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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1511**

Sandra Bacon, et al.,
Appellants,

vs.

Hennepin County Medical Center,
Respondent.

**Filed April 26, 2011
Reversed and remanded
Ross, Judge**

Hennepin County District Court
File No. 27-CV-09-15851

Duane E. Arndt, Arndt & Benton, P.A., Minneapolis, Minnesota (for appellant)

Michael O. Freeman, Hennepin County Attorney, Michael B. Miller, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Lansing, Presiding Judge; Ross, Judge; and Connolly, Judge.

UNPUBLISHED OPINION

ROSS, Judge

The dispute in this case began after an x-ray technician positioned a hip-replacement patient's bare skin against a metal plate, which, when removed after the x-ray procedure, allegedly caused epidermal tearing that precipitated a serious skin

infection. Sandra Bacon appeals from the dismissal of her medical-malpractice claim, leaving us to decide whether her required expert-identity affidavit meets the substantive requirements of Minnesota Statutes section 145.682 (2010). The district court dismissed her claim with prejudice after concluding that her physician, an orthopedic surgeon, was not qualified to opine reliably on the cause of her skin infection and failed to outline a causation chain linking the allegedly negligent x-ray procedure to the infection. The hospital maintains that the district court appropriately rejected the affidavit on the merits, and in the alternative it asks us to review the district court's failure to find that the tardiness of Bacon's affidavit was an independent alternative basis for dismissing her claim. Because we conclude that the expert affidavit satisfied section 145's requirements, we reverse. We decline to address the hospital's alternative theory because it filed no notice of related appeal of that issue.

FACTS

We accept the following facts as true for the purpose of resolving this appeal. Dr. Robert Wengler replaced Sandra Bacon's impaired left hip with a prosthesis at the Hennepin County Medical Center (HCMC) and ordered a post-operative x-ray. HCMC x-ray technicians brought radiology equipment into her recovery room and took the x-ray. While taking the x-ray, one of them placed a metal plate temporarily under Bacon's bare buttock, causing her to feel "a painful pulling tearing sensation on her buttock when the x-ray plate was removed." Before Dr. Wengler discharged Bacon the next day, he noticed a "bluish discoloration with a small abrasion" on the skin covering Bacon's sacrum (the bone at the base of the spine), but it was not substantially infected at that

time. Bacon was discharged into the care of her daughter, a professional home healthcare aide.

Nine days after the discharge, Bacon's daughter called HCMC and reported that Bacon's skin abrasion had become seriously infected. Bacon visited Dr. Wengler two days later for a post-operative evaluation. Dr. Wengler diagnosed that Bacon had developed a "sacral decubitus ulcer" (an infected bed sore) at the abrasion site. He concluded that she required immediate hospitalization and "intensive medical care[] to heal the infected ulcerated tissue and infection." The infection's proximity to Bacon's hip-replacement incision site increased its danger. Bacon's treatment and recovery left her hospitalized for nine days.

Two years later, Bacon and her husband sued HCMC for medical malpractice and loss of consortium. Bacon relied on Dr. Wengler in the suit as her medical expert, offering as her statutorily required expert-witness affidavit Dr. Wengler's testimony summarizing his critical opinion of Bacon's post-operative treatment. HCMC moved the district court to dismiss the suit, contending that the expert-opinion affidavits failed to satisfy the requirements of Minnesota Statutes section 145 because Dr. Wengler was not qualified and Bacon was late in giving the statutorily mandated government-subdivision notice of claims. The district court held that although Dr. Wengler was qualified to testify about the standard of care for x-ray technicians, he lacked the medically specific expertise to qualify him to testify about the cause of Bacon's skin infection. It also held that the affidavit failed to outline a chain of causation linking the x-ray technician's breach to Bacon's infection. After holding that it was dismissing the lawsuit with

prejudice, it added that Bacon's tardiness in notifying HCMC of her claims was not a basis to dismiss. Bacon appeals.

