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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1826**

Holly Kuhne, individually, and as Trustee for the Next-of-Kin of Marc Kuhne, Decedent,
Appellant,

vs.

Allina Health System, d/b/a Abbott Northwestern Hospital,
Respondent.

**Filed June 15, 2010
Reversed and remanded
Connolly, Judge**

Hennepin County District Court
File No. 27-CV-08-29814

Wilbur W. Fluegel, Fluegel Law Office, Minneapolis, Minnesota; and

Steven D. Emmings, Sieben, Grose, Von Holtum & Carey, Ltd., Fairfax, Minnesota (for
appellant)

Kelly A. Putney, Charles E. Lundberg, Bassford Remele, P.A., Minneapolis, Minnesota
(for respondent)

Considered and decided by Schellhas, Presiding Judge; Connolly, Judge; and
Muehlberg, Judge.*

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

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant challenges the district court's dismissal of her medical-malpractice claim for failure to comply with the expert-disclosure requirements of Minn. Stat. § 145.682 (2008). Because appellant submitted expert affidavits sufficient to satisfy the statutory requirements, we reverse and remand.

FACTS

Decedent Marc Kuhne underwent a surgical revision of an anterior cervical fusion at Abbott Northwestern Hospital on September 19, 2006, which led to postoperative complications including respiratory failure and, ultimately, his death.

After surgery, decedent was taken to the post-anesthetic care unit, and he was transferred to the spine-institute floor at about 4:00 p.m. Throughout the evening, decedent received nursing care from several registered nurses and a nursing assistant. It is undisputed that, following the surgery, decedent developed a retropharyngeal hematoma. A retropharyngeal hematoma is a blood clot behind the pharynx, and it can cause trouble breathing and swallowing, and can compromise a person's airway if not timely treated. Decedent's nurses had received training to look for the possible existence of a hematoma, although none of them had previously encountered a hematoma following the type of surgery that decedent underwent. Nurses are trained to look for the following symptoms: swelling around the neck, bleeding around the incision, tracheal shift, change in vital signs, and a decrease in oxygen saturation.

Decedent reported an increase in pain at approximately 7:00 p.m. He told his nurse that he was having difficulty swallowing shortly after 7:30. He told her the same thing when she checked in on him shortly after 8:00; he also reported pain in his nose when breathing. Decedent activated his call light between 8:00 and 8:30, and he reported difficulty swallowing and breathing when the nursing assistant responded. The nursing assistant called the charge nurse, and a nurse checked in on decedent at 8:40. At that time, decedent was alert, his oxygen saturation level was normal, and his breathing did not sound constricted. However, listening to his lungs from the back indicated extra noise on exhalation, and he was coughing up phlegm. Two nurses checked on decedent at 8:50, when he again stated that he was having trouble breathing and swallowing. They observed a loose cough, but his breathing, oxygen saturation, neck, and surgical dressing all appeared normal.

A nurse paged respiratory therapy to perform a nebulizer treatment, which is indicated for lung difficulties. A respiratory therapist performed the nebulizer treatment at 9:20 p.m. Decedent stopped breathing shortly after the nebulizer treatment began, and a code blue was called at 9:23. The code team began cardiopulmonary resuscitation (CPR) and attempted to intubate decedent, but intubation was difficult because his airway was swollen; he was eventually successfully fiberoptically intubated at 9:59. A surgeon removed the hematoma, and decedent was transferred to the intensive-care unit with suspected anoxic encephalopathy. Decedent did not recover, and he died on September 25.

Individually and as trustee for decedent's next of kin, decedent's wife, appellant Holly Kuhne, sued respondent Allina Health System, doing business as Abbott Northwestern Hospital, for medical malpractice, alleging that the nursing staff's medical negligence caused her husband's death. In support of her claim, appellant submitted affidavits of expert identification from Brian McAlary, M.D., and Barbara Levin, B.S.N., R.N., O.N.C., L.N.C.C. Appellant subsequently submitted a supplemental affidavit of Dr. McAlary.

