STATE OF MINNESOTA
IN COURT OF APPEALS
A07-849

Verna M. Cyrette, as Trustee for the heirs of Damien Anderson, deceased,
Appellant,

vs.

Velcommen Village, Inc.,
Respondent.

Filed April 1, 2008
Affirmed
Connolly, Judge

St. Louis County District Court
File No. 69-C4-04-600848

Andrew Engebretson, 300 Beal Building, 5 North Third Avenue West, Duluth, MN 55802 (for appellant)

Louise Dovre Bjorkman, Mark A. Solheim, Melissa M. Weldon, Larson King, LLP, 2800 Wells Fargo Place, 30 East Seventh Street, St. Paul, MN 55101 (for respondent)

Considered and decided by Minge, Presiding Judge; Kalitowski, Judge; and Connolly, Judge.

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

CONNOLLY, Judge

Appellant challenges the district court's judgment dismissing her complaint based upon appellant's failure to file an affidavit of expert review or affidavit of identification

of expert witnesses. Appellant argues that such affidavits were not required because (1) respondent was not an institution entitled to the protection of Minn. Stat. § 145.682 (2006); (2) the employee whose actions were alleged to have caused the harm was not a licensed health-care professional; (3) the lack of care resulting in the harm was care that could have been provided by any person at any location; and (4) a jury hearing the evidence would not require the assistance of expert testimony to decide the issues of standard of care, breach, and causation. We affirm.

FACTS

Appellant Verna Cyrette gave birth to Damien Anderson on January 27, 1991. Anderson suffered from serious health problems, including fetal-alcohol syndrome, cerebral palsy, spastic quadriplegia, microcephaly, seizure disorder, reactive-airway disease, and psycho-motor retardation. These health problems required him to take medication, use a wheelchair, be fed through a gastronomy tube, and be constantly supervised.

Due to Cyrette's chemical-dependency issues, Anderson was removed from appellant's home on December 1, 1999, and placed in foster care. St. Louis County placed him at respondent Velcommen Village on February 9, 2000. Velcommen is a long-term foster-care facility designed exclusively for individuals with intensive medical needs. Velcommen staff provided Anderson with a 24-hour plan of care and awake supervision. He also had personal-care attendants on a 1:1 basis, who were trained in CPR.

On March 1, 2003, St. Louis County issued an individual service plan addressing the medical care that Anderson required. This plan required Velcommen and other care providers to have a written seizure protocol and emergency plan in place to cover Anderson at all times. One of the treatment goals identified in the plan was for Anderson to maintain or increase his physical mobility. This was done by using a standing table for two hours, twice daily. On August 3, 2003, Anderson was placed in the stander at 2:15 p.m. He was found unresponsive in his stander at 2:45 p.m. Anderson was taken to the hospital, where resuscitation efforts were unsuccessful, and he was pronounced dead at 4:15 p.m.

An autopsy was conducted on Anderson. The pathologist concluded that Anderson died of acute cardiopulmonary arrest during an epileptic seizure. The South St. Louis County Multidisciplinary Child Protection Team also conducted an investigation into his death. The report states that three people "indicate that [Anderson] was left alone for no more than 10 minutes." Appellant believes he was left unsupervised in the stander for 30 minutes.

Appellant brought this action against Velcommen, alleging that its "negligence and carelessness" caused her son's death. In its answer, Velcommen declared that appellant had not complied with the expert-review requirements of Minn. Stat. § 145.682, subd. 2 (2006). Appellant subsequently provided Velcommen with a report from registered nurse Linda Graham entitled "Standard of Care Evaluation." Velcommen moved for dismissal based on appellant's failure to comply with Minn. Stat. § 145.682,

subd. 2. The district court granted the motion and dismissed the case with prejudice. This appeal follows.

