STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0022

Joseph Kurian, individually,
and as Trustee for Samael Alessandro Ittyerah, deceased,
Appellant,

vs.

Hennepin Healthcare System, Inc.,
d/b/a Hennepin County Medical Center,
Respondent,

Fairview Health Services,
d/b/a University of Minnesota Medical Center Fairview,
Respondent,

and

University of Minnesota Physicians,
Respondent.

Filed September 6, 2022
Affirmed
Gaïtas, Judge

Hennepin County District Court
File No. 27-CV-20-13181

Wayne B. Holstad, Craig J. Beuning, White Bear Lake, Minnesota (for appellant)

Michael O. Freeman, Hennepin County Attorney, Matthew S. Frantzen, Assistant County Attorney, Minneapolis, Minnesota (for respondent Hennepin Healthcare System, Inc.)

Kelly A. Putney, Anuradha Chudasama, Bassford Remele, P.A., Minneapolis, Minnesota (for respondent Fairview Health Services, d/b/a University of Minnesota Medical Center Fairview)

Rodger A. Hagen, Julia J. Nierengarten. Meagher & Geer PLLP, Minneapolis, Minnesota (for respondent University of Minnesota Physicians)

Considered and decided by Gaïtas, Presiding Judge; Larkin, Judge; and Cochran, Judge.

NONPRECEDENTIAL OPINION

GAÏTAS, Judge

Appellant Joseph Kurian challenges the district court's dismissal of his wrongful-death action against respondents Hennepin Healthcare System, Inc., d/b/a Hennepin County Medical Center (HHS), Fairview Health Services, d/b/a University of Minnesota Medical Center Fairview (FHS), and University of Minnesota Physicians (UMP), which claimed that respondents' medical negligence injured and caused the death of Kurian's premature infant. Kurian argues that the district court erred by dismissing the action (1) pursuant to *Ortiz v. Gavenda*, 590 N.W.2d 119 (Minn. 1999), based on Kurian's commencement of the wrongful-death action before he was appointed as a trustee for the next-of-kin and (2) pursuant to Minnesota Statutes section 145.682 (2020), based on Kurian's failure to comply with the expert-witness-disclosure requirement. Because the district court did not abuse its discretion by dismissing the action under section 145.682, subdivision 6, based on Kurian's insufficient expert-witness disclosures, we affirm.

FACTS

This case involves the death of a premature infant treated by respondents. Kurian, who brought a wrongful-death action against respondents, is the infant's father and the trustee for the infant's next-of-kin.

Facts Alleged in Complaint

On May 3, 2017, Samael Alessandro Ittyerah was born at HHS's facility, Hennepin County Medical Center. At 25 weeks gestational age, Samael was very premature. He remained under HHS's care until September 10, 2017. According to Kurian's complaint, Samael's condition improved throughout the summer of 2017. He gained weight and no longer needed a ventilator.

The complaint alleges that HHS administered a series of vaccines to Samael in mid-August. Samael's health "rapidly and significantly" deteriorated, and he was again placed on a ventilator. On August 29, 2017, an x-ray revealed that Samael had "numerous unexplained bone fractures."

On September 10, 2017, after Samael's condition had further declined, he was transferred to FHS. UMP is a physicians group whose physicians provide care at FHS.

After the transfer to FHS, Samael's weight "more than doubled," and he was lethargic, required ventilation, and had numerous broken bones. Samael was also given intravenous fentanyl and caffeine, a regimen that was started after his birth and was continued while he was at FHS. During a procedure on September 13, 2017, a physician punctured Samael's spleen, requiring surgery. On September 20, 2017, doctors met with Samael's family and recommended that life-saving measures be discontinued. The family disagreed with the recommendation. FHS then used "oxygen bursts" to assist Samael's breathing. Samael died later that day.

On September 18, 2020, Kurian served FHS with a summons and complaint, and on September 21, 2020, he served HHS with an identical summons and complaint. Kurian's

complaint identified four claims against HHS and FHS: (1) medical malpractice, (2) wrongful death, (3) negligent infliction of emotional distress, and (4) res ipsa loquitur.

