This opinion is nonprecedential except as provided by Minn.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
A24-2012

Brindalyn P. Foster,
Appellant,

vs.

Fairview Health Services,
Respondent.

Filed September 15, 2025
Affirmed; motion denied
Ede, Judge

Hennepin County District Court
File No. 27-CV-22-10694

Brindalyn P. Foster, Edina, Minnesota (pro se appellant)

Ryan C. Ellis, Eric J. Steinhoff, Lind, Jensen, Sullivan & Peterson, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Bond, Presiding Judge; Slieter, Judge; and Ede, Judge.

NONPRECEDENTIAL OPINION

EDE, Judge

In this medical-malpractice case, appellant challenges the district court's order denying her motion for default judgment and granting summary judgment for respondent. Appellant argues: (1) that the district court abused its discretion by denying her default-judgment motion because respondent's counsel purportedly engaged in misconduct; (2) that the district court erred in granting judgment as a matter of law for respondent because there are genuine issues of material fact; and (3) that this court should grant her motion to supplement the appellate record with certain medical documents. We affirm the district court's summary-judgment order for respondent and deny appellant's motion to supplement the record on appeal.

FACTS

Lawsuit, Withdrawal of Counsel, and Order to Provide Notice of Trial Experts

Alleging medical malpractice, appellant Brindalyn P. Foster sued respondent Fairview Health Services. In her complaint, Foster maintained that Fairview's medical providers, including Dr. A.B., a physician assistant, and a nurse practitioner—who cared for or provided consultation for Foster while she was treated at Fairview clinics from March 2018 to August 2019—breached their duties of care by failing to perform an endometrial biopsy, despite Foster's repeated concerns about postmenopausal vaginal discharge.

Foster was initially represented by an attorney who retained experts to testify at trial about Foster's claim that Fairview's medical providers had breached their standards of care. But the attorney later moved to withdraw from representing Foster.

After Foster's attorney withdrew, the district court ordered that, by September 2024, Foster was to provide notice of whether her previously disclosed experts would appear on her behalf at trial. Foster subsequently requested that the district court waive the fee for the trial testimony of her expert witnesses, whom she listed as: Drs. C.A. and M.E., who would testify about the proper standard of care; Dr. D.S., who would testify that the delayed diagnosis required Foster to undergo extensive chemotherapy and radiation; Dr. S.S., who would testify about lost wages; and a registered nurse, who would validate past and future medical expenses. The district court denied Foster's request based on a lack of information about the location of the experts.[1]

Motion to Dismiss and Motion Hearing

Before Foster filed an amended fee-waiver request, Fairview moved to dismiss the complaint with prejudice. Fairview asserted that Foster had failed to provide expert notice by September 2024, as required by the district court's order. And Fairview contended that, because Foster could not prove her medical-malpractice claim without expert testimony and there was no reason to believe that the experts would testify on her behalf, dismissal was warranted.

Several days after Fairview moved to dismiss, Foster filed a list disclosing a fact witness and the following expert witnesses: Dr. M.E.; an occupational therapist; Dr. D.S.; Dr. C.A.; and the aforementioned registered nurse. Foster later submitted an amended fee-waiver request, which listed three witnesses: Dr. M.E., the occupational therapist, and the fact witness. Fairview filed objections to these witnesses on several grounds, including that Foster had not provided timely notice about which of her experts would be testifying at trial.

At a motion hearing, Foster confirmed that she was seeking to offer prior reports and disclosures prepared by her former counsel, which were inadmissible. Foster acknowledged that, because Dr. D.S., Dr. C.A., and Dr. S.S. were all out of state, she could

[1] *See* Minn. Stat. § 563.01, subd. 5 (2024) (for purposes of witness fees, requiring that a subject witness be "within the State of Minnesota").

not present their testimony at trial. Yet Foster also maintained that she intended to rely on those doctors' disclosures to establish causation.

During the motion hearing, Fairview argued that Foster's disclosure that Dr. M.E. would testify about the standard of care was untimely. Fairview also informed the district court that it had received a filing from attorney C.C. on behalf of Dr. M.E. and the occupational therapist. According to Fairview, attorney C.C. stated in the filing that neither Dr. M.E. nor the occupational therapist had agreed to provide expert testimony on Foster's behalf.[2] Foster asked whether Fairview's counsel represented Dr. M.E. and the occupational therapist. The district court responded: "No. He [(i.e., Fairview's counsel)] said [that attorney C.C.] does." Foster also asked if Fairview's counsel had initiated communications with Dr. M.E.'s attorney. The district court answered that whether Fairview's counsel initiated the communications was "not really an issue."