D E C I S I O N

Minn. Stat. § 145.682, subd. 2 (2006) requires a plaintiff to provide two expert affidavits in an action alleging "malpractice, error, mistake, or failure to cure . . . against a health care provider." The first affidavit must be served with the summons and complaint. Minn. Stat. § 145.682, subd. 2. The second affidavit must be served within 180 days after the commencement of the litigation. *Id.* There are strict form requirements for these affidavits. *Id.*, subds. 2, 3 (2006). The identification of experts to be called can also be provided in answers to interrogatories, so long as they are served within 180 days of commencement of the suit and are signed by each expert identified. *Id.*, subd. 4(a) (2006). Failure to comply with the affidavit requirements results in mandatory dismissal of the claim with prejudice. *Id.*, subd. 6 (2006).

Minnesota law generally requires expert testimony in medical-malpractice cases because they often "involve complex issues of science or technology, requiring expert testimony to assist the jury in determining liability." *Tousignant v. St. Louis County, Minn.*, 615 N.W.2d 53, 58 (Minn. 2000). There is a limited exception to the expert requirement, which applies when the "acts or omissions complained of are within the general knowledge and experience of lay persons." *Atwater Creamery Co. v. W. Nat'l*

Mut. Ins. Co., 366 N.W.2d 271, 279 (Minn. 1985). Whether expert testimony is required is a legal question to be determined de novo by this court. *Tousignant*, 615 N.W.2d at 58.

It is not disputed that appellant failed to provide either affidavit, despite repeated demands from Velcommen.[1] But, appellant alleges that (1) Velcommen was not a "health care provider" entitled to the protection of Minn. Stat. § 145.682 (2006); (2) the employee whose actions were alleged to have caused the harm was not a licensed health-care professional; (3) the lack of care resulting in the harm was care that could have been provided by any person at any location; and (4) a jury hearing the evidence would not require the assistance of expert testimony to decide the issues of duty of care, breach, and causation. We disagree.

First, appellant contends that Minn. Stat. § 145.682 does not apply because Velcommen is not a "health care provider." Minn. Stat. § 145.682 applies to claims against a "health care provider," which is broadly defined to mean "a physician, surgeon, dentist, or other health care professional or hospital, including all persons or entities providing health care as defined in section 145.61, subdivisions 2 and 4." Minn. Stat. § 145.682, subd. 1. "Health care" is defined as "professional services rendered by a professional or an employee of a professional and services furnished by a hospital, sanitarium, nursing home or other institution for the hospitalization or care of human beings." Minn. Stat. § 145.61, subd. 4 (2006).

[1] On November 23, 2006, over one year after the filing of this action, appellant provided a standard-of-care evaluation from R.N. Linda Graham. This evaluation, as found by the district court, was untimely. *See* Minn. Stat. § 145.682, subd. 2 (stating that the first affidavit must be filed with the summons and complaint while the second must be filed within 180 days of commencement of the suit).

Velcommen is a long-term care facility that provides intensive medical care to its residents. After Anderson was removed from appellant's care, St. Louis County placed him with Velcommen precisely because of its ability to handle his myriad medical problems. The individual service plan described Anderson's medical needs:

> Damien requires a 24-hour plan of care and awake supervision. He is wheelchair dependent . . . . Repositioning is required at two-hour intervals 24 hours daily . . . . Damien wears leg braces, which are rotated on and off at two-hour intervals . . . . He receives Nebulizer treatments, which assist in drying his frequent secretions. He requires frequent suctioning on a PRN basis daily. He has a gastrostomy and receives Isomil formula and juice daily and flushing of G-tube with water after each feeding and medications administration.

Based on this description, it is evident that Velcommen was an "institution" providing "health care" to Anderson.

Appellant next asserts that expert testimony is not required because the individual who left Anderson alone in the stander was not a licensed professional. The statute does not require that health-care providers be licensed in order to fall within its ambit. As discussed above, a health-care provider includes an "institution for the hospitalization or care of human beings." Minn. Stat. § 145.61, subd. 4. Appellant argues that if the legislature meant for the statute to extend to employees of institutions, it would have included them specifically, as the legislature did for employees of professionals.[2] These two clauses can be distinguished. If the statute did not explicitly state that an employee of a professional was considered a health-care provider, there would certainly be a question as to the application of the statute to an employee. However, an institution itself

[2] "'Health care' means professional services rendered by a professional *or an employee of a professional* . . . ." Minn. Stat. § 145.61, subd. 4 (emphasis added).

cannot care for human beings. Rather, only its employees can do so. Velcommen is an institution that provides for the care of human beings, and its employees, acting for the institution, are health-care providers under the statute. Anderson required assistance with virtually all aspects of his daily living, including eating (through a gastronomy tube), moving, personal hygiene, and administration of medications. His medical needs required the staff of Velcommen to give him nebulizer treatments, suction his airways because of his respiratory problems, follow the primary physician's care plan, and develop and implement a written seizure and emergency medical plan.

