NOT DESIGNATED FOR PUBLICATION

No. 125,889

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

ALLISON L. MOSES,
Appellant,

v.

BOJANGLES HAULING, LLC, and
ALLEN PERRY,
Appellees.

MEMORANDUM OPINION

Appeal from Johnson District Court; JAMES F. VANO, judge. Opinion filed September 1, 2023. Affirmed.

Jennifer E. McElderry, of House Packard McElderry LLC, of Liberty, Missouri, and *Ryan M. McElderry*, pro hac vice, of the same firm, for appellant.

Bryan E. Mouber and *Kevin D. Weakley*, of Wallace Saunders, of Overland Park, for appellees.

Before ATCHESON, P.J., MALONE and PICKERING, JJ.

PER CURIAM: Plaintiff Allison L. Moses appeals the Johnson County District Court's decision granting summary judgment to Defendants Bojangles Hauling, LLC and Allen Perry because she failed to present evidence that would allow a reasonable jury to find a causal link between the parties' motor vehicle collision in April 2019 and her complex migraine syndrome medically diagnosed nearly 18 months later. Despite the unusually ragged procedural progression of this civil action, we find no reversible error in the ruling and affirm the judgment for the defendants.

FACTUAL AND PROCEDURAL HISTORY

We first outline the standards of review governing summary judgment motions in both the district court and on appeal because they shape how the factual record should be considered. See *Bouton v. Byers*, 50 Kan. App. 2d 34, 36-37, 321 P.3d 780 (2014). The common core test is well-known and regularly recited. The district court must view the properly presented evidence in the most favorable light for the party opposing the motion, here Moses, and give that party the benefit of every reasonable inference that might be drawn from the evidence. Taking the evidence in that manner, the moving party needs to demonstrate the absence of any genuine dispute over the material facts and, in turn, an entitlement to judgment as a matter of law. *Trear v. Chamberlain*, 308 Kan. 932, 935-36, 425 P.3d 297 (2018); *Miller v. Hutchinson Regional Med. Center*, 63 Kan. App. 2d 57, 59, 525 P.3d 10, *rev. denied* 317 Kan. ___ (May 5, 2023). As we recently explained, the party requesting summary judgment "[b]asically . . . submits no reasonable construction of the evidence would permit a jury to return a verdict for the opposing party." 63 Kan. App. 2d at 59.

An appellate court applies the same standard in reviewing a challenge to the district court's entry of summary judgment. So we examine the facts in the best light for Moses. Because neither we nor the district court weighs the evidence generally or resolves credibility disputes, the decision to grant summary judgment functionally presents a question of law we assess without deference to the district court. See *Adams v. Board of Sedgwick County Comm'rs*, 289 Kan. 577, 584, 214 P.3d 1173 (2009); *Miller*, 63 Kan. App. 2d at 59.

We now examine the historical facts associated with the collision and Moses' claimed injury in the best light for her, although at least some of those circumstances are disputed. We then outline the procedural history of this litigation depicting an atypical journey to judgment.

During an afternoon in April 2019, Moses had stopped her car for a red light at an intersection in south Johnson County when a cement mixer owned by Bojangles Hauling rearended her. Moses was treated and released that same afternoon at the emergency room of an Olathe hospital. Moses has alleged that Perry drove the cement mixer; the identity of the driver has been disputed but is immaterial to this appeal. For purposes of the appeal, Bojangles Hauling is legally responsible for any negligence on the driver's part that caused compensable harm to Moses.

In September 2020, a nurse practitioner referred Moses to a neurology group after she reported briefly experiencing symptoms consistent with a transient stroke. Moses saw Dr. Joseph Wend, M.D., a neurological resident, and Dr. Frederick Sachen, M.D., a neurologist with decades of experience. Dr. Wend diagnosed Moses' immediate symptoms as a migraine and concluded she likely has what is sometimes called complex migraine syndrome. Dr. Sachen concurred in the diagnosis. In a later deposition, Dr. Wend explained that severe migraines often mimic symptoms associated with strokes.

