IN THE COURT OF APPEALS OF IOWA

No. 3-366 / 12-1292
Filed June 12, 2013

JACKIE KUSH and ALLEN KUSH, and KASEY WARNKE, Individually and Next Friends of DAWSON KUSH, a Minor,
Plaintiffs-Appellants,

vs.

PATRICK M. SULLIVAN, M.D., and DES MOINES ORTHOPAEDIC SURGEONS, P.C.,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Mary Pat Gunderson, Judge.

Jackie Kush appeals the summary judgment order dismissing her medical malpractice claim. **AFFIRMED.**

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

Erik P. Bergeland of Finley, Alt, Smith, Scharnberg, Craig, Hilmes & Gaffney, P.C., Des Moines, for appellees.

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

TABOR, J.

Jackie Kush sued Dr. Patrick Sullivan, her orthopedic surgeon, alleging he engaged in professional negligence by using the wrong size prosthetics when replacing her knees. She designated Dr. Charles Clark, the treating physician who performed revision surgery on her knees, as the only expert witness in her medical malpractice suit. But when deposed by the defense, Dr. Clark said Kush had not hired him as an expert witness and he declined to give an opinion on the standard of care.

Dr. Sullivan moved for summary judgment, alleging Kush could not establish a prima facie case of medical malpractice without an expert opinion that he violated the standard of care. Plaintiff's counsel resisted, filing an affidavit by Kush recounting Dr. Clark's criticisms of Dr. Sullivan's work. The district court granted summary judgment, finding the record "void of any evidence" Dr. Sullivan breached the standard of care.

On appeal, Kush contends the district court entered summary judgment prematurely and erred in finding Dr. Clark could not be compelled to give an expert opinion that Dr. Sullivan violated the standard of care.[1] Kush also asserts her affidavit was sufficient to divert the grant of summary judgment.

At the time of the hearing on summary judgment, Kush did not have on record an expert opinion that Dr. Sullivan performed negligently. Nobody asked Dr. Clark during his deposition if he had formed an opinion regarding the

[1] Kush suggested for the first time in oral argument that the question of expert testimony was not ripe for summary judgment and a second deposition of Dr. Clark may be required.

standard of care in Kush's case. Nobody asked him about the accuracy of Kush's recollection he made derogatory statements about Dr. Sullivan's work, and if he made those statements, whether in his mind they equated to an expert opinion on deviation from the standard of care. Given the state of the record, we agree with the district court's grant of summary judgment.

I. Background Facts and Proceedings

Viewed in the light most favorable to Kush, the following facts appear in the summary judgment record. In December 2008, Kush sought treatment from Dr. Sullivan for pain in her right knee. She suffered discomfort in both knees as time went on. Dr. Sullivan eventually recommended thirty-eight-year-old Kush have both knees replaced. He performed total replacement surgery on her right knee on March 13 and her left knee on March 17, 2009.

Kush's knees continued to bother her after the surgeries. She reported muscle cramps and sleep problems. Dr. Sullivan prescribed pain medication and limited her activity, but her symptoms persisted. She experienced excruciating pain; her knees would pop; and she had decreased function in her knees, ankles, and hips.

Kush sought answers from Dr. Lynn Lindaman, another Des Moines area orthopedic surgeon. Kush recalled that Dr. Lindaman suggested the replacement knees were not the proper size and referred her to Charles Clark, an orthopedic surgeon at the University of Iowa Hospitals and Clinics. Dr. Clark performed revision surgeries on Kush's knees seven months after her original

replacement surgeries. After she had the new implants, her symptoms dramatically improved.

On January 7, 2011, Kush sued Dr. Sullivan, claiming professional negligence and loss of consortium.[2] Specifically, she alleged Sullivan deviated from the generally accepted standard of medical care:

> a. In negligently choosing an oversized prosthetic component both prior to and at the time of surgery;
> b. In negligently failing to discover the inappropriate size of the prosthetic components at the time of the surgery so that it could be remedied;
> c. In discharging Ms. Kush before she attained a state of adequate recovery; and
> d. In failing to exercise a degree of care and skill ordinar[il]y exercised under the conditions and circumstances then and there existing.

