STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0915

Jacqueline Hautala and Gary D. Thiel,
as Trustees for the next of kin of Sandy Lee Smith,
Appellants,

vs.

ALZA Corporation, et al.,
Respondents,
Wal-Mart Stores, Inc., et al.,
Respondents,
Dakota Clinic, Ltd., et al.,
Respondents.

Filed June 2, 2009
Affirmed
Stauber, Judge

Hennepin County District Court
File No. 27CV0710581

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Considered and decided by Stauber, Presiding Judge; Minge, Judge; and Larkin, Judge.

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

STAUBER, Judge

Appealing from summary judgment dismissing appellants' claims of medical malpractice and product liability in a wrongful-death action, appellants argue that the district court erred by (1) granting summary judgment for respondents ALZA Corporation and Janssen Pharmaceutica, Inc., and Wal-Mart Stores, Inc., concluding that appellants could not demonstrate causation as a matter of law because they do not possess the medicinal patch alleged to have caused the decedent's death; (2) granting summary judgment before discovery was complete; (3) dismissing medical and pharmacist malpractice claims against Wal-Mart, Dakota Clinic Ltd., Dr. Robert Koshnick, and Dr. Panjini Sivana based on a conclusion that appellants' expert affidavit failed to meet the requirements of the expert-disclosure statute, Minn. Stat. § 145.682, subd. 4 (2008); (4) failing to grant appellants' motion to reconsider; and (5) denying appellants' discovery motion but requiring appellants to produce medical records for in camera review. Because the motions for summary judgment and dismissal under Minn. Stat. § 145.682, subd. 6, were properly granted, and the district court did not abuse its discretion in denying appellants' motions to reconsider or for discovery, we affirm.

FACTS

Decedent Sandy Smith had a long history of shoulder and neck pain, as well as a history of asking doctors to prescribe specific narcotics for her pain. Due to concerns

about Smith's abuse of prescription medication, Smith and Dr. Robert Koshnick of the Dakota Clinic entered into a narcotic pain medication agreement in January 2001, by which Smith agreed to use only one clinic and one pharmacy for her narcotic medications. Smith did not comply with the agreement, and in November 2001, Dr. Koshnick wrote Smith a letter stating that he would no longer prescribe drugs for her pain and urging her to seek help from a pain clinic. Over the next two years, Smith continued to request and obtain pain medications from various sources. At some point, Smith did consult a pain clinic, and Dr. Koshnick resumed treating her, but concerns about substance abuse remained.

Beginning in August 2001, Smith received prescriptions for Duragesic patches from Dr. Koshnick. Duragesic, a prescription pain patch which delivers the narcotic fentanyl transdermally, is manufactured by ALZA Corporation (ALZA) and distributed by Janssen Pharmaceutica (Janssen).

Between November 2003 and March 2004, Smith visited the Dakota Clinic numerous times and was given at least six prescriptions for Duragesic during the four month period. Smith also filled her prescriptions at several pharmacies during this period, including the Detroit Lakes Wal-Mart Pharmacy (Wal-Mart), a K-Mart pharmacy, the Linson Pharmacy, and the Medical Pharmacy Moorhead.

In late February 2004, Smith told Dr. Panjini Sivanna at Dakota Clinic that she was moving in with her mother in Prescott, Arizona. On March 7, Dr. Sivanna prescribed a 30-day supply of 75 mcg/hr patches, but the prescription was dated for filling on March 26. On March 13, Dr. Koshnick prescribed a 30-day supply of 50

mcg/hr patches so that Smith would be supplied during the move and while she was arranging for treatment in Arizona.

Around March 21, Smith moved in with her mother in Prescott, Arizona. The next day, Smith was admitted to the emergency room in a severely agitated state, complaining of pain. The ER doctor believed that her agitated state was due to drug withdrawal. On release from the ER, she was prescribed four medications, including a prescription for the 50 mcg/hr Duragesic patch.

