STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1686

Marlene Fearing,
Appellant,

vs.

University of Minnesota Medical Center
a/k/a M Health Fairview Clinics,
Respondent,

and

Mayo Clinic of Rochester, MN,
Respondent.

Filed October 9, 2023
Affirmed
Reyes, Judge

Hennepin County District Court
File No. 27-CV-21-6173

Marlene Fearing, Mahtomedi, Minnesota (self-represented appellant)

Julia J. Nierengarten, Meagher & Geer, P.L.L.P., Minneapolis, Minnesota (for respondent University of Minnesota Medical Center)

Paul C. Peterson, William L. Davidson, Matthew D. Sloneker, Lind, Jensen, Sullivan & Peterson, Minneapolis, Minnesota (for respondents Fairview Health Services, Dr. Nikola Vuljaj, and Michael Rendel)

Andrew B. Brantingham, Nathan J. Ebnet, Charles J. Pults, Dorsey & Whitney, L.L.P., Minneapolis, Minnesota (for respondent Mayo Clinic of Rochester, MN)

Considered and decided by Reyes, Presiding Judge; Tracy M. Smith, Judge; and Bratvold, Judge.

NONPRECEDENTIAL OPINION

REYES, Judge

Appellant challenges the dismissal of her medical-malpractice suit, arguing that (1) the district court abused its discretion by failing to recuse itself; (2) the district court "lost subject matter jurisdiction" due to obstruction of justice; (3) her injury was so apparent that she did not need to submit an expert affidavit; and (4) the district court erred by dismissing her claims based on insufficient service of process and expiration of the statute of limitations. We affirm.

FACTS

I. Background and Fearing's allegations

The following alleged facts are taken from self-represented appellant Marlene Fearing's first amended complaint. On May 1, 2019, Fearing was admitted to the Emergency Department at respondent University of Minnesota Medical Center (UMMC) with a pulmonary infection. Fearing was observed overnight and released the next day. On the morning of May 3, 2019, Fearing received a phone call from a nurse at UMMC who told her that "she needed to go immediately to the emergency room due to a blood contamination." The nurse explained to Fearing that the blood draw taken upon Fearing's discharge was "contaminated," "perhaps due to improper cleaning of the skin." Fearing returned to UMMC that day.

Fearing contends that the "assault and abuse" of her began when Dr. Nikola Vuljaj came into the room and told her in "a rather angry voice" that "there was no contamination." Dr. Vuljaj said that he would do another blood draw. After Dr. Vuljaj left

the room, nurse Michael Rendel entered the room and "put an IV into [] Fearing's right arm" and "injected [seven] vials of unknown substances" into the IV. Fearing asked Rendel "what was being injected," and he said antibiotics. Fearing did not believe him because she was already on antibiotics and prednisone. Fearing initially refused to leave the emergency room until someone told her what they injected into her arms. Eventually, Fearing contacted a social worker who summoned a cab to take her home.

When Fearing arrived home, she "began coughing up pink foamy substance and thick phlegm" which made it difficult for her to breathe. Fearing asserts that

> she experienced headfog, pain around her eye, left and right temple[s] were excruciating. Her right eye started blinking and soon would not open. She suffered double vision and every morning brought more head[]fog and intermittent pain [throughout] her entire body. Her heart rate and blood pressure w[ere] uncontrollable even with medication. She suffered stomach pain and [was] unable to keep food for nourishment, causing loss of weight.

The symptoms persisted for two weeks before Fearing sought care.

From May 14 to August 27, 2019, multiple physicians at respondent Mayo Clinic of Rochester (Mayo Clinic)[1] provided treatment for Fearing. Fearing alleges that, although she reported all her symptoms to the physicians at Mayo Clinic, "no toxicology tests [were] ordered despite signs of poisoning contaminant from IV [i]njections at UMMC." The physicians at Mayo Clinic diagnosed her with anxiety, brain fog, altered mental status, low blood pressure, nerve disorder, thyroid nodule, chronic pain syndrome, and target of

[1] Fearing's claims against Mayo Clinic arose out of treatment that she received at locations in Rochester and in Red Wing.

prosecution, among other conditions. Fearing became increasingly suspicious that her insurance network was scheming to "cover[] up their wrongdoings," so she went to a private forensic expert outside the network at her own expense.[2]