Affidavit of Expert Review

Minnesota law mandates a plaintiff alleging medical malpractice to serve an affidavit of expert review with the summons and complaint. *See* Minn. Stat. § 145.682, subd. 2.[1] Kurian did not follow this requirement. On September 29, 2020, FHS requested Kurian's affidavit of expert review. Shortly thereafter, HHS also demanded an affidavit of expert review.

Almost two months later, in November 2020, Kurian's attorney served a purported "Affidavit of Expert Review." It stated that no affidavit was served with the summons and complaint because "no expert could be retained to render an opinion prior to the expiration of the statute of limitations."[2] Additionally, the affidavit noted that Kurian's attorney had personally communicated

> with three experts who have been consulted but cannot or will not formally render an opinion prior to reviewing documents which the plaintiff was unable to obtain from the defendants prior to the commencement of this lawsuit. The experts consulted have a recognized expertise in the areas of

[1] In cases where expert review "could not reasonably be obtained before the action was commenced because of the applicable statute of limitations," a plaintiff must provide an affidavit certifying this fact. Minn. Stat. § 145.682, subd. 3(2).

[2] Although the statute of limitations for a wrongful-death lawsuit is three years, *see* Minn. Stat. § 573.02, subd. 1 (2020), the governor issued an executive order extending statutes of limitation due to the COVID-19 pandemic that affected the limitations period in this case. Emerg. Exec. Order No. 20-01, *Declaring a Peacetime Emergency & Coordinating Minnesota's Strategy to Protect Minnesotans from COVID-19* (Mar. 13, 2020); 2020 Minn. Laws ch. 74, art. 1, § 16. The parties agree that the limitations period for this action expired on April 15, 2021.

> vaccinations for neonatal infants, pediatrics, and interventional radiology.

Finally, the affidavit stated that Kurian, who attended some medical school, and his mother, who "has substantial experience with hospital care and procedures based on many years of practical experience working in hospitals in India," were qualified to render opinions.

Appointment of Kurian as Trustee and Amendment of Complaint

When Kurian served the summons and complaint, he had not been appointed trustee under Minnesota Statutes section 573.02 (2020), which requires wrongful-death actions to be commenced by a trustee for the next-of-kin. On October 7, 2020, Kurian petitioned for appointment as trustee. Following Kurian's petition for appointment as trustee, by stipulation of the parties and with the district court's permission, Kurian served and filed an amended complaint. On January 12, 2021, four months after Kurian served the summons and complaint, the district court issued an order appointing him as the trustee.

In February 2021, Kurian filed a second amended complaint, which added UMP as a party.

Motion for Judgment on the Pleadings

In March 2021, HHS and FHS brought motions for judgment on the pleadings, seeking dismissal of Kurian's action on the ground that the complaint failed to properly plead his claims. Kurian agreed to dismiss his claim for negligent infliction of emotional distress. In support of his remaining claims, Kurian's counsel filed affidavits from Kurian and Kurian's mother.

Affidavits of Kurian and His Mother

Kurian's affidavit explained that he was in medical school when Samael was born, but that he later dropped out. It provided background information about Samael's birth and medical history. The affidavit discussed Samael's medical treatment by HHS, including his surgeries, management of complications, and medications. Kurian noted his disagreement with the decision to vaccinate Samael and expressed his opinion that the vaccinations "overloaded" Samael's immune system, causing Samael to decompensate. He stated that Samael was diagnosed with "osteopenia of prematurity" once HHS discovered Samael's bone fractures. But he surmised that the fractures could have been caused by abuse. Kurian's affidavit further described Samael's treatment at FHS following the transfer, including an interventional radiologist's unintentional puncture of Samael's spleen during a procedure, and the complications that occurred thereafter. Finally, the affidavit described the treatments that Samael received, including "oxygen bursts," which Kurian speculated contributed to Samael's death.

The affidavit of Kurian's mother stated that she worked as a psychiatrist for the Missouri Department of Mental Health and the Missouri Department of Corrections. It also noted her one-year residency in obstetrics and gynecology in India. Kurian's mother stated that she visited regularly after Samael's birth and reviewed the notes of his nurses and doctors. She described Samael's course of treatment and the complications he experienced. Her affidavit criticized the providers' decisions to vaccinate Samael and to treat him with fentanyl, which can cause intestinal complications. It also expressed her opinion that an improperly administered "oxygen burst" ultimately caused Samael's death.