Dr. McAlary's expert affidavit stated that the nurses failed to recognize post-surgical airway compromise, which is a known complication of neck surgery. Dr. McAlary stated that decedent's symptoms indicated a problem in his throat, not his lungs. Thus, nebulizer treatment "was the wrong treatment," since it acts on the lungs by dilating the bronchial passages. Dr. McAlary also stated that the nurses breached the standard of care by ordering the nebulizer treatment themselves rather than referring the matter to a physician, who should have been the one ordering the treatment. Dr. McAlary opined that the nurses would have had "several hours to call for a doctor to intervene" if they had properly monitored decedent. The "improper assessment and ordered treatment contributed to the delay in making the proper assessment and correct diagnosis." Thus, in Dr. McAlary's opinion, failure to alert decedent's physician to the possibility of internal neck compression was a substantial contributing factor to his death.

Dr. McAlary's supplemental affidavit reiterated that decedent's symptoms indicated a problem in his throat and upper airway rather than in his lungs. Dr. McAlary asserted that the hematoma was likely expanding from when decedent entered the spine-

institute floor at 4:00 p.m., and that the nursing standard of care was breached by failure to contact a physician about decedent's symptoms. Dr. McAlary asserted that the physician "would have had a more complete assessment performed by himself, another physician, or an anesthesiologist," which likely "would have resulted in timely intubation of [decedent] in order to protect his airway in the face of breathing and swallowing difficulties." The supplemental affidavit specifically stated that earlier evaluation by a physician would have likely resulted in timely intubation. In Dr. McAlary's opinion, intervention anytime between 7:30 and 8:50 p.m. would have resulted in proper diagnosis and timely intubation. With decedent's airway secured, he would not have asphyxiated. The hematoma would have been removed, and decedent would not have suffered brain damage or premature death resulting from the asphyxiation.

In her expert affidavit, Nurse Levin stated that the nurses breached the standard of care by failing to assess decedent's condition or to alert his physician of his symptoms. She stated that decedent's symptoms indicated throat, rather than chest, problems, and that a physician rather than a nurse or respiratory therapist should have evaluated and decided whether nebulizer treatment was appropriate. Nurse Levin opined that the "improper assessment and ordered treatment contributed to the delay in making the proper assessment and correct diagnosis and implementing a plan of care."

Respondent brought a motion to dismiss and/or for summary judgment. The district court concluded that neither of appellant's experts was qualified to render expert opinion testimony on causation, and that in any event the expert affidavits failed to adequately set forth the chain of causation. Holding that appellant's affidavits were

insufficient under Minn. Stat. § 145.682, the district court dismissed appellant's medical-malpractice suit with prejudice. This appeal follows.

D E C I S I O N

This court reviews a district court's dismissal of an action pursuant to Minn. Stat. § 145.682 for an abuse of discretion. *Anderson v. Rengachary*, 608 N.W.2d 843, 846 (Minn. 2000). However, we do not defer to the district court on questions of law, which include statutory construction. *Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 190 (Minn. 1990).

In an action for medical malpractice in which expert testimony is required to establish a prima facie case, the plaintiff's attorney must submit two types of affidavits at different stages of the litigation. Minn. Stat. § 145.682, subd. 2. First, the plaintiff must serve the summons and complaint with an attorney affidavit stating that the plaintiff's attorney has reviewed the facts of the case with an expert who believes that the defendant caused the plaintiff's injury by deviating from the applicable standard of care. *Id.*, subds. 2(1), 3(a).

Second, within 180 days following commencement of the suit, the plaintiff must serve on the defendant an affidavit identifying and signed by each expert expected to be called as an expert witness at trial that sets forth "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(2), 4(a). Upon a defendant's motion, the statute calls for "mandatory dismissal with prejudice of each action as to which expert testimony is

necessary to establish a prima facie case” when the expert affidavit is deficient. *Id.*, subd. 6(c).

