

IN THE COURT OF APPEALS OF IOWA

No. 2-1169 / 12-1117

Filed April 24, 2013

SANDRA L. MUSGROVE,
Plaintiff-Appellant,

vs.

LARRY A. MCCRAY, D.D.S., M.S.,
Defendant-Appellee.

Appeal from the Iowa District Court for Linn County, Robert E. Sosalla,
Judge.

Sandra Musgrove appeals from the district court order granting summary judgment in favor of Dr. Larry McCray on her medical battery and medical negligence claims. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Paul Kevin Waterman of Waterman Law Offices, P.L.C., Iowa City, for appellant.

Roland Dale Peddicord and Joseph M. Barron of Peddicord, Wharton, Spencer, Hook, Barron & Wegman, LLP, West Des Moines, for appellee.

Considered by Doyle, P.J., and Mullins and Bower, JJ.

BOWER, J.

Sandra Musgrove appeals from the district court order granting summary judgment in favor of Dr. Larry McCray on her medical battery and medical negligence claims. Musgrove contends there is a genuine issue of material fact regarding whether she consented to the removal of all of her teeth, and therefore summary judgment was inappropriate on her medical battery claim. She also contends that expert witness testimony is unnecessary to prove her medical negligence claim, and therefore it should survive summary judgment.

Musgrove's failure to designate an expert witness to establish the applicable standard of care bars her medical negligence claim. However, a genuine issue of material fact exists as to whether or not Musgrove consented to the removal of her bottom teeth. Therefore, we reverse the district court's grant of summary judgment on Musgrove's medical battery claim and remand for further proceedings.

I. Background Facts and Proceedings.

Sandra Musgrove was referred by her dentist, Dr. Charles Choi, to Dr. Larry McCray, an oral surgeon, for removal of her upper teeth in preparation for dentures. Musgrove had previously had a number of her upper and lower teeth extracted, and several of the remaining teeth had either fillings or crowns. At least one lower tooth required a filling. Musgrove wished to have her remaining upper teeth extracted, and Dr. Choi was preparing an upper denture for her.

On March 23, 2010, Musgrove signed an "Informed Consent for Oral Surgery, Anesthesia Sedation" for Dr. McCray. At the top of the form, the name

of the operation or procedure is “removal of remaining teeth and alveolectomy [with] IV sedation.” At the bottom of the form Musgrove initialed the statement, “The nature of the surgery and anesthesia has been FULLY EXPLAINED TO ME and no warranty or guarantee has been made as a result and/or cure.” The form states: “I HAVE READ AND UNDERSTAND ALL OF THE ABOVE INFORMATION. I HAVE BEEN GIVEN INFORMATION REGARDING AVAILABLE OPTIONS, INCLUDING NO TREATMENT, AND CONSENT TO THIS PROCEDURE AS DISCUSSED. I HAVE BEEN GIVEN THE OPPORTUNITY TO ASK QUESTIONS AND HAVE RECEIVED SATISFACTORY ANSWERS.” Musgrove also signed the form.

Dr. McCray performed the extraction surgery on April 8, 2010. He removed all of Musgrove’s remaining teeth, which were identified as numbers 6-13 and 20-27. Dr. McCray wrote Dr. Choi a letter explaining that he had removed all of Musgrove’s teeth.

On January 19, 2011, Musgrove filed a petition against Dr. McCray, alleging medical negligence and medical battery. She claimed she did not consent to the removal of her lower teeth, and only understood that she was consenting to the removal of her upper teeth.

Musgrove did not designate an expert witness within the deadline provided in Iowa Code section 668.11 (2011). After Musgrove was deposed on November 3, 2011, Dr. McCray moved for summary judgment on both claims, alleging in part that Musgrove failed to timely designate an expert witness as was required to prove her claims. On that same day, November 15, 2011, Musgrove

filed a certification of expert witness, which Dr. McCray moved to strike as untimely. Musgrove resisted both the motion for summary judgment and the motion to strike her expert witness designation.

