IN THE COURT OF APPEALS OF IOWA

No. 5-480 / 94-1532

PATRICIA K. HOGAN,

Plaintiff-Appellant,

vs.

D. G. SCHWEIZER,

Defendant-Appellee.

FILED
OCT 31 1995
CLERK SUPREME COURT

Appeal from the Iowa District Court for Floyd County, Jon Stuart Scoles, Judge.

Patricia Hogan appeals the district court's grant of defendant D. G. Schweizer's motion for summary judgment in this medical malpractice case. **AFFIRMED.**

Richard N. Tompkins, Jr., Mason City, for appellant.

Kerry A. Finley and Thomas A. Finley of Finley, Alt, Smith, Scharnberg, May & Craig, P.C., Des Moines, for appellee.

Heard by Sackett, P.J., Cady, J., and McCartney, S.J.*, but decided by Donielson, C.J., Hayden, Sackett, Habhab, Cady and Huitink, JJ.

* Senior judge from the Second Judicial District serving on this court by order of the Iowa Supreme Court.

SACKETT, J.

This appeal follows the trial court affirmance of defendant's motion for summary judgment in a medical malpractice action following plaintiff's failure to certify experts. We affirm.

Plaintiff-appellant Patricia K. Hogan sued defendant-appellee D. G. Schweizer contending the doctor had failed to discover a cut tendon in her hand. Plaintiff failed to certify to the district court and to defendant the name, qualifications, and purpose of an expert witness she expected to have testify in her behalf within the time frame directed by statute. *See* Iowa Code § 668.11(1)(a) (1993). Defendant also propounded interrogatories requesting the same information which interrogatories were not answered.

Defendant filed a motion for summary judgment contending plaintiff could not establish a prima facie case or generate a factual issue because she was precluded from offering expert testimony due to her failure to designate expert witnesses as directed by Iowa Code section 668.11(1)(a) and the trial court's scheduling order. Plaintiff had not requested an extension of time to designate an expert.

The trial court set the motion filed July 19, 1994 for hearing on September 6, 1994. Plaintiff and her counsel did not respond to the motion or appear at the hearing, although defendant's counsel was telephoned from court chambers. While plaintiff's attorney talked to the trial judge on the telephone, his comments were not reported. The trial court granted summary judgment and plaintiff now appeals.

Defendant, therefore, contends plaintiff has failed to preserve the issues now raised on appeal. Without deciding whether the issues are preserved, we address plaintiff's challenge to the motion.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 237(c); *see Farm Bureau Mut. Ins. Co. v. Milne*, 424 N.W.2d 422, 423 (Iowa 1988). The moving party has the burden to show the nonexistence of a material fact. *Milne*, 424 N.W.2d at 423, and the evidence must be viewed in the light most favorable to the resisting party. *Thorp Credit, Inc. v. Gott*, 387 N.W.2d 342, 343 (Iowa 1986). The procedure is functionally akin to a directed verdict, and every legitimate inference that reasonably can be deduced from the evidence should be afforded the resisting party. *Id.*; *Sherwood v. Nissen*, 179 N.W.2d 336, 339 (Iowa 1970). A fact issue is generated if reasonable minds can differ on how the issue should be resolved, but if the conflict in the record consists only of the legal consequences flowing from undisputed facts, entry of summary judgment is proper. *Milne*, 424 N.W.2d at 423; *Gott*, 387 N.W.2d at 343. If the motion is properly supported, however, the resisting party "must set forth specific facts showing that there is a genuine issue for trial." Iowa R. Civ. P. 237(e). The language of our rule and case law are substantially similar or identical to that of rule 56 of the Federal Rules of Civil Procedure, *see, e.g., Matsushita Elec. Indus. Co. v.*

Zenith Radio Corp., 475 U.S. 574, 585-88, 106 S. Ct. 1348, ____, 89 L. Ed. 2d 538, 551-53 (1986), from which we may draw for guidance in interpreting our own rule, *Sherwood*, 179 N.W.2d at 339.

To establish a prima facie case of medical malpractice, a plaintiff must produce evidence establishing (1) the applicable standard of care; (2) a breach of that standard; and (3) a causal relationship between the breach and the injury sustained. *See Kosburg v. Washington Hosp. Center, Inc.*, 394 F.2d 947, 949 (8th Cir. 1968); *Oswald v. LeGrand*, 453 N.W.2d 634, 635 (Iowa 1990); *Daboll v. Hoden*, 222 N.W.2d 727, 734 (Iowa 1974). Summary judgment in a medical malpractice action is proper if the plaintiff cannot produce evidence upon which liability can be found. *See Cox v. Jones*, 470 N.W.2d 23, 26-27 (Iowa 1991).

The Iowa legislature has required, by statute, parties designate experts in a timely fashion. *See* Iowa Code § 668.11(1)(a). If a party fails to timely disclose an expert, the expert shall be prohibited from testifying unless the trial court grants leave for good cause. *See* Iowa Code § 668.11(2).

The court has held plaintiff must substantially comply with this statute. *Hamsbarger v. Coffin*, 501 N.W.2d 501, 504 (Iowa 1993). Plaintiff does not dispute she cannot offer expert testimony; rather, she contends her case is one where the negligence of defendant in not finding a severed tendon is within the common understanding of a person not in the medical profession and it was so obvious as to be within the comprehension of the non-medical person without the admission of

expert testimony. Plaintiff relies on *Kennis v. Mercy Hosp. Medical Center*, 491 N.W.2d 161, 165 (Iowa 1992), to support her position. The trial court in its ruling showed plaintiff had advanced this argument, but the trial court rejected it. Without deciding if the issue was preserved for review, we address it. We agree with the trial court and affirm on this issue.

Plaintiff also relies on res ipsa loquitur as a rule of evidence that permits an inference defendant was negligent. Defendant, however, points out this is the first time plaintiff has sought to rely on res ipsa loquitur. In addition to not responding to the motion for summary judgment, plaintiff did not plead res ipsa loquitur in her petition. Matters not raised in the trial court will not be considered on appeal. *See O'Connor v. State*, 362 N.W.2d 449, 457 (Iowa 1985); *State v. Lyon*, 223 N.W.2d 193, 194 (Iowa 1974).

We affirm.

AFFIRMED.