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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1501**

Michelle J. Duppong,
Respondent,

vs.

Mayo Clinic Health System - Red Wing,
Appellant.

**Filed April 15, 2019
Reversed and remanded
Reyes, Judge**

Goodhue County District Court
File No. 25-CV-16-1968

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

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Minnesota (of counsel); and

Matthew J. Hanzel, MCHS – Red Wing – Rochester, Rochester, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Hooten, Judge; and Cochran,
Judge.

UNPUBLISHED OPINION

REYES, Judge

In this medical-malpractice appeal, after a jury found appellant negligent in treating
respondent and the district court denied its motion for a new trial, appellant argues that

(1) the district court erroneously excluded a statement by a party opponent and (2) the erroneously excluded statement resulted in prejudice. We reverse and remand.

FACTS

On November 25, 2012, respondent Michelle Duppong began to experience nausea, cramping, abdominal pain, and diarrhea. Two days later, she began vomiting, and her abdominal pain increased, causing her to visit appellant Mayo Clinic Health System – Red Wing’s (MCHS) emergency room. The doctor prescribed medication and discharged her after two hours.

The next day, Duppong continued to vomit, and her abdominal pain increased. In the early morning of November 29, 2012, she visited MCHS’s emergency room a second time. This time, a different doctor, Dr. Michael Giorgi treated her. He performed an abdominal examination and ordered lab tests but did not order a CT scan. He prescribed her three more medications and discharged her after about three hours.

Shortly after her discharge, Duppong made an appointment with her primary-care doctor at MCHS’s clinic, Dr. David Bahl, and visited him in the afternoon of November 29. Dr. Bahl performed an x-ray. Because the x-ray showed that her intestine was black, he informed her that she was constipated. He prescribed over-the-counter laxatives, fiber medication, and pain medication. Dr. Bahl did not order a CT scan or lab testing, and the parties dispute whether Dr. Bahl performed an abdominal examination.

For the next two days, Duppong continued to experience severe abdominal pain and vomiting. On Sunday, Duppong went to the emergency room at Regina Hospital in Hastings. The doctor admitted her, ordered a CT scan, and informed her that her appendix

had burst. The doctors had to clean and drain the infectious fluid from her burst appendix, and she spent 11 days at Regina Hospital.

Duppong filed a lawsuit against MCHS for medical malpractice, claiming that MCHS's employees, Dr. Giorgi and Dr. Bahl, breached the standard of care by failing to diagnose her with appendicitis. Prior to and during trial, the parties disputed the admissibility of a statement contained in a letter from Duppong's attorney to MCHS's in-house counsel. Duppong's attorney sent the letter in February 2014, prior to the start of litigation in this case. The letter stated that Dr. Bahl performed an abdominal examination. This statement was not favorable to Duppong's theory of negligence. The district court excluded the statement after Duppong brought a motion in limine. After a trial in March 2018, a jury found that MCHS's employees were negligent in treating Duppong. The district court entered judgment in favor of Duppong in the amount of \$62,800. MCHS moved for a new trial, and the district court denied the motion. This appeal follows.

D E C I S I O N

I. The statement in Duppong's attorney's letter is admissible as a statement by a party opponent.

MCHS argues that the statement of fact contained in the letter from Duppong's attorney is admissible as a statement by a party opponent because (1) Duppong's attorney made the statement in the course of a principal-agent relationship and (2) Duppong adopted the statement by using it in her answers to interrogatories. We agree.

The district court's decision to admit or exclude evidence is within its broad discretion and will not be reversed unless it is based on an erroneous view of the law or

constitutes an abuse of discretion. *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997) (quotation omitted).

In February 2014, Duppong's attorney sent a letter to MCHS providing a detailed factual basis for her claims. The letter outlines MCHS's treatment of Duppong, and in reference to her visit with Dr. Bahl, the letter states: "Dr. Bahl examined her and pushed on her abdomen. Michelle told him it hurt." Duppong referred to the letter in three of her answers to MCHS's interrogatories (interrogatories 14, 15, and 22). However, Duppong maintained throughout trial that Dr. Bahl did not perform an examination of her abdomen.

The district court excluded the attorney's statement in the letter because it is a factual statement, rather than a conclusory statement. The district court stated that Duppong's attorney was not in the room at the time the statement was made so it was "not going to get into" the circumstances under which the attorney gained the information in the statement. It found that the statement sounded "like an assumption that was made." During trial, MCHS again asked the district court to allow it to introduce the statement in the letter under Minn. R. Evid. 801(d)(2). The district court affirmed its ruling to exclude admission of the letter.

An agent may make an admission on behalf of his principal if she is acting within the scope of the agency relationship. *Rosenberger v. H.E. Wilcox Motor Co.*, 177 N.W. 625, 626 (Minn. 1920). A statement is admissible against a party as nonhearsay if it is made by the party's agent during the principal-agent relationship and within the scope of the relationship. Minn. R. Evid. 801(d)(2)(D). Generally, statements of fact made by an attorney in reference to the subject of his agency are admissible against the attorney's

client. *Wenner v. Gulf Oil Corp.*, 264 N.W.2d 374, 379 (Minn. 1978) (admitting factual statement made in letter outlining plaintiff's claim). An attorney-client relationship is the "quintessential principal-agent relationship." *C.I.R. v. Banks*, 543 U.S. 426, 436, 125 S. Ct. 826, 832 (2005) (citing Restatement (Second) of Agency § 1, comment *e* (1957)).

Duppong relies on *Caroll v. Pratt*, 76 N.W.2d 693 (Minn. 1956), for the proposition that the mere existence of an attorney-client relationship does not authorize the attorney to make admissions on behalf of his client. But rather than focusing on whether the agent is authorized to speak on behalf of the principal, rule 801(d)(2) only requires that the statement be made concerning a matter within the scope of the agency. Minn. R. Evid. 801(d)(2) 1989 comm. cmt. Therefore, Duppong's emphasis on whether her attorney had authorization to make the statement is misguided.

