IN THE COURT OF APPEALS OF IOWA

No. 6-549 / 05-1592
Filed October 25, 2006

STEVEN D. MAXFIELD,
Plaintiff-Appellant,

vs.

ALAN R. KOSLOW,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Robert J. Blink, Judge.

Steven D. Maxfield appeals the district court's ruling dismissing his petition on summary judgment. **AFFIRMED.**

Theodore Hoglan of Condon and Hoglan Law Firm, Marshalltown, for appellant.

Robert Rouwenhorst of Rouwenhorst & Brown, P.C., West Des Moines, for appellee.

Heard by Mahan, P.J., and Miller and Vaitheswaran, JJ.

MAHAN, P.J.

Steven D. Maxfield appeals the district court's ruling dismissing his petition on summary judgment. He argues the district court erred in finding his medical malpractice claim was barred under both Iowa Code sections 668.11 and 614.1(9) (2005). We affirm.

I. Background Facts and Proceedings

On February 24, 1998, Dr. Alan Koslow performed surgery on Maxfield. The surgery was comprised of a right cervical sympathectomy and resection of fibrous bands on the thoracic outlet. The day after surgery, February 25, 1998, a chest x-ray was ordered for shortness of breath. According to Maxfield's discharge summary, his "phrenic nerve was identified and protected" during the surgery. At a follow-up visit on March 11, 1998, Koslow noted that Maxfield's chest x-ray showed he had "a right hemidiaphragmatic paralysis [that was] most likely secondary to a phrenic nerve stretch during the surgery." At the time, Koslow thought Maxfield's condition would improve. Two weeks later, however, Maxfield was complaining of shortness of breath and had neuropraxia of the phrenic nerve on the right side and an elevated diaphragm. Koslow noted that there was slight improvement of diaphragmatic expansion. He extended Maxfield's excuse from work for another month, then another month after that. On May 20, 1998, Koslow noted, "Overall, I feel that he is doing very well. He is slowly improving his exercise tolerance, although he has not been very aggressive about exercising." Koslow also stated he thought the neuropraxia would take six to nine months to improve, but that Maxfield's exercise tolerance should improve sooner.

Maxfield saw Dr. David Laughrun on August 19, 1998. Laughrun indicated Maxfield had a phrenic nerve paralysis. In March 1999 Dr. Donald Burrows noted Maxfield was suffering from right hemidiaphragmatic paralysis and underlying bronchospastic lung disease. Maxfield continued to experience shortness of breath, but believed on the advice of his doctors that the condition would improve. Maxfield, however, was hospitalized in December 2002.

Maxfield filed a petition alleging medical malpractice on February 24, 2004. Koslow filed his answer on August 16, 2004. Maxfield's deadline for certifying expert witnesses was February 12, 2005. However, he never filed any certification. The district court granted Koslow summary judgment on August 19, 2005. According to the district court, Maxfield's claim failed because it was time-barred under Iowa Code section 614.1(9) and he lacked an expert pursuant to section 668.11. Maxfield appeals.

II. Standard of Review

We review a ruling granting summary judgment to determine both whether there is a genuine issue of material fact and whether the district court correctly applied the law. *Ratcliff v. Graether*, 697 N.W.2d 119, 123 (Iowa 2005). Summary judgment is appropriate where the moving party shows there is no issue of material fact and it is entitled to judgment as a matter of law. *Bazel v. Mabee*, 576 N.W.2d 385, 387 (Iowa 1998). In determining whether an issue of material fact exists, we view the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits in the light most favorable to the party opposing summary judgment. *Id.* No material issue of fact exists if the only dispute concerns the legal issues surrounding the facts. *Ratcliff*, 697 N.W.2d at

123. However, if reasonable minds could differ as to the facts, summary judgment should not be granted. *Bazel*, 576 N.W.2d at 387.

III. Merits

First, Maxfield claims the district court erred in dismissing his claim under section 668.11. According to section 668.11, a party's expert witness in a professional liability case must be disclosed both to the court and the other party within a certain timeframe. Maxfield argues, however, that because his claim is based on the doctrine of *res ipsa loquitur*, it is unnecessary for him to provide an expert witness. Therefore, his claim should not have been dismissed for failure to comply with the timeframe in section 668.11.

