

NOT DESIGNATED FOR PUBLICATION

No. 125,586

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

PATRICK J. NUESSEN,
Appellant,

v.

KANSAS HEART HOSPITAL LLC, et al.,
Appellee.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; FAITH MAUGHAN, judge. Oral argument held November 15, 2023. Opinion filed December 29, 2023. Affirmed.

Thomas M. Warner, Jr., of Warner Law Offices, P.A., of Wichita, for appellant.

Matthew A. Spahn and *Marcia A. Wood*, of Martin, Pringle, Oliver, Wallace & Bauer, L.L.P., of Wichita, for appellee.

Before BRUNS, P.J., COBLE and PICKERING, JJ.

PER CURIAM: This appeal arises out of a medical malpractice case brought by Patrick J. Nuessen against the Kansas Heart Hospital and several physicians after he suffered a stroke while undergoing a heart catheterization procedure. Prior to trial, the district court granted partial summary judgment to the hospital on one of the negligence claims asserted by Nuessen against it in the agreed pretrial order. However, the hospital did not seek summary judgment on the other claims asserted by Nuessen. These remaining claims asserted against the hospital as well as those asserted against Dr. Matthew Butler—who had settled with Nuessen—were presented at trial.

At trial—following the close of Nuessen's case-in-chief—the district court granted judgment as a matter of law on another one of his claims asserted against the Kansas Heart Hospital. As a result, three claims of negligence against the hospital—based on the alleged failures of its employees to take certain actions—and seven claims of negligence against Dr. Butler were submitted to the jury. Ultimately, the jury found neither the Kansas Heart Hospital nor Dr. Butler to be at fault and Nuessen does not appeal from the jury's verdict. Accordingly, the only issue presented on appeal is whether the district court erred in granting partial summary judgment to the Kansas Heart Hospital based on its finding that K.S.A. 40-3403(h) barred one of the multiple claims asserted against it by Nuessen in the agreed pretrial order.

The claim in question alleged that employees of the hospital negligently failed to "speak up or go up the chain of command" after it became apparent that Dr. Butler had not called a "stroke alert" or "expedited" Nuessen's care pursuant to applicable "stroke protocols[.]" In granting partial summary judgment on this claim, the district court found that it was uncontroverted that both the Kansas Heart Hospital and Dr. Butler are "healthcare providers" qualified for coverage by the Kansas Healthcare Stabilization Fund. Consequently, the district court concluded that the hospital could not be held liable or responsible under K.S.A. 40-3403(h) for any injury to Nuessen "arising out of the rendering of or the failure to render professional services . . . by [Dr. Butler] who is also qualified for coverage under the fund."

Based on our review of the record on appeal and Kansas caselaw, we find that the district court properly granted partial summary judgment to the Kansas Heart Hospital on the claim in question. Moreover, we find that even if the district court had erred in granting partial summary judgment on this claim, any error would be harmless in light of the jury's verdict determining that neither Dr. Butler nor the hospital was at fault in causing Nuessen's injury. Thus, we affirm.

FACTS

The uncontroverted facts establish that on October 3, 2016, Nuessen—who was then 58 years old—was admitted to the Kansas Heart Hospital with complaints of chest pain. The next day, Dr. Matthew A. Butler performed a diagnostic heart catheterization procedure on Nuessen that began at 3:52 p.m. Prior to the procedure, Nuessen signed a written consent form in which he acknowledged that a stroke is a foreseeable risk of a heart catheterization procedure. We note that Nuessen does not challenge the validity of the consent form.

Unfortunately, Nuessen suffered neurologic changes during the heart catheterization procedure that were later determined to be caused by a stroke. In response, Dr. Butler ordered the administration of reversal agents at 5:21 p.m. and 5:24 p.m. and further assessment was made. After completing his assessment, Dr. Butler chose to admit Nuessen to the intensive care unit (ICU) at the Kansas Heart Hospital instead of having him transferred to a certified stroke care center. In addition, Dr. Butler ordered a neurology check and a routine CT scan.

