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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0962**

Zahra Kaliveh, et al.,
Appellants,

vs.

Target Clinic Medical Associates Minnesota, LLC
d/b/a Target Clinic and/or Target Corporation,
Respondent.

**Filed December 17, 2012
Affirmed
Chutich, Judge**

Hennepin County District Court
File No. 27-CV-10-23935

Thomas M. Countryman, Thomas M. Countryman, LLC, St. Paul, Minnesota (for appellants)

Mark A. Solheim, Jennifer L. Young, Larson King, LLP, St. Paul, Minnesota (for respondent)

Considered and decided by Hudson, Presiding Judge; Chutich, Judge; and Klaphake, Judge.*

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

UNPUBLISHED OPINION

CHUTICH, Judge

In this medical-negligence case, appellant Zahra Kaliveh challenges the district court's grant of judgment as a matter of law in favor of respondent Target Clinic Medical Associates Minnesota, LLC d/b/a Target Clinic and/or Target Corporation (Target Clinic). Specifically, Kaliveh contends that the district court erred in concluding that the evidence was insufficient, as a matter of law, to present a factual question for the jury on the elements of standard of care and causation. Because Kaliveh did not present sufficient evidence that Target Clinic breached the applicable standard of care, we affirm.

FACTS

On Friday, September 5, 2008, Kaliveh had a sore throat and went to the Target Clinic at the Target store in Eden Prairie for treatment. She and her family were going out of town for the weekend, and she wanted to make sure that she did not have strep throat. Kaliveh testified in her deposition that, at the time she went to Target Clinic, her throat had been sore for about one hour. Kaliveh was seen and treated by physician's assistant Tonia Ashline.

Ashline prepared a progress note after Kaliveh's visit, noting the following symptoms:

Patient presents with sore throat and sinus pain and pressure x 6-7 days.

nasal drainage moderate, worsening, green, blood-streaked. nasal congestion moderate, worsening. sore throat moderate. swollen lymph nodes none. hoarseness none. dysphagia yes. sick contacts none. strep pharyngitis (previous) none, in the past few years.

Based on these symptoms, Ashline diagnosed Kaliveh with acute sinusitis and prescribed 3,000 milligrams of amoxicillin per day for 10 days. In her deposition, Kaliveh denied that she had any of these symptoms besides a sore throat.

Kaliveh began taking the amoxicillin as prescribed. A few days later, hives began developing all over her body, and she stopped taking the medication. Over the next few weeks, Kaliveh saw physicians who were concerned that her hives were the result of the high dose of amoxicillin. A couple months later, Kaliveh began experiencing shortness of breath. She saw a lung specialist who diagnosed her with asthma, noting that “[i]t is possible that [Kaliveh’s] asthma was triggered by the high doses of amoxicillin.”

Kaliveh sued Target Clinic in April 2010, contending that the clinic was negligent, through Ashline’s actions, in prescribing such a high dose of amoxicillin. Kaliveh filed expert affidavits as required in medical-negligence cases, including one from Dr. Alfonso Morales, who opined that Target Clinic breached the applicable standard of care in prescribing 3,000 milligrams of amoxicillin to Kaliveh.

The week before trial, the parties took the depositions of Dr. Morales and Dr. Sue Ravenscraft, Kaliveh’s treating physician. Neither doctor was going to testify live at trial; rather, Kaliveh intended to present their deposition testimony to the jury. Dr. Morales was the only witness that Kaliveh intended to offer to establish the standard of care and its breach, and Dr. Ravenscraft was the only witness who would testify as to Kaliveh’s diagnosis of asthma.

Based on this deposition testimony, Target Clinic moved for judgment as a matter of law, contending that the testimony of Dr. Morales showed that Target Clinic did not

breach the standard of care in its treatment of Kaliveh. In fact, Dr. Morales testified that the amoxicillin prescription was within the standard of care. Target Clinic also contended that Kaliveh could not prove causation because Dr. Ravenscraft did not formally diagnose Kaliveh with asthma. Rather, Dr. Ravenscraft testified that Kaliveh's test results fell short of a formal asthma diagnosis and instead diagnosed her with "a form of reactive airways disease." Target Clinic argued that, based on the expert deposition testimony, no reasonable jury could find in Kaliveh's favor.

The district court agreed and granted judgment as a matter of law for Target Clinic, concluding that deposition testimony of Dr. Morales and Dr. Ravenscraft was insufficient to raise a fact question for the jury as to breach of the standard of care and causation. This appeal followed.

