IN THE COURT OF APPEALS OF IOWA

No. 0-518 / 00-0161
Filed August 30, 2000

JENNIFER DALEY,
Plaintiff-Appellant,

vs.

JOSEPH E. HOAGBIN, M.D.,
Defendant-Appellee.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Pottawattamie County, James Heckerman, Judge.

Plaintiff appeals following the grant of summary judgment dismissing her medical malpractice action. She contends there was evidence her injury was a proximate result of defendant's negligence. We disagree. **AFFIRMED.**

Edward L. Wintroub of Wintroub, Rinden, Sens & McReary, Omaha, Nebraska, for appellant.

Gregory M. Thomas and Mary M. Schott of Sodoro, Daly & Sodoro, P.C., Omaha, Nebraska, for appellee.

Considered by Sackett, C.J., and Streit and Vaitheswaran, JJ.

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SACKETT, C.J.

Plaintiff-Appellant Jennifer Daley appeals following the dismissal of her medical malpractice action against Defendant-Appellee Joseph E. Hoagbin. The district court in sustaining the defendant's motion to dismiss on summary judgment found that plaintiff failed to show through expert testimony that defendant's alleged negligence was the cause of plaintiff's injuries. Plaintiff on appeal contends that the summary judgment should not have been granted because there was expert testimony which if believed would have proved that fact. We affirm.

On July 2, 1996, plaintiff went to the emergency room at Mercy Hospital in Council Bluffs, Iowa, complaining of pain in her left hip and back following a fall several days earlier down some steps. Defendant examined plaintiff and x-rays were taken. Defendant determined plaintiff had contusions to the left hip and buttock and released her. Plaintiff continued to have pain in her low back and leg and experienced numbness. On July 29, 1996, she sought further medical care from Patrick W. Bowman, M.D. of Nebraska Spine Surgeons, P.C. The medical record from this group indicated plaintiff was diagnosed there as having "a herniated lumbar disk, L4-5, left with severe L5 radiculopathy. The records further indicated that on August 1. 1996 Plaintiff had a microlumbar diskectomy L3-4, left and a large free fragment removed.

Plaintiff subsequently filed this suit alleging that as a result of defendant's failure to properly diagnose her injury she suffered a severe and permanent injury. Plaintiff designated Bowman as her sole expert. Defendant took Bowman's deposition and then filed a motion for summary judgment contending

his testimony did not provide sufficient evidence to support a finding that the negligence of defendant if any was the proximate cause of plaintiff's alleged injury and damages. The district court in sustaining defendant's motion held "the testimony of Dr. Bowman is not sufficient to show the required nexus between defendant's alleged negligence and the plaintiff's injuries. Dr. Bowman is not able to testify to any degree of certainty that any of plaintiff's injuries were caused by the actions of the defendant." Plaintiff contends that Bowman's testimony supplies the required nexus.

Our review of a grant or denial of summary judgment is for correction of errors at law. Iowa R. App. P. 4; *Gabrilson v. Flynn*, 554 N.W.2d 267, 270 (Iowa 1996). Summary judgment is only appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 237(c); *Phipps v. IASD Health Servs. Corp.*, 558 N.W.2d 198, 201 (Iowa 1997). To determine whether there is a genuine issue of material fact, the court must examine the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. Iowa R. Civ. P. 237(c). We review the record in the light most favorable to the party opposing summary judgment, in this sense, we consider a motion for summary judgment as we would a motion for directed verdict. *Dickerson v. Mertz*, 547 N.W.2d 208, 212 (Iowa 1996). Under this standard, summary judgment is inappropriate if reasonable minds would differ on how the issue should be resolved. *Id.*

In order to establish a prima facie case of medical malpractice, plaintiff must show evidence which establishes the applicable standard of care, demonstrate this standard has been violated, and develop a causal relationship

between the violation and the alleged harm. *Kennis v. Mercy Hosp. Medical Center*, 491 N.W.2d 161, 165 (Iowa 1992); *Daboll v. Hoden*, 222 N.W.2d 727, 734 (Iowa 1974).

