STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1912

Estate of David Allen Jaranson,
Appellant,

vs.

David R. Moyer, M. D., et al.,
Respondents.

Filed August 10, 2010
Affirmed
Hudson, Judge

St. Louis County District Court
File No. 69HI-CV-08-402

Richard E. Bosse, Law Offices of Richard E. Bosse, Chartered, Henning, Minnesota (for appellant)

Katherine A. McBride, James F. Roegge, Meagher & Geer, P.L.L.P., Minneapolis, Minnesota (for respondents)

Considered and decided by Hudson, Presiding Judge; Minge, Judge; and Bjorkman, Judge.

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

HUDSON, Judge

In this medical-malpractice action following former appellant-decedent's death from colon cancer, decedent's estate, substituted for decedent as appellant by order of this court, challenges the district court's denial of appellant's new-trial motion, claiming

that a new trial was warranted because: (1) appellant was surprised by the testimony of one of respondents' expert witnesses, who failed to fully disclose his theory of causation; and (2) the testimony of respondents' experts on causation was cumulative. Because the district court did not abuse its discretion, we affirm.

FACTS

In March 2004, decedent David Jaranson presented before respondent Dr. David Moyer complaining of intermittent abdominal pain. Decedent had a history of surgery to repair a double hernia, and his pain was localized in the left inguinal region. Based on decedent's symptoms and history, Dr. Moyer made a diagnosis of "[l]ikely direct hernia," and ordered a CT scan. The next day, decedent underwent a CT scan (March CT scan). The March CT scan report indicated the presence of "some small nodular densities seen within the mesentery within the left lower quadrant" that "may be related to an inflammatory process such as diverticulitis or colitis." Dr. Moyer advised decedent of the March CT scan results and prescribed antibiotics to treat diverticulitis. Dr. Moyer did not obtain a colonoscopy at that time.

In June 2004, decedent complained that his pain had returned. Dr. Moyer again prescribed medication to treat diverticulitis and noted that he would "schedule [decedent] for a colonoscopy once this clears up." Dr. Moyer's notes indicated that he and decedent planned to follow up in two to three weeks to discuss a colonoscopy. For reasons disputed by the parties, Dr. Moyer never conducted a colonoscopy.

In September 2004, decedent visited a doctor at the Mayo Clinic who gave an initial impression of cancer, but who could not rule out diverticulitis. A CT scan

(September CT scan) and a colonoscopy were ordered. The accompanying report indicated that the September CT scan showed "a very large mass" that appeared to be "a colon cancer with probable omental nodules." Decedent underwent a colonoscopy on September 28, 2004, which revealed "[i]nvasive grade 2 (of 4) adenocarcinoma" and multiple "mesenteric and omental tumor studs."

Decedent brought a medical-malpractice action alleging that, by failing to obtain a colonoscopy in March 2004, Dr. Moyer's actions fell below the applicable standard of care. Decedent alleged that, in March 2004, he had stage III colon cancer and that because no colonoscopy was ordered, his cancer was not diagnosed until September 2004, at which point it had progressed to stage IV. Respondents argued that Dr. Moyer initially recommended a colonoscopy and that appellant's cancer had already advanced to stage IV in March 2004.

At trial, respondents called two expert witnesses: Dr. Patrick Flynn, a hematologist and oncologist, and Dr. Paul Severson, a surgeon with a practice emphasis on colonoscopies. Approximately four months before trial commenced, respondents disclosed the experts and the substance of their opinions to decedent. Respondents disclosed that

> Dr. Flynn will testify that based upon the [decedent's] records and, in particular, the comparison of the September 27 CT scan with the March 17 CT scan, the nodular abnormalities separate from the colon evident on the March CT and later proven to be metastatic cancer following the September CT were present on the March 17 CT Study. This was not an early stage III carcinoma in March 2004. It was already a stage IV colon cancer in March based upon the

> progression of nodular abnormality as revealed by comparison of the two CT studies.
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> . . . .
>
> In sum, with retrospective comparison of the CT scans of March and September 2004, the areas of nodular abnormality that were later proven to be metastatic cancer were already present in March.

