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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1465**

Lisa Haag, as Trustee for the Heirs and Next of Kin
of Mark W. Malherek, Deceased
and the Estate of Mark W. Malherek,
Appellant,

vs.

Fairview Health Services d/b/a Fairview Ridges Hospital, et al.,
Respondents,

Joseph Borer, M. D.,
Respondent.

**Filed June 16, 2009
Affirmed
Shumaker, Judge**

Dakota County District Court
File No. 19-CX-08-007097

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Considered and decided by Shumaker, Presiding Judge; Johnson, Judge; and Collins, Judge.*

UNPUBLISHED OPINION

SHUMAKER, Judge

Appellant challenges the dismissal of her medical-malpractice action for failure to comply with the expert-affidavit requirements, arguing that (1) respondents, an emergency-department doctor and a hospital, failed to timely file their motions to dismiss and failed to provide adequate notice of the alleged deficiencies in her expert disclosures, and (2) the district court erred by concluding that her disclosures, through answers to interrogatories and a supplemental affidavit, did not satisfy the requirements of Minn. Stat. § 145.682 (2008). Because the district court did not abuse its discretion, we affirm.

FACTS

On October 11, 2004, Mark W. Malherek went to the emergency department at Fairview Ridges Hospital with impaired respiratory function, weakness, inability to swallow, and dehydration secondary to swallowing dysfunction associated with myasthenia gravis. Myasthenia gravis is a disease characterized by chronic, progressive muscular weakness, which typically begins in the face and throat, and is the result of a defect in muscle and nerve conduct. *Stedman's Medical Dictionary* 1009 (25th ed. 1990). Malherek had been diagnosed with myasthenia gravis in October 2002, and his condition was resistant to treatment.

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

When Malherek arrived at the emergency department, respondent Dr. Joseph Borer, M.D., treated him and then admitted him to Fairview Ridges Hospital for further treatment. Upon admission to the hospital, another attending physician accepted responsibility for Malherek's care.

On October 14, 2004, three days after being admitted to the hospital, Malherek died of respiratory failure associated with a mucous plug in his right mainstem bronchus—a division of the trachea leading to the lungs—and pneumonia.

In October 2007, appellant Lisa Haag, acting as trustee for the heirs and next of kin of Malherek and the estate of Malherek, brought a medical-malpractice claim against respondents Dr. Borer and Fairview Health Services, d/b/a Fairview Ridges Hospital ("Fairview"). Haag alleged that, during the course of Malherek's treatment, Malherek's healthcare providers negligently failed to intubate Malherek upon his admission to the emergency department or anytime thereafter until Malherek himself requested intubation, and they thereby breached the standard of care and caused Malherek's death.

With her complaint, Haag submitted an "affidavit of expert review," signed by her attorney, as required by Minn. Stat. § 145.682, subd. 3. Later, she also answered interrogatories from both Dr. Borer and Fairview, under Minn. Stat. § 145.682, subd. 4.

In her answers to interrogatories, Haag identified Dr. James F. Howard Jr. as the expert she intended to call as a witness at trial. Dr. Howard is a professor of neurology and medicine. The interrogatory answers claim that Dr. Borer and the nursing staff were negligent in "the failure to intubate upon admission to ER and the failure to meet

accepted nursing standards regarding documentation of care.” More particularly, the interrogatory answers explain that Dr. Howard would testify that:

b. [Malherek] had severe generalized myasthenia gravis that was resistant to treatment and who developed progressive respiratory embarrassment leading to a pneumonia and the subsequent development of a mainstem bronchus mucous plug, which appears to be a major contributor to his death. The patient should have been intubated upon admission when he could not swallow, had difficulty speaking and had respiratory difficulty. In doing so, the myasthenic patient is placed in the safest situation possible, the airway is protected and ventilation is assured.

c. Intubating upon admission is standard for the myasthenic patient. By intubating he would have been placed in the safest situation possible, as the airway is protected and ventilation is assured. In addition, intubation would have facilitated more effective treatment of the right mainstem bronchus mucous plug which was a major contributor to [Malherek’s] death.