Kush designated Dr. Clark as her sole expert witness "to testify regarding issues of the appropriate standard of care, deviations from the appropriate standard of care, causation, and damages." She filed the expert designation on July 29, 2011—one day before the deadline—as well as an application for additional time to designate expert witnesses. On December 12, 2011, the district court found no good cause to extend the deadline to designate additional expert witnesses and denied her request.

During Dr. Clark's January 17, 2012 deposition, he repeatedly declined to offer expert testimony on standard of care. He told counsel he was testifying "regarding my care and treatment of the patient, period." When asked if he was

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[2] Although Kush's husband and two children joined as plaintiffs for their loss of consortium claims, for purposes of this appeal, we will refer to all plaintiffs collectively as Kush. The Des Moines Orthopaedic Surgeons, P.C. is also listed as a defendant under the doctrine of respondeat superior. We refer to both parties as Dr. Sullivan.

prepared to offer an opinion whether Dr. Sullivan breached a standard of care to Kush, he answered "No." On multiple occasions Dr. Sullivan refused to answer questions from plaintiff's counsel relating to the standard of care; the doctor would only testify as to his personal procedures:

> A. Once again, the term "standard of care" is a legal term, and when we teach, I don't teach a resident "this is a standard of care." I teach them what I believe is the best way to, you know, examine a patient, to discuss surgery with a patient, and to do the surgery and what the elements are, you know, with all those things. I don't tell them that the standard of care is X, Y, and Z. I teach them what I believe is the appropriate way to examine and discuss with the patient and do the surgery.
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> Q. Okay. I think the problem we're having is one of semantics, and I think you're getting hung up and maybe I'm getting hung up on "standard of care," and I think the way you put it is good. So when you teach your students, obviously you want to teach them the best way to do it, correct; that's your goal? A. What in my opinion is the best way, back to your previous comments, I'm not getting hung up on semantics. "Standard of care" is basically a legal term, and I'm talking about medical treatment of patients, and there is a distinction between the two.

On further examination, Dr. Sullivan's attorney asked Dr. Clark:

> Q. I think that there were some questions that resulted in some "could's" and "maybe's"; because of that line of testimony, I just want to clarify, do you intend to offer an opinion to a reasonable degree of medical certainty that breach of the standard of care by Dr. Sullivan or some other treating physician caused Ms. Kush's complaints that she shared with you in your office in 2009?"

Dr. Clark answered, "No."

On March 8, 2012, Dr. Sullivan moved for summary judgment based on Kush's failure to identify an expert witness to testify to the appropriate standard of care. Kush resisted, attaching an affidavit in which she swore Dr. Clark told her Dr. Sullivan's work was "total physician sloppiness." The affidavit also attributed other disparaging statements to Dr. Clark. The district court granted

summary judgment on June 29, 2012. Without filing a motion to enlarge or amend the ruling, Kush filed her notice of appeal.

II. Scope and Standard of Review

We probe the summary judgment ruling for legal error. *Seneca Waste Solutions, Inc. v. Sheafer Mfg. Co.*, 791 N.W.2d 407, 410–11 (Iowa 2010). We view the record in the light most favorable to the non-moving party. *Robinson v. Allied Prop. & Cas. Ins. Co.*, 816 N.W.2d 398, 401 (Iowa 2012). Summary judgment is appropriate when no genuine issues of material fact appear on record and the movant is entitled to judgment as a matter of law. *Id.* If the record would allow a reasonable jury to return a verdict for the non-moving party, a genuine issue of material fact exists. *Wilkins v. Marshalltown Med. Surg. Ctr.*, 758 N.W.2d 232, 235 (Iowa 2008). The movants must show they are entitled to judgment as a matter of law. *Sallee v. Stewart*, 827 N.W.2d 128, 133 (Iowa 2013).