A review of the record reveals that Nuessen was admitted to the ICU at 5:57 p.m., and he arrived unresponsive. Because the Kansas Heart Hospital's radiology department is not staffed in the evening, the ICU staff contacted an on-call radiology technician to come to the hospital to perform the CT scan. The CT scan was completed at 7:00 p.m. and reviewed by a remote radiology interpretation service. The review of the CT scan showed evidence of a stroke. Between 7:40 p.m. and 7:42 p.m., the CT results were relayed to Dr. Butler. At 9:28 p.m., Dr. Butler ordered that Nuessen be transferred to Wesley Medical Center, which is a stroke certified center. At 9:35 p.m., Dr. Butler subsequently ordered thrombolytic therapy to begin and Nuessen was then taken by ambulance to Wesley Medical Center.

Shortly after his arrival at Wesley Medical Center, another CT scan was performed, and it was determined that Nuessen had suffered an acute stroke in the right side of his brain. During Nuessen's hospitalization at Wesley Medical Center, physicians found that a significant amount of brain swelling had occurred which required a decompressive craniotomy. On October 20, 2016, Nuessen was discharged to Wesley Rehabilitation Hospital. According to the discharge summary, Nuessen had suffered "profound deficits" from the stroke.

On September 20, 2018, Nuessen filed a petition against Dr. Butler for allegedly failing to comply with the appropriate standard of care for the treatment of patients who suffer a stroke. The petition also named the Kansas Heart Hospital and two other physicians who had provided care and treatment to Nuessen. The claims against these physicians were later dismissed and they are not parties to this appeal.

Prior to trial, the district court entered an agreed pretrial order setting forth—among other things—the claims and defenses asserted by the parties. As to Dr. Butler, Nuessen claimed: (1) failure to timely diagnose and treat ischemic stroke; (2) failure to follow stroke protocols; (3) failure to prepare for the possibility of stroke despite the fact stroke is a known risk associated with heart catheterization procedures; (4) failure to timely call a stroke alert, order a stat CT scan, and take other emergent action; (5) failure to recognize that the Kansas Heart Hospital was unable to provide certain after-hours care and failure to call 911 for an emergent transfer to Wesley Medical Center; (6) wasting valuable time in providing care and treatment; and (7) failure to promptly consult a neurologist and ordering a routine rather than a stat CT scan.

As to the Kansas Heart Hospital, Nuessen alleged in the agreed pretrial order that (1) the hospital was liable for the negligent acts and omissions of its employees under the doctrine of respondeat superior; (2) the hospital failed to have a stroke alert protocol in place even though suffering a stroke is a known risk of a heart catheterization procedure;

(3) the hospital's employees failed to rapidly recognize and respond to this known stroke risk utilizing the appropriate protocols to mitigate the extent of damage to the brain; (4) the hospital employees failed to follow the appropriate stroke algorithm; (5) the hospital employees failed to speak up or go up the chain of command after it became apparent that Dr. Butler had not called a stroke alert or expedited stroke care pursuant to appropriate stroke protocols; and (6) the hospital staff failed to call 911 to request emergency transport to a nearby certified stroke care facility in a timely manner.

The Kansas Heart Hospital filed a motion for partial summary judgment regarding the fifth claim listed by Nuessen against it in the agreed pretrial order. Like the parties and the district court, we will call this claim "Contention No. 5" in this opinion. Specifically, the hospital argued that under K.S.A. 40-3403(h) it could not be found liable or responsible for any claim arising out of the rendering of professional services by Dr. Butler because both are healthcare providers covered by the Kansas Health Care Stabilization Fund.

In support of its motion, the Kansas Heart Hospital attached several exhibits. These exhibits included Nuessen's pretrial questionnaire; the report of Nuessen's nursing expert, Sheree Schroeder, RN, MSN; and the transcript of Nurse Schroeder's deposition discussing her opinions. In his pretrial questionnaire, Nuessen alleged that if Dr. Butler had taken alternative timely actions, then "the clinical outcome for Mr. Nuessen would have been markedly improved." Similarly, Nurse Schroeder testified in her deposition that the hospital's employees should have challenged and attempted to override Dr. Butler's care and treatment decisions.

