

**IN THE COURT OF APPEALS OF IOWA**

No. 2-564 / 11-1189  
Filed August 8, 2012

**ROBERT A. GRAHAM and  
CINDY GRAHAM,**  
Plaintiffs-Appellants,

**vs.**

**KRISTOPHER J. KELLY, D.D.S.,**  
Defendant-Appellee.

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Appeal from the Iowa District Court for Floyd County, Chris Foy, Judge.

Robert and Cindy Graham appeal from the district court order granting summary judgment in favor of Dr. Kristopher Kelly on their claim of dental malpractice. **AFFIRMED.**

Judith O'Donohoe of Elwood, O'Donohoe, Braun & White, L.L.P., Charles City, for appellants.

Raymond R. Stefani II and Richard A. Stefani of Gray, Stefani & Mitvalsky, P.L.C., Cedar Rapids, for appellee.

Considered by Vogel, P.J., and Tabor and Bower, JJ.

**TABOR, J.**

Robert Graham and his wife, Cindy, filed a lawsuit alleging Dr. Kristopher Kelly was negligent in obtaining consent and performing a tooth extraction. As a result of the alleged dental malpractice, the Grahams claim they are entitled to compensatory damages, damages for loss of consortium, and punitive damages. Dr. Kelly moved for summary judgment, which the district court granted.

The Grahams contend the court erred in granting summary judgment on their malpractice claims involving informed consent, surgical referral, and the extraction technique. But the undisputed facts do not show Dr. Kelly breached the appropriate standard of care. Because the Grahams' claims fail as a matter of law, the court appropriately granted summary judgment.

**I. Background Facts and Proceedings.**

On Sunday, October 14, 2007, Robert Graham woke up with a toothache in the upper right side of his jaw. He visited his dentist on Monday, October 15. Dr. Kelly examined Graham and took an x-ray to determine the source of the pain. The dentist recommended a root canal (for a tooth identified as #6). Graham doubted the identified tooth was the problem. Rather than undergo a root canal, Graham decided to return home and discontinue his pain medication so that he could better identify which tooth was causing the pain.

Graham returned to Dr. Kelly's office at 8:15 a.m. on October 16, 2007, identifying a different tooth (described as tooth #2) on the upper right side of his jaw as the source of his pain. Dr. Kelly again recommended Graham undergo a root canal to preserve the tooth. But due to cost considerations, Graham asked

the dentist to extract the tooth instead. Dr. Kelly had Graham sign a written form outlining the risks associated with extraction and setting forth Graham's consent.

The complications listed on the form included:

3. SINUS OPENING: Sometimes the roots of teeth will push through the maxillary sinus. If this happens we close it up surgically and put you on antibiotics and decongestants for 2 weeks. You should not blow your nose during this time.

The form continues, "I have read and fully understand the above complications that were also explained to me." A note below states, "extraction max 2nd molar #2 recommend root canal – pt desires extraction." Dianne Sullivan, Dr. Kelly's office assistant, witnessed Graham's signature.

It took Dr. Kelly approximately thirty minutes to extract the tooth. The tooth was extracted intact with a portion of buccal bone connected to the root. Dr. Kelly did not observe any complications or bleeding around the extraction site while Graham was in the office. It was not until Graham returned home that he began to bleed from his mouth and nose. Graham went to the emergency room at Mercy Medical Center in Mason City and was treated by an oral surgeon for a hole that had developed between his mouth and sinus cavity. On April 1, 2008, Graham underwent a second, more extensive surgery to repair the hole.

On October 7, 2009, Graham and his wife filed a petition against Dr. Kelly, alleging he committed dental malpractice and seeking compensatory and punitive damages, as well as damages for loss of consortium. The petition alleged Dr. Kelly failed to provide adequate information to Graham regarding his treatment options and the risks of extraction, negligently performed the extraction, and failed to provide the appropriate post-operative care. The

Grahams alleged Dr. Kelly acted with reckless disregard for Graham's rights and health. The Grahams designated Dr. Charles Ringgold from the Oral Surgery Department at the University of Iowa Hospitals as an expert.

Dr. Kelly filed a motion for summary judgment on March 8, 2011. Dr. Kelly also designated defense experts: Dr. David Hennessey and Dr. James Erusha.

The Grahams received two extensions of time to file their resistance before the court set an April 26, 2011 deadline. The Grahams filed their resistance on the day of the deadline. On May 26, 2011, a representative of the court contacted the parties to notify them the court granted summary judgment in favor of Dr. Kelly on all claims and a written ruling would follow.

On June 3, 2011, the Grahams filed a document purported to be an addition to their appendix supporting their claims with expert testimony. The document contained a transcript of Dr. Hennessey's deposition, which was taken on May 13, 2011. Because the deposition was taken after the deadline for resistance, the court gave the document no consideration.

The court filed its written opinion granting summary judgment on June 7, 2011. The Grahams filed a motion to enlarge or amend on June 15, 2011. The court denied the motion on July 5, 2011. The Grahams filed their notice of appeal on July 27, 2011.

