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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A09-1437**

John Eide,  
Appellant,

vs.

Center for Diagnostic Imaging, Inc.,  
Respondent.

**Filed April 20, 2010  
Reversed and remanded  
Collins, Judge\***

Hennepin County District Court  
File No. 27-CV-08-14241

Douglas E. Schmidt, Schmidt Law Firm, Minnetonka, Minnesota (for appellant)

Katherine A. McBride, Barbara A. Zurek, Meagher & Geer, P.L.L.P. Minneapolis,  
Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Larkin, Judge; and Collins,  
Judge.

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\* 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## UNPUBLISHED OPINION

**COLLINS**, Judge

Appellant disputes the grant of summary judgment to respondent, arguing that the district court improperly weighed evidence and abused its discretion in refusing to consider appellant's supplemental expert affidavit as untimely and excluding appellant's expert testimony. Because the district court should have considered appellant's supplemental affidavit, we reverse and remand.

### FACTS

On June 8, 2004, appellant John Eide went to respondent Center for Diagnostic Imaging, Inc. (CDI) for magnetic resonance imaging (MRI) of his lumbosacral spine in preparation for spinal surgery. Eide claims to have sustained permanent injuries when, as the moveable platform on which he was lying was being withdrawn from the MRI machine, his left elbow struck a side railing, causing rotation of his body. Eide reported the incident to CDI the next day and complained of pain in his neck, shoulders, and arm.

Prior to the MRI, Eide had described his symptoms as constant lower back pain, stiffness in his mid-to-lower back, tingling in both legs, and tingling spasms in his face. The June 8 MRI was read to indicate "Mild disc degeneration at L5-S1" and other issues implicating Eide's lumbar spine.

On June 16 another MRI was done at CDI to examine Eide's cervical spine. This MRI depicted damage to the cervical spine as well as cervical degeneration and disc herniations. Eide continued to complain of cervical spine and arm pain, facial twitching, numbness, and tingling. A follow-up MRI on January 15, 2005, showed a decrease in the

cervical herniations but continued cervical degeneration. Eide then had an anterior cervical discectomy, decompression, and fusion. Thereafter, according to Eide, the previous symptoms persisted.

Eide commenced this action alleging that CDI's negligent operation and monitoring of the MRI machine on June 8, 2004, caused his cervical injuries. Eide submitted two expert opinions from T. G. Domino, M.D., and Seth Rosenbaum, M.D. Dr. Domino's affidavit states that he had treated Eide prior to the MRI incident and at that time Eide was "generally asymptomatic in his neck and upper back with only mild pain and no history of any significant cervical injury." The affidavit further states that:

6. When [Dr. Domino] saw [Eide] next on June 18, 2004 he presented with a history of having been injured when he forcibly struck his right elbow against the side rail of the MRI scanner and experienced immediate pain in the left elbow, shoulder, and neck, with pain extending in two [sic] the right side of the neck radiating in to the right shoulder. MRI studies show that [Eide] had sustained an injury to his C5-6 intervertebral disc with flattening of a lateral corridor and impingement of the C6 nerve root.

7. It was at the time, and continues to be, my opinion to reasonable medical certainty that [Eide] sustained a significant injury, both musculoligamentous, myofascial, and discogenic to his back up her [sic] back and shoulders in the incident where he struck his right elbow on the side rail of the MRI scanner on June 8, 2004.

Dr. Rosenbaum also provided an affidavit stating that it was his opinion that Eide "sustained a serious and permanent injury to his cervical spine which either caused or aggravated an injury to his intervertebral discs at C5-6 and C6-7, resulting in the need for extensive surgical treatment, and has resulted in permanent injury and disability." Dr.

Rosenbaum’s opinion was based on Eide’s medical history and description of the MRI incident. In his opinion, Eide’s characterization of the MRI incident—“that the force of the jamming of his elbow against the side rail of the MRI machine was sufficient to forcibly twist his upper body, neck and head to the right and move his body to a crossways position on the MRI bed”—was “sufficient to either cause a fresh injury/herniation of the intervertebral discs or to aggravate a pre-existing asymptomatic disc condition.”

