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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1511**

Abdel Elnashar,
Appellant,

vs.

Summit Orthopedics, Ltd., et al.,
Respondents.

**Filed May 13, 2019
Affirmed
Stauber, Judge***

Washington County District Court
File No. 82-CV-18-1470

Abdel Elnashar, Minneapolis, Minnesota (pro se appellant)

Richard J. Thomas, Bryon G. Ascherman, Burke & Thomas, P.L.L.P., Arden Hills,
Minnesota (for respondent)

Considered and decided by Cleary, Chief Judge; Hooten, Judge; and Stauber, Judge.

UNPUBLISHED OPINION

STAUBER, Judge

In this appeal from the district court's dismissal of pro se appellant's medical-malpractice claim, appellant argues that (1) insufficient service of process should not result

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

in dismissal; (2) the district court should have granted him more time to file an expert-review affidavit; and (3) his case does not require an expert witness. We affirm.

FACTS

Appellant Abdel Elnashar injured his knee in a work-related accident in 2007. He visited respondent Dr. Peter J. Daly at respondent clinic Summit Orthopedics, Ltd. (Summit) in May of 2008. Dr. Daly discussed treatment options and made recommendations for a follow-up appointment. Elnashar did not see Dr. Daly again until November of 2010. In January of 2011, he again visited Summit for his knee, and this time, he saw a physician's assistant, respondent Daniel L. Peterson. During this visit, Mr. Peterson administered a Synvisc injection.¹ From January of 2011 to August of 2013, Elnashar continued to visit Summit for Synvisc injections in his knee, which provided him pain relief and did not cause complications.

On March 18, 2014, Elnashar again visited Summit and received a Synvisc injection from Mr. Peterson. After this injection, Elnashar developed a relatively abrupt onset of significant swelling and discomfort. As a result, Elnashar visited a different orthopedic clinic several times in March and April of 2014. The doctor who treated him there expressed concern about a possible infection because of Elnashar's recent Synvisc injection. On April 21, 2014, Elnashar visited the University of Minnesota Medical Center, where he was diagnosed with a bacterial infection in his knee.

¹ According to respondents, a Synvisc injection supplements the fluid in the knee to help lubricate and cushion the joint, and can provide up to six months of relief from osteoarthritis knee pain.

Elnashar filed suit against respondents Summit, Dr. Daly, and Mr. Peterson on March 12, 2018. On that day, he served three copies of the summons and complaint on the chief financial officer (CFO) of Summit. On May 4, 2018, Elnashar, through the county sheriff, attempted to personally serve Dr. Daly and Mr. Peterson, but the summons and complaint was left with the human-resources manager at Summit. Respondents moved for summary judgment with respect to the claims against Dr. Daly and Mr. Peterson, based on insufficient service of process. They also moved to dismiss the claims against Summit because Elnashar did not comply with the requirements of Minnesota's expert-review statute, Minn. Stat. § 145.682, subd. 6 (2018).

On July 3, 2018, after a hearing, the district court granted respondents' motion for summary judgment with respect to Elnashar's claims against Dr. Daly and Mr. Peterson for insufficient service of process. The district court also dismissed Elnashar's claims against Summit for failure to provide an expert-review affidavit under Minn. Stat. § 145.682, subd. 6. The district court entered judgment on July 27, 2018. Elnashar appeals.

D E C I S I O N

I. The district court properly granted summary judgment with respect to Elnashar's claims against Dr. Daly and Mr. Peterson for insufficient service of process.

Elnashar argues that insufficient service of process should not be grounds for dismissal of his claims against Dr. Daly and Mr. Peterson and that the case should proceed on the merits. He contends that the CFO of Summit accepted service, and that he tried, in good faith, to have Dr. Daly and Mr. Peterson personally served. We are not persuaded.

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.01. We review the district court's grant of summary judgment de novo to determine whether there are genuine issues of material fact and if the district court properly applied the law. *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017). We view the record in the light most favorable to the nonmoving party. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citation omitted).

