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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1355**

Angelica F. Dragon, et al.,
Appellants,

vs.

Nancy L. Hassinger, M.D., et al.,
Respondents.

**Filed July 18, 2011
Affirmed
Worke, Judge**

St. Louis County District Court
File No. 69DU-CV-08-3834

Richard E. Bosse, Henning, Minnesota (for appellants)

David D. Alsop, Ryan C. Ellis, Gislason & Hunter, LLP, Minneapolis, Minnesota (for respondents)

Considered and decided by Shumaker, Presiding Judge; Klaphake, Judge; and Worke, Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellants argue that the district court abused its discretion by denying their posttrial motion for a new trial in this medical-malpractice case. We affirm.

DECISION

Appellants Angelica F. Dragon and Gary L. Dragon challenge the district court's denial of their motion for a new trial following a jury verdict in favor of respondents Nancy Hassinger, M.D., Duluth Clinic, Ltd., St. Mary's Medical Center of Duluth, and St. Mary's/Duluth Clinic Health System. A district court may grant a new trial upon a showing of misconduct by the prevailing party, accident or surprise that could not have been prevented by ordinary prudence, or errors of law made by the court at trial. Minn. R. Civ. P. 59.01. The reviewing court will not set aside a jury's verdict unless "it is manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable to the verdict." *Navarre v. S. Washington County Schs.*, 652 N.W.2d 9, 21 (Minn. 2002) (quotation omitted). We review a district court's decision on a motion for a new trial for an abuse of discretion. *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990).

Dr. Hassinger performed an angiogram on Angelica F. Dragon in May 2004. Dragon experienced residual fatigue in the years following the procedure, and appellants alleged that Dr. Hassinger committed malpractice by puncturing her iliac artery while performing the angiogram. To establish a prima facie case of medical malpractice, a plaintiff must produce expert testimony demonstrating: (1) the standard of care in the medical community applicable to the defendant's conduct; (2) the defendant's departure from the standard of care; and (3) direct causation between the defendant's departure and the plaintiff's injury. *Bigay v. Garvey*, 575 N.W.2d 107, 111 n.4 (Minn. 1998). The jury

determined that Dr. Hassinger did not depart from the standard of care in performing the angiogram. The jury did not reach the issue of causation.

Appellants argue that a new trial was warranted on the grounds of surprise, contending that respondents called Dr. Mark Neustel to testify about the standard of care pertaining to the procedure Dr. Hassinger performed. Appellants claim that respondents disclosed only that Dr. Neustel would testify about causation and did not mention anticipated standard-of-care testimony, thereby violating their requirement to disclose the full nature of an expert witness's testimony before trial under Minn. R. Civ. P. 26.02(e). Because this surprise testimony unfairly allowed respondents to present two experts supporting Dr. Hassinger's conduct as opposed to appellants' lone expert on the standard-of-care issue, appellants argue that a new trial is warranted.

But appellants argued in their posttrial motion that Dr. Neustel was a *causation* expert, not a standard-of-care expert: "Dr. Mark Neustel, who was not disclosed as a causation expert, testified as to his being a risk manager . . . and the risks of the procedure [and] no disclosure had been provided [regarding] his being an expert in causation." This motion was never amended prior to the posttrial hearing; thus, appellants failed to properly provide notice within 30 days of the hearing as required by Minn. R. Civ. P. 59.03. Despite arguing the issue at the hearing, the district court did not address appellant's argument in its posttrial order; therefore, appellants effectively waived this argument for appeal by failing to assert the argument in a formal motion. *See Sauter v. Wasemiller*, 389 N.W.2d 200, 201 (Minn. 1986) ("A post-trial motion for a new trial pursuant to Minn. R. Civ. P. 59.01 raising individual errors allegedly occurring at trial is

a prerequisite to appellate review of those errors.”); *see also Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (confining appellate review to only arguments raised before and considered by the district court).

Furthermore, the argument properly raised by appellants below—that Dr. Neustel was called as a causation expert—dealt with an issue that the jury did not reach. Thus, appellants demonstrate non-prejudicial error, at best. *See* Minn. R. Civ. P. 61 (requiring errors that do not affect the substantial rights of the parties to be ignored). Accordingly, the district court did not abuse its discretion by denying appellants’ motion for a new trial.

Affirmed.