STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2253

Mark A. Jensen, as trustee for the next of kin of Ann Marie Jensen,
Appellant,

vs.

Parker Arnold S. Leonard, M. D.,
Defendant,

University of Minnesota Medical Center-Fairview,
Respondent,

University of Minnesota, formerly d/b/a University of Minnesota Medical Center,
Respondent.

Filed October 20, 2009
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-CV-05-017115

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Considered and decided by Peterson, Presiding Judge; Schellhas, Judge; and Connolly, Judge.

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

PETERSON, Judge

In this appeal from summary judgment dismissing appellant's claims of negligent credentialing and breach of a duty to warn, appellant argues that the district court erred by (1) dismissing his claims on the grounds that he failed to establish a prima facie case of negligent credentialing or a breach of a duty to warn and (2) denying his motion to compel answers to written deposition questions regarding the competence of the doctor who was allegedly negligently credentialed. We affirm.

FACTS

On March 17, 2003, Ann Marie Jensen sought treatment for abdominal pain from Dr. Vandana Gupta, M.D., at the Parker Hughes Cancer Center and was referred to Dr. Arnold Leonard, M.D., for a colonoscopy. On May 1, 2003, Leonard performed a colonoscopy on Jensen, during which he attempted to biopsy part of Jensen's colon but experienced difficulty due to bleeding. In October 2003, Jensen presented at the Mercy Hospital emergency room with shoulder pain and was referred to a rheumatologist. The rheumatologist ordered a CT scan, which revealed liver cancer that was confirmed by a biopsy. In December 2003, a colonoscopy and biopsies revealed colon cancer. Jensen received unsuccessful chemotherapy in December 2003 and died on January 28, 2004.

Appellant Mark A. Jensen, as trustee for the next of kin of Ann Marie Jensen, filed suit against the Parker Hughes Cancer Center, Gupta, and Leonard. Appellant voluntarily dismissed the claims against Gupta and the Parker Hughes Cancer Center and settled the claim against Leonard. Appellant's suit also alleged that the University of Minnesota

Medical Center-Fairview negligently credentialed Leonard and that the University of Minnesota (the university) had a special relationship with Jensen that created a duty for the university to warn Jensen of Leonard's known lack of colonoscopy competence, and the university failed to warn Jensen.

Appellant provided an affidavit of Dr. Douglas Rex, M.D, a gastroenterologist. Rex opined that to a reasonable degree of medical probability, Leonard breached the standard of care for performing a colonoscopy on May 1, 2003, and that "[i]f Dr. Leonard had competently performed Mrs. Jensen's colonoscopy on May 1, 2003, it is probable that she would have been diagnosed with colon cancer at that time."

Appellant also provided an affidavit of Dr. Harold N. Londer, M.D, an oncologist. Londer opined that, at the time of the May 1, 2003, colonoscopy, Jensen's cancer was probably stage III or stage IV. Londer opined that if it was stage III and Jensen had been started on appropriate treatment in May 2003, it is probable that Jensen would have survived her cancer. Londer opined that if the cancer was stage IV and Jensen had been started on appropriate treatment in May 2003, it is probable that Jensen would have survived for three years if the cancer was surgically respectable with curative intent or that Jensen would have had a median survival of two years if the cancer was not initially surgically respectable with curative intent.

Appellant also presented an affidavit of Nancy Kolb, R.N., which states that in 1988, Kolb was the head nurse of the endoscopy unit at the University of Minnesota Hospital. In that capacity, Kolb observed Leonard performing various endoscopic procedures, including colonoscopies. Kolb's observations of Leonard caused her to have

concerns regarding Leonard's competence to perform colonoscopies. Kolb stated that similar concerns about Leonard's competence were expressed to her by other members of her nursing staff. Kolb discussed these concerns with Dr. Michael Shaw, M.D., the director of the endoscopy unit. According to Kolb, Shaw then shadowed Leonard, which means he observed him performing colonoscopies. Kolb stated that, from that point through the remainder of the time that she was head nurse of the endoscopy unit, Leonard did not perform any more endoscopic procedures, including colonoscopies.