On April 5, 2004, Smith was found dead in the bathroom of her mother's mobile home in Prescott. Her mother's boyfriend gave the police a black case that included thirteen prescriptions in Smith's name; not one of them was Duragesic. Upon performing the autopsy, Arizona physician Dr. Kevin Horn determined that Smith died of fentanyl intoxication. She had a fentanyl level of 26 ng/ml (nanograms per milliliter) in her bloodstream, about ten times greater than the therapeutic range. Dr. Horn found a single patch on Smith's body. He examined the patch, noticed no irregularities, and disposed of it. In his autopsy report and during his deposition, Dr. Horn noted that Smith's death was consistent with drug abuse.

About two months before Smith's death, on February 17, 2004, Janssen voluntarily recalled one lot number of 75 mcg/hr patches when it learned several of the patches were not properly sealing. Two days after Smith's death, on April 7, 2004, Janssen recalled four additional lots of 75 mcg/hr patches. By deposition, Darren Mack, the pharmacy manager at the Detroit Lakes Wal-Mart where Smith often filled prescriptions, said that he searched the store's stock twice after being notified of the

recalls and did not find any of the recalled lot numbers. On March 30, 2004, after the first recall but before the second recall, Mack filled the March 7 prescription for Smith for 75 mcg/hr patches. He discarded the Duragesic boxes after repackaging the prescription and mailing it to Smith in Arizona.

On April 5, 2007, three years after Smith's death, appellants Jacqueline Hautala and Gary Thiel filed a complaint against respondents Dakota Clinic, Dr. Sivanna and Dr. Koshnick (collectively Dakota Clinic), ALZA and Janssen, and Wal-Mart. The complaint alleged that Dakota Clinic was negligent in over-prescribing Duragesic to Smith and failing to monitor for recalls. The complaint also alleged product liability, negligence, and malpractice claims against Wal-Mart, Dakota Clinic, ALZA, and Janssen.

Along with the complaint, appellants filed an affidavit for no expert review, appellants' counsel contending that the expert review required under Minn. Stat. § 145.682, subd. 3(b) (2008), could not be timely completed due to the statute of limitations running on these claims. On October 2, 2007, appellants finally served and filed an affidavit of James O'Donnell in support of their malpractice claims against Wal-Mart. O'Donnell's affidavit established that he would testify that the patch Smith was wearing caused her death, that it was one of the recalled patches, and that it was from a prescription filled by Wal-Mart. However, the affidavit statements were mere conjecture. Around October 10, 2007, appellants served and filed an affidavit prepared by Dr. George Graf in support of their claims against Dakota Clinic. Dr. Graf agreed to testify that the doctors did not practice the proper standards of care in prescribing medication to

Smith, and that it was likely that Smith was using a patch from the defective lot at the time of her death. This affidavit also lacked specificity.

On October 23, 2007, Dakota Clinic moved for dismissal under Minn. Stat. § 145.682, subd. 6, alleging that the Graf affidavit failed to satisfy the statutory expert review requirements. On December 7, 2007, Wal-Mart moved for dismissal on the same grounds, and in the alternative, for summary judgment for lack of proximate cause. On January 11, 2008, ALZA and Janssen moved for summary judgment on the grounds that appellants did not present sufficient evidence to establish that the patch used by Smith at the time of her death was defective and that it caused her death.

In various proceedings from December to February 19, 2008, the district court heard all of the respondents' motions. On March 28, 2008, the district court ordered summary judgment in favor of ALZA, Janssen, and Wal-Mart for lack of evidence, and granted the motions to dismiss under Minn. Stat. § 145.682 for Wal-Mart and Dakota Clinic. Three days later, appellants requested reconsideration and enclosed an affidavit of Dr. Stanton Kessler as a "supplemental exhibit." The district court denied reconsideration on April 2, 2008. This appeal follows.