III. Analysis

A. Necessity of Expert Testimony in Medical Malpractice Suits

To establish a prima facie case of medical malpractice, Kush must submit evidence that shows: (1) the applicable standard of care, (2) a breach of the standard of care, and (3) a causal relationship between the breach and the harm the plaintiff allegedly experienced. *See Peppmeier v. Murphy*, 708 N.W.2d 57, 61–62 (Iowa 2005). Almost always, a plaintiff must prove each element through expert testimony. *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 718 (Iowa 2001). Two narrow exceptions exist where the plaintiff may prove a physician's

negligence without expert testimony: the first is through evidence showing the physician's lack of care is so obvious to be within the understanding of a lay person and the second (an extension of the first) is through evidence the physician injured a body part not involved in the treatment. *Kennis v. Mercy Hosp. Med. Ctr.*, 491 N.W.2d 161, 165 (Iowa 1992).

In addition, Iowa Code section 668.11 (2011) requires parties in a professional liability case such as medical malpractice to timely designate expert witnesses expected to testify. Iowa courts may require disclosure under section 668.11 when a treating physician gives an opinion about reasonable standards of medical care because a physician ordinarily is not required to form such an opinion in the course of treating a patient. *Hansen v. Cent. Iowa Hosp. Corp*., 686 N.W.2d 476, 482 (Iowa 2004).

B. Kush's Disclosure of Expert Testimony

The district court granted summary judgment because Kush's only designated expert refused to offer an opinion on the standard of care during his deposition. To salvage her case on appeal, Kush urges she can generate a jury question on the medical malpractice elements through either of two alternative scenarios. First, she contends Dr. Clark, as her treating physician, may be compelled to testify regarding his expert opinion—disputing the district court's reliance on *Mason v. Robinson*, 340 N.W.2d 236 (Iowa 1983). Second, she argues her own affidavit, recalling hearsay statements made by Dr. Clark before and after he performed her revision surgery, can substitute for expert testimony. We examine each claim in turn.

1. Compelling Dr. Clark's Expert Testimony

Kush targets the district court's determination Dr. Clark could not be compelled to testify as an expert witness. The district court invoked the case law prohibition against forcibly extracting a prior opinion from a reluctant expert—in the absence of an affirmative showing by the plaintiff of a unique need for that expert's opinion. *See Mason*, 340 N.W.2d at 242 (holding "the principle of necessity" provides only basis for "compulsion of an unwilling expert's testimony"). Because Kush failed to show she needed the expertise of Dr. Clark, as opposed to any other qualified physician, the district court decided: "the law does not permit compelling Dr. Clark to develop any such opinion."

On appeal, Kush offers a persuasive argument for distinguishing *Mason*. Because *Mason* involved an expert witness who was a "stranger" to the medical malpractice suit, our supreme court tailored its holding to situations where the expert has no other connection to the litigation. *See id*. at 237, 241–42. Kush points out that Dr. Clark, as her treating physician, is not a "stranger to the litigation" and, therefore, *Mason's* "compelling necessity" rule should not apply. She asserts Dr. Clark "should be compelled to testify regarding his previously formed opinions."

We agree applying *Mason* to the instant facts would expand the reach of its doctrine. When a treating physician is already being called to testify in a medical malpractice case, the burden placed on the physician by compelling his or her expert opinion may be less onerous than compelling an expert with no prior knowledge of the matter, and the balance may tip toward the common law

maxim that the public has a right to everyone's evidence. *See id.* at 242 (noting inconvenience to a witness in testifying may be overborne by the need of the court and the litigant for the testimony).

But we do not need to endorse an expansion of *Mason* here because we detect a more fundamental flaw in Kush's logic. She cannot point to any statement in Dr. Clark's deposition revealing he had previously formed an opinion that Dr. Sullivan's care of Kush deviated from acceptable medical standards.[3] Neither attorney asked Dr. Clark whether, despite his reluctance to express it, he indeed formulated a viewpoint on Dr. Sullivan's alleged negligence. Plaintiff's counsel admitted at the summary judgment hearing to being unsure whether Dr. Clark would provide an expert opinion:

> We knew he was a treating physician and we knew by talking to the client what she believes he said, and we knew that when they deposed Dr. Clark he was either going to say I have an opinion; I told somebody that I had an opinion; or I refuse to talk about it. That's something we found at the deposition, just like counsel found out at the deposition.

