances, both things he used to do.

Respondents moved for a rule 12 dismissal of all claims for failure to state a claim upon which relief can be granted. The district court partially granted respondents' motion

and dismissed all of appellants' claims except negligence per se, negligence, professional malpractice, and loss of consortium. Respondents moved for summary judgment on the remaining claims.

After receiving the parties' memoranda, exhibits, and expert reports, the district court heard arguments on respondents' motion. During the hearing, appellants asked for permission to supplement their expert disclosures on causation. Over respondents' objection, the district court granted appellants' request. Appellants filed two supplemental affidavits on causation, one from Brian Isetts, Ph.D., a licensed pharmacist, and the other from, Steven Lockman, M.D.

The district court granted respondents' summary-judgment motion for two reasons. First, appellants failed to offer evidence of respondents' breach of the standard of care because, with no evidence of active negligence by respondents, "Target pharmacists fulfilled their duty to accurately fill the prescriptions and no other duty arose or was breached."[2] Second, appellants were "unable to establish a prima facie case that the pharmacists' actions caused Mr. Musselman's adverse reaction." Thus, the district court

[2] On the breach/standard-of-care issue, appellants filed in the district court one affidavit by Isetts, signed July 2, 2018, and one unattested expert report, dated July 24, 2019. The district court considered the July 2, 2018 affidavit, but refused to consider the July 24, 2019 report. The district court rejected the July 24, 2019 report because appellants submitted it with their reply memorandum so it was not timely under the district court's scheduling order. In this appeal, appellants do not challenge the district court's decision to reject the July 24, 2019 report.

dismissed the negligence and loss-of-consortium claims and directed entry of judgment for respondents.[3]

This appeal follows.

D E C I S I O N

Minnesota appellate courts "review the grant of summary judgment de novo to determine 'whether there are genuine issues of material fact and whether the district court erred in its application of the law.'" *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017) (quoting *Stringer v. Minn. Vikings Football Club, LLC*, 705 N.W.2d 746, 754 (Minn. 2005)); *see* Minn. R. Civ. P. 56.01; *see also Modrow v. JP Foodservice, Inc.*, 656 N.W.2d 389, 393 (Minn. 2003) (explaining no deference is afforded to the district court on questions of law). In reviewing a district court's summary-judgment determination, we consider the evidence "in the light most favorable to the party against whom summary judgment was granted." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002) (citations omitted). We will affirm a grant of summary judgment "if it can be sustained on any grounds." *Doe 76C v. Archdiocese of St. Paul*, 817 N.W.2d 150, 163 (Minn. 2012).

[3] The district court also determined that respondents were entitled to summary judgment on Musselman's negligence per se claim, based on Minn. Stat. § 151.21, subd. 1 (2018), which makes it unlawful for a pharmacist to "substitute" a drug different from the one prescribed. The district court first noted that appellants' opposition memorandum "does not seem to oppose" summary judgment for respondents. The district court then determined that appellants offered no evidence that respondents violated section 151.21, subd. 1, because it is undisputed that respondents followed the prescriptions as written. Appellants do not raise negligence per se in their brief to this court.

Respondents suggest that we should review the summary-judgment decision for abuse of discretion because the district court rejected appellants' medical evidence as legally insufficient. It is true that we review for abuse of discretion a district court's evidentiary rulings, including rulings on expert evidence offered under Minn. Stat. §§ 145.682, subds. 2-3, 145.61 subds. 2, 4 (2018). *See Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997) (admissibility of evidence); *Broehm v. Mayo Clinic Rochester*, 690 N.W.2d 721, 725 (Minn. 2005) (statutory compliance of expert affidavit) ("We will reverse a district court's dismissal of a malpractice claim for noncompliance with expert disclosure only if the district court abused its discretion.").

But the district court did not grant summary judgment because appellants failed to comply with the expert-affidavit requirements under Minn. Stat. § 145.682. Nor did the district court determine that appellants' expert evidence was inadmissible. Rather, appellants ask us to review the district court's summary-judgment decision based on its application of the law to the record evidence on breach of the standard of care and causation. This appeal therefore raises questions of law. *See, e.g.*, *Montemayor*, 898 N.W.2d at 628 (reviewing the district court's application of the law on summary judgment de novo). Thus, we apply de novo review.

