

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1920**

Mark Wilmes,
Appellant,

vs.

Owatonna Hospitality, LLC,
Respondent.

**Filed August 7, 2017
Affirmed
Hooten, Judge**

Steele County District Court
File No. 74-CV-14-130

Kenneth R. White, Law Office of Kenneth R. White, P.C., Mankato, Minnesota (for appellant)

Juan M. Avila, Jeffrey M. Markowitz, Arthur, Chapman, Kettering, Smetak & Pikala, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Bjorkman, Presiding Judge; Hooten, Judge; and Toussaint, Judge.*

UNPUBLISHED OPINION

HOOTEN, Judge

Appellant challenges the district court's dismissal of his claims on summary judgment, arguing that the district court abused its discretion by excluding expert opinions

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

that respondent's negligence caused appellant's injury and erred by concluding that appellant needed to offer expert testimony regarding causation in order to withstand summary judgment. We affirm.

FACTS

On July 6, 2012, appellant Mark Wilmes waded in a pool at a hotel operated by respondent Owatonna Hospitality, LLC, for approximately 20 to 30 minutes while supervising his grandchildren. Wilmes also went into the water park area and went down the water slide once. Wilmes described the pool as looking "pretty used" and "dirty," noting that towels were lying around the pool. Wilmes noticed a smell of chlorine and observed that his grandchildren's eyes were red. Wilmes does not recall having any injuries while he was in the pool.

Almost two weeks after his visit to the hotel pool, Wilmes was hospitalized for cellulitis after experiencing symptoms of fever, pain, and swelling and redness of his leg. According to his medical records, Wilmes told his doctor that he had noticed an abrasion to his calf a few days prior to his hospitalization. During his hospital stay, Wilmes' blood cultures tested positive for *aeromonas hydrophila*. Wilmes stated that he was in no other bodies of water after being in the hotel pool until his hospitalization.

Aeromonas hydrophila is a waterborne bacterium that can cause a number of illnesses in humans, including gastrointestinal and skin infections. The skin infections that can be caused by *aeromonas hydrophila* include cellulitis, abscesses, furuncles, and folliculitis. The pool was never tested for the presence of *aeromonas hydrophila*.

Wilmes brought suit against Owatonna Hospitality, claiming that it was negligent in the maintenance and operation of its pool and water park facilities, causing him to contract aeromonas hydrophila. Owatonna Hospitality moved for summary judgment, arguing that Wilmes failed to present admissible evidence of causation between its maintenance and operation of the pool and Wilmes' contraction of aeromonas hydrophila. The district court agreed. Specifically, the district court determined that the conclusions of both of Wilmes' experts that Wilmes contracted aeromonas hydrophila from the pool lacked foundation, were "clearly conjecture," and therefore were inadmissible. The district court concluded that because the experts' opinions regarding causation were inadmissible, there were no facts in the record establishing causation between the conditions of the pool and Wilmes' infection and granted summary judgment in favor of Owatonna Hospitality. This appeal followed.

D E C I S I O N

Summary judgment is appropriate when the record "show[s] that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. "A defendant is entitled to summary judgment as a matter of law when the record reflects a complete lack of proof on an essential element of the plaintiff's claim." *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995). In order to raise a genuine issue of material fact, "the nonmoving party must present more than evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case

to permit reasonable persons to draw different conclusions.” *Valspar Refinish, Inc. v. Gaylord’s, Inc.*, 764 N.W.2d 359, 364 (Minn. 2009) (quotation omitted).

Appellate courts “review a district court’s grant of summary judgment de novo to determine whether any genuine issue of material fact exists and whether the district court erred in applying the law.” *Larson v. Nw. Mut. Life Ins. Co.*, 855 N.W.2d 293, 299 (Minn. 2014). In conducting this review, we view the evidence in the light most favorable to the party against whom summary judgment was granted. *Id.*

I.

Wilmes argues that the district court abused its discretion by excluding the opinions of his two expert witnesses, Trevor Sherwood and Dr. Harry Hull, that the conditions of the pool caused Wilmes’ *aeromonas hydrophila* infection.