Plaintiff's counsel tried to fill the gap by submitting Kush's affidavit highlighting what she remembered from conversations with Dr. Clark. She insists the following statements reveal Dr. Clark *did* form an opinion that Dr. Sullivan breached the standard of care.

- "Prior to actually cutting to my knees, Dr. Clark said he felt the wrong sized implant had been used."
- "Dr. Clark said that what he saw was the result of total physician sloppiness."

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[3] We have no doubt Dr. Clark is qualified to be an expert witness on knee replacement surgery and could offer an opinion on the standard of care. He is an experienced and distinguished orthopedic surgeon who has testified as an expert witness more than one hundred times.

- "Dr. Clark said there was too much cement put into the part."
- "Dr. Clark said there should have been tree holes for the drainage tubes and I had none."
- "Dr. Clark said he couldn't believe Dr. Sullivan was the physician who performed my surgery."
- "Based on these comments I felt Dr. Clark had a very poor opinion of the manner in which Dr. Sullivan performed my total knee replacements."

Even when viewed in the light most favorable to Kush's case, her own self-interested, lay person's memory of what Dr. Clark told her in the course of treatment cannot bootstrap an expert opinion into the summary judgment record. *See* Iowa Code § 147.139 (setting out expert witness standards in medical malpractice cases); *Graeve v. Cherny*, 580 N.W.2d 800, 802 (Iowa 1998) (requiring expert testimony in medical malpractice case brought in small claims court even when the conclusion that the doctor breached a standard of care might appear logical to a lay person).

The first hitch in using Kush's affidavit to show Dr. Clark had formed a negative opinion on the standard of care is that plaintiff's counsel never asked Dr. Clark at the deposition whether he expressed a standard-of-care opinion to Kush. At the hearing on the motion for summary judgment, plaintiff's counsel argued the material fact in dispute was "did he or did he not say the things that the plaintiff said in her affidavit he told her?" Plaintiff's counsel went on to assert Dr. Sullivan's attorney could have redeposed Dr. Clark to ask him: "Did you say those things? Was the plaintiff telling the truth in her sworn affidavit[?]"

Kush's argument misplaces the burden of proof.[4] As plaintiff, she must make a sufficient showing, through expert testimony,[5] of the defendant doctor's deviation from the standard of care to withstand the defense motion for summary judgment. *See generally Phillips*, 625 N.W.2d at 721. The uncertainty whether Dr. Clark actually expressed a standard-of-care opinion to Kush does not represent a genuine issue of material fact pertinent to the elements of professional negligence. *See Murphy*, 708 N.W.2d at 58 (explaining a factual issue is material only if the factual dispute has a direct impact on the outcome of the suit).

And even assuming Kush accurately recalled Dr. Clark's words, his comments to his patient in a clinical setting about Dr. Sullivan's performance are not of the same quality as direct expert testimony, under oath, that Kush needs to offer to prove a breach in the standard of care or a causal relationship between the breach and her harm.

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[4] As the dissent points out, our supreme court has held a defendant doctor moving for summary judgment must first sustain the burden of proving "the absence of genuine triable issues," before the burden to show their existence shifts to the plaintiff. *See Daboll v. Hoden*, 222 N.W.2d 727, 735 (Iowa 1974) (finding doctor's failure to satisfy the burden defeats motion even if plaintiff presents "no opposing evidentiary matter"). But our supreme also has determined in a case where the plaintiff is limited in the presentation of expert testimony, the issue becomes "not whether there was *negligence* in the actions of the defendant but whether there was *evidence* upon which liability could be found." *Oswald v. LeGrand*, 453 N.W.2d 634, 635 (Iowa 1990) (quoting *Donovan v. State*, 445 N.W.2d 763, 766 (Iowa 1989)). Significantly, in this appeal Kush centers her argument on whether she has presented sufficient evidence—through Dr. Clark's compelled testimony or her own affidavit—to prove a prima facie case of medical negligence. We accordingly limit our analysis to those issues on appeal.

