STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1448

Jim D. Schwerdt, et al.,
Appellants,

vs.

Jay O. Lenz, M.D., et al.,
Respondents.

Filed June 13, 2011
Affirmed
Klaphake, Judge

St. Louis County District Court
File No. 69DU-CV-09-264

Richard E. Bosse, Law Offices of Richard E. Bosse, Chartered, Henning, Minnesota (for appellants)

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

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

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

KLAPHAKE, Judge

In this medical malpractice action, appellants Jim D. Schwerdt and Nancy Schwerdt challenge the district court's order denying their motions for a new trial or for judgment as a matter of law (JMOL). The district court issued an order for judgment in

favor of respondents Jay O. Lenz, M.D., Miller-Dwan Medical Center, Inc., The Duluth Clinic, Ltd., St. Mary's Medical Center, and St. Mary's Duluth Clinic Health System, based on a jury verdict that respondents were not negligent in the care and treatment of appellant Jim Schwerdt. Appellants argue that the district court abused its discretion by denying their motion for a new trial because of (1) alleged deficiencies in respondents' disclosure of their experts' opinions and the experts' failure to testify as to a standard of care, (2) misconduct by respondents' counsel for failure to disclose their experts' opinions, and (3) the court's improper exclusion of appellants' proposed rebuttal witnesses. Appellants also assert that the district court erred by not granting JMOL because the jury's verdict was not supported by competent evidence.

Because we observe no abuse of discretion in the district court's denial of appellants' motion for a new trial and because the verdict is supported by the evidence, we affirm.

D E C I S I O N

I. Motion for a New Trial

Among other reasons, the district court may grant a party 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. 59.02(b), (c), (f). We review the district court's decisions on motions for a new trial for an abuse of discretion. *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 892 (Minn. 2010). We 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. Wash. Cnty. Schs.*, 652 N.W.2d 9, 21 (Minn. 2002) (quotation omitted).

We review the district court's rulings on discovery violations for an abuse of discretion. *Shetka v. Kueppers, Kueppers, Von Feldt and Salmen*, 454 N.W.2d 916, 921 (Minn. 1990). The district court's evidentiary rulings are scrutinized for an abuse of discretion or error in law. *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997). We apply the same standard to the district court's evidentiary rulings on the admissibility of expert opinions; this is a "deferential standard" and we will not reverse the district court's decision "absent clear abuse of discretion." *Gross v. Victoria Station Farms, Inc.*, 578 N.W.2d 757, 760-61 (Minn. 1998) (quotation omitted). In order for this court to reverse due to a district court's evidentiary rulings, a party must show both an abuse of discretion and prejudice. *Blatz v. Allina Health Sys.*, 622 N.W.2d 376, 387-88 (Minn. App. 2001).

A. Disclosure under Minn. R. Civ. P. 26.02(e)

Appellants contend that respondents' experts failed to fully disclose a summary of the grounds for each opinion on which they proposed to testify, making it difficult for appellants to rebut their evidence. Specifically, appellants argue that the experts failed to disclose that they believed that Dr. Lenz acted appropriately because it was not known whether the mass he removed from appellant Jim Schwerdt was benign or malignant; this caused Lenz to treat the mass as cancerous, which required more expeditious removal.

We have reviewed the experts' disclosures. Neither disclosure specifically uses the word "malignant" or "cancerous." But all the expert witnesses, including both of

appellants' experts, acknowledged in their testimony the possibility that the mass could be malignant because of its location and its characteristics, and that an interim pathology report had to be done before the tumor could be fully removed. In fact, none of the experts disagreed that the mass had to be removed, could be malignant, and must be biopsied. Under these circumstances, respondents' experts' testimony about the possibility that the mass could be malignant could not have been a surprise to appellants.

Even in cases of failure to fully disclose, courts are cautioned against "readily excluding expert testimony for inadvertent failure to disclose that testimony during discovery. Exclusion is justified only when prejudice would result." *Cornfeldt v. Tongen*, 262 N.W.2d 684, 697 (Minn. 1977); *accord Dennie v. Metro. Med. Ctr.*, 387 N.W.2d 401, 405 (Minn. 1986).

The district court did not abuse its discretion by permitting respondents' experts to testify about possible malignant properties of the mass, despite the lack of specific reference to cancer, in their rule 26.02(e) disclosures. Because appellants' experts testified about possible malignancy as well and how that would affect the procedure, we conclude that appellants were not prejudiced in any way.

B. Standard of Care

Appellants assert that the district court erred by not instructing the jury that they were bound by appellants' experts' definition of the standard of care because respondents failed to discuss the standard of care in their pretrial expert witness disclosures, and that the court further erred by denying their new trial motion based on respondents' failure to provide pretrial disclosure of the standard of care.

Appellants are conflating the requirements of Minn. Stat. § 145.682 (2010) (requiring plaintiff in medical malpractice action to provide certification of expert review) and Minn. R. Civ. P. 26.02(e) (requiring disclosure of expert witness opinion and basis therefore).

