STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1377

Leroy Bothun,
Trustee for the Next of Kin of Elda Bothun,
Appellant,

vs.

Martin LM, LLC
d/b/a Martin Luther Care Center, et al.,
Respondents.

Filed May 13, 2013
Affirmed
Smith, Judge

Hennepin County District Court
File No. 27-CV-11-15095

Sharon L. Van Dyck, Van Dyck Law Firm, PLLC, St. Louis Park, Minnesota; and

Mark R. Kosieradzki, Joel E. Smith, Kara Rahimi, Kosieradzki Smith Law Firm, LLC, Plymouth, Minnesota (for appellant)

Rebecca Egge Moos, Charles E. Lundberg, Shanda K. Pearson, Bassford Remele, P.A., Minneapolis, Minnesota (for respondents)

Considered and decided by Smith, Presiding Judge; Kalitowski, Judge; and Judge, Stoneburner.

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

SMITH, Judge

Appellant challenges the dismissal of his claims arising from his wife's death while she recovered from surgery at a rehabilitative care center. Appellant contends that respondents' delay and negligence in providing emergency medical care to his wife caused her death. Respondents moved for summary judgment or dismissal, and appellant subsequently moved to amend his complaint to add a request for punitive damages. The district court granted respondents' motion for summary judgment and dismissal pursuant to Minn. Stat. § 145.682, concluding that appellant's expert affidavit failed to detail a sufficient chain of causation between respondents' care and the patient's death and that appellant's claim for direct corporate medical negligence is not recognized in Minnesota. The district court also denied appellant's request to amend his complaint for punitive damages. We affirm.

FACTS

In late 2008, decedent Elda Bothun (Ms. Bothun) was diagnosed with an abdominal aortic aneurysm that required surgery. Ms. Bothun underwent preoperative testing that revealed heart problems. In preparation for the surgery, Ms. Bothun had stents inserted into her heart to relieve the artery blockage and was prescribed blood thinners. Dr. Peter Alden performed the abdominal surgery on January 13, 2009. Dr. Alden noted that Ms. Bothun experienced "some renal ischemia and postoperatively . . . some transient hypotension," which suggested a 32-minute loss of blood flow to the kidneys. The remainder of Ms. Bothun's hospital stay was classified as "uncomplicated."

On January 18, 2009, Dr. Alden discharged Ms. Bothun to respondent Martin Luther Care Center (MLCC) for rehabilitative treatment. Ms. Bothun was prescribed blood pressure and pain medications and was utilizing supplemental oxygen on an intermittent basis.

The events that transpired from Ms. Bothun's admittance to MLCC on January 18 through the early morning hours of January 19 are the basis of this dispute. The undisputed facts are: (1) when Ms. Bothun's husband left MLCC on the evening of January 18, he indicated that she "looked great"; (2) Ms. Bothun's condition significantly worsened sometime after 3:00 a.m. on January 19; (3) at 4:36 a.m. the Bloomington Police Department received a phone call regarding Ms. Bothun's condition; (4) an ambulance arrived at 4:42 a.m., and emergency medical technicians (EMTs) initiated cardiopulmonary resuscitation (CPR); (5) the EMTs estimated that Ms. Bothun had been "down" for at least 20 minutes; and (6) Ms. Bothun died at 5:05 a.m.

The remaining facts regarding the night of Ms. Bothun's death are disputed. Meaza Abayneh, the nurse directly responsible for Ms. Bothun's care, and Elijah Mokandu, who supervised Abayneh, are the only two witnesses capable of establishing a timeline. The record demonstrates that at 1:35 a.m. Abayneh noted that Bothun was alert, oriented, and able to communicate her needs. According to medical charting and a plurality of Abayneh's statements, at 3:00 a.m. Abayneh discovered that Ms. Bothun was

short of breath, restless, tossing from side to side, pale, and had a hand on her chest.[1] When Abayneh was unable to obtain a blood pressure reading, she considered the situation an emergency and ran to inform Mokandu. While en route to the west wing of the facility, she located nitroglycerin and a manual blood pressure cuff. When she returned to Ms. Bothun's room, she noted that Ms. Bothun's status had "totally changed," as she was unresponsive but still breathing and maintaining a pulse. Mokandu arrived with supplemental oxygen and told Abayneh to call 911. Abayneh ran to the nurses' station and called the police.[2] It is undisputed that the call to the Bloomington Police Department occurred at 4:36 a.m.

