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Minn. Stat. § 480A.08, subd. 3 (2010).

STATE OF MINNESOTA
IN COURT OF APPEALS
A11-780

L. Charles Linden, as trustee for the heirs
and next-of-kin of Rosemary Linden, deceased,
Appellant,

vs.

Ross Siemers, M. D., et al.,
Defendants,
Fairview Health Services d/b/a Fairview Lakes Regional Medical Center,
Respondent.

Filed January 9, 2012
Affirmed
Stauber, Judge

Hennepin County District Court
File No. 27CV1011327

Valerie LeMaster, Mackenzie & Dornick, P.A., Minneapolis, Minnesota (for appellant)

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

Considered and decided by Peterson, Presiding Judge; Connolly, Judge; and Stauber, Judge.

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

STAUBER, Judge

Appellant challenges the district court's pretrial dismissal of his medical-malpractice claim against respondent hospital arising out of the alleged negligence of the hospital's pharmaceutical staff. Because appellant did not serve an affidavit of expert identification for the pharmaceutical expert until after the timeline established by Minn. Stat. § 145.682 (2010) had lapsed, we affirm.

FACTS

On July 6, 2006, Rosemary Linden (decedent) was admitted to Fairview Regional Medical Center Infusion Clinic for administration of a WinRho infusion, which had been ordered by her hematologist, Dr. Ross Siemers. Dr. Siemers was employed by North Memorial Health Services. Two days later, decedent suffered three cardiac arrests, was unable to be resuscitated, and was pronounced dead.

On July 7, 2009, appellant L. Charles Linden, as trustee for the heirs and next-of-kin of decedent, brought a wrongful-death medical-malpractice claim against Dr. Siemers; North Memorial; and respondent Fairview Health services, d/b/a/ Fairview Lakes Regional Medical Center, the hospital where the care was provided.[1] In the complaint, appellant alleged that the defendants "were negligent in that they departed from that degree of skill and care normally possessed and exercised by physicians, nurses, pharmacists, other allied health professionals, and hospitals under the same or

[1] Appellant later settled his claims against Dr. Siemers and North Memorial, neither of whom is a party to this appeal.

similar circumstances." The complaint went on to allege that the defendants' negligence led to "an adverse response to the inappropriate medication which triggered acute hemolysis which resulted in [decedent's] death."

The initial statutory 180-day deadline to serve an affidavit of expert identification was January 3, 2010. In late December 2009, the parties agreed to extend this deadline until March 23, 2010. Within this extended deadline, appellant served two affidavits of expert identification, disclosing the expert opinions of hematologist Dr. Harold Liebman and registered nurse Pamela Steinacher.[2]

On June 28, 2010, the district court issued a scheduling order, requiring appellant to make "expert disclosures" by November 18 and requiring respondent to make its own expert disclosures by December 3. The order made no reference to the statutory deadline to serve an affidavit of expert identification.

On November 17, appellant provided a "supplemental answer" to respondent's interrogatories, in which he provided a summary of expected expert testimony of pharmacist Dr. Patrick J. McDonnell. The summary detailed the accepted standards of pharmaceutical practice and concluded that "[d]ispensing WinRho under these circumstances was a departure" from those accepted standards.

On December 3, respondent moved to strike Dr. McDonnell's testimony as untimely under the statute. The district court concluded that the McDonnell affidavit was an untimely affidavit of expert identification, struck the affidavit, precluded

[2] Respondent has made no argument, either before the district court or now on appeal, challenging the timeliness or sufficiency of the Liebman or Steinacher affidavits.

Dr. McDonnell from testifying at trial as an expert, precluded appellant from offering any testimony regarding the standard of care applicable to a pharmacist, and dismissed appellant's "claims against the Fairview pharmacy staff" with prejudice. This appeal follows.

D E C I S I O N

"Statutory construction is . . . a legal issue reviewed de novo." *Lee v. Fresenius Med. Care, Inc.*, 741 N.W.2d 117, 122 (Minn. 2007). When construing statutes, we attempt "to ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2010). "We construe statutes to effect their essential purpose but will not disregard a statute's clear language to pursue the spirit of the law." *Lee*, 741 N.W.2d at 123.

"A [district] court's dismissal of an action for procedural irregularities will be reversed on appeal only if it is shown that the [district] court abused its discretion." *Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 190 (Minn. 1990). But here, the statute leaves no room for the district court to exercise its discretion. *See* Minn. Stat. § 145.682, subd. 6(b) (providing that a failure to serve affidavits within the statutory timeframe results in "mandatory dismissal"). The undisputed facts establish that the statutory deadline for the filing of affidavits of expert identification was March 23, 2010, and that appellant did not serve a summary of expected testimony regarding the standard of care observed by pharmacists until November 17. We therefore review de novo whether the district court erred by concluding that the statute mandated dismissal on these facts. *See Juetten v. LCA-Vision, Inc.*, 777 N.W.2d 772, 775 (Minn. App. 2010) (outlining standard of review), *review denied* (Minn. Apr. 28, 2010).

