STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0019
A08-0020

Kevin Sumstad,
Appellant,

vs.

Mark Edward Wilson, M. D., et al.,
Respondents,

Minnesota Cardiovascular and Thoracic Surgeons, LLC, et al.,
Respondents.

Filed January 27, 2009
Affirmed
Kalitowski, Judge

Hennepin County District Court
File No. 27-CV-06-2747

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Considered and decided by Kalitowski, Presiding Judge; Worke, Judge; and Huspeni, Judge.*

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

KALITOWSKI, Judge

In this action alleging medical malpractice, appellant Kevin Sumstad challenges the district court's grant of summary judgment to respondent Minnesota Cardiovascular and Thoracic Surgeons, LLC (Thoracic). Appellant also challenges several of the district court's rulings in his medical malpractice action against respondent Dr. Mark Edward Wilson. We affirm.

D E C I S I O N

I.

Appellant argues that the district court erred in granting summary judgment to Thoracic by concluding that appellant's expert affidavits failed to meet the requirements of Minn. Stat. § 145.682 (2008). We disagree.

On appeal from summary judgment we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). "On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citation omitted). But we will reverse a district court's dismissal of a

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

malpractice claim for noncompliance with expert disclosure only if the district court abused its discretion. *Broehm v. Mayo Clinic Rochester*, 690 N.W.2d 721, 725 (Minn. 2005) (citation omitted).

Section 145.682 is designed to prevent frivolous medical malpractice lawsuits by requiring plaintiffs to file expert affidavits in support of their malpractice allegations. *Canfield v. Grinnell Mut. Reinsurance Co.*, 610 N.W.2d 689, 691-92 (Minn. App. 2000), *review denied* (Minn. July 25, 2000). Thus, in order to comply with the requirements of subdivision 4 of section 145.682 following commencement of a suit for medical malpractice, a plaintiff must serve an expert-disclosure affidavit that (1) discloses specific details concerning the expert's expected testimony, including the applicable standard of care; (2) identifies the acts or omissions that the plaintiff alleges violated the standard of care; and (3) includes an outline of the chain of causation between the violation of the standard of care and the plaintiff's damages. *Teffeteller v. Univ. of Minn.*, 645 N.W.2d 420, 428 (Minn. 2002) (citing *Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 190 (Minn. 1990)).

A plaintiff's prima facie case "must prove, among other things, that it is more probable than not that his or her injury was a result of the defendant health care provider's negligence." *Leubner v. Sterner*, 493 N.W.2d 119, 121 (Minn. 1992) (stating that failure to present such proof mandates either summary judgment or a directed verdict for the defendant); *Fabio*, 504 N.W.2d at 762 (applying the more-probable-than-not standard to causation in summary judgment context). Thus, to survive summary

judgment, appellant must establish, as a matter of law, that it is more probable than not that the negligence of Thoracic's treating doctor, Dr. Lyle D. Joyce, caused him injury.

Appellant first brought a medical malpractice claim against respondent Wilson and submitted an expert affidavit for this claim prepared by appellant's expert. Appellant later amended his complaint and joined Thoracic as a defendant, asserting a claim of medical malpractice by one of Thoracic's surgeons, Dr. Joyce. Appellant's expert prepared a supplemental affidavit considering the care provided to appellant by Dr. Joyce. Both respondents moved to dismiss the complaint for failure to meet the requirements of section 145.682. Appellant then submitted a second supplemental affidavit by his expert. The second supplemental affidavit states in relevant part:

> Dr. Joyce's delay in performing the surgery made it more probable than not and was a substantial contributing factor in taking away Mr. Sumstad's quantifiable chance of a curative outcome. *For example research and my experience would have placed that opportunity at approximately 20-30 percent of the time.*

(Emphasis added.) By this statement appellant's expert claims that Dr. Joyce's delay in performing surgery made it more probable than not that appellant would have an adverse outcome. But the expert opinion quantifies appellant's chance of a curative outcome at only 20-30 percent absent any surgical delay. It follows from this quantification that even without any delay in surgery, appellant still had a 70 to 80 percent chance of an adverse outcome. Therefore, appellant's expert affidavit does not establish that Dr. Joyce's allegedly negligent act of delaying surgery more likely than not caused appellant's adverse outcome. Consequently, appellant's affidavit does not meet the

causation requirements of section 145.682. We therefore affirm the district court's grant of summary judgment.

II.

The district court denied Dr. Wilson's motion for summary judgment, and the case was tried to a jury. Appellant moved for, and was granted, a directed verdict against Dr. Wilson on the issue of negligence. But the jury found that Dr. Wilson's negligence was not the cause of appellant's injuries. Appellant challenges the district court's denial of his pretrial motion in limine, the quashing of his subpoena, the admission of several of Dr. Wilson's experts, and the denial of appellant's motion for judgment as a matter of law.