Moses filed this action in April 2021, about 10 days before the statute of limitations would have run, and the defendants duly answered denying liability. During discovery, Moses stated she had not retained any expert witnesses but intended to rely on Dr. Wend and Dr. Sachen, as her treating physicians, to provide medical testimony. In a deposition the lawyers for the defendants took as discovery closed, Dr. Wend declined to draw a causal connection between the 2019 collision and Moses' complex migraine diagnosis. The defendants filed a motion for summary judgment and a short supporting memorandum anchored in Dr. Wend's deposition testimony asserting Moses could not establish the collision as the proximate cause of her migraines.

In piecing together the appellate record, we gather Moses attempted to electronically file a memorandum in opposition to summary judgment with various exhibits and did serve a copy on defense counsel. The clerk of the district court

apparently rejected the filing because of the way the memorandum and exhibits were packaged and sent an email to Moses' lawyers informing them of the deficiency. The lawyers seem to have overlooked the email and were unaware their opposition memorandum had not been filed until the district court informed them during oral argument on the summary judgment motion.

In the meantime, the lawyers for the defendants submitted a reply to the opposition memorandum that had never actually been filed. And Moses' lawyers took the deposition of Dr. Sachen to be used by agreement of the parties in place of his in-person testimony at trial.

During argument on the summary judgment motion, one of Moses' lawyers alluded to Dr. Sachen's testimony and information in the errant opposition memorandum. Toward the end of the hearing, the lawyer asked the district court for permission to file the opposition to the summary judgment motion. The district court labeled the request "untimely" and neither explicitly granted nor denied it in so many words. Moses' lawyers did not pursue the point further, so the memorandum and accompanying exhibits are not part of the record either in the district court or on appeal.

At the end of the hearing, the district court found that the factual recitation the defendants offered in support of their summary judgment motion had not been controverted (since the memorandum in opposition had never been filed) and those facts showed a lack of proximate cause between the collision and Moses' complex migraines. The district court, therefore, granted the motion, ventured the ruling "may cover all of [the] damage claims," and ordered entry of judgment for the defendants. None of the lawyers suggested the summary judgment ruling left unresolved claims. The district court entered a short written ruling granting judgment to the defendants and against Moses about a month later.

Moses then filed a motion to alter or amend the judgment under K.S.A. 2022 Supp. 60-259(f) with a supporting memorandum and exhibits, including excerpts from Dr. Sachen's deposition. She argued that Dr. Sachen's testimony established a causal link between the collision and her migraine headaches and, at the very least, showed a disputed issue of material fact on causation. The defendants essentially responded that Dr. Sachen's testimony was legally insufficient. As part of her reply, Moses filed Dr. Sachen's full deposition. After reviewing the written submissions, the district court entered a two-page memorandum decision denying the motion to alter or amend, finding the testimony to be insufficient as a matter of law primarily because Dr. Sachen was unaware that Moses had been injured in motor vehicle mishap in 2017, about two years before the collision at issue here. The district court also rejected Moses' argument that jurors reasonably could find causation without expert medical testimony. Moses has appealed.

LEGAL ANALYSIS

We have already outlined our standard of review in considering a challenge to the entry of a summary judgment. We turn to the governing substantive legal principles. In a personal injury action based on negligence, a plaintiff must prove: (1) The defendant owed him or her a duty of care; (2) a breach of the duty; (3) a physical injury or some other legally recognized harm; and (4) a causal connection between the breach and the harm. *Estate of Randolph v. City of Wichita*, 57 Kan. App. 2d 686, 698, 459 P.3d 802 (2020). Here, the defendants sought summary judgment based solely on the lack of causation. Typically, causation entails a question of fact for a jury to decide. *Kudlacik v. Johnny's Shawnee, Inc.*, 309 Kan. 788, 793, 440 P.3d 576 (2019); *Estate of Randolph*, 57 Kan. App. 2d at 698; *Estate of Belden v. Brown County*, 46 Kan. App. 2d 247, Syl. ¶ 13, 261 P.3d 943 (2011). But if a plaintiff cannot muster evidence suggesting a reasonable basis for a jury to find a legally sufficient causal link between the claimed injury and the

claimed breach, a district court may properly grant summary judgment to the defendant for that reason. 46 Kan. App. 2d 247, Syl. ¶ 13.