I. Dr. McAlary was qualified to provide testimony on the issue of causation.

A. Waiver: Failure to Raise on Appeal

As an initial matter, respondent contends that we must deem waived the issue of Dr. McAlary’s qualification because appellant’s principal brief fails to challenge this aspect of the district court’s order, and that this dooms the entire appeal. Respondent cites *In re Olson*, 648 N.W.2d 226, 228 (Minn. 2002); *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982); and *McIntire v. State*, 458 N.W.2d 714, 717 n.2 (Minn. App. 1990), *review denied* (Minn. Sept. 28, 1990), which establish and apply the general rule that an issue not argued in an appellant’s principal brief is deemed waived. Respondent overstates the import of these cases. This court “may review any other matter as the interest of justice may require.” Minn. R. Civ. App. P. 103.04. Further, the supreme court has specifically held that this court has “some discretion” to decide issues not argued in briefs. *Balder v. Haley*, 399 N.W.2d 77, 80 (Minn. 1987).

Despite the general rule that an issue not briefed in an appellant’s principal brief will be deemed waived, in this case, we opt to exercise our discretion to review the issue in the interests of justice. *See* Minn. R. Civ. App. P. 103.04; *Balder*, 399 N.W.2d at 80. This is an appeal of the district court’s order, which granted dismissal on the sufficiency of appellant’s expert affidavits. The district court ruled that (1) appellant’s experts were not qualified to testify as to causation and (2) causation was not adequately demonstrated; each ground provided an independent basis for dismissal. Appellant plainly intended to

challenge the fundamental ruling that dismissal was mandated due to insufficient expert affidavits. This is not a case of an appellant unfairly surprising a respondent by making a new and unrelated argument in a reply brief to which the respondent lacked an opportunity to respond. Indeed, respondent anticipated and briefed this issue, ably arguing on the merits that Dr. McAlary was not qualified to opine on causation. Therefore, based on the facts of this case we conclude that review is appropriate.

B. Qualification: Merits

In its order granting respondent's motion to dismiss, the district court ruled that neither of appellant's experts was qualified to provide opinion testimony on the issue of causation. Regarding Nurse Levin, the district court stated, "On the issue of causation, it is undisputed that Nurse Levin, as a registered nurse, is not qualified to render opinions." This remains undisputed. The issue on appeal is with respect to Dr. McAlary, about whom the court stated, "Dr. McAlary is not qualified to testify regarding what a surgeon would have done if presented with information regarding [decedent's] symptoms." The court reasoned that Dr. McAlary was an anesthesiologist who had assisted surgeons in medically responding to previously diagnosed hematomas, but that he lacked diagnostic experience and therefore was not qualified as an expert with respect to the link in the chain of causation concerning how decedent's surgeon would have responded if timely informed of decedent's symptoms by the nursing staff.

The supreme court has "been firm in holding that failure by the plaintiff to strictly satisfy the requirements under Minn. Stat. § 145.682, subd. 4(a) results in dismissal of the claim with prejudice." *Broehm v. Mayo Clinic Rochester*, 690 N.W.2d 721, 726 (Minn.

2005). Accordingly, the expert affidavit must be made by a witness who is qualified to give an expert opinion. *Id.* “The affidavit requirement simply cannot be met by a witness not *reasonably expected* to provide an admissible expert opinion at trial.” *Teffeteller v. Univ. of Minn.*, 645 N.W.2d 420, 427 (Minn. 2002) (emphasis added). “Expert testimony cannot be given by a witness who is not an expert—that is, someone who is not qualified or competent to give an expert opinion.” *Id.*

An expert medical 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); *see also Wall v. Fairview Hosp. & Healthcare Servs.*, 584 N.W.2d 395, 404 (Minn. 1998) (“Expert medical witnesses must have both sufficient scientific knowledge and practical experience with respect to the subject matter of the offered testimony.”). We review the district court’s determination of qualification under an abuse-of-discretion standard. *Teffeteller*, 645 N.W.2d at 427.

