IN THE COURT OF APPEALS OF IOWA

No. 3-753 / 12-1778
Filed October 23, 2013

LUKE STUTZMAN, Individually and as Executor of the ESTATE OF JULIE STUTZMAN; and TREY STUTZMAN, CAROL WILLIAMS MURPHY, and DEL MURPHY, Individually,
Plaintiffs-Appellants,

vs.

WEST DES MOINES OB/GYN, P.C.; DR. BEVERLY BELSHEIM, Individually and as an Employee of WEST DES MOINES OB/GYN; ADEL FAMILY MEDICAL CENTER, PC; DR. SUSAN DONAHUE, Individually and as an Employee of ADEL FAMILY MEDICAL CENTER, P.C.,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Robert B. Hanson, Judge.

The plaintiffs appeal the court's entry of directed verdicts for the defendants in this medical malpractice action. **AFFIRMED.**

Alfredo Parrish and Eric Parrish of Parrish Kruidenier Dunn Boles Gribble Gentry & Fisher, L.L.P., Des Moines, for appellants.

John D. Hilmes, Erik P. Bergland, and Kellen B. Bubach of Finley, Alt, Smith, Scharnberg, Craig, Hilmes & Gafney, P.C., Des Moines, for appellees.

Heard by Vogel, P.J., and Danilson and Tabor, JJ.

DANILSON, J.

The plaintiffs appeal the district court's entry of directed verdicts for the defendants in this medical malpractice action. The court concluded the plaintiffs had failed to establish essential elements of their claims. Because the plaintiffs' expert found fault only with respect to the gynecologist's record keeping for the June 11, 2007 office visit, and nothing in this record establishes a nexus between the record keeping and the decedent's illness, we affirm the entry of judgment for the defendants.

I. Background Facts and Proceedings.

Dr. Beverly Belsheim had been the gynecologist for Julie Stutzman since 1992. In 2005, Julie gave birth to her son, Trey Stutzman. Approximately seven months later, on January 17, 2006, Julie called Dr. Belsheim's office. The nurse taking the call wrote,

> Pt called and stated she only nursed 1 week. Pt is 7 mns PP c/o leakage in early AM and after baths. Told the pt to come in and have PRL, TGH drawn. I also told her per Belsheim it can take this long for your breast milk to dry up.[1]

Julie did not go for the recommended testing.

On June 11, 2007, Julie had an annual "well woman" appointment with Dr. Belsheim. Julie complained of breast discharge after hot baths. Dr. Belsheim's notes indicates "+ expressible" in the "breasts" section, and it notes a diagnosis

---

[1] Dr. Belsheim translated the note during her testimony:

> Patient called and stated she only nursed one week. Patient is seven months postpartum complaining of leakage in the early morning and after baths. Told the patient to come in and have a prolactin and a TSH, thyroid-stimulating hormone, drawn. I also told her, per Belsheim, it can take this long for breast milk to dry up.

of galactorrhea. Dr. Belsheim's record for an April 29, 1999 examination of Julie indicates Julie had expressible galactorrhea "on L only."

Julie was diagnosed with breast cancer in March 2008, and died from breast cancer on September 19, 2009. Her family[2] sued Drs. Belsheim and Donahue[3] and their employers for negligence, contending they deprived Julie of an early opportunity to detect, diagnose, and treat her cancer. At trial, plaintiffs asserted that Dr. Belsheim was negligent (1) in handling the January 17, 2006 telephone call from Julie; (2) in not ordering breast imaging based upon the June 11, 2007 examination of Julie; and (3) in preparing the medical record of the June 11 examination.

Dr. Belsheim testified Julie presented with bilateral galactorrhea, explaining that she was able to express a milky substance from both of Julie's breasts.[4] She testified that had the discharge been unilateral, she would have ordered a mammogram. Upon questioning by plaintiffs' counsel as to how she could know the discharge was bilateral from the notes of that exam, Dr. Belsheim responded, "My diagnosis of galactorrhea. That is what galactorrhea is." She stated, "It was bilateral. I have no doubt of that. . . . If it was unilateral, I would

---

[2] At the time of her death Julie was thirty-eight years old. Surviving her were her husband of eight years, Luke Stutzman, their four-year-old son, Trey, and her parents, Carol Williams and Del Murphy. Luke, as executor of Julie's estate, sued for wrongful death. In his individual capacity he sought damages for loss of consortium, as did Trey and Julie's parents. We will refer to all simply as plaintiffs.

[3] Dr. Susan Donahue was Julie's primary physician and was employed by Adel Family Medical Center. Allegations against these defendants were apparently dismissed prior to trial.