Proximate cause—the legal term for the required connection between the breach of duty and the injury—has two components. First, there must be "causation in fact," essentially meaning that but for (or absent) the wrongful conduct the injury would not have happened. *Kudlacik*, 309 Kan. at 793-94. The second component is "legal causation" requiring that the injury be a reasonably foreseeable consequence of the conduct. 309 Kan. at 794. In any given case, the defendant need not actually consider or recognize that another person might be injured as a result of his or her conduct. The injury need only be one that fairly could be predicted from the defendant's actions in combination with the surrounding circumstances. By the same token, however, a defendant should not be liable for injuries produced through an exceptionally unusual or unpredictable sequence of events that simply includes those actions among others. See *Burnette v. Eubanks*, 308 Kan. 838, 842, 425 P.3d 343 (2018); *Wrinkle v. Norman*, No. 112,441, 2016 WL 562998, at *3 (Kan. App. 2016) (unpublished opinion) (Common-law negligence does not impose liability "when a plaintiff's injury results from a sequence of events in which that harm is so attenuated or removed from a defendant's conduct as to be unpredictable or unforeseeable."); Prosser & Keaton, Law of Torts § 43, p. 280 (5th ed. 1984). Here, we are principally concerned with causation in fact. That is, did the collision in April 2019 bring about or aggravate Moses' migraines as they were diagnosed in September 2020?

In some circumstances, expert opinion testimony may be necessary to link the injury to the negligent act. If making the connection depends on specialized learning or experience beyond the common understanding of an average person, then a qualified expert witness must build the causation bridge. See *Puckett v. Mt. Carmel Regional Med. Center*, 290 Kan. 406, 435-36, 228 P.3d 1048 (2010) (expert testimony on causation); see also K.S.A. 2022 Supp. 60-456(b) (expert testimony admissible if "specialized

knowledge will help the trier of fact to understand the evidence or to determine a fact in issue"). This is such a case, especially given the lapse of time between the collision and the diagnosis and the nature of the diagnosed harm—recurrent migraines attributable to the impact of the two vehicles.

Apart from those substantive legal principles, the procedural progression of the case from the filing of the summary judgment motion was, in a word, irregular. We look at how the parties and the district court created and dealt with those irregularities in explaining our reasoning in affirming the ultimate decision entering judgment for the defendants.

First, Moses never filed a memorandum in opposition to the defendants' motion, so the district court correctly treated the statement of facts in support of the motion as uncontroverted. See *Gietzen v. Feleciano*, 25 Kan. App. 2d 487, 488-89, 964 P.2d 699 (1998); *Huffman v. Stormont-Vail Healthcare, Inc.*, No. 122,686, 2022 WL 188563, at *13 (Kan. App. 2022) (unpublished opinion); Supreme Court Rule 141(f)(2) (2023 Kan. S. Ct. R. at 224). Neither Moses' attempted (though unsuccessful) effort to timely file her memorandum opposing summary judgment nor her later (and also unsuccessful) request to the district court to accept the memorandum in any way mitigates that result.

Likewise, the oral representations Moses' lawyer made during the hearing on the summary judgment motion about what was in the never-filed opposition memorandum and what Dr. Sachen testified to in his deposition did not constitute substantive evidence that the district court could consider. As a general matter, statements of a lawyer in arguing a motion are not evidence. *State v. Fitch*, 249 Kan. 562, 565, 819 P.2d 1225 (1991); *State v. Gill*, 48 Kan. App. 2d 102, 117, 283 P.3d 236 (2012). The rule has particular force in assessing summary judgment motions. Under K.S.A. 2022 Supp. 60-256(e)(2), a party opposing summary judgment must rely on affidavits, declarations, or other evidentiary materials such as deposition excerpts or answers to interrogatories to

show there are genuinely disputed issues of material fact. Thus, plaintiffs may not rely on the factual allegations in their petitions for that purpose. *Carr v. Vannoster*, 48 Kan. App. 2d 19, 21, 281 P.3d 1136 (2012); *Gray v. Freeman*, No. 112,248, 2015 WL 1125305, at *2 (Kan. App. 2015) (unpublished opinion). In short, a lawyer's factual representations in oral argument on a summary judgment motion that are not otherwise properly supported in the pertinent filings carry no evidentiary weight.

