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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0665**

Gary Fridell, as Trustee for the heirs of Jane A. Fridell,
Appellant,

vs.

CommonBond Communities, Inc.,
d/b/a Oak Ridge Assisted Living of Hastings,
Respondent.

**Filed February 19, 2008
Affirmed
Connolly, Judge**

Dakota County District Court
File No. C9-06-8625

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(for appellant)

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Considered and decided by Willis, Presiding Judge; Hudson, Judge; and Connolly,
Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant Gary Fridell, as trustee for the heirs of Jane A. Fridell, challenges the district court's decision granting respondent CommonBond Communities, Inc.'s motion to dismiss with prejudice for appellant's noncompliance with the expert-disclosure-

affidavit requirement of Minn. Stat. § 145.682 (2006). Because the district court did not err in determining that appellant's cause of action requires expert testimony to establish a prima facie case of negligence, we affirm.

FACTS

On April 1, 2005, decedent Jane Fridell, a 90-year-old woman who suffered from dementia, moved into the "Memory Care" unit at Oak Ridge Assisted Living of Hastings (Oak Ridge), owned by respondent. Oak Ridge is a licensed "assisted living home care provider" pursuant to Minn. Stat. § 144A.4605 (2006). Appellant Gary Fridell, Jane Fridell's son, signed a "Service Agreement" which set forth certain services that appellant wanted to be provided to Jane Fridell by Oak Ridge. Oak Ridge agreed to "assist with bath/shower" and provide a "24 hr. emergency response call pendant," among other things. A resident assistant was to be on duty 24 hours a day and was to respond to any calls from the emergency-response pendant.

On April 23, 2005, Jane Fridell was ill with diarrhea and vomiting. On April 25, 2005, at 2:30 a.m., an Oak Ridge staff member was making rounds and found Jane Fridell unconscious on the floor of her shower with her head and torso under hot running water. Jane Fridell's call pendant was located in another room of her apartment. Jane Fridell was taken to the hospital and later died. Her cause of death was determined to be "complications of thermal burns."

Appellant subsequently commenced a civil action alleging that:

[Respondent] owed a duty of reasonable care in providing the living facility with care and supervision.
[Respondent] breached this duty of reasonable care by

providing a dangerous condition which scalded Jane A. Fridell to her death. [Respondent] further failed to properly supervise the care of Jane A. Fridell.

With the complaint, appellant's attorney served an expert-review affidavit stating that he had reviewed the facts of the case with an expert who had determined that respondent had deviated from the applicable standard of care and caused Jane Fridell's death. The expert's identity was not provided. Later, respondent served discovery requests upon appellant. Appellant's answers to the interrogatories were not signed by any expert, and it is undisputed that appellant failed to serve an expert-disclosure affidavit upon respondent within 180 days of commencing his lawsuit.

Respondent moved the district court to dismiss the action with prejudice on the ground that appellant had failed to serve the expert-disclosure affidavit required by Minn. Stat. § 145.682 (2006). Appellant moved to amend his complaint to assert separate causes of action for (1) breach of warranty and (2) violation of Minn. Stat. §§ 504B.001-.471 (2006), which set forth the obligations that landlords owe to tenants. The district court granted respondent's motion to dismiss with prejudice and denied appellant's motion to amend. Based on appellant's complaint and answers to interrogatories, the district court determined that appellant was making a "professional negligence claim," alleging that respondent "should have supervised Jane Fridell in a different manner and that would have prevented her exposure to the hot water in her shower." The district court held:

To prove "duty" in this instance necessarily requires reference to whatever standards exist for assisted living facilities, reference to Jane Fridell's medical condition and

the necessary assessments and level of care for her condition. This constitutes an action against a health care provider as contemplated by Minn. Stat. § 145.682, not a premises liability claim as [appellant] now asserts

. . . .

. . . The nature of the facility, standards for operation and resident supervision, while not necessarily medically complex, require technical considerations not within the common knowledge of lay persons and require expert testimony to establish a *prima facie* case of negligence.

This appeal challenges the district court's decision, asserting that his claim does not require expert testimony because it is not a medical-malpractice claim, but a negligence action based on premises liability within the common knowledge and understanding of jurors and is therefore not subject to the requirements of Minn. Stat. § 145.682.

DECISION

The district court dismissed appellant's claim for failure to serve upon respondent the second affidavit required by Minn. Stat. § 145.682 (2006), commonly referred to as the expert-disclosure affidavit. Whether a claim necessitates compliance with section 145.682 is a question of law requiring statutory interpretation, which this court reviews *de novo*. *Tousignant v. St. Louis County*, 615 N.W.2d 53, 58 (Minn. 2000).