Appellant Leroy Bothun (Bothun), Ms. Bothun's husband, subsequently commenced this wrongful-death action, alleging ordinary and professional negligence and asserting direct corporate liability on the part of MLCC. To comply with Minn. Stat. § 145.682, Bothun secured an expert affidavit of Dr. Alden, the same doctor who performed the abdominal surgery on Ms. Bothun, to establish a causal chain between respondents' actions and Ms. Bothun's death. Dr. Alden opined that Ms. Bothun likely suffered from one of three conditions and that, had she received treatment prior to 3:30 a.m., it was more probable than not that she would have survived. Respondents moved to dismiss the action with prejudice pursuant to Minn. Stat. § 145.682 "and/or for Summary Judgment" arguing that Dr. Alden's affidavit failed to meet statutory requirements.

[1] The parties' main dispute is whether Abayneh discovered Ms. Bothun at 3:00 a.m. or 4:00 a.m. Due to the procedural posture of the case, we view the events in the light most favorable to appellant.

[2] It is undisputed that MLCC's 911 system was inoperable.

Bothun subsequently moved to amend his complaint to include a claim for punitive damages.

The district court dismissed the action with prejudice. Despite an investigation by the Minnesota Department of Health that found various actors neglectful, the district court concluded that Dr. Alden's affidavit was too conclusory to sustain a wrongful-death action. Specifically, the district court noted that "Dr. Alden fails to explain why 3:30 a.m. is the critical time for emergency treatment for each of Ms. Bothun's probable conditions." The district court proceeded to dismiss the corporate-liability claims because it determined that Minnesota law does not recognize such a cause of action. Finally, the district court denied Bothun's motion to amend his complaint to add a claim for punitive damages, concluding that "the facts [did] not justify" such a claim. This appeal followed.

D E C I S I O N

I.

Under Minnesota law, a plaintiff who brings a medical malpractice action must file an affidavit identifying (1) experts who intend to testify; (2) the substance of their testimony; and (3) a summary of the basis for the experts' opinions. Minn. Stat. § 145.682, subd. 4(a) (2012). Failure to comply with the statutory requirements mandates that the district court, upon motion, dismiss the plaintiff's claim with prejudice. *Id.*, subd.

6. We will not reverse a district court's dismissal under this statute absent an abuse of discretion.[3] *Anderson v. Rengachary*, 608 N.W.2d 843, 846 (Minn. 2000).

The purpose of requiring an expert affidavit is to eliminate nuisance medical malpractice suits by requiring plaintiffs to substantiate their claims. *Stroud v. Hennepin Cnty. Med. Ctr.*, 556 N.W.2d 552, 555 (Minn. 1996). Expert affidavits are generally required for all actions alleging medical malpractice unless "the acts or omissions . . . are within the general knowledge and experience of lay persons." *Tousignant v. St. Louis Cnty.*, 615 N.W.2d 53, 58 (Minn. 2000) (quotation omitted). Situations not requiring an expert affidavit are the exception, not the rule.[4] *Id.* at 58, 61.

The expert affidavit requirement imposes strict standards for compliance:

> [P]laintiffs will be expected to set forth, by affidavit . . . specific details concerning their experts' expected testimony, including the applicable standard of care, the acts or omissions that plaintiffs allege violated the standard of care and an outline of the chain of causation that allegedly resulted in damage to them.