[4] When asked, "By definition, isn't galactorrhea a milky discharge from multiple ducts [of the breast]?" Dr. Mark Karwal answered "yes."

have done a mammogram, although I would recognize that unilateral galactorrhea is probably not a sign of breast cancer."

Plaintiffs presented the testimony of Dr. Raymond Schulte. Dr. Schulte acknowledged he had "no concerns or criticisms" of the handling of the January 17, 2006 telephone call. During his testimony he further acknowledged that at his deposition he stated he had no criticisms, complaints, or concerns about the June 11, 2007 office visit. Dr. Schulte testified that the record from the June 11, 2007 examination did not meet the standard of care because it did not indicate whether the "+ expressible" breast discharge was unilateral or bilateral, and did not describe the coloration and consistency of the discharge. "That would be kind of a baseline of adequate." He testified that he could not tell from the report if Julie was experiencing unilateral or bilateral discharge. Dr. Schulte testified that unilateral discharge would require some sort of imaging study to rule out breast cancer. He acknowledged that bilateral discharge would not require a follow-up mammogram.

The plaintiffs then called Dr. Gerald Sokol, who testified that had some sort of breast imaging been done in June 2007, "it's more likely than not that [Julie's cancer] would have been detectable." He also testified that had the "tumor been diagnosed between nine or ten months earlier, or maybe a year or two earlier, she clearly would have had a better chance to survive." When asked if the cancer would have been detectable in January 2006, Dr. Sokol stated:

> Well, that is a harder date to state with absolute assurance that it would have been detected. The answer is maybe. But I can't tell you that it would have been able to be detected. It could have been. It is a maybe, but I don't know that anybody can say for

> sure that, roughly, whatever it was 18 months, or so before her diagnosis, that it clearly would have been evaluable. To some extent it depends on how hard you look. Perhaps, if they had looked particularly hard, they might have seen it. That, again, I hate to be wishy-washy, but it is a definite maybe.
>
> . . . .
>
> No, sir. I can't tell you it was more likely than not that [the cancer] would have been detectable in January 2006.

Luke Stutzman testified that on two occasions, Julie and he had conversations that she was experiencing breast discharge. The first time was "six or seven months after [their child] was born. It was the day of or the day before she reported that with a phone call." Luke stated, "[Julie] reported to me that she was leaking from her right breast and she was concerned that it was just from the one." When asked, "[D]id you see it all?" Luke responded, "I did not."

Luke could not pinpoint when the second conversation was, but it was "much later than that" and before her March 2008 diagnosis. On this second occasion, "[s]he came into bed. She was either taking a shirt off or putting one on and said it is happening again . . . she was leaking from her right breast again." Again, he stated he did not see it.

Following the presentation of evidence, the defendants moved for a directed verdict, arguing that the plaintiffs had failed to present sufficient evidence to establish a prima facie case of medical malpractice. The district court orally granted the motion. The court later wrote:

> This court concluded that plaintiffs had failed to produce substantial evidence in that they had failed to establish by expert testimony any breach of the applicable standard of care relating to (a) the January 17, 2006 phone call or (b) the June 11, 2007 visit and examination. The court also concluded that, although plaintiffs had presented substantial evidence of Dr. Belsheim's breach of the applicable standard of care relating to her preparation of the medical record

> describing the visit and examination of June 11, 2007, plaintiffs had failed to present substantial evidence—by expert testimony or otherwise—of causation of damages by the aforementioned breach. For these reasons, the court concluded that defendants' motion for directed verdict as to plaintiffs' claims against Dr. Belsheim must be granted.
>
> Plaintiffs' claims against defendant West Des Moines OB/GYN, P.C. were based upon the doctrine of respondeat superior and the fact that Dr. Belsheim was the P.C.'s employee. Because plaintiffs had failed to present substantial evidence as to their claims against Dr. Belsheim as indicated above, they necessarily had failed to present substantial evidence supporting their claims against the P.C. and, consequently, defendants were also entitled to a directed verdict dismissing all claims against the P.C. and said motion was granted as to those claims, as well.

The plaintiffs appeal.

II. Scope and Standard of Review.

Our scope of review of the district court's grant of the motion for directed verdict is for correction of errors at law. *Heinz v*. *Heinz*, 653 N.W.2d 334, 338 (Iowa 2002) (citations omitted). We consider the evidence in the light most favorable to the non-moving party. *Id*. If each element of the claim is supported by substantial evidence in the record, the court must overrule the motion. *Id*.; *Scoggins v*. *Wal-Mart Stores*, *Inc*., 560 N.W.2d 564, 566 (Iowa 1997) ("We must determine whether reasonable minds could differ on the issue presented, and if such is the case, a jury question exists and the grant of directed verdict was inappropriate.").[5]

[5] Even if the court concludes a directed verdict is warranted, the better practice is to allow the jury to deliberate. *See Royal Indem. Co. v. Factory Mut. Ins. Co.*, 786 N.W.2d 839, 846 (Iowa 2010) (noting that court may grant a new trial or enter judgment as though it had directed a verdict at the close of evidence).

