STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1914
A10-1915

Susan Zwaschka, et al.,
Respondents,

vs.

Patrick Carney, M. D.,
Defendant (A10-1914),
Appellant (A10-1915),

Skin Speaks M. D., LLC,
Appellant (A10-1914),
Defendant (A10-1915)

Filed June 27, 2011
Affirmed
Larkin, Judge

Hennepin County District Court
File No. 27-CV-08-29413

Chris Messerly, Vincent J. Moccio, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, Minnesota (for respondents)

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Considered and decided by Stoneburner, Presiding Judge; Larkin, Judge; and Willis, Judge.*

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

LARKIN, Judge

Appellants challenge the denial of their motions for judgment as a matter of law and for a new trial. Because the jury's verdict is supported by the evidence, and because the district court did not err in its denial of a new trial or in its finding of vicarious liability, we affirm.

FACTS

Appellant Patrick Carney, M.D., practices general and cosmetic dermatology. Dr. Carney owns appellant Skin Speaks M.D., LLC. Respondent Susan Zwaschka became a patient of Dr. Carney's in 1988; she began skin treatment with a Skin Speaks esthetician in 2001 or 2002, and with a different esthetician, Jeanne Jellison, in 2003. Zwaschka saw Jellison once every four to six weeks and received a number of treatments.

In 2007, Zwaschka asked Jellison if she could try something more corrective for her skin because the treatments were not accomplishing her goals. Jellison suggested a "medical grade treatment" and explained Dr. Carney's chemical-peel technique. A chemical peel, as defined by Zwaschka's medical expert, is the "controlled wounding of the skin with an acid." Chemical peels can be light, medium, or heavy, based on the percentage of trichloroacetic acid (TCA) included in the solution.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

Zwaschka scheduled an appointment for a chemical peel with Dr. Carney. Upon her arrival at Skin Speaks, Zwaschka signed a consent form and took Vicodin and Valium at Jellison's direction. Jellison led Zwaschka to a spa room and brought in two solutions—one containing 20 percent TCA, the other containing 30 percent TCA. When Dr. Carney arrived in the spa room, Zwaschka explained that she wanted a light peel. As Jellison testified, Zwaschka asked for "the lightest version of [Dr. Carney's] chemical peel" because Zwaschka knew that "he does more aggressive peels." She also told the doctor that she intended to take a trip to Chicago with her family eight days after the procedure. Dr. Carney testified that, on the morning of the appointment, Jellison informed him that Zwaschka wanted a "medium-depth" peel.

Dr. Carney applied a pre-peeling agent of alcohol, which he testified is lighter than the Septisol soap and acetone that he typically uses. He then performed a chemical peel that he described as "slightly lighter than a classic medium-depth chemical peel," using 30 percent TCA rather than 35 percent TCA. Zwaschka testified that about 20 to 30 minutes into the procedure, she began to experience pain that "was worse than anything" she had ever felt before. She told the doctor to stop the procedure and sat up. A few minutes later, she lay back down and the doctor continued the peel. She asked the doctor to stop two additional times so she could take a break. As Dr. Carney completed the peel on the right side of Zwaschka's face, Jellison pointed to a spot on Zwaschka's right cheek that she believed he had missed. Dr. Carney applied the chemical to that area, even though he testified that he did not believe that he had missed the spot. Zwaschka testified

that, at the end of the procedure, Dr. Carney told her that he had been more aggressive than she wanted, so she could get her money's worth out of the procedure.

In the days following the peel, Zwaschka experienced pain, swelling, redness, and open wounds that wept fluid. She returned to Dr. Carney's office one week after the chemical peel, and Dr. Carney told her that her condition was not normal and that he was very concerned. Zwaschka cancelled her trip to Chicago and treated with Dr. Carney for several days. During these visits, Dr. Carney conducted "aggressive wound care." He soaked her face in wet gauze, discussed giving her a steroid injection, and prescribed medication. Dr. Carney and Zwaschka discussed scarring and the risk of infection in the open wounds. Dr. Carney explained that when Jellison pointed out the spot that he had missed during the peel, he may have overlapped the procedure and applied a second coat of the solution. Dr. Carney told Zwaschka that she should blame him rather than herself and that he had contacted his malpractice-insurance provider. The chemical peel had caused superficial second-degree burns that left Zwaschka with permanent scars on her right cheek, on her chin, and above her lip.

