STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2312

Alan Meinershagen,
Appellant,

vs.

Stefan J. Konasiewicz, M.D.,
and St. Luke's Hospital of Duluth,
Respondents.

Filed November 26, 2012
Affirmed
Huspeni, Judge[*]

St. Louis County District Court
File No. 69DU-CV-10-2255

Richard E. Bosse, Henning, Minnesota (for appellant)

Shawn M. Raiter, Mark A. Solheim, Paul A. Sand, Larson King, LLP, St. Paul, Minnesota (for respondent Stefan J. Konasiewicz, M.D.)

Tracy A. Schramm, Charles B. Bateman, Bateman & Schramm, P.A., Duluth, Minnesota (for respondent St. Luke's Hospital of Duluth)

Considered and decided by Hooten, Presiding Judge; Peterson, Judge; and Huspeni, Judge.

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

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

HUSPENI, Judge

Appellant challenges the jury verdict in respondents' favor on medical-malpractice claims, arguing that the district court abused its discretion by denying appellant's motion for a new trial and asserting that (1) respondents failed to disclose expert testimony, (2) the district court erred in denying appellant's request to compel depositions of respondents' experts, (3) the district court erred in denying appellant's request to compel depositions of its treating physicians, and (4) the district court erred in excluding appellant's rebuttal experts. Because the district court neither erred nor abused its discretion in ruling on any of the issues raised by appellant, we affirm.

FACTS

On February 19, 2006, Alan Meinershagen[1] walked into respondent St. Luke's Hospital of Duluth complaining of numbness in his left arm and hand. Meinershagen had a CT scan and an MRI of his brain; following interpretation of the MRI, Meinershagen was referred to respondent physician Dr. Stefan J. Konasiewicz for a neurosurgical consultation. Respondent physician recommended a brain biopsy based on the two tests, which showed an irregular enhancing lesion in the right hemisphere. Meinershagen consented to the biopsy, which was performed by respondent physician on February 21.

[1] Alan Meinershagen died during the pendency of this appeal. The special administrator for Meinershagen's estate authorized continuation of this appeal. For purposes of this opinion, "appellant" will refer to Meinershagen's estate and the decedent will be referred to by name.

The removed tissue was benign, but as a result of the procedure, Meinershagen suffered complications resulting in brain injury and severe disability.

In August 2010, Meinershagen filed a complaint against respondent physician and respondent hospital, alleging that respondents failed to exercise the necessary standard of care, which resulted in his injuries.[2] After a seven-day trial in which the district court had granted a motion for change of venue due to publicity, a jury returned a verdict in favor of respondents. Appellant's motion for judgment as a matter of law or for a new trial was denied by the district court after a hearing. This appeal followed.

D E C I S I O N

Appellant argues that the district court abused its discretion in denying its request for a new trial. A district court may grant a new trial upon a showing of misconduct by the prevailing party, accident or surprise that could not have been prevented by ordinary prudence, or errors of law made by the court at trial. Minn. R. Civ. P. 59.01(b), (c), (f). The reviewing court will not set aside a jury's verdict unless "it is manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable to the verdict." *Navarre v. S. Washington Cnty. Schs.*, 652 N.W.2d 9, 21 (Minn. 2002) (quotation omitted). We review a district court's decision on a motion for a new trial for an abuse of discretion. *Halla Nursery, Inc. v. Baumann–Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990). The record before us for review includes a 22-page detailed memorandum addressing and deciding each of the issues appellant raises.

[2] Appellant makes no claim that the biopsy was conducted in a negligent manner. The only issue at trial was whether the decision to perform the biopsy was a correct one.

Disclosure

We first address appellant's assertion that it is entitled to a new trial because respondents failed to disclose their expert's testimony; a failure, appellant contends, that resulted in surprise and prejudice because appellant was unable to fully anticipate the expert's testimony. This court reviews the district court's rulings on discovery violations for an abuse of discretion. *Shetka v. Kueppers, Kueppers, Von Feldt & Salmen*, 454 N.W.2d 916, 921 (Minn. 1990).

Appellant commenced this action in February 2010. Expert disclosures were required by February 2, 2011, but discovery was extended by stipulation to June 1, 2011. On February 1, 2011, respondents' expert, Dr. Larkins, provided an affidavit. Dr. Larkins outlined his review of the records, his opinions regarding the standard of care, and the basis for his opinions. We conclude that there is no merit in appellant's claim of failure to disclose expert testimony.

Minn. R. Civ. P. 26.02(e)(1)(A) provides that an expert must "state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." Our review of the record confirms that Dr. Larkins's affidavit complies with these requirements.

Appellant also claims, however, that Dr. Larkins's trial testimony went beyond that outlined in his affidavit. While appellant is correct in asserting that Dr. Larkins's testimony at trial went beyond that included in his affidavit, this additional detailed testimony emerged when Dr. Larkins addressed appellant's expert's opinions during

cross examination by appellant's counsel. No objection was raised during this now-challenged testimony.

Under Minn. R. Evid. 103(a) "[e]rror may not be predicated upon a ruling which admits . . . evidence unless a substantial right of the party is affected, and . . . a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context." Because appellant failed to object, we could deem this issue waived. *See Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458, 479 (Minn. App. 2006) (stating that when a party failed to object to evidence at trial, the party generally waives the right to object), *review denied* (Minn. Aug. 23, 2006). The district court cited appellant's failure to object to Dr. Larkins's expanded testimony when it rejected this claim as a basis upon which to grant a new trial.