[5] Kush does not argue, and we do not find, that her case presents one of those rare medical malpractice actions where a plaintiff may establish the standard of care without an expert. *See Hill v. McCartney*, 590 N.W.2d 52, 56 (Iowa Ct. App. 1998) ("when the lack of care is so obvious it is within comprehension of a lay person").

In addition, we are not convinced the substance of Dr. Clark's purported statements reflects his opinion Dr. Sullivan breached the standard of care. We can extrapolate from his criticisms that he would have performed Kush's knee surgery differently. But without medical expertise, we cannot tell if Dr. Clark was saying Dr. Sullivan's work fell below a professional norm. For example, Kush recalled Dr. Clark saying "there should have been tree holes for drainage tubes" and she had none. Nowhere in the record can we find a definition of "tree holes" or an explanation that malfunctioning drainage tubes contributed to Kush's injury. As for the use of cement, in his deposition, Dr. Clark testified some knee surgeons use the substance, but he prefers not to. He also suggested fitting a patient with a prosthetic knee may not be an exact science.

> [I]t's a relative thing. In this country there's what 300 million people? But there's roughly—most systems of implant have about six different sizes, so it's rare that you can have an implant that's perfectly sized, but yet patients can do well, so it's a judgment call as far as sizing it.

And while the phrase "total physician sloppiness" strikes a lay ear as a damning indictment, it is too colloquial and imprecise to be considered the equivalent of medical evidence indicating the first surgeon's performance breached a standard of care. Overall, the implication of Dr. Clark's alleged statements to Kush is not clear. These statements fall short of demonstrating Dr. Clark formed an expert opinion that Dr. Sullivan breached the standard of care and that breach caused Kush harm.

In the district court, Kush never sought to compel Dr. Clark's testimony. She was satisfied to argue at the summary judgment hearing: "as rare as it may

be, our claim today is that he gave an opinion to the plaintiff in this case." Kush contends for the first time on appeal that the district court's summary judgment order was premature, and she should be allowed to redepose Dr. Clark and compel his expert opinion on the standard of care and whether that standard was breached. Because Kush did not raise this claim before the district court, she may not advance it on appeal. *See C & J Vantage Leasing Co. v. Outlook Farm Golf Club, LLC*, 784 N.W.2d 753, 757 (Iowa 2010) (refusing to reach issue on appeal not argued before the district court or briefed at summary judgment).

Because Kush is unable to show through her affidavit that Dr. Clark previously formed an opinion that Dr. Sullivan deviated from the standard of care, we agree with the district court that she failed to generate a jury question on her professional negligence claims. *See Kennis v. Mercy Hosp. Med. Ctr.*, 491 N.W.2d 161, 167–68 (Iowa 1992) (affirming summary judgment where plaintiff failed to provide expert testimony in malpractice action).

2. Substituting Kush's Affidavit for Expert Testimony

In the alternative, Kush argues her affidavit listing statements by Dr. Clark relating to Dr. Sullivan's allegedly deficient care may itself substitute for the general requirement she present expert testimony to establish a prima facie case of medical malpractice.

Dr. Sullivan contends Kush did not argue this theory to the district court and, thus, did not properly preserve error. Dr. Sullivan also asserts the second-hand statements are insufficient to meet the expert testimony elements in a professional negligence cause of action and are inadmissible hearsay.

