

IN THE COURT OF APPEALS OF IOWA

No. 8-101 / 97-1018

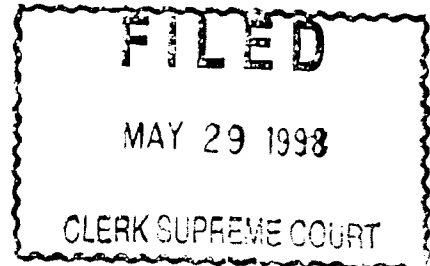
HARRY BLEWETT and RITA M. BLEWETT,

Plaintiffs-Appellants,

vs.

THE MEDICAL ASSOCIATES CLINIC,

Defendant-Appellee.



Appeal from the Iowa District Court for Dubuque County, Robert J. Curnan,
Judge.

Plaintiffs appeal from a district court ruling granting defendant a summary
judgment. **REVERSED.**

James H. Reynolds, Dubuque, for appellants.

Nancy J. Penner and Connie Alt of Shuttleworth & Ingersoll, P.C., Cedar
Rapids, for appellee.

Heard by Streit, P.J., Vogel, J., and Habhab, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

HABHAB, S.J.

Harry and Rita Blewett (“the Blewetts”) appeal the district court’s grant of summary judgment following motion by defendant The Medical Associates Clinic (“MAC”). The Blewetts contend the district court incorrectly determined an expert would be necessary to prove their claim of negligence. Neither party contends the facts are in dispute; however, the Blewetts contend the issues should have been left to the jury. We reverse.

Rita Blewett went to MAC for catheterization. The process required her to lie on her back with her feet placed in stirrups. When the doctor completed the examination, Lori Hessling, a licensed practical nurse, took Rita’s left foot out of the stirrup, then reached behind Rita’s back and helped her sit up. Rita’s right foot was still in the stirrup. The Blewetts contend this awkward position injured Rita’s back. Rita did not report her injury immediately. Instead, she came back four days later complaining of pain in her right buttock. Rita told the doctor the pain started when she felt a little twinge as she was being taken off the examining table and the pain became worse that night. She also told the doctor she left the examining table awkwardly.

The Blewetts did not designate an expert. MAC filed a summary judgment motion on the ground the Blewetts could not establish their cause of action without expert testimony. The district court agreed and granted MAC’s motion.

I. STANDARD OF REVIEW. Because the only dispute concerns the legal consequences flowing from undisputed facts, our review is limited to whether the district court correctly applied the law. *Baker v. City of Ottumwa*, 560 N.W.2d 578, 582 (Iowa 1997).

II. 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 plaintiff.

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). 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).

In making its ruling, the district court stated:

Whether or not expert testimony is required is always a judgment call. In this case, the Court determines that a jury could not find failure to act with ordinary care under the above facts. Absent evidence that the events violate a professional's standard of care, the Court finds that Defendant's motion should be sustained.

Ordinarily, evidence of negligence in a medical malpractice action must be proven by expert testimony. *Cockerton v. Mercy Hosp. Medical Center*, 490 N.W.2d 856, 859 (Iowa App. 1992); *see also Welte*, 482 N.W.2d at 440-41. When the case involves professional activities, the standard is the care one would obtain generally under similar circumstances. *Kastler v. Iowa Methodist Hosp.*, 193 N.W.2d 98, 102 (Iowa 1971). However, when the question involves nonmedical, administrative, ministerial, or routine care, the standard is such reasonable care for patients as their known mental and physical condition may require. *Id.*; *Cockerton*, 490 N.W.2d at 859. The characterization of the activity is determined by the nature of the activity itself, not by its purpose. *Kastler*, 193 N.W.2d at 102.

If the activity is classified as a professional activity, then the evidence of the requisite skill and care normally exercised must be given by experts, unless the lack of care is so obvious as to be within the comprehension of the layman's common knowledge or experience, or a part of the body not under treatment is injured. *Sinkey v. Surgical Assoc.*, 186 N.W.2d 658, 660 (Iowa 1971). If the activity is classified as nonmedical, administrative, ministerial, or routine, no expert testimony is required; the jury may use its own knowledge and good sense with respect to the conduct in

question. *Kastler*, 193 N.W.2d at 102.