“An opinion of a[n] . . . expert witness based upon an adequate factual foundation is not a conjecture, but a legitimate inference, and as such has evidentiary value in determining disputed questions of fact.” *Albert Lea Ice & Fuel Co. v. U.S. Fire Ins. Co.*, 239 Minn. 198, 204–05, 58 N.W.2d 614, 618 (1953). But, if an expert’s opinion is based on assumptions not established by the evidence, the opinion lacks foundation and is inadmissible. *Huseby v. Carlson*, 306 Minn. 559, 560–61, 238 N.W.2d 589, 590 (1975).

“A district court’s evidentiary ruling on the admissibility of an expert opinion rests within the sound discretion of the [district] court and will not be reversed unless it is based on an erroneous view of the law or it is an abuse of discretion.” *Gross v. Victoria Station Farms, Inc.*, 578 N.W.2d 757, 760 (Minn. 1998). “The district court has considerable discretion in determining the sufficiency of foundation laid for expert opinion.” *Id.* at 760–

61 (quotation omitted). Even if we would have reached a different decision than the district court regarding the sufficiency of the foundation, we will not reverse absent a clear abuse of discretion. *Id.* at 761.

Sherwood, Wilmes' pool expert, reviewed Wilmes' medical records, the pool logs, Minnesota Department of Health reports regarding the pool, and information about aeromonas hydrophila, among other materials. Sherwood noted that at 9:00 a.m. on July 6, the pH and the level of free chlorine in the main pool and the plunge area¹ were within the acceptable ranges.

Sherwood noted, however, that the pool's level of combined chlorine was over the acceptable range at 9:00 a.m. The pool log indicates that the main pool had a combined chlorine level of .8 ppm and the plunge pool had a combined chlorine level of 1.0 ppm. Minn. R. 4717.1750, subp. 3 (2015), requires action if a pool's combined chlorine level exceeds .5 ppm. Sherwood stated that industry standard limits combined chlorine to a maximum of .2 ppm.

Sherwood explained that combined chlorine is a chemical species that forms when chlorine chemically bonds to nitrogen-containing compounds, such as perspiration, algae, or urine. Sherwood stated that combined chlorine is "a less effective form of chlorine." Sherwood also stated that combined chlorine has a strong chlorine-like smell. Sherwood noted that there is a common conception that a strong chlorine odor indicates too much

¹ The plunge area is the pool of water at the bottom of the waterslide.

chlorine; instead, he explained, an excessive chlorine odor indicates that “there is not enough chlorine to take care of the bather load.”

According to Sherwood, *aeromonas hydrophila* “is present in all types of water worldwide as well as food and soil.” *Aeromonas hydrophila* can be contracted through swimming pool use, but it is “sensitive to chlorine” and therefore its presence is rare in chlorinated pools. However, Sherwood noted that outbreaks of the *aeromonas hydrophila* may be caused by lack of disinfection.

Sherwood stated that the hotel pool had a “long-term history of neglect and ignorance toward the operation of the water park,” noting numerous code infractions and water chemistry violations. Sherwood stated that the water chemistry issues would “contribute to bather discomfort and irritation and increase the likelihood of contracting a recreational water illness.” Sherwood noted that the combined chlorine issue, documented ventilation issues, and issues with the chemical feeder would contribute to the possibility of a bather developing a recreational water illness. Given the issues with the pool, Sherwood opined that Owatonna Hospitality’s failure to properly maintain the pool caused Wilmes to contract a recreational water illness.

Dr. Hull, Wilmes’ epidemiology expert, reviewed Wilmes’ medical records, Sherwood’s report, Wilmes’ deposition, and articles about *aeromonas hydrophila*, as well as other materials, in preparing his report. Dr. Hull noted that Wilmes had several serious pre-existing medical issues before July 2012, including multiple episodes of cellulitis in his legs. Dr. Hull stated that *aeromonas hydrophila* is a bacterium that rarely causes illness in humans, but that it may cause gastrointestinal, skin, and soft tissue issues. Dr. Hull also

noted that individuals who have a compromised immune system or chronic illness “appear to have a greater risk of contracting [a]eromonas hydrophila infections.” Dr. Hull stated that most aeromonas hydrophila infections occur after exposure to fresh water, but such infections have also been associated with exposure to poorly maintained swimming pools or pools where water was allowed to stand.