Res ipsa loquitur is an exception to the general rule that a party alleging negligence must specifically identify the acts or omissions constituting negligence. *Welte v. Bello*, 482 N.W.2d 437, 439 (Iowa 1992). The phrase means literally, "the thing speaks for itself." BLACK'S LAW DICTIONARY 1336 (8th ed. 2004). In Iowa, the doctrine has been applied to both medical and dental malpractice actions. *Welte*, 482 N.W.2d at 439. To use the doctrine, the plaintiff must show (1) the injury was caused by instrumentality in the defendant's exclusive management and control and (2) the injury would not ordinarily have occurred if reasonable care was taken. *Kennis v. Mercy Hosp. Med. Ctr.*, 491 N.W.2d 161, 166-67 (Iowa 1992). The common experience of laypersons or experts may be used to show the second element. *Id.* at 167; *Welte*, 482 N.W.2d at 440. Generally, where the ordinary care of a physician is at issue, only an expert can testify to the standard of care and skill required. *Graeve v. Cherny*, 580 N.W.2d 800, 802 (Iowa 1998). When expert testimony is necessary to

establish the foundational facts and that expert testimony is not available, summary judgment is appropriate. *Kennis*, 491 N.W.2d at 167.

In *Welte*, our supreme court provided a truncated review of cases where expert testimony was and was not required. *Welte*, 482 N.W.2d at 441. The difference between these cases is thus: cases involving injuries to body parts outside the field of treatment or to otherwise healthy body parts did not require expert testimony while cases involving technical questions of causality do. *Kennis*, 491 N.W.2d at 167. The difference has been described simply:

> If a doctor operates on the wrong limb or amputates the wrong limb, a plaintiff would not have to introduce expert testimony to establish that the doctor was negligent. On the other hand, highly technical questions of diagnoses and causations which lie beyond the understanding of a layperson require introduction of expert testimony.

Donovan v. State, 445 N.W.2d 763, 766 (Iowa 1989).

In this case, the phrenic nerve was allegedly stretched. The injury is located near the site of surgery. According to the surgery notes, the nerve was manipulated during surgery. Maxfield provides no proof of the standard of care necessary to protect the phrenic nerve during a sympathectomy. Thus, expert testimony is necessary in this case to establish both causation and a standard of care.

Second, Maxfield argues his claim is not barred by the statute of limitations. According to section 614.1(9):

> [T]those [claims] founded on injuries to the person . . . against any physician . . . arising out of patient care, must be brought within two years after the date on which the claimant knew, or through the use of reasonable diligence should have known . . . of the existence of, the injury . . . for which damages are sought in the action, whichever of the dates occurs first, but in no event shall any action

> be brought more than six years after the date on which occurred the act or omission or occurrence alleged in the action to have been the cause of the injury . . . .

Iowa Code § 614.1(9)(a).

Maxfield's surgery took place on February 24, 1998. On February 25, 1998, a chest x-ray film was ordered for shortness of breath. During Maxfield's check-up on March 11, 1998, Koslow noted the phrenic nerve was stretched. On April 29, 1998, another chest inspiration and expiration x-ray was ordered for shortness of breath. Maxfield, however, did not file this petition until February 24, 2004.

Inquiry notice requires only that a person be aware of a problem. *Ratcliff*, 697 N.W.2d at 124. Once a person is aware or should be aware of a problem, the statute of limitations begins to run. *Id.* We find Maxfield was aware he was experiencing shortness of breath as early as the day after his surgery. In any event, his counsel concedes Maxfield was aware of the stretched phrenic nerve in March 1998. He argues that under the "continuous treatment" doctrine, he had more than two years to file his complaint. Our supreme court recently rejected the continuous treatment doctrine with respect to a plaintiff who was under inquiry notice. *See id*. at 125. Thus, we refuse to accept it here.

The district court's ruling dismissing Maxfield's claim on summary judgment is affirmed.

AFFIRMED.