The admission of evidence rests within the broad discretion of the district court and the court's ruling will only be reversed if it is based on an erroneous view of the law or constitutes an abuse of discretion. *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997). "Entitlement to a new trial on the ground of improper evidentiary rulings rests upon the complaining party's ability to demonstrate prejudicial error." *Id.* at 46. In the absence of some indication that the district court exercised its discretion arbitrarily, capriciously, or contrary to legal usage, the appellate court is bound by the result. *Id.*

Motion in Limine

Appellant argues that the district court erred in denying his motion in limine because the doctrine of collateral estoppel precludes Dr. Wilson from asserting Thoracic's negligence as a defense to his own medical malpractice. We disagree.

Whether collateral estoppel precludes litigation of an issue is a mixed question of law and fact subject to de novo review. *Hauschildt v. Beckingham*, 686 N.W.2d 829, 837 (Minn. 2004). For collateral estoppel to apply, the following four prongs must be met:

> (1) the issue must be identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party or was in privity with a party to the prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

Id.

Appellant argues that the issues of Thoracic's negligence and causation were litigated and decided at summary judgment and therefore Dr. Wilson could not assert Thoracic's negligence as a defense. We disagree. Summary judgment dismissal of appellant's claim against Thoracic was based on appellant's failure to establish a prima facie case of causation against Thoracic as required by section 145.682. Thus, Dr. Wilson's assertion of Thoracic's negligence as a defense was not a relitigation of an identical issue, and therefore, appellant's collateral estoppel argument fails.

Moreover, appellant's argument also fails because there is a lack of privity between respondents. "Privity depends upon the relation of the parties to the subject matter rather than their activity in a suit relating to it after the event. Participation in the defense because of general or personal interest in the result of the litigation does not make one privy to the judgment." *Hentschel v. Smith*, 278 Minn. 86, 95, 153 N.W.2d 199, 206 (1967). In general, privity involves a person so identified in interest with another that he represents the same legal right. *McMenomy v. Ryden*, 276 Minn. 55, 58-59, 148 N.W.2d 804, 807 (1967).

Here, the fact that both Thoracic and Dr. Wilson were defendants does not establish privity between them for purposes of collateral estoppel. Indeed, in many respects respondents' interests are adverse to each other and those interests are not so common that they represent the same legal right. Consequently, collateral estoppel did not bar Dr. Wilson from discussing or referencing Thoracic's deviation from the standard of care in its own defense. We therefore conclude that the district court did not abuse its discretion in denying appellant's motion in limine.

Quashing the subpoena

Appellant argues that the district court erred when it quashed a subpoena served on Dr. Joyce. We disagree.

"'In ruling on a motion to quash [a subpoena], the court should balance the need of the party to inspect the documents or things against the harm, burden, or expense imposed upon the person subpoenaed.'" *Ciriacy v. Ciriacy*, 431 N.W.2d 596, 599 (Minn. App. 1988) (quoting 2 D. Herr & R. Haydock, *Minnesota Practice* § 45.7 at 374 (1985)). The decision to quash a subpoena is within the district court's discretion. *Phillippe v. Comm'r of Pub. Safety*, 374 N.W.2d 293, 297 (Minn. App. 1985). But on a timely motion, the court shall quash or modify a subpoena if it subjects a person to undue burden. Minn. R. Civ. P. 45.03(c)(1). And "the court shall exercise its power with liberality in issuing orders which justice requires for the protection of parties or witnesses from unreasonable annoyance, expense, embarrassment, or oppression." *Baskerville v. Baskerville*, 246 Minn. 496, 506, 75 N.W.2d 762, 769 (1956).

Appellant sought to call Dr. Joyce as a rebuttal witness to counter Dr. Wilson's evidence tending to show that Thoracic was responsible for appellant's injuries. The record indicates that prior to trial appellant knew Dr. Wilson planned to assert Thoracic's care and treatment in its defense. But appellant did not serve a subpoena on Dr. Joyce until the third day of trial. On the following day, the district court heard oral argument on the motion to quash and concluded that complying with the subpoena would place an undue burden on Dr. Joyce because Dr. Joyce had surgery scheduled the entirety of the following day. The court also reasoned that appellant could use the transcript from depositions to rebut Dr. Wilson; that the subpoena did not allow reasonable time for compliance; and that Dr. Joyce was not a proper rebuttal witness. The record indicates that the district court appropriately considered and balanced the needs of appellant and the burden on Dr. Joyce. *See Ciriacy*, 431 N.W.2d at 599 (stating that the court should balance the parties' need to inspect documents against the burden imposed upon a person subpoenaed). On this record we conclude that the district court did not abuse its discretion in quashing the subpoena.

Admission of Expert Testimony

Appellant challenges the district court's decision to admit the opinions of several of Dr. Wilson's experts. We conclude that the district court did not abuse its discretion.

