STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2320

C. C.,
Appellant,

vs.

Fairview Health Services, et al.,
Respondents.

Filed August 3, 2010
Affirmed
Kalitowski, Judge

Hennepin County District Court
File No. 27-CV-08-12857

Mark R. Anfinson, Minneapolis, Minnesota (for appellant)

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

Considered and decided by Wright, Presiding Judge; Kalitowski, Judge; and Shumaker, Judge.

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

KALITOWSKI, Judge

Appellant C.C. challenges the district court's grant of summary judgment to respondents Fairview Health Services, et al., arguing that (1) the district court erred by concluding that her claim that respondents were negligent in allowing another patient to sexually assault her in their psychiatric care facility is subject to the requirements of the

medical-malpractice statute, and (2) the district court erred by concluding that appellant's sexual assault was not foreseeable. We affirm.

D E C I S I O N

On review of a grant of summary judgment, we determine "whether there are any genuine issues of material fact and whether the district court erred in its application of the law." *City of Morris v. Sax Invs., Inc.*, 749 N.W.2d 1, 5 (Minn. 2008) (quotation omitted). A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the party against whom summary judgment was granted. *Frieler v. Carlson Mktg. Group, Inc.*, 751 N.W.2d 558, 564 (Minn. 2008). We review application of the law de novo. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002).

I.

In May 2006, appellant was voluntarily admitted to respondent Fairview's Station 30 for depression and suicidal thoughts. Station 30 is a locked behavioral-health unit housing higher-functioning mood-disordered patients. Appellant alleged that while in respondents' care, she was sexually assaulted by P.W., another patient at Station 30. Although the police investigated the incident, criminal charges were not filed against P.W.

The medical-malpractice statute, Minn. Stat. § 145.682, subd. 2 (2008), provides that "[i]n 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,

among other requirements, serve on the defendant an affidavit of expert review. *See* Minn. Stat. § 145.682, subd. 3 (2008) (setting forth requirements for affidavit of expert review).

The district court determined that appellant's case came under this statute because the "appropriate level of security required for a behavioral unit ultimately depends on an assessment of the patients' medical or psychiatric states and the patients' potential to harm or be harmed. . . . [T]hese determinations require medical expertise in the diagnosis, monitoring, and treatment of mood-disordered individuals. . . ." The district court concluded that appellant failed to fulfill the statute's expert-affidavit requirement.

Appellant argues that the malpractice statute does not apply because this case involves the safety and security of patients and not actual medical treatment, and thus sounds in ordinary negligence, not medical negligence. We disagree.

This court will not reverse a dismissal for failure to comply with the requirements of section 145.682 absent a showing that the district court abused its discretion. *See Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 190 (Minn. 1990). But construing the requirements of section 145.682 requires statutory interpretation, a question of law that this court reviews de novo. *Tousignant v. St. Louis County*, 615 N.W.2d 53, 58 (Minn. 2000). Section 145.682, subdivision 2, "specifically limits its application to those medical malpractice actions as to which expert testimony is necessary to establish a prima facie case." *Id.* (quotation omitted). Thus, the threshold question is whether a claim requires expert testimony to establish a prima facie case. *Id.*

Expert testimony is generally required to establish the standard of care and the departure from that standard for the conduct of medical staff. *Id.* This is because medical-malpractice claims usually involve complex issues of science or technology. *Id.* "The purpose of expert testimony is to interpret the facts and connect the facts to conduct which constitutes [medical] malpractice and causation." *Sorenson*, 457 N.W.2d at 192.

A medical-malpractice action "typically involve[s] negligent conduct that is connected to a person's professional licensure." *Paulos v. Johnson*, 597 N.W.2d 316, 320 (Minn. App. 1999), *review denied* (Minn. Sept. 28, 1999). "Thus, an action involving medical negligence that necessarily flows from a therapeutic relationship, rather than administrative or policymaking functions," is considered to be within medical-malpractice laws. *Id.* In *Kaiser v. Memorial Blood Ctr.*, negligent acts by a blood bank's physician-employees did not constitute medical malpractice, even though they were committed by physicians, because the physician-employees were not performing functions requiring a professional license. 486 N.W.2d 762, 767 (Minn. 1992). As the court noted, a distinction exists "between malpractice by professionals acting pursuant to their professional licensure [and] negligence based upon conduct for which a professional license is not required." *Id.* The court determined that decisions about "standards for the selection of donors and the screening of collected blood" implicated the administrative functions of the blood bank industry for which a professional license was not required. *Kaiser*, 486 N.W.2d at 767-68.

