STATE OF MINNESOTA
IN COURT OF APPEALS
A24-0973

Kimberly Kay Mountjoy,
Appellant,

vs.

Fairview Health Services, et al.,
Respondents.

Filed December 16, 2024
Affirmed in part, reversed in part, and remanded; motions denied
Frisch, Judge

Hennepin County District Court
File No. 27-CV-23-14736

Kimberly Kay Mountjoy, Bloomington, Minnesota (pro se appellant)

Kelly A. Putney, Bassford Remele, P.A., Minneapolis, Minnesota (for respondents)

Considered and decided by Frisch, Presiding Judge; Smith, Tracy M., Judge; and Schmidt, Judge.

NONPRECEDENTIAL OPINION

FRISCH, Judge

Appellant argues that the district court erred by dismissing her complaint alleging medical malpractice and medical battery. Because appellant failed to timely serve an affidavit of expert review pursuant to Minn. Stat. § 145.682 (2022), we affirm the dismissal of the medical-malpractice claim. But we reverse the dismissal of appellant's

medical-battery claim because that claim is not subject to the expert-affidavit requirements set forth in Minn. Stat. § 145.682, and appellant claims that she did not consent to a medical procedure.

FACTS

On January 19, 2020, appellant Kimberly Kay Mountjoy went to Fairview Southdale Hospital seeking treatment for "a massive headache and weakness" that she alleges was caused by "brain inflammation." Mountjoy claims that on February 5, 2020, Dr. Rohan Lall—one of Fairview's providers—performed "major laminectomy back surgery" without her consent. Mountjoy claims that she told Dr. Lall not to perform the surgery and asserts that she was otherwise unable to consent because she was "heavily drugged on Ketamine," "coerced," and "given no other choice." Mountjoy further alleges that the surgery failed to relieve her existing symptoms and resulted in severe chronic pain and disability.

On September 18, 2023, Mountjoy initiated separate actions based on nearly identical allegations against respondents Fairview Health Services (Fairview) and Dr. Lall, which the district court later consolidated. On October 5, 2023, Fairview sent Mountjoy a letter informing her that she had failed to submit an initial affidavit of expert review as required by Minn. Stat. § 145.682 and that the failure to provide such an affidavit within 60 days might result in dismissal of the case with prejudice. On October 12, Dr. Lall sent Mountjoy a similar letter demanding an affidavit of expert review. Mountjoy did not provide the requested affidavit.

On December 22, 2023, Fairview served and filed a notice of motion and motion to dismiss asserting that Mountjoy failed to comply with the requirements of Minn. Stat. § 145.682. On December 29, Mountjoy requested funds to obtain an expert witness to review her case. The district court denied the request, stating that "[a]bsent identification of an expert willing to testify in this case, [Mountjoy] is not entitled to expenses." On January 19, 2024, Mountjoy filed a second request seeking funding to retain Dr. Pierre Kory to review her medical records and provide an opinion. That same day, Fairview amended its motion to dismiss to a "motion to dismiss and/or for summary judgment" and submitted supporting documentation including an informed-consent form purportedly signed by Mountjoy. Mountjoy thereafter filed separate responses with supporting affidavits, identifying herself as an expert witness based on her 30 years of experience working as a certified nursing assistant and home health aide.

Following briefing and oral argument, the district court issued an order dismissing Mountjoy's entire action with prejudice because Mountjoy failed to timely serve an affidavit of expert review. The district court denied Mountjoy's funding requests and rejected Mountjoy's contention that she was qualified to act as an expert on her own behalf because she "is not a physician and has no surgical experience." The district court also determined that Mountjoy had signed a consent form before the surgery was performed.

Mountjoy appeals.

DECISION

Mountjoy argues that the district court erred in dismissing her complaint in its entirety for failing to meet the expert-affidavit requirements set forth in Minn. Stat. § 145.682. In general, we review a district court's decision on a motion to dismiss de novo. *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008). But we review a district court's dismissal of a claim for failure to meet the requirements of Minn. Stat. § 145.682 for an abuse of discretion. *Daulton v. TMS Treatment Ctr., Inc.*, 2 N.W.3d 331, 336 (Minn. App. 2024). "A district court abuses its discretion by making findings of fact that are unsupported by the evidence, misapplying the law, or delivering a decision that is against logic and the facts on record." *Id.* at 336-37 (quotation omitted).

As a threshold matter, we construe Mountjoy's complaints as asserting two, distinct causes of action: (1) a medical-malpractice claim claiming medical negligence and (2) a medical-battery claim. We note that the district court dismissed the entirety of Mountjoy's complaint because she did not comply with the requirements of section 145.682. Against this backdrop, we consider the district court's dismissal of each asserted claim in turn.

