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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-1470**

Kimberly DelPercio,  
as trustee for the heirs and next-of-kin of  
Josiah DelPercio, deceased,  
Appellant,

vs.

Park Nicollet Clinic,  
Respondent.

**Filed April 23, 2012  
Affirmed  
Worke, Judge**

Hennepin County District Court  
File No. 27-CV-10-13818

Mark Hallberg, Marshall S. Lichty, Hallberg & McClain, P.A., St. Paul, Minnesota (for  
appellant)

Rebecca Egge Moos, Jonathan C. Marquet, Bassford Remele, P.A., Minneapolis,  
Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Worke, Judge; and  
Stauber, Judge.

## UNPUBLISHED OPINION

**WORKE**, Judge

Appellant challenges the district court's dismissal of her medical-malpractice claim for failure to comply with the medical-expert-identification requirements of Minn. Stat. § 145.682 (2010). We affirm.

### FACTS

J.D. was born with congenital aortic valve stenosis and had his first heart surgery in October 2003, when he was 3 months old. He had heart surgery again in November 2003, June 2004, and May 2008. Two days after J.D. was discharged from the hospital following his May 2008 heart surgery, his mother, appellant Kimberly DelPercio, contacted his cardiologist, Amarjit Singh, M.D., and reported that he was experiencing shallow breathing and decreased airflow. Dr. Singh recommended that J.D. have a chest x-ray. DelPercio scheduled an appointment with J.D.'s pediatrician, Greta Chen, M.D., at respondent Park Nicollet Clinic because it was more conveniently located than Dr. Singh's office. Dr. Chen saw J.D. that afternoon and completed a chest x-ray. Dr. Chen and the radiologist interpreted the x-ray "as consistent with a small left-sided effusion with no pneumothorax." Dr. Chen discharged J.D. in stable condition.

Dr. Singh examined J.D. about a week later and obtained another chest x-ray. DelPercio reported that J.D.'s breathing was shallow and rapid and he was tiring with activity. The chest x-ray revealed elevation in the left dome of J.D.'s diaphragm and Dr. Singh modified his medication.

On June 3, DelPercio called the clinic and reported that J.D.'s breathing was rapid and shallow, his chest was tight, and he had dark circles under his eyes. The clinic advised DelPercio to call 911 or go to the emergency room. DelPercio also contacted Dr. Singh and made an appointment with him for the following day. Later that day, DelPercio told the clinic that she had spoken with Dr. Singh and she was comfortable with J.D.'s breathing. The clinic advised her to call 911 or take J.D. to the emergency room if his complaints recurred.

On the morning of June 4, DelPercio and J.D. met with Dr. Chen. DelPercio reported that J.D.'s breathing was shallow and he just wanted to lie around. Dr. Chen examined J.D. and noted that he was alert, cooperative, and talking in sentences. J.D.'s heart rate was 140 and his oxygen saturation level was 100%. Dr. Chen noted that J.D.'s "[l]ungs [were] clear with good breath sounds." J.D. was able to walk around, and "after walking a lap he had a slightly increased respiratory rate but was still moving good air and did not seem to be labored with breathing." Dr. Chen administered a nebulizer treatment and J.D. said it helped. Dr. Chen discharged him in stable condition.

Later that day, DelPercio and J.D. went outside to the family car. As J.D. reached the car, he "started this very [bizarre] shrill kind of cry." He stated that he could not see and then went limp; the family called 911. When the paramedics arrived they found J.D. unconscious and with dilated pupils. The paramedics performed CPR but were unable to resuscitate him; he was pronounced dead that afternoon.

Pathologist Mark Arnesen, M.D., completed an autopsy of J.D. and concluded that he had a left hemothorax because his "left pleural cavity contains 350 cc of liquid and

clotted blood with associated collapse of the left lung. The heart and remnants of the pericardial sac are adherent to the sternal plate and left lung.” Cardiovascular pathologist Shannon Mackey-Bojack, M.D., examined J.D.’s heart and lungs. Dr. Mackey-Bojack observed that the sutures from J.D.’s heart surgeries were intact. She noted that his left lung was collapsed, but did not identify a source of the bleeding in his chest.

