

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1248**

Erica Vipond,
Appellant,

vs.

Lance J. Beebout, et al.,
Respondents.

**Filed April 26, 2021
Affirmed
SLieter, Judge**

Douglas County District Court
File No. 21-CV-19-1533

Michael A. Bryant, Bradshaw & Bryant, PLLC, Waite Park, Minnesota (for appellant)

Kenneth H. Bayliss, Steven R. Schwegman, Michelle M. Draewell, Quinlivan & Hughes,
P.A., St. Cloud, Minnesota (for respondents)

Considered and decided by Hooten, Presiding Judge; Johnson, Judge; and Slieter,
Judge.

NONPRECEDENTIAL OPINION

SLIETER, Judge

This appeal is from the dismissal of appellant Erica Vipond’s medical-malpractice claim against her orthopedic physician’s assistant in which she claims “tortious assault and battery” occurred during a medical examination. Vipond argues that because the allegations in her complaint are within the “general knowledge or experience of

laypersons,” the district court erred by determining that she was required to submit expert affidavits pursuant to Minn. Stat. § 145.682 (2020). Alternatively, Vipond argues that the expert affidavits she did submit were legally sufficient. We conclude that an expert affidavit was required and the expert affidavit Vipond submitted was insufficient because it did not identify the standard of care and how it was violated during the medical examination. Therefore, we affirm.

FACTS

In September 2016, Vipond attended a medical appointment with respondent Lance Beebout, a physician’s assistant with respondent Heartland Orthopedic Specialists. Vipond was experiencing knee pain, shooting pain in her back and legs, and numbness and tingling. Vipond alleges that during the examination, Beebout, who remained in the room, instructed Vipond to remove her clothing from the waist up, including her bra, for purposes of a scoliosis examination. Vipond alleges that, after her clothes were removed, Beebout instructed Vipond to bend over and straighten her back several times. After Vipond was again fully clothed, Beebout instructed Vipond to lie on an exam table and Beebout examined her spine and lower body. This examination included Beebout touching Vipond on the front of her pelvic bone and on the inside of her leg near her pelvic area, referred to by Vipond’s medical record as a “palpation.”

Vipond commenced a medical malpractice action alleging tortious assault and battery by Beebout based on Beebout's actions during the examination.¹ Vipond alleges that the following actions constituted tortious assault and battery: his request that she disrobe, his failure to leave the room while she disrobed, his failure to provide her a gown or otherwise ensure that she did not unnecessarily require her to expose herself, and his touching of her pelvic area.

Vipond submitted the affidavit of expert witness Mark R. Halstrom, M.D.² The affidavit indicated that Dr. Halstrom had "read the complaint," that he was "familiar with the standard of care" for such situations, and that "[i]n providing care to Vipond on September 22, 2016, Beebout deviated from the applicable standard of care and by that action caused injury to Vipond."

Respondents subsequently moved to dismiss for failure to comply with Minn. Stat. § 145.682, alleging that Vipond's affidavit failed to meet the specificity requirements of that statute. The district court concluded that general statements in the affidavit failed to satisfy the statutory requirements and dismissed Vipond's claims. This appeal follows.

¹ Vipond also asserts negligence on the part of Heartland Orthopedic, including negligence in hiring, supervising, and continuing to retain Beebout as an employee. Those claims were also dismissed, and that dismissal is not before us.

² Vipond initially submitted an expert affidavit from Dr. David B. Ketrosier. However, Dr. Ketrosier died and Vipond substituted Dr. Ketrosier's affidavit with Dr. Halstrom's. The district court found this to be a proper substitution, pursuant to Minn. Stat. § 145.682, subd. 6. On appeal, respondents argue that such substitution was improper. However, Minn. Stat. § 145.682, subd. 4(b) clearly states that "[n]othing in this subdivision may be construed to prevent either party from calling additional expert witnesses or *substituting other expert witnesses*." (emphasis in original).