## **II. Scope and Standard of Review.**

We review a district court decision to grant a motion for summary judgment for the correction of errors at law. *Ranes v. Adams Labs., Inc.*, 778 N.W.2d 677, 685 (Iowa 2010). We examine the record to determine whether any

of the material facts are in dispute and, if not, whether the district court properly applied the law. *Id.*

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 as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Iowa R. Civ. P. 1.981(3); *Christy v. Miulli*, 692 N.W.2d 694, 699 (Iowa 2005). The court reviews the record in the light most favorable to the nonmoving party, granting the nonmoving party every legitimate inference the record will bear. *Kern v. Palmer Coll. of Chiropractic*, 757 N.W.2d 651, 657 (Iowa 2008). A fact question exists “if reasonable minds can differ on how the issue should be resolved.” *Walker v. Gribble*, 689 N.W.2d 104, 108 (Iowa 2004).

### **III. Dental Malpractice.**

To establish a prima facie case of malpractice, the Grahams were required to submit evidence showing the dentist’s applicable standard of care, a violation of that standard, and a causal relationship between the violation and the harm the patient allegedly experienced. *Lobberecht v. Chendrasekhar*, 744 N.W.2d 104, 108 (Iowa 2008). Where, as here, the standard of care for a dentist is at issue, Iowa law permits only testimony on the appropriate standard of care by an expert who has qualifications, related directly to the problem at issue and type of treatment administered. *Hill v. McCartney*, 590 N.W.2d 52, 56 (Iowa Ct. App. 1998).

The Grahams advance several theories as to how Dr. Kelly violated the standard of care for general dentists performing tooth extractions. They claim genuine issues of material fact exist relating to whether Dr. Kelly violated the standard of care in the following ways: (1) failing to obtain Robert Graham's informed consent, (2) failing to refer him to an oral maxillary surgeon, and (3) in performing the extraction. We consider each claim in turn.

### **1. Informed consent.**

The Grahams first contend the record shows a genuine issue of material fact regarding whether Dr. Kelly obtained informed consent from Robert Graham before extracting his tooth. They do not dispute that Robert Graham signed the written consent form Dr. Kelly provided or that the written form provided the essential information. Instead, they argue Dr. Ringgold opined the standard of care required a verbal explanation of the risks of the procedure, tailoring the risks to the particular tooth being extracted and the health and condition of the individual patient involved.

At his deposition, Dr. Ringgold testified Dr. Kelly's written informed-consent form was appropriate. He also testified he had "[n]o problem" with someone other than Dr. Kelly witnessing the patient's signature, so long as the patient received the necessary information. Dr. Ringgold did not believe it was a breach of the standard of care for an assistant to review the form with the patient and the dentist to ask if the patient had any other questions.

In his deposition, Robert Graham stated he did not remember Dr. Kelly or his staff reviewing the form with him before he signed it. But he also

acknowledged, “[T]hey talked through it with me.” While Dr. Kelly could not specifically remember going over the written consent form with Robert Graham, he testified it is his practice to discuss the risk of performing an extraction: “Usually we go by the informed consent form and just go over the ones that commonly appear is my routine, or the dental assistant will discuss that too with [the patient].”

On April 19, 2011, Dr. Ringgold executed an affidavit, which the Grahams included in support of their resistance to summary judgment. In his affidavit, Dr. Ringgold stated the following:

The partially copied consent form signed by Robert Graham is adequate but, for informed consent within the standard of care, it must be supplemented by an oral explanation of the treatment options and risks tailored to the particular facts of the patient's condition and proposed treatment. This was not done according to Robert Graham and thus, the consent for the extraction was not adequate.

The district court was critical of this evidence. In granting summary judgment, the court found Dr. Ringgold's affidavit contradicted his deposition testimony, rather than clarifying or explaining it. We believe the district court properly decided to disregard the portions of Dr. Ringgold's affidavit that contradicted his deposition testimony. See *Cole v. Homier Distrib. Co., Inc.*, 599 F.3d 856, 867 (8th Cir. 2010) (noting that while a court should consider an affidavit submitted in response to a motion for summary judgment when it elaborates upon or clarifies information already submitted, a party cannot avoid summary judgment by contradicting previous sworn testimony).

Even if we were to consider Dr. Ringgold's affidavit on this point, we note that it presumes Dr. Kelly did not orally review Graham's treatment options and the risks associated with the treatment. Such a presumption is contravened not only by Dr. Kelly's deposition, but Graham's own testimony that "they talked through [the forms] with me." At his deposition, Dr. Ringgold indicated this conduct met the standard of care.

Reviewing the evidence in the light most favorable to the Grahams, we find the undisputed evidence shows Dr. Kelly did not violate the standard of care in obtaining Robert Graham's informed consent. Dr. Kelly's written consent form outlined the risks of the procedure. Graham signed the form and an assistant witnessed the signature. Dr. Kelly's practice was to review the consent form with his patients, and to have his dental assistant discuss the form with the patients as well. Robert Graham stated that "they" talked through the forms with him. No expert testimony suggests Dr. Kelly should have done anything more. Summary judgment was properly granted.