Motion to Dismiss Kurian's Remaining Claims

In early June 2021—and before the district court ruled on the motions to dismiss on the pleadings—respondents collectively moved to dismiss Kurian's remaining claims on two grounds. First, they argued that, because Kurian had commenced the action before being appointed trustee for Samael's next-of-kin, the action was a legal nullity pursuant to the Minnesota Supreme Court's decision in *Ortiz*, 590 N.W.2d 119. Second, they argued that dismissal was required because Kurian failed to comply with the statutory requirements for maintaining a medical-malpractice action. Respondents noted that Kurian had never served the affidavit of expert review required by section 145.682, subdivisions 2 and 3. Moreover, Kurian had failed to timely serve the expert-witness disclosures mandated by section 145.682, subdivision 4(a), which requires a plaintiff in a medical-malpractice action to serve expert-witness disclosures on the defendant within 180 days of the commencement of discovery.

Order for Partial Judgment on the Pleadings

On June 22, 2021, the district court issued an order granting the initial motions of HHS and FHS for partial judgment on the pleadings. Concluding that Kurian's complaint failed to sufficiently plead his medical-malpractice claims against HHS and FHS because it did not identify the applicable standards of care or the alleged departures from those standards, the district court dismissed those claims with prejudice. As to the affidavits of Kurian and his mother, the district court determined that they "do not qualify as expert testimony, are inadmissible for purposes of this motion, and the court need not analyze them further." The district court declined to dismiss the res ipsa loquitur claim against

HHS, however—but only as to Samael's broken bones. Because Kurian did not allege that these injuries caused Samael's death, the district court limited the claim as to special damages. *See* Minn. Stat. § 573.02, subd. 2 (2020) ("When injury is caused to a person by the wrongful act or omission . . . and the person thereafter dies from a cause unrelated to those injuries, the trustee [in a wrongful-death action] may maintain an action for special damages arising out of such injury . . . .").

Affidavit of Dr. Jonathan Cohen and Supplemental Affidavits

In response to respondents' second dispositive motion, which alleged that Kurian had failed to provide expert-witness disclosures, Kurian filed an affidavit from Dr. Jonathan Cohen, a neonatologist. Kurian also filed his own supplemental affidavit and a supplemental affidavit from his mother. He filed these affidavits almost two months after the 180-day statutory deadline for a plaintiff's expert-witness disclosures.

Dr. Cohen's affidavit stated that the "records available . . . regarding the precise cause of death are too incomplete to reach a conclusion or render an opinion." It explained that there was a "temporal relationship" between Samael's death and the vaccinations, but that "a causal relationship between the vaccinations and the infant's decomposition can't be established from the data present." Dr. Cohen also noted that Samael's "death and poor outcome were, in part, due to a complication that occurred during the paracentesis. There is insufficient charting available to determine the level of monitoring that occurred following the procedure." Regarding the administration of fentanyl, Dr. Cohen stated that "fentanyl is commonly used for pain for premature infants and it was not negligent to prescribe it." And as to the oxygen bursts, Dr. Cohen stated that this "can be necessary

during periods of desaturation or bradycardia, however there is the possibility of lung damage due to exposure of fragile lung tissue to high levels of oxygen."

The supplemental affidavits from Kurian and his mother reiterated that they had scientific and medical knowledge. Their affidavits asserted that they were qualified to provide opinions about Samael's medical care.

District Court's Second Order and Judgment

On October 11, 2021, the district court dismissed Kurian's remaining claims with prejudice. The district court agreed with respondents that the action was a legal nullity under Minnesota law because a wrongful-death action must be brought and maintained by a trustee, and Kurian had commenced the action before he was appointed as trustee. But even if the action had been properly commenced, the district court determined that Kurian's failure to timely serve the expert-witness disclosures required by section 145.682, subdivision 4, necessitated dismissal of Kurian's medical-malpractice claims. The district court reiterated that the affidavits of Kurian and his mother "do not qualify as expert testimony" and are "inadmissible for purposes of this motion." As to Dr. Cohen's affidavit, the district court concluded that it failed to "demonstrate a causal link between the breach of standard of care and the harm suffered" and therefore "does not remotely show malpractice and/or causation as required by statute."

