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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1516**

Jeanne Shellum, et al.,
Respondents,

vs.

Fairview Health Services d/b/a Fairview Southdale Hospital,
Appellant,

Edina Retina Consultants PA, et al.,
Defendants.

**Filed May 28, 2019
Affirmed
Hooten, Judge**

Hennepin County District Court
File No. 27-CV-16-267

Teresa Fariss McClain, Lisa L. Beane, Robins Kaplan LLP, Minneapolis, Minnesota (for respondents)

Matthew S. Frantzen, Marissa K. Linden, Gislason & Hunter LLP, Minneapolis, Minnesota (for appellant)

Considered and decided by Cochran, Presiding Judge; Hooten, Judge; and Reyes, Judge.

UNPUBLISHED OPINION

HOOTEN, Judge

Following a jury verdict finding appellant liable for an infection that required respondent's eye to be removed, appellant moved for a judgment as a matter of law (JMOL)

or, in the alternative, a new trial. The district court denied the motion and appellant appealed. We affirm.

FACTS

In 2011, respondent Jeanne Shellum underwent surgery to repair a macular hole in her left eye, a condition that causes some vision impairment. Following the surgery, Jeanne developed endophthalmitis, an infection that caused enough damage that the eye eventually had to be removed. Jeanne and her husband, respondent Wayne Shellum, filed a medical malpractice lawsuit against appellant Fairview Health Services d/b/a Fairview Southdale Hospital for its agents' failure to adhere to sterile procedures before and during the surgery. Jeanne's damages arose from the loss of her eye, while Wayne's came from the trauma that his wife had been through and the resulting loss of consortium.

At trial, respondents presented evidence that the infection had been caused by appellant's employees negligently failing to follow proper procedures before and during the surgery. Specifically, they argued to the jury that breaks in sterile technique during the preparation and use of a bottle of balanced salt solution (BSS) caused two bacteria species, *Pseudomonas aeruginosa* and *Serratia marcescens*, to be introduced into Jeanne's left eye which caused the infection. Appellant argued that there was no breach of care, or if there was, that respondents could not prove the bacteria that caused the infection was introduced through the surgery.

In a special-verdict form, the jury found for respondents. The jury awarded \$2,704,506.91 to Jeanne and \$470,000 to Wayne. Following the verdict, appellant moved

for JMOL or, in the alternative, a new trial. The district court denied this motion. This appeal follows.

D E C I S I O N

I. The district court correctly determined that respondents established a prima facie case that appellant caused Jeanne's injury.

Appellant does not dispute the jury's determination that there was a breach of duty in failing to utilize sterile procedures before and during the surgery, but does argue that respondents did not present sufficient evidence to allow a reasonable jury to find a chain of causation from appellant's employees' actions to Jeanne's injury. It argues that therefore the district court erred by denying appellant's motion for JMOL.

We review de novo a district court's decision on a motion for JMOL. *Knuth v. Emergency Care Consultants, P.A.*, 644 N.W.2d 106, 110 (Minn. App. 2002), *review denied* (Minn. Aug. 6, 2002). We view the evidence in the light most favorable to the nonmoving party and independently determine whether the evidence is sufficient to present an issue of fact for the jury. *Jerry's Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 816 (Minn. 2006).

To establish a prima facie case of medical malpractice, the plaintiff bears the burden of showing through expert testimony: (1) the standard of care required from a physician under the circumstances; (2) defendant's departure from that standard; and (3) that defendant's departure from that standard was a direct cause of the patient's injuries. *Walton v. Jones*, 286 N.W.2d 710, 714 (Minn. 1979). A plaintiff makes a prima facie showing for the element of causation by presenting evidence that it is more probable than

not that her injury resulted from the defendant health care provider's negligence. *Cornfeldt v. Tongen*, 295 N.W.2d 638, 640 (Minn. 1980). Expert testimony in a medical malpractice case must be "more than consistent with" a simple recitation of a plaintiff's theory of causation; it must demonstrate a reasonable probability that the defendant's negligence was the proximate cause of the injury. *Walton*, 286 N.W.2d at 715. The guiding principle is that juries are not permitted to speculate as to the possible causes of a plaintiff's injury. *Smith v. Knowles*, 281 N.W.2d 653, 656 (Minn. 1979). Failure to present such proof by admissible expert testimony requires that a judge grant JMOL. *Cf. McDonough v. Allina Health Sys.*, 685 N.W.2d 688, 697 (Minn. App. 2004).