D E C I S I O N

Rule 50.01 of the Minnesota Rules of Civil Procedure governs judgments as a matter of law. The rule provides:

(a) Standard. If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may decide the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(b) Timing and Content. Motions for judgment as a matter of law during trial may be made at any time before submission of the case to the jury.

A district court should grant judgment as a matter of law “only in those unequivocal cases where (1) in the light of the evidence as a whole, it would clearly be the duty of the [district] court to set aside a contrary verdict as being manifestly against the entire evidence, or where (2) it would be contrary to the law applicable to the case.” *Jerry’s Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 816 (Minn. 2006) (quotation omitted).

We review de novo the district court’s grant of judgment as a matter of law. *Id.* (“Viewing the evidence in a light most favorable to the nonmoving party, this court makes an independent determination of whether there is sufficient evidence to present an issue of fact for the jury.”); *see also Plate v. St. Mary’s Help of Christians Church*, 520 N.W.2d 17, 20 (Minn. App. 1994) (“The [motion for judgment as a matter of law] presents a legal question concerning the sufficiency of the evidence to create a fact question.”), *review denied* (Minn. Oct. 14, 1994).

In a medical-negligence case, the plaintiff must prove the following elements: “(1) the standard of care recognized by the medical community as applicable to the particular defendant’s conduct, (2) that the defendant in fact departed from that standard, and (3) that the defendant’s departure from the standard was a direct cause of [the patient’s] injuries.” *Plutshack v. Univ. of Minn. Hosps.*, 316 N.W.2d 1, 5 (Minn. 1982). In the typical malpractice case, the plaintiff must introduce expert testimony to establish these elements. *Becker v. Mayo Found.*, 737 N.W.2d 200, 216 (Minn. 2007).

I. Timing of the Motion for Judgment as a Matter of Law

As an initial matter, we note that Target Clinic brought its motion for judgment as a matter of law *before* the trial started, although Rule 50.01 expressly provides that the district court may grant such a motion “during a trial by jury” when a party has been “fully heard.” The district court noted, however, that because Dr. Morales and Dr. Ravenscraft were not going to testify live at trial, and because they were Kaliveh’s only witnesses as to standard of care and the asthma diagnosis, Kaliveh had already been “fully heard” on those relevant issues and therefore the motion was procedurally appropriate. While motions for judgment as a matter of law are typically brought after a plaintiff has presented all of his or her evidence to the jury, Kaliveh does not challenge the procedural timing of the motion. Therefore, we will assume, without deciding, that the motion for judgment as a matter of law was timely.

II. Negligent Diagnosis vs. Negligent Dosage

We first address Kaliveh’s argument that she was not “fully heard” on her claims because factual issues exist about whether Target Clinic was negligent in *diagnosing* her with acute sinusitis. In the initial complaint, however, Kaliveh alleged that Target Clinic breached the standard of care by prescribing 3,000 milligrams of amoxicillin per day for Kaliveh’s symptoms. Nowhere in the complaint does Kaliveh allege that Ashline incorrectly or negligently diagnosed her with acute sinusitis. The district court noted that because of Dr. Morales’s deposition testimony that the prescription was within the standard of care, Kaliveh had “shifted [her] theory of negligence from dosage to diagnosis,” and now claims that the symptoms listed by Ashline in the progress note did

not accurately reflect Kaliveh's symptoms. We conclude that the district court did not abuse its discretion by precluding Kaliveh from pursuing this negligent-diagnosis theory or her additional theory that Target Clinic fraudulently altered the progress note to support the amoxicillin dosage.

First, as Target Clinic asserts, it did not believe that it was defending a misdiagnosis case, but rather understood this case to involve a negligent prescription based on the symptoms described in the progress note. Allowing Kaliveh to now shift her theory to misdiagnosis would result in prejudice to Target Clinic. *See Perine v. Grand Lodge of Ancient Order United Workmen*, 48 Minn. 82, 90, 50 N.W. 1022, 1023 (1892) (stating that "a party cannot frame his pleading and introduce his evidence upon one theory, and then shift his ground, and ask to have the case submitted to the jury upon an entirely different one, to the surprise and possible prejudice of the other party"); *see also Rios v. Jennie-O Turkey Store, Inc.*, 793 N.W.2d 309, 317 (Minn. App. 2011) (stating that a party who fails to amend its pleadings is bound thereby unless new issues are litigated by consent).