Kurian appeals.

DECISION

Kurian challenges the district court's dismissal of his action on two grounds. First, he argues that the district court erred as a matter of law in concluding that his

commencement of the action before he was appointed as trustee rendered it a legal nullity. Second, he contends that the district court erred in dismissing his claims under Minnesota Statutes section 145.682 because he provided the statutorily required expert-witness disclosures. We conclude that the district court did not abuse its discretion in dismissing the action because Kurian did not satisfy the expert-witness-disclosure requirement under section 145.682, and we do not reach Kurian's other argument.

Appellate courts review a dismissal of a medical-malpractice action for failure to comply with section 145.682 under an abuse-of-discretion standard. *Haile v. Sutherland*, 598 N.W.2d 424, 426 (Minn. App. 1999). A district court abuses its discretion when its ruling is based on an erroneous view of the law or is against the facts in the record, or when it exercises its discretion in an arbitrary or capricious manner. *City of N. Oaks v. Sarpal*, 797 N.W.2d 18, 24 (Minn. 2011).

To establish a prima facie case of medical malpractice, a plaintiff must show: "(1) the standard of care recognized by the medical community as applicable to the . . . defendant's conduct; (2) that the defendant departed from that standard; (3) that the defendant's departure . . . was a direct cause of the [plaintiff's] injuries; and (4) damages." *Tousignant v. St. Louis County*, 615 N.W.2d 53, 59 (Minn. 2000). "Expert testimony is generally required in medical-malpractice cases because they involve complex scientific or technological issues." *Mercer v. Andersen*, 715 N.W.2d 114, 122 (Minn. App. 2006). In a medical-malpractice action where expert testimony is necessary to establish a prima facie case, Minnesota Statutes section 145.682 imposes two requirements on a plaintiff. Minn. Stat. § 145.682, subd. 2; *Anderson v. Rengachary*, 608 N.W.2d 843, 846 (Minn.

2000). These statutory requirements were enacted "as a means of readily identifying meritless lawsuits at an early stage of the litigation." *Broehm v. Mayo Clinic Rochester*, 690 N.W.2d 721, 725 (Minn. 2005). First, the complaint must include an affidavit of expert review by the plaintiff's attorney stating that the attorney has reviewed the case "with an expert whose qualifications provide a reasonable expectation that the expert's opinions could be admissible at trial and that, in the opinion of this expert, one or more defendants deviated from the applicable standard of care and by that action caused injury to the plaintiff." Minn. Stat. § 145.682, subds. 2, 3(1). Second, within 180 days after commencement of discovery, a plaintiff must serve on the defendant an affidavit of expert identification that includes:

> [T]he identity of each person whom plaintiff expects to call as an expert witness at trial to testify with respect to the issues of malpractice or causation, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion.

Id., at subd. 4(a). To satisfy this second requirement for expert-witness disclosures, the expert affidavit must articulate specific details of the expert's testimony, including the standard of care, the acts or omissions that the plaintiff alleges violated the standard of care, and an outline of the chain of causation that resulted in the injury. *Maudsley v. Pederson*, 676 N.W.2d 8, 13 (Minn. App. 2004). General or conclusory statements concerning the standard of care, breach, or the causative link between the breach and the injury will not suffice. *See Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 192-93 (Minn. 1990).

Although respondents point out that Kurian failed to satisfy either statutory requirement, the district court ultimately dismissed Kurian's claims because he did not comply with the second requirement for expert-witness disclosures. We therefore confine our analysis to the second requirement.

A. Kurian's claims required expert testimony.

Initially, Kurian suggests that expert testimony is not required to establish a prima facie case of malpractice under the circumstances alleged here, and therefore, the expert-witness-disclosure requirement of section 145.682 does not apply. The affidavit requirements of section 145.682 only apply to medical-malpractice actions "as to which expert testimony is necessary to establish a prima facie case." Minn. Stat. § 145.682, subd. 2. If expert testimony is unnecessary to establish a prima facie case, the statute is inapplicable. *See Sorenson*, 457 N.W.2d at 191. Thus, as a threshold question, we consider whether Kurian can establish a prima facie case of medical malpractice without expert testimony. *See Tousignant*, 615 N.W.2d at 58.

