STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1133

Peter Allan, Sr.,
Appellant,

vs.

Dr. David Paulson, Medical Director for MSOP, et al.,
Respondents.

Filed February 24, 2014
Affirmed
Halbrooks, Judge

Ramsey County District Court
File No. 62-CV-12-5707

Peter Allan, Sr., Moose Lake, Minnesota (pro se appellant)

Lori Swanson, Attorney General, Marsha Eldot Devine, Assistant Attorney General, St. Paul, Minnesota (for respondents)

Considered and decided by Halbrooks, Presiding Judge; Stoneburner, Judge; and Schellhas, Judge.

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

HALBROOKS, Judge

Following the summary-judgment dismissal of his claims of medical malpractice and violation of his Fourteenth Amendment rights, appellant, a resident of the Minnesota

Sex Offender Program (MSOP), argues that the district court erred by determining that he provided insufficient evidence to support his claims. We affirm.

FACTS

Appellant Peter Allan, Sr. contends that MSOP medical providers improperly delayed the surgical removal of a growth on his finger that all parties believed was an arthritic growth, but was determined post-operatively to be a benign tumor. Upon his admission to the MSOP in 2007, it was noted that Allan had undergone multiple surgeries on the fingers of his right hand, including reattachment, and that he had "joint abnormalities." Allan required no treatment or intervention at that time for his rheumatoid arthritis that was diagnosed in the 1980s. As of January 2009, Allan's rheumatoid arthritis remained asymptomatic.

In January 2010, Allan submitted a form requesting eyeglasses, a specialist for severe headaches, surgery "for a[n] osteonode" on his finger, and medical attention for a hernia. He resubmitted his request relating to this "osteonode" in February, April, and August of 2010. MSOP providers determined that off-site treatment was not medically necessary for what they had diagnosed as a Heberden's node, or arthritis-related growth. Respondent Sharyn Barney, M.D., an MSOP physician, discussed the growth with respondent David Paulson, M.D., the MSOP medical director, and they determined that treatment should begin with a steroid injection. But Allan refused all treatment by Dr. Barney from February through December 2011 due to an unrelated complaint.

In February 2012, Allan petitioned the district court to order an appointment with a rheumatologist "to obtain much needed medication" and "much needed surgery to his

hand." In this petition, Allan related his history of surgical removal of arthritic nodules. On February 21, 2012, Dr. Barney again evaluated the growth and noted that symptoms had not improved with a steroid injection. In March 2012, respondent Marie Skalko, MSOP's director of nursing, consulted Dr. Paulson regarding a change in the appearance of the growth. Dr. Paulson ordered an x-ray, after which Allan was referred to an orthopedic surgeon. The orthopedic surgeon noted that the growth was "most certainly a rheumatoid nodule" that is "gradually getting larger and more painful." After reviewing options with the surgeon, including excisional biopsy, Allan opted for surgical removal. The growth was removed on May 29, 2012, and determined to be a rare and benign tumor.

In July 2012, Allan filed a complaint against Dr. Paulson; Scott Sutton, Minnesota Department of Human Services health services director; Dr. Barney; and Skalko, alleging medical malpractice and constitutional violations. The district court granted respondents' motion for summary judgment, determining that (1) Allan provided insufficient evidence to comply with the requirements to proceed in a medical-malpractice claim; (2) the evidence was insufficient to support a finding of deliberate indifference necessary to support his Fourteenth Amendment claim; and (3) in the alternative, respondents are entitled to qualified immunity related to Allan's constitutional claim. This appeal follows.

D E C I S I O N

In reviewing the district court's grant of summary judgment, we determine whether there are genuine issues of material fact and whether the district court properly

applied the law. *Offerdahl v. Univ. of Minn. Hosps. & Clinics*, 426 N.W.2d 425, 427 (Minn. 1988). "[A] moving party is entitled to summary judgment when there are no facts in the record giving rise to a genuine issue for trial as to the existence of an essential element of the nonmoving party's case." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997) (quotation omitted). "[T]he mere existence of a scintilla of evidence" in favor of the nonmoving party's position is not sufficient to survive summary judgment. *Id.*

I.

In a medical-malpractice claim, the plaintiff must show: "1) the standard of care recognized by the medical community as applicable to the particular defendant's conduct; 2) that the defendant departed from that standard; 3) that the defendant's departure from that standard was a direct cause of the patient's injuries; and 4) damages." *Tousignant v. St. Louis Cnty.*, 615 N.W.2d 53, 59 (Minn. 2000). Expert testimony is almost always required to establish a prima facie case of medical malpractice. *Id.* at 61.

