IN THE COURT OF APPEALS OF IOWA

No. 8-016 / 97-0221
Filed April 24, 1998

FILED
APR 24 1998
CLERK SUPREME COURT

CORINNE K. HEATH,
Appellant,

vs.

RANDALL J. BREMNER and RUSSELL ADAMS,
Appellees.

Appeal from the Iowa District Court for Black Hawk County, William G. Klotzbach, Judge.

Plaintiff appeals the district court's ruling granting defendants' motion for summary judgment. **AFFIRMED.**

Obie Saddler, Jr., and Charles F. Hinton, Waterloo, for appellant.

Angela C. Simon, David L. Hammer, and Scott J. Nelson of Hammer, Simon & Jensen, Dubuque, for appellee Randall J. Bremner.

Chad M. Vonkampen and James E. Shipman of Simmons, Perrine, Albright & Ellwood, P.L.C., Cedar Rapids, for appellee Russell Adams.

Heard by Cady, C.J., and Huitink and Streit, JJ.

HUITINK, J.

Corinne Heath appeals from the district court's adverse ruling granting Randall Bremner's and Russell Adams' motions for summary judgment dismissing her medical malpractice claims against them. We affirm.

I. Background Facts and Proceedings.

Corinne Heath sued her physicians, Randall J. Bremner and Russell Adams, for damages resulting from their alleged medical malpractice. Heath's petition was filed on November 30, 1995.[1] Bremner filed an answer on December 20, 1995. Adams filed his answer on January 8, 1996. Heath's designation and certification of an expert witness supporting her claims was filed on August 27, 1996.

On August 23, 1996, Bremner and Adams filed joint motions to exclude expert testimony supporting Heath's claims citing her failure to designate an expert witness within the time required by Iowa Code section 668.11 (1995). Bremner and Adams supported their motion for summary judgment with an affidavit from a medical expert attesting to their compliance with appropriate standards of medical care and the absence of any causal link between their conduct and Heath's injuries.

Heath conceded her designation of an expert witness was untimely. She, however, argued her failure to comply with the requirements of Iowa Code section 668.11 resulted from counsel's inadvertent failure to disclose a timely-retained expert

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[1] In her petition Heath alleges Dr. Bremner negligently nicked and perforated her small bowel while performing a vaginal hysterectomy. She also claims both doctors were negligent in not timely discovering her condition after surgery.

witness. Heath also argued Bremner and Adams were not prejudiced by her untimely designation because there was adequate time remaining before the scheduled trial date to complete any additional discovery.

The district court determined Heath's designation of an expert was untimely and factually distinguished Heath's circumstances from those justifying relief from the exclusionary consequences of an untimely designation of expert witnesses. The court, citing the content of the foregoing affidavit, entered summary judgment dismissing Heath's claims. Heath's 179(b) motion claiming the district court failed to address issues of good cause and resulting prejudice attending her untimely designation of an expert witness was summarily denied.

On appeal, Heath challenges the district court's rulings excluding expert testimony and granting summary judgment. She claims there was good cause for her failure to comply with Iowa Code section 668.11. Heath also argues there are genuine issues of material fact precluding entry of summary judgment.

II. Designation of Expert Witnesses.

A medical malpractice plaintiff is required to certify the name, qualifications, and testimonial purpose of any expert witness within 180 days of the defendant's answer. Iowa Code section 668.11(1). Failure to comply with this requirement precludes plaintiff's use of expert testimony unless the court upon a finding of good cause excuses the plaintiff's noncompliance. Iowa Code section 668.11(2). The legislative intent expressed in these provisions is "to provide certainty about the

identity of experts and prevent last minute dismissals when an expert cannot be found." *Hartsbarger v. Coffin,* 501 N.W.2d 501, 504 (Iowa 1993) (citing *Cox v. Jones*, 407 N.W.2d 23, 25-26 (Iowa 1991)). In *Hartsbarger* the court also stated:

> Section 668.11 is designed to require a plaintiff to have his or her proof prepared at an early stage in the litigation in order that the professional does not have to spend time, effort, and expense in defending a frivolous action.

Id.

Good cause ordinarily requires "'more than an excuse, a plea, apology, extenuation, or justification for the resulting effect.'" *Thomas v. Fellows,* 456 N.W.2d 170, 172 (Iowa 1990) (quoting *Donovan v. State,* 445 N.W.2d 765, 766 (Iowa 1989)). In making this determination, the court should consider "the seriousness of the deviation and defendant's prejudice or lack thereof." *Hartsbarger v. Coffin,* 501 N.W.2d at 505. It is also "appropriate to consider defendants' counsel's actions or lack thereof in determining good cause . . . ." *Id.* at 506.

The district court is vested with broad discretion in making its good cause determination. *Donovan v. State*, 445 N.W.2d at 766. We will not interfere absent an abuse of that discretion. *Id.* An abuse of discretion requires its exercise "'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" *State v. Blackwell*, 238 N.W.2d 131, 138 (Iowa 1976) (quoting *Weeks v. Burnor,* 326 A.2d 138, 140 (Vt. 1974)).

As already noted, the untimeliness of Heath's designation of an expert witness resulting from counsel's inadvertence is not disputed. The record also indicates Heath's intention regarding expert witnesses was the subject of inquiry by opposing counsel and the court as early as January 1996. Heath, nevertheless, failed to respond to counsel's interrogatory or designate her expert witness until after the motions which are the subject of this appeal were filed. If the purpose of section 668.11 is served by early designation of expert witnesses, we are unable to say Bremner and Adams were not prejudiced to some degree even though there were ten months remaining before trial when these motions were filed. We accordingly find no abuse of discretion and affirm the district court on this issue.

III. Summary Judgment.

Summary judgment is appropriate only if there exists no genuine issue of material fact. *Farm Bureau Mut. Ins. Co. v. Milne*, 424 N.W.2d 422, 423 (Iowa 1988). The moving party has the burden to show the nonexistence of a material fact. *Id.* The evidence must be viewed in the light most favorable to the nonmoving party. *Thorp Credit, Inc. v. Gott*, 387 N.W.2d 342, 343 (Iowa 1986). This procedure is functionally akin to a directed verdict, and every legitimate inference that reasonably can be deduced from the evidence should be afforded the nonmoving party. *Id.* A fact issue is generated if reasonable minds can differ on how the issue should be resolved. *Id.* If the conflict in the record consists only of legal consequences flowing

from undisputed facts, entry of summary judgment is proper. *Milne*, 424 N.W.2d at 423.

However, the nonmoving party may not simply rest on its pleadings and allegations once a motion for summary judgment is filed.

> When a motion for summary judgment is made and supported as provided in [Iowa R. Civ. P. 237], an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Iowa R. Civ. P. 237(e).

There is nothing in the record by way of affidavit, deposition testimony, interrogatory, or other response contradicting the contents of the affidavit from Bremner's and Heath's medical expert. Because Heath has failed to raise genuine issues of material fact, we are obliged to affirm the district court's ruling granting summary judgment.

We have considered the remainder of Heath's appellate contentions and find them to be without merit. The judgment of the district court is affirmed in its entirety.

AFFIRMED.