

IN THE COURT OF APPEALS OF IOWA

No. 8-196 / 97-0629

BONIFACIO B. MEQUI and SUSANA C. MEQUI,

Plaintiffs-Appellants,

vs.

**MARSHALLTOWN MEDICAL AND SURGICAL
CENTER, GARY A. PEASLEY, UROLOGIC
CONSULTANTS, P.C., and McFARLAND CLINIC, P.C.,**

Defendants-Appellees.

JUN 24 1998

Appeal from the Iowa District Court for Marshall County, Joel E. Swanson,
Judge.

Plaintiffs appeal the district court's ruling granting defendants' motion for
summary judgment in this medical malpractice action. **AFFIRMED.**

Jeffrey L.L. Stein of the Stein Law Office, Marshalltown, for appellants.

Robert C. Rouwenhorst and Susanna M. Albaugh of Dickinson, Mackaman,
Tyler & Hagen, P.C., Des Moines, for appellee Marshalltown Medical and Surgical
Center.

Aaron Oliver and Chester C. Woodburn III, of Hansen, McClintock & Riley,
Des Moines, for appellees Gary A. Peasley, Urologic Consultants, P.C., and
McFarland Clinic, P.C.

Heard by Cady, C.J., and Vogel and Mahan, JJ.

MAHAN, J.

Bonifacio and Susana Mequi appeal the district court's grant of defendants' motion for summary judgment. The Mequis argue the district court erred when it: (1) precluded their expert witnesses from testifying; (2) failed to consider the extent of the other witnesses' testimony; and (3) dismissed their action. We affirm.

On March 28, 1994, Bonifacio underwent a cystoscopy procedure at Marshalltown Medical Clinic and Surgical Center. The attending physician was Dr. Gary Peasley. On April 1, 1994, Bonifacio noticed blistering in his genital area. Peasley saw Bonifacio again on April 25 and prescribed medication for him. On May 2, Bonifacio saw Dr. Eileen Robb, his regular physician, and she confirmed he was suffering from herpes, an incurable viral infection. According to the Mequis' petition, Robb believed the virus *could* have been transmitted during the cystoscopy procedure. The Mequis claim the transmission of the virus occurred due to a failure to properly maintain a safe, healthy, and sterile environment.

The case scheduling order required the Mequis to designate their expert witnesses by November 15, 1996. However, the parties agreed to extend the date to November 22 to coincide with the deadline for the Mequis to answer defendants' interrogatories. Counsel for the Mequis claims he deposited the envelope into the mail on November 22, but opposing counsel never received them. Proof of service was not filed until December 11, nineteen days after the alleged service, and also after defendants filed a motion for summary judgment alleging the Mequis could not prove

their case due to the lack of expert testimony. This was not the first time defendants had failed to receive documents the Mequis' counsel claimed to have mailed.

The district court granted defendants' motion for summary judgment as to the exclusion of expert testimony, but refused to grant summary judgment as to the entire case. The district court determined no expert testimony was required because "sterilization and cleaning procedures are a routine occurrence not requiring the expertise and close supervision of specialized doctors, but is a rather routine matter." The district court also stated, "Since expert testimony is not necessary to determine whether Defendants exercised reasonable care in sterilizing the facility and instruments, a genuine issue of material facts exists for trial, and summary judgment is inappropriate."

Defendants filed a second motion for summary judgment and an affidavit by Dr. Steven Rosenberg. In their motion, defendants alleged the Mequis had absolutely no evidence the cystoscopy procedure caused Bonifacio's herpes. Defendants claimed their undisputed expert testimony showed Bonifacio did not develop herpes as a result of the procedure. They also argued Bonifacio cannot prove whether he developed herpes after the procedure or had the herpes prior to the procedure and had a recurrence.

Rosenberg's affidavit stated the sterilization procedure used would have eliminated any herpes virus on the instrument and there would normally be no contact, gloved or otherwise, with the site of Bonifacio's herpes outbreak. Rosenberg

also stated he is unaware of any reported cases of herpes being transmitted in a cystoscopy procedure.