Minn. Stat. § 145.682, subd. 2, states that the plaintiff in a malpractice action must provide an affidavit of expert review within 180 days of the commencement of the action. Subdivision 3 requires that an expert has examined the facts of the case, that the expert is qualified enough so that the expert's opinion is reasonably likely to be admissible at trial, and that in the opinion of the expert, the defendant deviated from the applicable standard of care. The purpose of the affidavit of expert review is to "eliminate frivolous medical-negligence lawsuits by requiring that plaintiffs file affidavits verifying that their alleged claims are well founded." *Maudsley v. Pederson*, 676 N.W.2d 8, 12 (Minn. App. 2004). The affidavit must state the standard of care and how the defendant deviated from it and must show that the deviation from the standard of care caused the injury. *Lindberg v. Health Partners, Inc.*, 599 N.W.2d 572, 577 (Minn. 1999). There is no corresponding requirement that the defendant in the action produce such an affidavit.

Appellants also argue that the burden of production of evidence passed to respondents once appellants presented a prima facie case of negligence and that respondents failed to sustain that burden by not formulating a standard of care. In order to establish a prima facie case of medical negligence, a plaintiff must show through expert testimony (1) the standard of care applicable in the community; (2) the defendant's

deviation from that standard; and (3) the deviation from the standard of care was the direct cause of the injury. *Fabio v. Bellomo*, 504 N.W.2d 758, 762 (Minn. 1993).

Appellants' experts propounded a standard of care that included use of a neurosurgeon, a microscope, and a neurostimulator. Respondents' experts negated those items as part of the standard of care under the circumstances of this surgery. This satisfies the burden of production held by respondents. The district court's refusal to adopt appellants' standard of care or to grant a new trial for this reason was not an abuse of discretion.

C. Misconduct

Appellants argue that the district court abused its discretion by denying their new trial motion based on misconduct of respondents' counsel. Appellants allege that counsel committed misconduct by refusing to make a proper expert disclosure.

The district court, in its discretion, may grant a new trial because of serious misconduct by counsel. *Nadeau v. County of Ramsey*, 277 N.W.2d 520, 523 (Minn. 1979) (affirming grant of new trial based on plaintiff's counsel's behavior of ignoring court's warnings, implying witnesses were lying, accusing defendant of destroying records, and making arguments not based on record evidence despite repeated warnings). The district court here rejected appellants' challenge to the expert witness disclosure, which negates a conclusion of misconduct. Denial of a new trial on these grounds was not an abuse of discretion.

D. Exclusion of Rebuttal Witnesses

Appellants assert that they were prejudiced because the district court excluded their rebuttal witnesses from testifying. Before trial began, appellants' counsel sought the court's permission to call two rebuttal witnesses. The district court noted that the proposed testimony was identical to appellants' experts' testimony and refused to permit appellants to call those witnesses for the matters set forth in their disclosures.

"Rebuttal evidence" is evidence that "explains, contradicts, or refutes the defendant's evidence. Its purpose is to cut down the defendant's case and not merely to confirm that of the plaintiff." *Farmers Union Grain Term. v. Indus. Elec. Co.*, 365 N.W.2d 275, 277 (Minn. App. 1985), *review denied* (Minn. 1985). The plaintiff is not required to make an anticipatory rebuttal of defense theories. *Id.* at 278. Because of this, we caution the district court against making a decision in limine to exclude a party's rebuttal witnesses before the presentation of testimony. The district court has no basis for excluding the testimony of rebuttal witnesses when it has yet to hear the testimony that a party proposes to rebut.

But the district court here offered appellants the opportunity to present rebuttal testimony at the close of respondents' case; after a recess to consider what rebuttal testimony to offer, appellants' counsel stated: "I have decided that we have no need for rebuttal." Under these circumstances, the district court did not abuse its discretion by denying appellants a new trial on this ground.

II. JMOL

Appellants contend that the district court erred by refusing to grant JMOL, arguing that undisputed facts supported a verdict against respondents. We review a request for JMOL de novo. *Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458, 475 (Minn. App. 2006), *review denied* (Minn. Aug. 23, 2006). We will affirm the district court's denial of a request for JMOL if any competent evidence tends to reasonably sustain the verdict. *Id.* In doing so, we view the evidence in the light most favorable to the prevailing party and will not set aside a verdict unless "the evidence is practically conclusive against the verdict." *Id.* (quotation omitted).

Appellants' argument is this: (1) respondents' expert stated that if Dr. Lenz knew the mass was a schwannoma, a benign mass, he needed to have a neurosurgeon present; (2) Dr. Lenz conceded that the mass most likely was a schwannoma; and (3) this clearly demonstrates a violation of a standard of care. Therefore, appellants assert, the evidence is conclusive against the jury's verdict.

Appellants' summary of the evidence omits certain salient facts: (1) neither radiology report indicated that the mass was a schwannoma, although Dr. Lenz opined that it could be a schwannoma; (2) all the experts for both sides conceded that a schwannoma in the retroperitoneal areas was so unlikely that none of them had ever seen one in that area; (3) all of the experts testified that a mass in that area was most likely a sarcoma or a malignant mass; (4) appellants' expert testified that the radiologist's report described the mass in terms that suggested a malignancy; (5) respondents' experts testified that they would not have expected a neurosurgeon to be present for removal of a

mass in the retroperitoneal area; (6) the mass had largely been removed before the pathologist confirmed that it was a schwannoma; the piece that had not been removed was left because it was adherent to a vein; and (7) Dr. Lenz testified that if a large nerve root had been present, he would have and could have called a neurosurgeon.

There is sufficient competent evidence here to sustain the jury's verdict. Therefore, the district court did not err by denying appellants' motion for JMOL.

Affirmed.