When Shaw shadowed Leonard in 1988, the University of Minnesota Hospital and Clinic was owned and run by the university. However, the university put into the record two agreements: an Asset Transfer and Statutory Merger Agreement, which was entered into on December 31, 1996, and an Academic Affiliation Agreement, which became effective on January 1, 1997. Under these agreements, the University of Minnesota Hospital and Clinic was severed from the university and merged with and into Fairview Hospital and Healthcare Services, a Minnesota nonprofit corporation (Fairview). As a result of the merger, the university's hospital assets were combined with Fairview assets to create an operating division of Fairview called "Fairview University Medical Center." Under the Academic Affiliation Agreement, Fairview holds the operating license for the consolidated hospital campus, and "[e]xcept with respect to faculty members who are otherwise authorized to provide patient care and to receive reimbursement for such services . . ., individual patient care is not controlled, supervised, or paid for by the University."

Appellant's attorney alleges that Shaw told him that he shadowed Leonard performing a colonoscopy in 1988, determined that Leonard was not competent to perform colonoscopies, and instructed Kolb that Leonard was no longer allowed to perform endoscopic procedures. Appellant served written deposition questions on Shaw regarding Shaw's observation of Leonard performing a colonoscopy and Leonard's competence to continue performing colonoscopies. Shaw provided an affidavit stating that in the late 1980s, he was the medical director of the University of Minnesota Endoscopy Clinic, and in that role, he had the responsibility of "determining whether a professional's staff privileges should be granted, limited, suspended or revoked."

Fairview filed a motion for summary judgment, and appellant moved to compel answers to the written deposition questions served on Shaw. On October 31, 2006, the district court denied appellant's motion to compel answers because the information sought by the questions was protected from discovery under Minn. Stat. § 145.64 (2006) and granted summary judgment for Fairview. The summary judgment was based on this court's decision in *Larson v. Wasemiller*, which held that Minnesota does not recognize a cause of action for negligent credentialing. 718 N.W.2d 461,468 (Minn. App. 2006), *rev'd*, 738 N.W.2d 300 (Minn. 2007) (recognizing cause of action for negligent credentialing). On September 19, 2007, following the supreme court's *Larson* decision, this court reversed and remanded the summary judgment in this case.

On November 21, 2007, the district court granted summary judgment for the university. The district court noted that it was undisputed that Jensen was not a patient of the university in 2003 or in the 1980s when Leonard performed colonoscopies at the

university. It also noted that the university no longer owned or operated the hospital where Leonard performed Jensen's colonoscopy and had not credentialed Leonard to perform colonoscopies when he performed Jensen's colonoscopy. The district court concluded that the university did not have a duty to warn patients of Leonard's incompetence because a hospital only has a special relationship to its own patients.

Appellant again moved to compel discovery from Shaw. On March 12, 2008, the district court denied the motion. It concluded that Shaw was a peer reviewer and therefore his impressions were protected by the peer-review statute. The district court also concluded that the information sought was too remote in time to be relevant to the issues litigated in the case.

On March 30, 2008, appellant provided a second affidavit from Rex. In the amended affidavit, Rex described the standard of care for credentialing a colonoscopist and opined that, because Leonard did not complete the necessary training, Fairview did not meet the standard for credentialing to perform colonoscopies. Rex also concluded that Leonard's performance when he was shadowed by Shaw was not "consistent with reasonably granting Dr. Leonard privileges to perform colonoscopies in 2003."

Fairview again moved for summary judgment on October 23, 2008, and the district court granted the motion and dismissed appellant's claim against Fairview. The district court concluded that Kolb's affidavit was insufficient to create a prima facie case of negligent credentialing because Kolb was not qualified to testify to the applicable standard of care of a physician and that the events of 1988 were too remote in time to be admissible. The district court also concluded that appellant presented no evidence that

Fairview's credentialing and re-credentialing processes were unreasonable. Finally, the court concluded that appellant failed to establish causation between the alleged negligent credentialing and Jensen's death.