II. Procedural history

A. The first amended complaint

On May 6, 2021, Fearing filed her initial complaint in district court, naming the "University of Minnesota Medical Clinics (UMMC)[3] aka M Health Fairview" and "Mayo Clinic in Rochester" as defendants. On May 11, 2021, Fearing filed a first amended complaint naming "Mayo Clinic in Rochester" and "University of Minnesota Physicians, aka University of Minnesota Medical Center, aka M Health Fairview Clinics aka UMMC" as defendants. The first amended complaint asserted three claims against respondent University of Minnesota Physicians (UMP): assault, abuse, and intentional cover-up. It also asserted claims of "negligence and coconspirators in cover-up" against Mayo Clinic for failing to diagnose her injuries.

B. Attempted service on UMP

UMP is a nonprofit, private physician group that has never employed Dr. Vuljaj or Rendel. UMP has a nonexclusive agreement to provide medical service at UMMC, which is owned and operated by Fairview Health Services, a Minnesota nonprofit corporation.

On May 1, 2021, Fearing tried to serve UMP through the Minnesota Secretary of State's Office. On May 3 or May 4, 2021, Fearing attempted to serve UMP through CT

[2] The record does not contain any information about the private forensic expert.
[3] The correct full name for UMMC is University of Minnesota Medical Center.

Wolters Corporation, allegedly as directed by a Stacey Montgomery who claimed to be the legal counsel of UMP. UMP denied having employed anyone in its legal department by that name.

On May 10, 2021, Fearing received a letter from CT Wolters, stating that it is not an agent for UMP and is not authorized to accept service on UMP's behalf. Fearing then sent two individuals to serve UMP at its administrative building that same day. At the entrance to the UMP administrative building, they encountered Joel Schurke, the vice president for real estate of UMP. Schurke explained that he was not authorized to accept service on UMP's behalf and observed that "[o]ne of the individuals [] slid papers titled "Amended Civil Summons, First Amended Civil Complaint, and Amended Waiver of Service of Summons under the door of UMP's administrative building."

On May 25, 2021, UMP moved to dismiss all the claims against it for lack of personal jurisdiction under Minn. R. Civ. P. 12.02(b) and for insufficient service of process under rule 12.02(d). The district court granted the motion to dismiss the entire complaint as asserted against UMP with prejudice in an October 18, 2021 order. On the same day, the district court also issued a scheduling order that joinder of all additional parties must be accomplished on or before December 13, 2021.

C. The attempted filing of the second amended complaint and attempted service on Fairview respondents

Despite the district court's order dismissing the entire complaint asserted against UMP,[4] Fearing filed a second amended complaint on December 15, 2021, naming the "University of Minnesota Medical Center/ aka MFairview Health Clinics/ aka University of Minnesota Physicians/ aka UMP Corp. aka UMPhysician, Dr. Nikola Vuljaj, Nurse Michael Rendel, and Mayo Clinic of Rochester, MN" as defendants. Fearing never served process on Fairview Health Services, or its employees, Dr. Vuljaj and Rendel (collectively, the Fairview respondents).

On January 10, 2022, the district court issued an order determining that Fearing improperly filed her second amended complaint, which sought to add new defendants, because (1) it was submitted after the December 13, 2021 deadline for joinder of parties as put forth in the scheduling order and (2) it failed to comply with Minn. R. Civ. P. 15.01. The district court allowed Fearing to obtain a hearing date and file a motion in compliance with Minn. Gen. R. Prac. 115 to seek leave to amend her complaint within 14 days. Fearing never filed a motion to amend. As a result, the first amended complaint remains the operative complaint in this case.

[4] In January 2022, UMP moved the district court to declare Fearing a frivolous litigant under Minn. R. Gen. Prac. 9.01. The district court granted the motion and imposed sanctions requiring Fearing to seek the district court's permission before submitting any additional claims, motions, or requests directed at or relating to UMP.

D. Fearing's motion to remove the district court judge

On December 15, 2021, Fearing brought a motion to remove the district court judge for cause. Fearing asserted that "it is quite clear that [she] cannot receive any kind of justice with" the judge because they had made rulings adverse to her. Fearing accused the judge of creating a "hostile environment" against her by "defend[ing]" UMP's counsel and "making excuses" for the misconduct of UMP's counsel. The judge heard the removal motion on January 7, 2022, and denied the motion on the same day.

