IN THE COURT OF APPEALS OF IOWA

No. 2-336 / 11-1251
Filed July 25, 2012

RAE A. LARY,
Plaintiff-Appellant,

vs.

ZE-HUI HAN, M.D., and IOWA ORTHOPAEDIC CENTER, P.C.,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Karen A. Romano, Judge.

Rae Lary appeals from the district court's grant of summary judgment dismissing her lawsuit for medical negligence. **AFFIRMED.**

Barry S. Kaplan and Melissa A. Nine of Kaplan, Frese & Nine, L.L.P., Marshalltown, for appellant.

Robin L. Hermann and Jason W. Miller of Patterson Law Firm, L.L.P., Des Moines, for appellees.

Heard by Vaitheswaran, P.J., and Doyle and Danilson, JJ.

DOYLE, J.

Rae Lary appeals from the district court's grant of summary judgment dismissing her lawsuit for medical negligence. We affirm.

***I. Background Facts and Proceedings*.**

When viewed in the light most favorable to Lary, the summary judgment record could establish the following facts. Doctor Ze-Hui Han is a hand surgeon specialist employed by the Iowa Orthopaedic Center, P.C. (collectively the defendants). On April 28, 2008, Lary, a registered nurse, met with Dr. Han concerning an infection in her right middle finger that would not go away. The next day, Dr. Han performed surgery, an incisional drainage and debridement, which Dr. Han characterized as a routine outpatient procedure. A mucous cyst was found right on the proximal nail fold and was completely released after removing the nail plate. There were no problems during surgery, and thereafter, Dr. Han applied a dressing to the finger. Upon discharge, Lary was instructed to keep the finger in ice and elevated and to loosen the dressing if necessary. Pain medication was prescribed, and she was to follow up with the doctor in two weeks.

The day after surgery, Lary had a telephone conversation with Dr. Han's nurse. While the parties dispute the exact account of the conversation, the subject matter concerned Lary's allergic reaction to the pain medication and her request to change it. Lary admits it was suggested that she loosen the dressing, and she responded she could not loosen it without removing it.

Lary experienced a fever five days post-surgery. On Sunday, May 4, Lary called the Center and spoke to Dr. Shumway, another doctor employed there.

She was prescribed Keflex and was told to call back the next day if her condition was not improving. Again, it was suggested she loosen the dressing, and she responded that she could not loosen the dressing without removing it. She also stated that she "was able to insert [her] fingers under the lower edge [of the dressing] without any problems."

On Monday, Lary called the Center and informed the staff she was still running a temperature and needed to see a doctor in person. She was told that no doctor was available to see her that day in the Des Moines office. She declined an offer to see Dr. Han at the Fort Dodge clinic that day, and an appointment was set up for her to see Dr. Shumway the next day.

After removing the post-op dressing, Dr. Shumway observed the fingertip to be somewhat dusky and insensate in some spots. While there was some blood flow, there appeared to be significant venous congestion. It was Dr. Shumway's impression there was partial vascular compromise of the fingertip. Lary was advised to apply Silvadine to the wound and to wrap it with a soft dressing very loosely and to continue with the Keflex. She was given a splint for protective purposes, and she scheduled a follow-up with Dr. Han.

Lary saw Dr. Han some days later for continued pain, redness, swelling, blisters, and fever. Dr. Han's impression was "[s]welling and possible blood circulation compromise on the tip of finger." His notes of that date state: "At this point, I think the clinical appearance of the long finger is related to the dressing being tight." Medications were continued. Lary again followed up with Dr. Han on May 12 for increased swelling, pain, and blisters. She was again told to continue with wound care and antibiotics. On May 15, Dr. Han debrided necrotic

skin. His impression was "[b]lood circulation compromise[d], [p]ossible infection." Since Lary had purulent drainage coming from the wound, Dr. Han had Lary admitted to the hospital where he then performed an incisional drainage and debridement of necrotic tissue. Whirlpool therapy and antibiotic treatment followed. At a June 6 follow-up visit, Dr. Han told Lary that, due to the ongoing problems with the finger, partial amputation may be the only option left.

Lary sought a second opinion from another doctor, Dr. Bergman. Dr. Bergman agreed amputation was necessary. On June 11, 2008, he performed a partial amputation of the distal necrotic phalanx of Lary's right middle finger.

In February 2010, Lary filed her medical negligence petition, later amended, against the defendants. Lary asserted the defendants "were negligent in that the dressing was too tight and was not wrapped appropriately with the appropriate dressing and [the defendants] failed to follow-up and treat [Lary]." The defendants denied her claims.