This appeal followed, challenging the summary judgment for Fairview and the university.

D E C I S I O N

On appeal from summary judgment, we review the record to "determine whether there are any genuine issues of material fact and whether a party is entitled to judgment as a matter of law." *In re Collier*, 726 N.W.2d 799, 803 (Minn. 2007). A genuine issue of material fact exists if the evidence would "permit reasonable persons to draw different conclusions." *Gradjelick v. Hance*, 646 N.W.2d 225, 231 (Minn. 2002). No genuine issue of material fact exists if the evidence "merely creat[es] a metaphysical doubt as to a factual issue." *State Farm Fire & Cas. v. Aquila Inc*., 718 N.W.2d 879, 886-87 (Minn. 2006). We view the evidence in the record "in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

I.

Appellant argues that the district court erred by granting summary judgment in favor of Fairview. Fairview argues that dismissal was appropriate because appellant failed to timely serve statutorily required affidavits. Although the district court did not address Fairview's claim that the action should be dismissed for failure to serve the

required affidavits, we agree that the action against Fairview should have been dismissed on this basis.

> 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: (1) . . . serve upon defendant with the summons and complaint an affidavit as provided in subdivision 3; and (2) serve upon defendant within 180 days after commencement of the suit an affidavit as provided by subdivision 4.

Minn. Stat. § 145.682, subd. 2 (2008).

The affidavit that must be served with the summons and complaint under Minn. Stat. § 145.682, subd. 2(1), is an affidavit of the plaintiff's attorney stating that

> the facts of the case have been reviewed by the plaintiff's attorney 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, subd. 3(a) (2008). Under certain conditions, service of this affidavit may occur as late as 90 days after service of the summons and complaint. Minn. Stat. § 145.682, subd. 3(b).

The affidavit that must be served within 180 days after commencing the suit as provided in Minn. Stat. § 145.682, subd. 2(2), is an affidavit that states

> the identity of each person whom plaintiff expects to call as an expert witness at trial to testify with respect to the issues of malpractice or causation, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion.

Minn. Stat. § 145.682, subd. 4(a) (2008).

This affidavit must be signed by each expert listed in the affidavit and by the plaintiff's attorney. *Id.* The supreme court has also explained that, within the 180-day period, by affidavit or interrogatory answers, plaintiffs must set forth "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 v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 193 (Minn. 1990); *see also Anderson v. Rengachary*, 608 N.W.2d 843, 847 (Minn. 2000) (applying *Sorenson*).

Failure to provide the affidavit required under Minn. Stat. § 145.682, subd. 2(2), results, upon motion, in mandatory dismissal with prejudice of each cause of action that requires expert testimony to establish a prima facie case. Minn. Stat. § 145.682, subd. 6 (2008); *see also Bjorke v. Mayo Clinic of Rochester*, 574 N.W.2d 447, 450 (Minn. App. 1998) (concluding that plaintiff's failure to provide either the affidavit of expert review, Minn. Stat. § 145.682, subd. 2(1), or the affidavit of expert identification, Minn. Stat. § 145.682, subd. 2(2), requires mandatory dismissal with prejudice). The supreme court has explained:

> Dismissal is mandated under Minn. Stat. § 145.682, subd. 6 when the disclosure requirements are not met and while we certainly recognize that the statute may have harsh results in some cases, it cuts with a sharp but clean edge. It is the legislative choice to implement the policy of eliminating frivolous medical malpractice lawsuits by dismissal. A showing of good cause for an extension of the 180-day time limit pursuant to Minn. Stat. § 145.682, subd. 4(b) may justify

> relief from the mandatory filing time required under the statute, but failing that, the statute compels dismissal for failure to timely file the required disclosure.

