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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1013**

Mario A. Ruiz, et al.,
Appellants,

vs.

Michael W. Unger, et al.,
Respondents.

**Filed April 13, 2020
Affirmed
Reyes, Judge**

Ramsey County District Court
File No. 62-CV-16-2980

Joe Crosby, Crosby Law Office, LLC, St. Paul, Minnesota (for appellants)

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

Considered and decided by Reyes, Presiding Judge; Bratvold, Judge; and Segal,
Judge.

UNPUBLISHED OPINION

REYES, Judge

In this appeal from judgment entered under Minn. R. Civ. P. 41.02(b) in a legal-malpractice claim, appellants challenge the district court's denial of their motion for continuance of trial. We affirm.

FACTS

Appellant Mario A. Ruiz (Ruiz) underwent heart-valve-replacement surgery on November 28, 2006. Ruiz and his wife, appellant Maria Ruiz (collectively, the Ruizes), allege that a cardiovascular surgeon employed by Regions Hospital breached the standard of care for heart-valve-replacement surgery by implanting too small of a valve. Ruiz alleges that, as a result, he suffered “iatrogenic aortic stenosis, cardiac dysfunction, shortness of breath, decreased energy, and deconditioning.” These conditions resulted in his permanent disability and left him unable to work.

In October 2009, the Ruizes retained attorney Michael W. Unger (Unger) of Michael W. Unger, Attorney at Law, PLLC (collectively, respondents) to represent them in a medical malpractice suit against the operating surgeon. On April 29, 2011, Unger withdrew from representation of the Ruizes because he had not yet initiated a malpractice suit against the operating surgeon and he anticipated a legal-malpractice action, which would create a conflict of interest with the Ruizes. The date that the statute of limitations expired is unclear, but at the time, Unger believed it had passed. The Ruizes never commenced a malpractice claim against the operating surgeon.

The Ruizes filed suit against respondents, arguing that the legal standard of care required respondents to file suit before the medical-malpractice statute of limitations expired, which respondents raise in their notice of related appeal. Respondents obtained counsel and moved for summary judgment on the legal-malpractice claim, arguing that the statute of limitations did not expire until after the Ruizes secured a new attorney. The district court denied respondents’ motion for summary judgment, stating that a genuine

issue of material fact existed on when the medical malpractice cause of action accrued. The district court noted that “there is a fundamental question of fact as to what ultimately caused the damage [to Ruiz’s health] and gave rise to the medical malpractice claim- the initial installation of the valve or the failure of the treating physicians to replace the valve promptly over the course of [Ruiz’s] continued treatment.”

The Ruizes’ new counsel retained three expert witnesses to establish a prima facie case for the underlying medical malpractice claim: two cardiovascular surgeons, Drs. Joseph Boyer and Daniel DiBardino, and one cardiologist, Dr. Morton Rinder. Respondents submitted a motion in limine to exclude Dr. Rinder from testifying on the standard of care, which the Ruizes opposed by contending that he qualified as an expert. Dr. Rinder asserted “knowledge of the standard of care relative to the treatment of aortic stenosis by bioprosthetic valve replacement,” and claimed that “the implant of the 19 [millimeter] bio-prosthetic valve did not meet the standard of care.” The district court did not decide the issue at that time because the Ruizes stated that Dr. Rinder would not testify on the standard of care.

A month before trial, on April 5, 2019, the Ruizes sought a continuance, citing the unavailability of Drs. DiBardino and Boyer. Dr. DiBardino notified the Ruizes on April 4, 2019, that he would be unable to testify due to his fear of professional repercussions. Dr. Boyer notified the Ruizes on April 5, 2019, that he would not testify or even give a video deposition, citing his son’s health crisis, already-scheduled surgeries, and a resulting lack of time to prepare for deposition or trial. Dr. Boyer noted that “hopefully he will be able to . . . fulfill his obligations in this case by October of 2019.” The Ruizes argued that,

without the testimony of either Dr. Boyer or Dr. DiBardino, they would be unable to establish a prima facie case of negligence.

Before the trial began, the Ruizes argued that denying a continuance would be fatal to their case, now taking the position that their only available expert witness, Dr. Rinder, was not qualified to testify on the standard of care of implanting a heart valve of a specific size because he had never performed the surgical procedure. When the district court again refused to grant a continuance and instead proceeded to trial, the Ruizes rested their case and respondents moved for a judgment as a matter of law under Minn. R. Civ. P. 41.02(b), which the district court accepted, dismissing the Ruizes' case. This appeal follows.

D E C I S I O N

The Ruizes argue that the district court abused its discretion by denying their motion for continuance of trial. We disagree.