The Mequis filed a resistance to defendants' motion. In it, they claimed Bonifacio's medical records they had already provided showed no record of any virus in his system prior to the procedure at issue, but there was ample evidence of the virus afterward, with no intervening circumstance or cause. The Mequis also contended they would be able to make proper proof of their claims through cross-examination of defendants and their witnesses.

The district court ruled:

The Plaintiffs rested on general denials and having had their experts precluded from testimony at the time of trial, seem to rely on "cross-examination of the Defendants and their witnesses in refutation of the defenses raised there." The Plaintiffs offer no affidavit or evidence that would establish that the Reverend Mequi was not infected with any virus prior to the hospital procedure at issue in this matter nor have they established the lack of any intervening causes. The Plaintiff would not be qualified to testify as it pertains to any viral infections and as Plaintiff's counsel stated at the time of hearing, the treating physician of the Plaintiff will simply state that a viral infection "could" have occurred during the cystoscopy.

The district court then granted defendants' motion and dismissed the action.

I. PROOF OF MAILING. The district court found the letters had not been mailed by November 22. We review findings of fact to see if they are supported by substantial evidence. Iowa R. App. P. 14(f)(1). However, we may make the determinations of law. *Liberty Mut. Ins. Co v. Caterpillar Tractor Co.*, 353 N.W.2d 854, 857 (Iowa 1984). Evidence is substantial if a reasonable mind could find it

adequate to reach the same findings. *Jones v. Lake Park Care Ctr., Inc.*, 569 N.W.2d 369, 372 (Iowa 1997).

Where a statute or rule merely states that written notice shall be given, ordinarily mailing a notice is not alone sufficient; the notice must be received. *Liberty Mut. Ins. Co.*, 353 N.W.2d at 857. When, however, a statute or rule does not merely state that written notice shall be given but also states that it may be given by mail, service is ordinarily accomplished by depositing the notice in the mail properly addressed and stamped. *Id.* Rule 82 expressly states, “service by mail is complete upon mailing.” *Id.* at 858; *State v. LeGrand*, 501 N.W.2d 59, 61 (Iowa App. 1993). Thus, the Mequis’ obligations are complete upon mailing of the designation of experts, irrespective of nonreceipt by defendants. *Liberty Mut. Ins. Co.*, 353 N.W.2d at 858. “[P]roof of mailing rests on proof of the *practice* . . . of placing the notice in envelopes . . . , and on the *practice* . . . of metering them, and placing them in a post office receptacle.” *Id.*

The Mequis’ counsel filed an affidavit alleging he personally deposited the designation of experts in the mail with proper postage. There is no evidence in the record of the *practice* of counsel’s office regarding the use of the mail system. Also, this was not the first incident regarding documents not being timely received through the mail. Further, defendants presented the affidavit of Mary Knight, an employee in the Customer Relations Office, Claims and Inquiry Department of the United States Post Office. Knight set out the process for delivery used by the post office:

[1] For postal delivery, a good address and sufficient postage are required.

[2] If the address is not correct or incomplete, the piece of mail will be returned to the sender as shown on the return address.

[3] If an envelope is undeliverable because of an incorrect address or if it cannot be returned to sender because of no return address, it is sent to the dead letter office of the U.S. Post Office in St. Paul, Minnesota. This office services a 20-state area.

[4] The dead letter office tries to determine the correct address from the area in which the envelope is addressed.

[5] If they cannot get an accurate address from the address label, then they open the mail and attempt to determine the addressee, or failing that, the sender and deliver it accordingly.

Given the lack of evidence presented by the Mequis' counsel regarding the practice of his office in using the postal system, the previous problems incurred when counsel claims to have mailed documents, the fact that *none* of the defendants' counsel received the documents, and Knight's affidavit, we find there is substantial evidence to support the district court's finding the designation of expert witnesses was not timely filed.