Medical Malpractice

The district court did not err in dismissing Mountjoy's medical-malpractice claim for failure to comply with section 145.682. The purpose of section 145.682 is to identify frivolous medical-malpractice suits at an early stage of litigation "by requiring plaintiffs to file affidavits verifying that their allegations of malpractice are well-founded." *Stroud v. Hennepin Cnty. Med. Ctr.*, 556 N.W.2d 552, 555 (Minn. 1996). In a medical-malpractice suit where expert testimony is necessary, a plaintiff must serve two affidavits on the

defendant. Minn. Stat. § 145.682, subd. 2. The first affidavit—the "[a]ffidavit of expert review"—must be signed by the plaintiff's attorney, or by the plaintiff if acting pro se, and served on the defendant with the summons and complaint. *Id.*, subds. 2, 3, 5. The second affidavit—the "identification of experts to be called"—must be signed by the experts and served on the defendant within 180 days of the commencement of discovery. *Id.*, subds. 2, 4. Only the affidavit of expert review is at issue in this appeal.

In relevant part, subdivision 3 requires the affidavit of expert review to state that

> the facts of the case have been reviewed by the plaintiff's attorney 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.

Id., subd. 3(1). A plaintiff's failure to serve the affidavit of expert review within 60 days of demand "results, upon motion, in mandatory dismissal with prejudice of each cause of action as to which expert testimony is necessary to establish a prima facie case." *Id.*, subd. 6(a). Minnesota courts rigorously enforce these statutory requirements. *Broehm v. Mayo Clinic Rochester*, 690 N.W.2d 721, 726 (Minn. 2005) ("[P]laintiffs must adhere to strict compliance with the requirements of Minn. Stat. § 145.682."). And pro se litigants are bound by the affidavit provisions of section 145.682 "as if represented by an attorney." Minn. Stat. § 145.682, subd. 5; *cf. Fitzgerald v. Fitzgerald*, 629 N.W.2d 115, 119 (Minn. App. 2001) ("[P]ro se litigants are generally held to the same standards as attorneys and must comply with court rules.").

Here, Mountjoy asserted a medical-malpractice claim but failed to satisfy the requirements of section 145.682. Mountjoy did not serve an affidavit of expert review with the summons and complaint, as required by Minn. Stat. § 145.682, subd. 2. Fairview thereafter sent Mountjoy two letters—on October 5 and 12, 2023—demanding that Mountjoy provide the affidavit of expert review. Mountjoy did not submit the missing affidavit within the 60-day deadline, which expired on December 12, 2023. Because Mountjoy did not provide the affidavit of expert review within 60 days of demand, her medical-malpractice claim was subject to mandatory dismissal with prejudice. *See id.*

Mountjoy argues that the district court otherwise abused its discretion in dismissing her medical-malpractice claim by (1) concluding that Mountjoy was not qualified to act as an expert on her own behalf, (2) dismissing the case without allowing her sufficient time to procure an expert, and (3) denying her request for expert funding. We disagree.

Putting aside that Mountjoy did not submit an affidavit identifying herself as an expert until after the 60-day deadline expired, we discern no abuse of discretion in the district court's determination that she is not qualified to act as an expert witness in her own case. We "apply a very deferential standard" when reviewing the district court's "determination as to expert qualification, reversing only if there has been a clear abuse of discretion." *Teffeteller v. Univ. of Minn.*, 645 N.W.2d 420, 427 (Minn. 2002) (quotation omitted). Expert testimony establishing the appropriate standard of care "is necessary to support all but the most obvious medical malpractice claims." *Haile v. Sutherland*, 598 N.W.2d 424, 428 (Minn. App. 1999). "Expert medical witnesses must have both sufficient scientific knowledge and practical experience with respect to the subject matter of the

offered testimony." *Wall v. Fairview Hosp. & Healthcare Servs.*, 584 N.W.2d 395, 404 (Minn. 1998).

As the district court noted, Mountjoy is not a licensed physician and is not a surgeon. Her 30 years of experience working as a certified nursing assistant and home health aide do not qualify her to opine on the standard of care for a surgical operation such as a laminectomy. *See Broehm*, 690 N.W.2d at 727 (concluding that a certified nurse practitioner lacked the training and practical experience "to offer opinions regarding postoperative care following tracheal resection surgery"). Because Mountjoy is not a surgeon and lacks sufficient knowledge and practical experience to opine on the standard of care for a laminectomy, the district court did not abuse its discretion in determining that she is not qualified to act as an expert witness on her own behalf. *See Wall*, 584 N.W.2d at 404.

Mountjoy also argues that the district court abused its discretion by not allowing her 180 days from the commencement of discovery to submit an expert affidavit. But the 180-day period invoked by Mountjoy refers to the procedures relating to the second expert affidavit, which serves to identify any expert the plaintiff intends to call as a witness. *See* Minn. Stat. § 145.682, subd. 4(a). This time period is unrelated to the requirements for providing an affidavit of expert review which, as already discussed, must be served within 60 days of demand. *Id.*, subds. 2, 3, 6(a).

