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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A09-1327**

M.G.L., a minor,  
by D.L. and K.M.L., his parents and natural guardians,  
Appellant,

vs.

Dr. Natalie Zabezhinsky, M.D., individually,  
and as an employee of Allina Health System, et al.,  
Respondents.

**Filed May 4, 2010  
Affirmed  
Stoneburner, Judge**

Hennepin County District Court  
File No. CV0813968

Zenas Baer, Zenas Baer and Associates, Hawley, Minnesota (for appellant)

Mark R. Whitmore, Charles E. Lundberg, Bassford Remele, P.A., Minneapolis,  
Minnesota (for respondents)

Considered and decided by Stoneburner, Presiding Judge; Minge, Judge; and  
Stauber, Judge.

**UNPUBLISHED OPINION**

**STONEBURNER**, Judge

Appellant challenges dismissal of this medical-malpractice action for failure to  
comply with statutory expert-affidavit requirements. We affirm.

## FACTS

Appellant M.G.L. was circumcised one day after his April 2001 birth at respondent Mercy Hospital, a member of Allina Health System. Respondent Dr. Natalie Zabezhinsky performed the circumcision. She contemporaneously documented the procedure in M.G.L.'s chart as follows: "Circ discussed [with] parents. Risks reviewed [no family history] of bleeding. Parents are willing to proceed. Circ performed in sterile manner using Mogan clamp. Anesth [with] 1% Xylocaine [no] complications."

M.G.L.'s parents claim that they were not given any information about risks associated with circumcision and were only asked one question to the effect of, "are you going to circumcise him?" M.G.L.'s parents responded "yes" to the question.

M.G.L.'s parents allege that after the circumcision, M.G.L. regularly experienced infections in the area of his penis. In the summer of 2006, M.G.L. underwent metoplasty, a surgery to remove excess skin and expand the penile opening. Since then, M.G.L. has not received medical care related to his penis.

In June 2008, M.G.L., by his parents D.L. and K.M.L. (collectively, M.G.L.), sued Zabezhinsky and Allina Health Systems d/b/a Mercy Hospital asserting claims of false imprisonment, assault and battery, lack of informed consent, respondeat superior, negligence, and consumer fraud. The complaint did not specify which claims applied to which defendants, but M.G.L. has not disputed the district court's presumption that negligence and respondeat superior applied only to the hospital and the remaining claims applied to both defendants. The complaint focuses on Zabezhinsky's failure to obtain informed consent for the circumcision and the hospital's failure to ensure that

Zabazhinsky obtained informed consent. The complaint asserts that M.G.L.'s circumcision resulted in the known complications of adhesions and meatal stenosis and that due to those complications, M.G.L. underwent surgery in July 2006. The complaint also asserts that the circumcision "permanently altered and mutilated [M.G.L.'s] normal genitalia," and subjected M.G.L. to pain and great bodily injury in violation of the Patients Bill of Rights, Minn. Stat. § 144.651 (2008).

In July 2008, M.G.L. submitted the expert affidavit of Robert S. Van Howe, M.D. M.G.L.'s attorney failed to certify Van Howe's affidavit as required by Minn. Stat. § 145.682, subd. 4 (2008), which provides, in relevant part, that "[t]he affidavit required by subdivision 2, clause (2), must be signed by each expert listed in the affidavit and by the plaintiff's attorney . . . ."

Van Howe, a board-certified pediatrician, has extensively researched male infant circumcision and has authored numerous articles concerning circumcision. Van Howe does not perform circumcisions: it is his opinion that "surgical amputation of the foreskin from the male penis results in damage. . . [and] there are no clear medical benefits to male genital alteration." Van Howe stated in his affidavit that he has personal knowledge of the standard of care and skill required of medical doctors "under the same conditions . . . as those presented by M.G.L.'s case."

Van Howe states in his affidavit that "meatal stenosis . . . is very common (up to 8-10%) in males who have had their genitals altered." He also lists a significant number of other possible side effects of circumcision, none of which M.G.L. claims to have suffered. Van Howe's affidavit suggests that a physician should make a decision about

circumcision “independent of parental desires or proxy consent” based on what the patient needs “not what someone else expresses.” Van Howe criticizes the hospital and Zabezhinsky for failing to obtain and document the fully informed consent of M.G.L.’s parents.