At a hearing on the motion for partial summary judgment, the district court stated that it was granting judgment as a matter of law to the hospital on Contention No. 5. A few weeks later, the district court issued a journal entry on the hospital's motion for partial summary judgment in which it explained that it found K.S.A. 40-3403(h) to be

applicable to the allegation that the hospital employees should have challenged Dr. Butler's professional judgment or gone above his head. The district court found that K.S.A. 40-3403(h) barred this claim because it was an attempt to hold the hospital liable or responsible for Dr. Butler's care and treatment of Nuessen. The district court explained that both the hospital and Dr. Butler are health care providers and found that Contention No. 5—unlike the other contentions asserted by Nuessen against the hospital—arose out of the rendering or failure to render professional services by the physician.

The district court further explained that Kansas appellate courts have broadly interpreted the phrase "arising out of " under K.S.A. 40-3403(h). Ultimately, the district court determined that Contention No. 5 was

"derivative and dependent upon the rendering of or the failure to render professional services by' Dr. Butler because—based on both the language of Contention No. 5 and the . . . expert testimony . . . [Nuessen] seeks to hold [the hospital] liable for its employees' alleged failure to prevent Dr. Butler from making and executing clinical decisions that allegedly caused [Nuessen's] injuries."

Accordingly, finding that there were no genuine issues of material fact, the district court granted the Kansas Heart Hospital partial summary judgment on Contention No. 5.

Subsequently, Nuessen filed a motion for reconsideration that was denied by the district court. Nuessen's other claims against the hospital proceeded to trial. Nuessen also sought and obtained approval of his settlement with Dr. Butler prior to trial. However, the district court allowed Dr. Butler's fault—if any—to be compared at trial. Consequently, the district court commenced a four-week jury trial on May 23, 2022.

At trial, Nuessen presented the testimony of 16 witnesses and introduced 49 exhibits into evidence. After the close of his case-in-chief, the hospital moved for judgment as a matter of law on Contention Nos. 2 and 6. Although the district court

granted the hospital judgment as a matter of law as to Contention No. 2, it did not grant judgment as a matter of law as to Contention No. 6. We note that neither party has challenged these rulings on appeal.

In its defense, the Kansas Heart Hospital presented the testimony of 9 witnesses and introduced 12 exhibits into evidence. After the close of all the evidence, the district court submitted Nuessen's three remaining contentions of negligence against the hospital to the jury. In addition, for the purposes of comparative fault, the district court also submitted the seven contentions of negligence asserted by Nuessen against Dr. Butler in the agreed pretrial order to the jury.

As to the Kansas Heart Hospital, the district court instructed the jury that it could find fault against the hospital based on the following contentions:

"1. Failure of cath lab staff and Nurse Vanskike to rapidly recognize and respond to the known stroke risk utilizing ACLS protocols to mitigate further brain damage.

"2. Failure to follow the ACLS stroke algorithm.

"3. Failure to emergently call 911 for emergency transport by EMS to a nearby facility that KHH agents and employees knew or should have known was a certified stroke care facility with 24/7/365 special expertise in diagnosing and treating stroke when employees and agents of KHH knew or should have known that it would be unlikely KHH could meet the ACLS/AHA stroke alert time goals after hours."

After deliberation, the jury returned a verdict finding neither the Kansas Heart Hospital nor Dr. Butler to be at fault.

Thereafter, Nuessen filed a timely notice of appeal.

ANALYSIS

On appeal, Nuessen does not challenge the district court's instructions to the jury nor does he challenge the jury's verdict. Rather, he challenges the district court's grant of partial summary judgment in favor of the Kansas Heart Hospital on Contention No. 5. In particular, he argues that the district court erred in finding that this contention against the hospital was barred by K.S.A. 40-3403(h). In support of this argument, Nuessen asserts that the district court misinterpreted or misapplied the statutory language by finding that Contention No. 5 arose out of the rendering of or failure to render professional services by Dr. Butler. In response, the hospital contends that the district court properly interpreted and applied K.S.A. 40-3403(h) consistent with its plain language as well as with the opinions handed down by both the Kansas Supreme Court and this court.