Appellant alleges that, "The testimony of respondents' experts was not, as a matter of law, sufficient to meet respondents' burden to establish causation." Appellant's argument contains two bases for why respondents' expert testimony was insufficient. First, appellant argues that their causation opinions did not contain "the required degree of certainty." Second, appellant argues that the district court erred when it concluded that "the seal applied to the BSS bottle was 'non-sterile.'"

Appellant's first argument is that the extensive expert testimony opining that breaks in sterile procedure caused the infection was simply speculation and was insufficient to establish causation. Appellant essentially argues that because respondents' expert witnesses could not testify with 100% certainty that the breaks in sterile procedure caused the infection, the evidence was insufficient to allow the jury to find appellant liable. But that is not the standard reviewing courts apply. We simply review the expert testimony to determine if there is sufficient factual foundation to support the expert's opinion that it is

more likely than not that the defendant's negligence caused the injury. *See Bernloehr v. Cent. Livestock Order Buying Co.*, 208 N.W.2d 753, 755 (Minn. 1973). And here there was sufficient factual foundation.

Dr. Polsky testified that the bacteria which caused Jeanne's infection was introduced into her eye at the time of surgery, most likely through the BSS, to a reasonable medical certainty. His opinion was grounded on the facts that: the disease moved rapidly after surgery and "presented in this dramatic, explosive way," suggesting that "a significant load of microorganisms were actually directly put into the eye"; there was a breach in sterile technique in preparing the solution used to irrigate the eye; and this breach consisted of a non-sterile sticker label being placed on a sterile cap and the surgery team relying on the assumption that the cap was sterile.

Dr. Cohen testified that: the day after the surgery Jeanne could only see light with the eye that had been operated on, whereas normally a patient would at least be able to count fingers with that eye; the eye also had abnormally elevated pressure; and the same day, it was discovered that the eye contained a collection of white cells, known as hypopyon, meaning that Jeanne had endophthalmitis. And on the second day after the surgery: these symptoms did not improve despite Jeanne receiving an injection of antibiotics directly into the infected eye; and there was "fibrin and pus in the anterior chamber," indicating a very aggressive infection. Dr. Cohen noted that the two main types of bacteria that caused the infection, "*Serratia marcescens* and *Pseudomonas aeruginosa*" are "very, very toxic organisms. They're not the typical. They're the contaminant." He also opined, "These bugs, as -- as you'll hear, can be everywhere. But the one place they

can never be is in an operating room. They can't be. . . . They can't be put in those situations because, if they do, you get infected like this.” He further testified that: these bacteria do not live together in eye drops or makeup; there has never been a reported case of that occurring; this is because of preservatives in those products; and while *Pseudomonas* can be found in these products maybe one percent of the time, *Serratia* simply “doesn't live there.” Dr. Cohen concluded his opinion that the bacteria could not have been introduced from eye drops or makeup by stating, “When I see these bugs, it's a contaminant. There was a breach. There is a breach somewhere that allowed these opportunistic bugs to get into the system, and that breach is the cause of those bugs.” Dr. Cohen also testified that this was his opinion to a reasonable medical certainty even before he was shown the evidence of an actual breach in sterile procedure in this case.

This testimony is sufficient to establish a *prima facie* case for the element of causation. The mere fact that the doctors could not guarantee that the seal was contaminated is insufficient to overturn a jury verdict. In the case that appellant relies on for this argument, *Walton v. Jones*, the district court granted JMOL because no expert testified to a reasonable probability that the defendant's negligence caused the plaintiff's death. 286 N.W.2d at 715–16. That scenario is a far cry from the extensive, unequivocal testimony in this case.

Appellant also asserts as part of this argument that Dr. Polsky incorrectly testified that Jeanne's eye was irrigated with 500ml of BSS, when really it was only irrigated with 25ml. But even assuming appellant is factually correct, that is irrelevant. In our review of the district court's denial of appellant's motion for JMOL, we simply analyze whether there

was a sufficient factual basis for the expert testimony to allow the jury to reach the verdict that they did. When considering Dr. Polsky's testimony as a whole, it is more than sufficient to establish a prima facie case of causation such that we would affirm the district court's denial of appellant's motion for JMOL. His expert testimony concluding that the infection-causing bacteria more likely than not entered Jeanne's eye due to contamination during surgery would still be supported by adequate factual foundation even if Dr. Polsky misstated the amount of BSS used for irrigation during the surgery.

