STATE OF MINNESOTA
IN COURT OF APPEALS
A11-591

Johnny L. Moore, et al.,
Appellants,

vs.

Park Nicollet Methodist Hospital, et al.,
Respondents.

Filed December 19, 2011
Reversed and remanded
Stauber, Judge

Hennepin County District Court
File No. 27CV1019720

Thomas F. Handorff, Handorff Law Offices, P.C., St. Louis Park, Minnesota (for appellants)

Paul C. Peterson, William L. Davidson, Matthew S. Frantzen, Lind, Jensen, Sullivan & Peterson, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Klaphake, Presiding Judge; Larkin, Judge; and Stauber, Judge.

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

STAUBER, Judge

On appeal from the dismissal of their medical-malpractice suit for failure to comply with the expert-identification requirements of Minn. Stat. § 145.682 (2010), appellants argue that the district court erred by determining that (1) expert testimony was necessary in

this case; (2) the expert-identification affidavit was untimely when it was deposited in the U.S. Mail on the due date but not postmarked until the following day; and (3) the affidavit was deficiently conclusory regarding causation. Because the district court erred by concluding that an expert affidavit was necessary in this case, we reverse and remand.

FACTS

In January 2010, appellants Johnny L. Moore (Mr. Moore) and his wife, Janice Moore (Mrs. Moore), brought this action against respondent Park Nicollet Methodist Hospital (the hospital). The complaint alleged that in November 2005, Mr. Moore underwent hip-replacement surgery at the hospital. Following his surgery, Mr. Moore "experienced complications, including blood clots that caused neurological impairment that affected his speech, balance, and movements." As a result, appellants alleged that Mr. Moore's medical orders and the nursing standards applicable for his care and treatment required that nursing personnel "accompany [him] and assist him in returning to his bed."

The complaint alleged that while he was hospitalized, Mr. Moore sustained "severe and permanent injuries" when he "fell and struck his head while attempting to return from the bathroom to his bed without assistance." According to Mr. Moore, he was assisted by a nurse to the bathroom, but while he was in the bathroom, the nurse left the hospital room. Appellants claimed that the hospital's nurses "were acting as agents and employees of [the hospital] when they deviated from the applicable standards of care in failing to protect and assist [Mr. Moore] from the risk of falling."

The hospital answered, denying that it was negligent and demanding compliance with "all of the provisions" of Minn. Stat. § 145.682. In an action alleging malpractice against a health-care provider in which expert testimony is necessary to establish a prima facia case, the statute requires an affidavit of expert identification "must . . . be served upon the defendant within 180 days after commencement of the suit." Minn. Stat. § 145.682, subds. 2, 4. Appellants filed suit on January 15, 2010. Thus, the deadline for timely serving an affidavit of expert identification was July 14, 2010.

Appellants served upon the hospital an affidavit of Sharon Crothers, a registered nurse licensed in Minnesota who has been practicing for 26 years. This expert affidavit was postmarked on July 15, 2010, and received by the hospital on July 16, 2010. Appellants claimed that the expert affidavit was deposited in the post office mailbox on July 14, 2010. But appellants admitted that the deposit was made after the post office had closed for the day.

The hospital moved to dismiss the complaint. The district court granted the motion, concluding that expert-witness testimony was necessary in the case, and that Crothers's affidavit did not meet the substantive requirements set forth in Minn. Stat. § 145.682, subd. 4(a). The court further concluded that Crothers's affidavit was "not effectively served on [the hospital] until July 15, 2010, 181 days after initiation of the lawsuit." Thus, the court concluded that appellants' complaint "is subject to mandatory dismissal pursuant to Minn. Stat. § 145.682 for failure to strictly comply with the requirements for timely service." This appeal followed.

D E C I S I O N

Minn. Stat. § 145.682, subd. 2, provides that, "[i]n an action alleging malpractice, error, mistake, or failure to cure, whether based on contract or tort, against a health care provider which includes a cause of action as to which expert testimony is necessary to establish a prima facie case," the plaintiff must, among other requirements, serve on the defendant an affidavit of expert identification. *See* Minn. Stat. § 145.682, subd. 4 (setting forth requirements for affidavit of expert identification). Minnesota law generally requires expert testimony in medical-malpractice cases because they often "involve complex issues of science or technology, requiring expert testimony to assist the jury in determining liability." *Tousignant v. St. Louis Cnty*, 615 N.W.2d 53, 58 (Minn. 2000). The purpose of this testimony is "to interpret the facts and connect the facts to conduct which constitutes [medical] malpractice and causation." *Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 192 (Minn. 1990).

However, there is a limited exception to the expert-testimony requirement. This exception applies when the "acts or omissions complained of are within the general knowledge and experience of lay persons." *Atwater Creamery Co. v. W. Nat'l Mut. Ins. Co.*, 366 N.W.2d 271, 279 (Minn. 1985). Whether expert testimony is required is a legal question to be reviewed de novo by this court. *Tousignant*, 615 N.W.2d at 58.

The district court here concluded that expert testimony would be

> necessary . . . to determine whether a patient in the same condition as Mr. Moore was to be escorted to and from the bathroom and whether it was necessary for hospital staff to remain in the room while Mr. Moore used the bathroom or whether it was common practice for the patient to be

> instructed to use the call button when he was ready to return to his bed.

Appellants argue that the district court erred by concluding that expert testimony is necessary in this case. We agree. In *Tousignant*, a confused, elderly woman recovering from a broken hip in the hospital refractured her hip when she slipped out of her wheelchair. 615 N.W.2d at 56. Although the physician's orders specifically stated that the patient was to have a "vest restraint on at all times," the accident occurred when the patient was not properly restrained or supervised. *Id.* The Minnesota Supreme Court determined that this was one of the "exceptional" cases that did not require expert testimony because lay people could understand that if an elderly person is confused and not restrained, it would be possible for her to fall and be reinjured. *Id.* at 60-61 (recognizing that although expert testimony may at some point be necessary to refute the defendant's evidence presented at trial, it was not necessary to establish a prima facia case).

Here, the doctor's orders were simple and straightforward: Mr. Moore was to be assisted by hospital staff to and from the bathroom. Although Mr. Moore was assisted to the bathroom, he alleged that the nurse left his room while he was in the bathroom. Mr. Moore further alleged that he was injured when he left the bathroom unassisted and fell. As in *Tousignant*, this is an "exceptional" case in which lay people could readily understand that if a patient recovering from hip-replacement surgery is not assisted to and from the bathroom, in violation of the doctor's orders, it would be possible (or likely) that

the patient could fall and be injured. Therefore, the district court erred by concluding that expert testimony is necessary in this case.

Because expert testimony is not necessary, the requirements of Minn. Stat. § 145.682 need not be satisfied. As a result, it is not necessary for us to determine whether the expert affidavit was timely served on the hospital and whether Crothers's affidavit met the substantive requirements of Minn. Stat. § 145.682. Accordingly, we reverse and remand for proceedings consistent with this opinion.

Reversed and remanded.