Maudsley v. Pederson, 676 N.W.2d 8, 13 (Minn. App. 2004) (quotation omitted). To establish causation, the expert affidavit should illustrate the "how" and "why" that

[3] Bothun also contends that we must resolve whether the district court dismissed his action under Minn. Stat. § 145.682, subd. 6 or whether it granted respondents' motion for summary judgment. Because the district court relied almost exclusively on the contents of Dr. Alden's affidavit, the abuse-of-discretion standard is appropriate.

[4] Bothun contends that, before considering the district court's causation analysis, we should first resolve whether an expert affidavit is required or if the facts of this case are within the common knowledge of lay persons. Because Bothun failed to raise this argument to the district court and because the district court did not consider it, we will not address it for the first time on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

connects the alleged malpractice to the injury. *Teffeteller v. Univ. of Minn.*, 645 N.W.2d 420, 429 n.9 (Minn. 2002). Conclusory statements do not satisfy this requirement. *Stroud*, 556 N.W.2d at 556. The district court is prohibited from relying on rebuttal evidence or outside medical knowledge when it determines whether a plaintiff's affidavit establishes a prima facie case of malpractice.[5] *See Demgen v. Fairview Hosp.*, 621 N.W.2d 259, 266 (Minn. App. 2001) (explaining that it is error to conduct a mini-trial that weighs an expert affidavit against rebuttal evidence), *review denied* (Minn. Apr. 17, 2001). We must resolve whether the district court abused its discretion when it determined that Dr. Alden's expert affidavit failed to establish a sufficient chain of causation between Ms. Bothun's care at MLCC and her death.

Dr. Alden's overarching conclusion was that, "within a reasonable degree of medical certainty" Ms. Bothun died due to MLCC's "failure to [immediately] provide medical attention for her symptoms of emergent respiratory/cardiac distress." Dr. Alden identified three possible conditions that Ms. Bothun likely suffered from: (1) a hemorrhage; (2) a pulmonary embolus; or (3) a myocardial infarction. Dr. Alden concluded that, "in any of those circumstances, it is more probable than not that had Ms. Bothun received immediate medical attention she would have survived the event."

[5] Bothun contends that the district court erred by relying on an expert affidavit submitted by respondents that asserted the overall probability of Ms. Bothun surviving her procedure. Bothun argues that he submitted a rebuttal affidavit that provided context for respondents' affidavit. In our view, the district court never directly referenced respondents' submitted affidavit and did not appear to base its conclusions on outside evidence. Rather, the district court determined that Bothun's responding expert was unqualified to offer an opinion. Regardless, the district court's analysis focused on Dr. Alden's affidavit, and our review is equally focused on his assertions.

Dr. Alden devoted attention to each of the three potential conditions he identified as potential causes of Ms. Bothun's death. In the case of a hemorrhage, although rare, he concluded that had Ms. Bothun received treatment "at or before [3:30 a.m.] . . . her condition could have been treated" by testing and providing intravenous fluids that would have sustained her until surgery. He noted that prompt diagnosis and treatment for a pulmonary embolus is essential for reducing the morbidity of the condition and again identified 3:30 a.m. as the pivotal time for providing treatment. Finally, Dr. Alden concluded that prompt treatment of a myocardial infarction (a heart attack) is "critical." Although he identified a 90-minute window to reduce the morbidity of heart attacks, he again suggested that had MLCC rendered treatment "at or before [3:30 a.m.] . . . [Bothun's] MI/heart attack could have been treated."

Bothun contends that the district court "missed the boat" by focusing on the unknown cause of Ms. Bothun's distress rather than the actual cause of her death. We agree. The district court stated that its "foremost" concern with Dr. Alden's affidavit was that "the nature and severity" of Ms. Bothun's condition was unknown. It appears that, in the district court's analysis, because the cause of death was unknown it was impossible to conclude that specific earlier medical attention would have prevented Ms. Bothun's death. However, our caselaw permits an expert witness to draw reasonable inferences from the facts. *See Blatz v. Allina Health Sys.*, 622 N.W.2d 376, 387 (Minn. App. 2001) ("[an] expert is permitted to make legitimate inferences, which have probative value in determining disputed fact questions"), *review denied* (Minn. May 16, 2001). Dr. Alden's affidavit extensively details Ms. Bothun's medical condition, vital signs, and the timeline