A hearing was held on January 27, 2012. In its March 12, 2012 ruling, the district court denied McCray's motion to strike and gave Musgrove additional time to supplement her discovery responses regarding her designated expert. The court held that Musgrove needed an expert to prove both of her claims. It granted the parties additional time to supplement their motion for summary judgment and resistance, and ordered that the motion would be resubmitted on April 17, 2012.

Musgrove failed to supplement her discovery responses as provided by the court's March 12, 2012 order. On May 14, 2012, Musgrove withdrew her expert witness designation and requested the original motion for summary judgment be submitted and ruled upon by the court. The district court entered its order the same day, finding Musgrove failed to provide expert witness discovery as ordered. The court found that such information was vital to Musgrove's case. The court then granted Dr. McCray's motion for summary judgment.

II. Scope and Standard of Review.

We review a ruling on a motion for summary judgment for the correction of errors at law. *Bagelmann v. First Nat'l Bank*, 823 N.W.2d 18, 23 (Iowa 2012). Summary judgment is appropriate when "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.” *Id.* (citing Iowa R. Civ. P. 1.981(3)). On appeal from a grant of summary judgment, we review the facts in the light most favorable to the nonmoving party. *Id.* We also afford the nonmoving party every legitimate inference that may be reasonably deduced from the record. *Id.* Where a motion for summary judgment is supported, the nonmoving party must respond with specific facts that show a genuine issue for trial. *Mueller v. Wellmark, Inc.*, 818 N.W.2d 244, 253 (Iowa 2012).

III. Analysis.

In order to establish a prima facie case of medical malpractice, a plaintiff must show (1) the applicable standard of care, (2) the violation of the standard of care, and (3) a causal relationship between the violation and the harm suffered by the plaintiff. *Peppmeier v. Murphy*, 708 N.W.2d 57, 61-62 (Iowa 2005). There are three means of establishing specific negligence:

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). Generally, when the ordinary care of a physician is at issue, only expert witnesses can testify and establish the standard of care and skill required. *Id.*

In medical malpractice actions stemming from the issue of informed consent, our supreme court has held that “the physician’s duty to disclose is measured by the patient’s need to have access to all information material to making a truly informed and intelligent decision concerning the proposed medical

procedure.” *Id.* at 166. In order show lack of informed consent, the patient must show:

- (1) The existence of a material risk unknown to the patient;
- (2) A failure to disclose that risk on the part of the physician;
- (3) Disclosure of the risk would have led a reasonable patient in the plaintiff's position to reject the medical procedure or choose a different course of treatment;
- (4) Injury.

Id. A patient will generally be required to present expert testimony relating to the nature of the risk and the likelihood of its occurrence in order for the jury to determine, from the standpoint of a reasonable patient, whether the risk is a material one. *Id.* Where the knowledge and likelihood of a risk is not within the common knowledge of laypersons, expert evidence is required. *Id.*

In her resistance to the motion to strike her expert witness designation, Musgrove stated:

After learning that Dr. McCray planned on calling witnesses who would claim to have heard Musgrove authorizing the removal of her lower teeth, and that there would likely be testimony as to the health of Musgrove's lower teeth, it was decided that expert witness testimony would be required for the purpose of informing the fact-finder that it didn't make sense, *medically*, to remove all of Musgrove's lower teeth, as there were healthy teeth remaining.

The district court agreed in its March 12, 2012 ruling, finding that “there appear to be issues regarding the health of Plaintiff's lower teeth that are beyond the common knowledge of laypersons, which may impact the conversations between Plaintiff, Dr. Choi, and Defendant regarding the removal of Plaintiff's teeth.” The court then allowed Musgrove's expert witness designation, expanded the time in which she was allowed to supplement her discovery responses, and allowed additional time to supplement her resistance to the motion for summary

judgment. Musgrove failed to supplement her discovery responses or her resistance to the motion for summary judgment, and later withdrew her expert witness designation. The court then granted summary judgment in favor of Dr. McCray, finding an expert witness “is vital to Plaintiff’s case continuing.”