When a negligence action involves matters "within the general knowledge and experience of lay persons," expert testimony may not be required. *Atwater Creamery Co. v. W. Nat'l Mut. Ins. Co.*, 366 N.W.2d 271, 279 (Minn. 1985). "But expert testimony is necessary to support all but the most obvious medical malpractice claims." *Haile*, 598 N.W.2d at 428. Only "exceptional" and "rare" medical-malpractice cases fall within the limited exception to the expert-testimony requirement. *Sorenson*, 457 N.W.2d at 191.

Kurian specifically points to three issues of medical malpractice in his brief: (1) "Was the failure to monitor the effects of the risky vaccinations malpractice and a

contributing factor to the death of the decedent?"; (2) "Was the accidental puncturing of the spleen during the paracentesis and the failure to monitor the condition of the patient after the procedure negligent?"; and (3) "Was the respiratory technician responsible for decedent's 'spontaneous pulmonary failure' after admitting that she gave too many 'oxygen bursts?'" "The primary purpose of an expert affidavit is to illustrate 'how' and 'why' the alleged malpractice caused the injury." *Maudsley*, 676 N.W.2d at 14. The issues identified by Kurian are certainly not within the realm of "practical common sense" of jurors. *See Miller v. Raaen*, 139 N.W.2d 877, 880 (Minn. 1966) (summarizing cases where expert testimony was unnecessary because they "involved situations where there was no doubt about the cause of the result complained of, and the result would not have followed in the absence of a breach of duty, the establishment of which did not involve any scientific knowledge"). A layperson would not be familiar with the medical standards of care for vaccinating a premature infant, for monitoring a premature infant postvaccination, for conducting a paracentesis procedure, or for administering oxygen bursts to a premature infant. Likewise, a layperson would not know what actions would breach the applicable standards of care or whether those breaches would cause injury or death.

Clearly, this is not the "rare" or "exceptional" medical-malpractice case that does not require expert testimony. We therefore reject Kurian's argument that section 145.682 does not apply to his claims.

B. The district court did not abuse its discretion by determining that Kurian's affidavits did not satisfy section 145.682, subdivision 4.

Kurian argues that the district court erred by determining that his expert-witness disclosures were insufficient under section 145.682, subdivision 4, and dismissing his claims on this basis. He first challenges the district court's refusal to consider his own affidavit and his mother's affidavit as expert-witness disclosures. Kurian contends that both he and his mother have scientific and medical expertise, and that they were qualified to render expert opinions about Samael's care.

In a medical-malpractice case, a plaintiff must identify an expert "whose qualifications provide a reasonable expectation that the expert's opinions could be admissible at trial." Minn. Stat. § 145.682, subd. 3(1). To qualify as an expert, a witness in a medical-malpractice case must have both scientific knowledge and practical or occupational experience in the subject matter at issue. *Cornfeldt v. Tongen*, 262 N.W.2d 684, 692 (Minn. 1977). In considering the competency of an expert witness, the district court examines "both the degree of the witness' scientific knowledge and the extent of the witness' practical experience with the matter which is the subject of the offered testimony." *Reinhardt v. Colton*, 337 N.W.2d 88, 93 (Minn. 1983). Theoretical expertise is not sufficient. *Lundgren v. Eustermann*, 370 N.W.2d 877, 880 (Minn. 1985).

An appellate court applies a "very deferential standard" to a district court's determination regarding the qualifications of an expert. *Teffeteller v. Univ. of Minn.*, 645 N.W.2d 420, 427 (Minn. 2002) (quotation omitted). That determination will only be reversed "if there has been a clear abuse of discretion." *Id.*

Here, the district court did not abuse its discretion by determining that neither Kurian nor his mother had the requisite credentials to qualify as expert witnesses in this case, involving the complex care of a very premature infant. Kurian, who did not complete medical school, is not a medical provider. And although his mother is a physician, she is a psychiatrist with no expertise or occupational experience in neonatology or interventional radiology. Thus, the district court properly exercised its discretion by deciding that Kurian and his mother were not qualified to offer opinions about the applicable standards of care, whether respondents deviated from those standards of care, and whether deviations from standards of care caused Samael's death.