Moreover, whether Duppong's attorney has personal knowledge and how she obtained information about the examination is irrelevant. The requirements of trustworthiness and firsthand knowledge that may be applicable in determining whether hearsay statements should be admissible do not apply when dealing with statements made by a party opponent. *Id.* All that the rule requires is that the statement be made in the scope of the principal-agent relationship. *Id.* Duppong's attorney made the statement during her representation of Duppong, and the statement related to Duppong's medical-malpractice claims. It was clearly within the scope of her representation and is therefore admissible.

A statement is admissible against a party as nonhearsay if the party has manifested an adoption or belief in its truth. Minn. R. Evid. 801(d)(2)(B). A manifestation of adoption

must be “*unequivocal, positive, and definite* in nature, *clearly showing that*” the party intends to adopt the statements as their own. *Kelly v. Ellefson*, 712 N.W.2d 759, 770 (Minn. 2006) (citing *Village of New Hope v. Duplessie*, 231 N.W.2d 548, 553 (Minn. 1975)) (emphasis in original). A party can adopt a statement by using or relying on a document. See *Laury v. Northwestern Mut. Life. Ins. Co.*, 231 N.W. 824, 825 (Minn. 1930) (facts contained in proof of death attached to insurance policy by beneficiary admissible as statement by party opponent). In *Kelly*, the supreme court considered whether the plaintiff’s answers to interrogatories were admissible. 712 N.W.2d at 769. It held that these were not admissible as statements by a party opponent because the plaintiff did not have personal knowledge of the facts asserted. *Id.*

Here, Duppong relies on her attorney’s letter multiple times in her answers to interrogatories without correcting or refuting the statement that Dr. Bahl examined her abdomen. Notably, interrogatory 15 reads:

- a. Specify in detail each contention;
- b. Specify in detail each act or omission of [MCHS] that you contend was a departure from the degree of skill and learning normally used by medical professionals in a similar practice and under like circumstances;
- c. Specify in detail the conduct of [MCHS] as you claim it should have been;
- d. Specify in detail each fact known to you and your attorneys upon which you base your answer(s).

Duppong answered: “See the complaint as well as the February 27, 2014 letter sent by [Duppong]’s counsel to MCHS’s counsel, which outlines the allegations of negligence.”

Duppong personally signed the answers to interrogatories. By relying on the letter in her answers to interrogatories, Duppong adopted the statement in the letter. Unlike *Kelly*, here,

Duppong has personal knowledge of Dr. Bahl's examination. The statement is admissible as adopted by Duppong.

II. A new trial is required because the erroneous exclusion of the statement resulted in prejudice.

MCHS argues that the statement, if admitted, might have changed the outcome of the trial because whether Dr. Bahl performed the abdominal exam was critical to Duppong's claim of negligence. Again, we agree.

If the district court's exclusion of the statement amounts to prejudicial error, MCHS is entitled to a new trial. *Kroning*, 567 N.W.2d at 46. Erroneously excluding evidence will result in a new trial "if it might reasonably have influenced the jury and changed the result of the trial." *George v. Estate of Baker*, 724 N.W.2d 1, 9 (Minn. 2006). "Where the case is close on the facts, the rejection of competent and material evidence is reversible error." *Kellett v. Wasnie*, 112 N.W.2d 820, 826 (Minn. 1962). Erroneously excluding evidence that might have changed the jury's standard-of-care, breach of the standard, or causation analysis requires a new trial. *Becker v. Mayo Foundation*, 737 N.W.2d 200, 218-219 (Minn. 2007) (granting new trial because court did not know which aspects of Mayo's care jury found to be negligent).

MCHS contends that Duppong's claim of negligence centered on her allegation that Dr. Bahl did not perform an abdominal examination. Dr. Bahl testified with "one hundred percent" certainty that he performed an abdominal examination. He stated that he did not see a requirement for a CT scan or surgical consult because he did not find any evidence

of acute abdomen¹ and that Duppong's symptoms did not present as appendicitis. Dr. Giorgi, who Duppong agrees performed an abdominal examination, testified to his clinical judgment that the abdominal examination did not indicate any kind of acute abdomen or appendicitis. One of Duppong's expert witnesses testified that, if Dr. Bahl had examined her abdomen, he would have been "much more in line with the standard of care." He stated that if Dr. Bahl performed an abdominal exam and there were no findings indicating acute abdomen, a CT scan would not have been necessary.

If the jury believed that MCHS provided negligent care because Dr. Bahl did not perform an abdominal examination, the admission of the statement might have influenced the jury's decision. If the jury had heard the earlier statement from Duppong herself that Dr. Bahl examined her abdomen, it may have found Duppong's testimony that he did not perform the examination to be not credible. It might have found that Dr. Bahl did perform the exam and that MCHS therefore did not breach the standard of care, especially in light of Duppong's expert testimony. Further, Duppong's attorney sent the letter in February 2014, just over a year after the visits. Duppong gave her deposition testimony in July 2017 and her trial testimony in March 2018. Much more time had passed between the visits and Duppong's testimony than between the visits and the letter. Although the jury may still have found MCHS negligent even after hearing the statement, we cannot determine what aspects of MCHS's care that it believed to be negligent. The standard is only whether the

¹ According to Duppong's expert, acute abdomen is "a medical emergency where something's going on in the abdomen that requires immediate attention."

evidence *might* reasonably have influenced the jury's decision and changed the outcome of the trial. Therefore, we reverse and remand for a new trial.

Reversed and remanded.