On appeal, Musgrove argues that expert witness testimony is not necessary because the question of whether there was adequate communication between Musgrove and Dr. McCray regarding the removal of her lower teeth is not a complicated one.

We conclude the district court properly granted summary judgment on Musgrove’s medical negligence claim. Musgrove may have been able to show that Dr. McCray knew or should have known that Musgrove was consenting only to the removal of her upper teeth. But in order to generate this fact issue, expert witness testimony was required to establish the proper standard of care for teeth extraction and dentures, and show how they related to Musgrove’s case. As Musgrove stated in her resistance to Dr. McCray’s motion to strike her expert witness designation, expert witness testimony would be necessary to establish whether the extraction of Musgrove’s lower teeth made sense *medically*. If a reasonable practitioner would have known that the removal of Musgrove’s lower teeth was harmful or unnecessary, a fact-finder could determine that Dr. McCray was negligent in failing to review these risks with Musgrove or to seek further clarification on the procedure. Because Musgrove failed to designate an expert witness and provide such evidence, she cannot show a genuine issue of material

fact in dispute. Summary judgment is, therefore, appropriate on this claim and we affirm.

However, we find a genuine issue of material fact exists with regard to Musgrove's medical battery claim. A medical battery is when a doctor performs an operation to which the plaintiff has not consented. *Moser v. Stallings*, 387 N.W.2d 599, 601 (Iowa 1986). The elements are met by showing the wrongdoer intended to inflict a harmful or offensive contact upon the plaintiff. *Id.* at 601-02. When the patient consents to one type of treatment and the doctor "intentionally deviates from the consent and performs a substantially different treatment," battery occurs. *Id.* at 602.

In resisting the motion for summary judgment, Musgrove disputes that she consented to the removal of all her remaining teeth; rather, she believed she was consenting to the removal of all her remaining upper teeth. She testified,

And I'm under the impression that when I read and signed [the consent form], since I had been there for my top denture, that I was signing it for my top teeth. Since my denture was there, that's what I was scheduled for, so I had no reason to believe that my bottom teeth would be pulled because I had no denture. And as I stated, I did not want my bottom teeth pulled, so I just assumed that it was for my top teeth. That's what I was there for.

She further testified: "I had no reason to believe that it [the consent form] meant my bottom teeth because I had been six weeks getting the cast done for my top dentures, so why would I think that I was getting my bottom teeth pulled?"

Musgrove's post-surgical actions are consistent with her impression that only her remaining top teeth were to be pulled. Upon discovery that all her bottom teeth had been removed, Musgrove had her sister call Dr. McCray's office

and Dr. Choi's office to find out why her bottom teeth were removed. Dr. Choi's records reflect the following entry for April 8, 2010,

Caregiver for Sandra called & said Sandra had lower teeth extracted as well. Confirmed w/ Dr. McCray that patient asked him to, both @ consult & before surgery, because she didn't want to restore them or deal with them anymore; and would get a lower denture later. Sandra denies she told them that.¹

The record is devoid of any rebuttal affidavit or testimony from Dr. McCray, or anyone from his office.

Given that the informed consent form may reasonably be interpreted one of two ways, in the context of the state of the present record, (consent to removal of all remaining teeth, or consent to removal of all remaining upper teeth), and viewing the evidence in the light most favorable to Musgrove, we find a genuine issue of material fact exists as to whether or not Musgrove consented to the removal of her bottom teeth. Under the circumstances presented to us, expert testimony is not required for Musgrove's battery claim. See *Perin v. Hayne*, 210 N.W.2d 609, 618 (Iowa 1973) ("However, expert opinion as to community standard is not required in a battery count, in which the patient must merely prove failure to give informed consent and a mere touching absent consent."). Accordingly, we reverse the district court's grant of summary judgment in favor of Dr. McCray on Musgrove's medical battery claim and remand for further proceedings.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

¹ This document is illegible in the appendix filed by the parties.