DECISION

A plaintiff in a medical-malpractice case must produce two affidavits when "expert testimony is necessary to establish a prima facie case." Minn. Stat. § 145.682, subd. 2; *Sorenson v. St. Paul Ramsey Medical Center*, 457 N.W.2d 188, 190–91 (Minn. 1990). The first, to be attached to the summons and complaint, Minn. Stat. § 145.682 subd. 2, must be signed by the plaintiff's attorney to assure that he thoroughly reviewed the case with an expert and believes that admissible testimony will establish the elements of the claim, *id.*, subd. 3. The second, served within 180 days after commencement of the suit, *id.*, subd. 2, must identify and be signed by each expected expert, 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. It also must describe the expert's expected testimony about the applicable standard of care, the alleged breach of the standard of care, and the chain of causation linking the alleged breach to the plaintiff's injury. *Sorenson*, 457 N.W.2d at 193. The failure of the plaintiff to satisfy these affidavit requirements results in the automatic dismissal of her malpractice claim with prejudice. Minn. Stat § 145.682, subd. 6(c) (2010); *Broehm v. Mayo Clinic Rochester*, 690 N.W.2d 721, 726 (Minn. 2005). At issue in this appeal is the adequacy of Bacon's second affidavit.

I

We first address the district court's ruling that Dr. Wengler is unqualified to testify about the cause of Bacon's injury. We will reverse the qualification ruling only if it reflects an abuse of the district court's discretion. *See Teffeteller v. Univ. of Minn.*, 645 N.W.2d 420, 427 (Minn. 2002). A witness possessing the requisite "knowledge, skill, experience, training or education" may testify about a relevant fact in the form of an opinion if the expert's specialized knowledge will assist a fact finder. Minn. R. Evid. 702. In a medical malpractice case, this expert witness must have both scientific knowledge and practical experience with the subject matter of his proposed testimony. *Cornfeldt v. Tongen*, 262 N.W.2d 684, 692 (Minn. 1977). That an expert witness who is a physician does not specialize in the subject for which he offers testimony does not automatically render him unqualified. *Fiedler v. Spoelhof*, 483 N.W.2d 486, 489 (Minn. App. 1992), *review denied* (Minn. Jun. 10, 1992).

Dr. Wengler has forty years' experience in orthopedic surgery. He was Bacon's physician throughout her hip surgery, her x-ray, her aftercare, and her skin-wound treatment. His affidavit asserts that he has significant personal experience providing wound care. As an orthopedist, he is required to, and does, observe and treat skin wounds on various body parts. And he has expertise in treating surgical and nonsurgical skin penetrations.

Despite this background, the district court deemed Dr. Wengler to be unqualified to provide the challenged expert affidavit because he had consulted with an infectious disease specialist regarding Bacon's infection. It inferred from this consultation that

Dr. Wengler, left to himself, must lack the knowledge needed to determine the infection's cause. But this reasoning ignores Dr. Wengler's affidavit, which implies necessarily that he did know the cause and that he had the requisite medical expertise to diagnose Bacon's decubitus ulcer.

Dr. Wengler explained how, as a result of the deviation from the standard of care, Bacon's skin was opened in an area highly susceptible to infection. And he reasoned that the infection was caused by bacteria entering the wound. That bacteria in close proximity to an open wound can cause infection seems to be basic medical knowledge within the expertise of any physician, but certainly within the expertise of one who, like Dr. Wengler, routinely provides post-operative care. Dr. Wengler has the scientific knowledge and practical experience to opine on the cause of Bacon's skin infection.

II

We next address whether Dr. Wengler sufficiently outlined a chain of causation. The district court held that Dr. Wengler's affidavit failed to outline a chain of causation because the affidavit did not explain how the organisms penetrated the wound. It also found that the affidavit failed to prove that it is "more likely than not" that Bacon's injury was a result of HCMC's negligence, rather than Dr. Wengler's or Bacon's homecare-providing daughter's negligence.

HCMC and the district court rely on *Stroud v. Hennepin County Medical Ctr.*, 556 N.W.2d 552 (Minn. 1996), as the controlling case for the assessment of the chain-of-causation requirements of section 145.682. The *Stroud* court held the affidavit in that

case inadequate to establish causation. The deficient expert-identity affidavit's entire outline of causation in *Stroud* was as follows:

I, Dr. Tredal, will testify that as a result of the breach of the standard of care on 1/1/94 and 1/4/94, as discussed, there was a failure to diagnose and treat a subarachnoid hemorrhage which ultimately resulted in a complicated hospital course and death of the Plaintiff.