DelPercio filed a complaint against the clinic, alleging that Dr. Chen’s negligence caused J.D.’s death. Pursuant to Minn. Stat. § 145.682, DelPercio submitted an expert affidavit from Edward Martin, M.D. Dr. Martin opined that Dr. Chen did not comply with accepted standards of care under the circumstances when she did not order a chest x-ray for J.D. on June 4. In Dr. Martin’s opinion, several factors required Dr. Chen to complete a chest x-ray, including: J.D.’s May 2008 heart surgery; his two recent chest x-rays that indicated decreased function in his left lung; his shallow breathing and lethargy over the previous two days; and the fact that his heart rate was 140 at the time of his visit to the clinic. Dr. Martin explained the “chain of causation” as follows:

[I]n light of the symptoms of difficulty breathing, lethargy and tachycardia, the subsequent course of events, including the collapse of the child in the afternoon, and the findings on autopsy of a left hemothorax (350 cc of fluid and clotted blood), it is probable that [J.D.] had a developing hemothorax on the morning of June 4, 2008, and that it is more likely than not that a chest x-ray would have identified the developing hemothorax. Furthermore, if a hemothorax would have been discovered, accepted standards of care required that Dr. Chen arrange for [J.D.’s] immediate admission to an emergency room for definitive treatment. It is likely that the draining of the left hemothorax would have improved lung function and prevented the child’s collapse, subsequent arrest and death on the afternoon of June 4, 2008. It is likely that a combination of decreased lung function as a result of the phrenic nerve

injury, the accumulation of fluid and blood in the left pleural space resulting in decreased lung function, and the decrease in intravascular blood volume contributed to the child's respiratory arrest and subsequent sequelae. It should be noted that 350 cc represents approximately 1/3 of the child's total blood volume. Accordingly, timely diagnosis and treatment of the left hemothorax would have likely prevented [J.D.'s] death.

The clinic filed a motion to dismiss DelPercio's complaint under Minn. Stat. § 145.682 and a motion for summary judgment under Minn. R. Civ. P. 56. The clinic argued that Dr. Martin was not qualified to criticize Dr. Chen's treatment of J.D. because Dr. Martin is not a primary care physician and that he did not "adequately set forth the chain of causation and his opinions lack factual foundation."

The district court concluded that, while Dr. Martin was qualified to offer an expert opinion, his affidavit failed to set forth the chain of causation required by Minn. Stat. § 145.682.<sup>1</sup> The district court found that Dr. Martin's opinion relied "on the unsupported assumption that [J.D.] was already developing hemothorax (a collection of blood in the space between the chest wall and the lung)" but that Dr. Martin "provides no explanation as to where the blood came from." The district court found that Dr. Martin ignored the fact that J.D. had two previous chest x-rays that did not show the presence of a hemothorax. The district court further noted that Dr. Martin did not address other possible causes of J.D.'s hemothorax, such as a different cardiac issue, a seizure, or the 30 minutes of CPR that the paramedics performed after he collapsed. In conclusion, the district court stated that Dr. Martin's opinion "that the symptoms presented to Dr. Chen

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<sup>1</sup> Dr. Martin's qualifications are not challenged on appeal.

. . . were diagnostic of a developing hemothorax, simply because hemothorax developed some time later” was an “unsupported conclusion” that did not comply with Minn. Stat. § 145.682. The district court granted the clinic’s motions for dismissal and summary judgment, and judgment was entered. This appeal follows.