Second, Kaliveh never presented any expert testimony suggesting that the acute sinusitis diagnosis breached the standard of care, or that a prescription of 3,000 milligrams of amoxicillin would be outside of the standard of care for a sore throat. In a medical-negligence case, issues such as diagnoses of medical conditions are generally not within the common knowledge of a jury, so expert testimony is necessary. *Shea v. Esensten*, 622 N.W.2d 130, 135 (Minn. App. 2001); *see also Sorenson v. St. Paul Ramsey Med. Center*, 457 N.W.2d 188, 191 (Minn. 1990) (noting that medical-negligence cases

not requiring expert testimony are “exceptional” and “rare”). Kaliveh contends that the jury could listen to her testimony about her symptoms and conclude that Ashline’s diagnosis of acute sinusitis was erroneous. We disagree. Such a conclusion is outside of the lay knowledge of a jury and requires expert testimony, which was not presented.

Third, Kaliveh did not comply with statutory and procedural requirements necessary to assert the misdiagnosis theory. She never identified, or provided an affidavit from, an expert who would testify as to the applicable standard of care, or its breach, in diagnosing a condition such as Kaliveh’s. *See* Minn. Stat. § 145.682 (2010) (requiring a plaintiff in a malpractice action to provide an affidavit and identify an expert who will testify as to the applicable standard of care and its breach). Moreover, she cannot now argue that Target Clinic fraudulently altered the progress note because she did not plead fraud with particularity as required by Minn. R. Civ. P. 9.02.¹

Therefore, we conclude that the district court did not err in disallowing Kaliveh’s claims of negligent diagnosis and fraudulent alteration of the progress note. We thus turn to whether the district court properly granted judgment as a matter of law on Kaliveh’s negligent-dosage claim.

III. Standard of Care

“The standard of skill and care required of all physicians is that degree of skill and care possessed and exercised by practitioners engaged in the same type of practice under like circumstances.” *Becker*, 737 N.W.2d at 216. An expert opining on the applicable

¹ No evidence in the record suggests that Target Clinic fraudulently altered the progress note to justify the prescription.

standard of care should not testify “as to whether the treatment or thing done was proper or improper, but rather whether or not it was according to” the accepted standard of care. *Hoffman v. Naslund*, 274 Minn. 521, 531, 144 N.W.2d 580, 589 (1966), *overruled on other grounds by Anderson v. Florence*, 288 Minn. 351, 181 N.W.2d 783 (1970).

Kaliveh contends that Dr. Morales’s testimony established the standard of care on the amoxicillin dosage and created a triable issue of fact as to whether Target Clinic breached that standard of care. Target Clinic, on the other hand, asserts that Dr. Morales unequivocally stated that it was within the standard of care to prescribe 3,000 milligrams of amoxicillin for Kaliveh’s symptoms.

The parties, and Dr. Morales, rely on two sources as setting forth the proper amount of amoxicillin to prescribe for acute sinusitis, *The Sanford Guide to Antimicrobial Therapy 2008* (38th ed. 2008) and the *Tarascon Pocket Pharmacopoeia* (2008). Dr. Morales agreed that both medical-reference books are widely accepted and routinely relied upon in the medical community for determining proper antibiotic dosage, and testified that relying on *Sanford* and *Tarascon* was within the standard of care. Both sources state that a prescription of 3,000 milligrams of amoxicillin per day, or more, is appropriate for acute sinusitis under certain circumstances.

Dr. Morales clearly testified that, given the symptoms reported in the Target Clinic progress note, the prescription of 3,000 milligrams of amoxicillin per day for Kaliveh’s acute sinusitis was within the standard of care. While Dr. Morales testified that *he* would not have prescribed such a high dose of amoxicillin to Kaliveh in this situation, this testimony is irrelevant in determining whether Target Clinic breached the standard of

care in this instance. *See Hoffman*, 274 Minn. at 531, 144 N.W.2d at 589. Dr. Morales's unequivocal testimony established that Target Clinic did not breach the standard of care in its prescription, and we believe that a contrary verdict would be "manifestly against the entire evidence." *See Jerry's Enters.*, 711 N.W.2d at 816.

Because Dr. Morales's testimony left no fact question for the jury as to whether Target Clinic breached the standard of care, we conclude that the district court correctly granted judgment as a matter of law for Target Clinic. Because breach of the standard of care is an essential element of Kaliveh's negligence claim, we need not address Kaliveh's contentions as to causation.

Affirmed.