Dr. Hull opined that Wilmes’ infection was “more likely than not” caused by the hotel pool. Dr. Hull reasoned as follows: the pool has a documented history of being improperly maintained; improper maintenance of pools is associated with transmission of bacterial infections such as aeromonas hydrophila; Wilmes reported no exposure to other bodies of water in the weeks leading up to his infection; and, while Wilmes did have an abrasion on his leg, an abrasion without fresh water or swimming pool exposure would most likely result in a different infection.

As the district court observed, Wilmes’ experts rely significantly on the pool’s documented past violations in concluding that Wilmes contracted the aeromonas hydrophila infection from the pool. Indeed, Sherwood notes patterns of equipment and water chemistry issues with the pool, spanning from 2008 to 2015. However, what is relevant to determining whether Wilmes contracted the infection from the pool are the pool conditions on July 6, 2012.

Therefore, in determining whether Wilmes presented sufficient evidence to withstand summary judgment, the issue is whether the district court abused its discretion by determining that Wilmes’ experts did not have sufficient foundation to opine that Wilmes contracted aeromonas hydrophila as a result of the pool conditions on July 6, 2012.

We conclude that the district court did not abuse its discretion in excluding the expert opinions.

First, we note that the experts' opinions failed to specifically address the likelihood of an aeromonas hydrophila outbreak under the specific conditions present in the pool on July 6, 2012. As the district court observed, the pool logs indicate that the level of free chlorine was within the acceptable range at 9 a.m. that day. While the level of combined chlorine exceeded the acceptable range, Sherwood indicated that "[c]ombined chlorine is a less effective form of chlorine." Sherwood's opinion does not indicate that too much combined chlorine increases the likelihood of an aeromonas hydrophila outbreak when the free chlorine level is within the acceptable range. Sherwood does state that the pool logs reflect numerous violations involving low free available chlorine, high levels of combined chlorine, and low or high pH and that "[a]ll of these water chemistry issues, especially the lack of free available chlorine and presence of combined chlorine, . . . increase the likelihood of contracting a recreational water illness." But, his report does not explain how the likelihood of an aeromonas hydrophila outbreak is increased when the pool has acceptable levels of free chlorine despite an excessive level of the less effective combined chlorine.

Wilmes notes that, although Owatonna Hospitality complied with Minnesota regulations by testing the pool only once a day, *see* Minn. R. 4717.0750 (2015), industry standards require more frequent testing during periods of heavy use in order to ensure that the circulation and filtration systems are handling the bather load. Sherwood indicated in his report that only by constantly monitoring the pool and taking corrective steps can a pool

operator make sure that the water is sanitary and the patrons are protected from germs. But, this broad statement, indicating the importance of monitoring water chemistry, does not indicate that a bacterial outbreak is likely if the pool has sufficient free chlorine but excessive combined chlorine.

This case is similar to *Gerster v. Special Adm'r for Estate of Wedin*, where plaintiffs who owned an apartment sued the estate of the neighboring apartment's owner, who died in a fire that damaged plaintiffs' apartment. 294 Minn. 155, 156, 199 N.W.2d 633, 634 (1972). At trial, the plaintiffs claimed that the fire was caused by the decedent's careless smoking. *Id.* The city fire marshal testified at trial. *Id.* at 157, 199 N.W.2d at 634. He stated that he had examined the decedent's apartment and that, through the process of elimination, he had determined that the probable cause of the fire was careless smoking of the decedent. *Id.* at 157–58, 199 N.W.2d at 634–35. The jury returned a verdict in favor of the plaintiffs, and the district court subsequently granted the motion of decedent's estate for judgment as a matter of law. *Id.* at 156, 199 N.W.2d at 634. The Minnesota Supreme Court affirmed, reasoning that there was no evidence that the decedent was smoking in his apartment or that if he was smoking, he was smoking in a negligent manner. *Id.* at 160, 199 N.W.2d at 636.

Like in *Gerster*, there is no evidence in the record that the specific conditions of the pool on July 6 would lead to Wilmes contracting an *aeromonas hydrophila* infection. Instead, Wilmes' experts relied on the documented evidence of past violations, as well as Wilmes' testimony that he had not been in any other water body between July 6 and the date of his hospitalization in concluding that his infection was caused by the pool. The

district court did not abuse its discretion by concluding that the experts' opinions were speculative and therefore inadmissible.