We address the error preservation question first. We will not entertain a theory for reversal on appeal that was not raised "with the requisite degree of specificity in timely fashion so that the trial court could correct any alleged error." *See Peterson v. First Nat'l Bank of Iowa*, 392 N.W.2d 158, 164 (Iowa Ct. App. 1986). It appears to us that Kush is raising a new theory on appeal. Kush first submitted her affidavit to the district court attached to her summary judgment resistance, arguing Dr. Clark's "total physician sloppiness" characterization shows "Dr. Clark is aware of the appropriate standard of care regarding total knee replacement surgeries and has an opinion regarding the breach of that standard in this particular case." She also argues her statement "could be used at trial to impeach Dr. Clark." At no point in the district court did she argue the affidavit, standing alone, could establish deviation from the standard of care. But even if her arguments concerning the affidavit in the district court could be broadly construed to encompass her appellate theory, Kush did not ask the district court to rule on the admissibility of the statements in her affidavit. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("When a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal."). Without a determination on admissibility from the district court, we have nothing to review on appeal. *See Freedom Fin. Bank v. Estate of Boesen*, 805 N.W.2d 802, 809 (Iowa 2011). Accordingly, we find Kush failed to preserve error on this claim.

Even if Kush had preserved error, we could not find her affidavit to be a worthy substitute for expert testimony. She argues the extrajudicial statements by Dr. Clark conveyed in her affidavit are the equivalent of the extrajudicial admissions by the defendant dentist in *Hill v. McCartney*, 590 N.W.2d 52 (Iowa Ct. App. 1998). In *Hill*, the plaintiff-patient testified the defendant-dentist struck her jaw or gum with a drill, became distraught, cried, and stated: "Oh, don't worry about it. I will take care of you. I have malpractice insurance" and "I did something freaky to you. I fucked you up." 590 N.W.2d at 54. Because Hill did not designate an expert under section 668.11, the district court granted summary judgment. *Id.* Our court held the defendant's extrajudicial statement admitting "negligence or lack of skill ordinarily required for the performance of the work undertaken" can constitute the direct expert testimony necessary to show malpractice. *Id.* at 56–57. Because a jury could infer from the dentist's admissions that she breached the standard of care, our court reversed summary judgment. *Id.* at 57.

Hill addresses only the circumstance when the defendant-professional's own admission to negligence avoids dismissal for lack of independent expert testimony. *Id*.; *see also Wiles v. Myerly*, 210 N.W.2d 619, 622–23, 628 (Iowa 1973) (admissions by defendant-surgeon in notes kept in hospital records fulfilled need for expert testimony to establish burn was inflicted in medical malpractice action). *Hill* did not contemplate that a non-defendant, treating physician's out-of-court statements may substitute for an expert's sworn testimony that the defendant's performance breached the standard of care.

Kush argues that our court extended the *Hill* holding in *Peppmeier v. Murphy*, 2005 WL 724064 (Iowa Ct. App. 2005). In that case, defendant Murphy performed two breast augmentation surgeries on plaintiff Peppmeier. Peppmeier sought to establish Dr. Murphy's negligence by offering extrajudicial statements from a partner at the surgery center where Murphy was previously employed. According to Peppmeier, the partner informed her that the surgery was "performed incorrectly" and Murphy should have known the surgery was "not appropriate for her breasts." *Peppmeier*, 2005 WL 724064, at *2. Two judges on a three-member panel of our court concluded the partner's statements were "sufficient to allow a jury to infer Murphy breached the standard of care." *Id*. But all three judges agreed the statements were hearsay and inadmissible against Murphy, and the district court properly granted the doctor's motion for summary judgment. *Id*. On further review, the supreme court assumed without deciding the court of appeals was correct in deciding the partner's challenged statements were sufficient to generate fact question on whether the defendant-doctor breached the standard of care. *Peppmeier*, 708 N.W.2d at 63.