Both Dr. Borer and Fairview moved for dismissal of Haag’s claims, claiming that she had failed to satisfy the expert-disclosure requirements set forth in Minn. Stat. § 145.682, subd. 4. In response, Haag submitted a supplemental affidavit, in which, Dr. Howard opined:

7. [T]here is no question that the failure to intubate was causally linked to Mr. Malherek’s death. As I have stated, intubating upon admission is standard for the myasthenic patient with severe bulbar or respiratory compromise. By intubating he would have been placed in the safest situation possible, as the airway is protected and ventilation is assured, and intubation would have facilitated more effective treatment of the right mainstem bronchus mucous plug which was a major contributor to [Malherek’s] death. In essence, the breach of the standard of care in this case is systemic in that the health care providers subsequent to Dr. Borer simply followed his lead in failing to intubate, which ultimately led

to Mr. Malherek's death; thus, the negligence continued unabated and the causal link between the initial negligence and his death is established.

8. In my opinion health care providers will follow the decisions or diagnoses of individual providers that immediately precede them in the process of providing care, unless there is a material change in the condition of the patient. Thus, in this case, the providers subsequent to Dr. Borer adopted his decision not to intubate until there was a material change in his condition, at which point it was too late. I do not find fault in individual decisions not to intubate after Dr. Borer's initial decision as this is standard practice in the medical profession. Because that initial decision was not contradicted, however, the standard of care was systemically breached and the failure to intubate was causally linked to Mr. Malherek's death.

After a hearing, the district court concluded that Haag's disclosures had sufficiently identified a standard of care and breach of that standard as to Dr. Borer, but not as to Fairview, but had failed to outline a chain of causation as to either. Accordingly, the district court concluded that Haag had not complied with Minn. Stat. § 145.682 and dismissed with prejudice the claims against Dr. Borer and Fairview. This appeal followed.

D E C I S I O N

When a medical-malpractice action requires expert testimony to establish a prima facie case, the plaintiff must produce an affidavit identifying each expert whom the plaintiff expects to call at trial "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, subs. 2, 4(a).

The plaintiff must serve an initial affidavit with the summons and complaint. Minn. Stat. § 145.682, subd. 2. This affidavit must indicate that the plaintiff's attorney has reviewed the facts of the case with an expert, that there is a reasonable expectation that the expert's opinions could be admissible at trial, and that, in the expert's opinion, the defendant deviated from the applicable standard of care and by that deviation caused injury to the plaintiff. Minn. Stat. § 145.682, subd. 3(a).

The plaintiff must serve a second affidavit within 180 days after the lawsuit begins. Minn. Stat. § 145.682, subd. 2. The second affidavit

must be signed by each expert listed in the affidavit and by the plaintiff's attorney and state 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). In lieu of an affidavit, the plaintiff may also submit "[a]nswers to interrogatories that state [this] information," as long as the interrogatory answers "are signed by the plaintiff's attorney and by each expert listed in the answers" and are served upon the defendant within 180 days after the lawsuit is started. *Id.*

Minn. Stat. § 145.682 is unambiguous, and plaintiffs must strictly comply with its disclosure requirements. *Lindberg v. Health Partners, Inc.*, 599 N.W.2d 572, 576-77 (Minn. 1999). Noncompliance results in "mandatory dismissal with prejudice of each action as to which expert testimony is necessary to establish a prima facie case." Minn. Stat. § 145.682, subd. 6(c). We review a dismissal under Minn. Stat. § 145.682 for an

abuse of discretion. *Broehm v. Mayo Clinic Rochester*, 690 N.W.2d 721, 725 (Minn. 2005).

I

On appeal, Haag challenges the district court's dismissal of her medical-malpractice claims for failure to comply with Minn. Stat. § 145.682, arguing, first, that neither of the respondents' motions to dismiss was timely or provided adequate notice of the alleged deficiencies in her expert disclosure, and that the court erred in concluding that she had not satisfied the requirements of Minn. Stat. § 145.682, subd. 4. We begin by addressing Haag's arguments relating to Dr. Borer.

A. *Timing of and Notice provided by Dr. Borer's Motion to Dismiss*

Haag first challenges the dismissal of her claim against Dr. Borer on procedural grounds, arguing that the district court abused its discretion by dismissing her claims against Dr. Borer. A district court may dismiss with prejudice a medical-malpractice claim if the plaintiff fails to comply with the requirements of section 145.682, subdivision 4, when

(1) the motion to dismiss the action identifies the claimed deficiencies in the affidavit or answers to interrogatories;

(2) the time for hearing the motion is at least 45 days from the date of service of the motion; and

(3) before the hearing on the motion, the plaintiff does not serve upon the defendant an amended affidavit or answers to interrogatories that correct the claimed deficiencies.

