

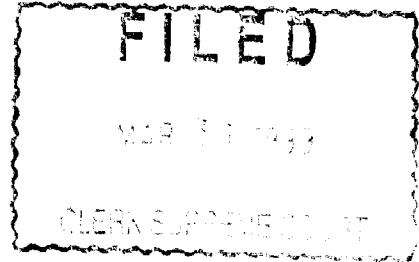
IN THE COURT OF APPEALS OF IOWA

No. 8-685 / 97-0366
Filed March 31, 1999

AMONIQUE STREHLE,
Appellant,

vs.

J. TERRY JOHNSON,
Appellee.



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

Amonique Strehle appeals from the summary judgment ruling dismissing her
dental malpractice claim against J. Terry Johnson. **AFFIRMED.**

Christopher M. Wilson, Council Bluffs, and James Miller, Omaha, Nebraska,
for appellant.

John M. French of Willson & Pechacek, P.L.C., Council Bluffs, for appellee.

Heard by Sackett, C.J., and Huitink and Mahan, JJ.

HUITINK, J.

Amonique Strehle appeals from the summary judgment ruling dismissing her dental malpractice claim against J. Terry Johnson. We affirm.

I. Background Facts and Procedure.

In May 1994, Amonique Strehle had a wisdom tooth extracted by J. Terry Johnson, a licensed dentist. During the extraction, a root tip pick (a dental instrument) broke and became lodged in Strehle's gum. Strehle ultimately underwent surgery in August 1994 to remove the pick.

Strehle filed a dental malpractice claim against Johnson for injuries sustained as a result of the broken root tip pick. On September 19, 1995, Johnson filed an answer denying Strehle's allegations. On September 6, 1996, Johnson filed a motion for summary judgment, alleging Strehle had failed to designate expert witnesses within the 180-day period required by Iowa Code section 668.11 (1995).¹

¹ Iowa Code section 668.11 provides in pertinent part:

1. A party in a professional liability case brought against a licensed professional pursuant to this chapter who intends to call an expert witness of their own selection, shall certify to the court and all other parties the expert's name, qualifications and the purpose for calling the expert within the following time period:

a. The plaintiff within one hundred eighty days of the defendant's answer unless the court for good cause not ex parte extends the time of disclosure.

b. The defendant within ninety days of plaintiff's certification.

2. If a party fails to disclose an expert pursuant to subsection 1 or does not make the expert available for discovery, the expert shall be prohibited from testifying in the action unless leave for the expert's testimony is given by the court for good cause shown.

Johnson asserted Strehle's failure to designate expert witnesses barred her from offering expert testimony on her negligence claim. Johnson further asserted expert testimony was necessary to establish Strehle's malpractice claim. Johnson claimed the inability to present expert testimony prevented Strehle from generating a genuine issue of material fact and entitled him to judgment as a matter of law. In addition to her resistance to summary judgment, Strehle also filed a motion for leave to amend her petition to assert a *res ipsa loquitur* or general negligence claim.

On October 15, 1996, the district court entered a ruling granting Johnson a partial summary judgment. The court determined Strehle's failure to designate experts within the confines of section 668.11 precluded her from offering expert testimony on her specific negligence claim. The court held such a want of expert testimony prevented Strehle from proving a necessary element of her specific negligence claim. Strehle's request to amend her petition to include her *res ipsa loquitur* claim was granted.

Johnson subsequently filed a motion for summary judgment on the *res ipsa loquitur* claim. Johnson provided a supporting expert opinion that the breaking of a root tip pick can happen in the exercise of ordinary care.

On January 31, 1997, the district court granted Johnson's second motion for summary judgment. The court noted that while the record indicated the breaking of a root tip pick during wisdom tooth extraction was a rare occurrence, Johnson presented undisputed evidence such an event can and does happen in the exercise of

ordinary care. The court granted Johnson's second motion for summary judgment because Strehle failed to establish the foundational underpinnings of a viable *res ipsa loquitur* claim.

Strehle appeals from the grant of both summary judgment motions. She raises three arguments on appeal: (1) the district court erred in granting Johnson's first motion for summary judgment based upon her failure to timely designate expert witnesses within the time limits of Iowa Code section 668.11; (2) expert testimony is not necessary to establish a *prima facie* showing of medical malpractice in this case; and (3) the district court erred in granting Johnson's second motion for summary judgment, as the doctrine of *res ipsa loquitur* is applicable to her cause of action.