III. Discussion.

"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). "'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, 108 (Iowa 2008) (citation omitted). Expert testimony is nearly always required to establish each element of the claim.[6] *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). "[P]roximate 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.*

Here, to survive the defendants' motion for directed verdict, the plaintiffs were required to produce through expert testimony, substantial evidence of (1) the applicable standard of care, (2) a violation or breach of this standard, and (3)

---

[6] For exceptions, *see Kennis v. Mercy Hosp. Med. Ctr.*, 491 N.W.2d 161, 165 (Iowa 1992) ("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.'" (internal citations omitted)).

a causal relationship between the breach and the injury sustained. *See Kennis*, 491 N.W.2d at 165; *Oswald v. LeGrand*, 453 N.W.2d 634, 635 (Iowa 1990) ("Ordinarily, evidence of the applicable standard of care—and its breach—must be furnished by an expert.").

The plaintiffs' argument is summarized as follows:

> If Dr. Belsheim had acted in conformance with Dr. Shulte's stated standard of care, she would have ordered imaging studies, had Ms. Stutzman in for an exam after the phone call and thoroughly documented her findings. Dr. Sokol testified that if the cancer had been diagnosed in 2006 after the phone call or if diagnosed after the office visit, Ms. Stutzman would, more likely than not, have survived her cancer.

However, there are analytical gaps in the argument that cannot be ignored.

A. Standard of Care—Expert Testimony. The plaintiffs argue the court erroneously concluded that they could not rely upon the defendants' experts to supply the standard of care. They point to the district court's statement to their attorney about the standard of care evidence, "It must come in your case in chief."

We note that the motion for directed verdict granted was made at the close of all of the evidence. Our supreme court has approved of the practice of not granting motions for directed verdict after the close of the plaintiff's case. *See Christiansen v. Sheldon*, 63 N.W.2d 892, 901 (Iowa 1954). The reasoning for this principle is that the evidence of the defense may disclose a case against a defendant. *See id*. Thus, the court must consider all the evidence presented—both the plaintiff's evidence and the defendant's evidence—in ruling upon a motion for directed verdict. *Id*. Our supreme court has also approved of plaintiffs

establishing "the applicable standard of care and its breach, by the defendants' own statements." *Oswald*, 453 N.W.2d at 640. Clearly the same would be true with any of the defendant's evidence, such as other expert testimony, as the court must consider all of the evidence presented, and the defendant's evidence may disclose a case or cause of action against them. *See Christiansen*, 63 N.W.2d at 901.

However, we are not convinced the district court misapplied the standard; the court simply may have misspoken. We note in the written order ruling on the motion for directed verdict that the court stated the motion was made at the close of all of the evidence and that the court considered "the oral and written arguments and authorities presented by counsel" and "reviewed the evidence submitted." Further in its oral rendition of its ruling on the record, the court stated,

> The court has reviewed—in addition to its own notes and recollection of *all* of the testimony, the Court has in particular reviewed the exhibits that were contained in Defendant's exhibits—I believe it's in Exhibit A, which are records from Defendant West Des Moines OB/GYN and Dr. Beverly Belsheim, pages 6 and 7 of those records.

(Emphasis added.) Accordingly, we conclude the district court did not rely solely upon the plaintiffs' evidence in ruling upon the motion for directed verdict.

B. The January 17, 2006 Telephone Call. Dr. Schulte testified he had no concerns or criticisms of the handling of the January 2006 telephone call.[7] The

---

[7] On appeal, the plaintiffs assert Dr. Schulte testified that the record of the telephone call was inadequate, but the transcript does not support the allegation.

The plaintiffs contend that the defendants' expert, Dr. Mark Karwal, opined that the January 2006 phone call breached the standard of care. This requires a strained

plaintiffs offered no evidence that any standard of care was breached with respect to the January 2006 telephone call. Even if Julie was suffering from unilateral breast discharge at that time, as her husband testified, Julie was directed to come into the office for some testing during the telephone conversation with Dr. Belsheim's nurse, and never followed up with an appointment.

C. June 11, 2007 Doctor Examination—Adequacy of Exam Record.

1. Standard of care established. Julie came to Dr. Belsheim more than a year after the January 2006 telephone call for a "well woman" appointment. According to the notes from the June 2007 annual exam, Julie complained of "breast discharge with hot bath." Under the heading "breasts," the examination form has this handwriting, "+ expressible." Dr. Belsheim wrote "o-cc galactorrhea" in the area of the form for "IMP" (impressions). Dr. Schulte testified that the doctor's notes of the examination, at a minimum, should have indicated whether the breast discharge was unilateral or bilateral, as well as its coloration and consistency. Thus, the plaintiffs did present substantial evidence of a standard of care concerning the adequacy of the exam record.