Lindberg v. Health Partners, Inc., 599 N.W.2d 572, 578 (Minn. 1999).

The amended complaint alleging negligent credentialing against Fairview was mailed on June 26, 2006, and Fairview acknowledged service the next day. Based on these dates, the 180-day period for serving the affidavit required under Minn. Stat. § 145.682, subd. 2(2), ended late in December 2006. Rex's amended affidavit, which addressed for the first time the standard of care for credentialing a colonoscopist and opined that Fairview breached the standard of care was signed on March 25, 2008, and served on Fairview on March 30, 2008. Therefore, the affidavit regarding negligent credentialing was not served within 180 days of commencement of the negligent-credentialing suit against Fairview.

Appellant does not claim that the affidavit was timely filed. Instead, he argues that the affidavit requirements of Minn. Stat. § 145.682 do not apply because his suit is for negligent credentialing, not medical malpractice. But under the plain language of the statute, the affidavit requirement applies to actions "alleging malpractice, error, mistake, or failure to cure," brought "against a health care provider" in "which expert testimony is necessary to establish a prima facie case." Minn. Stat. § 145.682, subd. 2. Appellant alleged that Fairview "failed to take the necessary steps to assure that Dr. Leonard either possessed the necessary training, experience and skill to competently perform the colonoscopy on Ann Marie Jensen on May 1, 2003 or to preclude him from performing that colonoscopy at its facilities." The definition of "health care provider" includes

hospitals, Minn. Stat. § 145.682, subd. 1 (2008), which means that Fairview is a "health care provider." Therefore, appellant's action alleges error by a "health care provider." Consequently, whether the affidavit requirement applies depends on whether expert testimony is required to establish a prima facie case.

"[W]hether expert testimony is required depends on the nature of the question to be decided by the trier of fact and on whether technical or specialized knowledge will assist the trier of fact." *Blatz v. Allina Health Sys.*, 622 N.W.2d 376, 388 (Minn. App. 2001). "Where the acts or omissions complained of are within the general knowledge and experience of lay persons, expert testimony is not necessary to establish a standard of care, even in cases of alleged medical malpractice." *Atwater Creamery Co. v. W. Nat'l. Mut. Ins. Co.*, 366 N.W.2d 271, 279 (Minn. 1985). But "if it would be speculative for the factfinder to decide the issue of negligence without having the benefit of expert testimony on the standard of care, the expert testimony is necessary." *Id.*

The supreme court explained in *Wasemiller* that "[c]redentialing decisions determine which physicians are granted hospital privileges and what specific procedures they can perform in the hospital." 738 N.W.2d at 302. Lay persons are not generally knowledgeable about and have no experience in determining whether a physician should be granted hospital privileges and what procedures a physician can perform in a hospital. Therefore, without the benefit of expert testimony, it would be speculative for a fact-finder to determine whether Fairview failed to take the necessary steps during its credentialing process for Leonard, and expert testimony is necessary to establish a prima facie case of negligent credentialing. Consequently, the affidavit requirement applies.

Appellant cites two cases to support his argument that negligent credentialing is a form of common-law negligence and not medical malpractice. But neither case demonstrates that the affidavit requirement does not apply to appellant's negligent-credentialing claim. The first case cited involved an action against a blood bank by a woman who was infected with HIV during a transfusion. *Kaiser v. Mem'l Blood Ctr. of Minneapolis, Inc.*, 486 N.W.2d 762, 764 (Minn. 1992). The supreme court held that the general negligence statute of limitations, rather than the medical-malpractice statute of limitations applied "[b]ecause blood banks are not expressly mentioned as a class of defendant governed by the two-year limitation." *Id.* at 766, 768. But as previously addressed, Fairview is a hospital, and hospitals are expressly included in the definition of a "health care provider" covered by the affidavit requirements of Minn. Stat. § 145.682.