Minn. Stat. § 145.682, subd. 6(c). This provision, sometimes referred to as a safe-harbor provision, was added by the Minnesota Legislature in 2002, 2002 Minn. Laws ch. 403,

§ 1, because the legislature feared “that meritorious medical malpractice claims were being dismissed where the expert disclosure affidavit was only missing some technical information that could be corrected,” *Brown-Wilbert, Inc. v. Copeland Buhl & Co.*, 732 N.W.2d 209, 217 (Minn. 2007). The provision is meant to “allow[] a 45-day time period for the plaintiff to cure the deficiencies before dismissal with prejudice is mandatory.” *Broehm*, 690 N.W.2d at 725 n.1.

The statute requires service of the motion at least 45 days before the hearing. Minn. Stat. § 145.682, subd. 6(c)(2). Here, Dr. Borer undisputedly served his motion 45 days before the hearing. Haag argues, however, that the motion was untimely because Dr. Borer did not serve the supporting memorandum until May 7, 2008, or 29 days before the June 5 hearing. Haag has identified no authority indicating that Minn. Stat. § 145.682, subd. 6(c), requires service of both the motion and supporting memorandum 45 days before the hearing. The plain language of the statute only requires service of the motion.

Haag also argues that Dr. Borer’s motion did not provide sufficient notice of any deficiencies in her expert disclosure. But Dr. Borer’s motion claims that Dr. Howard’s opinion was deficient because Dr. Howard was not qualified to give an opinion on the standard of care required by an emergency-department physician, and because his opinion did not identify a medical standard of care that Dr. Borer failed to adhere to nor did it provide a chain of causation linking Dr. Borer’s acts or omissions to Malherek’s death. Haag has identified no authority requiring the motion to contain any more detail than a precise statement of the nature of the alleged deficiency, as this motion did. The

statute requires merely that the motion to dismiss *identify* the claimed deficiencies, and Dr. Borer's motion provides this identification. The notice required by Minn. Stat. § 145.682, subd. 6, is analogous to notice pleading in that all that the statute requires is notice; development of factual details and legal arguments may follow. The purpose of the notice requirement is to ensure that a plaintiff receives notice of the alleged deficiencies at least 45 days before the hearing, so that, under the safe-harbor provision, there will be an opportunity to correct those deficiencies. Here, Haag received such notice and had that opportunity.

Because Dr. Borer's motion to dismiss was timely and because Dr. Borer's motion sufficiently identified the deficiencies in Haag's expert disclosure, the district court did not abuse its discretion by considering the merits of Dr. Borer's motion to dismiss.

B. *Merits of Dr. Borer's Motion to Dismiss*

We turn next to the district court's conclusion that Haag failed to satisfy the requirements of Minn. Stat. § 145.682, as to her claims against Dr. Borer.

The purpose of Minn. Stat. § 145.682 is to “readily identify[] meritless lawsuits at an early stage of the litigation.” *Broehm*, 690 N.W.2d at 725. This is accomplished by requiring, in accordance with Minn. Stat. § 145.682 and caselaw, that the plaintiff allege facts, which, in reasonable detail, establish a prima facie case.

The statute requires that the second affidavit or, alternatively, the answers to interrogatories, provide “the substance of the [expert's] facts and opinions” along with “a summary of the grounds for each opinion.” Minn. Stat. § 145.682, subd. 4(a). In other words, the affidavit or interrogatory answers must set forth specific details concerning the

expert's expected testimony, including the applicable standard of care; identify the acts or omissions that violated the standard of care; and provide an outline of the chain of causation between the violation of the standard of care and the claimed damage to the plaintiff. *Teffeteller v. Univ. of Minn.*, 645 N.W.2d 420, 428 (Minn. 2002).

General or conclusory statements regarding either the applicable standard of care or the causative chain linking its breach to the injury will not be deemed sufficiently detailed to meet the statute's requirements. *See Lindberg*, 599 N.W.2d at 578 (indicating that a general statement about familiarity with the proper standard of care is insufficient); *Stroud v. Hennepin County Med. Ctr.*, 556 N.W.2d 552, 556 (Minn. 1996) (stating that broad and conclusory statements regarding causation do not satisfy the statute). Affidavits providing simply a "sneak preview" or "general disclosure" of an expert's testimony are inadequate. *Teffeteller*, 645 N.W.2d at 430. Instead, an expert affidavit must "interpret the facts and connect the facts to conduct which constitutes malpractice and causation." *Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 192 (Minn. 1990); *see also Maudsley v. Pederson*, 676 N.W.2d 8, 14 (Minn. App. 2004) (requiring the affidavit to "illustrate 'how' and 'why' the alleged malpractice caused the injury" (citing *Teffeteller*, 645 N.W.2d at 429 n.4)).