Order to Show Cause and Show-Cause Hearing

After the motion hearing, the district court filed an order to show cause requiring that Foster attend a "show cause hearing, establish how she will introduce admissible

[2] At the motion hearing, both the district court and Foster stated that they were unaware of attorney C.C.'s filing on behalf of Dr. M.E. and the occupational therapist. The district court, however, said that a contemporaneous check of the docket revealed that the communication from attorney C.C. had been filed on the same day as the motion hearing. Based on our review of the record, a notice of appearance by attorney C.C. on behalf of Dr. M.E. and the occupational therapist was file stamped with a date three days after the motion hearing, but attorney C.C.'s signature on the document is dated the same day the motion hearing occurred. And attorney C.C.'s letter—which informs the district court that neither Dr. M.E. nor the occupational therapist consented to serve as expert witnesses "on matters outside of their treatment of Ms. Foster"—is likewise file stamped with a date three days after the motion hearing, although attorney C.C.'s signature on the document is dated the same day the motion hearing occurred.

evidence of the standard of care and breach thereof, and show cause why the [c]ourt should not dismiss her case with prejudice for lack of such evidence." The district court determined that this matter was not within the class of cases in which "negligence is so obvious that no expert testimony is required" and that Foster needed expert testimony to prove her claim. In addition, the district court ruled that Dr. D.S.'s and Dr. C.A.'s reports were inadmissible hearsay and that Foster had not established the applicability of any exception to the hearsay rule.[3] The district court also decided that Foster could not offer testimony from Dr. M.E. and the occupational therapist to prove the standard of care because: Dr. M.E. and the occupational therapist were unwilling to serve as experts; neither Dr. M.E. nor the occupational therapist produced an expert report or affidavit regarding the standard of care, as required by Minnesota Statutes section 145.682, subdivision 4(a) (2024); and Foster did not disclose Dr. M.E. and the occupational therapist as experts per the court's scheduling order.

Before the show-cause hearing, Foster filed a declaration in support of a proposed order granting default judgment in her favor.[4] In her declaration, Foster wrote that, at the motion hearing, Fairview's attorney had "voluntarily admitted . . . that he had communicated with attorney [C.C.] regarding [her] expert witnesses," i.e., Dr. M.E. and

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[3] Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Minn. R. Evid. 801(c). Hearsay statements are inadmissible unless they fall within a recognized exception to the hearsay rule. Minn. R. Evid. 802; *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006).

[4] According to a letter by Foster that is within the record on appeal, Foster served Fairview's counsel with a notice of motion and motion for default judgment. But the notice of motion and motion themselves do not appear in the appellate record.

the occupational therapist. The day after Foster filed her declaration, attorney C.C. filed a letter stating that she "had multiple conversations with [Foster's] former attorney . . . on [the] topic" of "trial testimony from [her] clients, Dr. [M.E.] and [the occupational therapist]."

At the show-cause hearing, Foster conceded that she would be proceeding without expert witnesses. When asked who would testify about the standard of care, Foster responded: "I plan to utilize Dr. [M.E.], in her testimony, to show the contrast of how she applies [the] standard of care in diagnosing the cancer and also to indicate that [Fairview] had an implied duty according to their training." Furthermore, Foster added that she was "relying upon an implied duty that is also supported by the American College of Obstetricians and Gynecologists" and that she would present evidence that the physicians who saw her should have followed the same standard of care that Dr. M.E. followed. Foster also asserted that she intended to cross-examine Dr. A.B., the physician assistant, and the nurse practitioner about whether they had an implied duty based on the guidelines of the American College of Obstetricians and Gynecologists. And Foster stated that she would ask Dr. A.B.: "Were you trained and were you required to do the same thing under the same conditions as Dr. [M.E.] for a postmenopausal woman that's bleeding?"

Attorney C.C. told the district court that, although Dr. M.E. would testify about her specific care and treatment of Foster, the doctor would decline to answer questions about the standard of care or would state that she had no opinion about that topic. And, after the hearing, Dr. M.E. filed a declaration stating that she did not wish to provide expert testimony about the standard of care.