## D E C I S I O N

In a medical-malpractice case where expert testimony is necessary to establish a prima facie case, a plaintiff must submit an expert affidavit that identifies, and is signed by, each person that the plaintiff intends to call as an expert witness during the trial. Minn. Stat. § 145.682, subds. 2(2), 4(a). The affidavit must contain the substance of the facts and opinions to which the expert plans to testify and summarize the grounds for those opinions. *Id.*, subd. 4(a). It also must include “specific details” about “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). If the plaintiff fails to satisfy this affidavit requirement, then the plaintiff’s malpractice claim must be dismissed with prejudice. Minn. Stat. § 145.682, subd. 6(c). We review the district court’s dismissal of a medical-malpractice action based on the insufficiency of an expert affidavit for abuse of discretion. *Anderson v. Rengachary*, 608 N.W.2d 843, 846 (Minn. 2000).

To prove causation, a plaintiff must demonstrate that it is more probable that the plaintiff’s injury “resulted from some negligence for which defendant was responsible than from something for which he was not responsible.” *Plutshack v. Univ. of Minn.*

*Hosp.*, 316 N.W.2d 1, 7 (Minn. 1982) (quotation omitted). This may be accomplished by “provid[ing] an outline of the chain of causation between the alleged violation of the standard of care and the claimed damages.” *Stroud v. Hennepin Cnty. Med. Ctr.*, 556 N.W.2d 552, 556 (Minn. 1996). The plaintiff must provide more than “broad, conclusory statements as to causation.” *Id.* The plaintiff also cannot simply state “that the defendants ‘failed to properly evaluate’ and ‘failed to properly diagnose’” because those statements “are empty conclusions which, unless shown how they follow from the facts, can mask a frivolous claim.” *Sorenson*, 457 N.W.2d at 192-93. But as long as a medical expert’s opinion is “based on an adequate factual foundation” the expert “is permitted to make legitimate inferences, which have probative value in determining disputed fact questions.” *Blatz v. Allina Health Sys.*, 622 N.W.2d 376, 387 (Minn. App. 2001), *review denied* (Minn. May 16, 2001).

DelPercio argues that the district court abused its discretion in granting the motion to dismiss because Dr. Martin’s affidavit was sufficient to meet the requirements of Minn. Stat. § 145.682. DelPercio contends that Dr. Martin’s affidavit established the standard of care; that Dr. Chen departed from the standard of care when she did not order a chest x-ray; and that if Dr. Chen had ordered an x-ray, then J.D. would not have died. DelPercio asserts that “there is no missing link in th[e] chain of causation” described by Dr. Martin.

DelPercio argues that the expert affidavit at issue in this case is very similar to the affidavit at issue in *Demgen v. Fairview Hosp.*, 621 N.W.2d 259 (Minn. App. 2001),

*review denied* (Minn. Apr. 17, 2001).<sup>2</sup> In *Demgen*, the plaintiff noticed decreased fetal movement when she was 36 months pregnant. 621 N.W.2d at 260. When she arrived at the hospital, a nurse applied an external fetal monitor to the plaintiff and it revealed an abnormal reading. *Id.* at 261. The fetus’ heart activity stopped about an hour after the plaintiff arrived at the hospital. *Id.* In the medical-malpractice action, the plaintiff submitted an expert affidavit, which stated that if an “ultrasound test [had] been performed, it would have revealed abnormally low amniotic fluid levels,” which, combined “with the markedly abnormal fetal heart rate tracing . . . would dictate the need for an immediate caesarean section.” *Id.* at 263. The affidavit further stated that “the applicable standard of care would dictate that such an emergency caesarean section be accomplished within 53 minutes” and that if “an emergency caesarean section [had] been timely performed, a live birth would have resulted.” *Id.* at 263. Following a hearing, the district court dismissed the plaintiff’s claims, relying on Minn. Stat. § 145.682. *Id.* On appeal, this court concluded that the expert’s “lengthy and detailed affidavit . . . set out a precise explanation of why [defendants’] failure to follow the applicable standard of care caused the death of the fetus.” *Id.*