II. Standard of Review.

Our review of a grant or denial of summary judgment is 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. *Smith v. CRST Int'l, Inc.*, 553 N.W.2d 890, 893 (Iowa 1996).

The moving party may establish a right to summary judgment by establishing the limits of the other party's proof. *Wilson v. Darr*, 553 N.W.2d 579, 582 (Iowa 1996). If those limits of proof reveal that the resisting party has no evidence to factually support an outcome determinative element of that party's claim, the moving party will prevail on summary judgment. *Clinton Nat. Bank v. Saucier*, 580 N.W.2d 717, 718-19 (Iowa 1998). See also *Griglion v. Martin*, 525 N.W.2d 810, 813 (Iowa 1994)(discussing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265, 274 (1986)).

III. Johnson's First Motion for Summary Judgment.

A. Necessity of Expert Testimony.

In order to establish a prima facie case of medical malpractice, Strehle must present evidence establishing the applicable standard of care, demonstrating the standard has been violated, and showing a causal relationship between the violation and the alleged harm. *Graeve v. Cherny*, 580 N.W.2d 800, 801 (Iowa 1998); *Hill v. McCartney*, ___ N.W.2d ___, ___ (Iowa App. 1998).

Generally, when the ordinary care of a physician is an issue, only experts can testify and establish the standard of care and the skill required. *Kennis v. Mercy Hospital Medical Center*, 491 N.W.2d 161, 167 (Iowa 1992). If the standard of care of a physician, surgeon, or dentist is at issue, Iowa law permits testimony upon the

appropriate standard of care only by an expert who has qualifications related directly to the medical problem at issue and type of treatment administered. Iowa Code § 147.139; *Bray v. Hill*, 517 N.W.2d 223, 226 (Iowa App. 1994). There are two exceptions to the general rule that expert testimony is needed to establish negligence in a medical malpractice action. *Graeve*, 580 N.W.2d at 802. The first exception is when the lack of care is so obvious it is within comprehension of a lay person. *Id.* The second exception, an extension of the first, is when the physician injured a part of the body not involved in the treatment. *Id.*

Strehle contends the first exception is applicable to her case. We disagree. The fact the root tip pick broke off and became lodged in Strehle's mouth, is alone insufficient proof of dental malpractice. We hold that this is not a case where a lack of care is obvious to a lay person. Expert testimony was required to establish the relevant standard of care. We affirm on this issue.

B. Dismissal of Malpractice Claim for Failure to Designate Experts.

We note at the outset Strehle failed to seek an extension of the 180-day period for designating experts as prescribed under Iowa Code section 668.11. Additionally, the record contains no evidence Strehle attempted to designate an expert witness. Strehle instead argues Johnson was not prejudiced by her failure to designate experts and dismissal of her claim was unjustified.

Substantial compliance with section 668.11 is required to achieve its intended objectives. *Nedved v. Welch*, 585 N.W.2d 238, 240 (Iowa 1998). These objectives include early and certain identification of experts and avoiding litigation of frivolous claims. *Hantsbarger v. Coffin*, 501 N.W.2d 501, 504 (Iowa 1993). Here, there has been no compliance, much less substantial compliance, with the statute's requirements. The record clearly indicates Strehle made no attempt to comply with section 668.11 through the time Johnson filed his first motion for summary judgment, nearly a year after he filed his answer. *Cf. Hantsbarger*, 501 N.W.2d at 505. Under these circumstances, we find Strehle's failure to designate expert witnesses is presumptively prejudicial.

We find Strehle's failure to designate expert witnesses within the time frame outlined in section 668.11 negates her ability to generate a genuine issue of material fact regarding the applicable standard of care, proximate causation, and resulting damages from the procedure performed by Johnson in May 1994. *See Nedved*, 585 N.W.2d at 241 (upholding grant of summary judgment in favor of defendant physician in medical malpractice case for plaintiff's failure to designate expert witnesses within statutorily defined time); *Cox v. Jones*, 470 N.W.2d 23, 26 (Iowa 1991); *Donovan v. State*, 445 N.W.2d 763, 766-67 (Iowa 1989). We therefore affirm the district court's grant of Johnson's first motion for summary judgment.

