IN THE COURT OF APPEALS OF IOWA

No. 1-615 / 91-0345

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DANIEL MARK KENNIS,

Plaintiff-Appellant,

vs.

MERCY HOSPITAL MEDICAL CENTER, SURGICAL AFFILIATES PROFESSIONAL CORPORATION, FOREMAN AND DICK PROFESSIONAL CORPORATION, DOCTOR JAMES CATERINE, and **DOCTOR HUGH C. DICK,**

Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

Plaintiff appeals an adverse ruling of the district court granting defendants' motion for summary judgment. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Daniel Mark Kennis, Grimes, pro se.

Glenn Goodwin of Duncan, Jones, Riley & Finley, P.C., Des Moines, for appellee Mercy Hospital Medical Center.

Chester Woodburn of Hansen, McClintock & Riley, Des Moines, for appellees Doctors Dick and Foreman & Dick, P.C.

Considered by Schlegel, P.J., and Sackett and Habhab, JJ. Oxberger, C.J., and Donielson and Hayden, JJ., take no part.

SACKETT, J.

Plaintiff-appellant Daniel Karl Kennis sued defendants-appellees Mercy Hospital Medical Center, Surgical Affiliates Professional Corporation, Foreman and Dick Professional Corporation, Doctor James Caterine, and Doctor Hugh C. Dick for medical malpractice. The trial court sustained a motion for summary judgment filed by the defendants and dismissed plaintiff's case. The plaintiff has appealed.

Plaintiff contends on appeal (1) the trial court erred in ruling that expert testimony was necessary to show a lack of care; (2) the trial court erred in ruling expert testimony was necessary when he pled res ipsa loquitur; and (3) the requirement that he needed expert testimony is unconstitutional. We affirm in part, reverse in part, and remand.

Plaintiff-appellant Daniel Mark Kennis sued the defendants for injuries he claimed to receive as a result of three surgeries. Plaintiff asserts a lack of care, the wrong surgical procedure, and lack of consent to surgical procedure. The plaintiff did not designate a medical expert within 180 days as required under Iowa Code section 668.11 (1987).

In 1971, the plaintiff had an abdominal lipectomy and jejunoileostomy, sometimes called intestinal bypass. This was plaintiff's first surgery, and it was not performed by any of the defendant surgeons, but it was performed at the defendant medical center. During plaintiff's first

surgery, the surgeon was not able to insert a catheter in the plaintiff's penis and ultimately a filiform was inserted with an attached catheter. The records from that surgery state plaintiff had an obstruction in his urethra. Plaintiff did not feel the first surgery was successful. Defendant James Caterine was to perform a second surgical procedure to reverse the first surgical procedure. The second surgery was performed at defendant Mercy Hospital Medical Center. During the second surgical procedure after the plaintiff was anesthetized, his doctors were not able to insert a urinary catheter in the plaintiff's penis, so defendant Dick, a urologist, was called in to place a suprapubic cystostomy tube. Placing the tube involved putting a hole directly in plaintiff's bladder. The reversal surgery was then completed.

After the second operation, the suprapubic cystostomy tube dislodged and leaked urine in plaintiff's body. A third operation was performed by defendant Dick to replace the suprapubic cystostomy tube. The plaintiff was discharged from the hospital. He had continued problems, and four days after he was discharged, he was seen by Kathleen Smith, a medical doctor affiliated with defendant Surgical Affiliates P.C. Smith performed a fourth operation where she cut open the suprapubic wound which was infected and drained it before admitting plaintiff to defendant hospital for I.V. antibiotic therapy and wound care.

The plaintiff's suit claims medical malpractice in operations two, three, and four. Plaintiff contends defendants were negligent in a number of particulars and that he did not give an informed consent to the operations. It is the defendant's position he can prove these claims without expert testimony.

To establish a prima facie case of medical malpractice, a 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. 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. Oswald v. LeGrand, 453 N.W.2d 634, 635 (Iowa 1990). 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. Buckroyd v. Bunten, 237 N.W.2d 808, 811-12 (Iowa 1976).