of events preceding her cardiac distress. Although some facts are disputed, he appears to draw legitimate inferences regarding her cause of death from the facts available, based on his medical knowledge and experience. A medical-malpractice plaintiff is not required to rule out all other possible causes of injury in order to establish a prima facie case. *See Bauer v. Friedland*, 394 N.W.2d 549, 554 (Minn. App. 1986). Accordingly, the district court's focus on the ultimate unknown cause of death was misplaced.

Even though Dr. Alden's affidavit contains reasonable inferences regarding the "what" of Ms. Bothun's condition, the affidavit must also complete the causal link to MLCC's care to sustain its burden. Dr. Alden's conclusion that 3:30 a.m. was the pivotal time for providing Ms. Bothun life-sustaining care is an unsupported, and therefore speculative, inference. Dr. Alden offers no explanation regarding why 3:30 a.m. was the required time for treatment. The district court compared this case to a situation previously confronted by this court where a woman visited her eye doctor who opted for a "wait and see" approach to treatment. *See Maudsley v. Pederson*, 676 N.W.2d 8, 10 (Minn. App. 2004). The next morning, the woman was blind in the affected eye, prompting her to sue. *Id.* Ultimately, we agreed with the district court that the submitted expert affidavit was conclusory because its statement that "generally earlier treatment results in better outcomes and that every hour counts" was not sufficiently concrete to establish a causal link. *Id.* at 14. We find *Maudsley* distinguishable. This is not a case where Dr. Alden asserted simply that earlier treatment would have saved Ms. Bothun's life. Dr. Alden identified conditions that Ms. Bothun likely suffered from and identified a specific timeframe during which her life could have been saved. Instead of asserting

that earlier care would have resulted in a better outcome, it is the lack of concrete explanation regarding his asserted time of 3:30 a.m. that prevents the affidavit from establishing a sufficient link.

For Dr. Alden's affidavit to sufficiently create a causal link, we must be able to identify a "precise explanation of why [the defendant's] failure to follow the applicable standard of care caused the [injury]." *Demgen*, 621 N.W.2d at 263. In *Demgen*, we decided the affidavit met this requirement because it specifically identified a 53-minute treatment window, described the relevant tests and procedures required for treatment, and linked those conclusions to the death of the plaintiff. *Id.* In *Blatz*, another case in which we found the expert affidavit sufficient on causation, the affidavit identified a five-minute window and tied the failure to act within that window to the ultimate harm. 622 N.W.2d at 386-87. In this case, Dr. Alden has described three possible conditions with great clarity, but even if his conclusions are a reasonable expert inference, his assertion that MLCC had to act by 3:30 a.m. is asserted with no context. Dr. Alden identifies a treatment window only for the heart attack, where he suggested a 90-minute window. Even assuming the facts most favorable to Bothun, had MLCC discovered Ms. Bothun's cardiac distress at 3:00 a.m., it would have had until 4:30 a.m. to begin rendering treatment. Dr. Alden's assertions enable us to establish the "how" of Ms. Bothun's death, but not to identify the "why" linking MLCC's failure to act within his identified, though unexplained, timeframe. For these reasons, the district court did not abuse its discretion when it determined that Dr. Alden's affidavit failed to meet the statutory requirements and dismissed the first two counts of Bothun's complaint with prejudice.

II.

The district court concluded that "Minnesota does not recognize a cause of action for corporate negligence" and thus dismissed Bothun's third and fourth claims. Because respondents moved to dismiss, we construe the district court's action on this issue as granting respondents summary judgment because Bothun failed to state a claim on which relief could be granted. We review the grant of summary judgment de novo. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010).