Given those procedural guideposts, the district court correctly granted the defendants' summary judgment motion at the conclusion of the hearing and as reflected in the later journal entry. The properly considered submissions contained no evidence that reasonably could be construed to establish the required cause in fact, as a component of proximate cause, between the April 2019 collision and Moses' claim for damages based on the complex migraine syndrome diagnosed in September 2020.

The procedural peculiarities continued with Moses' filing of her motion to alter or amend the judgment. As we have explained, Moses submitted Dr. Sachen's deposition, among other exhibits, in support of the motion to set aside the judgment because his testimony ostensibly provided the requisite causal connection between the collision and her migraines. But the purpose of a motion to alter or amend is to call to the district court's attention material factual or legal errors it has made in entering judgment, thereby allowing the district court to reconsider its reasoning and ruling. The motion should not be used as a means to inject additional facts or new legal arguments into the case in an effort to augment what has already been presented. *Sierra Club v. Mosier*, 305 Kan. 1090, 1122, 391 P.3d 667 (2017) ("As a general rule, a party may not raise a new argument in a motion for reconsideration."); *Ross-Williams v. Bennett*, 55 Kan. App. 2d 524, 564, 419 P.3d 608 (2018); *State v. Wilson*, No. 114,203, 2016 WL 1169487, at *4-5 (Kan. App. 2016) (unpublished opinion).

Dr. Sachen's expert opinion did not qualify as new evidence that would have been unavailable before the district court ruled on the motion for summary judgment—true unavailability would be a factor weighing in favor of exceptionally late consideration of evidence even on a motion to alter or amend. See *Ross-Williams*, 55 Kan. App. 2d at 564 (suggesting "previously unavailable" evidence might be presented with motion to alter or amend). Moses presumably could have secured a declaration or affidavit from Dr. Sachen to submit in opposition to the motion for summary judgment or could have sought an extension to respond under K.S.A. 2022 Supp. 60-256(f) to do so. But she did not. Likewise, she could have taken Dr. Sachen's deposition earlier in the litigation process, so it would have been available for use in timely opposing the defendants' motion.

All of that said, however, the defendants apparently did not object to the district court considering Dr. Sachen's testimony in ruling on Moses' motion to alter or amend. And they have not argued the point on appeal. We, therefore, treat any objection as waived or forfeited. At the same time, we do not wish to create the impression that Moses deployed her motion to alter or amend in the manner the rules of civil procedure and the accompanying caselaw contemplate.

The linchpin testimony from Dr. Sachen on causation rests on this exchange with Moses' lawyer during the deposition:

"Q. So from the records you've reviewed and your experience in treating [Moses], do you believe her complex migraine syndrome was caused by the crash that she has mentioned in the records?

[objection omitted]

"A. Well, I would say either caused or aggravated."

To reiterate, after reviewing the written submissions, the district court issued its memorandum decision denying Moses' motion to alter or amend essentially because Dr. Sachen was unaware of her 2017 motor vehicle collision and had not taken it into account

in rendering his testimony about the cause of her migraines. Moses' aunt and grandmother apparently suffered from migraines, and the district court suggested that the family history prompted Dr. Sachen to raise aggravation of a preexisting condition in his deposition testimony. But Dr. Sachen also noted a gap in the medical records about whether Moses had migraines before the 2019 collision. Nothing in the summary judgment record shed light on that gap. There is neither an affidavit nor deposition testimony from Moses concerning the onset or frequency of her migraines. Dr. Sachen may have been suggesting that if Moses already suffered from migraines at the time of the 2019 collision, any increase in their frequency or intensity—an aggravation of them—might be attributed to the collision.

