IN THE COURT OF APPEALS OF IOWA

No. 2-195 / 91-1548

FILED
AUG 27 1992
CLERK SUPREME COURT

GAIL M. HAYEK,

Plaintiff-Appellant,

vs.

ARNIS B. GRUNDBERG, M.D.,

Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Richard A. Strickler, Judge.

Hayek appeals from a district court order overruling her motion to extend the time period to disclose experts pursuant to Iowa Code section 668.11 and sustaining Grundberg's motion for summary judgment concerning this medical malpractice action. **AFFIRMED.**

John M. Popelka of Capron, Avgerinos & Popelka, Chicago, Illinois, for appellant.

Steven K. Scharnberg and Glenn Goodwin of Duncan, Jones, Riley & Finley, Des Moines, for appellee.

Considered by Donielson, P.J., and Sackett and Habhab, JJ. Hayden, J., takes no part.

SACKETT, J.

This is a medical malpractice action. The trial court sustained a motion for summary judgment filed by defendant-appellee Arnis B. Grundberg, M.D. dismissing the claim of plaintiff-appellant Gail M. Hayek. Plaintiff appeals contending the trial court abused its discretion in not granting her leave to extend the time to disclose experts and in granting summary judgment on the issue of negligence. We affirm.

In May 1988, defendant operated on plaintiff's wrist to remove a ganglion cyst. Plaintiff claims in the course of the operation defendant severed the branch of her dorsal ulna sensory nerve.

On May 22, 1990, plaintiff filed a petition alleging defendant had committed medical malpractice and asking for damages. On June 13, 1990, defendant filed his answer. On July 1, 1991, defendant filed a motion for summary judgment, and plaintiff on July 24, 1991, filed a motion for leave to extend the time period to disclose experts. The trial court denied this motion.

We first address plaintiff's contention that, under the facts of this case, the trial court abused its discretion in denying the motion for leave to extend the time period to disclose experts.

Iowa Code section 668.11 requires a plaintiff in a negligence action against a licensed professional to

certify to the court and all of the parties the name, qualifications, and purpose for calling any expert witness within 180 days of the defendant's answer. See Donovan v. State, 445 N.W.2d 763, 765 (Iowa 1989). A failure to comply with this statutory dictate will result in the expert being prohibited from testifying in the action unless leave for the expert's testimony is given by the court for good cause shown. See Iowa Code § 668.11(2) (1989). It is undisputed that plaintiff did not file this certification. Plaintiff's argument is that good cause has been shown for her failure to designate expert witnesses in the specified period and she should be allowed to call her expert witnesses at trial.

Plaintiff advances she should be granted leave to certify her experts because (1) she had an expert, Dr. Leonard S. Bodell, M.D., prior to suit; (2) a copy of Dr. Bodell's report was attached to her answers to interrogatories filed in January 8, 1991; (3) the letter from Dr. Bodell contained the statement the defendant "failed to meet the accepted standard of care of a board certified orthopedic surgeon by probably cutting the branch of the dorsal ulna sensory nerve in the course of surgery"; (4) arrangements to depose Dr. Bodell were made and his deposition was scheduled for February 25, 1991, and continued because of a death in the family of defendant's attorney; and (5) plaintiff on June 13, 1991, sent the

defendant a letter identifying all of her experts and attempting to schedule the experts' depositions, and defendant answered plaintiff's designation by filing the motion for summary judgment.

The legislative intent of section 668.11 is that suit should not be brought against licensed professionals for malpractice unless there is a basis for the suit. See Farley v. Ginther, M.D. & Bluff Medical Ctr., 450 N.W.2d 853, 855 (Iowa 1990). The statute establishes a procedure for the orderly handling of malpractice litigation and fosters early disposition of potential nuisance cases and cases that must ultimately be dismissed because there is not expert testimony. See Thomas v. Fellows, 456 N.W.2d 170, 173 (Iowa 1990).

We review for an abuse of discretion. The plaintiff must show a good cause for her failure to timely designate an expert or lose her opportunity to call the expert at trial. See Cox v. Jones, 470 N.W.2d 23, 25 (Iowa 1991). Good cause requires more than an excuse or justification for the resulting effect. Id. It must be a sound, effective, truthful reason that is more than an excuse. Donovan, 445 N.W.2d at 766. The plaintiff must show the reason that the designation was not made was not due to his or her negligence. Id.