Order Denying Motion for Default Judgment and Granting Summary Judgment

Following the show-cause hearing, the district court filed an order denying Foster's motion for default judgment and granting Fairview's motion to dismiss.

As to the motion for default judgment—in which Foster asserted that Fairview's counsel had violated the rules of professional conduct by contacting Foster's witnesses, Dr. M.E. and the occupational therapist—the district court ruled that the record evidence on this issue established only that Fairview's counsel "was in contact with an attorney representing the witnesses, not the witnesses themselves." The district court also pointed to "evidence in the record that [Foster's] former counsel was also in contact with the same attorney regarding the same witnesses." And the district court reasoned that Foster had "not cited any authority demonstrating that it is inappropriate for [Fairview's] counsel to speak with the attorney for these witnesses" or that, "even if such conduct were inappropriate or constituted a violation of the rules of professional conduct (which it does not), . . . the appropriate remedy would be to grant a default judgment against [Fairview]."

Construing Fairview's motion to dismiss as a motion for summary judgment because the motion required consideration of materials outside Foster's complaint,[5] the district court determined that Foster could not prove her medical-malpractice claim without

[5] *See* Minn. R. Civ. P. 12.03 (providing that, when a motion for judgment on the pleadings presents "matters outside the pleadings" that are "not excluded by the [district] court," the court "shall . . . treat[] [the motion] as one for summary judgment and dispose[] of [it] as provided for in Rule 56," and the court shall give "all parties . . . [a] reasonable opportunity to present all material made pertinent to such a motion by Rule 56").

expert testimony. And the district court ruled that the following issues precluded Foster from relying on Dr. M.E.'s testimony to establish her claim.

First, Foster disclosed Dr. M.E. "as a fact witness" and as a witness who would "provide expert testimony solely about damages"—not "as an expert to opine on the standard of care, breach of the standard, or causation." Nor did Dr. M.E. prepare a report about those topics.

Second, Dr. M.E. filed an affidavit stating that she did not consent to provide expert testimony and that she did not have an opinion about whether Fairview caused Foster's injuries. "Although [Foster] claim[ed] that she [would] be able to elicit direct testimony from Dr. [M.E.] and cross-examination testimony from the other medical witnesses that [would] prove her case," the district court reasoned that Foster made "no offer of proof as to what that testimony [would] be and there [was] no evidence in the record to support her assertion that they [would] admit a violation of the standard of care." Nor did Foster list Dr. A.B., the physician assistant, and the nurse practitioner on the witness list that she filed after the September 2024 expert-notice deadline and following the filing of Fairview's motion to dismiss. Thus, Foster did not disclose during discovery that she would call those witnesses to provide expert opinions about the standard of care or causation. And Dr. A.B.'s deposition testimony did not include statements that Fairview breached the standard of care or about causation; instead, Dr. A.B. denied breaching the standard of care.

Third, Foster was "barred from seeking . . . opinions [about the standard of care, breach, and causation] given that she did not disclose during discovery that she would be using [the] witnesses [on which she intended to rely] to prove her case without independent expert testimony."

The district court therefore concluded that there were no disputed issues of material fact about the standard of care, alleged breach, and causation and that Foster had no admissible evidence that would establish her medical-malpractice claim. Accordingly, the district court entered judgment for Fairview.

Foster appeals.

DECISION

Foster challenges the district court's denial of her motion for default judgment and grant of summary judgment for Fairview, asserting: (1) that the district court abused its discretion by denying her default-judgment motion because Fairview's counsel purportedly engaged in misconduct; (2) that the district court erred in granting judgment as a matter of law for Fairview because there are genuine issues of material fact; and (3) that we should grant her motion to supplement the appellate record with certain medical documents.[6] We address each argument in turn.

[6] Foster also asserts that her counsel's withdrawal constituted ineffective assistance. But Foster has not cited authority supporting her contention that she has a right to the effective assistance of counsel in a medical-malpractice lawsuit. We therefore decline to decide this issue, which was inadequately briefed. *See State Dep't of Lab. & Indus. by the Special Comp. Fund v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997) (stating that appellate courts "decline to reach [an] issue in the absence of adequate briefing").