Finally, Mountjoy argues that the district court abused its discretion in not providing her with funding to obtain the services of Dr. Kory. But Mountjoy submitted her request relating to Dr. Kory on January 19, 2024, over a month after the deadline for submitting

the required affidavit of expert review. Thus, the district court was well within its discretion to reject Mountjoy's fee-waiver request as untimely. We therefore conclude that the district court's dismissal of the medical-malpractice claim with prejudice was proper.

Medical Battery

We conclude that the district court erred in dismissing the entirety of Mountjoy's complaint, including the medical-battery claim, for failure to comply with section 145.682. Medical battery "consists of an unpermitted touching, in the form of a medical procedure or treatment." *Kohoutek v. Hafner*, 383 N.W.2d 295, 299 (Minn. 1986). But if the patient gives their consent, the "touching is permitted," precluding a claim of medical battery. *Id.* Unlike a medical-negligence claim, a medical-battery claim does not require expert testimony to establish a prima facie case. *Id.* ("In [medical] battery cases, no expert testimony need be adduced, for the question is whether the physician, in fact, told the patient of the nature and character of the procedure and the patient consented to that procedure."). And section 145.682 only requires a plaintiff to submit an affidavit of expert review in any "action alleging malpractice, error, mistake, or failure to cure, whether based on contract or tort, against a health care provider which includes a cause of action as to which expert testimony is necessary to establish a prima facie case." Minn. Stat. § 145.682, subds. 2, 3. We are unaware of any authority requiring a plaintiff asserting a medical-battery claim to produce an affidavit of expert review.

Fairview argues that it is nevertheless entitled to summary judgment on the medical-battery claim because it produced evidence that Mountjoy signed an implied-consent form. "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. Children's Health Care*, 996 N.W.2d 197, 201 (Minn. 2023); *see also* Minn. R. Civ. P. 56.01. We review de novo whether a genuine issue of material fact exists. *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 609 N.W.2d 868, 874 (Minn. 2000). "A genuine issue of material fact exists when reasonable minds can draw different conclusions from the evidence presented." *Rygwall v. ACR Homes*, *Inc.*, 6 N.W.3d 416, 427 (Minn. 2024). "[W]e view the evidence in the light most favorable to the nonmoving party and resolve all doubts and factual inferences against the moving party." *Id.* (quotation omitted).

Here, the record contains conflicting evidence about Mountjoy's consent to the surgery. Since initiating this action, Mountjoy has consistently maintained that she did not consent to the laminectomy at all and that she told Dr. Lall not to perform the procedure. Fairview argues that because Mountjoy "signed a consent form authorizing surgery," there is no genuine issue of material fact on the issue of consent. But as the supreme court has observed, under certain circumstances, a "patient's consent can be vitiated." *Kohoutek*, 383 N.W.2d at 299. Mountjoy alleges that she was "heavily drugged on Ketamine," "coerced," and "given no other choice." On this limited record, and given these disputed material facts regarding whether Mountjoy consented to surgery, we cannot conclude that Fairview is entitled to judgment as a matter of law on Mountjoy's medical-battery claim.

Accordingly, we affirm the district court's dismissal of the medical-malpractice claim, reverse the dismissal of the medical-battery claim, and remand for further proceedings consistent with this opinion.[1]

Affirmed in part, reversed in part, and remanded; motions denied.

[1] On November 6, 2024, Mountjoy moved to supplement the record on appeal with several affidavits and various documents including (1) the results of two Google searches regarding a patients' right to refuse care, (2) a copy of Minn. Stat. § 145.682 with handwritten notes, (3) a copy of Rule 26 of the Minnesota Rules of Civil Procedure with handwritten notes, and (4) a copy of Rules 702, 703, and 705 of the Minnesota Rules of Evidence. On December 5, 2024, Mountjoy filed a second motion to supplement the record with a letter from a medical provider and documentation relating to Mountjoy's "spine disabilities." "The general rule is that an appellate court must decide an appeal based solely upon the evidence actually presented to the trial court and shown by the record on appeal." *W. World Ins. Co. v. Anothen, Inc.*, 391 N.W.2d 70, 72 (Minn. App. 1986) (quotation omitted). The affidavits and documents Mountjoy seeks to add to the record were not before the district court when it entered judgment dismissing Mountjoy's action. And to the extent Mountjoy advances substantive arguments in either motion, such arguments are improper because at this juncture, "[n]o further briefs may be filed except with leave" of this court. *See* Minn. R. App. P. 128.02, subd. 4. For these reasons, we deny both motions to supplement the record.