STATE OF MINNESOTA
IN COURT OF APPEALS
A09-667

Joeffre Kolosky,
Appellant,

vs.

Woodwinds Hospital,
Respondent,

Dr. Mark Dahl,
Respondent,

Northwestern Health Sciences University,
Respondent,

Ian Johnson,
Respondent.

Filed December 1, 2009
Affirmed
Halbrooks, Judge

Washington County District Court
File No. 82-CV-08-5597

Joeffre Kolosky, 2 River Terrace Court #101, Minneapolis, MN 55414 (pro se appellant)

Mark R. Whitmore, Bassford Remele, a Professional Association, 33 South 6th Street, Suite 3800, Minneapolis, MN 55402 (for respondent Woodwinds Hospital)

Richard J. Thomas, Bryon Ascheman, Burke & Thomas, PLLP, 3900 Northwoods Drive, Suite 200, St. Paul, MN 55112 (for respondent Dahl)

Barbara A. Zurek, Melissa Dosick Riethof, Meagher & Geer, PLLP, 33 South 6th Street, Suite 4400, Minneapolis, MN 55402 (for respondents Northwestern Health Sciences University and Ian Johnson)

Considered and decided by Klaphake, Presiding Judge; Halbrooks, Judge; and Bjorkman, Judge.

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

HALBROOKS, Judge

Appellant challenges the dismissal of his medical-malpractice claim for failure to include an affidavit of expert review with his summons and complaint as required by Minn. Stat. § 145.682 (2008). Because we conclude that expert testimony would be required in this case and dismissal with prejudice is mandatory upon appellant's failure to strictly comply with the statutory requirement, we affirm.

FACTS

Appellant Joeffre Kolosky initiated this medical-malpractice action after acquiring an infection following a knee replacement. Kolosky believes that the infection was caused by acupuncture that he received while recovering at respondent Woodwinds Hospital. He alleges that respondent Ian Johnson, a licensed acupuncturist, negligently performed the acupuncture and that respondent Mark Dahl, M.D., was negligent for not informing Kolosky of the dangers of acupuncture after knee replacement.[1] Johnson is an employee of respondent Northwestern Health Sciences University.

[1] Kolosky's complaint against Dr. Dahl was dismissed without prejudice for lack of proper service. By separate order, we concluded that the partial judgment dismissing claims against Dr. Dahl was not appealable. Accordingly, this appeal does not address Kolosky's claims against Dr. Dahl.

When Kolosky served his summons and complaint, he did not attach an affidavit of expert review as required by Minn. Stat. § 145.682. Woodwinds and Northwestern (on behalf of Northwestern and Johnson) answered and demanded compliance. Kolosky did not submit an affidavit until January 5, 2009, which was after the district court had issued a scheduling order and Woodwinds and Northwestern had moved for dismissal. Kolosky appeals the dismissal of his claims against Woodwinds and Northwestern on the grounds that (1) an affidavit was not required, (2) the affidavit he submitted is adequate, and (3) the time to submit an affidavit was extended by the scheduling order.

D E C I S I O N

We will reverse the dismissal of a malpractice claim for noncompliance with expert-disclosure requirements only if the district court abused its discretion. *Tousignant v. St. Louis County*, 615 N.W.2d 53, 58 (Minn. 2000). In a medical-malpractice action, Minn. Stat. § 145.682 requires that a plaintiff's attorney serve an affidavit with the summons and complaint that states 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(a).

Noncompliance results in "mandatory dismissal with prejudice of each cause of action as to which expert testimony is necessary to establish a prima facie case." *Id.*, subd. 6(a). To establish a prima facie case of medical malpractice, a plaintiff must offer evidence that is sufficient to prove "(1) the standard of care recognized by the medical

community as applicable to the particular defendant's conduct, (2) that the defendant in fact departed from that standard, and (3) that the defendant's departure from the standard was a direct cause of the patient's injuries." *MacRae v. Group Health Plan, Inc.*, 753 N.W.2d 711, 717 (Minn. 2008) (quotation omitted).