“We review district court rulings on continuance [motions] . . . for [an] abuse of discretion.” *Torchwood Props., LLC v. McKinnon*, 784 N.W.2d 416, 418 (Minn. App. 2010). “A district court abuses its discretion by making findings of fact that are unsupported by the evidence, misapplying the law, or rendering a decision that is against logic and the facts on record. A district court’s findings of fact are not set aside unless clearly erroneous.” *Knapp v. Knapp*, 883 N.W.2d 833, 835 (Minn. App. 2016) (citation and quotation omitted). Moreover, we give “due regard” to the district court’s credibility assessments. Minn. R. Civ. P. 52.01. We view the record in the light most favorable to sustaining the order. *Cotroneo v. Pilney*, 343 N.W.2d 645, 648 (Minn. App. 1984).

In deciding whether to grant a motion for continuance, the district court must consider and balance (1) the degree of prejudice to the moving party; (2) prejudice to the nonmoving party; “(3) the impact of a modification at that stage of the litigation; [and] (4) the degree of willfulness, bad faith, or inexcusable neglect” by the nonmoving party. *Id.* at 649. In addition, the district court must base its decision “on all facts and circumstances surrounding the request.” *State v. Vance*, 254 N.W.2d 353, 358 (Minn. 1977).

Here, the district court denied the Ruizes’ motion for a continuance after analyzing the four *Cotroneo* factors and the facts and circumstances surrounding the Ruizes’ request. The record supports the district court’s determination.

Degree of prejudice to the moving party

The Ruizes argue that denying them a continuance prejudiced them by not allowing them time to retain and prepare a new expert, whom they needed because Dr. Rinder did not qualify to testify on the standard of care. We are not persuaded.

Expert-opinion testimony is admissible “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue” Minn. R. Evid. 702. “[W]e have required both sufficient scientific knowledge of and some practical experience with the subject matter of the offered testimony.” *Cornfeldt v. Tongen*, 262 N.W.2d 684, 692 (Minn. 1977); *see also Gross*, 578 N.W.2d 757, 761 (Minn. 1998). “Occupational experience” is of “controlling importance” when determining qualification. *Cornfeldt*, 262 N.W.2d at 692-93 (holding that internist had sufficient practical experience from consultations on suitability of patients for surgery

and familiarity with authoritative medical text qualified to testify); *see also Koch v. Mork Clinic, P.A.*, 540 N.W.2d 526, 529-30 (Minn. App. 1995) (concluding that doctor had sufficient practical experience from consultations with specialists and general physicians, knowledge of symptoms, and familiarity with authoritative literature), *review denied* (Minn. Jan. 12, 1996); *Swanson v. Chatterton*, 160 N.W.2d 662, 667 (Minn. 1968) (upholding district court’s exclusion of internist’s testimony on standard of care of orthopedic surgeon treating arm fracture because internist lacked “substantial experience or expertise in the direct care of orthopedic patients”). “Moreover, opinion evidence is not restricted to the testimony of the [expert] best qualified to give [it],” and “any person whose profession or vocation deals with the subject at hand is entitled to be heard as an expert, while the value of his evidence is to be tested by cross-examination and ultimately determined by the jury.” *Christy v. Saliterman*, 179 N.W.2d 288, 303 (Minn. 1970).

The Ruizes argued against respondents’ motion in limine to exclude Dr. Rinder’s testimony, asserting that “voir dire will reveal that Dr. Rinder has ample practical experience to qualify as an expert.” The district court invited the Ruizes to proceed with Dr. Rinder at trial so it could assess the foundation of his opinions at voir dire.¹ But the Ruizes declined to offer Dr. Rinder’s testimony, preventing the district court from assessing his qualifications. Instead, the parties agreed to let respondents move for

¹ The district court decides whether to admit expert testimony. Minn. R. Evid. 702 1977 comm. cmt. (“The admissibility of expert opinion has traditionally rested in the discretion of the trial court. This discretion is primarily exercised in two areas: . . . 2. deciding if the witness is sufficiently qualified as an expert in a given subject area to justify testimony in the form of an opinion.”).

judgment as a matter of law under Minn. R. Civ. P. 41.02(b), resulting in dismissal with prejudice. By so agreeing, the Ruizes prevented the district court from determining Dr. Rinder's qualifications and prevented a possibly qualified expert from testifying. Because the district court did not have the opportunity to assess Dr. Rinder's expert qualifications, we have no admissibility determination to review.

The Ruizes, relying on *Weise*, next contend that their inability to establish a prima facie argument fatally prejudiced their case, requiring the district court to grant a continuance. *Weise v. Comm'r of Pub. Safety*, 370 N.W.2d 676, 678 (Minn. App. 1985) ("The test is whether a denial [of a continuance] prejudices the outcome of the trial."). The Ruizes' argument is misguided.

