STATE OF MINNESOTA
IN COURT OF APPEALS
A10-941

Karen M. Hanson,
Appellant,

vs.

Thomas R. McNiff, M.D., et al.,
Respondents,

Jack E. Hubbard, Jr., M.D., et al.,
Respondents,

Edward Michel, M.D., et al.,
Defendants.

Filed January 18, 2011
Affirmed
Worke, Judge

Dakota County District Court
File No. 19HA-CV-09-3935

Wilbur W. Fluegel, Fluegel Law Office, Minneapolis, Minnesota; and

J. Michael End, End, Hierseman & Crain, LLC, Milwaukee, WI (for appellant)

Barbara A. Zurek, Melissa Dosick Riethof, Meagher & Geer, P.L.L.P., Minneapolis, Minnesota (for respondents Jack E. Hubbard, Jr., M.D., et al.)

Steven R. Schwegeman, Quinlivan & Hughes, P.A., St. Cloud, Minnesota (for respondents Thomas R. McNiff, M.D., et al.)

Considered and decided by Larkin, Presiding Judge; Worke, Judge; and Huspeni, Judge.*

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

WORKE, Judge

Appellant challenges the dismissal of her medical-malpractice claim under Minn. Stat. § 145.682 (2010), arguing that the district court abused its discretion by determining that her expert-opinion disclosures were insufficient to establish a prima facie case. We affirm.

FACTS

On the morning of June 13, 2005, appellant Karen M. Hanson called respondent Minneapolis Clinic of Neurology, Ltd., and was referred to her treating neurologist, respondent Jack E. Hubbard, Jr., M.D. Appellant had sought medical attention for low-back pain four times over the preceding four days. The previous night, appellant received emergency care after experiencing numbness from the waist down and a loss of control over her bladder and bowels; the treating emergency-room physician noted that she was incontinent of urine. After speaking with appellant, Dr. Hubbard ordered a "stat" magnetic resonance imaging (MRI) scan to be performed. The MRI was performed later in the evening on June 13, and Dr. Hubbard did not obtain the results until the morning of June 14. After an emergency consultation with the resident neurosurgeon, Dr. Hubbard diagnosed appellant with cauda equina syndrome—a neurological condition caused by

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

compression of the nerves in the lower part of the spinal canal which can result in permanent lower-body pain and loss of bowel and bladder control. Appellant underwent surgery around 9:30 p.m. on June 14 to alleviate the compression of the nerves.

Appellant suffers from residual neurological defects of cauda equina syndrome, including bladder and bowel incontinence. Appellant initiated a medical-malpractice claim against the physicians who treated her low-back pain in the days leading up to her surgery, including respondents Dr. Hubbard and Minneapolis Clinic of Neurology. Appellant disclosed expert affidavits to support her claim against respondent Dr. Hubbard from two neurologists: Edward J. O'Connor, M.D., and George R. Cybulski, M.D.

Dr. O'Connor indicated that treatment of cauda equina syndrome within the first 12-24 hours of bladder incontinence can significantly alleviate the risks of long-term damages because "decompression of the nerves . . . must be accomplished as soon as possible." Dr. O'Connor opined that: "It is a well-known fact for neurologists that cauda equina syndrome is a medical emergency that requires diagnosis and treatment as soon as possible. That is the standard of care that existed on June 13, 2005." According to Dr. O'Connor, this standard of care required respondent Hubbard "to order MRI [scanning] as soon as possible so that [] surgery could [have been] performed as soon as possible."

Dr. O'Connor asserted that appellant's surgery was "performed later than it could have been" and that Dr. Hubbard should have "shepherd[ed] [appellant] through the MRI scan to obtain the results on June 13." Dr. O'Connor declared that "Dr. Hubbard failed to exercise reasonable care for a neurologist in failing to obtain imaging of the low back as

soon as possible following his conversation on June 13[] with [appellant] so that immediate referral to a neurosurgeon could have been made." In Dr. O'Connor's opinion, "[i]f Dr. Hubbard had exercised reasonable care on June 13 in obtaining the MRI of the spine and then referring [appellant] to [the neurosurgeon] as soon as the results of the MRI were known, the surgery . . . would have been performed on June 13[] instead of late in the night of June 14." This would have prevented "further damage to the nerves that occurred between the time surgery [c]ould have been performed . . . [and when] it was actually performed."

