STATE OF MINNESOTA
IN COURT OF APPEALS
A10-611

Jocelyn Tschakert,
a minor by Denise Tschakert,
her mother and natural guardian, et al.,
Appellants,

vs.

Fairview Health Services, et al.,
Respondents,

Obstetrics & Gynecology West, P. A., et al.,
Respondents.

Filed January 25, 2011
Affirmed
Klaphake, Judge

Hennepin County District Court
File No. 27-CV-09-8294

Philip K. Jacobson, Kelly & Jacobson, Minneapolis, Minnesota; and

Kenneth M. Levine (pro hac vice), Kenneth M. Levine & Associates, Brookline, Massachusetts (for appellants)

Lynn M. Schmidt Walters, David D. Alsop, Angela M. Nelson, Henry A. Parkhurst, Gislason & Hunter LLP, Minneapolis, Minnesota (for respondents Fairview Health Services, et al.)

William M. Hart, Damon L. Highly, Cecilie Morris Loidolt, Meagher & Geer, P.L.L.P., Minneapolis, Minnesota (for respondents Obstetrics & Gynecology West, P.A., et al.)

Considered and decided by Connolly, Presiding Judge; Klaphake, Judge; and Halbrooks, Judge.

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

KLAPHAKE, Judge

Appellants Denise and Adam Tschakert, on behalf of their minor daughter, J.T., challenge the dismissal of their medical malpractice action against respondents, the doctor and hospital, among others, who oversaw J.T.'s birth. The district court dismissed the case for failure to comply with the medical expert disclosure requirements of Minn. Stat. § 145.682 (2008). Because the original affidavit submitted by the medical expert was substantively inadequate and because a subsequent letter signed by the medical expert was not made under oath, the district court did not abuse its discretion in dismissing the case. We therefore affirm.

D E C I S I O N

Minn. Stat. § 145.682 requires medical malpractice plaintiffs to serve "within 180 days after commencement of the suit" an affidavit signed by an expert that sets forth "the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion." *Id.*, subds. 2(2), 4. This language requires the expert affidavit of disclosure to provide "specific details" about "the applicable standard of care, the acts or omissions which the plaintiff alleges resulted in a violation of the standard of care, and an outline of the chain of causation between the violation of the standard of care and the plaintiff's damages." *Stroud v. Hennepin County Med. Ctr.*, 556 N.W.2d 552, 555-56 (Minn. 1996). The statutory penalty for noncompliance with the expert affidavit requirement is, upon proper motion, "mandatory dismissal with prejudice of each cause of action as to which expert testimony is necessary to establish a prima

facie case." Minn. Stat. § 145.682, subd. 6(c); *see Broehm v. Mayo Clinic Rochester*, 690 N.W.2d 721, 726 (Minn. 2005) (requiring strict compliance with statutory provisions for expert affidavits in medical malpractice cases); *Mercer v. Andersen*, 715 N.W.2d 114, 122 (Minn. App. 2006) (same). The statute permits a plaintiff to amend an expert affidavit to correct deficiencies if amendment is made before the hearing on the motion to dismiss. Minn. Stat. § 145.682, subd. 6(c)(3). The district court's decision to dismiss a medical malpractice action for insufficiency of the expert's affidavit is subject to an abuse of discretion standard of review. *Anderson v. Rengachary*, 608 N.W.2d 843, 846 (Minn. 2000); *Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 190 (Minn. 1990).

Appellant claims that the first expert affidavit of Dr. Berto Lopez was legally sufficient to meet the requirements of Minn. Stat. § 145.682, and that his second submission, a November 8, 2009 letter, was not technically deficient, and thus that the district court erred in dismissing appellant's medical malpractice action. We will address each documentary submission in turn.

First Expert Affidavit

Minn. Stat. § 145.682, subd. 4(a) requires the expert's affidavit of disclosure to include "the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion." The supreme court has interpreted this language to require "meaningful disclosure" by the expert, rather than merely a "sneak preview" of the expert's testimony. *Teffeteller v. Univ. of Minn.*, 645 N.W.2d 420, 430 (Minn. 2002) (quotations omitted); *see Lindberg v. Health Partners, Inc.*, 599 N.W.2d

572, 578 (Minn. 1999) (stating that expert affidavit must include "far more" than general disclosures).

An affidavit of disclosure must include three areas: (1) the standard of care, *Teffeteller*, 645 N.W.2d at 428 (requiring expert's disclosure affidavit to include "the applicable standard of care"); *Sorenson*, 457 N.W.2d at 193 (same); (2) acts or omissions that constituted a breach of the standard of care, *Teffeteller*, 645 N.W.2d at 428 (requiring expert's disclosure affidavit to include "the acts or omissions that plaintiff alleges violated the standard of care"); *Sorenson*, 457 N.W.2d at 193 (same); and (3) the chain of causation. *Id.* at 193 (requiring expert affidavit to "outline . . . the chain of causation that allegedly resulted in damage"); *Maudsley v. Pederson*, 676 N.W.2d 8, 14 (Minn. App. 2004) (requiring the expert affidavit to "illustrate how and why the alleged malpractice caused the injury").