For two reasons, we are not persuaded by Kush's reliance on *Peppmeier*. First, the partner's assessment of the plastic surgery in that case as "performed incorrectly" and "not appropriate" for the patient's breasts provided a more clear-cut and reliable opinion that the surgeon violated the standard of care than Dr. Clark's statements included in Kush's affidavit. As discussed above, Dr. Clark's oblique criticisms may have reflected a difference in surgery styles rather than an opinion that Dr. Sullivan violated a professional norm. We do not believe a

reasonable jury could infer from Dr. Clark's references to sloppy work, ill-sized implants, too much cement, or "tree holes" that Dr. Sullivan breached the standard of care. Moreover, given the position of the declarant in *Peppmeier* as a former partner of the defendant-doctor, his statements carry greater credibility because they were against the interests of his medical practice.

Second and more significantly, like the challenged declarations in *Peppmeier*, Dr. Clark's statements to Kush constitute inadmissible hearsay. Kush argues on appeal that Clark's statements fall under the hearsay exception for statements for the purposes of medical diagnosis or treatment in Iowa Rule of Evidence 5.803(4) or under the residual hearsay exception in rule 5.807. We do not believe Dr. Clark's statements are admissible under either rule.

Rule 5.803(4) creates an exception for "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Iowa courts have interpreted this exception as applying to statements made by the person to be diagnosed or treated or by third persons who have a strong motivation to obtain satisfactory diagnosis or treatment for someone close to them. *State v. Long*, 628 N.W.2d 440, 444 (Iowa 2001) (describing rationale behind rule as recognizing declarant's motive to provide reliable information with the goal of receiving accurate diagnosis and treatment). Kush cites no Iowa case applying the exception to doctors' statements or more pertinently to statements intended as expert testimony against a different doctor.

Because Dr. Clark's statements about Dr. Sullivan's work were not made for the purpose of obtaining an accurate diagnosis or treatment, we do not believe the rule applies.

Rule 5.807 is a catch-all provision, allowing admission of out-of-court statements not covered by other exceptions, but having equivalent guarantees of trustworthiness. Under the residual exception, the proponent of the evidence must show trustworthiness, materiality, necessity, service of the interests of justice, and notice. *See State v. Neitzel*, 801 N.W.2d 612, 622–23 (Iowa Ct. App. 2011). The residual rule does not offer a broad license to admit hearsay statements not covered by delineated exceptions; it is to be used "very rarely and only in exceptional circumstances." *State v. Brown*, 341 N.W.2d 10, 14 (Iowa 1983).

Kush cannot satisfy the requirements of trustworthiness and necessity. As Dr. Sullivan points out, the summary judgment record offers several reasons to doubt the reliability of Dr. Clark's statements: they were not under oath, were not documented in contemporaneous medical records, and were not recorded by Kush until years after they were allegedly uttered. Kush's need for Dr. Clark's hearsay statements was self-induced by not securing Dr. Clark as an expert witness and by not timely designating any other experts. We agree with Dr. Sullivan that this is not the rare case where the residual hearsay exception should be applied.

Because Dr. Clark's extrajudicial statements in Kush's affidavit do not present a plain inference that Dr. Sullivan was negligent and, in any regard,

constitute inadmissible hearsay, the affidavit cannot replace direct expert testimony in support of her medical malpractice action.

For all the reasons set forth above, we affirm the district court's summary judgment ruling that Kush failed to establish a prima facie case of medical malpractice against Dr. Sullivan.

AFFIRMED.

Mullins, J., concurs; Danilson, J. dissents.

DANILSON, J. (dissenting)

I respectfully dissent. Dr. Sullivan's motion for summary judgment is premised solely upon the fact that the physician designated as an expert by Kush, Dr. Clark, was deposed and testified that he would not be giving an opinion of the standard of care or that Dr. Sullivan violated the standard of care. The burden to prove that facts are undisputed is upon the moving party. *Phillips*, 625 N.W.2d at 717. Here, Dr. Sullivan provided no facts to controvert the allegations in the petition that he violated the standard of care in performing the knee replacement surgeries upon Kush. As observed by our supreme court,

> This burden of the doctors as the moving parties in a motion for summary judgment to establish the absence of any triable issue is not to be confused with the burden of proof placed on plaintiff at trial to sustain the specifications of negligence asserted against defendants as a proximate cause [ ] in order to generate a jury question.