Both parties rely on the Minnesota Supreme Court decision in *Larson v. Wasemiller* for their arguments regarding whether direct corporate negligence is a cause of action in Minnesota. 738 N.W.2d 300, 300 (Minn. 2007). In *Larson*, the supreme court recognized the tort of "negligent credentialing." *Id.* at 313. Before deciding to recognize negligent credentialing as a tortious offense, the supreme court conducted a thorough review of neighboring jurisdictions before noting that, "[s]ome courts have recognized the tort of negligent credentialing as simply the application of broad common law principles of negligence."[6] *Id.* at 307. However, the supreme court adopted the tort of negligent credentialing without tying its rationale to these "broad[er] common law principles." *Id.* Instead, the supreme court explicitly narrowed its opinion to the specific theory of negligent credentialing. *Id.* at 307 n.4. We conclude that there is no support for Bothun's assertion that *Larson* implicitly recognizes a claim for direct corporate negligence.

[6] This language was under the heading of "Direct or Corporate Negligence." *Larson*, 738 N.W.2d at 307.

Bothun also contends that direct corporate negligence is an extension of ordinary and professional negligence and thus already recognized under Minnesota law. We disagree. It is clear that claims of negligent credentialing and direct corporate negligence are distinct from ordinary and professional negligence. If the cause of action was a simple offshoot of ordinary and professional negligence, the supreme court's recognition of negligent credentialing would have been duplicative.

The court of appeals is an error-correcting court without the authority to change the law or create new causes of action. *See Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434, 439 (Minn. 1990); *Lake George Park, LLC v. IBM Mid-Am. Emps. Fed. Credit Union*, 576 N.W.2d 463, 466 (Minn. App. 1998), *review denied* (Minn. June 17, 1998). Even if Bothun is correct that the supreme court is likely to extend *Larson* to recognize claims of direct corporate negligence on public policy grounds, it would be improper for us to overreach and establish a new tort. The district court did not err when it dismissed these counts of Bothun's complaint.

III.

Finally, Bothun challenges the district court's denial of his motion to amend his complaint to include a claim for punitive damages. Minnesota law mandates that in a civil action the original complaint "must not" seek punitive damages. Minn. Stat. § 549.191 (2012). A party seeking punitive damages must move to amend its complaint accompanied by factual affidavits. *Id.* Punitive damages are only available upon "clear and convincing evidence" that the acts of the defendant demonstrate a deliberate disregard for the rights or safety of others. Minn. Stat. § 549.20, subd. 1(a) (2012). We

review a district court's denial of leave to amend to add a claim for punitive damages for an abuse of discretion. *Metag v. K-Mart Corp.*, 385 N.W.2d 864, 866 (Minn. App. 1986), *review denied* (Minn. June 23, 1986).

The fact that a claim for punitive damages requires clear and convincing evidence demonstrates that the conduct warranting this type of damage is more than negligence. Here, the district court specifically noted that it "[didn't] see that there is anything . . . indicating deliberate disregard of the patient's rights." We have previously determined that even in cases where prima facie negligence is established, an affidavit must demonstrate "bad faith or [a] willful disregard [for] the decedent's rights or safety" to support an amended complaint for punitive damages. *McKenzie v. N. States Power Co.*, 440 N.W.2d 183, 184 (Minn. App. 1989). On this record, there are no facts that any respondent noticed Bothun's condition, believed it serious, and then willfully disregarded her care. Although the Minnesota Department of Health concluded that negligence was present, this does not establish a foundation of bad faith sufficient to sustain a claim for punitive damages. The district court did not abuse its discretion when it denied Bothun's request to amend his complaint.[7]

Affirmed.

[7] Bothun contends that the district court abused its discretion because its conclusion on his leave to amend request was "little more than an afterthought." The record does not support this assertion. Reviewing the district court's order in conjunction with the transcript demonstrates that the district court was fully aware of the statutory requirements to grant leave to amend a complaint for punitive damages and concluded that the facts did not meet those requirements. *See* Minn. R. Civ. App. P. 110.01 (explaining that the record on appeal includes "[t]he papers filed in the trial court, the exhibits, and the transcript of the proceedings").