In January 2009, respondents moved to dismiss for procedural and substantive deficiencies in Van Howe’s affidavit. Respondents also moved for summary judgment on all claims, asserting a lack of evidence to support one or more elements of every count in the complaint. On February 16, 2009, M.G.L.’s attorney signed and submitted an amended affidavit of expert review.

The district court granted respondents’ motion to dismiss, stating that it “need not decide whether the expert affidavits filed by [M.G.L.] were procedurally deficient, because both the [a]ffidavit and the [a]mended [a]ffidavit fail to meet the substantive requirements of an expert affidavit.” The district court found that Van Howe’s affidavit inadequately addressed the applicable standard of care. Taking as true Van Howe’s assertion that physicians violate the standard of care by performing circumcisions at all, the district court reasoned that informed consent would therefore be impossible because consent would not suffice to bring the procedure within the standard of care.

Additionally, the district court concluded that the affidavit failed to establish proximate causation because, while it provided a long list of possible risks associated with circumcision, M.G.L. only experienced one of the listed risks, and Van Howe made only conclusory statements about the alleged causal link between the circumcision performed and the meatal stenosis that M.G.L. experienced years later. The district court noted that

Van Howe had not reviewed any of M.G.L.'s post-circumcision medical records. The district court also concluded that because Van Howe does not perform circumcisions, he is not competent to testify about the applicable standard of care.

The district court concluded that the failure to provide a "valid and meaningful" expert affidavit caused all of M.G.L.'s claims to fail because each count is a "cause of action as to which expert testimony is necessary to establish a prima facie case." Minn. Stat. § 145.682, subd. 6(a) (2008). The district court concluded specifically that: (1) M.G.L.'s false imprisonment, assault and battery, and informed-consent claims failed because he failed to prove lack of informed consent; (2) M.G.L.'s respondeat superior claim failed because the affidavit did not establish that the acts of Zabezhinsky resulted in an injury; (3) M.G.L.'s negligence claim failed because M.G.L. did not provide expert testimony establishing the standard of care recognized by the medical community; and (4) M.G.L.'s consumer-fraud claim failed because M.G.L. failed to identify any false, deceptive, or misleading statement on the part of respondents and also failed to establish that the action benefits the public as a whole. The district court determined that respondents' motion for summary judgment would have been granted, but in light of the dismissal, the motion was moot. This appeal follows.

## **D E C I S I O N**

An affidavit in a medical malpractice action must include "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 v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 193 (Minn. 1990). "The affidavit should

set out how the expert will use [the facts in the hospital or clinic record] to arrive at opinions of malpractice and causation.” *Id.* at 192. Failure to comply with the expert-identification requirements of Minn. Stat. § 145.682 mandates dismissal if: (1) the motion to dismiss the action identifies the claimed deficiencies; (2) the motion hearing is held at least 45 days after service of the motion; and (3) plaintiff does not correct the deficiencies before the motion hearing. Minn. Stat. § 145.682, subd. 6(c) (2008). “We will reverse a district court’s dismissal of a malpractice claim for noncompliance with expert disclosure only if the district court abused its discretion.” *Broehm v. Mayo Clinic Rochester*, 690 N.W.2d 721, 725 (Minn. 2005).

M.G.L. argues that the district court abused its discretion by granting respondents’ motion to dismiss because Van Howe is qualified to testify as an expert in this case, and his affidavit adequately sets forth the standard of care, causation, and damages.

**I. The district court’s finding that Van Howe is not competent to be an expert witness in this case is not clearly erroneous.**

“The competence of a witness to testify on a particular matter is a question of fact peculiarly within the province of the [district court] judge, whose ruling will not be reversed unless it is based on an erroneous view of the law or clearly not justified by the evidence.” *Cornfeldt v. Tongen*, 262 N.W.2d 684, 692 (Minn. 1977). The fact that this court might have reached a different result had the issue come before it in the first

instance is not sufficient to justify reversal under the abuse-of-discretion standard.

*Benson v. N. Gopher Enters.*, 455 N.W.2d 444, 446 (Minn. 1990).<sup>1</sup>

In this case, the district court acknowledged caselaw holding that to qualify as an expert on the standard of care, an individual must have more than an academic knowledge of the standard of care.