Zwaschka and her husband sued Dr. Carney and Skin Speaks in Hennepin County District Court, alleging medical negligence and civil battery. At the ensuing jury trial, Zwaschka's expert witness, Dr. Barry Resnik, defined the relevant standard of care as "what a reasonable dermatologist . . . would do to ensure a good result and the least possible side effects or complications in the procedure or treatment that I would render for a patient." He testified that Dr. Carney's treatment of Zwaschka fell below this standard of care for numerous reasons. First, Dr. Carney wrongfully relied on Jellison's

recommendation regarding the type of chemical peel that Zwaschka should receive, without examining Zwaschka and consulting with her himself. Dr. Resnik stated that "an esthetician should not be determining medium-depth chemical peel patients, and a physician should not be relying upon that decision without" further consultation. Second, Dr. Carney failed to discuss the procedure with Zwaschka for a sufficient period of time. Dr. Resnik testified that a reasonable dermatologist would spend 30 to 45 minutes discussing the risks of a medium-depth peel, and he faulted Dr. Carney for spending only a few minutes with Zwaschka before beginning the procedure. Third, Dr. Carney should have waited to schedule the peel until after Zwaschka returned from Chicago. Fourth, Dr. Carney did not inform Zwaschka of alternatives to the medium-depth peel. Fifth, Dr. Carney did not listen to Zwaschka when she told him to stop the procedure; rather, he gave her a short break and resumed the treatment. Dr. Resnik stated, "There is no medical reason why you cannot stop a peel at any stage." Sixth, Dr. Carney returned to the spot that Jellison believed that he had missed and treated it again. Dr. Resnik testified that the spot that Dr. Carney treated a second time "turned out to be one of the areas with the most significant scarring." Seventh, Dr. Carney failed to fully document Zwaschka's post-operative care. Finally, Dr. Resnik testified that he would not have performed a medium-depth chemical peel on Zwaschka: "A medium-depth chemical peel would not be at the top of my hit list for [her]". But during cross-examination, Dr. Resnik testified that he was not critical of the manner in which Dr. Carney applied the chemical.

Near the end of the third day of the trial, defense counsel moved for a mistrial on the ground that Zwaschka, who is an attorney, had testified about her professional

experience working with doctors and about malpractice insurance. Zwaschka testified that Dr. Carney told her that he had contacted his malpractice-insurance provider. She also testified that, in her experience, injuries to patients often resulted from a doctor's failure to listen to his or her patient. The district court denied the motion but "caution[ed]" Zwaschka against "any more discussion about insurance or insurance companies or malpractice."

When the case was submitted to the jury, the district court instructed on three causes of action: medical negligence, battery, and failure to obtain informed consent. The district court provided the jury with a special-verdict form asking it to address Dr. Carney's liability on each of the three causes of action, as well as appropriate damages. The following day, the jury returned its special verdict, finding Dr. Carney liable for medical negligence but not liable for civil battery or failure to obtain informed consent. The jury awarded damages of approximately $1 million.