Significant to this appeal, Dr. Flynn did not use the word "omentum" in his expert disclosure.[1] Respondents also disclosed that

> Dr. Severson holds the opinion that the care, treatment and recommendations of Dr. Moyer were reasonable and in conformance with accepted standards of care for physicians under such circumstances. Dr. Severson also holds the opinion that the [decedent's] ultimate prognosis was not affected by the timing of the diagnosis made in September 2004.
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> . . . .
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> [Dr. Severson will testify that decedent] refused colonoscopy. If the patient had agreed to colonoscopy, which was recommended in March and again in June, the treatment would have been the same as ultimately performed in September 2004 and the patient's prognosis would have been no different for this stage IV colon cancer.

Respondents disclosed their intent generally to use diagnostic film studies of the CT scans approximately one month before trial. On the Friday before trial began, respondents' trial counsel sent decedent's trial counsel two images from each of the scans

[1] The "omentum" is a double fold of the peritoneum (the membrane forming the wall of the abdomen) attached to the stomach and connecting it with certain abdominal viscera. *Taber's Cyclopedic Medical Dictionary* 1250, 1369 (16th ed. 1989). During his testimony, Dr. Flynn described the omentum—where these nodules were seen on the scans—as a free-floating organ that is separate from the colon and sits like an apron overlaying the abdomen.

that respondents intended to introduce as exhibits. The exhibits showed side-by-side comparisons of the March CT scan and September CT scan with arrows pointing to masses on the images and the words "[o]mental soft tissue nodules" and "[o]mental and mesenteric soft tissue nodules" above the arrows.

The substance of the experts' opinions was also discussed during opening statements, during which respondents' counsel commented:

> [W]hat we see in September as nodular omental tissue . . . we'll see those same abnormal nodules [in March]. . . . [I]n this case, the metastasis had advanced beyond lymph nodes and was also in these omental nodes, or nodules rather, as well. And that's the subject that Dr. Flynn will address.

Dr. Flynn testified to a number of things about the "masses," including: (1) that both CT scans showed that there were nodules in decedent's omentum; (2) that "nodule" "is a term for a mass"; and (3) that the nodules in decedent's omentum are not normally seen in the human body and are different from lymph nodes. Dr. Flynn testified that the omentum is "distinctly separate from" the mesenteric lymph nodes. He opined that decedent had metastatic disease to the omentum in March 2004, meaning that he already had stage IV cancer when the March CT scan was performed. Dr. Flynn explained that his opinion was based on the fact that the nodules could be seen in both the March CT scan and the September CT scan and were located in the same area that was biopsied and determined to be cancerous.

Dr. Severson testified as to the applicable standard of care and causation. He testified that Dr. Moyer's management of decedent's symptoms met the standard of care. He also testified that the alleged failure to order a colonoscopy in March was not causally

related to the progression of the cancer to stage IV. He based his opinion on the fact that decedent suffered from mucinous carcinoma, an aggressive form of cancer that "spreads earlier and more quickly." Dr. Severson noted that, rather than presenting as a hard mass that spreads first to the liver and then to other distant organs through the bloodstream, the pattern of spread for a mucinous cancer is along the lining of the abdomen and is most commonly picked up by the omentum.

Decedent moved to exclude Dr. Severson's testimony because it was not supported by generally accepted scientific principles and evidence, it did not have foundational relevancy, and it was cumulative to Dr. Flynn's testimony. The district court admitted Dr. Severson's testimony, except that portion of testimony stating that decedent's report of pain indicated stage IV colon cancer.

Decedent's expert witness, Dr. Barry Singer, also testified as to negligence, malpractice, and the standard of care. Dr. Singer commented on Dr. Flynn's opinion that the March CT scan showed "nodular abnormalities separate from the colon." Dr. Singer testified that he could "not know that these nodes at all contained cancer," and that, if they did, he believed "that the patient would not have survived six months without treatment." Decedent's trial counsel attempted to show Dr. Singer the CT scan exhibits relied upon by Dr. Flynn, but could not find them and decided to proceed without having Dr. Singer examine them, stating: "You don't have it with you? That's fine. It's not important."

The jury returned a special verdict finding that both decedent and Dr. Moyer were negligent, but that their negligence was not a direct cause of decedent's injury. Decedent