Kurian also argues that the district court erred in concluding that the affidavit of Dr. Cohen did not satisfy the requirements of section 145.682. We disagree. Dr. Cohen's affidavit did not identify the applicable standards of care or the acts or omissions alleged to violate those standards, nor did it assert that deviations from the standard of care caused any injury. *Maudsley*, 676 N.W.2d at 13-14. Indeed, the affidavit indicates that providers did not deviate from the standard of care by vaccinating Samael because his condition at the time of the vaccination "would lead to an opinion that the vaccinations could be administered safely." As the district court observed, the affidavit suggests there were some communication issues between medical providers and the family. But it does not establish that any malpractice occurred or that there was any causal link between Samael's medical care and his death. The district court therefore did not abuse its discretion by concluding that Dr. Cohen's affidavit did not satisfy the statutory requirement for expert-witness disclosures.

C. Because Kurian failed to comply with section 145.682, subdivision 4, the district court properly dismissed the action.

"Strict compliance" with section 145.682 is required, "[s]o as not to undermine the legislative aim of expert review and disclosure." *Broehm*, 690 N.W.2d at 726; *see also Lindberg v. Health Partners, Inc.*, 599 N.W.2d 572, 577-78 (Minn. 1999) (concluding that the statutory requirements of section 145.682 are "uncomplicated and unambiguous" and contemplate strict compliance). Kurian did not submit sufficient affidavits as required by section 145.682, subdivision 4. A plaintiff's failure to comply with subdivision 4 requires "mandatory dismissal of each action with prejudice as to which expert testimony is necessary to establish a prima facie case."[3] Minn. Stat. § 145.682, subd. 6(c). The district court did not abuse its discretion in dismissing Kurian's claims on this basis.[4]

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[3] Kurian suggests that respondents failed to provide notice of the alleged deficiencies in his expert-witness disclosures, which he could have cured if given the opportunity. *See* Minn. Stat. § 145.682, subd. 6(c) (stating that mandatory dismissal is appropriate if a motion to dismiss identifies the alleged deficiencies in plaintiff's affidavit, a hearing on the motion is scheduled at least 45 days from service of the motion, and the plaintiff does not correct the deficiencies before the hearing). This argument was not presented below and is therefore forfeited. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Moreover, we observe that respondents moved to dismiss Kurian's claims based on his failure to comply with the expert-witness disclosure requirement in June 2021. After respondents' motion was filed, Kurian served the affidavit of Dr. Cohen and supplemented the affidavits already provided. Thus, the record does not support Kurian's claim that he did not receive sufficient notice of the deficiencies in his expert-witness disclosures.

[4] We note that Kurian's wrongful-death and res ipsa loquitur claims are medical-malpractice claims subject to the expert-review requirements of section 145.682. The wrongful-death claim was based entirely on the theory that medical malpractice caused Samael's death. And the res ipsa loquitur claim is a claim against a health care provider "alleging malpractice, error, mistake, or failure to cure, whether based on contract or tort," and is thus a medical-malpractice claim governed by section 145.682. *See* Minn. Stat. § 145.682, subd. 2; *Tousignant*, 615 N.W.2d at 56, n.1 (concluding that a negligence action against a health care provider alleging failure to exercise care in providing care and

Because we conclude that the district court did not abuse its discretion by dismissing Kurian's action based on his failure to comply with the statutory expert-witness-disclosure requirement, we need not address his argument that the district court erred by determining that the action was a nullity because Kurian brought suit under the wrongful-death statute, Minnesota Statutes section 573.02, subdivision 3, before he was appointed as the trustee.

Affirmed.

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treatment is a medical-malpractice claim subject to Minn. Stat. § 145.682). Because Kurian did not comply with the statutory expert-witness-disclosure requirement, the district court was required to dismiss these additional claims. Minn. Stat. § 145.682, subd. 6(c).