Here, Dr. Lopez's affidavit summarizes Denise Tschakert's medical records and concludes that the doctor and nurse who assisted in J.T.'s delivery "deviated from the prevailing professional standard of care" in their treatment of Denise Tschakert. The affidavit states that the delivery doctor violated the standard of care by failing to perform a cesarean section and by failing to perform proper shoulder dystocia release techniques, and that the delivery nurse failed to notify a doctor of the presence of a non-reassuring fetal heart rate. The affidavit does not include a standard of care, and without some description of what a doctor and nurse should do under the circumstances presented in this case, the alleged breaches amount to insufficient allegations. *See Sorenson*, 457 N.W.2d at 192-93 (rejecting expert's affidavit as insufficient when it included alleged

breach of medical standards of care that only included "failed to properly evaluate" and "failed to properly diagnose").

A rendition of the chain of causation is also missing in Dr. Lopez's affidavit. The affidavit states that the delivery doctor "[f]ail[ed] to timely perform a cesarean section in a patient with a nonreassuring fetal heart rate pattern" and "[f]ail[ed] to perform appropriate shoulder dystocia release techniques, and that such deviation resulted in brachial plexus injury." As to the delivery nurse, the affidavit states that she "[f]ail[ed] to timely notify the attending obstetrician of the presence of a nonreassuring fetal heart rate pattern so that a cesarean section could be performed, and that such deviation resulted in a brachial plexus injury." These statements are the types of "broad, conclusory statements," *Stroud*, 556 N.W.2d at 556, that have been rejected by our appellate courts. *See, e.g., Lindberg*, 599 N.W.2d at 578 (stating that "broad and conclusory statements as to causation" are insufficient to satisfy the statute and rejecting expert opinion that "fail[ed] to outline a chain of causation connecting the alleged [doctor's] failure to instruct [the plaintiff] to seek immediate medical attention with the stillbirth of the decedent"); *Stroud*, 556 N.W.2d at 554 (rejecting expert opinion as insufficient that stated: "[A]s a result of the breach of the standard of care . . . there was a failure to diagnose and treat a subarachnoid hemorrhage which ultimately resulted in . . . death of the Plaintiff"); *Teffeteller*, 645 N.W.2d at 429 (rejecting expert affidavit that stated that hospital "should have immediately recognized that [plaintiff] was experiencing morphine toxicity" and that "outline[d] what should have been done to comply with an acceptable

level of care," but "treat[ed] the cause of death summarily," stating that the departures from the standards of care "were a direct cause of [the plaintiff's] death").

As noted by the district court, *Demgen v. Fairview Hosp.*, 621 N.W.2d 259 (Minn. App. 2001), *review denied* (Minn. Apr. 17, 2001), provides an example of a substantively sufficient expert's affidavit in a case involving the stillborn birth of a baby who was delivered without special medical intervention, although the fetus showed poor heart tracing on an external heart monitor for nearly an hour prior to its death. There, the supreme court ruled that a lengthy and detailed affidavit that set forth the applicable standards of care, numerous deviations from the standards of care, and the breaches of the standards of care that were the direct cause of the fetus's death, was sufficient to satisfy statutory expert disclosure requirements. *Id.* at 263. The affidavit in this case falls short of the *Demgen* affidavit and reads more like a summary of Denise Tschakert's medical records. We conclude that the first affidavit submitted by Dr. Lopez did not comply with the disclosure requirements of Minn. Stat. § 145.682.

November 8, 2009 Letter

Minn. Stat. § 145.682, subd. 6(c)(3) permits a plaintiff to cure an expert's defective affidavit of disclosure by serving on the defendant "an amended affidavit or answers to interrogatories that correct the claimed deficiencies." Here, appellant submitted an unsworn letter signed by Dr. Lopez; as it was not sworn to by Dr. Lopez "before an officer authorized to administer oaths," the letter does not constitute an affidavit. *Black's Law Dictionary* 66 (9th ed. 2009) (defining "affidavit"). Minn. Stat. § 145.682 was enacted as a procedural reform directed at eliminating "nuisance medical

malpractice lawsuits" or "frivolous cases." *Stroud*, 556 N.W.2d at 555; *Sorenson*, 457 N.W.2d at 191. As such, its requirements are to be strictly enforced. *Mercer*, 715 N.W.2d at 122; *Broehm*, 690 N.W.2d at 726.[1] Thus, the district court properly rejected appellants' letter of November 8, 2009, because it was technically deficient. *See Tousignant v. St. Louis County*, 615 N.W.2d 53, 60 (Minn. 2000) (ruling that unsigned expert's affidavit was deficient and noting that "nonaffidavit materials may not be used to supplement an otherwise deficient affidavit under section 145.682").

Because neither the first affidavit of expert disclosure nor the November 8, 2009 letter submitted by the expert satisfied the disclosure requirements of Minn. Stat. § 145.682, the district court did not abuse its discretion by dismissing appellants' medical malpractice claim against respondents.

Affirmed.

[1] Additional evidence that an amendment to an expert's disclosure should be signed under oath is included in the disclosure statute, which permits the plaintiff to submit either an expert affidavit or answers to interrogatories, both of which require a signature under oath. Minn. Stat. § 145.682, subd. 4. *See* Minn. R. Civ. P. 33.01(d) (requiring that answers to interrogatories "shall be signed under oath").