Here, Dr. Martin’s explanation of the chain of causation lacks specificity. As the district court noted, Dr. Martin essentially concludes that J.D. was developing a

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<sup>2</sup> The clinic argues that the Minnesota Supreme Court has “harshly criticized” *Demgen* and DelPercio’s reliance on the case is misplaced. In *Teffeteller v. Univ. of Minn.*, 645 N.W.2d 420 (Minn. 2002), the supreme court criticized the *Demgen* court’s statement that the expert affidavit is simply a “sneak preview” of an expert’s testimony. *Id.* at 429-30. The supreme court stated that an expert affidavit “must provide more than a sneak preview” and “[a]t a minimum, a ‘meaningful disclosure’ is required.” *Id.* at 430. But, as DelPercio points out in her brief, *Demgen* has not been overruled.

hemothorax when he saw Dr. Chen on June 4 because a hemothorax was found after he died. In coming to this conclusion, Dr. Martin broadly states that, based on J.D.'s symptoms on June 4 and his subsequent collapse, "it is probable" that he was developing a hemothorax at the time of his appointment with Dr. Chen on June 4. But Dr. Martin does not address the fact that, a few weeks before his death, J.D. had very similar symptoms on two occasions and x-rays done at those times did not reveal a hemothorax. Dr. Martin also does not explain how or why the hemothorax developed, and does not discuss other possible causes of the hemothorax, such as the paramedics' administration of CPR or J.D.'s underlying heart problems. Unlike the affidavit at issue in *Demgen*, Dr. Martin's affidavit did not precisely explain the link between Dr. Chen's failure to order an x-ray and J.D.'s subsequent death.

DelPercio argues that the district court's analysis was erroneous for two additional reasons. First, DelPercio argues that the district court incorrectly concluded that Dr. Martin was required to exclude all possible causes of J.D.'s injury in order to establish a prima facie case. DelPercio argues that Minnesota law does not require a medical-malpractice plaintiff to prove facts to an absolute certainty and exclude all other possible theories. In contrast, DelPercio contends that a medical-malpractice plaintiff is only required to establish facts from which inferences might be drawn. *See Schulz v. Feigal*, 273 Minn. 470, 475, 142 N.W.2d 84, 88 (1966) (noting that a plaintiff is not necessarily required to "prove causation by direct and positive evidence which excludes every other possible hypothesis as to the cause of the injuries"); *Bauer v. Friedland*, 394 N.W.2d 549, 554 (Minn. App. 1986) (stating that a medical-malpractice plaintiff "is not required

to prove her theory of negligence by testimony so clear as to exclude every other possible theory”). DelPercio further argues that the district court improperly applied the *Frye-Mack* standard<sup>3</sup> because this case did not involve novel methodology and so it was not subject to a *Frye-Mack* challenge.

In response, the clinic argues that an expert opinion must meet a threshold of foundational reliability in order to be admissible, and “the consideration of whether an expert has ruled out all other possible causes of injury is within the discretion of a district court directly on the threshold issue of reliability.” The clinic argues that this threshold requirement “extends to **all** expert testimony and not just [to] new or novel scientific methods or theories which are the subject of *Frye-Mack*.” The clinic cites Minn. R. Evid. 702, which states that an expert opinion “must have foundational reliability” in order to be admissible. The clinic argues that the district court did not apply the *Frye-Mack* standard, but instead analyzed Dr. Martin’s affidavit to determine if it had foundational reliability.