The district court seemed to conclude that since Dr. Sachen qualified his statement by referring to possible aggravation of a preexisting condition and knew nothing about the 2017 collision, the testimony was so speculative or otherwise ungrounded as to be inadmissible and, thus, insufficient to create a disputed issue of material fact on causation to defeat the defendant's motion for summary judgment. But the memorandum decision provides no detailed reasoning for the ruling. Although Dr. Sachen's testimony may not have accounted for every aspect of Moses' migraines, the omissions arguably go to weight rather than admissibility. See *Tonn Family Ltd. Ag. Ptnshp. v. Western Ag. Ins. Co.*, No. 120,933, 2021 WL 1045206, at *10 (Kan. App. 2021) (unpublished opinion); *Campbell v. Board of Sedgwick County Comm'rs*, No. 114,880, 2016 WL 6139662, at *11 (Kan. App. 2016) (unpublished opinion).

But there is a more fundamental flaw in Dr. Sachen's key testimony, and we may affirm a ruling of the district court if it is right, albeit for what appears to be an unsatisfactory reason. *Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc.*, 62 Kan. App. 2d 204, 214, 510 P.3d 1172, *rev. denied* 316 Kan. 756 (2022). In addition to being grounded in sufficient facts and reliable principles or methods, a physician's expert opinion must be stated to a reasonable degree of medical

probability to be admissible. K.S.A. 2022 Supp. 60-456(b) (sufficient facts and reliable principles or methods); *Bacon v. Mercy Hosp. of Ft. Scott*, 243 Kan. 303, 307-08, 756 P.2d 416 (1988) (expert medical opinion requires at least professional probability); *Acord v. Porter*, 58 Kan. App. 2d 747, 762-63, 475 P.3d 665 (2020) (expert opinion on causation must be stated to "reasonable degree of medical probability"); *Illig v. BeLieu*, No. 124,347, 2022 WL 7813881, at *5 (Kan. App. 2022) (unpublished opinion). A medical expert may not testify to opinions presented as possibilities. *Bacon*, 243 Kan. at 307-08.

As framed in the pivotal question Moses' lawyer put to Dr. Sachen, his testimony established only that he "believe[d]" the April 2019 collision either caused or aggravated Moses' migraines. That is, Dr. Sachen held that belief. But testifying to "believing" or having a "belief" does not itself convey some measure of the degree of acceptance the witness attributes to the expressed proposition or thing. In that respect, "believe" may be defined as "to suppose or think," Webster's New World College Dictionary 134 (5th ed. 2018), or "to hold an opinion," Merriam-Webster's Collegiate Dictionary 112 (11th ed. 2020). And a "belief" is defined as "anything believed or accepted." A "belief" encompasses a tenet held as a matter of faith, especially in a religious sense. Webster's New World College Dictionary 134 (5th ed. 2018) (definition of "belief").

We may (and do) infer Dr. Sachen was not testifying to an expression of faith in his deposition. But testimony couched in terms of what he believed merely conveyed an opinion of, at best, unstated soundness or conviction. Without something more—and there doesn't appear to have been more—Dr. Sachen cannot be taken as expressing a belief or opinion that exceeds a possibility. His testimony thus stated would be inadmissible at trial to prove causation. In turn, it cannot be used to defeat a motion for summary judgment. *Estate of Belden*, 46 Kan. App. 2d at 286 ("It would be both contrary to K.S.A. 60-256(e) and nonsensical to suggest an affidavit could be used to defeat summary judgment by presenting opinion evidence that would be inadmissible in the trial of the case.").

At the start of the deposition, Moses' lawyer asked that Dr. Sachen give "any opinion" requested about the treatment of Moses "to a reasonable degree of medical probabilities or reasonable degree of medical certainty." He agreed to do so. We suppose a lawyer may define how particular terms will be used in a deposition in a manner agreeable to the witness and the other parties. Here, however, the lawyer did not then rely on her defined term "opinion" in soliciting Dr. Sachen's testimony on causation and instead asked what he "believe[d]"—using an amorphous word and inviting a less rigorous response. The shifting terminology matters, especially given the lawyer's definitional directive at the outset.