Expert testimony is required to establish proximate cause in a medical malpractice suit. *See Lambert v. Sisters of Mercy Health Corp.*, 369 N.W.2d 417, 420 (Iowa 1985); *Bradshaw v. Iowa Methodist Hospital*, 251 Iowa 375, 101 N.W.2d 167, 172 (1960). The element of proximate cause has two components: (1) "the defendant's conduct must have in fact caused the plaintiff's damages," and (2) "[t]he policy of the law must require the defendant to be legally responsible for the injury." *Gerst v. Marshall*, 549 N.W.2d 810, 815 (Iowa 1996). The first factor is commonly known as causation in fact. To prove causation in fact, the plaintiff must at a minimum establish that, but for the defendant's negligence, the plaintiff's injury would not have occurred. *Id.* In other words, " ' there must be some causal relationship between the defendant's conduct and the injury or event for which damages are sought.' " *Id.* at 818 (quoting *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 862 (Mo.1993) (en banc)). Whether the injuries suffered by the plaintiff were the result of or worsened by defendant's failure to properly diagnose and treat her when she first came into the emergency room is not within the common knowledge of a non-medically trained person. Consequently, to generate a factual issue on the question of proximate cause, plaintiff must present expert testimony sufficient to prove the injury was caused by defendants' negligence. *Bazel v. Mabee*, 576 N.W.2d 385, 388 (Iowa App. 1998).

Bowman's deposition testimony provided substantial evidence to show there was a genuine issue of material fact as to whether defendant breached a standard of care. However, although fault is established, it does not necessarily prove proximate cause. *Id.* at 387; *see Oak Leaf Country Club, Inc. v. Wilson*, 257 N.W.2d 739, 746 (Iowa 1977). Proof of negligence alone does not create a jury question; "[t]here must also be substantial evidence it was the proximate cause of plaintiff's damage." *Barnes v. Bovenmyer*, 255 Iowa 220, 112 N.W.2d 312, 316-17 (1963).

Plaintiff substantially relied on the following portion of Bowman's deposition to support her position that there was substantial evidence to support a finding that defendant's negligence was a proximate cause of her injury:

> Q. Now I am going to paraphrase how I understand that and you, I am sure, will correct me if I am wrong, but it is my understanding that you believe earlier intercession, if you believe her story, may have – may have made a difference, you can't say for – to a reasonable degree of certainty it would have – it would have made things better. It may have made a difference but how much you can't really say?
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> A. The answer to that is, yes, but the corollary, I don't know with reasonable medical certainty that it wouldn't, either. I just don't know.

Bowman essentially states that earlier diagnosis or treatment may have or may not have made a difference in lessening the injuries plaintiff suffered. Conduct is a proximate cause of damage when it is a substantial factor in producing damage and the damage would not have happened except for the conduct. *Bazel*, 575 N.W.2d at 389; *Grinnell Mut. Reinsurance Co. v. Employers Mut. Casualty Co.*, 494 N.W.2d 690, 693 (Iowa 1993). Bowman's testimony taken in the light most favorable to

plaintiff could not cause a reasonable person to consider the examination and lack of proper diagnosis or treatment was the proximate cause of plaintiff's condition. Bowman does not know whether defendant's failure to diagnose or treat plaintiff's injuries was a substantial factor in producing or increasing the injuries suffered. Accordingly he testified, "I just don't know".

When a jury is left to speculate on whether the defendant's conduct in fact caused the plaintiff's damages, the evidence is insufficient to support a finding of proximate cause. *Hasselman v. Hasselman*, 596 N.W.2d 541, 546 (Iowa 1999); *see also Gerst*, 549 N.W.2d at 818-19 (holding the district court properly granted summary judgment to the defendants when plaintiffs' evidence required the jury to speculate as to whether the plaintiffs' damages would not have occurred but for the defendants' conduct); *Blackhawk Bldg. Sys., Ltd. v. Law Firm of Aspelmeier, Fisch, Power, Warner & Engberg*, 428 N.W.2d 288, 290 (Iowa 1988) (holding "[a] jury cannot be left to speculate, but rather, must be provided with facts affording a reasonable basis for ascertaining the loss.") Accordingly, summary judgment was properly granted to defendant. The judgment of the district court is affirmed.

AFFIRMED.