Appellant next contends that this is a routine negligence case and that the statute does not apply because placing Anderson in the stander was something that anyone at any location could have performed. However, cases cannot be creatively pleaded so as to avoid the statutory expert requirements. *Haile v. Sutherland*, 598 N.W.2d 424, 428 (Minn. App. 1999); *D.A.B. v. Brown*, 570 N.W.2d 168, 171 (Minn. App. 1997). Velcommen's employees were health-care providers providing health-care services. It had CPR-certified staff and nursing assistants caring for Anderson around the clock. Velcommen provided "PCA level of services" at all times under the supervision of a registered nurse. Certainly, not all tasks were difficult, time-consuming, or complicated to perform. This, however, does not make them any less befitting of the designation "health-care." Placing a physically challenged individual in a stander so as to increase his mobility fits within this definition.

The negligence claims asserted by appellant depend entirely on analyzing whether Velcommen's employees properly monitored and provided for Anderson's medical

needs. On this point, the district court stated, "negligence claims against medical providers are incorporated within medical malpractice. Permitting otherwise would allow plaintiffs to circumvent the affidavit requirements under Minn. Stat. § 145.682 and frustrate the purpose behind the legislation itself." We agree. Therefore, although this cause of action was brought as a negligence claim, it should be analyzed as one of medical malpractice.

There is one general exception to requiring expert testimony in medical-malpractice cases, and appellant claims that this action fits within it. If the jury, as lay people, can understand all elements of the claim, including the standard of care, breach of that standard, and causation, without expert testimony, the exception applies and expert testimony is not required. These situations, however, are rare. *Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 191 (Minn. 1990).

Appellant argues that

> [a] Minnesota jury panel can, without speculating, decide it is more probable than not where the decedent was found unresponsive and could not be successfully resuscitated after being left alone for thirty minutes, that the decedent suffered a respiratory interruption during the absence of the attendant and that the absence of the attendant precluded the summoning of appropriate help to restore Damien's breathing with the result that Damien's heart stopped and he could not be revived; in short, the failure to attend and observe was a direct cause of Damien's death.

The crucial inquiry here, as the district court noted, involves causation. An expert would be needed to explain to the jury how the alleged breach of the standard of care, i.e., leaving Anderson alone for potentially up to 30 minutes, caused his death. The

common knowledge of a lay person is insufficient to determine whether anything Velcommen did, or failed to do, contributed to the seizure and cardiac arrest that caused Anderson's death. Anderson had numerous, complicated medical problems, and a lay person lacks the knowledge to identify Anderson's medical and other care requirements, evaluate his cause of death, and determine if Velcommen contributed to it in any way.

This case can be distinguished from *Tousignant.* In that case, a confused, elderly woman recovering from a broken hip in the hospital was not properly restrained or supervised. She refractured her hip when she slipped out of her wheelchair. *Tousignant*, 615 N.W.2d at 60. The Minnesota Supreme Court determined that this was one of the rare cases that did not require expert testimony because lay people could understand that if an elderly person is confused and not restrained, it would be possible for her to fall and be reinjured. *Id.* Anderson's death by cardiac arrest and seizure requires a much more nuanced analysis than that in *Tousignant*. The district court summed it up succinctly: "[A] causal link between failure to supervise an immobile patient and an epileptic seizure and subsequent cardiac arrest is outside the general knowledge of lay persons." Because this case does not fall within the narrow exception, the district court did not err by concluding that the issues in this case require expert testimony.

The district court did not err in dismissing appellant's lawsuit with prejudice for failure to comply with the requirements of Minn. Stat. § 145.682 because expert testimony was required to establish the applicable standard of care, breach, and causation.

Affirmed.