IV. Johnson's Second Motion for Summary Judgment.

Iowa courts view *res ipsa loquitur* as a rule of evidence rather than a rule of substantive tort law. *Brewster v. United States*, 542 N.W.2d 524, 529 (Iowa 1996). Under Iowa law, *res ipsa loquitur* applies when “(1) the injury is caused by an instrumentality under the exclusive control of the defendant, and (2) the occurrence is such as in the ordinary course of things would not happen if reasonable care had been used.” *Id.* (quoting *Mastland, Inc. v. Evans Furniture, Inc.*, 498 N.W.2d 682, 686 (Iowa 1993)). The applicability of the doctrine is to be determined from common experience alone and not from evidence tending to prove a particular negligent act. *Wilson v. Paul*, 176 N.W.2d 807, 811 (Iowa 1970). Because the doctrine creates an inference of negligence without specific proof, it traditionally has been applied sparingly, particularly in medical malpractice cases. *Tappe v. Iowa Methodist Medical Center*, 477 N.W.2d 396, 399 (Iowa 1991).

If there is substantial evidence to support both elements, the happening of the injury permits—but does not compel—an inference that the defendant was negligent. *Brewster*, 542 N.W.2d at 530. Evidence is substantial if a reasonable mind could accept it as adequate to reach the same findings. *Id.*

The *res ipsa loquitur* inference of negligence cannot be relied upon unless, within the common experience of lay persons, the occurrence is such that in the ordinary course of things, it would not have happened if reasonable care had been used. *See Reilly v. Straub*, 282 N.W.2d 688, 694 (Iowa 1979). “[T]his common

experience may include the common experience of experts.” *Brewster*, 542 N.W.2d at 530 (quoting *Reilly*, 282 N.W.2d at 694); *see also* W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 39 at 247 (5th ed. 1984). *Res ipsa loquitur* does not raise any inference as to what occasioned the injury-causing event. *Northwestern Nat. Ins. Co. v. Raid Quarries Corp.*, 249 N.W.2d 640, 644 (Iowa 1977).

We do not address the sufficiency of the evidence on whether the root tip pick was in Johnson’s sole control.² We do, however, find Strehle has failed to satisfy the common experience requirement. Even if we assume Strehle’s injuries were caused by the breaking of the root tip pick, the record indicates this event could occur despite the exercise of ordinary care. The record contains the affidavits of experts for both parties that indicate while it is rare for a root tip pick to break during a wisdom tooth extraction, it can and does happen even in the exercise of ordinary care. There is nothing else in the record providing substantial evidentiary support for the notion that in the ordinary course of things the root tip pick would not have broken if reasonable care had been used. *See Heritage Bank v. State*, 515 N.W.2d 348, 352 (Iowa 1992)(finding district court erred in submitting *res ipsa loquitur* theory in absence of evidence that injurious occurrence would not have transpired in the exercise of ordinary care); *Perin v. Hayne*, 210 N.W.2d 609, 613-14 (Iowa 1973)(“Where an

² Our supreme court has recognized “while physicians control their surgical instruments and medicine, they do not control the physical condition and reactions of their patients.” *Tappe*, 477 N.W.2d at 400 (quoting *Mogensen v. Hicks*, 253 Iowa 139, 143, 110 N.W.2d 563, 565 (1961)).

injury may occur despite due care, a finding of negligence cannot be predicated solely on the fact it did occur.”); *Wiles v. Myerly*, 210 N.W.2d 619, 625 (Iowa 1973)(finding the res ipsa loquitur inference fails if the injurious occurrence is shown to be of such a nature as can ordinarily happen despite due care); *Wagner v. Northeast Farm Service Co.*, 177 N.W.2d 1, 4 (Iowa 1970)(finding doctrine of res ipsa loquitur inapplicable absent evidence the occurrence would not have happened in the exercise of ordinary care). We therefore find Strehle has failed to demonstrate a genuine issue of material fact regarding the foundational underpinnings necessary for a valid application of the theory of res ipsa loquitur. The district court properly granted Johnson’s motion for summary judgment on this issue.

We affirm the district court’s grant of both motions for summary judgment.

AFFIRMED.