Daboll v. Hoden, 222 N.W.2d 727, 734 (Iowa 1974).

Instead, Dr. Sullivan attempts to shift the burden to Kush by relying upon the Dr. Clark's deposition testimony that Dr. Clark will not be testifying to the proper standard of care or deviation from that standard, contrary to Kush's expert designation. These facts are similar to *Daboll*, where our supreme court concluded that until the defendant-doctors met their burden, the burden of going forward with proof of existence of genuine triable issues was not shifted. *See id*. at 736. This obligation exists even where the record reflects that the plaintiff does not have expert testimony to sustain the averments in the petition. *Id*. More recently our supreme court has stated, "When a motion for summary judgment is properly supported, the nonmoving party is required to respond with

specific facts that show a genuine issue for trial." *Green v. Racing Ass'n of Cent. Iowa,* 713 N.W.2d 234, 245 (Iowa 2006); *accord* Iowa R. Civ. P. 1.981(5); *see also Mueller v. Wellmark, Inc*., 818 N.W.2d 244, 253 (Iowa 2012).

Moreover, there is no dispute that Dr. Clark was Kush's treating physician subsequent to the initial knee replacement surgeries performed by Dr. Sullivan. Dr. Clark has the expertise and experience to testify to the proper standard of care and any deviation from the standard. He was also timely designated as an expert to testify. A motion to strike Kush's expert designation of Dr. Clark may have been successful. However, rather than filing a motion to strike, Dr. Sullivan seeks a dismissal of the action via his motion for summary judgment without any evidence that Dr. Sullivan *performed the surgeries in conformance with the proper standard of care*. A review of Dr. Sullivan's statement of undisputed facts provides no basis to conclude that he conformed with the proper standard of care.

Considering the evidence of Dr. Clark's deposition and Kush's affidavit together in a light most favorable to Kush, as we must, there is also a likelihood Dr. Clark formed an opinion, as a treating physician, that Dr. Sullivan's surgeries were substandard and the cause of Kush's excruciating pain. *See Hansen v. Cent. Iowa Hosp. Corp*., 686 N.W.2d 476, 482 (Iowa 2004) (observing that a treating physician may testify as to causation if the opinion was reached during treatment and not formulated pending trial or in anticipation of trial). This conclusion is supported by Dr. Clark's remarks to Kush as shown in her affidavit, the fact that Dr. Clark performed "revision surgeries" on both of Kush's knees

seven months after the original surgeries, and the surgeries having successfully alleviated Kush's pain. I would concede, however, that before Dr. Clark could testify as to the proper standard of care, he would have to be designated as an expert. *See Cox v. Jones*, 470 N.W.2d 23, 25 (Iowa 1991) (concluding that a treating physician may not testify to reasonable standards of care unless designated as an expert).

Of course, we know Dr. Clark was designated as an expert on the standards of care. Kush argues that she may compel Dr. Clark to testify regarding the standard of care. The majority concludes Kush failed to preserve error on her claim that the summary judgment order was premature as Kush should have been permitted to compel Dr. Clark's testimony and re-depose him. I do not disagree with this conclusion, but clearly Kush preserved error on the issue that she was entitled to seek an order to compel Dr. Clark's testimony at trial. Further, Kush has made a colorable claim to the right to compel Dr. Clark's testimony. Unlike the facts in *Mason*, 340 N.W.2d at 237, 241-42, Dr. Clark had a strong connection to the litigation as he performed the revision surgeries. Moreover, although there may be other qualified experts available to speak to the proper standard of care, none would have the information and personal observations to rely upon as would Dr. Clark, and he made a decision to perform revision surgeries upon Kush.

On this record, where a proper designation of expert has been filed, the designation has not been stricken, Kush has a colorable claim to seek an order to compel Dr. Clark's testimony, and Dr. Sullivan has clearly not met his burden

or supported his motion to show that he performed the knee replacement surgeries in conformance with the standard of care, I would reverse the grant of summary judgment.