Standard of Review

Our standard of review on summary judgment is well known:

"Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and supporting affidavits show that no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. The district court must resolve all facts and reasonable inferences drawn from the evidence in favor of the party against whom the ruling is sought. When opposing summary judgment, a party must produce evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issue in the case. Appellate courts apply the same rules and, where they find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment is inappropriate. Appellate review of the legal effect of undisputed facts is de novo. [Citation omitted.]" *GFTLenexa, LLC v. City of Lenexa*, 310 Kan. 976, 981-82, 453 P.3d 304 (2019).

In considering whether the district court's granting of summary judgment—or in this case partial summary judgment—was appropriate, we look to the evidence that was

before the district court at the time it granted the motion. See *Antrim, Piper, Wenger, Inc. v. Lowe*, 37 Kan. App. 2d 932, 939-40, 159 P.3d 215 (2007).

Furthermore, this appeal raises an issue regarding the interpretation of a statute, which is a question of law subject to unlimited review. To the extent that it is possible to determine, the intent of the Kansas Legislature controls. In ascertaining legislative intent, we look to the plain language of the statute—giving words their ordinary meaning. When a statute is plain and unambiguous, we are not to speculate about the legislative intent behind that clear language. Likewise, we are to refrain from reading something into the statute that is not readily found in its words. However, if a statute's language is ambiguous, we will consult the canons of statutory construction to resolve the ambiguity. *Johnson v. U.S. Food Service*, 312 Kan. 597, 600-01, 478 P.3d 776 (2021).

Application of K.S.A. 40-3403(h)

Resolution of the limited issue presented in this appeal requires us to interpret K.S.A. 40-3403(h) and to determine whether the district court appropriately applied it in granting partial summary judgment to the Kansas Heart Hospital on Contention No. 5 as asserted by Nuessen in the agreed pretrial order. This statute is part of the Kansas Health Care Provider Insurance Act, K.S.A. 40-3401 et seq., which created the Kansas Health Care Stabilization Fund as a source of funds from which persons injured by the professional negligence of healthcare providers who are qualified for coverage can recover some or all of their damages under the circumstances set forth in the Act. K.S.A. 40-3403(a).

The Act defines "Healthcare provider" as a "person licensed to practice any branch of the healing arts by the state board of healing arts" and "medical care facilit[ies] licensed by the state of Kansas." K.S.A. 40-3401(f). Here, it is uncontroverted that Dr. Butler is licensed to practice medicine by the Board of Healing Arts. Likewise, it is

uncontroverted that the Kansas Heart Hospital is a medical care facility licensed by the State of Kansas. Therefore, it is undisputed that both parties are healthcare providers qualified for coverage under the Health Care Stabilization Fund.

The provision of the Act that is at issue in this appeal is K.S.A. 40-3403(h), which states in material part:

"A healthcare provider who is qualified for coverage under the fund shall have no vicarious liability or responsibility for any injury or death arising out of the rendering of or the failure to render professional services inside or outside this state by any other healthcare provider who is also qualified for coverage under the fund."

In other words, because the Kansas Heart Hospital is a healthcare provider qualified for coverage under the Fund, it cannot be held vicariously liable or responsible for any injury that arose out of the rendering or failure to render medical care by Dr. Butler who is also a healthcare provider qualified for Fund coverage.

Nuessen's argument on appeal hinges on his assertion that K.S.A. 40-3403(h) should be applied differently depending on a plaintiff's theory of liability. But the Kansas Supreme Court rejected a similar argument in *Cady v. Schroll*, 298 Kan. 731, 746, 317 P.3d 90 (2014). In doing so, our Supreme Court held that "[t]he language of K.S.A. 40-3403(h) does not premise immunity on the type of health care providers involved, the nature of the relationship between the two health care providers, or *the nature of the theory of liability*." (Emphasis added.) 298 Kan. at 746. Hence, K.S.A. 40-3403(h) bars claims attempting to hold "one health care provider responsible for the action or inaction of another health care provider who was also covered under the Fund." *Brown v. Trobough*, 57 Kan. App. 2d 271, 281, 462 P.3d 635 (2019), *rev. denied* 312 Kan. 890 (2020).