Second, although not discussed by the district court, evidence in the record suggests that the combined chlorine level reading relied upon by Wilmes' experts may not accurately reflect the combined chlorine level at the time that Wilmes entered the pool. There is no evidence in the record regarding what time in the day Wilmes was in the pool, other than his testimony that he did a number of things before going to the pool. And, there is also little indication of how many people visited the pool that day.

Moreover, hotel staff took remedial measures after the 9:00 a.m. reading revealed that the combined chlorine level was elevated. In the comments section, the pool logs state that the pool water in the main pool and the plunge area was "backwashed." In a deposition, the certified pool operator on July 6, 2012, explained that if the combined chlorine level is too high, one way to take corrective action is to backwash the water, which means sending the water through a sand filter to clean out contaminants. It is not clear from the record how long the pool operator backwashed the pool or the effect that the backwashing had on the pool's combined chlorine level on July 6, as the pool was not subsequently tested.²

Given the lack of information regarding the time when Wilmes was in the pool, the number of bathers, and the effect of the backwashing, any suggestion that the free chlorine levels fell and the combined chlorine levels rose throughout the day to a level that would

² The pool logs only indicate that the pool was backwashed and do not indicate the combined chlorine level of the pool after the backwashing.

support an aeromonas hydrophila outbreak is mere conjecture. The fact that the experts relied on the 9:00 a.m. combined chlorine levels in opining that Wilmes' infection was caused by the pool, despite the existence of a number of factors that could have raised or lowered the combined chlorine levels, indicates that their opinions regarding causation lacked foundation.

Because neither Sherwood nor Hull specifically address the likelihood of an aeromonas hydrophila outbreak under the conditions present at the pool and because the accuracy of the combined chlorine level relied on by the experts is uncertain, we cannot conclude that the district court abused its discretion in determining that the experts' opinions regarding causation were inadmissible for lack of foundation.

II.

Wilmes argues that, even if we conclude that the district court did not abuse its discretion in determining that the experts' opinions on causation were inadmissible, he created an issue of fact sufficient to withstand summary judgment. Specifically, Wilmes argues that he was not required to present expert testimony on the element of causation. We disagree.

“[W]hether expert testimony is required to establish a prima facie case is a question of law that [appellate courts] review de novo.” *Guzick v. Kimball*, 869 N.W.2d 42, 46–47 (Minn. 2015). Expert testimony based on adequate factual foundation is required to prove causation if the issue involves matters outside of ordinary lay knowledge. *Gross*, 578 N.W.2d at 762.

In arguing that expert testimony was not needed to establish that the conditions of the pool led to his infection, Wilmes cites *M.M.D. v. B.L.G.*, 467 N.W.2d 645 (Minn. App. 1991), *review denied* (Minn. May 23, 1991). In *M.M.D.*, the plaintiff argued that the defendant infected her with herpes during their sexual relationship. 467 N.W.2d at 646. On appeal, the defendant challenged the district court's finding of causation because M.M.D.'s expert was not able to determine whether M.M.D.'s herpes outbreak was due to a recent infection and not due to a dormant virus. *Id.* at 647. This court rejected the defendant's argument, reasoning that expert testimony was not necessary to establish causation because "causation of herpes is not beyond the average person's knowledge." *Id.*

Unlike the transmission of the herpes virus, the conditions of a chlorinated pool that could lead to an individual contracting an *aeromonas hydrophila* infection are beyond the knowledge of a lay juror. As demonstrated by the evidence presented by Wilmes' experts, the water chemistry issues that could increase the likelihood of a swimmer contracting a waterborne illness in a chlorinated pool necessitate a consideration of the levels of free chlorine and combined chlorine in the water, as well as the pH level. Understanding the relationship between the amounts of combined and free chlorine and the pH level and the development of *aeromonas hydrophila* is complicated, especially where, as here, there is no evidence that *aeromonas hydrophila* was in the pool at any point or that any other individual who entered the pool contracted an *aeromonas hydrophila* infection.

This is not a case where a layperson would be able to conclude from his or her own knowledge or experience, without the assistance of expert testimony, that Wilmes'

aeromonas hydrophila infection was caused by the pool conditions, rather than some other source. Therefore, the district court properly determined that Wilmes needed to present admissible expert testimony as to causation in order to withstand Owatonna Hospitality's summary judgment motion.

Affirmed.