The second case that appellant cites involved paramedics who took the wrong route to an emergency site and were delayed in responding to a person with a brain injury. *Blatz*, 622 N.W.2d at 381. The defendants argued that the plaintiff was required to provide expert testimony on the issue of whether the paramedics breached their duty of care. *Id.* at 383. The supreme court held:

> [W]hen paramedics furnish medical treatment to a patient, a medical or professional standard of care should apply. But when paramedics are performing functions not requiring professional training or judgment, such as using an address to locate a home when responding to an emergency, then a heightened standard of professional care is not required.

Id. at 385. Unlike using an address to locate a home, determining whether a doctor should be granted hospital privileges requires technical or specialized knowledge that is

not within the general knowledge and experience of lay persons. Consequently, *Blatz* does not demonstrate that the affidavit requirement of Minn. Stat. § 145.682 does not apply to appellant's negligent-credentialing claim.

Because appellant did not satisfy the affidavit requirement for his negligent-credentialing claim, dismissal of the claim is mandatory under Minn. Stat. § 145.682, subd. 6. Because we affirm on this ground, we need not address whether the district court erred by concluding that appellant failed to present a prima facie case of negligent credentialing.

II.

Appellant argues that the district court erred by granting summary judgment for the university. The district court concluded that because there was no special relationship between Jensen and the university, the university had no duty to warn Jensen, and because the university had no duty, appellant's negligence action failed as a matter of law.[1] Appellant contends that the university had a special duty to warn Jensen about Leonard based on the fact that, in 1988, the university became aware that Leonard was not competent to perform colonoscopies. Appellant argues that the fact that the university failed to include Leonard's documented lack of colonoscopy competence in its file exposed all of Leonard's later colonoscopy patients to incompetent care and that it was foreseeable that every future patient was at risk of serious harm, which created a duty for the university to warn future patients.

[1] The only claim that appellant asserted against the university was a claim for failure to warn.

> In a claim for negligence, a plaintiff must prove: (1) the defendant has a legal duty to the plaintiff to take some action; (2) there was a breach of that duty; (3) the breach of the duty was the proximate cause of the harm to the plaintiff; and (4) damage. In the absence of a legal duty, the negligence claim fails.

Gilbertson v. Leininger, 599 N.W.2d 127, 130 (Minn. 1999) (citation omitted).

> The existence of a duty is a question of law we decide de novo. The general common law rule is that a person does not have a duty to give aid or protection to another or to warn or protect others from harm caused by a third party's conduct. An exception to this general rule arises when the harm is foreseeable and a special relationship exists between the actor and the person seeking protection. These circumstances create a duty to protect.

Becker v. Mayo Found., 737 N.W.2d 200, 212 (Minn. 2007) (footnote omitted) (citations omitted).

Even if we assume that the university knew in 1988 that Leonard was incompetent to perform colonoscopies, that knowledge, by itself, is not sufficient to establish a duty by the university to warn Jensen about Leonard. Knowledge of Leonard's incompetence may make it foreseeable that Leonard's future patients will be at risk of harm, but for a duty to exist there must also be a special relationship between Jensen and the university. The factors that the supreme court has "consistently examined when confronted with a special relationship claim are the vulnerability and dependency of the individual, the power exerted by the defendant, and the degree to which the defendant has deprived the plaintiff of her ordinary means of protection." *Id.* at 213. There is no evidence that when Leonard examined Jensen at Fairview in May 2003, Jensen depended on the university with respect to her medical care or even knew that Leonard had been associated with the

university. Also, there is no evidence that the university exerted any power over Jensen, deprived her of any opportunity to obtain medical care, or in any way influenced or interfered with her efforts to obtain medical care.