DelPercio’s argument appears to be based on the district court’s reliance on *McDonough v. Allina Health Sys.*, 685 N.W.2d 688 (Minn. App. 2004). In its order, the district court quotes *McDonough*, stating that “an expert must ‘rule out *all* other hypotheses, or at least explain why the other conceivable causes [of an injury] are

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<sup>3</sup> The *Frye-Mack* standard for admission of expert testimony requires “the proponent of scientific evidence [to] establish the proper foundation for admissibility by showing that the scientific theory is generally accepted in the applicable medical or scientific community . . . and that the principles and methodology used are reliable.” *McDonough v. Allina Health Sys.*, 685 N.W.2d 688, 694 (Minn. App. 2004) (citing *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) and *State v. Mack*, 292 N.W.2d 764, 768 (Minn. 1980)).

excludable.” 685 N.W.2d at 695 (emphasis added). In *McDonough*, the district court excluded expert testimony after a *Frye-Mack* hearing. *Id.* On appeal, this court concluded that the expert’s testimony was not sufficiently reliable to establish causation because she did not rule out all of the other possible causes of the injury. *Id.* But, as DelPercio argues, a medical-malpractice plaintiff is not required to rule out all other possible causes of injury in order to establish a prima facie case. *See Bauer*, 394 N.W.2d at 554; *Schulz*, 273 Minn. at 475, 142 N.W.2d at 88. And the *Frye-Mack* standard did not apply here because this case did not involve a novel scientific method. We conclude that the district court incorrectly relied on *McDonough* when it stated that Dr. Martin was required to rule out all other possible causes of J.D.’s injury. But we conclude that this error was harmless because it was not an essential part of the district court’s decision to grant the clinic’s motion to dismiss. *See* Minn. R. Civ. P. 61 (requiring harmless error to be disregarded).

In addition, we determine that the district court correctly based its conclusion on an analysis of the factual basis for Dr. Martin’s opinion. The district court did not cite Minn. R. Evid. 702 in its analysis, but it did discuss whether facts supported Dr. Martin’s conclusion that J.D. had a hemothorax on June 4. Ultimately, the district court concluded that an adequate factual basis was missing from Dr. Martin’s chain of causation. While Dr. Martin was not required to rule out all other possible causes of the hemothorax, he needed to at least address the basis for his conclusion that the hemothorax was present on June 4 in order to establish that it was more probable than not that Dr. Chen’s alleged breach of the duty of care caused J.D.’s death.

Second, DelPercio argues that the district court's analysis was incorrect because it considered rebuttal evidence in determining if she established a prima facie case. DelPercio argues that the district court relied on the clinic's rebuttal evidence for several of its findings, including the following: Dr. Martin did not explain where the blood came from; the pathologist did not identify the source of the bleeding; Dr. Martin did not explain when the bleeding started or its cause; Dr. Martin did not explain the significance of the two previous x-rays; the district court referred to "[s]upposed bleeding"; and Dr. Martin did not rule out other causes. In response, the clinic argues that this "rebuttal evidence" is simply the district court's own observations about the lack of factual support for Dr. Martin's conclusions.

A district court may not consider a defendant's rebuttal evidence when determining whether a plaintiff established a prima facie case. *See Tousignant v. St. Louis Cnty.*, 615 N.W.2d 53, 60 (Minn. 2000) (stating that the district court's analysis "related to the [defendants'] *rebuttal* of [plaintiff's] case, not whether [plaintiff] established a prima facie case"); *Demgen*, 621 N.W.2d at 266 (stating that the district court incorrectly relied on a rebuttal affidavit). Here, the clinic submitted a memorandum in support of the motion to dismiss and included copies of J.D.'s medical records. The clinic did not submit a rebuttal affidavit. We agree with the clinic that all of the district court's findings that DelPercio's argues were made based on rebuttal evidence were, rather, the district court's own observations. In his affidavit, Dr. Martin discussed the events that led to J.D.'s death, including the two x-rays that were completed in May 2008

and the results of J.D.'s autopsy. We conclude that the district court did not rely on rebuttal evidence in determining whether DelPercio established a prima facie case.

Accordingly, we conclude that the district court did not abuse its discretion when it dismissed DelPercio's claim pursuant to Minn. Stat. § 145.682, subd. 6.

**Affirmed.**