moved for a new trial, arguing that respondents' disclosure was misleading and deceiving because the disclosure did not fully or adequately disclose Dr. Flynn's theory of causation and that the district court erred in admitting cumulative testimony from Dr. Flynn and Dr. Severson relating to causation. In an affidavit attached to the motion, Dr. Singer stated that he understood the word "nodular" in Dr. Flynn's disclosure to reference lymph nodes, that he could have rebutted Dr. Flynn's testimony had he known otherwise, and that he was unable to evaluate the exhibits that Dr. Flynn used. The district court denied the new-trial motion. The district court found that Dr. Flynn's disclosure was proper and that his testimony was encompassed by his disclosure. Furthermore, the district court found that, under *Gunderson v. Olson*, 399 N.W.2d 166, 168 (Minn. App. 1987), *review denied* (Minn. Mar. 18, 1987), there was a sufficient basis to deny the new-trial motion because decedent made no objection, no claim of surprise, and did not request a continuance at the time the challenged evidence was offered. The district court also found that Dr. Flynn's and Dr. Severson's testimony was not cumulative because each doctor had a different basis for their opinion that appellant had stage IV cancer in March 2004. This appeal followed. During the pendency of this appeal, decedent died and his estate was substituted as the appellant in this case.

D E C I S I O N

The district court has broad discretion over whether to grant a new trial. *State Farm Fire & Cas. Co. v. Short*, 448 N.W.2d 560, 563 (Minn. App. 1990), *aff'd*, 459 N.W.2d 111 (Minn. 1990). The district court's decision not to grant a new trial "will not be disturbed on appeal absent a clear abuse of discretion." *Id.* On appeal from the denial

of a new-trial motion, the jury's "verdict must stand unless it is manifestly and palpably contrary to the evidence, viewed in a light most favorable to the verdict." *ZumBerge v. N. States Power Co.*, 481 N.W.2d 103, 110 (Minn. App. 1992), *review denied* (Minn. Apr. 29, 1992).

The district court has wide discretion to make evidentiary rulings. *Yamry-Smoley v. Zehrer*, 432 N.W.2d 480, 483 (Minn. App. 1988), *review granted* (Minn. Jan. 31, 1989) *and appeal dismissed* (Minn. Apr. 10, 1989). To constitute reversible error, an evidentiary ruling must be prejudicial. *Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (Minn. 1975). A district court should grant a new trial "only if there is a strong probability that it will render a different result." *Gunderson*, 399 N.W.2d at 168.

I

Appellant argues that a new trial is warranted based on unfair surprise because respondents did not adequately disclose Dr. Flynn's theory of causation. Specifically, appellant alleges that the disclosure did not explain that the "nodular abnormalities" were not lymph nodes, or that they were contained in the omentum, which was the basis for Dr. Flynn's opinion that appellant had stage IV cancer in March 2004. Appellant argues that the inadequacy of the disclosure prevented Dr. Singer from offering rebuttal testimony as to Dr. Flynn's theory of causation. "Whether to grant a new trial based on a claim of surprise is 'largely within the discretion of the [district] court and will rarely be reversed on appeal.'" *Id.* (quoting *Sward v. Nash*, 230 Minn. 100, 109, 40 N.W.2d 828, 833 (1950)). Where there is no objection when the evidence is offered, no claim of

surprise during trial, and no request for a continuance, a district court is "well within [its] discretion to deny a motion for a new trial." *Id.* A new trial may be granted based on "surprise which could not have been prevented by ordinary prudence." Minn. R. Civ. P. 59.01(c).

A party may require the disclosure of expert witnesses intended to be called at trial. Minn. R. Civ. P. 26.02(e). When served with interrogatories, a party must "state the subject matter on which the expert is expected to testify, and . . . state 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.*

Dr. Flynn's expert disclosure refers to "nodular abnormalities separate from the colon." Decedent's trial counsel and Dr. Singer understood this to mean lymph nodes, rather than the small masses that Dr. Flynn pointed out during his testimony. But the disclosure does not state that the nodules referenced are lymph nodes. A "nodule" is defined as "[a] small mass of tissue or aggregation of cells." *The American Heritage Dictionary of the English Language* 1227 (3d ed. 1992); *see also Stedman's Medical Dictionary* 1056–59 (25th ed. 1990) (defining "nodule" as "[a] small node" and a "node" as "[a] circumscribed mass of differentiated tissue" and listing 33 types of named nodules, and more than 100 types of nodes, including many varieties of lymph nodes); *Taber's Cyclopedic Medical Dictionary* 1218–19 (16th ed. 1989) (defining "nodule" as "[a] small node" or "[a] small aggregation of cells" and listing 21 types of nodules found in the human body, including lymph nodes and lymphatic nodes). Thus, a lymph node is a particular type of node or nodule, but not all nodes, nodules, or nodular abnormalities

are lymph nodes. Decedent's trial counsel and Dr. Singer apparently mistakenly believed that the disclosure was referencing lymph nodes. As the district court noted, "such an unfounded assumption cannot form the basis of a claim of surprise." Furthermore, the report accompanying the March CT scan points out "small nodular densities seen within the mesentery." A report relating to the September CT scan also indicates the existence of "omental nodules." By using the same language found in both CT scan reports, the disclosure further clarifies Dr. Flynn's testimony as to the meaning of the term "nodule" and illustrates that the term is not an explicit reference to lymph nodes.