The district court is vested with the discretion to determine whether a witness whose identity was not disclosed before trial should be allowed to testify over objections by an opposing party. *Phelps v. Blomberg Roseville Clinic*, 253 N.W.2d 390, 394 (Minn. 1977). The district court has a "duty to suppress such evidence or testimony where

counsel's dereliction [in disclosing] is inexcusable and results in unjust surprise and prejudice to his opponent." *Id.* (citing *Krech v. Erdman*, 305 Minn. 215, 233 N.W.2d 555 (1975)). But failure to suppress is not an abuse of discretion where the opposing party does not seek a continuance and fails to show prejudice from having only brief notice of the appearance of an expert medical witness. *Id*. (discussing *Krech*); *see Dorn v. Home Farmers Mut. Ins. Ass'n*, 300 Minn. 414, 220 N.W.2d 503 (1974) (holding it was not reversible error to allow testimony of an expert witness not listed in answers to interrogatories where record disclosed that plaintiffs had no intent to call the witness prior to trial and no prejudice to the defendants was shown). "What is proper rebuttal evidence rests almost wholly in the discretion of the court." *Farmers Union Grain Terminal Ass'n v. Indus. Elec. Co.*, 365 N.W.2d 275, 277 (Minn. App. 1985), *review denied* (Minn. June 14, 1985).

Appellant argues that the district court abused its discretion by admitting previously undisclosed expert opinions of Dr. Henseler. We disagree. The record shows that although Dr. Henseler was listed as an expert witness on Dr. Wilson's witness list, Dr. Wilson did not disclose the expected content of Dr. Henseler's testimony. The district court allowed Dr. Henseler to testify for the limited purpose of: rebutting the testimony of appellant's witness, Dr. Hunter, on the interpretation of a venogram performed by Dr. Henseler on appellant. We conclude that the admission of this testimony was not an abuse of discretion. *See Phelps*, 253 N.W.2d at 394 (finding no abuse of discretion where potential prejudice could be controlled by limiting the scope of testimony).

Appellant argues that the district court erred by allowing Dr. Wilson's expert, Dr. Urschel, to testify that Dr. Joyce's treatment may have caused appellant's injuries. Causation was a central issue at trial. The record indicates that the expert disclosure states that Dr. Urschel planned to testify that the delay in surgery and post-surgical management of appellant may have contributed to appellant's injuries. Thus, appellant cannot claim unfair surprise. Moreover, because it was not error for the district court to permit Dr. Wilson to assert Thoracic's negligence, it was not an abuse of discretion to admit Dr. Urschel's testimony.

Appellant also challenges the admission of a videotaped deposition of Dr. Murray, a radiologist and expert witness for Wilson. Specifically, appellant argues that there was no foundation for Dr. Murray to testify as to the standard of care exercised by a family doctor and an occupational medicine doctor, both of whom treated appellant. A decision to exclude medical expert testimony lies within the sound discretion of the district court. *Benson v. N. Gopher Enters., Inc.*, 455 N.W.2d 444, 445-46 (Minn. 1990). And a district court has wide latitude to determine whether there is sufficient foundation upon which an expert may state an opinion. *Id.* at 446.

Here, Dr. Murray testified that he had practiced family medicine in the past. And the record reflects that on cross-examination, Dr. Murray admitted that he did not have a "strong opinion" as to whether the two treating doctors deviated from the expected standards of care.

We conclude that on this record the district court did not abuse its discretion in admitting Dr. Murray's testimony. Moreover, "[e]ntitlement to a new trial on the

grounds of improper evidentiary rulings rests upon the complaining party's ability to demonstrate prejudicial error." *Kroning*, 567 N.W.2d at 46. Because Dr. Murray was but one of several witnesses presented by respondent to refute appellant's charge of negligence, we conclude that even if the district court erred in admitting some parts of Dr. Murray's testimony, any error was not prejudicial.

Judgment as a Matter of Law

Appellant challenges the district court's denial of his motion for judgment as a matter of law. We disagree.

"The denial of a motion for judgment as a matter of law presents a legal question, which is subject to de novo review." *Kidwell v. Sybaritic, Inc.*, 749 N.W.2d 855, 861 (Minn. App. 2008). And again, "[e]ntitlement to a new trial on the grounds of improper evidentiary rulings rests upon the complaining party's ability to demonstrate prejudicial error." *Kroning*, 567 N.W.2d at 46.

The district court concluded that the jury's finding that Dr. Wilson's treatment was not the cause of appellant's injuries was not manifestly against the weight of the evidence. And on that basis, the district court denied appellant's motion. Appellant has not challenged this finding. Because the district court correctly granted summary judgment and because the jury's finding regarding causation is not manifestly against the weight of the evidence, we conclude that the district court correctly denied appellant's motion for judgment as a matter of law.

Affirmed.