In other cases, Minnesota courts have concluded that, for the purposes of Minn. Stat. § 145.682, the following statements did not sufficiently outline causation: (1) "the departure from the standard of care was a direct cause of [plaintiff's] second degree burns," *Mercer v. Andersen*, 715 N.W.2d 114, 123 (Minn. App. 2006); (2) "there was a failure to diagnose and treat a subarachnoid hemorrhage which ultimately resulted in a

complicated hospital course and death,” *Stroud*, 556 N.W.2d at 554; (3) “the departures from accepted levels of care, as above identified, were a direct cause of [plaintiff’s] death,” *Teffeteller*, 645 N.W.2d at 429; and (4) “generally earlier treatment results in better outcomes and . . . every hour counts,” *Maudsley*, 676 N.W.2d at 14.

Here, the district court determined that Haag’s interrogatory answers and supplemental affidavit identified a standard of care and a breach of that standard of care by Dr. Borer—namely, failure to intubate upon admission. But the district court concluded, and Dr. Borer argues on appeal, that the affidavit is deficient as to causation.¹ We agree.

Haag’s disclosures contain broad, conclusory statements on causation and do not set forth a chain of causation connecting the failure to intubate on arrival at the emergency room to Malherek’s death three days later. Dr. Howard claims, for instance, that intubation would have facilitated treatment of the mucous plug and protected the airway, but he does not explain how intubation would have prevented Malherek’s death, or explain why intubation by Dr. Borer was necessary for treatment, or identify what

¹ In reaching its conclusion on causation, the district court did not rely on—though it did mention—a July 8, 2007 letter written by Dr. Howard to Haag’s attorney, in which Dr. Howard stated, “It is not possible to predict whether earlier intervention [in Malherek’s case] would have prevented the ultimate outcome.” Because the district court did not rely on the letter and because we do not rely on it, we do not address whether the district court *could* have considered such evidence. *Compare Demgen v. Fairview Hosp.*, 621 N.W.2d 259, 267-68 (Minn. App. 2001) (explaining that it is improper to consider conflicting evidence when determining the sufficiency of a plaintiff’s expert affidavit), *review denied* (Minn. Apr. 17, 2001), *with Teffeteller*, 645 N.W.2d at 426-27 (concluding that the district court did not abuse its discretion when, based on the expert affidavit and accompanying curriculum vitae, it concluded that the plaintiff’s expert was not qualified to testify to the applicable standard of care as required by Minn. Stat. § 145.682).

“more effective” treatments would have been available as a result of the earlier intubation or even why, specifically, the failure to intubate led causally to Malherek’s death. *See Maudsley*, 676 N.W.2d at 14 (stating that the expert affidavit should explain “how” and “why” the malpractice caused injury).

Dr. Howard’s opinion that intubation would have placed Malherek in the safest situation possible also fails to satisfy the requirements of Minn. Stat. §145.682. The statement is broad and conclusory. And it is similar to a statement that earlier treatment generally results in better outcomes, which was rejected by this court as being inadequate to satisfy the expert disclosure mandate. *Maudsley*, 676 N.W.2d at 13.

Dr. Howard also asserts that “the standard of care was systemically breached,” and that as a result, Dr. Borer’s failure to intubate was causally linked to Malherek’s death. But this statement does not provide any facts specific to Malherek’s case or connect those facts to his death (except for the conclusory statement that the failure to intubate is causally linked to Malherek’s death). *See* Minn. Stat. § 145.682, subd. 4 (requiring a summary of the grounds for the expert’s opinions); *Sorenson*, 457 N.W.2d at 192 (requiring the expert affidavit to interpret the facts and connect the facts to the malpractice and causation).

Furthermore, three days are unaccounted for in the alleged causation chain. Instead of explaining what happened during the three days after Malherek left Dr. Borer’s care and before he died, Dr. Howard states simply that “the negligence [in failing to intubate] continued unabated and the causal link between the initial negligence and [Malherek’s] death is established.” As the district court found, this statement is

“speculative,” because it assumes (without identifying any facts to support the assumption) that subsequent healthcare providers followed Dr. Borer’s lead. And there is “virtually no detail outlining what happened and who was involved after Mr. Malherek was admitted to the hospital.” In this regard, the affidavit does not identify any facts or connect those facts to Malherek’s death. Simply arguing that treatment is improperly delayed does not sufficiently outline a chain of causation. *Maudsley*, 676 N.W.2d at 14.

Because the district court correctly concluded that the supplemental affidavit was “conclusory” and “[did] not set forth a chain of causation,” the district court did not abuse its discretion by granting Dr. Borer’s motion to dismiss.