II. EXCLUSION OF EXPERT WITNESSES. We review exclusion of expert witnesses for an abuse of discretion. *Flom v. Stahly*, 569 N.W.2d 135, 143 (Iowa 1997); *Loftsgard v. Dorrian*, 476 N.W.2d 730, 732 (Iowa App. 1991). We will not find an abuse of discretion unless such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Selestian*, 515 N.W.2d 356, 358 (Iowa App. 1994); *Loftsgard*, 476 N.W.2d at 732.

The district court's decision the Mequis failed to timely file their designation of expert witnesses clearly supports its decision to exclude the experts. Thus, we find the district court did not abuse its discretion.

III. SUMMARY JUDGMENT.

We will uphold a grant of summary judgment when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. An issue of fact is "material" only when the dispute is over facts that might affect the outcome of the litigation, given the applicable governing law.

When we review the propriety of a grant of summary judgment, the moving party is required to show that no genuine issue of material fact exists and that he or she is entitled to judgment as a matter of law. In determining whether the movant has met this burden, we review the record in a light most favorable to the party opposing summary judgment, in this case the [defendant].

In this sense, we review the record as we would on a motion for directed verdict, with the nonmoving party entitled to every legitimate inference that reasonably can be deduced from the evidence and summary judgment is inappropriate if reasonable minds can differ on how the issue should be resolved.

Smith v. CRST Int'l, Inc., 553 N.W.2d 890, 893 (Iowa 1996). Even when the facts are not in dispute, summary judgment is not appropriate where reasonable minds could draw different inferences from the facts. *Grace Hodgson Trust v. McClannahan*, 569 N.W.2d 397, 400 (Iowa App. 1997).

The question of whether negligence is established under the evidence is almost without exception said to be inappropriate for summary judgment treatment. However, the critical issue in this case is not whether there was *negligence* in the actions of the defendant but whether there was *evidence* upon which liability could be found. Specifically, the issue is whether in view of the fact that [the plaintiff

is] precluded from introducing expert evidence, there is a genuine issue of material fact.

Donovan v. State, 445 N.W.2d 763, 766 (Iowa 1989) (citation omitted). If expert testimony is required to establish general negligence or the foundational facts and expert testimony is unavailable, then summary judgment is appropriate. *Welte v. Bello*, 482 N.W.2d 437, 440 (Iowa 1992); *Landes v. Women's Christian Ass'n*, 504 N.W.2d 139, 141 (Iowa App. 1993)

Ordinarily evidence of negligence in a medical malpractice action must be proven by expert testimony. *Cockerton v. Mercy Hosp. Medical Ctr.*, 490 N.W.2d 856, 859 (Iowa App. 1992). However, where a physician's lack of care is so obvious as to be within the comprehension of laymen, and to require only common knowledge and experience to understand, expert testimony is unnecessary. *Id.* In *Donovan*, the supreme court stated:

Donovan's own petition shows that his is a case requiring expert evidence. He alleged a break in sterile procedure resulting in staph infection, as well as misdiagnosis and delay of treatment. The affidavit of the State's expert asserted that Donovan's problems were caused by a weakening of a replacement valve due to a staph infection. He stated, however, that "[t]here was no indication that there was any break in a surgical or sterile technique which led to the prosthetic valve endocarditis." The factual issues raised clearly demanded expert evidence for their resolution.

Donovan, 445 N.W.2d at 767.

In this instance the Mequis allege defendants failed to follow sterile procedures to ensure Bonifacio would be safe from infection from herpes. We find this case is

similar to *Donovan*, and expert testimony is required to establish the factual issues raised by the Mequis. As noted above, the Mequis are precluded from presenting expert witnesses, so summary judgment is proper. Thus, even though we rule summary judgment is appropriate for a different reason than the district court, we affirm the result of the district court. See *Harbit v. Voss Petroleum, Inc.*, 553 N.W.2d 329, 330 (Iowa 1996) (we can affirm a trial court judgment on any ground, whether urged or not).

For these reasons, we affirm the exclusion of the expert witnesses and the grant of defendants' motion for summary judgment.

AFFIRMED.