In *Cady*, our Supreme Court reaffirmed its interpretation of "arising out of" in *McVay v. Rich*, 255 Kan. 371, 376-78, 874 P.2d 641 (1994). The *Cady* court explained that in *McVay*, this phrase was interpreted to focus on the cause of the asserted claim rather than on the theory of liability. 298 Kan. 742-43. The plaintiff in *McVay* filed a medical malpractice action against both her doctor and the hospital seeking to recover damages for injuries allegedly sustained during surgery. Similar to the present case, the plaintiff settled with the doctor prior to trial but moved forward with her claim against the hospital alleging that the hospital negligently granted the doctor privileges when it should have known he was incompetent.

After the district court granted the hospital summary judgment under K.S.A. 40-3403(h)—as well as another statute that is not material to this appeal—the plaintiff appealed. Ultimately, our Supreme Court affirmed the district court's granting of summary judgment to the hospital. 255 Kan. at 381. In doing so, it found that the plaintiff's claim against the hospital was "derivative of and dependent upon her claim" against the doctor, and her "injury arose out of the rendering of professional services" by the doctor. 255 Kan. at 377-78.

In *Cady*, the Kansas Supreme Court also synthesized its decision in *McVay* with its previous decisions in *Glassman v. Costello*, 267 Kan. 509, 523-26, 986 P.2d 1050 (1999), and *Aldoroty v. HCA Health Services of Kansas, Inc.*, 265 Kan. 666, 682, 962 P.2d 501 (1998). In *Glassman*, our Supreme Court held under the circumstances presented that a claim against an obstetrician did not arise from the alleged negligence of a nurse anesthetist but from the obstetrician's own alleged negligence. 267 Kan. at 523-26. Similarly, in *Aldoroty*, our Supreme Court held that a claim against a hospital based on the alleged negligence of its radiology technicians did not arise out of a radiologist's rendering of or failure to render professional services to the plaintiff. 265 Kan. at 682. As a result, "it was up to the jury to compare their fault." 265 Kan. at 682.

In *Cady*, the Kansas Supreme Court distinguished the holdings in *Glassman* and *Aldoroty* from the holding in *McVay*. As our Supreme Court explained, *Glassman* and *Aldoroty* stand for the proposition that two healthcare providers can—under the appropriate circumstances—each have liability under K.S.A. 40-3403(h) when the injuries arise from the actions of each provider individually. *Cady*, 298 Kan. at 749-53. On the other hand, claims cannot be made against one healthcare provider that "derive from the alleged wrongful acts" of another healthcare provider. See 298 Kan. at 754. In other words, K.S.A. 40-3403(h) bars a claim against a healthcare provider that is "derivative of and dependent upon [a] claim" against another healthcare provider. 298 Kan. at 754.

Based on our review of the record on appeal in this case, we find that the district court appropriately analyzed and applied K.S.A. 40-3403(h). While removing Contention No. 5, which was based on an alleged failure to challenge the professional judgment of Dr. Butler, the district court properly allowed the jury to consider three separate and distinct claims of negligence against the Kansas Heart Hospital for the alleged negligence of its employees. Furthermore, the district court properly allowed the jury to compare the alleged fault of both the hospital and Dr. Butler.

Specifically, the district court allowed Nuessen to present claims at trial that the hospital's employees allegedly failed "to rapidly recognize and respond to [a] known stroke risk utilizing ACLS protocols to mitigate further brain damage"; "to follow the ACLS stroke algorithm"; and "to . . . call 911 for emergency transport by EMS to a nearby . . . certified stroke care facility with . . . special expertise in diagnosing and treating stroke when [they] knew or should have known that it would be unlikely KHH could meet the ACLS/AHA stroke alert time goals after hours." Therefore, the district court's instructions provided the jury with the opportunity to find that the employees of the Kansas Heart Hospital were independently negligent in rendering or failing to render professional services to Nuessen.

In granting partial summary judgment as to the hospital prior to trial on Contention No. 5, the district court fittingly cited both *Cady* and *Brown* in interpreting and applying K.S.A. 40-3403(h) to this claim. Quoting language directly from *Cady*, the district court found:

"Plaintiff's Contention No. 5 is 'derivative and dependent upon the rendering of or the failure to render professional services by' Dr. Butler because, based on both the language of Contention No. 5 and the facts and expert testimony [Nuessen] offers in support of Contention No. 5 . . . , [Nuessen] seeks to hold KHH liable for its employees' alleged failure to prevent Dr. Butler from making and executing clinical decisions that allegedly caused [Nuessen]'s injuries."