2. Breach? The second element necessary to establish a prima facie case of medical malpractice is that the standard of care was breached. Viewed in the light most favorable to the plaintiffs, there is substantial evidence

---

and convoluted reading of the testimony relied upon: "Q. Would you agree Doctor, that the standard evaluation of patients presenting with nipple discharge includes a thorough history and physical examination? A. Yes." The testimony does not address the January 2006 telephone call. Even if we were to conclude that the plaintiffs can rely on such an inference to establish a standard of care, Dr. Schulte—the plaintiffs' own expert—testified he had no criticisms of the handling of the January call.

that Dr. Belsheim's record of the June 2007 exam does not comply with the standard of care in that the exam notes do not state whether Julie was experiencing unilateral or bilateral breast discharge, do not indicate the coloration of the discharge, and do not state the consistency of the discharge. The plaintiffs thus presented substantial evidence of a breach of care.

3. Causation? Is there evidence that there is a causal relationship between the inadequacy of the June 2007 examination notes and the injury sustained? The district court answered that question in the negative, as do we. The plaintiffs correctly note that expert testimony need only establish a probability or likelihood of causal connection. *See Hansen v. Cent. Iowa Hosp. Corp.*, 686 N.W.2d 476, 485 (Iowa 2004). But here no expert testified there was a probability of a causal relationship between the inadequacy of the exam notes and the plaintiffs' damages.[8]

D. June 11, 2007 Doctor Examination—Follow-up Imaging Required with Unilateral Breast Discharge.

1. Standard of care established. The plaintiffs argue that they established a standard of care through the testimony of Dr. Schulte, and we agree. Dr. Schulte testified that if a patient presents with unilateral breast discharge, then breast imaging should be ordered. Dr. Belsheim agreed, and testified that if Julie presented with unilateral breast discharge, she would have ordered breast imaging. There was substantial evidence of the standard of care

---

[8] In explaining how they believe they have met their burden, plaintiffs argue that "Dr. Sokol indicated to the jury that the inaction of Dr. Belsheim . . . in diagnosis of the etiology of Ms. Stutzman's breast leakage, Ms. Stutzman would have had a better than fifty percent chance to live."

established—that when a patient presents with unilateral breast discharge, follow-up imaging is required.

2. Breach? Dr. Belsheim testified that Julie did not present with unilateral breast discharge. The plaintiffs argue that Luke Stutzman's testimony that his wife complained to him of discharge from only her right breast sometime before her March 2008 diagnosis supports an inference that Julie complained of unilateral discharge to Dr. Belsheim, which in turn raises an inference that Dr. Belsheim breached the standard of care by failing to order follow-up breast imaging.

The plaintiffs argue that Dr. Sokol provides the necessary link to establish causation. Our review of Dr. Sokol's testimony is that Dr. Sokol simply opined that if a mammogram had been ordered in June 2007, he believed it was more likely than not that the cancer would have been detected. He also testified that if Julie had been diagnosed in June 2007, she would have had a better chance of survival. However, Dr. Sokol, nor any other witness, could testify that Julie presented herself to Dr. Belsheim as having or that she was suffering from unilateral discharge in June 2007.

We recognize that we must consider every legitimate inference that can be deduced reasonably from the record. *See Phillips*, 625 N.W.2d at 718. But this series of inferences is too tenuous and speculative. "No consequential fact in a case can be resolved by pure guesswork." *Id.* Perhaps a different result would be reached if, for example, Luke Stutzman was able to testify that his

wife's complaint was the night before or the morning of her June 11, 2007, examination. However, those are not facts presented to us.

E. Last-chance-of-survival Doctrine. The plaintiffs also argue that even if their cause could not survive the motion for directed verdict, they still should be able to recover damages under the last-chance-of-survival doctrine. However, our supreme court has stated, "As developed in our case law, the last-chance-of-survival doctrine is not an alteration of the traditional rules for determining proximate cause, but, rather, the creation of a newly recognized compensable event to which those traditional rules apply." *Mead v. Adrian*, 670 N.W.2d 174, 178 (Iowa 2003). Inasmuch as the plaintiffs were unable to present sufficient evidence of any breach except record-keeping, and there was no proximate cause of damages by the poor record-keeping, the claim for last-chance-of-recovery damages also fails.

The district court did not err in granting the defendants' motion for a directed verdict. We therefore affirm.

AFFIRMED.