The definitive criteria in guidance of the [district] court's determination of the qualifications of an expert witness . . . rest primarily on occupational experience . . . : The proof of that standard (the reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of the medical profession under similar circumstances) is made by the testimony of a physician qualified to speak as an expert and having in addition . . . occupational experience—the kind which is obtained casually and incidentally, yet steadily and adequately, in the course of some occupation or livelihood. . . . He must have had basic education and professional training as a general foundation for his testimony, but it is a practical knowledge of what is usually and customarily done by physicians under circumstances similar to those which confronted the defendant charged with malpractice that is of controlling importance in determining competency of the expert to testify to the degree of care against which the treatment given is to be measured.

*Cornfeldt*, 262 N.W.2d at 692–93 (citations and quotations omitted).

In his brief on appeal, M.G.L. notes Van Howe's board certification as a pediatrician and his extensive research on the subject of circumcision and asserts that Van Howe "speaks from personal knowledge as to the standard of care and skill required of medical doctors who are embarking on a process to surgically alter healthy genital

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<sup>1</sup> M.G.L.'s assertion that because Van Howe has been approved as an expert witness in another action, by a different district court, in a different state (North Dakota) merely demonstrates that district courts may exercise their discretion differently.

tissue without medical diagnosis.” But the basis of this personal knowledge is described as Van Howe’s extensive survey of the literature on circumcision and his presentation of the summary of his research to various learned gatherings. Neither the affidavit nor anything else in the record establishes that Van Howe, though very learned in the subject of circumcision, has the *practical* knowledge to address the standard of care with regard to obtaining informed consent for the procedure, and the district court did not misapply the law. Therefore, we conclude that the district court’s finding that, in this case, Van Howe is not qualified to be an expert on the standard of care required of respondents with regard to obtaining informed consent for circumcision is not clearly erroneous.

**II. The district court did not err by concluding that all of M.G.L.’s claims depend on proving lack of informed consent.**

M.G.L. argues that not all of his claims are dependent on proving the lack of informed consent. Although not explicitly stated, we understand this argument to be that even if Van Howe is not competent to testify as an expert on the issue of informed consent in this case, he is competent to testify about the claims that are not dependent on informed consent. But all of M.G.L.’s claims against the hospital depend on his claim that Zabezhinsky failed to obtain informed consent, and the district court did not err in rejecting M.G.L.’s implicit assertion that some of his claims are not dependent on expert testimony.

M.G.L. asserts that the hospital had a duty to protect him from harm by third persons, including employees like Zabezhinsky. But the cause of harm asserted in this

case is failure to obtain informed consent and requires expert testimony.<sup>2</sup> Likewise, M.G.L.'s claims of battery, false imprisonment, negligence per se, and violation of a special relationship all depend on his claim of lack of informed consent. We therefore find no merit in M.G.L.'s assertion that expert testimony is not required for these claims.

Regardless of how various causes of action are labeled, Minn. Stat. § 145.682 applies to each count of a complaint that arises out of a patient's medical care and treatment as to which expert testimony is necessary to establish a prima facie case. Minn. Stat. § 145.682, subd. 2; *Haile v. Sutherland*, 598 N.W.2d 424, 428–29 (Minn. App. 1999) (stating that a claim which “sounds in medical malpractice” requires compliance with Minn. Stat. § 145.682 even if captioned as a claim of battery). Furthermore, the district court correctly held that M.G.L.'s respondeat superior claim failed because dismissal of the claims against the Zabezhinsky leaves nothing for which her employer can be vicariously liable. The district court correctly held that the inadequacy of M.G.L.'s expert affidavit required dismissal of all of his claims.

**III. The district court's findings that the expert affidavit inadequately articulated the applicable standard of care and failed to establish causation are not clearly erroneous.**

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<sup>2</sup> We also note that M.G.L. relies on *Sylvester v. Nw. Hosp. of Minneapolis*, 236 Minn. 384, 53 N.W.2d 17 (1952), as defining the hospital's duty to protect him from harm. *Sylvester* held that when a hospital knew, or in the exercise of reasonable care should have known, that the condition (intoxication) of one of its patients was likely, if the patient was permitted to wander about the hospital, to result in injury to other patients, the hospital is liable for any injury that proximately resulted. *Id.* at 389, 53 N.W.2d at 20–21. But there is no evidence in this record that the hospital had any reason to know that Zabezhinsky posed any threat to M.G.L.

The district court's disqualification of Van Howe as an expert adequately supports the district court's dismissal of all claims in this case, but in the interest of judicial economy, we conclude that the dismissal is also supported by the finding that Van Howe failed to articulate an applicable standard of care, explain how that standard of care was breached, or how a breach of the standard of care resulted in injury to M.G.L.