It is undisputed that Jensen was not Leonard's patient until after the University of Minnesota Hospital and Clinic merged with and into Fairview in 1997. Appellant contends, however, that the university did not stop providing health care in 1997 and its employed physicians are a significant part of the Fairview medical staff that credentialed Leonard through 2003. Therefore, appellant concludes, the university has always been a participant in Leonard's colonoscopy credentialing. Appellant asserts that "it is common knowledge that [the] University has continued to operate its medical school with a large faculty of employee physicians who also provide healthcare at [Fairview]" and that it is undisputed that Fairview and the university have maintained an academic affiliation. But appellant has cited no evidence that indicates that this affiliation creates a special relationship between the university and Jensen. The fact that doctors employed by the university's medical school also provide patient care at Fairview does not demonstrate that the university exerted any control over or was involved with medical care that Jensen received at Fairview, and without some university involvement in Jensen's care, there is no special relationship between the university and Jensen.

Appellant argues that, as a government entity, the university had a special duty toward Jensen under *Cracraft v. St. Louis Park*, 279 N.W.2d 801 (Minn. 1979). In *Cracraft*, the supreme court explained that "'[s]pecial duty' is nothing more than convenient terminology, in contradistinction to 'public duty,' for the ancient doctrine that

once a duty to act for the protection of others is voluntarily assumed, due care must be exercised even though there was no duty to act in the first instance." *Cracraft*, 279 N.W.2d at 806. The supreme court then considered the point at which a municipality assumes to act for the protection of others when it inspects the activities of third parties for fire-code violations and determined that there is no bright line but that

> there are at least four factors which should be considered. First, actual knowledge of the dangerous condition is a factor which tends to impose a duty of care on the municipality. Second, reasonable reliance by persons on the municipality's representations and conduct tends to impose a duty of care. Of course, reliance on the inspection in general is not sufficient. Instead, the reasonable reliance must be based on specific actions or representations which cause the persons to forego other alternatives of protecting themselves. Third, a duty of care may be created by an ordinance or statute that sets forth mandatory acts clearly for the protection of a particular class of persons rather than the public as a whole. Finally, the municipality must use due care to avoid increasing the risk of harm.

Id. at 806-07 (footnote omitted).

Even if we assume that the first *Cracraft* factor is met because the university knew in 1988 that Leonard was incompetent to perform colonoscopies, the record does not provide a sufficient basis for concluding that, under *Cracraft*, the university assumed a duty to act to protect Jensen. With respect to the second factor, there is no evidence that Jensen relied on any specific actions or representations by the university that caused her to forego any alternatives for protecting herself. Appellant contends that the third factor is met because the university was required by statute to report to the board of medical practice Leonard's lack of colonoscopy competence and the restriction of his privileges.

The statute that appellant cites states, "Any hospital . . . located in this state shall report to the board any action taken by the institution or organization or any of its administrators or medical or other committees to revoke, suspend, restrict, or condition a physician's privilege to practice or treat patients in the institution." Minn. Stat. § 147.111, subd. 2 (2008). But the legislature has expressly stated that the purpose of this statute is to protect the public as a whole. Minn. Stat. § 147.001 (2008) states:

> The primary responsibility and obligation of the Board of Medical Practice is to protect the public.
>
> In the interest of public health, safety, and welfare, and to protect the public from the unprofessional, improper, incompetent, and unlawful practice of medicine, it is necessary to provide laws and regulations to govern the granting and subsequent use of the license to practice medicine.

In light of this unambiguous expression of legislative intent, we conclude that Minn. Stat. § 147.111, subd. 2, does not set forth mandatory acts clearly for the protection of a particular class of persons rather than the public as a whole, and, therefore, it does not create a special duty under *Cracraft*. *See* Minn. Stat. § 645.16 (2008) ("When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit."). Finally, with respect to the fourth factor, appellant does not allege that the university did anything that increased the risk of harm.

Because appellant has not shown that the university had a duty to warn Jensen, we conclude that the district court properly granted summary judgment dismissing

appellant's claims against the university. Because the university did not have a duty to warn Jensen, we need not address whether the district court erred by denying appellant's motion to compel answers to the written deposition questions served on Shaw.

Affirmed.