Because the Ruizes have not established their inability to make a prima facie case with Dr. Rinder, we need not opine on whether the lack of an expert witness, which may fatally prejudice a case, requires granting a continuance. However, we note that *Cotroneo* provides a balancing test with four factors, only one of which is prejudice. *Cotroneo*, 343 N.W.2d at 649. "[P]revent[ing] manifest injustice" underlies the decision of whether to grant a continuance, which goes beyond avoiding prejudicing the outcome of trial. *Id.*

Prejudice to the nonmoving party

The Ruizes, assuming that they would have been unable to establish a prima facie case, contend that the prejudice to them far outweighed any prejudice to respondents. The district court determined that this factor weighed against granting the continuance because the Ruizes sought an indefinite continuance, based on Dr. Boyer's assertion that he would

“hopefully” be able to testify in October 2019, which would have prejudiced respondents. The record supports the district court’s determination.

Impact of a modification at that stage of the litigation

The Ruizes contend that the district court considered irrelevant factors such as trial delay and ample preparation time in concluding that this factor weighed against granting a continuance. We disagree. This factor logically includes considerations such as trial expediency, judicial resources, and the time, expense, and effort associated with trial preparation, which the district court appropriately determined supported denying a continuance. *See id.* at 649.

Degree of willfulness, bad faith, or inexcusable neglect by the nonmoving party

The Ruizes contend that, because they did not cause their experts’ unavailability, the district court inappropriately punished them by denying a continuance. The Ruizes’ argument is misguided.

Even if the Ruizes did not willfully or in bad faith cause their experts’ unavailability, this factor also includes inexcusable neglect. *Id.* at 649. “Courts are less sympathetic to the modification of a pretrial order when the dilemma is attributable to the failure of a party to properly prepare for trial.” *Id.* at 650; *see also Kate v. Kate*, 48 N.W.2d 551, 555 (Minn. 1951) (stating that district court may deny motion for continuance if movant fails to exercise due diligence in attempting to secure evidence).

The Ruizes do not explain why Dr. DiBardino cooperated in trial preparation yet did not realize until a month before the trial that there might be professional repercussions if he chose to testify. Moreover, the Ruizes provided an equivocal response for why they

were unable to determine that Dr. DiBardino was unwilling to testify until one month before trial. The Ruizes contended that “[w]e had always *hoped* that Dr. DiBardino would testify. And when we called him up to get the additional information that defense counsel wanted, we had asked him to testify and he refused.” (Emphasis added.) The Ruizes never asserted that they had communicated with Dr. DiBardino before learning at the last minute that he would not testify. The district court did not clearly err by finding that the Ruizes could have avoided this outcome.

Moreover, as the district court suggested, the Ruizes could have subpoenaed Dr. Boyer’s testimony given that he continued 25% of his surgery practice. *See Beyer v. Comm’r of Pub. Safety*, 358 N.W.2d 713, 715-16 (Minn. App. 1984) (finding no abuse of discretion when district court denied continuance motion because moving party knew of expert and expected testimony before conclusion of trial and failed to subpoena expert, and denial of continuance did not prejudice moving party).² The record supports the district court’s inference that the Ruizes’ predicament of lacking two expert witnesses was not “unforeseen and unforeseeable.” *Cotroneo*, 343 N.W.2d at 650 (quotation omitted).

² The Ruizes appear to argue that, under *Bush v. Winter*, an unwilling expert cannot be compelled by subpoena to give an opinion. 402 N.W.2d 229, 230-31 (Minn. App. 1987). But we held merely that “no Minnesota case, however, specifically address[es] the question whether a litigant has an absolute right to compel an unwilling, *non-party* expert to give an opinion on facts outside the expert’s personal knowledge.” *Id.* Dr. Boyer is a retained expert, not a nonparty expert. Moreover, in *Bush* we did not decide that unwilling nonparty experts *could* not be subpoenaed. Instead we noted that no case addresses *whether* they could be. *Id.* We recognize that it may have been impractical to subpoena an unwilling expert, but difficulty does not equate with impossibility.

The record supports the district court's weighing of the *Cotroneo* factors, and we conclude that the district court did not abuse its discretion by denying the Ruizes' motion for continuance. While the result of denying the Ruizes' motion for continuance is certainly harsh, the district court must consider more than just prejudice to the plaintiff. Our function is to review the record to see whether it supports the district court's exercise of discretion, not to retry the case. *See Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 68 n.2 (Minn. 1979). Because we affirm the district court's denial of the Ruizes' motion for continuance, we need not address respondents' argument, raised by notice of related appeal, that the district court erred by denying their motion for summary judgment.

Affirmed.