In September 2010, the defendants filed their motion for summary judgment. They asserted that because Lary had not named an expert as required pursuant to Iowa Code section 668.11 (2009), she could not generate a jury issue on any of the necessary elements to establish a prima facie case of medical negligence. Lary resisted, contending the injuries sustained by her were so obvious a layperson could see negligence on behalf of the defendants and therefore no expert was required. Further, Lary contended the need for an expert to define the proper follow-up care was not necessary because there was no follow-up care offered despite her numerous requests for assistance.

An unreported hearing was held on the defendants' motion. Apparently Lary expanded her argument at the hearing, alleging there that the defendants' lack of care was so obvious as to be within the comprehension of the layperson's knowledge or experience that expert testimony was not required. Thereafter, the district court entered its ruling granting summary judgment in the defendants' favor and dismissing Lary's petition.

Lary appeals.

***II. Scope and Standards of Review*.**

We review the district court's summary judgment rulings for the correction of errors at law. Iowa R. App. P. 6.907; *Alliant Energy-Interstate Power & Light Co. v. Duckett*, 732 N.W.2d 869, 873 (Iowa 2007). In a case such as this, summary judgment is appropriate "when the party can demonstrate that the proof of the other party is deficient as to a material element of that party's case." *Thompson v. Embassy Rehab. & Care Ctr*., 604 N.W.2d 643, 646 (Iowa 2000); *see also Welte v. Bello*, 482 N.W.2d 437, 440 (Iowa 1992) (stating summary judgment is appropriate if expert testimony is required to establish general negligence or foundational facts and such testimony is unavailable); *Oswald v. LeGrand*, 453 N.W.2d 634, 635 (Iowa 1990) (citing *Donovan v. State*, 445 N.W.2d 763, 766 (Iowa 1989) (stating issue is "not whether there was *negligence* in the actions of the defendant but whether there was *evidence* upon which liability could be found")). The court reviews the record in a light most favorable to the opposing party. *Frontier Leasing Corp. v. Links Eng'g, L.L.C.*, 781 N.W.2d 772, 775 (Iowa 2010). We afford the opposing party every legitimate inference the record will bear. *Id*.

III. Discussion.

On appeal, Lary again asserts no expert testimony was needed because her "injury of a partially amputated finger deriving from a simple routine outpatient procedure . . . [was] so negligent on its face even laypersons could comprehend [Dr. Han's] lack of care."[1] She also asserts that even if expert testimony is needed, Dr. Han's testimony and records provide the requisite evidence needed to establish the applicable standards of care and causation. Finally, she asserts summary judgment as to the Center was improper.

A. Necessity of an Expert.

> It is a fundamental tenet of tort law that the fact a plaintiff has suffered an injury, without more, does not mean the defendant was negligent. Instead, to recover for an injury, our law requires an injured person to establish the existence of a duty of care, breach of the duty of care, and that the breach was the cause of the injuries suffered.

Smith v. Koslow, 757 N.W.2d 677, 680 (Iowa 2008) (internal citations omitted). "To establish a prima facie case of medical malpractice, the plaintiff must submit evidence that shows the applicable standard of care, the violation of the standard of care, and a causal relationship between the violation and the harm allegedly experienced by the plaintiff." *Lobberecht v. Chendrasekhar*, 744 N.W.2d 104,

[1] Also woven into Lary's argument for the first time on appeal is the res ipsa loquitur doctrine; she maintains that her injury was one that, in the ordinary course of things, would not have happened if reasonable care had been used. The defendants argue that since Lary did not plead the doctrine of res ipsa loquitur, it was not before the district court on their motion for summary judgment. The doctrine is considered "a rule of evidence, not one of pleading or substantive law." *Banks v. Beckwith*, 762 N.W.2d 149, 152 (Iowa 2009). Nevertheless, Lary did not raise the issue in her resistance to the motion for summary judgment, and the district court made no specific ruling as to the applicability of the doctrine. Because it is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal, *see Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002), we do not address her res ipsa loquitur claim on appeal.

108 (Iowa 2008) (citation omitted). There are three means of establishing specific negligence of a physician:

> One is through expert testimony, the second through evidence showing the physician's lack of care so obvious as to be within comprehension of a layman, and the third, (actually an extension of the second) through evidence that the physician injured a part of the body not involved in the treatment. The first means is the rule and the others are exceptions.