A civil action commences against a defendant when the summons is served upon that defendant. Minn. R. Civ. P. 3.01(a). Rule 4.03(a) governs service of process upon an individual. Service of process in a manner that is not authorized by the rule is ineffective and results in a lack of personal jurisdiction. *Tullis v. Fed. Mut. Ins. Co.*, 570 N.W.2d 309, 311 (Minn. 1997). Whether service of process is effective and, therefore, whether personal jurisdiction exists, is a question of law that we review de novo. *Cox v. Mid-Minn. Mut. Ins. Co.*, 909 N.W.2d 540, 547 (Minn. 2018).

Service upon an individual is proper if a plaintiff serves a copy of the summons and complaint (1) on the individual personally, (2) at the individual's usual place of abode with a person of suitable age and discretion who also resides therein, (3) on/through an agent designated by the individual to receive service, or (4) in any other method of service to which the individual has consented. Minn. R. Civ. P. 4.03(a). Service of process must strictly comply with statutory requirements. *Lundgren v. Green*, 592 N.W.2d 888, 890 (Minn. App. 1999). "Usual place of abode" for purposes of service of process means a defendant's fixed place of residence at the time of service. *Id.* Personal service of process

cannot be satisfied by service on a defendant's place of work or business. *Thiele v. Stich*, 425 N.W.2d 580, 584 (Minn. 1988) (attempted service ineffective when papers were not served personally on defendant but were left with receptionist at defendant's office). Further, an agent cannot be designated to receive service on behalf of a defendant without the defendant's express or implied consent. *Nerlund v. Schiavone*, 84 N.W.2d 61, 65 (Minn. 1957).

Elnashar initially attempted service on Dr. Daly and Mr. Peterson by providing three copies of the summons and complaint to the CFO of Summit. Later, on May 4, a county sheriff delivered two more copies, but left them with the human-resources manager at Summit. The district court granted respondents' motion for summary judgment and dismissed the action with respect to Dr. Daly and Mr. Peterson because the district court lacked personal jurisdiction over them due to Elnashar's failure to properly serve them.

Elnashar appears to contend that Dr. Daly and Mr. Peterson's place of work is their usual place of abode. However, a usual place of abode is one's fixed place of residence, *Lundgren* 592 N.W.2d at 890, and leaving the summons and complaint at a defendant's place of work is insufficient to satisfy the requirements of rule 4.03. *Thiele*, 425 N.W.2d at 584. Elnashar also argues that Summit's CFO was authorized to accept service. But Dr. Daly and Mr. Peterson did not authorize the CFO or human-resources manager to accept service on their behalf. Elnashar did not properly serve Dr. Daly and Mr. Peterson and, as a result, the district court lacks jurisdiction over them.

Elnashar argues that the district court should not have dismissed his action because Dr. Daly and Mr. Peterson had actual notice of the action and it should be decided on the

merits. But the supreme court recently clarified in *Jaeger v. Palladium Holdings, LLC*, that Minnesota law does not recognize an actual-notice exception to the service-of-notice rules. 884 N.W.2d 601, 609 (Minn. 2016) (citing Minn. R. Civ. P. 4.03) (“By using the word ‘shall’ to describe its requirements, Rule 4.03 mandates strict compliance with its terms.”). The district court properly granted summary judgment.

II. We decline to address Elnashar’s additional arguments because they were not raised to and considered by the district court.

Elnashar asserts that the district court should have granted him an extension of time to file his expert-review affidavit. He contends that he could not obtain the affidavit on time because: (1) the expert he hired breached their contract by not having the requisite qualifications; and (2) he found another expert but could not reach the district court. Elnashar did not raise these arguments to the district court. Instead, he requested an extension of the timelines because the expert he hired had breached their contract with respect to cost. On appeal, a party cannot “obtain review by raising the same general issue litigated below but under a different theory.” *Thiele*, 425 N.W.2d at 582.

Elnashar further contends that his case does not require an expert witness, stating that after talking to over two dozen medical expert firms, he was told that his medical records would speak for themselves and that he would not need an expert. He asserts that the doctrine of *res ipsa loquitur* applies here. But appellant did not raise this argument to

the district court. Again, we cannot decide matters not argued to and considered by the district court. *Id.* Therefore, we decline to address Elnashar's additional arguments.

Affirmed.