Here, Dr. McAlary could not have performed hematoma-removal surgery. But Dr. McAlary does have experience dealing with hematomas and similar postoperative complications. As Dr. McAlary explained in his supplemental affidavit, he is “familiar with how surgeons as well as anesthesiologists respond to post-operative bleeding in the neck in order to protect the patient’s airway and to avoid neck constriction and asphyxia,” and he has “performed intubations and assisted surgeons in addressing hematomas that develop in the throat following neck surgery.” Appellant’s theory of medical malpractice is that decedent’s death was caused by the nursing staff’s failure to alert a physician of decedent’s symptoms, and it is apparent that Dr. McAlary’s opinion is that any competent

physician, when presented with those symptoms, would have recognized the potential existence of a hematoma or compromised airway and would have ordered or performed an intubation to maintain oxygen flow. We agree that on this theory of causation, the critical step is *not* the hematoma-removal surgery, which was successfully performed following intubation, albeit too late to change the outcome because of the amount of time decedent's airway was compromised. Rather, the critical step is a physician's reaction to knowledge of decedent's symptoms, which would have entailed diagnosing and treating the compromised airway.

The district court's ruling and respondent's argument on appeal focus on Dr. McAlary's practical experience with, rather than his scientific knowledge of, the subject matter of the offered testimony. Dr. McAlary's affidavits make clear that he has practical experience dealing with hematomas, constricted airways, and intubation. Although Dr. McAlary is not a surgeon, practical experience performing surgery (i.e., surgically removing a hematoma from a patient's neck) is not implicated by either diagnosis of decedent's hematoma or intubation of decedent's airway. Accordingly, the district court abused its discretion in determining that Dr. McAlary could not be reasonably expected to provide an admissible expert opinion at trial. *See id.*

II. Dr. McAlary's affidavits adequately set forth the chain of causation.

Appellant challenges the district court's ruling that her expert's affidavits were insufficient on the issue of causation. 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*, 457 N.W.2d at 193. Section 145.682 requires expert affidavits to make “far more” than general disclosures. *Lindberg v. Health Partners, Inc.*, 599 N.W.2d 572, 578 (Minn. 1999). Expert affidavits “must provide more than a sneak preview” to satisfy the statute. *Teffeteller*, 645 N.W.2d at 430. If the affidavits contain “nothing more than broad and conclusory statements as to causation,” dismissal is mandated by subdivision 6. *Lindberg*, 599 N.W.2d at 578. The purpose of requiring substantive disclosure is to enable early dismissal of “nuisance medical malpractice lawsuits” or “frivolous cases.” *Stroud v. Hennepin County Med. Ctr.*, 556 N.W.2d 552, 555 (Minn. 1996); *Sorenson*, 457 N.W.2d at 191 (internal quotation marks omitted).

An expert affidavit must “set[] forth in detail the causal connection” between the defendant’s conduct and the injury, and it does not do so when it fails to explain how the conduct led to the injury. *Stroud*, 556 N.W.2d at 556. “The gist of expert opinion evidence as to causation is that it explains to the jury the ‘how’ and the ‘why’ the malpractice caused the injury.” *Teffeteller*, 645 N.W.2d at 429 n.4; *see also Maudsley v. Pederson*, 676 N.W.2d 8, 14 (Minn. App. 2004) (“The primary purpose of an expert affidavit is to illustrate ‘how’ and ‘why’ the alleged malpractice caused the injury.”). We have explained that simply citing a delay in diagnosis is not enough, and that stating that earlier treatment generally results in better outcomes is conclusory and insufficient to make out a prima facie case. *Maudsley*, 676 N.W.2d at 14. The supreme court has reached a similar conclusion: “To state, as was done in this case, that the expert will testify that the defendants ‘failed to properly evaluate’ and ‘failed to properly diagnose’

is not enough. These are empty conclusions which, unless shown how they follow from the facts, can mask a frivolous claim.” *Sorenson*, 457 N.W.2d at 192-93.