On March 27, 2009, just prior to the district court’s April 1 discovery deadline, CDI submitted to Eide by mail the expert opinion of Alfred Bowles, M.D., dated February 3, 2009. Dr. Bowles is a biomechanical medical expert who examined Eide’s records and description of the MRI incident, engaged in an extensive biomechanical evaluation of the potential for injury caused by the MRI machine, and concluded:

- Based on principles of medical science related to intervertebral disc degeneration, and biomechanics associated with impact injury, I am unable to establish a scientifically credible mechanism by which the mechanical input from the moving MRI table can lead to the claimed injury in [Eide’s] cervical spine.
- If Dr. Domino’s history on June 18, 2004 is reliable, it would appear that [Eide’s] neck complaints are chronic, rather than acute, and were pre-existing at the time of the subject’s incident.
- Objective findings demonstrate degenerative changes in [Eide’s] cervical spine. His subjective symptoms are consistent with the known natural progression of his diagnosed cervical degenerative condition, and are non-specific with respect to causative etiology.

CDI also identified three other medical experts who note that Eide's medical complaints pre-dated the MRI incident and that Eide's symptoms were not causally related to the MRI incident.

On April 21, 2009, CDI filed a motion for exclusion of Eide's expert testimony and a motion for summary judgment. CDI's motion argued that Eide's experts' causation testimony was not sufficiently reliable and their bases were not generally accepted in the medical community. Eide then filed a supplemental affidavit from Dr. Rosenbaum, dated May 11, 2009, stating that "[i]t has long been recognized universally in the medical community that disc herniation can be produced by minor trauma." Dr. Rosenbaum cited three articles which note that disc herniation can be caused by the trauma of vomiting, trauma from coughing and sneezing, and trauma from a relatively small force. But because it was submitted after the discovery deadline of April 1, 2009, the district court struck this supplemental affidavit as untimely.

The district court concluded that expert testimony was necessary to establish causation in this negligence action. The district court reviewed Eide's primary affidavits and CDI's affidavits and determined that Eide's expert affidavits were unreliable because they "lack[ed] appropriate medically-based analysis" and gave "only inadmissible and otherwise conclusory statements to support their opinions" and were therefore inadmissible at trial. Because Eide's expert testimony was excluded, the district court concluded that he could not, as a matter of law, prove an essential element of his case. The district court granted summary judgment to CDI dismissing Eide's case with prejudice. This appeal followed.

## DECISION

Eide argues that the district court erred in excluding his expert testimony that was necessary to establish an essential element of his case. The admission of expert testimony is governed by the rules of evidence:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. The opinion must have foundational reliability. In addition, if the opinion or evidence involves novel scientific theory, the proponent must establish that the underlying scientific evidence is generally accepted in the relevant scientific community.

Minn. R. Evid. 702. Absent an erroneous interpretation of the law, the question of whether to admit evidence is within the district court's discretion. *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997). The standard of review of the admissibility of expert testimony is determined under a two-pronged analysis. *Goeb v. Tharaldson*, 615 N.W.2d 800, 815 (Minn. 2000).

Whether a particular principle or technique satisfies the first prong, general acceptance in the relevant scientific field, is a question of law that [appellate courts] review de novo. District court determinations under the second prong, foundational reliability, are reviewed under an abuse of discretion standard, as are determinations of expert witness qualifications and helpfulness.

*Id.* (citation omitted).

The district court ruled that Eide's expert testimony failed under both the "foundational reliability" prong and the "general acceptance" prong. Expert testimony

based on a differential diagnosis has been approved by this court as sufficiently reliable in *Ingram v. Syverson*, 674 N.W.2d 233 (Minn. App. 2004). In *Ingram* this court upheld the admission of a physician's testimony that an accident was related to a plaintiff with a pre-existing degenerative disc disorder's need for surgery based on the physician's examination of the plaintiff's medical history, plaintiff's own statements, and firsthand observations during examinations. 674 N.W.2d at 236. We concluded that, based on that analysis, the physician was able to form an opinion as to the legitimacy of the plaintiff's statements about her pain, and could rationally relate her symptoms to the accident; and, thus, that the district court erred in determining the expert's testimony lacked adequate foundation for expert causation testimony. *Id.* at 236-37. This court also held that where there are two plausible theories as to the cause of a plaintiff's deteriorating back condition, it is the jury's job to determine which is more credible. *Id.* at 237.