Appellant's second argument, that the district court erred when it concluded that the seal applied to the BSS bottle was non-sterile, is similarly baseless. When this court reviews a post-trial denial of a motion for JMOL, we view the evidence in the light most favorable to the non-moving party. *Jerry's*, 711 N.W.2d at 816. Whether the seals were actually sterile was a contested issue at trial. Respondents elicited testimony during cross-examination from one of appellant's experts, a surgical nurse, who opined that the seals could not have been sterile based on the manner in which they were stored. Appellant introduced evidence that the seals were sterile to contest this testimony. But because there was contested evidence, the district court was obliged to view the evidence in the light most favorable to respondents and accept as proved that the seals were not sterile. *See id.*

Appellant argues that reversal is required under *Ingram v. Syverson* because there was more than one possible inference to be drawn from the conflicting testimony. 674 N.W.2d 233, 237 (Minn. App. 2004), *review denied* (Minn. Apr. 20, 2004). But that was a case where we reviewed a grant of summary judgment. *Id.* There, we held that if reasonable minds can differ as to causation, then summary judgment is inappropriate and

a jury should resolve the issue. *Id.* But that is completely different from this case, where the evidence was presented to the jury and the jury made permissible credibility and factual determinations. This court does not review orders denying motions for JMOL under the same standard that we review a grant of summary judgment; we only analyze whether the evidence was sufficient to permit the jury to have reached the verdict that they did.

For the above reasons, we affirm the denial of appellant's motion for JMOL.

II. The district court did not abuse its discretion when it ruled that appellant was not entitled to a new trial based on claimed evidentiary errors.

Evidentiary rulings will not be reversed unless they are based on an erroneous view of the law or constitute an abuse of the district court's broad discretion. *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45–46 (Minn. 1997). We will only reverse a judgment based on an erroneous evidentiary ruling when the complaining party demonstrates prejudice. *Uselman v. Uselman*, 464 N.W.2d 130, 138 (Minn. 1990).

Relevant evidence is generally admissible. Minn. R. Evid. 402. Relevant evidence is that which has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Minn. R. Evid. 401. But relevant evidence may be excluded if “its probative value is substantially outweighed by the danger of unfair prejudice.” Minn. R. Evid. 403.

a. November 2016 swabbing of Jeanne's makeup

Because appellant alleged that the bacteria that caused Jeanne's infection could have been introduced through her makeup, the issue of whether Jeanne's makeup was contaminated with the bacteria at the time of the surgery was of central importance.

Appellant's claim was that Jeanne used the makeup in such a way that allowed it to become contaminated with bacteria. Because the makeup Jeanne was using in 2011 had long ago been disposed of, when Jeanne first learned of appellant's alternate theory of causation in 2016, she had the makeup she was using then tested for the presence of this bacteria. Respondents submitted that this was relevant because the cleanliness of the makeup Jeanne was using in 2016 was indicative of the level of care that she took of her makeup generally.

The district court allowed the parties to jointly submit Jeanne's medical records, including a 2016 test of her makeup for bacteria which could have caused the infection. Jeanne testified that she went to get the tests done in response to appellant's allegations during litigation that the bacteria that caused her infection came from either her eyes being "colonized" or from her makeup. While she did not testify about the methodology of the testing or any inferences that could be drawn from those results, she did testify that the tests "were all negative." One of appellant's experts, Dr. Gary Kravitz, testified in rebuttal that the results of these tests were not necessarily reliable and that they likely did not reflect what was going on in 2011.

Appellant argues that the district court erred in admitting the evidence because it was not relevant. It argues that whether or not Jeanne's makeup was contaminated in 2016 has absolutely no bearing on whether her makeup that she used in 2011, which had long ago been discarded, was contaminated. But, the evidence above was not admitted to directly prove anything about the makeup Jeanne used in 2011; it was admitted to demonstrate the general level of care that Jeanne used to keep her makeup clean. And because relevancy is an incredibly low bar, this is sufficient to render the 2016 test of the

makeup relevant. *See* Minn. R. Evid. 401 (defining relevant evidence as that which has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable” (emphasis added)). We cannot say that it was an abuse of the district court’s broad discretion to conclude that the 2016 testing was relevant.¹

Appellant also argues that this evidence was unfairly prejudicial. Though framed as a separate argument, appellant is simply re-asserting the immediately preceding argument that the evidence was irrelevant. Specifically, appellant argues that the danger of unfair prejudice significantly outweighed the probative value because the evidence had “zero probative value.” But appellant does not offer any distinct argument about prejudice, and simply repeats claims that the evidence was irrelevant.