"In an action alleging malpractice . . . 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 . . . serve upon defendant within 180 days after commencement of the suit an affidavit [of expert identification]." Minn. Stat. § 145.682, subd. 2. The term "health care provider," as used in the statute, includes a hospital. *Id.*, subd. 1. Failure to comply with this requirement "results, upon motion, in mandatory dismissal with prejudice of each cause of action as to which expert testimony is necessary to establish a prima facie case." *Id.*, subd. 6(b).

"The Minnesota legislature enacted Minn. Stat. § 145.682 for the purpose of eliminating nuisance medical malpractice lawsuits by requiring plaintiffs to file [expert] affidavits verifying that their allegations of malpractice are well-founded." *Stroud v. Hennepin Cnty. Med. Ctr.*, 556 N.W.2d 552, 555 (Minn. 1996). "[E]xpert testimony is generally required to establish the standard of care and the departure from that standard for the conduct of [medical professionals]." *Tousignant v. St. Louis Cnty.*, 615 N.W.2d 53, 58 (Minn. 2000). Such affidavits are required for all causes of action alleging medical malpractice, unless "the acts or omissions complained of are within the general knowledge and experience of lay persons." *Id.* (quoting *Atwater Creamery Co. v. W. Nat'l Mut. Ins. Co.*, 366 N.W.2d 271, 279 (Minn. 1985)).

Appellant makes no argument that the alleged negligence of the pharmaceutical staff is one of the "exceptional" cases that does not require expert testimony. *See Tousignant*, 615 N.W.2d at 60–61 (recognizing that although expert testimony may be necessary to refute a defendant's evidence at trial, it is not always necessary to establish a

prima facie case). Nor does he make any argument that the McDonnell affidavit was served on respondent by the deadline expressed in Minn. Stat. § 145.682. Instead, appellant's challenge rests on his assertion that the McDonnell affidavit "was not necessary to establish [a] prima facie case" because he had already satisfied the statute's requirements by timely serving the Liebman and Steinacher affidavits. This argument is unavailing.

Under the language of the statute, "[t]he terms 'suit' and 'action' are synonymous and denote a judicial proceeding." *Juetten*, 777 N.W.2d at 776. "By contrast, a 'cause of action' is a group of operative facts giving rise to one or more bases for suing." *Id.* (quotation omitted). Appellant's argument mistakenly equates these two distinct terms by his repeated assertion that there is "one plaintiff, one remaining defendant, and one cause of action." But under the definitions we expressed in *Juetten*, while there is one "suit" or "action," in which respondent is the sole defendant, the suit encompasses at least three distinct causes of action; to wit, the alleged negligence of the doctor, the alleged negligence of the nursing staff, and the alleged negligence of the pharmaceutical staff.

Each of these causes of action requires expert testimony because each alleges a departure from medical standards of care. By timely serving the Liebman and Steinacher affidavits, appellant established a prima facie case as to the alleged negligence of the doctor and nursing staff, respectively. But the record clearly indicates that appellant failed to timely serve an affidavit of expert identification that would establish a prima facie case as to the alleged negligence of respondent's pharmaceutical staff. The district court therefore did not err by precluding appellant from offering testimony regarding the

standard of care applicable to a pharmacist and dismissing appellant's cause of action arising from the alleged negligence of the pharmaceutical staff. *See* Minn. Stat. § 145.682, subd. 6(b) (requiring dismissal with prejudice as to "each cause of action as to which expert testimony is necessary to establish a prima facie case" when a medical-malpractice plaintiff does not timely serve an affidavit of expert identification).

Appellant argues that application of the statute in this manner may result in an injustice. In his brief, he argues that the statute was "not meant to preclude additional theories of liability uncovered during discovery." Contrary to appellant's assertion, however, this case is significantly different from the hypothetical situation posited by his brief. The original complaint, filed more than eight months before the section 145.682 deadline, asserted that the defendants "were negligent in that they departed from that degree of skill and care normally possessed and exercised by physicians, nurses, *pharmacists*, other allied health professionals, and hospitals under the same or similar circumstances." (Emphasis added.) This is therefore not a case in which a medical-malpractice plaintiff does not discover the alleged negligence of a medical professional

until after the section 145.682 deadline had lapsed. Indeed, the alleged misconduct of the pharmaceutical staff was a subject of the original complaint.[3]

Affirmed.

[3] We note that Dr. Liebman's affidavit identifies the effects and complications of WinRho infusions as "information that all physicians who prescribe WinRho, *all pharmacists who prepare WinRho*, and all nurses who administer WinRho are required to be aware of." (Emphasis added). The affidavit, while primarily relating to the alleged malpractice of the hematologist, therefore arguably addresses the alleged negligence of all three classes of professionals; to wit, the doctor, the nurse, and the pharmacist. But appellant made no argument—either before the district court or on appeal—that the Liebman affidavit constituted an affidavit of expert identification for his cause of action against the pharmacist. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that an appellate court will generally only consider matters that were argued to and considered by the district court); *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (stating that issues not briefed on appeal are waived). By affirming the district court's order here, we express no opinion as to whether the Liebman affidavit would be sufficient to satisfy the requirement of Minn. Stat. § 145.682, subd. 2, as to appellant's cause of action based on the alleged negligence of the pharmacist.