But even if this court considers the merits of this rejected claim, appellant has failed to demonstrate any abuse of discretion. Pursuant to agreement of the parties at trial, Dr. Larkins testified "out of order" prior to appellant resting its case. Thus, if Dr. Larkins's testimony came as a surprise, appellant had an opportunity yet in its case-in-chief to address the challenged evidence. The record does not support appellant's allegation that respondents committed misconduct by expanding Dr. Larkins's testimony at trial. Admitting this evidence was within the district court's discretion. *See Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997) (stating that absent an erroneous interpretation of law, it is within the district court's discretion whether to admit evidence).

Depositions of experts

Appellant also claims that the district court abused its discretion by denying its request to compel a deposition of respondents' experts. We disagree.

In February 2011, respondents disclosed expert witnesses. In May of that year appellant moved for leave to take depositions of respondents' experts. In support for its claim of a right to depose respondents' experts, appellant cites Minn. R. Civ. P. 35.04, which precludes depositions of treating or examining physicians except upon court order. Thus, argues appellant, this rule does not apply to the taking of depositions of expert witnesses. While rule 35.04 limits certain medical-expert depositions, the specific question we must decide here is whether the district court abused its discretion by denying appellant's request to take the depositions at issue. We conclude that there was no abuse of discretion.

The record supports the district court's determination that the parties discussed making experts available for depositions prior to trial. Respondents were willing to allow appellant to take depositions, and appellant had sufficient time in which to take depositions, but failed to do so. We conclude that it was within the district court's discretion to deny appellant's request to compel the taking of experts' depositions.

Depositions of treating/examining physicians

Appellant raises an issue similar to that just addressed in claiming that the district court abused its discretion by denying appellant's request to compel the depositions of appellant's own treating physicians, including the radiologists who interpreted the images of Meinershagen's brain scans. This argument appears to conflict with appellant's earlier

recognition that rule 35.04 restricts the taking of depositions of treating physicians. *See* Minn. R. Civ. P. 35.04 (stating that "depositions of treating or examining medical experts shall not be taken except upon order of the court for good cause").

Appellant argues, nonetheless, that rule 35.04 is designed to protect treating physicians from the opposing party, and appellant is not an opposing party vis-à-vis the treating physicians whose depositions are sought. Appellant failed, however, to show the good cause necessary to order the taking of the treating physicians' depositions because each physician was made available to attend an informal conference. As the district court determined, at no time did appellant's counsel claim that the physicians failed to cooperate during the conferences. Moreover, neither party called any of the treating physicians as a witness during trial. The district court did not abuse its discretion by denying appellant's motion to compel these depositions.

Rebuttal witnesses

Finally, we address appellant's argument that it is entitled to a new trial because the district court excluded rebuttal witnesses whom appellant wished to call. Essentially, appellant asserts that because respondents failed to fully disclose the extent of their expert's testimony, appellant's counsel was inadequately prepared to address the surprise testimony and should have been allowed to call rebuttal witnesses because his case-in-chief witnesses were no longer available. We will address appellant's argument mindful that we have already determined that respondents' disclosure was adequate.

"Rebuttal evidence" is evidence that "explains, contradicts, or refutes the defendant's evidence. Its purpose is to cut down [the] defendant's case and not merely to

confirm that of the plaintiff." *Farmers Union Grain Term. v. Indus. Elec. Co.*, 365 N.W.2d 275, 277 (Minn. App. 1985), *review denied* (Minn. 1985).

Appellant's attorney disclosed his intent to call rebuttal expert witnesses two weeks before trial. The district court reserved ruling on respondents' motion to preclude the rebuttal testimony on the basis of tardy disclosure. Ultimately, the district court excluded appellant's rebuttal experts, stating:

> [T]he jury has been provided sufficient evidence that allows both counsel to argue at length regarding their side of the story; that there was very lengthy examination and cross-examination of the various witnesses; that all of these areas have been covered. . . . [T]here doesn't appear [to be] any information * * * that could possibly bring anything new or different into this case. . . . [Appellant is still] able to argue . . . whether Mr. Meinershagen would have ended up in a nursing home or not because there's testimony either way on that[.] . . . [N]ot knowing exactly what (a rebuttal expert witness) is going to say, other than he agrees with [appellant's experts] would be cumulative.

Importantly, the district court relied heavily on appellant's failure to make an offer of proof; appellant failed to specify what evidence the rebuttal witnesses would present. In posttrial motions, appellant again failed to provide an offer of proof, despite the district court's suggestions of several ways to provide an offer of proof. As the district court noted, the testimony of a rebuttal witness is not obvious based on identity of the witness. Appellant failed to meet its burden of specifying the testimony of respondents'

experts that would be rebutted or showing that the rebuttal evidence would not be cumulative of the evidence presented in appellant's case-in-chief. [3]

Affirmed.

[3]Appellant argued two additional issues in its initial brief to this court—challenging the constitutionality of Minn. Stat. § 145.682 (2010), and arguing that the district court abused its discretion in refusing to include a reference to the Hippocratic Oath. In its reply brief, appellant withdrew and waived these arguments.