We have, however, recognized a distinction between rebutted and unrebutted differential-diagnosis causation testimony. *McDonough v. Allina Health Sys.*, 685 N.W.2d 688, 695 (Minn. App. 2004) (citing *Kudabeck v. The Kroger Co.*, 338 F.3d 856, 862 (8th Cir. 2003); *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 262-63 (4th Cir. 1999); *Heller v. Shaw Indus., Inc.*, 167 F.3d 146, 156 (3rd Cir. 1999)). In *McDonough*, the plaintiff's experts relied on differential diagnosis and their own knowledge and experience to conclude that the plaintiff suffered a stroke caused by the negligent infusion of immunoglobulin. *McDonough*, 685 N.W.2d at 692. The defendant countered McDonough's experts with expert testimony to the effect that the cause of strokes during immunoglobulin therapy is not known and that McDonough suffered from a number of

risk factors predisposing her to a risk of stroke. *Id.* at 694. We affirmed the exclusion of the expert causation evidence and the subsequent grant of summary judgment, stating that when the defendant's experts have pointed to plausible alternative causes and the plaintiff's expert failed to sufficiently explain why the other potential causes were excludable, "differential diagnosis is not sufficiently reliable to be used for the purpose of proving causation." *Id.* at 695.

Here, CDI argues that Eide has failed, like McDonough, to show why or how the MRI incident was the cause of his injury. CDI's rebuttal to Eide's expert testimony is essentially that (1) it is biomechanically impossible for Eide to have suffered the injuries he claims to have suffered based on the slow movement of the platform of MRI machine and (2) Eide's neck and back problems stem from a pre-existing degenerative disc disease. Eide's primary expert affidavits did not address how it was biomechanically possible for him to have suffered his injury given the slow speed of the platform on which he was lying in the MRI machine and in light of the contrary biomechanical analysis presented by CDI.

Like in *McDonough*, Eide's primary expert affidavits failed to sufficiently explain how, considering the evidence rebutting their causation theory, such an injury was possible. But Eide sought to provide the district court with the response required by *McDonough* in the supplemental affidavit. The supplemental affidavit was not belated discovery; rather, it was obtained and submitted in direct response to CDI's biomechanical expert testimony to show that such an injury is possible despite the slow speed of the MRI platform. Eide argues that the district court abused its discretion in

refusing to consider the supplemental affidavit in conjunction with his experts' primary testimony. We agree.

The rules of civil procedure provide that a party defending against a summary judgment motion may submit affidavits, and the district court “may permit affidavits to be supplemented or opposed by depositions or by further affidavits.” Minn. R. Civ. P. 56.05. Here, although the admission of evidence is within the broad discretion of the district court, by refusing to consider Eide’s supplemental affidavit in making a reliability determination regarding proffered evidence, the district court effectively precluded Eide from rebutting CDI’s challenge to the admission of his essential expert testimony. Eide’s supplemental affidavit presented additional testimony directly responsive to that of CDI’s experts, and cited studies that Eide argues demonstrate that disc herniation can be caused by minor trauma and a relatively small force. We recognize the setting of discovery deadlines as essential to district courts’ case management. But on these facts and procedural history, we hold that it was an abuse of discretion for the district court to apply its discovery deadline to exclude Eide’s supplemental affidavit responding to CDI’s challenge to the reliability of his essential expert testimony. We therefore reverse the district court’s decision excluding appellant’s expert testimony and the subsequent summary judgment determination, and remand for consideration of the supplemental affidavit for the sole purpose of evaluating the reliability—and thus admissibility—of the entirety of Eide’s expert testimony.

**Reversed and remanded.**