D E C I S I O N

I. Summary Judgment

The district court shall grant summary judgment if the pleadings, discovery, and affidavits show that there are no genuine issues of material fact and that a party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. On appeal from summary judgment, this court asks whether there are any genuine issues of material fact and

whether the district court erred in applying the law. *In re Collier*, 726 N.W.2d 799, 803 (Minn. 2007). This court must consider the evidence in the light most favorable to the party against whom summary judgment was granted. *Gradjelick v. Hance*, 646 N.W.2d 225, 231 (Minn. 2002). "[E]vidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions" does not constitute a genuine issue of material fact. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). "The party opposing summary judgment may not establish genuine issues of material fact by relying upon unverified and conclusory allegations, or postulated evidence that might be developed later at trial . . . ." *Dyrdal v. Golden Nuggets, Inc.*, 689 N.W.2d 779, 783 (Minn. 2004). Although proximate cause generally is a question of fact for the jury, "where reasonable minds can arrive at only one conclusion," proximate cause becomes a question of law and may be disposed of by summary judgment. *Lubbers v. Anderson*, 539 N.W.2d 398, 402 (Minn. 1995).

A. ALZA and Janssen

Appellants argue that ALZA and Janssen failed to meet their burden of proof on summary judgment for the product liability claims. But the burden of proof in a product liability claim is on appellants, not respondents. "For a products liability claim, the plaintiff must demonstrate that a product was defective at the time it left the defendant's control and that the defect caused injury to the plaintiff." *Duxbury v. Spex Feeds, Inc.*, 681 N.W.2d 380, 387 (Minn. App. 2004), *review denied* (Minn. Aug. 25, 2004). In Minnesota, product liability law imposes liability on the distributor of a defective product

as well as the seller. *Id*. A prima facie negligent design claim consists of (1) a product in a defective condition that is unreasonably dangerous to the user; (2) a defect that existed when it left the designer's control; and (3) causation. *Westbrock v. Marshalltown Mfg. Co*., 473 N.W.2d 352, 356 (Minn. App. 1991), *review denied* (Minn. Sept. 13, 1991). Appellants must show that the patch that Smith was wearing at the time of her death was defective, that the defect existed when it left ALZA's and Janssen's control, and that the defective patch is what caused Smith's death.

Appellants contend that this is a prima facie case of a defective product and that there were specific product design defects in ALZA's Duragesic patch. Appellants provided an affidavit by Dr. Graf stating that, "[b]ased on the date Ms. Smith purchased the defective 75 mcg/hour patches (March 30, 2004) and the earlier date she purchased the 50 mcg patches, it is most likely she was using a patch from the defective lot at the time of death." But "most likely" is not proof that she was wearing a defective patch, especially when Dr. Graf never examined the patch. The only person to examine the patch Smith was wearing was Dr. Horn, who performed the autopsy. He examined the patch, noted that it contained no observable defects, and discarded it. He did not recall or note the dosage of the patch that Smith was using at the time of her death. Appellants have not established that Smith was using a 75 mcg/hour patch, rather than one of the 50 mcg/hour patches that were also prescribed for her. As the district court observed in its order, appellants cannot even show that Smith received patches from any of the recalled lots.

Appellants present mere speculation about causation, and did not provide any proof that Smith was in possession of a defective patch. Because no genuine issues of material fact exist with respect to this claim, the district court did not err in granting summary judgment for ALZA and Janssen.

B. Wal-Mart

Appellants argue that the district court contradicted itself in its order when it found that Wal-Mart filled all of the 2004 Duragesic prescriptions, but later ruled that even if appellants could establish that Smith was wearing a defective patch, they lacked evidence that the patch came from Wal-Mart Pharmacy. The district court's finding that Wal-Mart Pharmacy filled all of the 2004 prescriptions was misstated, because the record shows that the February 27 prescription was filled at K-Mart Pharmacy. Even though the district court did contradict itself, it was correct in stating that appellants could not establish a particular patch came from the Wal-Mart Pharmacy. The court's contradiction is harmless error and appellants were not prejudiced by it. *See Midway Ctr. Assocs. v. Midway Ctr. Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975) (stating that to prevail on appeal, an appellant must show both error and prejudice).