Minnesota courts have applied the *Kaiser* analysis in other cases. *See Henderson v. Allina Health Sys.*, 609 N.W.2d 7, 9 (Minn. App. 2000) (concluding that hospital

employee's decision not to raise patient's bed rails required a medical judgment and thus amounted to medical malpractice rather than ordinary negligence), *review denied* (Minn. June 13, 2000); *D.A.B. v. Brown*, 570 N.W.2d 168, 171 (Minn. App. 1997) (determining that claim that physician breached fiduciary duty by taking kickbacks from drug companies for prescribing certain drugs was medical-malpractice claim because scheme was "dependent on the medical diagnosis, treatment, and care of the patients"); *Blatz v. Allina Health Sys.*, 622 N.W.2d 376, 385 (Minn. App. 2001) (concluding that when paramedics perform functions such as using an address to locate a home when responding to an emergency, professional judgment is not implicated and thus ordinary negligence principles apply).

These cases applying *Kaiser* guide our analysis here regarding whether appellant's challenge to the security decisions of respondents bring appellant's claims under the umbrella of medical malpractice or ordinary negligence. We conclude that, like the decision not to raise bed rails in *Henderson*, respondents' decisions regarding patient admission, monitoring, supervision, and security implicate medical judgment. And like the prescription decisions in *D.A.B.*, these decisions depend on the medical diagnosis and treatment of patients. But unlike the act of locating an address in *Blatz*, the acts of monitoring and securing patient safety involve professional judgment. Thus, under the line of precedent applying *Kaiser*, the security and monitoring decisions that Fairview made in this case implicate medical and professional judgment and come under the purview of medical malpractice and error as those terms are used in Minn. Stat. § 145.682.

In addition, the reasoning in *Kanter v. Metro. Med. Ctr.*, 384 N.W.2d 914 (Minn. App. 1986), supports our conclusion. In *Kanter*, a psychiatric-ward patient drowned in a bathtub while left unattended. 384 N.W.2d at 915. The *Kanter* court reasoned that in a "psychiatric ward the potential tendencies of patients suffering from mental illness are not so easily determined by one without special training and knowledge . . . . Jury guesswork is to be discouraged if the use of expert testimony can assist the jury in determining these essential facts." *Id.* at 916. Although Minn. Stat. § 145.682 was not in effect at the time *Kanter* was decided, it is instructive on the threshold issue of whether expert testimony is needed in cases involving psychiatric patients.

Like this case, *Kanter* involved claims of negligent supervision and monitoring. Furthermore, *Kanter* relied on the reasoning that determinations about the level of care required for psychiatric patients are medical judgments. This case involves similar considerations. Here, without expert testimony, the jury would likely have to guess at the appropriate levels of monitoring and security needed for patients at Station 30. Appellant attempts to distinguish this case from *Kanter* by asserting that *Kanter* focused on the "nature of the patient's mental illness," and the patient's "potential tendencies." *See* 384 N.W.2d at 916. But P.W. was also a patient at Station 30, and appellant asserts that respondents were negligent in protecting her from him. Decisions regarding the admission of patients and the security and monitoring necessary to protect psychiatric patients from one another necessarily implicate the nature of the patients' mental illness and their potential tendencies. We reject appellant's attempts to distinguish *Kanter*, and conclude that it was appropriate for the district court to apply Minn. Stat. § 145.682 here.

Both appellant and respondents cite numerous cases from other jurisdictions that address the issue of whether third-party conduct that occurs in a healthcare setting falls within the purview of medical-negligence or medical-malpractice statutes. But because we conclude that under Minnesota precedent, appellant's claim that respondents were negligent in the admission, monitoring, and security of patients in a psychiatric unit falls under the medical-negligence statute, we need not address cases from other jurisdictions.

***Tousignant* Exception to Minn. Stat. § 145.682**

It is undisputed that appellant has not fulfilled the expert-affidavit requirement of section 145.682. But appellant further argues that if Minn. Stat. § 145.682 applies, her case falls under a limited exception to the affidavit requirement set forth in *Tousignant*. In *Tousignant*, the supreme court determined that when "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." 615 N.W.2d at 58 (quotation omitted).

Appellant argues that her claim falls within the *Tousignant* exception to the expert-review requirement. But as discussed above, appellant has failed to show that respondents' decisions regarding patient admission, monitoring, and supervision are administrative or routine in nature. *See Broehm v. Mayo Clinic Rochester*, 690 N.W.2d 721, 728 (Minn. 2005) (providing that the *Tousignant* exception may apply to claims involving nonmedical, administrative, or custodial judgment). And appellant has not shown that the care and supervision of psychiatric patients is within the general

knowledge of lay persons. Thus, we conclude that the *Tousignant* exception does not apply.

II.

Because we conclude that appellant's claim is one for medical negligence and because appellant failed to provide an affidavit of expert review or satisfy the exception to the expert-affidavit requirement, we need not reach the issue of whether her assault was foreseeable.

Affirmed.