To survive summary judgment on a medical-negligence claim, a plaintiff must offer evidence sufficient to present a prima facie case on three elements: "'(1) the standard of care recognized by the medical community as applicable to the particular defendant, (2) that the defendant departed from that standard, and (3) that the defendant's departure was a direct cause of the plaintiff's injuries.'" *McDonough v. Allina Health Sys.*,

685 N.W.2d 688, 697 (Minn. App. 2004) (quotation omitted). Here, the district court granted summary judgment after determining that appellants failed to offer prima facie evidence on breach of the standard of care and causation. Because we conclude that appellants' medical evidence failed to present a genuine issue of material fact on causation, we decline to consider or decide whether appellants presented prima facie evidence on breach of the standard of care.[4]

We read appellants' brief to make two arguments on causation. First, they argue that the district court "ignored" the "clear evidence of causation" offered by their experts, held their expert evidence to "an impossible burden of proof," and improperly "substituted its [own] pharmaceutical/medical opinions" in place of appellants' medical evidence. Second, appellants contend that the district court erred in denying them "the right to recover for [Musselman's] enhanced or aggravated injury."

Respondents counter that appellants "presented no evidence that the [adverse] side effects Musselman experienced with the 300 milligram dose would have been any different had he started with the 150 milligram dose." While respondents acknowledge that appellants' expert affidavits attest that Musselman would *not* have experienced similar side effects from the lower dose, respondents point out that appellants' experts also concede

[4] Appellants contend that the district court erred in dismissing their negligence claims on the standard of care. They claim that, when viewed in their favor, their medical evidence shows that Target breached a duty and deviated from the applicable standard of care by violating the Minnesota Board of Pharmacy Rules. Appellants assert that the district court erroneously concluded that pharmacists are only "pill pushers" and thus not liable because respondents accurately filled Musselman's prescriptions. In contrast, respondents argue that "[a]lleged violations of the Minnesota Board of Pharmacy Rules are not evidence of negligence."

they are unable to attest whether Musselman would have reacted adversely had he taken the lower dose. Given these internal contradictions, respondents contend that appellants' expert affidavits fail to offer prima facie evidence that the 300-milligram dose was the direct cause of appellants' damages. Respondents emphasize the district court determined that appellants' expert affidavits were "conclusory," "speculative," "too vague," "weak," and "devoid of analysis." Respondents also insist the district court properly dismissed the opinions as "legally insufficient" to establish causation in this case.

A medical-negligence plaintiff must establish causation by submitting expert medical testimony that defendant's negligence directly caused the alleged injury. *See Fabio v. Bellomo*, 504 N.W.2d 758, 762 (Minn. 1993); *see also Knuth v. Emergency Care Consultants, P.A.*, 644 N.W.2d 106, 111 (Minn. App. 2002) ("Expert testimony is required to establish the standard of care, the defendant's departure from that standard, and causation." (quotation omitted)). "The failure to provide such admissible expert testimony results in the failure to establish an essential element of that party's case, and the moving party is entitled to summary judgment as a matter of law." *McDonough*, 685 N.W.2d at 697.

Similarly, appellants' medical-negligence claims require expert testimony on causation to present a prima facie case against respondents for how they dispensed Musselman's two prescriptions. While our caselaw has not previously considered a medical-negligence claim against a pharmacist or pharmacy, Minnesota Statutes support the view that expert evidence on causation is necessary. *See* Minn. Stat. §§ 145.682, subd. 3(1) (requiring expert affidavit in actions against healthcare providers), 145.61

subds. 2, 4 (defining healthcare professional to include pharmacist). Appellants do not contend otherwise.

Minnesota caselaw guides our review of appellants' medical evidence. "Proof of causation cannot rest on conjecture and the mere possibility of such causation is not enough to sustain [appellant's] burden of proof." *Walton v. Jones*, 286 N.W.2d 710, 715-16 (Minn. 1979) (quotation omitted) (affirming directed verdict against plaintiff based on insufficient expert evidence of causation). Thus, general statements and speculative opinions on causation cannot establish a prima facie case of medical negligence. *See generally Stroud v. Hennepin Cty. Med. Ctr.*, 556 N.W.2d 552, 556 (Minn. 1996) (affirming summary judgment based on plaintiff's failure to provide sufficient expert affidavit and determining that expert's "broad" and "conclusory" opinions could not establish defendant's failure to diagnose and treat hemorrhage caused patient's death); *Lindberg v. Health Partners, Inc.*, 599 N.W.2d 572, 578 (Minn. 1999) (affirming summary judgment based on plaintiff's failure to provide sufficient expert affidavit and rejecting expert's "broad and conclusory statements" that defendant's failure to instruct pregnant mother to seek immediate medical care caused her newborn's death).