Kennis v. Mercy Hosp. Med. Ctr., 491 N.W.2d 161, 165 (Iowa 1992) (citations and internal quotation marks omitted). "Doctors are held to such reasonable care and skill as is exercised by the ordinary physician of good standing under like circumstances." *Surgical Consultants, P.C. v. Ball*, 447 N.W.2d 676, 678 (Iowa Ct. App. 1989). "Generally, when the ordinary care of a physician is at issue, only experts can testify and establish the standard of care and the skill required." *Kennis*, 491 N.W.2d at 165 (citations omitted), *see also* Iowa Code § 147.139. Expert testimony is nearly always required to establish the applicable standard of care, the violation of this standard of care, and a causal relationship between the violation and the harm allegedly suffered by the plaintiff. *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 718 (Iowa 2001), *see also Peppmeier v. Murphy*, 708 N.W.2d 57, 62 (Iowa 2005); *Cox v. Jones*, 470 N.W.2d 23, 25 (Iowa 1991). Moreover, proximate cause, like the other elements, cannot be based upon mere speculation. *Phillips*, 625 N.W.2d at 718. No consequential fact in a case can be resolved by pure guesswork. *Id*. Expert testimony is needed for highly technical questions of diagnoses and causation which lie beyond the understanding of a layperson. *Donovan*, 445 N.W.2d at 766. Generally, expert testimony is

required to establish the appropriate standard for follow-up care. *See Cox*, 470 N.W.2d at 26; *Surgical Consultants*, 447 N.W.2d at 678–79.

Our supreme court has framed the test for determining whether an expert is necessary as follows:

> [I]f all the primary facts can be accurately and intelligibly described to the jury, and if they, as [persons] of common understanding, are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training, experience, or observation in respect of the subject under investigation, [expert testimony is not required].

Thompson, 604 N.W.2d at 646 (citation and internal quotation marks omitted); *cf. Welte*, 482 N.W.2d at 441–42 (looking to whether an act or omission was within "common experience of persons" in deciding whether expert was necessary).

In resisting the motion for summary judgment before the district court, Lary argued that because "the injury she sustained was so obvious that a layperson could deduct negligence at the 'hands' of the [d]efendants," she was excepted from the general rule requiring expert witness testimony. In other words, Lary asserted a layperson could, by merely looking at the end result, determine the defendants were negligent. But, this is not a case where the physician injured a part of the body not involved in the treatment. Lary misconstrues the exception to the general rule requiring expert testimony. It is the obviousness of the physician's lack of care that triggers the exception, not the obviousness of the resultant injury. A bad result, standing alone, is not adequate to create a jury question; "Instead, 'something more is required, be it the common knowledge that the injury does not ordinarily occur without negligence or expert testimony to that effect.'" *Smith*, 757 N.W.2d at 682 (quoting *Jones v. Porretta*, 405 N.W.2d

863, 874 (Mich. 1987)). "[W]hile the result alone is not, in itself, evidence of negligence, yet same may nevertheless be considered, together with other facts and circumstances disclosed by the evidence in a given case in determining whether or not such result is attributable to negligence or want of skill." *Daiker v. Martin*, 91 N.W.2d 747, 750 (Iowa 1958) (citations and internal quotation marks omitted).

On appeal, Lary argues she is excepted from the general rule requiring expert testimony because the defendants' lack of care was so obvious as to be within the comprehension of a layman. We have carefully reviewed the cases Lary sets forth in her brief "where the exceptions to the general rule requiring expert witness testimony in medical malpractice cases have applied are usually those where something drastic has gone wrong." Each case is materially distinguishable from the case at bar, including the circulatory obstruction cases *Daiker*, 91 N.W.2d at 747, and *Bartholomew v. Butts*, 5 N.W.2d 7 (Iowa 1942). In those cases, the treating doctors had actual knowledge, for significant periods of time, of symptoms demonstrating constricted blood flow, but failed to follow up with appropriate treatment. *See Daiker*, 91 N.W.2d at 752; *Bartholomew*, 5 N.W.2d at 8. In *Daiker*, the court concluded "that thereafter [while the patient was in the hospital for almost two weeks after having the cast split three times] defendant knew the leg was swelling inside the cast and causing pain, but failed to loosen the cast." 91 N.W.2d at 752. Similarly, in *Bartholomew*, the doctor knew for weeks of the patient's arm swelling, but failed to loosen or remove the bandage. 5 N.W.2d at 8. Additionally, in both cases, there was medical testimony critical of the care provided by the defendant doctors. *Daiker*, 91

N.W.2d at 752 ("[The subsequent treating physician] testified one of the dangers of [giving drugs to relieve pain] is that the actual seat of the trouble causing the pain might be masked. He testified the best protection for any infection or healing is good blood supply and a cast that impaired the circulation should be split."); *Bartholomew*, 5 N.W.2d at 10–11 (establishing the applicable standard of care, a violation thereof, and causation by way of expert testimony).