The question we address is not whether under these facts we may have granted plaintiff's motion. The issue is

whether the trial court abused its discretion in not doing so. See Cox, 470 N.W.2d at 25; Thomas, 456 N.W.2d at 172. Plaintiff did not meet the specifications of the statue, even if she did have expert testimony to support her claim from its inception. We cannot say the trial court abused its discretion in not allowing plaintiff additional time to designate experts. We affirm on this issue.

Plaintiff contends summary judgment should not have been sustained because, even without expert testimony, there is substantial evidence to establish a prima facie case of medical malpractice, and she had shown the necessary elements to rely on the doctrine of res ipsa loquitur.

Summary judgment procedure allows a party by proper motion to compel his or her adversary to come forth with specific facts which constitute competent evidence showing a prima facie claim or defense. See McCarney v. Des Moines Register and Tribune Co., 239 N.W.2d 152, 154 (Iowa 1976); Iowa Civil Rights Comm'n v. Masssey-Ferguson, Inc., 207 N.W.2d 5, 8 (Iowa 1973); Gruener v. City of Cedar Falls, 189 N.W.2d 577, 580 (Iowa 1971).

Summary judgment is appropriate only if there exists no genuine issue of material fact. See Farm Bureau Mut. Ins. Co. v. Milne, 424 N.W.2d 422, 423 (Iowa 1988). The evidence must be viewed in the light most favorable to the nonmoving party. See 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.

To establish a prima facie case of medical malpractice the plaintiff must show an applicable standard of care, demonstrate a violation of the standard, and show a causal relationship between the violation and the harm of which he or she complains. See Cole v. Taylor, 301 N.W.2d 766, 767 (Iowa 1981); Daboll v. Hoden, 222 N.W.2d 727, 734 (Iowa 1974). Generally in a medical malpractice suit, the applicable standard of care and its breach must be provided by expert witnesses. See Oswald v. LeGrand, 453 N.W.2d 634, 635 (Iowa 1990). See also Perin v. Hayne, 210 N.W.2d 609, 613 (Iowa 1973). There are exceptions to the rule where the physician's lack of care is so obvious that it is within the comprehension of a person who is not medically trained or where a physician injures a part of the body not being treated. See Buckroyd v. Bunten, 237 N.W.2d 808, 811-12 (Iowa 1976). One undergoing surgery does not sustain an unusual injury to a healthy part of his body not within the area of the operation in the absence of negligence. See Wiles v. Myerly, 210 N.W.2d 619, 629 (Iowa 1973); Stickleman v. Synhorst, 243 Iowa 872, 878, 52 N.W.2d 504, 508 (1952).

Plaintiff contends the severing of a nerve while removing a ganglion cyst is an event of such a nature as cannot reasonably be expected to occur when due care is exercised by a board certified orthopedic surgeon. Plaintiff contends such things do not ordinarily attend the service of one possessing ordinary skill and experience in delicate work of surgery, one does not need scientific knowledge or training to understand this and, ordinarily speaking, such results are not anticipated if reasonable care is exercised by the operator. We disagree with plaintiff's contention the trial court erred in finding as a matter of law the defendant was not negligent. We affirm on this issue.

Plaintiff also contends she has established a claim under the doctrine of res ipsa loquitur. To invoke the doctrine of res ipsa loquitur in a tort action for negligence, the plaintiff has the burden of proving the defendant had the exclusive control of the instrumentality that caused the plaintiff's injury, and the injury was the type that in the ordinary course of events would not have happened if reasonable care had been used. See Wiles, 210 N.W.2d at 624-25. Because the doctrine of res ipsa loquitur creates an inference of negligence without specific proof, it is applied sparingly in medical malpractice cases. See Tappe v. Iowa Methodist Medical Ctr., 477 N.W.2d 396, 399 (Iowa 1991). We cannot say that

an injury to a nearly invisible nerve branch just beneath the surface of the skin of the hand would not have happened if reasonable care had been used in surgery on the hand for a ganglion cyst. See Perin, 210 N.W.2d at 614. The trial court did not err on this issue.

AFFIRMED.