We have considered each of plaintiff's claims under these standards and find in all instances except the argument addressed below defendant clearly needed expert testimony to prove his claims. He failed to provide that evidence in response to the motion for summary judgment. The trial court properly sustained that part of defendants'

motions for summary judgment. To grant a motion for summary judgment, a court must determine the moving party has shown no issue of material fact exists. Northrup v. Farmland Indus., Inc., 372 N.W.2d 193, 195 (Iowa 1985).

The plaintiff contends that if defendant Caterine had read the hospital medical records on the plaintiff he would have known there was a stricture in plaintiff's urethra, and if plaintiff had been so advised and had known that a suprapubic catheter was to be inserted, he would not have agreed to the surgery. The plaintiff contends medical evidence is not necessary to prove that the record existed (which it did) and the doctor had a duty to examine the records (which he did not do). Plaintiff further contends when the doctors discovered the urethral stricture in the operating room while attempting the elective surgery, they should have awakened the plaintiff and explained the complications rather than calling in the urologist to perform the suprapubic cystostomy placement, a procedure that involved cutting and inserting a catheter. Plaintiff points out under normal conditions that the cutting or surgical procedure for placement of the suprapubic cystostomy tube would not have been necessary. Plaintiff further argues the third and fourth operations were caused by the negligence of lack of consent in operation number two.

The plaintiff contends the evidence in this case is that the occurrence was such that in the ordinary course of

things it would not have happened if reasonable care had been used, and it is such an occurrence that it was within the common knowledge that it was negligence. The defendants argue the questions are highly technical and require a medical opinion.

The record would support a finding Caterine failed to find from the medical records that a surgical procedure would be necessary to insert a catheter in the plaintiff's body, and because of the failure to learn about the problems before surgery, the problem did not manifest itself until after the plaintiff was under anesthetic. The evidence shows that in the absence of the blockage in the urethra, a catheter would have been inserted in the penis and the surgical puncturing of the bladder would not have been necessary. One undergoing surgery does not sustain an unusual injury to a healthy part of his body 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, 879, 52 N.W.2d 504, 508 (1952). The surgery was elective. There is no evidence plaintiff's life or health would have been in danger if the surgery was not continued when the doctors discovered the problem of putting a catheter in his urethra.

We believe that persons without medical training could have within their common experiences knowledge that if reasonable care had been used, the doctor would have

discovered the constricted urethra before plaintiff was anesthetized for surgery. And that had the problem been identified, the plaintiff would have been informed of the procedure necessary to catheterize him and would have had that knowledge in determining whether he would consent to the elective reversal operation. The catheterization involved another invasive procedure in an elective operation. Furthermore, a nonmedical person could find that the second procedure was performed without waking the plaintiff. The trial court erred in granting summary judgment on the general negligence claim and consent claims. The record establishes circumstances of the occurrence sufficient to defeat summary judgment without the necessity of expert medical evidence. See Welte v. Bello, No. 90-1723 (Iowa Mar. 18, 1992).

The plaintiff also raises the constitutionality of section 668.11 on equal protection and due process grounds. These issues were addressed and decided against the plaintiff in Thomas v. Fellows, 456 N.W.2d 170, 172-73 (Iowa 1990).

We affirm in part and reverse in part. We affirm in all respects except that we reverse for a trial on the issues of the negligence of Caterine in not discovering the blocked urethra before surgery and against Caterine and Dick on the issue of whether there was informed consent for the procedure. We do not infer there was negligence on either ground, merely that plaintiff has met the burden to

escape summary judgment on these issues. We affirm the dismissal of the claims against defendant Mercy Hospital Medical Center and Surgical Affiliates Professional Corporation.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

Schlegel, P.J., concurs; Habhab, J., concurs in part and dissents in part.

HABHAB, J. (concur in part and dissent in part)

I concur with that part of the majority opinion that affirms the trial court. I also concur in the dismissal of the claims against defendant Mercy Hospital Medical Center and Surgical Affiliate Professional Corporation. I dissent, however, from that part of the majority opinion that reverses and remands for trial on the issues of the negligence of Caterine in not discovering the blocked urethra before surgery and against Caterine and Dick on the issue of whether there was informed consent for the procedure. I concur with the manner in which the trial judge disposed of those matters.