A plaintiff bringing a medical-malpractice claim must meet two statutory requirements when expert testimony is necessary to establish a prima facie case. *Anderson v. Rengachary*, 608 N.W.2d 843, 846 (Minn. 2000) (quotation omitted). First, the plaintiff must serve an affidavit of expert review with the summons and complaint. Minn. Stat. § 145.682, subd. 2 (2012). This affidavit must state that an expert has reviewed the facts of the case and that in the expert's opinion the defendant departed from the applicable standard of care and caused injury to the plaintiff. *Id.*, subd. 3 (2012). Second, the plaintiff must serve an affidavit of expert disclosure within 180 days after the lawsuit begins. *Id.*, subd. 2. The affidavit of expert disclosure must identify the

expert who will testify at trial, the substance of the expert's testimony, and a summary of the grounds for the expert's opinion. *Id.*, subd. 4(a) (2012). Answers to interrogatories will satisfy the substantive requirements of the second affidavit if they are signed by the expert and served within the 180-day time period. *Mercer v. Andersen*, 715 N.W.2d 114, 122 (Minn. App. 2006). Failure to comply with these requirements "because of deficiencies in the affidavit or answers to interrogatories results, upon motion, in mandatory dismissal with prejudice of each action as to which expert testimony is necessary to establish a prima facie case." Minn. Stat. § 145.682, subd. 6(c) (2012).

Allan did not serve an affidavit of expert review with his summons and complaint. After a demand from respondents and an extension granted by the district court, Allan served a two-page affidavit of Robert C. Myers, M.D., of Wasilla, Alaska. In this affidavit, Dr. Myers opines:

> 6. The issue involves the timeliness of medical intervention for Mr. Allan at the MSOP. Since these are very painful disease entities, prompt evaluation and treatment at the onset of symptoms is crucial.
>
> 7. Generally accepted and practiced standards of professional care would have included elements that protected the plaintiff and provided timely identification of the tumor type, pain control, and rapid removal of the tumor upon presentation and onset of symptoms.
>
> 8. Lastly, it is my professional opinion that the delay of treatment in this matter enabled the tumor to continue to grow to an unreasonable and unnecessary size that caused much pain, worry, and distress to Mr. Allen (sic).

On April 1, 2013, more than 180 days after commencement of the lawsuit, Allan identified three potential experts in answers to interrogatories: (1) the orthopedic surgeon

who treated him, (2) a nurse employed by the MSOP, and (3) Dr. Myers. Allan never filed a second expert affidavit, nor are his interrogatory responses signed by any of his identified experts.

If Allan's interrogatory responses are intended to satisfy the statutory requirements for the second expert affidavit, they are insufficient. Allan's first two proposed expert witnesses are actually fact witnesses, and the proposed testimony of Dr. Myers is, in its entirety, "the facts regarding the tumor, the proper diagnosis, level of care, its level of pain, discomfort/suffering and what possible reason it took over two years to get the much needed surgery [Allan] requested. Also how having or not having insurance play/played a part in determining a course of treatment."

The first affidavit need not identify the expert or provide the details of the expert's opinion. *See* Minn. Stat. § 145.682, subd. 2(1). But the second affidavit (or interrogatory responses signed by the expert) must identify the expert and disclose the substance of the facts and opinions regarding the alleged negligence and a summary of the grounds for each opinion. *See* Minn. Stat. § 145.682 subd. 2(2); *see also Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 190 (Minn. 1990). A plaintiff must set forth specific details concerning an expert's anticipated testimony, including the applicable standard of care, the acts or omissions that plaintiff alleges violated the standard of care, and an outline of the chain of causation that allegedly resulted in damage. *Anderson*, 608 N.W.2d at 848. Broad or conclusory statements of causation are insufficient. *Stroud v. Hennepin Cnty. Med. Ctr.*, 556 N.W.2d 552, 556 (Minn. 1996).

> The purpose of expert testimony is to interpret the facts and connect the facts to conduct which constitutes malpractice and causation. . . . To state, as was done in this case, that the expert will testify that the defendants "failed to properly evaluate" and "failed to properly diagnose" is not enough. These are empty conclusions which, unless shown how they follow from the facts, can mask a frivolous claim.

Sorenson, 457 N.W.2d at 192-93.

The district court determined that Allan's expert submissions are inadequate under Minnesota law in that they do not identify the appropriate standard of care as to each respondent, do not discuss whether any standard of care has been breached by individual respondents or what actions amount to a breach, and fail to address Allan's symptoms in the context of his related medical history. We agree.