DECISION

Appellate courts review a district court's dismissal of a case for failure to comply with section 145.682 for an abuse of discretion, but statutory construction is a question of law which is reviewed *de novo*. *Stroud v. Hennepin Cnty. Med. Ctr.*, 556 N.W.2d 552, 555 (Minn. 1996).

“[E]xpert testimony is necessary to support all but the most obvious medical malpractice claims.” *Haile v. Sutherland*, 598 N.W.2d 424, 428 (Minn. App. 1999). The purpose of the affidavit requirement is to “eliminat[e] nuisance medical malpractice lawsuits by requiring plaintiffs to file affidavits verifying that their allegations of malpractice are well-founded.” *Stroud*, 556 N.W.2d at 555.

Section 145.682 requires that a plaintiff alleging malpractice must submit an “affidavit of expert disclosure.” *Wesley v. Flor*, 806 N.W.2d 36, 40 (Minn. 2011). This affidavit must contain specific details of the plaintiff's claims, including (1) identification of any experts expected to testify, (2) “the facts and opinions to which the expert is expected to testify,” and (3) “a summary of the grounds of each opinion.” *Id.*; Minn. Stat. § 145.682, subd. 4.³

Vipond argues that, because the allegations contained within her complaint were “within the general knowledge or experience of laypersons,” no expert testimony was required at trial for a jury to make a finding of malpractice and, consequently, no expert

³ Though Minn. Stat. § 145.682, subd. 2 also requires an initial, less detailed, affidavit of expert review, which may be completed by plaintiff's attorney, compliance with this requirement of section 145.682 is not disputed.

affidavit was necessary. Alternatively, Vipond argues that Dr. Halstrom’s affidavit was sufficient. We are not persuaded.

I. An expert affidavit was required.

An exception to the requirement for expert testimony and affidavit applies “when the alleged negligent acts are within the general knowledge or experience of laypersons.” *Mercer v. Andersen*, 715 N.W.2d 114, 122 (Minn. App. 2006) (citing *Tousignant v. St. Louis Cnty.*, 615 N.W.2d 53, 61 (Minn. 2000)). However, “it is an exceptional medical malpractice case that does not require expert testimony.” *Tousignant*, 615 N.W.2d at 61. The Minnesota Supreme Court in *Tousignant* examined the facts required to establish “such an exceptional case.” *Id.* In that case, a plaintiff alleged that nursing home staff failed to—after being explicitly directed to do so—restrain an elderly patient recovering from a broken hip. *Id.* at 60. The court reiterated that expert affidavits were required in situations where the acts or omissions complained of are not within the “general knowledge or experience of lay persons.” *Id.* at 58. However, the court found that an expert affidavit and testimony were not required in that case because “[i]t is a matter of common knowledge and experience that an elderly person, confused and recovering from a fractured hip, who was likely to attempt to walk without assistance if left unattended, also likely would fall” and “[t]hat a fall by such a person would result in . . . injuries.” *Id.* The matter before us is not “such an exceptional case.” *Id.* at 61.

Vipond argues “[i]t is unthinkable to believe that a male doctor needs to look at his patients’ breasts when conducting an examination of her spine.” Regarding the touching, she argues “[i]t is even more clear that a lay juror can determine that touching someone’s

vagina when she is being seen for knee complaints is a sexual battery.” She summarizes: “requiring a medical expert to explain to a jury that the standard of care that needed to be exercised is to not sexually assault the patient does not make any sense. Requiring a medical expert in sexual assault cases like this one borders on disrespectful.”

First, this argument has no factual basis in the record. Though Vipond’s brief refers to this matter as a “sexual battery,” Vipond testified during her deposition that Beebout touched her *near* her vagina, inside her thigh and on the front of her pelvic bone. Second, unlike *Tousignant*, this case does not involve allegations a lay person would be equipped to adequately assess. All of the alleged conduct occurred during a medical examination. An average layperson would not be equipped to know whether Beebout’s examination violated the applicable standard of care and, therefore, constituted tortious assault and battery. Expert testimony was required to establish Vipond’s claims and, therefore, an expert affidavit was required. Minn. Stat. § 145.682, subd. 3; *Mercer*, 715 N.W.2d at 122-23.