Finally, appellant argues that the test results should not have been introduced because the results were not introduced through an expert witness. To support this argument, appellant cites to *Tousignant v. St. Louis Cty.*, 615 N.W.2d 53 (Minn. 2000). But that case is inapposite. *Tousignant* dealt with statutory requirements for certification of expert review, and limited that requirement to cases where expert testimony was required to establish a prima facie case. *Tousignant*, 615 N.W.2d at 55.

Here, the evidence at issue was not required to establish a prima facie case; it was offered to rebut appellant’s alternate theory that the source of the bacteria could have been Jeanne’s makeup. And while Jeanne testified that the testing did not find any similar

¹ And even if admission of the test results was irrelevant, appellant has also failed to demonstrate prejudice from the alleged error.

bacteria on her makeup, she did not offer any medical opinion about how the makeup was tested or what those results meant. Appellant has failed to present any argument or authority that would justify ordering a new trial based on a lack of expert testimony about the 2016 test results. We therefore affirm the district court's conclusion that the introduction of the 2016 test results did not constitute reversible error.

b. Failure to investigate infections

Appellant argues that the introduction of testimony regarding its failure to investigate the cause of Jeanne's infection also constituted reversible error. It argues: (1) that the questions were unfairly prejudicial, and (2) that the testimony about the lack of investigation violated Minn. Stat. § 145.64 (2018).

Before trial, the district court ruled that respondents could not introduce testimony about the failure to investigate because it would simply tend to show that appellant "didn't know" or "didn't care" about Jeanne, which was not relevant to the case and was unfairly prejudicial. The calculus changed when *appellant* argued to the jury that there was no evidence that the bottle containing the BSS was infected with bacteria. This of course hinges on whether or not there was ever any attempt to test the bottle, making that question of central importance. It would have been absurd to have allowed appellant to argue that there was no evidence of negligence because no bacteria was found on the bottle containing the BSS, while not allowing respondents to question whether the bottle was ever tested. And while appellant could have requested a limiting instruction once this calculus changed, they failed to do so. *See* Minn. R. Evid. 105 (noting that the court "*upon request*, shall

restrict the evidence to its proper scope and instruct the jury accordingly” (emphasis added)). This argument therefore fails.

Appellant’s other argument in this section is that Minn. Stat. § 145.64, subd. 1, which protects the records of medical review organizations, barred the introduction of testimony which was used at trial. This argument selectively ignores a crucial section of the relevant statute. While the statute bars the introduction of records of review organizations and prevents witnesses from testifying about their testimony to review organizations, it does not bar the use of, “Information, documents or records otherwise available from original sources.” Minn. Stat. § 145.64, subd. 1(a). And appellant fails to point to a single piece of evidence that was a record from a medical review organization, as opposed to evidence “otherwise available from original sources.” *Id.* In short, the statute simply does not apply to the evidence in this case. We therefore affirm the district court’s conclusion that introduction of the above evidence did not constitute reversible error.

c. Photographs of the seal’s packaging and demonstrative evidence

Appellant argues that the district court committed reversible error by refusing to admit a photograph of the seals that the hospital used at the time of the trial and to allow appellant’s employees to demonstrate the procedure used to apply seals to bottles prepared with BSS for surgery. Respondents argue that the seals used at the time of trial were packaged and stored differently than they were in 2011, and so the pictures of the packaging used at the time of trial were irrelevant. They also argue that the procedure used to apply the seals is irrelevant.

Respondents are correct on both counts. As for the packaging of the seals, appellant's pharmacy supervisor, Karleen Franck, testified that the seals used in 2011 were not wrapped in protective or sterile coating. To contrast, the seals in use at the time of trial were packaged in sterile packaging, and were labeled as such. Notably, the photograph that appellant argues should have been admitted shows packaging (packaging that was not present on the seals used in 2011) prominently labeling the seals as "sterile." Thus, the district court's conclusion—that a photograph showing the seals and packaging different from that used in 2011 was irrelevant and unfairly prejudicial—fell within its broad discretion.

Appellant also challenges the district court's exclusion of a photograph of seals the hospital currently uses because they are the same type of seals the hospital used in 2011. While it is undisputed that the actual seals are the same, appellant misses the point of the district court's ruling. The photograph was not excluded because the seals were different, the photograph was excluded because the packaging was different. This argument also fails.