Even if we read Dr. Myers's affidavit together with Allan's interrogatory answers, the combined content clearly does not satisfy the statutory requirements for expert affidavits. Neither Dr. Myers's affidavit nor Allan's answers to interrogatories directly asserts any standard of care applicable to specific respondents, identifies the alleged acts or omissions that violate the standards, or outlines the chain of causation that resulted in damage to Allan. Nor do the affidavit or interrogatory responses address or endorse Allan's argument that "[a] biopsy is always done to determine the type and treatment needed."

While the deficiencies of the expert submissions support dismissal of the medical-malpractice claim on procedural grounds, *see* Minn. Stat. § 145.682, subd. 6(c), they also demonstrate that Allan cannot establish the existence of essential elements of his

medical-malpractice claim. Accordingly, the district court correctly granted respondents' motion for summary judgment on this claim.

II.

We next address Allan's argument that his Fourteenth Amendment due-process rights were violated when respondents delayed surgical removal of the growth on his finger, despite his repeated requests. Because Allan is civilly committed, his deliberate-indifference claim is analyzed under the due-process clause of the Fourteenth Amendment. *See Davis v. Hall*, 992 F.2d 151, 152-53 (8th Cir. 1993) (identifying standard for Eighth Amendment claim of deliberate indifference, then applying it under Fourteenth Amendment to claim by pretrial detainee); *see also Beaulieu v. Ludeman*, 690 F.3d 1017, 1045 (8th Cir. 2012) (applying pretrial-detainee standard to due-process claims brought by civilly committed individuals). To prove a violation of the Fourteenth Amendment, Allan must show that MSOP officials were deliberately indifferent to his medical needs. *See Davis*, 992 F.2d at 152-53.

The district court determined that Allan's deliberate-indifference claim is precluded by a lack of evidence (1) of any detrimental effect of delaying the removal of the tumor and (2) that respondents did anything but mistakenly identify the nature of the growth.

> [A]n inadvertent failure to provide adequate medical care cannot be said to constitute "an unnecessary and wanton infliction of pain" or to be "repugnant to the conscience of mankind." Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment.

Estelle v. Gamble, 429 U.S. 97, 105-06, 97 S. Ct. 285, 292 (1976).

Courts apply the same deliberate-indifference analysis to Fourteenth Amendment claims by MSOP residents as they do to Eighth Amendment claims asserted by inmates. *Beaulieu*, 690 F.3d at 1045. To prevail on a deliberate-indifference claim, a plaintiff must show "both an objective element, that the deprivation was sufficiently serious, and a subjective element, that the defendant acted with a sufficiently culpable state of mind." *Coleman v. Rahija*, 114 F.3d 778, 784 (8th Cir. 1997). In a deprivation of medical care claim, the plaintiff must show that he had an objectively serious medical need and that the defendants knew of and disregarded that need. *Id.*

Allan's alleged serious medical need is a benign growth on his finger that caused him pain, which was exacerbated due to a delay in removal. "When an inmate alleges that a delay in medical treatment constituted a constitutional deprivation, 'the objective seriousness of the deprivation should also be measured by reference to the effect of delay in treatment.'" *Id.* (quoting *Crowley v. Hedgepeth*, 109 F.3d 500, 502 (8th Cir. 1997)). A failure to place verifying medical evidence in the record to establish that a defendant "ignored a critical or escalating situation or that the delay posed a substantial risk of serious harm" precludes a claim of deliberate indifference to medical needs. *See id.* at 785 (quotation omitted).

Here, the evidence of the detrimental effect of the purported delay in treatment is limited to the statement in Dr. Myers's affidavit that "the delay of treatment . . . caused much pain, worry, and distress to Mr. Allen." Allan does not offer any evidence that the

delay posed a substantial risk of serious harm. He merely asserts that "[a]fter the tumor was removed, all the pain was gone." On this record, Allan cannot establish a detrimental effect from any delay in medical treatment. Accordingly, Allan cannot satisfy the objective element of his deliberate-indifference claim. Because Allan cannot satisfy the objective element, we need not consider whether the district court erred in finding that Allan also fails to satisfy the subjective element.

The district court also determined, in the alternative, that respondents are entitled to qualified immunity on Allan's constitutional claim. Because Allan did not brief this issue on appeal, we decline to reach it. *See Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 919 n.1 (Minn. App. 1994).

Affirmed.