Stroud, 556 N.W.2d at 554. The *Stroud* affidavit lacked any explanation of how the hospital's failure to timely diagnose Stroud's hemorrhage led to her death and the failure was particularly troublesome because the death certificate said that death was caused by a pulmonary embolism. *See id.* at 553. Rejecting the affidavit, the *Stroud* court held that it "provides only broad, conclusory statements as to causation," and it affirmed the district court's dismissal. *Id.* at 556.

The essential chain-of-causation statements in Dr. Wengler's affidavit are plainly more specific than the affidavit considered in *Stroud*:

[Sandra Bacon's] x-ray procedure requires use of a sheet or pad to avoid skin contact with the metal surface of the x-ray cassette to avoid injury and prevent an infectious agent being transferred to a patient's skin.

Sandra Bacon reported to me that the x-ray cassette was placed under her bare buttock, without the benefit of a sheet or padding; this was a deviation from acceptable practice for doing this type of x-ray by the x-ray technician at any hospital.

[Sandra Bacon was abraded on her sacrum during the procedure.]

The sacrum is a bone structure that is covered with very limited amounts of soft tissue, and is an area where the covering skin is sensitive to potential infection because of its proximity to the anus.

....

[The abrasion cite developed into the sacral decubitus ulcer about 11 days after Bacon was discharged from the hospital.]

It is my opinion that the sacral decubitus ulcer was not caused by pressure or failure of the patient to move or change position.

....

It is my opinion that the improper x-ray procedure used by Noad Tezera caused a breakage of skin which allowed an infectious agent to enter the abraded sacrum during the recovery. This infectious agent produced the sacral decubitus ulcer. The infectious agent was documented in the tissue culture done from tissue I removed when I did Sandra Bacon's debridement on readmission to HCMC on December 14, 2006.

This affidavit contains detailed explanation far beyond the merely conclusory statements in *Stroud*. Dr. Wengler's affidavit does not simply allege that the breach of the standard of care caused an abrasion that led to infection. It explains that not positioning a pad between Bacon's skin and the machine caused an abrasion (because the skin in that area is thin) and that the area of the abrasion is particularly susceptible to the type of bacteria that caused the infection (because of its proximity to the anus). No pad; weak skin; abrasion; proximity to bacteria: infection. This is a simple and direct chain of causation.

The district court relied on *Leubner v. Sterner*, 493 N.W.2d 119 (Minn. 1992), as essentially requiring the expert-identity affidavit to "prove, among other things, that it is more probable than not that [Bacon's] injury was a result of the defendant health care provider's negligence." But *Leubner* does not construe the expert-identity statute. *Leubner* was an appeal from a summary judgment decision in which the district court dismissed a medical-malpractice plaintiff's claims because her pretrial offer of proof "failed to establish that it was more likely than not that the specified consequences

resulted from the alleged negligence.” *Leubner*, 493 N.W.2d at 120. By contrast, section 145 requires only that the plaintiff assert causation; it does not require her to prove it by a preponderance of the evidence. *See Demgen v. Fairview Hosp.*, 621 N.W.2d 259, 265 (Minn. App. 2001), *review denied* (Minn. Apr. 17, 2001). We are confident that Dr. Wengler’s affidavit sufficiently outlines a chain of causation, linking in logical and understandable fashion the x-ray technician’s breach to Bacon’s skin ulcer.

III

In its responsive brief, HCMC goes beyond defending the district court’s decision on the merits of the affidavit; it asks us to reverse the district court’s holding that HCMC was not prejudiced by Bacon’s late notice, and to hold that it *was* prejudiced, allowing us to affirm the result on that alternative ground. But our rules require a respondent to give notice when it asks us to review an adverse decision. Minn. R. Civ. App. P. 106. Because HCMC failed to provide this notice, we decline its invitation to address the issue it raises in brief. *See Kolby v. Nw. Produce Co.*, 505 N.W.2d 648, 653 (Minn. App. 1993).

Reversed and remanded.