Thereafter, Dr. Carney and Skin Speaks moved for judgment as a matter of law (JMOL) or a new trial, arguing jointly that the evidence, particularly the medical expert's testimony, did not support the jury's verdict and that the district court had improperly admitted certain evidence. Zwaschka opposed these motions. She also filed proposed findings of fact, conclusions of law, and an order for judgment that imposed vicarious liability on Skin Speaks for Dr. Carney's negligence. Dr. Carney and Skin Speaks jointly opposed the proposed order. The district court denied appellants' motions. The court rejected the arguments that Zwaschka's medical expert had not provided sufficient expert testimony regarding Dr. Carney's deviations from the standard of care, finding that

"[a]mple expert testimony was proffered . . . regarding Dr. Carney's alleged negligence." The court also rejected the arguments that Dr. Carney and Skin Speaks were entitled to a new trial. Finally, the court determined that Skin Speaks is vicariously liable for Dr. Carney's negligence, finding that Dr. Carney was both an actual agent of Skin Speaks and that he had apparent authority to act as Skin Speaks's agent. Dr. Carney and Skin Speaks appealed separately, and this court consolidated their appeals.

D E C I S I O N

I.

We first address Dr. Carney's argument that the district court erred in denying his motion for JMOL. JMOL is appropriate if there is "no legally sufficient evidentiary basis for a reasonable jury to find" against the moving party. Minn. R. Civ. P. 50.01. The district court must determine whether, viewing the evidence in the light most favorable to the nonmoving party, the verdict is contrary to law or "manifestly against the entire evidence." *Langeslag v. KYMN Inc.*, 664 N.W.2d 860, 864 (Minn. 2003) (quotation omitted); *see also Lester Bldg. Sys. v. Louisiana-Pacific Corp.*, 761 N.W.2d 877, 881 (Minn. 2009). This court must affirm a district court's denial of a motion for JMOL if "there is any competent evidence reasonably tending to sustain the verdict." *Langeslag*, 664 N.W.2d at 864 (quotation omitted). "Verdicts are upset only in extreme circumstances." *Bolander v. Bolander*, 703 N.W.2d 529, 545 (Minn. App. 2005), *review denied* (Minn. Nov. 17, 2005). "Unless the evidence is practically conclusive against the verdict, this court will not set the verdict aside." *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998) (internal quotations and alteration omitted).

To prove medical negligence, a plaintiff must introduce expert testimony that demonstrates three elements: a standard of care recognized by the medical community and applicable to the defendant's conduct; a departure from that standard of care; and injury to the plaintiff that was directly caused by the departure. *Plutshack v. Univ. of Minn. Hosps.*, 316 N.W.2d 1, 5 (Minn. 1982). "[A] physician is not responsible for the consequences of an honest mistake or error of judgment in his diagnosis or treatment." *Silver v. Redleaf*, 292 Minn. 463, 465, 194 N.W.2d 271, 272 (1972). Consequently, the plaintiff must show it was more probable than not that the defendant was responsible for the plaintiff's injuries. *Id.* at 465, 194 N.W.2d at 273. Expert testimony is essential in establishing a case of medical negligence: the jury must not be allowed to speculate as to whether a different treatment would have avoided the injury. *See Cornfeldt v. Tongen*, 295 N.W.2d 638, 640 (Minn. 1980).

The relevant standard of care is "the standard of skill and learning ordinarily possessed and exercised under similar circumstances by physicians in good standing in the same or similar localities." *Plutshack*, 316 N.W.2d at 5 n.7 (quotation omitted). Zwaschka's medical expert, Dr. Resnik, testified that the standard of care that he applied to his analysis of Dr. Carney's conduct was that of a reasonable dermatologist who took action to ensure a good result with the least possible side effects or complications.

Regarding Dr. Carney's deviation from the standard of care, Dr. Resnik focused on two general areas. First, he testified that Dr. Carney failed to independently examine and consult with Zwaschka before proceeding with the medium-depth peel. Instead, Dr. Carney accepted his esthetician's opinion regarding the appropriate procedure.