The affidavit does not state what is ordinarily or customarily done regarding informed consent or how Zabezhinsky or the hospital deviated from the norm. *Compare Anderson v. Rengachary*, 608 N.W.2d 843, 848 (Minn. 2000) (concluding that an affidavit insufficiently identified the applicable standard of care where it stated that "esophageal trauma should be avoided during surgery of this type" without describing what steps should be taken by the attending physician) *with Demgen v. Fairview Hosp.*, 621 N.W.2d 259, 263 (Minn. App. 2001) (concluding that the standard of care was sufficiently stated by an affidavit describing which tests should have been performed, what the results of those tests would have been, and what action would have been taken in response to the tests that would have resulted in a different outcome for the patient), *review denied* (Minn. Apr. 17, 2001).

At oral argument on appeal, M.G.L. urged this court to consider the first seventeen paragraphs of Van Howe's affidavit as establishing the applicable standard of care. The first five paragraphs of the affidavit describe the bases of Van Howe's knowledge. Paragraph six is a conclusory statement that, in Van Howe's opinion, Zabezhinsky failed to exercise the degree of skill and care ordinarily required of medical doctors under similar circumstances, directly causing M.G.L. "severe pain and suffering, the loss of his

foreskin, and meatal stenosis.” Paragraph seven is another conclusory statement that Zabezhinsky was negligent by performing a circumcision “without first obtaining consent, informed or otherwise,” resulting in the removal of healthy foreskin tissue and permanently altering M.G.L.’s genitalia by leaving him with a permanent scar and injury. Paragraphs eight and nine assert negligence for failing to evaluate the parent’s competence to provide consent and failing to adequately document the circumcision procedure. Paragraphs ten through thirteen assert the hospital’s failure to enforce its bylaws, staff rules and regulations, or industry standards with regard to informed consent. Paragraph fourteen is a conclusory opinion that the hospital’s failure to follow industry standards proximately caused “injuries suffered by M.G.L.” This paragraph also lists what Van Howe considers should have been included in a “complete disclosure.” Paragraphs fifteen and sixteen reassert conclusory opinions that the failures of Zabezhinsky and the hospital caused the removal of M.G.L.’s foreskin and injury to his penis. Paragraph seventeen merely asserts that Van Howe has extensively researched the subject of male infant circumcision.

Contrary to M.G.L.’s assertion, none of the information in the first seventeen paragraphs of the affidavit, or elsewhere in the affidavit, establishes the applicable standard of care alleged to have been breached. And, except for one reference to meatal stenosis and a permanent scar, the only injury asserted to have occurred is the successful completion of a circumcision. Notably, M.G.L. does not make any allegation that the procedure was not performed in accord with applicable standards of care. And Van Howe offers no details linking M.G.L.’s diagnosis of meatal stenosis to the

circumcision other than the conclusory assertion that this condition is one of the known risks of circumcision. An expert affidavit is insufficient if it presents merely a list of conclusory failures without connecting those failures to a standard of care or an injury. *Sorensen*, 457 N.W.2d at 192–93. That is precisely the problem with Van Howe’s affidavit.

In a medical-malpractice action, a plaintiff bears the burden of establishing that it is more probable than not that the plaintiff’s injury resulted from the malpractice of the healthcare provider. *Fabio v. Bellomo*, 504 N.W.2d 758, 762 (Minn. 1993). “Proof of causation cannot rest on conjecture and the mere possibility of such causation is not enough to sustain the plaintiffs’ burden of proof.” *Walton v. Jones*, 286 N.W.2d 710, 715 (Minn. 1979) (quoting *Walstad v. Univ. of Minn. Hosp.*, 442 F.2d 634, 639 (8th Cir. 1971)); see *Stroud v. Hennepin County Med. Ctr.*, 556 N.W.2d 552, 555–56 (Minn. 1996) (stating that medical expert affidavit, which contained only “broad, conclusory statements as to causation,” failed to meet requirements of statute regarding plaintiff’s affidavit of expert identification).

Even if the district court had found Van Howe competent to testify as an expert in this case, the expert affidavit failed to adequately articulate the standard of care and detail causation as required by Minn. Stat. § 145.682. The district court did not abuse its discretion by concluding that dismissal of M.G.L.’s claims was mandatory.

**Affirmed.**