As to the exclusion of demonstrative evidence, the district court also acted within its discretion there. Appellant argues that a demonstration of the procedure used to apply the seal to the bottle containing the BSS would have helped the jury to "understand the processes and establish[] that they are done without contaminating the seal or port."

That may have been so, but the district court ruled that appellant could adequately make its case to the jury without actually demonstrating how the seals are placed on the bottle containing the BSS solution. Absent a ruling based on clearly erroneous facts or an

incorrect application of the law, district courts have broad discretion about what evidence to admit at trial. *Kroning*, 567 N.W.2d at 45–46. And appellant has failed to provide any authority to support a conclusion that this ruling was somehow an abuse of discretion. Even if appellant had made such a showing, appellant has also failed to show that the lack of a live demonstration was prejudicial.

We therefore hold that it was not an abuse of discretion for the district court to exclude the demonstrative evidence.

d. Questions about preparation for testimony

Appellant argues that the district court “permitted respondents to elicit testimony protected by the attorney-client privilege.” In Minnesota, attorney-client privilege has been defined as follows:

- (1) Where legal advice of any kind is sought
- (2) from a professional legal adviser in his capacity as such,
- (3) the communications relating to that purpose,
- (4) made in confidence
- (5) by the client,
- (6) are at his instance permanently protected
- (7) from disclosure by himself or by the legal adviser,
- (8) except the protection be waived.

Kobluk v. Univ. of Minn., 574 N.W.2d 436, 440 (Minn. 1998). This privilege protects the substance of the relevant communications, not the fact that communications took place at all. *See City Pages v. State*, 655 N.W.2d 839, 844 (Minn. App. 2003) (holding that narrative descriptions of services provided within an attorney’s billing records were not protected by attorney-client privilege because they did not reveal “the subject of confidential communications with any specificity”), *review denied* (Minn. Apr. 15, 2003).

Appellant argues that the questions presented to Ms. Franck and Nurse Wendy Jo College by respondents' attorneys about whether they spoke with an attorney prior to their testimony constituted a breach of attorney-client privilege. But, as above, these questions were about whether there was any communication, not about the substance of those communications. Therefore allowing these questions did not constitute reversible error. *See id.*

Appellant also argues that the questions to Ms. College about what she spoke about with appellant's attorney constituted a breach of attorney-client privilege. It may have been error for respondents' attorney to ask these questions. Ms. College was asked if she discussed with the attorney: her testimony generally, the issue of the seals, and questions about disinfecting specific medical equipment.

However, these questions do not constitute reversible error because Ms. College never directly answered them. All of her answers were equivocal and included statements such as, "We didn't talk about any one particular issue," or, "I don't understand what you're questioning." Therefore, because there was no privileged information actually communicated to the jury, we hold that it was not error to deny appellant's motion for a new trial on the grounds of a violation of attorney-client privilege.²

² Further, as respondents note, appellant has never argued that respondents' attorney committed misconduct in merely asking these questions, and so that issue is not properly before this court.

e. Impeachment evidence regarding breach of the standard of care

Appellant finally argues that the district court erred by allowing respondents to question Nurse Ellen Simonson about a previous statement she had made in a deposition because that introduced impermissible testimony about hospital policies. Minn. Stat. § 145.65 (2018) precludes evidence of written hospital policies from being used to establish standards of care in medical malpractice cases.

Here, Ms. Simonson testified at trial that Ms. College did not violate accepted standards of care. This contradicted an earlier statement that Ms. Simonson made at a pre-trial deposition that Ms. College did violate accepted standards of care. The district court ruled that while respondents could not use any portion of the deposition testimony at trial, because the discussion during the deposition was inextricably tied to a line of questions about hospital policies, respondents could question Ms. Simonson about her prior inconsistent statement. Respondents' attorney did ask Ms. Simonson about her prior inconsistent statement, but the exchange did not include any discussion of hospital policies.

The testimony to which appellant now objects is Ms. Simonson's response on cross-examination that her opinion about whether Ms. College violated the standard of care changed between the deposition and trial. While appellant frames the issue as being about hospital policies, implicating Minn. Stat. § 145.65, hospital policies were not discussed at trial and therefore the statute is not implicated. We therefore hold that the district court did not err when it permitted respondents to impeach Ms. Simonson by asking her about her prior inconsistent statement.

Affirmed.