Moreover, he discussed the peel with Zwaschka for only a few minutes, and he failed to consider alternatives to the procedure in light of Zwaschka's request for the "lightest peel" and her plans to travel to Chicago eight days after the procedure. Dr. Resnik testified that Dr. Carney did not give Zwaschka the "lightest peel" because the lightest peel is no peel at all: "By definition, there is no light version of a . . . TCA 30 percent peel." Second, Dr. Resnik faulted Dr. Carney's conduct during the chemical peel. Dr. Resnik testified that it was inappropriate for Dr. Carney to have failed to consider stopping the procedure when Zwaschka informed him of her pain and discomfort, because there is "no medical reason" why a chemical peel may not be stopped. Dr. Resnik also criticized Dr. Carney's treatment of an area on Zwaschka's face a second time, after Jellison informed him that she believed he had missed the spot. Treating this area of Zwaschka's face a second time was, in Dr. Resnik's opinion, a direct cause of her most serious injuries. Dr. Resnik's expert testimony provides sufficient evidence that Dr. Carney deviated from the standard of care.

Dr. Carney argues that the district court erred in failing to consider Dr. Resnik's testimony that he was not critical of the manner in which Dr. Carney applied the chemical peel to Zwaschka's face. But the district court was required to view the evidence in the light most favorable to Zwaschka. *Langeslag*, 664 N.W.2d at 864. Thus, it may be inferred that the jury disregarded Dr. Resnik's approval of some of Dr. Carney's conduct and weighed more heavily Dr. Resnik's critique of other aspects of Dr. Carney's conduct, such as his decision not to stop the procedure despite the pain that Zwaschka experienced and his re-application of the chemical-peel solution to an area of Zwaschka's face.

Dr. Carney also argues that "[m]ost of Dr. Resnik's opinion testimony" is related to Zwaschka's claims of civil battery and failure to obtain informed consent, for which the jury concluded that Dr. Carney was not liable. Dr. Carney suggests that we categorize portions of Dr. Resnik's testimony as relating to Zwaschka's civil-battery claim, medical-negligence claim, or failure-to-obtain-informed-consent claim and that we reject all testimony that relates to the civil-battery claim or the failure-to-obtain-informed-consent claim. This approach is inconsistent with our standard of review, which requires us to affirm the jury's verdict so long as "there is *any* competent evidence reasonably tending to sustain the verdict." *Id.* (emphasis added). For example, we may not reject Dr. Resnik's testimony regarding Dr. Carney's pre-operative conduct toward Zwaschka—the amount of time he spent discussing the procedure with her, his failure to offer alternative treatments, his decision to proceed with the peel despite her travel plans to Chicago, and so forth—merely because this evidence relates to both the failure-to-obtain-informed-consent and medical-negligence claims. Regardless of whether this conduct relates to the alleged failure to obtain informed consent, it also demonstrates negligence because it suggests that Dr. Carney failed to conduct a full investigation of Zwaschka's condition and failed to consider treatments that would better suit her needs.

In sum, the jury's verdict of negligence against Dr. Carney is not "manifestly against the entire evidence." *See id.* In addition to the expert testimony, the verdict is supported by Zwaschka's own account of the pain she experienced during and after the procedure; Dr. Carney's and Jellison's testimony regarding Zwaschka's post-operative condition; and photographs of Zwaschka's face that showed permanent scarring.

Because the evidence in the record supports the jury's finding that Dr. Carney is liable to Zwaschka for medical negligence, the district court properly denied Dr. Carney's motion for JMOL.

II.

We next address Dr. Carney's argument that he is entitled to a new trial. This court reviews a district court's decision to deny 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). Unlike a motion for JMOL, "which raises a purely legal question, the new trial motion presents a factual question, where the reviewing judge may properly weigh the evidence." *Lamb v. Jordan*, 333 N.W.2d 852, 855 (Minn. 1983).

Dr. Carney raises three objections to the district court's denial of his motion for a new trial. First, he claims that one or more theories of negligence were improperly submitted to the jury. *See Kaiser-Bauer v. Mullen*, 609 N.W.2d 905 (Minn. App. 2000) (reversing jury verdict when plaintiff had submitted three theories of negligence to a jury but failed to establish a prima facie case with respect to two of them, and it was not clear that the verdict was based on the third, properly submitted theory), *review denied* (Minn. July 25, 2000). Dr. Carney alleges "that it is impossible to determine" whether the jury's verdict is grounded on one or more properly submitted theories of negligence. Because we are not persuaded that any negligence theory was improperly submitted to the jury in this case, a new trial is not warranted on this basis.