I. The district court did not abuse its discretion by denying Foster's motion for default judgment.

"The decision to grant or deny a motion for a default judgment lies within the discretion of the district court, and this court will not reverse absent an abuse of that discretion." *Black v. Rimmer*, 700 N.W.2d 521, 525 (Minn. App. 2005), *rev. dismissed* (Sept. 28, 2005).

The district court acted within its discretion by denying Foster's default-judgment motion. The Minnesota Rules of Professional Conduct prohibit an attorney from speaking with a person represented by another attorney. *See* Minn. R. Prof. Conduct 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter . . . ."). The record before us does not establish that Fairview's counsel directly interacted with Dr. M.E. or the occupational therapist, only that he communicated with attorney C.C., who represented those individuals. But even assuming without deciding that Fairview's counsel violated a rule of professional conduct, Foster cited no authority to the district court that would have allowed default judgment as relief for such a violation. And by likewise neglecting to cite authority for her position in this appeal, she has not established that she is entitled to relief. *See Wintz Parcel Drivers, Inc.*, 558 N.W.2d at 480; *see also Schoepke v. Alexander Smith & Sons Carpet Co.*, 187 N.W.2d 133, 135 (Minn. 1971) ("An assignment of error based on mere assertion and not supported by any argument or authorities in appellant's brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection.").

For these reasons, and because no prejudicial error is obvious on our careful inspection of the record, we conclude that the district court did not abuse its discretion in denying Foster's default-judgment motion.

II. The district court did not err in granting summary judgment for Fairview.

Appellate courts review "a district court's summary judgment decision de novo." *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). "In doing so, [appellate courts] determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Id.* On appeal from a summary-judgment order, appellate courts "view the evidence in the light most favorable to the party against whom summary judgment was granted." *Com. Bank v. W. Bend Mut. Ins.*, 870 N.W.2d 770, 773 (Minn. 2015). "Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Schneider v. Child.'s Health Care*, 996 N.W.2d 197, 201 (Minn. 2023). "[W]hen the nonmoving party bears the burden of proof on an element essential to the nonmoving party's case, the nonmoving party must make a showing sufficient to establish that essential element." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986)).

There are three elements to a medical-malpractice claim: "(1) the standard of care recognized by the medical community as applicable to the particular defendant's conduct," (2) that the defendant departed from that standard, and (3) "that the defendant's departure was a direct cause of the patient's injuries." *MacRae v. Grp. Health Plan, Inc.*, 753 N.W.2d

711, 717 (Minn. 2008) (quotation omitted). "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). "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). "Failure to present such proof (normally in the form of expert testimony) "mandates . . . summary judgment . . . for the defendant." *Leubner v. Sterner*, 493 N.W.2d 119, 121 (Minn. 1992). "There are, however, exceptional cases in which expert testimony is not necessary." *Sorensen*, 457 N.W.2d at 191. These cases involve "alleged negligent acts [that] are within the general knowledge or experience of laypersons." *Mercer*, 715 N.W.2d at 122.

Foster cites no legal authority in support of her argument that genuine issues of material fact precluded summary judgment for Fairview. For three reasons, we discern no prejudicial error on our inspection of the record, and reversal is therefore unwarranted. *See Schoepke*, 187 N.W.2d at 135.

First, Foster conceded at the show-cause hearing that she would be proceeding to trial without expert witnesses. And even considering her expressed intention to rely on the testimony of Dr. M.E., Foster never provided—nor did Dr. M.E. produce—a report of the doctor's opinions about the standard of care, breach, or causation. Expert witnesses are required to submit a written report that must contain, among other things, a statement of all the opinions that the witness will express. Minn. R. Civ. P. 26.01(b)(2).

Second, although Foster planned to rely on Dr. M.E.'s testimony to prove her case, Dr. M.E. filed an affidavit stating that she did not consent to providing expert testimony and that she did not have an opinion about whether Fairview caused Foster's injuries. Foster also made no offer of proof about what Dr. M.E.'s testimony would be and there was no evidence in the record to support Foster's generalized assertion that Dr. M.E. would provide testimony to support Foster's medical-malpractice claim. *See Rygwall v. ACR Homes, Inc.*, 6 N.W.3d 416, 434–35 (Minn. 2024) (explaining that, in responding to "a summary judgment motion in a medical malpractice case where expert testimony is needed," a plaintiff must proffer an expert who can "provide an opinion with proper foundation and enough information about the specific case to reassure the court that the jury will have sufficient information to draw a reasonable inference—without speculating—that the provider's conduct caused the plaintiff's injury"; in other words, "[a] plaintiff must provide evidence that, if the evidence and inferences to be drawn from the evidence are accepted as true, [shows that] it is more probable than not that the plaintiff's injury was a result of the defendant's negligence").