Dr. Flynn's disclosure states that the nodular abnormalities are "separate from the colon," but does not specifically state that the nodules are in the omentum. Appellant argues that the disclosure should have been more specific and stated explicitly that Dr. Flynn would be testifying about masses in the omentum. But, as the district court noted, the area "separate from the colon" includes the omentum. Moreover, the basis for Dr. Flynn's opinion was not that decedent presented with stage IV cancer in March because the nodules were found in the omentum specifically, but rather that the cancer was at stage IV because it had progressed out of the colon. Dr. Flynn's exhibits, which were also received, pointed to "[o]mental and mesenteric soft tissue nodules" and "[o]mental soft tissue nodules" present in both the March and September CT scans. As the district court noted, "Dr. Flynn's disclosure was not contrary to his testimony, his disclosure encompassed his testimony, albeit in not as much detail."

In any case, appellant must show that the claimed surprise could not have been prevented by ordinary prudence. *See* Minn. R. Civ. P. 59.01(c). Appellant fails to meet

this burden. Even if the expert witnesses here could not be deposed before trial, nothing in the rules prevented a request for clarification of the expert witness disclosures. *See* Minn. R. Civ. P. 26.02(e). No clarification was requested. Prior to trial, decedent received the exhibits that Dr. Flynn used during his testimony. Those exhibits, which were also listed on the exhibit list, clearly indicated that Dr. Flynn would reference "[o]mental and mesenteric soft tissue nodules," and "[o]mental soft tissue nodules" in connection with the March CT scan. This shows that decedent was on notice that Dr. Flynn would testify about nodules in the omentum. Respondents' counsel also outlined Dr. Flynn's theory of causation in his opening statement. Thus, decedent was made aware of Dr. Flynn's causation theory and had multiple opportunities to prevent the alleged surprise by ordinary prudence. Importantly, as the district court noted, decedent did not object at any time to Dr. Flynn's alleged surprise testimony, did not claim surprise during trial, and did not request a continuance. Under *Gunderson*, this alone is a sufficient basis to deny a new-trial motion. 399 N.W.2d at 168.

II

Appellant also argues that a new trial should be granted because the district court admitted cumulative expert testimony. When the admission of improper evidence has deprived the losing party of a fair trial, the district court may appropriately grant a new trial. *Glood v. Gundlach*, 303 Minn. 447, 448, 228 N.W.2d 566, 567 (1975). "Evidentiary rulings on . . . the cumulative nature of testimony are within the [district] court's discretion and will not be reversed absent a clear showing of abuse." *Molkenbur v. Hart*, 411 N.W.2d 249, 253 (Minn. App. 1987), *review denied* (Minn. Oct. 30, 1987).

This court has stated that "[a] new trial will not generally be granted on the basis of evidence that is merely contradictory, impeaching, or cumulative." *Dostal v. Curran*, 679 N.W.2d 192, 194 (Minn. App. 2004), *review denied* (Minn. July 20, 2004); *see also Disch v. Helary, Inc.*, 382 N.W.2d 916, 918 (Minn. App. 1986) (stating same), *review denied* (Minn. Apr. 24, 1986).

Here, the district court considered the testimony provided by Dr. Flynn and Dr. Severson and determined that their testimony was not cumulative. The district court so held because Dr. Severson testified that Dr. Moyer conformed to the standard of care while Dr. Flynn did not address that issue; and because Dr. Severson and Dr. Flynn had different reasons and approaches for their opinions that decedent presented with stage IV colon cancer in March 2004. The district court stated that, as opposed to Dr. Flynn's testimony about the presence of nodular abnormalities on the March CT scan, "[Dr. Severson's] opinion that [decedent] had Stage IV cancer in March of 2004 was based on his conclusion that [decedent] had a type of cancer, mucinous, that by its very nature spreads beyond the colon."

After careful review of the record, we agree that the testimony of Dr. Flynn and Dr. Severson was not cumulative. Therefore, the district court did not abuse its discretion by admitting the testimony of both experts.

Affirmed.