Lary has no designated expert to testify as to the applicable standard of care, that it was violated, or that any damages resulted from a violation of the standard of care. Without expert testimony, Lary cannot establish a prima facie case of medical negligence as alleged against the defendants. The obviousness of lack of care, as demonstrated in the *Daiker* and *Bartholomew* cases, is not present here. We agree with the district court that "[t]his is not a case where the defendants' lack of care is so obvious that expert testimony is not needed to establish the standard of care or that it was violated."

But that does not end our inquiry. Lary also contends that if expert testimony is needed, Dr. Han's deposition testimony and records provide the requisite evidence needed to establish the applicable standards of care and causation.

B. Dr. Han as Lary's Expert.

Lary argues Dr. Han's testimony and records provide the requisite evidence needed to establish the applicable standards of care and causation. At the end of his deposition, Dr. Han volunteered: "It's [six] to [twelve] hours is very important. That's called the warm ischemia. And so the first [twenty-four] hours is window time. And if the dressing was loose—was loose in the first [twenty-

four] hours, there was no [sic] any problem leading to all this later event." Lary claims that since no follow-up care was administered within the first [twenty-four] hours after surgery, "[t]his is against [the] defendants' procedure, as stated by . . . Dr. Han." The procedure Lary refers to is a routine follow-up call to the patient by a nurse the day after surgery. When asked whether or not any of his nurses told Lary that she should come in and see the doctor if pain persisted, Dr. Han testified:

> At a regular follow-up call the first day after the operation, the nurse always talk to the patient several points. Number one is what's going to happen to the pain. Number two, if you're doing the instruction as elevation and ice; and always tell patient if the pain happens, severe pain, it is changing, the first thing is loosening the dressing. And my nurse always do this follow-up with every patient.

Although the protocol of a nurse initiating a call to the patient was not followed, Lary did speak with one of Dr. Han's nurses the day after surgery. Lary called to advise that she was allergic to the pain medication. She admits it was suggested to her to loosen the dressing. Lary has shown no material violation of their protocol.

Lary does not dispute that she was given post-surgical discharge instructions. In her affidavit in response to the defendants' motion, Lary stated: "Dr. Han's only instruction to me for discharge was to not remove the dressing, but loosen if necessary. In addition, the nurse's instructions only included ice, elevation, pain medication, fever and drainage." The written postoperative discharge orders given to Lary instructed her to "apply ice and elevate to affected extremity [twenty-four to forty-eight] hours." Under the form's instructions concerning "surgical dressings," the box for "reinforce dressing as

needed" was checked. None of the other boxes were checked; including the one marked "do not remove dressing."

Dr. Han gave no testimony as to applicable standards of care relative to Lary's specifications of negligence, nor did he make any admissions that the care provided by the defendants fell below the applicable standard of care. We cannot extrapolate a prima facie case of medical negligence from his deposition or the medical records. After thoroughly reviewing the entire record in a light most favorable to Lary and affording her all reasonable inferences that can be deduced from the factual record, we agree with the district court that "Dr. Han's deposition testimony does not constitute expert testimony of [Dr. Han] admitting to negligence, nor does anything in the medical records. Independent expert testimony is required for [Lary] to establish her claim of medical malpractice in this case." Accordingly, we affirm on this issue.

***C. Summary Judgment as to the Center*.**

Finally, Lary asserts summary judgment as to the Center was improper. Lary did not designate an expert to establish the applicable standard of care, the defendants' violation of the standard of care, and a causal relationship between the alleged violation and the harm allegedly experienced by her. Without expert testimony, as discussed above, Lary is left without a crucial part of her case. Again, reviewing the entire record in a light most favorable to Lary and affording her all reasonable inferences that can be deduced from the factual record, we agree with the district court that summary judgment was proper as to the Center. We therefore affirm on this issue.

***IV. Conclusion*.**

We agree with the district court that expert testimony was required under the circumstances to establish a prima facie case of medical negligence against the defendants. We therefore affirm the district court's grant of the defendants' motion for summary judgment.

AFFIRMED.