“In 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

certify expert review through two affidavits.¹ Minn. Stat. § 145.682, subd. 2. The plaintiff must first serve, with the summons and complaint, an affidavit by the plaintiff's attorney stating that an expert has reviewed the facts of the case and believes that the defendant deviated from the appropriate standard of care and caused an injury to the plaintiff. *Id.*, subds. 2, 3(a). Within 180 days of commencing litigation, the plaintiff must serve a second affidavit that identifies the expert expected to testify about malpractice or causation and state "the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion." *Id.*, subds. 2, 4(a). Answers to interrogatories will satisfy the substantive requirements of the expert-disclosure affidavit if they are signed by the plaintiff's attorney and each expert, and served within the 180-day time period. *Id.*, subd. 4(a).

Failure to comply with the expert-review requirement results in mandatory dismissal with prejudice of each cause of action for which expert testimony is necessary. Minn. Stat. § 145.682, subd. 6. "Section 145.682 is unambiguous and requires strict compliance with its provisions." *Mercer v. Anderson*, 715 N.W.2d 114, 122 (Minn. App. 2006).

In reviewing appellant's complaint and answers to interrogatories, the district court concluded that appellant was pursuing a "professional negligence claim" against respondent subject to the requirements of section 145.682 because appellant would have

¹ Appellant does not dispute that respondent is a "health care provider" within the framework of section 145.682. *See* Minn. Stat. §§ 145.682, subd. 1 (stating that "health care provider" is defined in Minn. Stat. § 145.61, subds. 2, 4), .61, subd. 4 (2006) (stating that "health care" includes "services furnished by a hospital, sanitarium, nursing home or other institution for the hospitalization or care of human beings").

had to prove “duty” with “reference to whatever standards exist for assisted living facilities, reference to Jane Fridell’s medical condition and the necessary assessments and level of care for her condition.” The record supports that conclusion because appellant claimed that respondent, a health-care provider, was liable for a “dangerous condition” and “negligent supervision.”

Appellant maintains that he can establish a prima facie negligence action without expert testimony because this case is not a medical-malpractice case and is simply about respondent, as a landlord, providing scalding hot water to Jane Fridell’s apartment. But to prove negligent supervision, appellant would have been required to establish that respondent violated the appropriate standard of care, taking into account Jane Fridell’s medical condition, including dementia, at the time of her injuries. Therefore, we conclude that this case is one of medical malpractice, subject to the requirements of section 145.682. *See Tousignant*, 615 N.W.2d at 59 (“In actions against a health care provider, malpractice is established by showing (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.”); *see also Paulos v. Johnson*, 502 N.W.2d 397, 400 (Minn. App. 1993) (“[Section 145.682] governs any allegations of malpractice, mistake, or failure to cure. This [alleged negligent nondisclosure] action is within that classification, since respondent is a health care provider. . . .”), *review denied* (Minn. Sept. 10, 1993).

Expert testimony is generally required in medical-malpractice cases because they involve complex scientific or technological issues. *Tousignant*, 615 N.W.2d at 58. An exception to this rule applies when the alleged negligent acts are within the general knowledge or experience of laypersons. *Id.* “But only rarely does section 145.682 not apply. . . .” *Mercer*, 715 N.W.2d at 122.

Appellant also claims that even if this case is subject to the requirements of section 145.682, it falls under the exception because a scalding death “is within the knowledge of a lay person,” “requires no specialized knowledge or education,” and “is not scientific or technical.” Death due to scalding water may not be a particularly complex medical concept to understand, but appellant’s claim against respondent is one of negligent supervision. The claim of negligent supervision in this case does require specialized knowledge because in order to evaluate the duty of medical care or supervision owed by respondent to Jane Fridell, the jury would have to take into account her medical condition at the time of her death. Jurors would be expected to determine if and when respondent was duty-bound to enter Jane Fridell’s apartment in the middle of the night, and under what circumstances her shower use was to be monitored. Jurors would need to rely on expert testimony regarding the medical condition of Jane Fridell and the standard of care owed to her by an assisted-living facility to make this determination. The district court did not err in concluding that appellant’s claim of negligent supervision required expert testimony and was therefore not exempt from the requirements of section 145.682.

The district court also did not err in rejecting appellant’s argument that this case is merely a premises-liability action against a landlord. An assisted-living facility owes

specific duties to its residents that landlords do not owe to their tenants. For example, respondent had contractually agreed to assist Jane Fridell in her daily activities, such as bathing. Because a different standard of care is applicable to assisted-living facilities than to landlords, this case is not a premises-liability action, but a professional-negligence claim against a “health care provider” that is subject to the requirements of section 145.682.

The district court did not err in dismissing appellant’s lawsuit with prejudice for failure to comply with the requirements of Minn. Stat. § 145.682 because expert testimony was required to establish the applicable standard of care.

Affirmed.