Dr. Cybulski echoed the opinions of Dr. O'Connor. Dr. Cybulski asserted that appellant's injuries could have been prevented by an "earlier" surgery. Dr. Cybulski's assessment was that appellant's "symptoms required a stat [MRI] . . . and an emergency neurosurg[ical] consult." According to Dr. Cybulski, "Dr. Hubbard's failure to do so . . . on June 13[] resulted more likely than not in [the] permanent neurological injury . . . that [appellant] has today."

Respondents alleged that these opinions failed to establish a prima facie case of medical malpractice and moved to dismiss the action due to deficient expert-opinion disclosures under Minn. Stat. § 145.682, subd. 6. The district court concluded that the expert opinions of Drs. O'Connor and Cybulski were insufficient to establish how Dr. Hubbard's care caused appellant's injuries, and granted respondents' motion. This appeal follows.

D E C I S I O N

In a medical-malpractice action, a plaintiff must file an expert affidavit establishing a prima facie case by setting forth "specific details concerning [the] experts' expected testimony, including the applicable standard of care, the acts or omissions that [] allege[dly] violated the standard of care and an outline of the chain of causation that allegedly resulted in damage." *Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 193 (Minn. 1990); *see also* Minn. Stat. § 145.682, subds. 2, 4(a) (2010). Causation may be demonstrated by "provid[ing] an outline of the chain of causation between the alleged standard of care and the claimed damages." *Stroud v. Hennepin County Med. Ctr.*, 556 N.W.2d 552, 556 (Minn. 1996); *see also Maudsley v. Pederson*, 676 N.W.2d 8, 14 (Minn. App. 2004) (requiring that an affidavit "illustrate 'how' and 'why' the alleged malpractice caused the injury" (quoting *Teffeteller v. Univ. of Minn.*, 645 N.W.2d 420, 429 n.4 (Minn. 2002))). But "broad and conclusory statements as to causation" will not equate to a prima facie showing required under Minn. Stat. § 145.682, subd. 4. *Lindberg v. Health Partners, Inc.*, 599 N.W.2d 572, 578 (Minn. 1999). Nor will bare testimony "that the defendants 'failed to properly evaluate' and 'failed to properly diagnose' . . . . These 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.

Strict compliance with the disclosure obligations is required. *Broehm v. Mayo Clinic Rochester*, 690 N.W.2d 721, 726 (Minn. 2005). Upon motion, a deficient expert affidavit results in "mandatory dismissal." Minn. Stat. § 145.682, subd. 6(c) (2010). This court reviews a district court's dismissal of an action pursuant to Minn. Stat.

§ 145.682 for an abuse of discretion. *Anderson v. Rengachary*, 608 N.W.2d 843, 846 (Minn. 2000).

Appellant argues that the expert opinions of Drs. O'Connor and Cybulski demonstrate a prima facie case of medical malpractice. Appellant claims that the opinion of Dr. O'Connor established the applicable standard of care pertaining to Dr. Hubbard. Appellant asserts that Dr. O'Connor's opinion established that Dr. Hubbard departed from this standard of care by failing to obtain the MRI results and confer with a neurosurgeon as soon as possible. And appellant claims that both expert opinions established that Dr. Hubbard's failure to expedite the MRI process and ensure an earlier surgery caused her permanent injuries.

The district court relied on this court's decision in *Maudsley* in concluding that appellant's disclosures advanced an unacceptable, general "earlier-is-better" theory of treatment. 676 N.W.2d at 14. In *Maudsley*, the plaintiff was suffering from glaucoma impairing her vision in both eyes. 676 N.W.2d at 9. The treating physician recommended surgery to prevent further vision loss; the procedure posed several risks, including virulent infection. *Id.* at 9-10. Surgery on the left eye was successful, and the plaintiff returned three weeks later for surgery on her right eye. *Id.* at 10. Ten days after the second surgery, however, the plaintiff called the physician complaining of pain and vision trouble in her right eye. *Id.* The physician believed that the plaintiff was suffering from ordinary post-operative symptoms, and recommended that she wait to see him until her upcoming appointment scheduled the next morning. *Id.* When the plaintiff arrived at her appointment the following morning, the physician determined that her right eye was

infected and sent her to a specialist who ultimately diagnosed the virulent infection at risk with glaucoma surgery. *Id.* The plaintiff lost all vision in her right eye, and eventually brought a medical-malpractice action alleging that her vision loss was caused by the physician's 15-to-17-hour delay in diagnosing the infection from when she first called to when she arrived for her appointment. *Id.*

The plaintiff's expert affidavit provided that:

> It is more likely than not that if treatment had been initiated on June 27, rather than June 28, [plaintiff] would not have lost the vision in her right eye. She may have suffered some impairment to that vision, but she would not have lost it totally. When infections are present, it is generally true that better outcomes are the result of earlier treatment; in fact every hour counts.