II. The expert affidavit was insufficient.

Dr. Halstrom’s expert affidavit must provide “the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion.” Minn. Stat. § 145.682, subd. 4(a); *Wesley*, 806 N.W.2d at 40. The affidavit must “[a]t a minimum . . . disclose 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 between the violation of the standard of care and the plaintiff’s damages.” *Lindberg v. Health Partners, Inc.*, 599

N.W.2d 572, 577 (Minn. 1995) (quotations omitted). These details are required because “empty conclusions . . . unless shown how they follow from the facts, can mask a frivolous claim.” *Id.* at 576 (quotations omitted).

Dr. Halstrom’s affidavit, in relevant part, states:

1. I am a medical doctor practicing Family Medicine. I am also a health care professional practicing as a member of Williams Integracare Clinic
2. I have read the Complaint of plaintiff Erica Vipond against Lance J. Beebout and Heartland Orthopedic Specialists, P.A. . . . For purposes of this affidavit, I assume the allegations of the complaint to be true.
...
6. I am familiar with the standard of care recognized by the health care industry in Minnesota as applicable to situations in which a provider like Beebout is working with a patient like Vipond.
7. In providing care to Vipond on September 22, 2016, Beebout deviated from the applicable standard of care and by that action caused injury to Vipond.

This expert affidavit is notably similar in its deficiencies to the expert affidavit rejected by the Minnesota Supreme Court in *Lindberg*. In *Lindberg*, the affidavit of expert disclosure examined read:

1. I am a board-certified specialist in obstetrics and gynecology.
...
3. I am familiar with the standard and duty of care applicable to doctors, midwives, nurses and other medical personnel in the Twin Cities of Minnesota area.
4. Based upon a reasonable degree of medical certainty, it is more probable than not, that if, among other things, Debra Lindberg had been instructed to seek medical treatment at the time of her phone call on the morning of March 28, 1994, Lukas Stewart Lindberg would not have died.
5. Based upon a reasonable degree of medical certainty, Lukas Stewart Lindberg died as a result of the negligent and

careless conduct of the Defendants and/or their agents and employees, including midwife Sharon Nichols and Donne Mathiowitz.

Id. at 574-75. Affirming the district court’s dismissal of the claims allegedly supported by this petition, the supreme court reemphasized “the importance of strict compliance with the disclosure requirements of [Minn. Stat. § 145.682.]” *Id.* at 576. The supreme court held:

It is clear that [the affidavit] contains nothing more than broad and conclusory statements as to causation It states that [the doctor] is familiar with the applicable standard of care but fails to state what it was or how the appellants departed from it, it fails to recite any facts upon which [the doctor] will rely as a basis for his expert opinion, it fails to outline a chain of causation connecting the alleged failure [with the alleged damages] and it fails to even identify the medical condition for which [the plaintiff] was not given attention.

Id. at 578.

Just as in *Lindberg*, Dr. Halstrom notes that he is “familiar with the standard of care” though he fails to state what that standard of care is or how it was violated. Dr. Halstrom additionally fails to identify any facts upon which he would rely at trial in forming his opinion, apart from a broad reference to “the complaint.”⁴ As in *Lindberg*, the types of “broad and conclusory statements” contained within Dr. Halstrom’s affidavit are insufficient to fulfil the requirements of section 145.682 and avoid dismissal. *See Id.* The district court did not abuse its discretion in dismissing Vipond’s claims. *Lindberg*, 599

⁴ Vipond argues that though the affidavit itself is brief, it was nevertheless sufficient because it incorporated the factual information contained within the complaint. It was not. Such an approach would violate the general rule that “nonaffidavit materials may not be used to supplement an otherwise deficient affidavit under section 145.682.” *Tousignant*, 615 N.W.2d at 60.

N.W.2d at 578 (“Dismissal is mandated under Minn. Stat. § 145.682, subd. 6 when the disclosure requirements are not met.”).

Affirmed.