Second, Dr. Carney argues that the district court's improper admission of insurance evidence requires a new trial. The district court enjoys "broad discretion"

regarding the admission of evidence, and this court will not disturb the district court's ruling "unless it is based on an erroneous view of the law or constitutes an abuse of discretion." *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 44-46 (Minn. 1997).

Rule 411 of the Minnesota Rules of Evidence provides, "Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully." Minn. R. Evid. 411; *see also Clark v. Johnson Bros. Constr.*, 370 N.W.2d 896, 900 (Minn. App. 1985) (concluding that repeated references to insurance were inappropriate when issue "was not related to any fact of consequence to the determination of the action"), *review denied* (Minn. Sept. 19, 1985). Evidence about liability insurance may be admitted, however, "for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness." Minn. R. Evid. 411; *see also Danielson v. Johnson*, 366 N.W.2d 309, 315 (Minn. App. 1985) (affirming admission of insurance evidence to rebut plaintiff's testimony that he stopped seeing doctor in part because he could not afford treatment), *review denied* (Minn. June 24, 1985).

Dr. Carney objects to Zwaschka's testimony that he told her that she should blame him rather than herself for what happened to her, that he had contacted his malpractice-insurance provider, and that, "That's what insurance is for." Dr. Carney argues that Zwaschka's testimony about insurance "fall[s] squarely within the Rule 411 bar on evidence of insurance." In allowing this testimony, the district court reasoned that the testimony was introduced not to impute negligence, but instead to show Dr. Carney's state of mind after the procedure, his "acceptance of responsibility for the results . . . and

his tacit admission of his own errors." We cannot say that the district court abused its discretion in this regard. Moreover, the admission of this testimony is not reversible error unless Dr. Carney can demonstrate prejudice. Minn. R. Civ. P. 61 (reviewing errors in the admission of evidence for prejudice); *see also Purdes v. Merrill*, 128 N.W.2d 164, 168 (Minn. 1964) (determining whether effect of disclosure of insurance coverage was prejudicial). Because the jury's verdict of negligence is supported by sufficient evidence, Dr. Carney's argument that he was prejudiced by the admission of this isolated testimony is not persuasive.

Third, and finally, Dr. Carney argues that he was entitled to a new trial after Zwaschka testified that, as an attorney, she was "hired by the insurance companies to represent physicians" and that "when there was unnecessary injury to a patient or an injury that could have been avoided, it was generally because a physician did not listen to his client." A party may be entitled to a new trial based on "[m]isconduct of the . . . prevailing party." Minn. R. Civ. P. 59.01(b). Whether to grant a new trial based on the misconduct of a party or counsel is entrusted to the district court's discretion. *Lake Superior Ctr. Auth. v. Hammel Green & Abrahamson, Inc.*, 715 N.W.2d 458, 479 (Minn. App. 2006) (discussing attorney misconduct), *review denied* (Minn. Aug. 23, 2006). But "[a]n objection to improper remarks, a request for curative instruction, and a refusal by the [district] court . . . are generally prerequisites to the obtaining of a new trial on appeal." *Id.* (quoting *Hake v. Soo Line Ry. Co.*, 258 N.W.2d 576, 582 (Minn. 1977)).

Dr. Carney concedes that his attorney did not request a curative instruction in response to Zwaschka's testimony. Nevertheless, he argues that her testimony was "so