Id. This court concluded that this disclosure was insufficient to establish causation, noting that "[t]he conclusory statements that generally earlier treatment results in better outcomes and that every hour counts fail to outline specific details explaining how and why [the] 15- to 17-hour delay in treatment caused [the plaintiff's] blindness." *Id.* at 14. The court determined that merely alleging a delay in diagnosis is not enough to establish a prima facie medical-malpractice claim because "if it were, expert testimony on causation would not be necessary." *Id.*

In contrast, we reversed a district court's dismissal under Minn. Stat. § 145.682 in *Demgen v. Fairview Hosp.*, 621 N.W.2d 259, 268 (Minn. App. 2001), *review denied* (Minn. Apr. 17, 2001). In *Demgen*, the plaintiff was 36 weeks pregnant when she noticed decreased fetal movement. 621 N.W.2d at 260. The plaintiff arrived at the hospital and tests were performed to measure the heart rate of the fetus. *Id.* at 261. The tests revealed

abnormal results, but no other alternative means were employed to assess the health of the fetus. *Id.* An external monitor was used to watch the heart activity of the fetus, and the heart activity finally ceased roughly an hour after the plaintiff arrived at the hospital. *Id.* In the ensuing malpractice action, the plaintiff's expert affidavit provided that: "Had [an] ultrasound been performed, it would have revealed abnormally low amniotic fluid levels. . . In combination with the markedly abnormal fetal heart rate tracing, this finding would dictate the need for an immediate caesarean section"; "the applicable standard of care would dictate that such an emergency caesarean section be accomplished within 53 minutes"; and "[h]ad such a timely emergency caesarean section been performed, a live birth would have resulted." *Id.* at 263. We concluded that this affidavit was sufficient to establish a prima facie case of malpractice because "it set out a precise explanation of why the failure to follow the applicable standard of care caused the death of the fetus." *Id.*

Appellant's expert opinions are more analogous to the unspecific affidavit denounced in *Maudsley* than the detailed expert opinion upheld in *Demgen*. Unlike *Demgen*, both doctors in this case fail to identify a specific time period in which Dr. Hubbard should have acted differently to prevent appellant's long-term injuries. Dr. O'Connor, for example, asserted that: cauda equina syndrome is "a medical emergency that requires diagnosis and treatment as soon as possible"; decompression of the nerves "must be accomplished as soon as possible"; the standard of care required Dr. Hubbard "to order the MRI . . . as soon as possible so that [] surgery could [have been] performed as soon as possible"; the surgery was "performed later than it could have

been"; and Dr. Hubbard "failed to exercise reasonable care for a neurologist in failing to obtain imaging of the low back as soon as possible." Each excerpt advances a nebulous timeframe in which Dr. O'Connor asserts that Dr. Hubbard's delay caused appellant's long-term injuries. Similarly, Dr. Cybulski merely alleged that a "stat" imaging study should have been performed followed by an "emergency neurosurg[ical] consult" and that appellant's injuries could have been prevented by an "earlier" surgery. But Dr. Cybulski does not posit an actual timeline in which these events should have occurred. These opinions differ drastically from the specific, 53-minute timeframe serving as the conduit for the chain of causation in *Demgen*. *See id*.

The supreme court has stated that the guiding principle underlying Minn. Stat. § 145.682 is "that a jury should not be permitted to speculate as to the possible causes of a plaintiff's injury or whether different medical treatment could have resulted in a more favorable prognosis for the plaintiff." *Leubner v. Sterner*, 493 N.W.2d 119, 121 (Minn. 1992). Unfortunately for appellant, her expert opinions lack the specificity regarding causation to prevent the exact jury speculation cautioned against by the supreme court. Because the expert affidavits fail to advance a particularized and direct causal nexus between respondents' care and appellant's injuries, appellant fails to demonstrate a prima facie case of medical malpractice. Accordingly, the district court did not abuse its discretion by dismissing appellant's claim.

Affirmed.