Causation is usually a fact question for the jury to decide. *See Sandhofer v. Abbott-Nw. Hosp.*, 283 N.W.2d 362, 367 (Minn. 1979). Minnesota courts apply the substantial factor test on summary judgment to determine whether a genuine issue of material fact exists. *See Fabio*, 504 N.W.2d at 762. This test is satisfied when a plaintiff "introduces evidence which affords a reasonable basis for one to conclude that it is more

likely than not that defendant's conduct was a substantial factor in bringing about the result." *Knuth*, 644 N.W.2d at 111 (quotation and alteration omitted).

Here, the district court determined that, to present a prima facie case on causation, appellants had to offer medical evidence from which the jury could determine "that it was the difference in dose that caused [Musselman's] problems." The district court determined that appellants' expert affidavits were insufficient because they neglected to "identify the chain of causation in requisite detail."

On appeal, appellants argue that the district court erred by requiring them to "prove a negative—to totally eliminate any possibility that Plaintiff would have suffered any harm from the ingestion of the 150 mg dosage." We disagree. "Legal causation cannot be discussed intelligently without reference to the injury claimed to be caused." *Leubner v. Sterner*, 493 N.W.2d 119, 121 (Minn. 1992). Appellants' brief to this court concedes that they seek damages from respondents for the "increased harm/aggravation caused by the higher dose." In particular, we note that, after Musselman consulted with his physician on June 16, 2014, he continued to take 300 milligrams of bupropion each day for two years, but did so by taking two 150-milligram doses every 12 hours. So, under appellants' theory of damages, the increased harm is very specific, given the course of Musselman's treatment.

Appellants' prima facie case therefore requires medical evidence from which the jury could determine that the 300-milligram dose, taken once daily for 11 days in 2014, caused Musselman's injuries and what were his enhanced injuries. In other words, appellants must offer medical evidence of Musselman's adverse effects had he started at

the lower dose. *See George v. Estate of Baker*, 724 N.W.2d 1, 11 (Minn. 2006) ("[I]f the harm would have occurred even without the negligent act, the act could not have been a substantial factor in bringing about the harm.") (citing Restatement (Second) of Torts § 432 (1965)).

During the summary-judgment hearing, appellants asked for and received leave to submit supplemental expert affidavits on causation, given their enhanced-injury theory of damages. It is these affidavits that appellants contend offer "clear evidence of causation." We consider each supplemental affidavit in turn.

Isetts Affidavit

Isetts opined that "an adverse drug event can occur at lower doses of a medication," but explained that Musselman's side effects "were accentuated" by the higher dose "or *might not have occurred*, from the unnecessary exposure to high doses of Bupropion."[5] (Emphasis added.) In other words, Isetts opined that Musselman "might" have experienced

[5] Because Isetts is a pharmacist, and not a medical doctor, it is unclear whether he is qualified to opine that ingesting 300 milligrams of bupropion for 11 days caused Musselman's injuries, including PTSD. *See generally Teffeteller v. Univ. of Minn.*, 645 N.W.2d 420, 427 (Minn. 2002) (affirming dismissal of plaintiff's case for failure to provide a sufficient affidavit of expert review after determining that plaintiff's expert had not specialized in oncology and was not otherwise experienced in bone-marrow transplants and so was unqualified to offer causation opinion for bone-marrow-transplant patient); *see also Benson v. Johnson*, 392 N.W.2d 890, 896 (Minn. App. 1986) (reversing jury verdict in no-fault case awarding compensatory damages for personal injury, in part, because the only testimony establishing the cause of plaintiff's damages was not by a medical witness), *review denied* (Minn. Oct. 29, 1986). Because the district court did not address this issue, we do not address it in this opinion. Instead, we assume Isetts is qualified to opine on the cause of Musselman's damages.

no adverse side effects had he started at the lower dose. This is not evidence that the higher dose was a substantial factor in causing Musselman's damages because, as the district court stated, the opinion is only speculation. *See Leubner*, 493 N.W.2d at 122 (rejecting expert opinion on causation for speculation); *Walton*, 286 N.W.2d at 715-16 (explaining speculative expert evidence cannot establish causation).