Fearing appealed the denial of her removal motion to the chief judge. Fearing repeated her assertion that a series of adverse rulings by the judge demonstrated bias against her. Moreover, Fearing alleged that the judge engaged in impermissible ex parte communications with counsel for respondents. The chief judge denied Fearing's removal motion in a January 28, 2022 order.

E. Dismissal of the remaining claims

The district court granted the Fairview respondents' motion to dismiss with prejudice and determined that (1) it lacked personal jurisdiction over the Fairview respondents because Fearing failed to serve them and (2) the two-year statute-of-limitations period for intentional torts had expired. The district court also granted Mayo Clinic's motion to dismiss Fearing's claims of negligence and conspiracy against it with prejudice for failure to comply with the expert-review requirement of Minn. Stat. § 145.682 (2022). This appeal follows.

DECISION

I. The district court did not abuse its discretion by denying Fearing's removal motion.

Fearing argues that the district court judge abused its discretion by rejecting her motion to remove themself for cause. We are not persuaded.

We review a district court's denial of a removal motion for a clear abuse of discretion. *See Carlson v. Carlson*, 390 N.W.2d 780, 785 (Minn. App. 1986) (declining to reverse district court's denial of removal motion absent clear abuse of discretion), *rev. denied* (Minn. Aug. 20, 1986).

Fearing first asserts that the removal of the judge should have been "automatic upon filing [of] a timely motion" under Minn. R. Civ. P. 63.03. Rule 63.03 permits any party to serve and file "a notice to remove" a judge "within ten days after the party receives notice of which judge . . . is to preside at the trial." However, "[n]o such notice may be filed by a party . . . against a judge . . . *who has presided at a motion or any other proceeding*." *Id.* (emphasis added). Because the judge had already presided over the proceeding before Fearing moved for removal, the motion was untimely. The district court therefore did not abuse its discretion by denying Fearing's removal motion under rule 63.03.

Fearing next claims that the judge should have been removed due to bias under Minn. R. Civ. P. 63.02. Rule 63.02 provides that a judge shall not "sit in any case if" they are "disqualified under the Code of Judicial Conduct," which requires a judge to disqualify themself "in any proceedings in which the judge's impartiality might reasonably be questioned." Minn. Code. Jud. Conduct, Canon 2.11(A). However, a party's "subjective

belief that the judge is biased does not necessarily warrant removal." *Hooper v. State*, 680 N.W.2d 89, 93 (Minn. 2004).

To support her claim of bias, Fearing points to the judge's adverse rulings against her as well as alleged ex parte communications with counsel for respondents related to a November 8, 2021 hearing. But prior adverse rulings by a judge "clearly cannot constitute bias." *Olson v. Olson*, 392 N.W.2d 338, 341 (Minn. App. 1986). Moreover, the chief judge found, and the record shows, that there was no evidence that the judge engaged in ex parte communications. The district court therefore did not abuse its discretion by denying Fearing's motion to remove the judge under rule 63.02.

II. The district court had subject-matter jurisdiction over the case.

Fearing argues that the various orders that the district court issued are all "void as a matter of law" because it had "lost subject matter jurisdiction" due to obstruction of justice. We disagree.

We review whether a district court has subject-matter jurisdiction de novo. *Daniel v. City of Minneapolis*, 923 N.W.2d 637, 644 (Minn. 2019). "Subject matter jurisdiction is a court's statutory or constitutional power to adjudicate the case." *State v. Schnagl*, 859 N.W.2d 297, 300 (Minn. 2015) (quotation omitted). "Article VI, Section 3 of the Minnesota Constitution expressly states that the district court has original jurisdiction in all civil and criminal cases." *Id.*

Here, Fearing brought civil claims of medical malpractice against respondents. As a result, the district court had original subject-matter jurisdiction over those claims. *See* Minn. Const. art. VI, § 3.

III. The district court did not abuse its discretion by dismissing Fearing's claims against Mayo Clinic for failure to satisfy the statutory expert-review requirement.

Fearing argues that her injury was so apparent that no expert testimony was needed. We are not convinced.