Appellants claim that the facts clearly establish that the patch on Smith's chest at the time of death was from one of the boxes of patches mailed to Smith in Arizona from the Wal-Mart Detroit Lakes Pharmacy. But appellants do not state where this is found in the record. Moreover, there does not appear to be any evidence of a causal connection between Wal-Mart's conduct and Smith's death. As discussed in Section I.A. of this

opinion, appellants have not shown that Smith was in possession of any of the recalled patches. Therefore, summary judgment was properly granted in favor of Wal-Mart.

Appellants also claim spoliation of evidence because Wal-Mart's pharmacist repackaged the patches for shipment to Smith in Arizona and discarded the boxes without memorializing the control numbers, and when the recall notice was received a few days later, the pharmacist was unable to determine their control numbers. However, this issue was not presented to the district court. This court will consider only those issues that were presented to and considered by the district court in deciding the matter before it. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Since spoliation was not an issue raised before the district court, we decline to address it.

II. Premature Summary Judgment

Appellants argue that summary judgment was premature because respondents withheld rule 30 deponents, delayed depositions and failed to produce other documents and electronic evidence. Appellants acknowledge that they were granted several extensions for discovery, but they argue that the district court did not compel respondents to present allegedly withheld discovery documents, or postpone the summary judgment hearing until after the April 2, 2008 discovery deadline. ALZA and Janssen counter that appellants failed to file a motion for relief or a detailed affidavit as required under Minn. R. Civ. P. 56.06. Under Minn. R. Civ. P. 56.06, if reasons are presented that the opposing party needs more time to collect essential facts, then "the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

But appellants' memorandum opposing summary judgment in favor of ALZA and Janssen did not set forth any reasons for another continuance. Nor did they file any other motions or affidavits setting forth such grounds. Accordingly, the district court did not err in not granting sua sponte another continuance. The granting of summary judgment on March 28, 2008, was not premature.

III. Motions to Dismiss Malpractice Claims under Minn. Stat. § 145.682

This court will reverse the dismissal of a malpractice claim for noncompliance with expert disclosure only if the district court abused its discretion. *Teffeteller v. Univ. of Minn.*, 645 N.W.2d 420, 427 (Minn. 2002). In a medical malpractice action, Minn. Stat. § 145.682 (2008), requires that a plaintiff's attorney must serve an affidavit with the summons and complaint stating that the case has been reviewed with an expert "whose qualifications provide a reasonable expectation that the expert's opinions could be admissible at trial and that, in the opinion of this expert, one or more defendants deviated from the applicable standard of care and by that action caused injury to the plaintiff." Minn. Stat. § 145.682, subds. 2, 3. If the expert review affidavits could not be submitted with the complaint due to the running of the statute of limitations, such affidavits must be served on the defendant within 90 days after service of the summons and complaint. *Id.*, subd. 3(b). In addition, within 180 days of commencement of suit, the plaintiff must serve upon defendant affidavits signed by each expert the plaintiff expects to call at trial stating, "with respect to the issues of malpractice or causation, the substance of the facts and opinions to which the expert expects to testify and a summary of the grounds for each opinion." *Id.*, subds. 2, 4(a).

The Minnesota legislature enacted expert-review and expert-disclosure requirements as a means of readily identifying meritless lawsuits at an early stage of the litigation. *Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 190–91 (Minn. 1990) (noting that "the legislature contemplated procedural reform directed at the elimination of 'frivolous cases'" in adopting the statute). To achieve the legislative aim of expert review and disclosure, Minnesota appellate courts have stressed that plaintiffs must adhere to strict compliance with the requirements of Minn. Stat. § 145.682. *See Lindberg v. Health Partners, Inc.*, 599 N.W.2d 572, 577–78 (Minn. 1999) (statutory requirements are "uncomplicated and unambiguous" and contemplate strict compliance). Plaintiffs are

> expected to set forth, by affidavit or answers to interrogatories, specific details concerning their experts' expected testimony, including the applicable standard of care, the acts or omissions that plaintiffs allege violated the standard of care and an outline of the chain of causation that allegedly resulted in damage to them.