egregious that [the district court] should have taken action on its own accord." *See id.* (quoting *Hake*, 258 N.W.2d at 582). Dr. Carney compares Zwaschka's testimony to the circumstances in *Ellwein v. Holmes*, 243 Minn. 397, 68 N.W.2d 220 (1955), and *Magistad v. Potter*, 227 Minn. 570, 36 N.W.2d 400 (1949), cases in which the supreme court ordered a new trial even though counsel did not object or request a curative instruction. These two cases are readily distinguishable from this case. In *Ellwein*, the plaintiff's attorney argued to the jury that the defendant's company had hidden records so they would not be available at trial, despite a flat-out denial of this fact by a witness. *Id.* at 399-400, 68 N.W.2d at 221-22. And in *Magistad*, a *per curiam* opinion that does not provide extensive facts, the supreme court observed that the defendant's counsel accused the plaintiff's witnesses of perjury and reasoned that these accusations "were not sufficient provocation to justify the misconduct" of the plaintiff's counsel in closing argument, which was "so prejudicial and so calculated to excite prejudice and passion" that a new trial was required. *Id.* at 571, 36 N.W.2d at 401. Although the opinion does not describe the specific misconduct of the plaintiff's counsel, the above statement indicates that the misconduct was worse than accusing an opposing party's witness of lying under oath. *See id.* Zwaschka's comments do not rise to a similar level of egregiousness. Moreover, Zwaschka complied with the district court's directive against "any more discussion about insurance or insurance companies or malpractice."

Finally, because there is sufficient evidence in the record to support the jury's verdict of negligence, we are not persuaded that Dr. Carney was prejudiced by Zwaschka's testimony. *Lake Superior Ctr.*, 715 N.W.2d at 479 ("The paramount

consideration in determining whether a new trial is required in cases alleging misconduct is whether prejudice occurred.") In sum, the district court did not abuse its discretion by denying Dr. Carney's motion for a new trial.

III.

Turning to Skin Speaks's arguments, Skin Speaks presents procedural and substantive challenges to the district court's determination that the clinic is vicariously liable for Dr. Carney's negligence. First, Skin Speaks asserts that the district court committed a procedural error by determining Skin Speaks's liability itself rather than presenting the question to the jury on the special-verdict form. Skin Speaks also argues that Zwaschka waived her right to a determination of vicarious liability because she failed to present the issue to the jury. In effect, Skin Speaks asserts that only the jury, and not the court, was permitted to decide the issue of vicarious liability. We disagree.

Rule 49.01 of the Minnesota Rules of Civil Procedure governs the submission of a special-verdict form to a jury. The rule states that the district court "may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact." Minn. R. Civ. P. 49.01(a). In the event that an issue of fact is omitted from the special-verdict form, "each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury." *Id.* "As to an issue omitted without such demand, the court may make a finding" on the issue. *Id.* The Minnesota Supreme Court applied this rule in *Milner v. Farmers Ins. Exch.*, 748 N.W.2d 608 (Minn. 2008), stating, "Provided that the issue. . .was pleaded or raised by the evidence, the issue [is] within the district court's authority under Minn. R. Civ. P.

49.01(a)." *Id.* at 618. The court concluded, "Because the issue . . . [was raised by the evidence at trial and] was not submitted to the jury on the special-verdict form, the court was within its authority pursuant to Minn. R. Civ. P. 49.01(a) to make factual findings" on the issue. *Id.* at 619.

Rule 49.01 squarely controls the question of whether the district court erred in making a finding regarding Skin Speaks's vicarious liability. The vicarious-liability issue was presented to the jury in testimony and jury instructions, but it was omitted from the special-verdict form. Neither Zwaschka nor Skin Speaks demanded its submission to the jury. Thus, the parties waived their rights to a jury trial on the issue of vicarious liability, and the district court was authorized to make a finding on the issue.

Skin Speaks cites *In re Shigellosis Litigation*, 647 N.W.2d 1 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002), in support of its argument that the district court erred by deciding the issue of Skin Speaks's vicarious liability. In that case, the district court denied judgment as a matter of law for the plaintiff, who had asked the district court to find a defendant per se negligent for having violated certain federal statutes, even though the plaintiff failed to request a special-verdict question on the issue. *Id.* at 4-5. We affirmed the district court's decision stating, "When the requesting party has not submitted the issue to the jury and fact issues appropriate for jury resolution remain, it is improper for the district court to grant [JMOL]." *Id.* at 10. But *In re Shigellosis Litigation* was decided before *Milner* and the decision does not mention or discuss application of rule 49.01, which clearly authorized the district court to make a finding on

vicarious liability in the absence of either party's demand for submission of the issue to the jury on the special-verdict form.