We do not believe that Dr. McAlary merely offered the conclusory statements that there was a delay in diagnosis and that earlier treatment often results in better outcomes. Dr. McAlary’s initial expert affidavit stated that the nurses failed to recognize post-surgical airway compromise, which is a known complication of neck surgery. Dr. McAlary stated that decedent’s symptoms indicated a problem in his throat, not his lungs. Thus, nebulizer treatment “was the wrong treatment” because it acts on the lungs by dilating the bronchial passages. Dr. McAlary also stated that the nurses breached the standard of care by ordering the nebulizer treatment themselves rather than referring the matter to a physician. With respect to causation, Dr. McAlary opined that the nurses would have had “several hours to call for a doctor to intervene” if they had properly monitored decedent. The “improper assessment and ordered treatment contributed to the delay in making the proper assessment and correct diagnosis.” Thus, failure to alert decedent’s physician to the possibility of internal neck compression was a substantial contributing factor to his death.

Dr. McAlary’s supplemental affidavit reiterated that decedent’s symptoms indicated a problem in his throat and upper airway rather than in his lungs. It asserted that the hematoma was likely expanding from when decedent entered the spine-institute floor at 4:00 p.m., and that the hematoma could have been diagnosed between 7:30 and 8:50, which would have been in time to save decedent’s life. Dr. McAlary alleged that decedent’s nurses breached the standard of care by failing to contact a physician

regarding decedent's symptoms. Upon being contacted, the physician "would have had a more complete assessment performed by himself, another physician, or an anesthesiologist," which likely "would have resulted in timely intubation of [decedent] in order to protect his airway in the face of breathing and swallowing difficulties."

Based on Dr. McAlary's affidavits, we conclude that appellant has not brought the sort of "nuisance" or "frivolous" medical-malpractice suit that section 145.682 seeks to weed out. Dr. McAlary's opinion is that (1) the nurses deviated from the applicable standard of care by failing to notify a physician in regard to decedent's symptoms; (2) any competent physician, when presented with decedent's constellation of symptoms, would have diagnosed his hematoma and compromised airway; (3) this diagnosis mandated immediate intubation; and (4) timely intubation in response to a correct diagnosis made as late as 8:50 p.m. would have maintained decedent's airway and prevented his ultimately fatal asphyxiation. We find no missing link in this chain of causation. Because Dr. McAlary's expert affidavits illustrate how the nurses' alleged malpractice caused decedent's death and adequately set forth the chain of causation, the district court abused its discretion in dismissing appellant's medical-malpractice action.

III. Appellant established a prima facie case of medical malpractice.

Appellant also contends that the district court improperly weighed conflicting evidence, and that she was only required to present affidavits establishing a prima facie case. We agree that appellant was only required to make a prima facie case at this stage in the proceedings. To establish a prima facie case, a plaintiff must "make an initial showing of all of the elements of a medical malpractice claim." *Tousignant v. St. Louis*

County, 615 N.W.2d 53, 59 (Minn. 2000). A prima facie case is established by presenting evidence sufficient to prevail in the absence of contrary evidence. *Id.* In the context of statutory dismissal, considering a defendant's rebuttal evidence is inappropriate because a prima facie case merely requires presentation of facts which, if believed, establish the elements of medical malpractice. *Id.* at 60.

Appellant cites numerous specific examples of the district court's alleged weighing of conflicting evidence. But we have already concluded that Dr. McAlary was qualified as an expert witness and that his affidavits sufficiently set forth the chain of causation and established a prima facie case of medical malpractice. Because we hold that the district court abused its discretion in dismissing appellant's lawsuit, it is unnecessary to consider whether it improperly weighed the parties' conflicting evidence, and we therefore decline to do so. *See Rodenwald v. State, Dep't of Natural Res.*, 777 N.W.2d 535, 539 (Minn. App. 2010) (finding it unnecessary to decide issues whose resolution would not affect court's decision), *review denied* (Minn. Mar. 30, 2010).

Reversed and remanded.