## **2. Surgeon referral.**

The Grahams also contend the opinion of their expert witness revealed a factual dispute over whether Dr. Kelly violated the standard of care by failing to refer Robert Graham to an oral maxillary surgeon. In his deposition, Dr. Ringgold revisited his responses to Dr. Kelly's interrogatories, wherein he offered his opinion of Dr. Kelly's treatment of Robert Graham. When asked if he still held the opinion that Dr. Kelly "should have considered a referral of the patient to an oral surgeon," Dr. Ringgold stated he no longer held that impression after being



presented with additional evidence. Dr. Ringgold agreed it was appropriate for Dr. Kelly to proceed with the extraction.

In his affidavit, Dr. Ringgold stated he had amended his opinion after receiving a “good” digital image of the radiography of Robert Graham’s tooth. He opined:

The roots appear in the sinus. This means that Graham’s situation was a high risk of creating a mouth to sinus hole. The only action for a general dentist to take is to refer the patient to an oral and maxillofacial surgeon for surgical extraction of the tooth in pieces and advancement of tissue to close the opening.

As previously stated, the district court disregarded the contradictory portions of the affidavit.

In contrast to Dr. Ringgold, the defense experts opined that it was appropriate for Dr. Kelly to extract the tooth. Dr. Hennessey believed the x-ray of the tooth “was of sufficient quality and gave good definition to allow Dr. Kelly to determine that he could perform an extraction . . . .” Dr. Erusha held the view that extraction was an appropriate treatment option and that Robert Graham “did not present any obvious history to indicate a referral . . . to an oral surgeon.”

Given the statements of the defense experts and Dr. Ringgold’s deposition testimony, we find the undisputed facts show Dr. Kelly did not breach a standard of care by not referring Robert Graham to a surgeon. Accordingly, the district court did not err in granting summary judgment on this claim.

### 3. The extraction.

Finally, the Grahams contend Dr. Kelly breached a standard of care in performing the tooth extraction. They suggest Dr. Kelly used excessive force in removing the tooth because he was angry with Robert Graham.

The defense experts both stated that Dr. Kelly's extraction technique did not fall outside the standard of care. Dr. Hennessey opined that Dr. Kelly's technique "was appropriate and followed education and training provided by the University of Iowa College of Dentistry and post graduate continuing education programs." Dr. Erusha opined, "Dr. Kelly's extraction of Mr. Graham's tooth #2 was performed appropriately and within the standard of care." He further stated, "Dr. Kelly's repair of the extraction site of tooth #2 and the torn gingival tissue was appropriate and within the standard of care when the buccal plate fracture occurred during extraction of tooth #2."

In his deposition, Dr. Ringgold testified accordingly:

Q. Is it your opinion that Doctor Kristopher Kelly used the degree of care, skill and learning ordinarily possessed and exercised by dentists under similar circumstances presented by Robert Graham concerning the extraction of tooth number 2? A. . . . I mean, I can only compare Doctor Kelly to general dentists in the community. Is that what you're—And I would say it was appropriate care, even though it appears that there was a problem afterwards.

Q. And—Well, first off, do you agree that he used the degree of care, skill and learning ordinarily possessed and exercised by dentists under similar circumstances? A. Yes.

Q. And secondly, the problem that occurred afterwards is not an indicator that the dentistry performed was substandard or inappropriate? A. Correct.

In his affidavit, Dr. Ringgold stated that some general dentists can perform extractions and some cannot. The plaintiff's expert admitted he was not familiar

with Dr. Kelly's competence with extractions, but suggested the fact that buccal bone came out with the tooth "might indicate the use of excessive force but did not conclusively indicate this."

While we view the facts in the light most favorable to the nonmoving party and extend every legitimate inference, an inference is not legitimate if it is "based upon speculation or conjecture." *McIlravy v. N. River Ins. Co.*, 653 N.W.2d 323, 328 (Iowa 2002). Dr. Ringgold offers no more than speculation or conjecture that Dr. Kelly used excessive force in extracting Robert Graham's tooth, thus breaching the standard of care. In contrast, both defense experts opined Dr. Kelly's extraction technique was appropriate and within the standard of care. Because there is no genuine issue of material fact showing Dr. Kelly breached the appropriate standard of care, summary judgment was appropriate. We affirm the district court's grant of Dr. Kelly's motion on this issue.

#### **IV. Punitive Damages.**

The Grahams also contend the district court erred in granting summary judgment in favor of Dr. Kelly on their claim for punitive damages. Because we have determined as a matter of law that the Grahams have failed to show Dr. Kelly acted negligently, there can be no award of punitive damages. See *McClure v. Walgreen Co.*, 613 N.W.2d 225, 230-31 (Iowa 2000) (holding mere negligent conduct is insufficient to support a claim for punitive damages; punitive damages may only be awarded where actual or legal malice is shown).

**AFFIRMED.**