Sorenson, 457 N.W.2d at 193.

Failure to comply with the requirements of Minn. Stat. § 145.682 because of deficiencies in the affidavit requires mandatory dismissal if: (1) the motion to dismiss the action identifies the claimed deficiencies; (2) the motion hearing is held at least 45 days after service of the motion; and (3) plaintiff does not correct the deficiencies before the motion hearing. Minn. Stat. § 145.682, subd. 6(c).

A. Wal-Mart

Wal-Mart argues that dismissal was mandatory under Minn. Stat. § 145.682, subd. 6(c), because Wal-Mart filed its motion to dismiss on December 7, 2007, and the motion hearing was held on February 8, 2008, two months after the motion was filed, without appellants making any attempt to correct the 13 deficiencies listed in the motion. As part of its motion, Wal-Mart alleged that O'Donnell was not a qualified expert, and his affidavit failed to (1) articulate the proper standards of care alleged to have been breached; (2) specifically identify the acts or omissions of Wal-Mart that breached the standards of care; and (3) explain how such a breach proximately caused Smith's death. Wal-Mart's motion cited seven points where O'Donnell's affidavit failed to articulate the applicable standard of care, and six additional points where O'Donnell failed to prove proximate cause. Under Minn. Stat. § 145.682, subd. 6(c), mandatory dismissal was necessary because Wal-Mart's motion included specific deficiencies, the hearing was over 45 days after the motion was served and appellants did not correct any of the 13 outlined deficiencies.

Appellants also challenge the district court's determination that O'Donnell was possibly not an expert. The competence of a witness to testify on a particular matter is a question of fact within the province of the district court judge, whose ruling will not be reversed unless it is based on an erroneous view of the law or clearly not justified by the evidence. *Hagen v. Swenson*, 306 Minn. 527, 528, 236 N.W.2d 161, 162 (1975). In order for a medical witness to be competent to testify as an expert, the witness must have both sufficient scientific knowledge of, and some practical experience with, the subject

matter of the offered testimony. *Cornfeldt v. Tongen*, 262 N.W.2d 684, 692 (Minn. 1977). The district court noted that O'Donnell is not a licensed doctor, and his only claim to the title of doctor is based on completion of a one-year "Pharm.D" program. The district court also noted that O'Donnell's affidavit of expert opinion provides few details as to what qualifies him as an expert. The district court did not abuse its discretion in determining that O'Donnell was not a qualified expert, nor did it abuse its discretion in granting Wal-Mart's motion to dismiss.

B. Dakota Clinic

In granting Dakota Clinic's motion to dismiss, the district court found that Dr. Graf's affidavit failed to: (1) give adequate guidance on the appropriate standard of care; (2) adequately outline how the alleged breach caused Smith's death; and (3) provide a specific basis for his conclusions beyond mere speculation. Appellants argue that Dr. Graf's affidavit was adequate because it identified specific standards of care and specific breaches of those standards of care in the chain of causation. But appellants do not elaborate regarding these alleged inadequacies. And the specifics are not clear from the affidavit itself. Dr. Graf's affidavit mentions the alleged breach on the part of Dakota Clinic, but fails to give specific guidance on the appropriate standard of care. The affidavit states that the "applicable standards of care for powerful narcotic medication, such as Duragesic, require that one physician alone prescribe and monitor its use by a patient." But the affidavit does not discuss this standard further, except to note that "[respondents] deviated from the standards of care, many of which are outlined in the [written narcotic] contract." Dr. Graf's affidavit also states that standards of care for pain

management specialists "require that physicians inquire and collaborate with other treating doctors" and that Dr. Sivanna and Dr. Koshnick failed to follow these procedures. These conclusory assertions do not show how Dakota Clinic and its doctors deviated from the standard of care in this particular situation, and under the actual circumstances they faced with this patient. *See Sorenson*, 457 N.W.2d at 193 (stating that expert affidavits must include specific details about the applicable standard of care, how the defendants violated the standard of care, and an outline of the chain of causation).