We review a district court's dismissal of a claim under Minn. Stat. § 145.682 (2022) for an abuse of discretion. *Maudsley v. Pederson*, 676 N.W.2d. 8, 11 (Minn. App. 2004). Whether section 145.682 applies in the instant case is an issue of statutory interpretation, which we review de novo. *See Ramirez v. Ramirez*, 630 N.W.2d 463, 465 (Minn. App. 2001).

"In order to prove medical negligence, a plaintiff usually must offer expert testimony with respect to the standard of care and establish that the defendant doctor departed from that standard." *Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 191 (Minn. 1990). When expert testimony is necessary, section 145.682 requires the plaintiff to "file an affidavit that identifies (1) qualified experts who intend to testify; (2) the substance of their testimony; and (3) a summary of the basis for the experts' opinions." *Maudsley*, 676 N.W.2d. at 11. A plaintiff's failure to provide an affidavit will result in mandatory dismissal with prejudice. *See* § 145.682, subd. 6. A self-represented litigant is not exempt from this requirement. *Id.* subd. 5.

"An exception to this rule 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). "But only rarely does section 145.682 not apply." *Id.* In these

exceptional cases, the plaintiff may establish a prima facie case without expert testimony. *Sorenson*, 457 N.W.2d at 191.

We first consider the applicability of section 145.682 in this case. Fearing claims that Mayo Clinic committed medical negligence by failing to diagnose and treat her injury properly caused by poisonous injections at the UMMC. However, it is not within a layperson's knowledge to understand whether certain treatment is required based on the symptoms of a patient. *See id.* at 189 (holding that expert testimony was required when plaintiffs sued medical institution for failure to diagnose and properly treat placental abruption). The expert-review requirement in section 145.682 applies.

It is undisputed that Fearing did not provide an expert affidavit. The district court therefore did not abuse its discretion by dismissing the claims against Mayo Clinic with prejudice. *See* § 145.682, subd. 6.

IV. The district court properly dismissed the claims against UMP and the Fairview respondents.

Fearing argues that the district court erred by dismissing her claims against UMP and the Fairview respondents based on insufficient service of process and expiration of the statute of limitations. We disagree.

A. Service of process

Proper service of process is a fundamental requirement to commencing a lawsuit. *Doerr v. Warner*, 76 N.W.2d 505, 511 (Minn. 1956). When a plaintiff fails to effectuate service of process properly before the statute of limitations expires, the district court is deprived of personal jurisdiction over a defendant. *Mercer*, 715 N.W.2d at 118-20. This

remains true even when the defendant has actual notice of a lawsuit. *See Thiele v. Stich*, 425 N.W.2d 580, 584 (Minn. 1988) ("Actual notice will not subject defendants to personal jurisdiction absent substantial compliance with [Minn. R. Civ. P. 4.03]."). Whether service of process was effective and a district court has personal jurisdiction over a defendant are questions of law that appellate courts review de novo. *Shamrock Dev., Inc. v. Smith*, 754 N.W.2d 377, 382 (Minn. 2008).

Under the Minnesota Rules of Civil Procedure, a plaintiff commences an action against a defendant by serving a summons on that defendant. Minn. R. Civ. P. 3.01(a). When the defendant is an individual, a plaintiff effectuates proper service "by delivering a copy [of the summons] to the individual personally or by leaving a copy at the individual's usual place of abode with some person of suitable age and discretion then residing therein." Minn. R. Civ. P. 4.03. When the defendant is a corporation, the plaintiff must deliver "a copy [of the summons] to an officer or managing agent, or to any other agent authorized expressly or impliedly . . . to receive service of summons." Minn. R. Civ. P. 4.03(c). The plaintiff must "determine who is authorized to accept service" on behalf of a corporation. *See Larson v. New Richland Care Ctr.*, 520 N.W.2d 480, 482 (Minn. App. 1994).

1. Fearing failed to serve process upon UMP.

Here, the record shows that Fearing never served process upon any authorized agent for UMP. On May 1, 2021, Fearing attempted to serve UMP through the Minnesota Secretary of State's Office. This attempt failed to comply with rule 4.03(c) and was therefore ineffective. On or about May 3, 2021, Fearing unsuccessfully tried to serve UMP through CT Wolters Corporation, which was not authorized to accept service on behalf of

UMP. Finally, on May 10, 2021, Fearing's process servers attempted to serve Schurke, UMP's vice president of real estate, at the entrance to the UMP's administrative building. After Schurke clarified that he was not authorized to accept service for UMP, they slid the papers under the door of UMP's administrative building. None of these attempts were effective service of process. *See* Minn. R. Civ. P. 4.03 (c).