II

We next address the district court’s dismissal with prejudice of the claims against Fairview.

A. *Timing of and Notice provided by Fairview’s Motion to Dismiss*

Haag again challenges the dismissal on procedural grounds, arguing that the district court abused its discretion by granting Fairview’s motion to dismiss when the motion was not served 45 days before the hearing, as required by Minn. Stat. § 145.682, subd. 6(c)(2). Although Fairview’s motion was not filed 45 days before the June 5 motion hearing, the district court concluded that Haag had sufficient notice of the alleged deficiency on causation. The court also found that Haag was not prejudiced by the failure to give 45 days notice because she had submitted the supplemental affidavit and did not ask for additional time.

As noted above, the 45-day period is meant to give plaintiffs an opportunity to cure any defects in their affidavit. Here, the motion was undisputedly late. The fact that Dr. Borer's motion was timely does not, in and of itself, save Fairview's motion.

The 45-day requirement is a procedural requirement. *See Lombardo v. Seydow-Weber*, 529 N.W.2d 702, 705 (Minn. App. 1995) (explaining, in a case decided before the addition of the safe-harbor provision, that the time limits imposed by Minn. Stat. § 145.682 are procedural, but that language mandating dismissal is substantive), *review denied* (Minn. Apr. 27, 1995); *see also Maudsley*, 676 N.W.2d at 11-12 (concluding that the district court did not abuse its discretion by dismissing a medical-malpractice claim based on the failure to comply with Minn. Stat. § 145.682, even though the motion to dismiss was untimely under the general rules of practice or the court's scheduling order); *Parker v. O'Phelan*, 414 N.W.2d 534, 537 (Minn. App. 1987) (observing that Minn. Stat. § 145.682, subd. 4, allows a district court to extend the time limits required for providing an affidavit of expert review under appropriate circumstances), *aff'd*, 428 N.W.2d 361 (Minn. 1993). The district court had the discretion to grant Haag additional time to prepare the supplemental affidavit. But Haag never requested additional time. Clearly, Haag was not prejudiced by Fairview's late motion. Haag submitted an affidavit supplementing the interrogatory answers and the district court considered this affidavit, but still concluded that Haag had failed to satisfy Minn. Stat. § 145.682. Although parties should file their motions in accordance with the 45-day time requirement in Minn. Stat. § 145.682, subd. 6(c)(2), we conclude that the district court did not abuse its discretion by granting Fairview's motion to dismiss.

Haag also asserts that Fairview did not sufficiently identify the alleged deficiencies of her expert disclosures. But we conclude that Fairview's motion gave Haag notice of the alleged deficiencies because Fairview's memorandum filed in support of its motion asserts that Dr. Howard failed to identify a breach of the applicable standard of care or provide an opinion that any mistakes by Fairview or its employees caused Malherek's death. Fairview has sufficiently identified the alleged deficiency, and Haag's claim to the contrary fails.

B. *Merits of Fairview's Motion to Dismiss*

Finally, we address Haag's claim that the district court erred when it concluded that she had failed to satisfy the requirements of Minn. Stat. § 145.682, subd. 4, with regard to Fairview.

The supplemental affidavit does not identify a specific breach by Fairview. Dr. Howard asserted that Dr. Borer's initial decision not to intubate breached the standard of care, but he "do[es] not find fault in individual decisions not to intubate after Dr. Borer's initial decision." His claim that the breach was "systemic" over three days is vague and meaningless, because there are no details indicating what happened over those three days. *See Maudsley*, 676 N.W.2d at 14 (requiring an expert affidavit to "illustrate how and why the alleged malpractice caused the injury" (quotation omitted)). And, as the district court noted, one of Haag's answers to interrogatories referred to "a failure to document," but Dr. Howard did not give any detail on what should have been documented, why it was important, or how documentation related to the standard of care.

Furthermore, the interrogatory answers and supplemental affidavit do not establish any chain of causation between a breach and Malherek's death. Because the affidavit "do[es] not find fault" with the later decisions not to intubate, there does not seem to be a connection between any identified breach and Malherek's death. *See Sorenson*, 457 N.W.2d at 192 (requiring the expert affidavit to interpret the facts and connect the facts to the malpractice and causation).

The district court correctly concluded that Haag's disclosures did not identify a breach of the standard of care by Fairview or explain how that breach led to Malherek's death. Accordingly, the district court did not abuse its discretion by granting Fairview's motion to dismiss.

Affirmed.