Like Wal-Mart, under Minn. Stat. § 145.682, subd. 6(c), dismissal here was mandatory because Dakota Clinic's motion to dismiss identified the affidavit's deficiencies, the motion hearing was held more than 45 days after service of the motion, and appellants had not corrected the deficiencies prior to the motion hearing.

In an additional argument, appellants contend that Dakota Clinic's motion was (1) untimely; (2) procedurally defective; and (3) did not provide appellants with an opportunity to respond to the deficiencies. This argument is without merit because Dakota Clinic first served its motion to dismiss on October 23, 2007, and the court heard arguments on the motion on both December 18, 2007 and February 19, 2008. There is no evidence in the record that Dakota Clinic's motion was untimely, procedurally defective, or that appellants were unaware of it.

IV. Refusal to Reconsider

Appellants argue that that the district court abused its discretion by refusing to allow them to file a motion to reconsider and because the court did not consider the Kessler affidavit provided to the court with the letter request to make a motion to

reconsider. "Motions to reconsider are prohibited except by express permission of the court, which will be granted only upon a showing of compelling circumstances." Minn. R. Gen. Pract. 115.11. Motions for reconsideration are not opportunities to present facts that were available when the prior motion was considered and will not be allowed to supplement the record on appeal. Minn. R. Gen. Pract. 115.11 1997 advisory comm. cmt; *see also Sullivan v. Spot Weld, Inc.*, 560 N.W.2d 712, 716 (Minn. App. 1997) (noting that the district court record cannot be supplemented by new evidence after the court grants summary judgment), *review denied* (Minn. Apr. 24, 1997). Furthermore, the denial of a request under Minn. R. Gen. Pract. 115.11 to make a motion to reconsider is not appealable. *Baker v. Amtrak Nat'l R.R. Passenger Corp.*, 588 N.W.2d 749, 755 (Minn. App. 1999). Appellants did not provide the district court with compelling circumstances to reconsider, and the district court's denial of reconsideration is not error.

V. Discovery and In Camera Review

The district court has wide discretion in granting or denying a discovery request and, absent a clear abuse of discretion, that decision will generally be affirmed. *Shetka v. Kueppers, Kueppers, Von Feldt & Salmen*, 454 N.W.2d 916, 921 (Minn. 1990).

In its January 10, 2008 order, the district court extended discovery to April 2, 2008, noted that the respondents "have no objections to producing the individuals identified by [appellants] for their depositions, subject to further clarification of persons designated under Minn. R. Civ. P. 30.02(f)," and ordered that appellants had 15 days to respond to outstanding discovery requests, provide medical authorizations for release of requested medical records, and file a brief on the discoverability of pharmacy records for

Laurie Nason and Shirley Thiel (Smith's sister and mother, respectively). In an order issued two weeks later, on January 25, 2008, the district court ordered that appellants produce records of all pharmacies from which Smith obtained Duragesic from November 2003 to April 2004 for in camera review.

Appellants argue that the district court abused its discretion in its January 25 order when it would not allow appellants to conduct additional discovery on the Duragesic patches, but it did allow respondents to conduct additional discovery into whether other family members may have been prescribed fentanyl patches. Dakota Clinic argues that appellants did not comply with the district court's order in any event, so the issue is moot. It is unclear from the record whether appellants submitted the records as the district court ordered. ALZA and Janssen argue that the district court properly exercised its discretion in the January 10 order by requiring appellants to clarify their Minn. R. Civ. P. 30.02(f) designations prior to requiring respondents to produce witnesses for depositions. It is unclear from the record whether and how these discovery issues may have impacted the March 28, 2008 order granting the motions for summary judgment and dismissal. However, these discovery orders do not constitute an abuse of discretion.

Affirmed.