Skin Speaks also challenges the district court's imposition of liability on substantive grounds, arguing that Dr. Carney, as the sole owner of Skin Speaks, is in greater control of the business than the business is in control of him. It is well settled that "an employer is vicariously liable for the torts of an employee committed within the course and scope of employment." *Schneider v. Buckman*, 433 N.W.2d 98, 101 (Minn. 1988). An employee's negligent acts occur within the scope of employment when "the conduct was, to some degree, in furtherance of the interests of his employer." *Hentges v. Thomford*, 569 N.W.2d 424, 427 (Minn. App. 1997) (citing *Edgewater Motels, Inc. v. Gatzke*, 277 N.W.2d 11, 15 (Minn. 1979)), *review denied* (Minn. Dec. 8, 1997). Courts consider such factors as whether the employee is authorized to perform the type of act in question, whether the act occurs substantially within authorized time and space restrictions, and whether the employer should reasonably have foreseen the employee's conduct. *Id.* at 428.

Here, Skin Speaks is in the business of providing medical and cosmetic services to its clients. Skin Speaks employs Dr. Carney to further this business interest by performing general and cosmetic dermatology services. As evidence that Dr. Carney is an employee of Skin Speaks, Zwaschka introduced a postcard advertisement that Skin Speaks sent to its clients in the spring of 2008, on which Dr. Carney is featured alongside of others who are identified as "staff." Zwaschka, a Skin Speaks client, saw Dr. Carney for a chemical peel, a procedure that he is licensed to perform. Dr. Carney performed the

procedure on Zwaschka at a Skin Speaks facility during its normal business hours. Because Skin Speaks's staff scheduled the appointment and a Skin Speaks's esthetician assisted Dr. Carney to perform the procedure, Skin Speaks should reasonably have foreseen Dr. Carney's conduct. This record demonstrates that Dr. Carney's negligent conduct occurred within the course and scope of his employment at Skin Speaks.

Skin Speaks faults the district court for stating, in its order, that Dr. Carney acted as Skin Speaks's "agent," because the jury was instructed on the vicarious liability of an employer for its employee. Skin Speaks asserts that it "cannot be held liable for an issue never tried, never argued and never submitted to the jury." But Skin Speaks raised the issue of vicarious liability on multiple occasions—in its motion in limine, in discussions with the district court regarding proposed jury instructions and the special-verdict form, and in its motion for JMOL or a new trial. Moreover, the law on principal-agent vicarious liability is strikingly similar to that of employer-employee vicarious liability. As with the employment relationship, there is a "long-standing common-law notion that a principal is liable for the act of an agent committed *in the course and within the scope of* agency." *Bedow v. Watkins*, 552 N.W.2d 543, 547 (Minn. 1996) (emphasis added); *see also Kellogg v. Woods*, 720 N.W.2d 845, 852 (Minn. App. 2006) ("[A] principal is liable for his agents' acts committed in the scope of the agency relationship."). "Vicarious liability may be imposed when master-servant or principal-agent relationship exists between the tortfeasor and a third party." *Urban ex rel. Urban v. American Legion Post 184*, 695 N.W.2d 153, 160 (Minn. App. 2005) (citing *Nadeau v. Melin*, 260 Minn. 369, 376, 110 N.W.2d 29, 34 (1961)), *aff'd*, 723 N.W.2d 1 (Minn. 2006). The caselaw does

not sharply distinguish between employment and agency relationships when discussing vicarious liability. Thus, we are not persuaded that reversal is necessary merely because the district court focused on an agency theory, instead of an employment theory, in its order.

In sum, the district court did not err in its determination of Skin Speaks's vicarious liability.

Affirmed.

Dated:

Judge Michelle A. Larkin