Kolosky alleges that his case should not have been dismissed because expert testimony is not necessary here to establish a prima facie case. He relies on the exception recognized by our supreme court in *Tousignant* when "the acts or omissions complained of are within the general knowledge and experience of lay persons." *Tousignant*, 615 N.W.2d at 58 (quotation omitted). But cases in which an affidavit of expert review are not required are rare and exceptional. *Id.* Examples of cases where expert testimony is unnecessary include failing to follow a physician's order, *id.* at 60, and leaving a surgical sponge in a patient, *Hestbeck v. Hennepin County*, 297 Minn. 419, 424, 212 N.W.2d 361, 364–65 (1973). Without addressing the merits of Kolosky's claim of medical malpractice, we conclude that this is not one of the exceptionally rare cases where expert testimony is unnecessary to establish a prima facie case.

Kolosky would need expert medical testimony to demonstrate both the standard of care for receiving acupuncture after a joint replacement and whether any deviation from this standard caused his injury. The standard of care for post-operative acupuncture is not within the common knowledge of laypersons. Specifically, whether Johnson's decision to perform acupuncture or his methods of performing acupuncture conformed to the standard of care under these circumstances is not within a layperson's common knowledge. Additionally, whether Kolosky's infection was directly caused by any

alleged deviation from the standard of care is not common knowledge, despite Kolosky's assertions to the contrary. Accordingly, we cannot conclude that the district court abused its discretion by finding that this is the type of case where expert testimony is required. *See Reinhardt v. Colton*, 337 N.W.2d 88, 94–95 (Minn. 1983) (noting that expert testimony is necessary in medical-malpractice cases to establish a prima facie case when issues are "not within the common knowledge of laymen").

Kolosky also argues that he complied with the statute by submitting the affidavit of Robert F. Kolosky, D.D.S., in January 2009. But to achieve the legislative aim of expert review and disclosure, Minnesota appellate courts have stressed that plaintiffs must strictly comply with the requirements of Minn. Stat. § 145.682. *See Lindberg v. Health Partners, Inc.*, 599 N.W.2d 572, 577–78 (Minn. 1999) (stating that the statutory requirements are "uncomplicated and unambiguous" and "cut[] with a sharp but clean edge"). The statute allows "60 days after demand for the affidavit" for an affidavit to be presented before dismissal becomes mandatory, even if the affidavit was not served with the complaint as contemplated by subdivision 2, clause 1. Minn. Stat. § 145.682, subd. 6(a). There is no dispute here that appellant's submission of an expert affidavit did not occur within this 60-day period.

Kolosky also contends that the scheduling order extended his time to submit the affidavit. But there is nothing in the district court's scheduling order to suggest that this time period had been extended, and the scheduling order is dated November 14, 2008, several days after Kolosky's expert affidavit was due. Because strict compliance is

required and Kolosky's affidavit was late, dismissal with prejudice was mandatory. The district court's refusal to consider Kolosky's affidavit was not an abuse of discretion.

Even if the affidavit of Dr. Kolosky had been considered timely by the district court, the supplied affidavit would not have met the statutory requirements. The expert must be one "whose qualifications provide a reasonable expectation that the expert's opinions could be admissible at trial." Minn. Stat. § 145.682, subd. 3(a). The opinion of a dentist would not be an admissible expert opinion in a medical-malpractice claim involving acupuncture and a post-orthopedic infection.

> To establish the foundation necessary to qualify a witness as an expert on whether a [health care provider] has exercised that degree of care required . . . , the witness must have both the necessary schooling and training in the subject matter involved, plus practical or occupational experience with the subject.

Lundgren v. Eustermann, 370 N.W.2d 877, 880 (Minn. 1985). A dentist does not have the educational training or practical experience in acupuncture or knee replacements to qualify as an expert under the statute for this type of claim. In addition, Dr. Kolosky's affidavit failed to state how "one or more defendants deviated from the applicable standard of care and by that action caused injury to the [appellant]." *See* Minn. Stat. § 145.682, subd. 3(a) (stating requirements of the affidavit). The submitted affidavit was technically and substantively deficient and would not have met the statutory requirements even if the district court had considered it.

This is a case in which an affidavit of expert review was required, and appellant did not strictly comply with the statutory requirements for submission. Accordingly,

dismissal with prejudice was mandatory. The district court acted well within its discretion.

Affirmed.