In affirming the district court on this basis, we do not rely on a notion that the proper use of legal concepts or principles depends upon deploying designated "'magic words'" or invoking some form of jurisprudential catechism. See *Nunez v. Wilson*, 211 Kan. 443, 445, 448, 507 P.2d 329 (1973) (eschewing "'particular words of art'" for the expression of expert medical opinion testimony) (quoting *Bachran v. Morishige*, 52 Haw. 61, 69, 469 P.2d 808 [1970]). In certain circumstances, however, the law lends itself to commonly accepted terminology. The expression of expert medical opinion is an obvious example based on the legal requirement that the conclusions be held to "a reasonable degree of medical probability" and that sense of the witness' conviction be conveyed to the fact-finder. *Acord*, 58 Kan. App. 2d at 762-63. In turn, the phrase may be used to capture the requisite degree of reliability. But its use is not mandatory. *Nunez*, 211 Kan. at 448 (testimony sufficient if expert's words "'show reasonable probability'") (quoting *Bachran*, 52 Haw. at 69). The failing here was not the lawyer's omission of the phrase "reasonable degree of medical probability" from the causation question posed to Dr. Sachen but the substitution of wording that was neither the linguistic nor the legal equivalent and, instead, fell below the required standard.

On appeal, Moses reprises an alternative argument against summary judgment she advanced in the district court based on the "common knowledge" doctrine that recognizes

expert testimony need not be presented if a professional, typically a medical provider, acts in a manner so obviously negligent that liability would be plain to a reasonable juror without the aid of specialized knowledge. See *Webb v. Lungstrum*, 223 Kan. 487, 490, 575 P.2d 22 (1978); *Hubbard v. Mellion*, 48 Kan. App. 2d 1005, 1013-14, 302 P.3d 1084 (2013). We have found the briefing of this point to be inexact and thus confusing and ultimately unpersuasive.

We initially took the argument to be that jurors could use their common knowledge and understanding to reasonably conclude the collision involving Bojangles' cement mixer caused Moses' migraines, obviating the need for expert opinion testimony. For the reasons we have already explained, we find that premise to be wrong and the alternative argument cast that way to be unavailing.

During oral argument, Moses' lawyer informed us the point really focuses on the injuries Moses described when she went to the hospital emergency room a few hours after the collision. Even so refined, the argument fails.

First, the hospital records from the emergency room visit have never been offered or admitted as evidence in this case. Likewise, we have no sworn statement from Moses describing her injuries. As the party appealing an adverse judgment, Moses has an obligation to furnish an appellate record showing any claimed error. *In re Marriage of Bush*, 62 Kan. App. 2d 284, 290-91, 513 P.3d 494 (2022). And "[w]hen there are blanks in that record, appellate courts do not fill them in by making assumptions favoring the party claiming error in the district court." *Harman v. State*, No. 108,478, 2013 WL 3792407, at *1 (Kan. App. 2013) (unpublished opinion). The legal vitality of the point depends on that evidence.

As Moses suggests by way of example, expert medical testimony would not be required to prove causation when a person who did not have a broken leg before a motor

vehicle collision was treated for one immediately afterward. We agree. But the proposition proves too little here. We have no idea, let alone evidence, as to what kind of injuries Moses described to the emergency room personnel. Based on the appellate record, Moses effectively invites us to write a blank check on causation for any injury she may have described to the emergency room personnel and to reinstate her claim based on those injuries. We decline the invitation.

Second, we suppose the alternative argument could be construed to suggest that if causation were shown as to the injuries Moses claimed at the emergency room, the showing would extend to her migraines diagnosed months later. The idea would treat each of the injuries Moses attributes to the collision as a component of an indivisible unit, so proof of causation as to some would fold in the rest as part of the whole. Assuming Moses is advancing that position (though we aren't sure), it fails. Discrete injuries or harms do not blend into a unitary claim for purposes of establishing causation. Moreover, as we have already concluded, Moses has failed to identify record evidence supporting causation for whatever presently unidentified injuries she asserts she described in the emergency room. Either flaw undermines this take on Moses' alternative argument for reversing the district court.

We conclude that the district court committed no reversible error in granting summary judgment to the defendants.

Affirmed.