Third, Foster did not list other potential expert witnesses on her witness list. In fact, deposition testimony in the record underscores that Foster had no one to testify about Fairview's alleged breach of the standard of care. And although she told the district court that she would try to elicit such testimony, Foster did not make an offer of proof about what she expected specific witnesses would say. "Speculation, general assertions, and promises to produce evidence at trial are not sufficient to create a genuine issue of material fact for trial." *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 848 (Minn.

1995). Because Foster failed to disclose expert witnesses to establish her medical-malpractice claim, the district court did not err in granting summary judgment for Fairview. *See Leubner*, 493 N.W.2d at 121.

Foster nonetheless maintains that the district court "erred in [its] application of the legal standard for summary judgment as a matter of law." This argument is unavailing.

The district court did not err in applying the summary-judgment standard. In its order, the district court correctly cited the standard set forth in Minnesota Rule of Civil Procedure 56.01 and properly identified the issue before it as whether Fairview had shown that there was no genuine issue as to any material fact, such that Fairview was entitled to judgment as a matter of law. The district court analyzed whether the evidence would allow a jury to find "that each of the elements of a medical malpractice claim had been met." And the district court ultimately concluded that, because Foster had not adduced any admissible expert testimony, she could not prove her case, and there were no genuine issues of material fact as to the standard of care, alleged breach, and causation. Our review of the record leads us to conclude that the district court appropriately applied the summary-judgment standard.[7]

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[7] Foster also asserts that the district court's findings of fact "were flawed and inconclusive in negating the ability of a reasonable jury to understand the merits of the case and deliver a verdict based on the merits of the case." While this argument suggests that Foster did not require expert testimony to prove her case, Foster has made no showing—either before the district court or on appeal—that this is an exceptional circumstance in which expert testimony is not necessary. *See Sorensen*, 457 N.W.2d at 191. Indeed, it does not appear that this matter involves "alleged negligent acts [that] are within the general knowledge or experience of laypersons." *Mercer*, 715 N.W.2d at 122. On this record, and insofar as "[e]xpert testimony is generally required in medical-malpractice cases because they

In sum, because failure to present proof of medical malpractice in the form of expert testimony "mandates . . . summary judgment . . . for the defendant," *Leubner*, 493 N.W.2d at 121, and given that Foster provided no admissible expert testimony in support of her medical-malpractice claim, the district court did not err in granting summary judgment for Fairview.

III. Foster's motion to supplement the record is denied.

"The documents filed in the trial court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases." Minn. R. Civ. App. P. 110.01. "An appellate court ordinarily may not consider matters outside the record." *Thomas A. Foster & Assocs., Ltd. v. Paulson*, 699 N.W.2d 1, 9 (Minn. App. 2005) (citing *Thiele v. Stich*, 425 N.W.2d 580, 582–83 (Minn. 1988)). But "[i]f the record on appeal is inaccurate or incomplete, a party may move to correct or modify the record." *K.S.A. v. Alyea*, 983 N.W.2d 455, 465 (Minn. App. 2022) (citing Minn. R. Civ. App. P. 110.05). "Rule 110.05 is limited to correction of the record so that it accurately reflects anything of material value that was omitted from the record by error or accident or is misstated in it." *W. World Ins. v. Anothen, Inc.*, 391 N.W.2d 70, 72 (Minn. App. 1986).

Foster's motion to supplement the record lacks sufficient legal and factual support to warrant relief. In particular, Foster has not established how the record, as it stands, does not accurately reflect something of material value that was omitted by error or accident, or

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involve complex scientific or technological issues," *id.*, we conclude that Foster has not shown that she did not require such testimony to prove the standard of care.

how it contains information that is otherwise misstated. *See id.* We therefore deny Foster's motion to supplement the record.

Affirmed; motion denied.