2. Fearing failed to join the Fairview respondents timely and never served process upon them.

As an initial matter, Fearing did not attempt to serve the Fairview respondents or name them in the caption of her initial complaint, which she filed on May 6, 2021. Fearing's first amended complaint dated May 10, 2021, named "Fairview Clinics aka UMMC" as one of the defendants, but it failed to state the correct name for Fairview Health Services. On December 15, 2021, two days after the deadline for joinder of parties, Fearing attempted to add the Fairview respondents to the suit in her second amended complaint. The district court correctly denied this joinder as untimely. *See* Minn. R. Civ. P. 16.02.

Moreover, it is undisputed that Fearing did not personally serve Dr. Vuljaj or Nurse Rendel. On May 3, Fearing attempted to serve UMP through CT Wolters Corporations, which was not an authorized agent for UMP but was authorized to receive service on behalf of Fairview respondents. However, that initial complaint was not directed to any of the Fairview respondents, nor did it name the Fairview respondents. In sum, Fearing's attempt to join the Fairview respondents was untimely, and she never properly served process on them. The district court therefore properly dismissed the claims against UMP and the

Fairview respondents for lack of personal jurisdiction and for insufficiency of service of process. *See* Minn. R. Civ. P. 12.02 (b), (d).

B. Statute of limitations

We review the interpretation and application of a statute of limitations de novo. *Ford v. Minneapolis Pub. Sch.*, 874 N.W.2d 231, 232 (Minn. 2016). The applicable statute of limitations "begins to run on a claim when the cause of action accrues." *Park Nicollet Clinic v. Hamann*, 808 N.W.2d 828, 832 (Minn. 2011). A cause of action accrues when "all the elements of the action have occurred." *Id.* Claims of intentional torts are subject to a two-year statute of limitations. *See* Minn. Stat. § 541.07 (2022) ("[T]he following actions shall be commenced within two years: . . . for . . . assault, battery, . . . or other tort resulting in personal injury").

Here, Fearing's alleged harm occurred during her May 3, 2019 visit at UMMC, and her symptoms manifested that same day. She therefore had until May 3, 2021, to bring her claims of assault and medical battery against UMMC and the Fairview respondents. However, Fearing did not file her initial complaint until May 6, 2021. Her claims are therefore statutorily time barred.

Fearing argues that her "original serv[ice] on May 3, 2021, [upon UMP] was proper and timely," and that UMP's "fraudulent concealment of corporate documents from the Minnesota Secretary of State's Office [] tolled the service." A claim for fraudulent concealment requires an allegation that a defendant concealed a plaintiff's potential *cause of action*, not that they made any misrepresentation to avoid service of process. *See Collins v. Johnson*, 374 N.W.2d 536, 541 (Minn. App. 1985). Not only does Fearing fail to support

her allegation of fraudulent concealment by UMP with any evidence, but she is also mistaken with the law.

We therefore conclude that the district court did not err by dismissing the claims against UMP and the Fairview respondents with prejudice based on insufficient service of process and expiration of the statute of limitations.

V. This court cannot grant the relief sought by Fearing.

Fearing makes a broad range of requests to this court, including: (1) empaneling a grand jury "to prevent the public from criminal assault as committed against [her]"; (2) a permanent injunction against the respondents to prevent them from denying her due process or harassing her and threatening her safety; (3) damages in excess of $15 million and "compensatory punitive damages" against each named respondent; (4) an award of attorney fees of $25,000; and (5) "further relief as the Court deems proper."

The grand jury system is not available to litigants in a civil case. *State v. Lopez-Solis*, 589 N.W.2d 290, 295 (Minn. 1999). "[T]he only person authorized to convene a grand jury inquiry is the county attorney." *Id.* at 294; *see* Minn. R. Crim. P. 18.01. "The function of the court of appeals is limited to identifying errors and then correcting them." *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). "It is not within the province of [appellate courts] to determine issues of fact on appeal." *Fontaine v. Steen*, 759 N.W.2d 672, 679 (Minn. App. 2009). Accordingly, we are not empowered to consider or grant any of Fearing's requests.

Affirmed.