In the following cases, our courts have classified the activities as professional activities: *Kennis v. Mercy Hosp. Medical Center*, 491 N.W.2d 161, 165-66 (Iowa 1992) (patient's claim in medical malpractice action that cystostomy tube was improperly placed during intestinal surgery and that surgeon and hospital provided improper care and treatment was required to be supported by expert testimony to establish applicable standard of care and violation of that standard); *Oswald v. LeGrand*, 453 N.W.2d 634, 638 (Iowa 1990) (independent expert testimony was required for claim that doctors' or hospital's treatment prompted or failed to prevent patient's premature delivery and, absent such testimony, that claim could not be maintained); *Donovan v. State*, 445 N.W.2d 763, 767 (Iowa 1989) (plaintiff alleging break in sterile procedure resulting in staph infection required expert testimony to establish his case).

In contrast, our supreme court in *Welte* reviewed a number of cases where it held that the occurrence or event was so obvious as to be within the comprehension of laypersons and required only common knowledge and experience. Those cases are as follows:

Wiles v. Myerly, 210 N.W.2d 619 (Iowa 1973) (vascular operation -- burned buttocks; "Knowledge and experience teaches us that in the ordinary course of events 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."); *Frost v. Des Moines Still College*, 248 Iowa 294, 79 N.W.2d 306 (1957) (back surgery -- ether burn to abdomen; "It is a simple understandable rule of circumstantial

evidence with a sound background of common sense and human experience, and difficulty comes only when we attempt to transform it into a rigid legal formula, which arbitrarily precludes its application in many cases where it is most important that it be applied. This is such a case. We should, in applying the rule, not forget the particular force and justice of the rule."); *Stickleman v. Synhorst*, 243 Iowa 872, 52 N.W.2d 504 (1952) (insertion of needle into trachea -- puncture to blood vessel in throat; "We are aware of no rule that the nature of an injury must be shown by medical testimony if the injury is such that it may satisfactorily be shown by other evidence. We think the nature of plaintiff's injury is sufficiently shown here."); *Whetstine v. Moravec*, 228 Iowa 352, 291 N.W. 425 (1940) (removal of six teeth -- root of tooth found in patient's lung; "It was a mechanical job. It is common knowledge that in extracting a tooth or its roots, neither ordinarily passes into the trachea and thus into the lungs. In fact such an occurrence is most rare. In the words of the authorities it is a matter of such rare occurrence and unusual character, that its very happening carries with it a strong inherent probability of negligence.").

Welte, 482 N.W.2d at 441.

Additionally, our supreme court has classified activities as nonmedical, administrative, ministerial, or routine in the following cases: *Landes*, 504 N.W.2d at 141 (taking patient to bathroom approximately three hours after arthroscopic knee surgery was non-medical or routine); *Cockerton*, 490 N.W.2d at 859 (question of handling patient during x-ray procedure was question of routine care, even though x-ray technician has elaborate training requirements, as laid out by the Iowa Code); *Kastler*, 193 N.W.2d at 102 (taking psychiatric patient to shower and leaving her alone even though she had complained of fainting spells was a question of routine care).

We find the activity in question fits into the latter category, and no expert

testimony is required to prove negligence. Thus, we are unable to agree with the district court's interpretation of the law. For this reason, we reverse the decision of the trial court.

In passing, defendant in its brief argues for the first time on appeal "plaintiffs cannot establish without expert testimony that the lumbosacral strain documented on January 11, 1994, or any subsequent difficulties Rita Blewett has experienced, are causally connected to the manner she was assisted to a sitting position on January 7." The issue of causation was not raised in defendant's motion for summary judgment, nor was it addressed by the trial court in its ruling. Accordingly, there is nothing for review as to that issue in this court. *See Mather v. State*, 200 N.W.2d 498, 503 (Iowa 1972).

However, since the question of causation may appear later, we do note that even though breach of a duty may be established, proximate cause must be determined separately. *See Blackhawk Bldg. Sys., Ltd. v. Law Firm*, 428 N.W.2d 288, 290 (Iowa 1988). Proximate cause does not necessarily follow breach of a duty. *Id.*

The proximate cause principle, referred to by our supreme court in *Kastler*, is stated in Restatement, Torts 2d § 431:

The actor's negligent conduct is a legal cause of harm to another if:

- (a) his conduct is a substantial factor in bringing about the harm, and
- (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.

REVERSED.