Isetts also opined that "higher daily doses of Bupropion are *associated* with the greater prevalence" of adverse effects. (Emphasis added.) This opinion, too, is problematic—association is not causation. "Coincidence is not causation . . . ." *McDonough*, 685 N.W.2d at 697; *compare Black's Law Dictionary* 152 (11th ed. 2019) (defining "association" as "the process of mentally collecting ideas, memories, or sensations") *with Knuth*, 644 N.W.2d at 111 (explaining medical negligence requires evidence that defendant's conduct was "more likely than not" a "substantial factor" in causing plaintiff's damages).

Even more to the point, Isetts attested that "it *cannot be said* to a reasonable degree of pharmaceutical and pharmacologic certainty, that Mr. Musselman would have experienced any adverse reaction at all to the Bupropion 150 mg dosage and certainly not to the magnitude that resulted in his case . . . given the wide variance in individual responses." (Emphasis added.) It is also true, as appellants argue, that Isetts concluded the 300-milligram dose "clearly was a substantial contributing factor" to Musselman's adverse reaction. But this conclusion contradicts his own opinion that he cannot state to a reasonable degree of certainty what adverse reaction Musselman would have experienced

had he started with and taken the 150-milligram dose for 11 days. In other words, Isetts's inability to opine with reasonable certainty that Musselman would have experienced "any adverse reaction at all" at the lower dose means that his opinion fails to provide the jury with any evidence on which it may determine whether the higher dose caused Musselman's enhanced injury.

Lockman Affidavit

Lockman, a medical doctor, opined similarly to Isetts that Musselman's adverse reactions were "dosage related." Lockman stated, "Musselman experienced a heightened adjustment reaction" to the bupropion and Musselman's reaction was "materially exacerbated by the fact that he started at twice the dosage he was prescribed." Lockman's opinion does not establish causation—it merely provides an association between events. *See McDonough*, 685 N.W.2d at 696 (distinguishing coincidence from causation); *Black's Law*, *supra* at 152 (defining "association"). Lockman's opinion is insufficient evidence of direct causation because he also identified other causes, stating that Musselman's reaction "was likely increased because of his prior fatigue and the stress of his employment." *See McDonough*, 685 N.W.2d at 690 (holding district court properly rejected expert testimony that failed to eliminate other potential causes).

Much like Isetts, Lockman concluded "to reasonable medical certainty that starting Mr. Musselman on the 300 mg dosage did in fact cause a PTSD." Caselaw establishes that a plaintiff must offer medical evidence that defendant's negligence was a substantial factor in causing plaintiff's injuries. *Knuth*, 644 N.W.2d at 111. But Lockman never opined that the 300-milligram dose was *a substantial factor* in causing Musselman's PTSD or any

other injury. Lockman merely opined that the higher dose was *a cause*. And, like Isetts, Lockman stated, "[i]t *cannot* be said to reasonable medical certainty that Mr. Musselman would have experienced adverse reactions sufficient to trigger PTSD had he started on 150 mg" because "[t]hat would be a matter of *complete speculation*." (Emphasis added.) Because he offers only speculation about Musselman's adverse reaction at the lower dose, Lockman's opinion fails to provide the jury with any evidence on which it may determine the higher dose was a substantial factor in causing Musselman's enhanced injury.

Neither Isetts's nor Lockman's opinion offers prima facie evidence of causation. Even if we assume that, read together, the two affidavits establish that the 300-milligram dose "caused" Musselman's PTSD, both experts made clear that they could not opine on whether the lower dose would have produced the same adverse reaction without basing that opinion on speculation. As a result, appellants' medical evidence fails to generate a genuine issue of material fact on causation, given their theory that the higher dose enhanced Musselman's injuries.

In closing, we agree with the district court's reasoning that summary judgment is required "[b]ecause the suitability of the drug is not in question—only the dose—[and, therefore,] a proper opinion on causation must negate a likelihood that the lower dose of the same medication would have produced the same result as the higher dose." Appellants contend that the district court's use of the word "negate" is too strong for summary judgment. But this choice of words does not diminish the district court's analysis. Simply put, appellants offered no medical evidence of Musselman's adverse side effects had he taken the lower dose for those 11 days in 2014. Viewing the evidence in the light most

favorable to appellants, their expert evidence merely established, as described by the district court, that "the drug caused the problems, which is insufficient causation under the unique facts of this case."

Affirmed.