The district court also correctly found—again quoting *Cady*—that the hospital's immunity from liability or responsibility under Contention No. 5 does not depend "'on the type of health care providers involved.' *Cady*, 298 Kan. at 746." Additionally, relying on caselaw and the language of the statute, the district court correctly rejected Nuessen's argument that K.S.A. 40-3403(h) does not apply because he was suing the Kansas Heart Hospital for the alleged negligence of its employees who are not qualified for Fund coverage. As the Kansas Supreme Court held in *Cady*, K.S.A. 40-3403(h) not only bars a claim against a healthcare provider for vicarious liability but also bars any responsibility if the alleged injuries or damages arise out of—or are derivative and dependent upon—the rendering of or failure to render professional services by another healthcare provider. 298 Kan. 731, Syl. ¶ 2.

In addition to finding that the district court appropriately interpreted K.S.A. 40-3403(h), we find that it aptly applied the statute to the claim set forth by Nuessen in Contention No. 5 of the agreed pretrial order. In Contention No. 5, Nuessen claimed that employees of the Kansas Heart Hospital were negligent by failing "to speak up or go up the chain of command when it was apparent or should have been apparent *that no stroke alert had been called by Dr. Butler and that the patient's stroke care had not been*

expedited as per ACLS/AHA stroke protocols." (Emphasis added.) In other words, unlike the claims against the hospital that the district court appropriately allowed to go to the jury, we find that this claim—for failure to challenge Dr. Butler's decision not to call a stroke alert or to order expedited stroke care—was derivative or dependent upon the alleged failure of Dr. Butler to render appropriate professional medical services. Thus, we conclude the district court did not err in granting partial summary judgment for KHH on Contention No. 5.

Harmless Error

In the alternative, the Kansas Heart Hospital contends that even if the district court erred in granting its motion for partial summary judgment on Contention No. 5, any such error would be harmless because the jury found Dr. Butler was not at fault. As discussed in the previous section of this opinion, we do not find that the district court misinterpreted or misapplied K.S.A. 40-3403(h) to Contention No. 5. Nevertheless, we agree that even if the district court had committed error, it would be harmless under the unique circumstances presented in this case.

K.S.A. 2022 Supp. 60-261 provides:

"Unless justice requires otherwise, no error in admitting or excluding evidence, or any other error by the court or a party, is ground for granting a new trial, for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."

As addressed above, a review of the record in this case reveals that the district court appropriately allowed Nuessen to present three claims of negligence against the hospital based on the alleged acts or omissions of its employees. Likewise, the district court allowed the jury to consider seven claims of negligence against Dr. Butler based on

the contentions set forth by Nuessen in the agreed pretrial order. The district court also appropriately presented the issue of comparative fault to the jury for consideration. Nevertheless, the jury ultimately determined that neither the Kansas Heart Hospital nor Dr. Butler were at fault based on the evidence presented at trial.

The district court correctly explained in jury instruction No. 12 that "[a] person is at fault when he or it is negligent and that negligence caused or contributed to the event which brought about the claim(s) for damages." So, a determination that neither Dr. Butler nor the Kansas Heart Hospital were at fault meant one of two things. It either meant that the jury found that neither Dr. Butler nor the hospital employees deviated from their appropriate standards of care or that any alleged deviations from these standards did not cause or contribute to Nuessen's damages.

If the jury found that Dr. Butler met the appropriate standard of care, then the employees of the Kansas Heart Hospital could not be negligent for failing to challenge his professional judgment. Similarly, if the jury found that Dr. Butler's alleged deviation from the appropriate standard of care did not cause or contribute to Nuessen's damages, the claim that hospital employees failed to challenge his decisions would also fail for lack of causation. Consequently, even if the district court had allowed Contention No. 5 to be submitted to the jury, we find that it would not have changed the outcome of this case in light of the entire record and, as a result, it did not affect Nuessen's right to a fair trial.

Affirmed.