IN THE SUPREME COURT OF IOWA

No. 19–1205

Polk County No. LACL139922

ORDER

CAROLYN HILL-LOMAX,
Plaintiff-Appellant,

vs.

DAVID VITTETOE, M.D.,
NIKKI TWEET and
KAMAL ADERIBIGBE, M.D.,
Defendants-Appellees.

This matter comes before the court, Appel, Waterman, and McDonald, JJ., on appellant's notice of appeal filed with this court on July 19, 2019. Appellant seeks review of the district court's July 15, 2019 order granting summary judgment to the defendants.

The court notes an appeal is taken by filing a notice of appeal with the clerk of the district court where the order or judgment was entered within the applicable time period. Iowa R. App. P. 6.102(2). Failure to comply with this rule means the court lacks jurisdiction to hear the appeal. *Evenson v. Winnebago Indus., Inc.*, 922 N.W.2d 335, 337 (Iowa 2019). The court notes the appellant did not file a notice of appeal with the clerk of the district court until October 9, 2019, 56 days after the deadline for taking an appeal. Upon consideration, the appeal is dismissed.

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IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	**Case Title**
19-1205	Hill-Lomax v. Vittetoe

So Ordered

Brent R. Appel, Justice

Electronically signed on 2019-11-07 11:44:03

IN THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY

CAROLYN HILL-LOMAX, Plaintiff, v. DAVID VITTETOE, M.D., NIKKI TWEET, & KAMAL ADERIBIGBE, M.D., Defendants.	Case No.: LACL139922 **ORDER:** Ruling on Defendants' Motion for Summary Judgment

On April 26, 2019, this matter came before the Court for hearing on Defendants' Motion for Summary Judgment. Plaintiff CAROLYN HILL-LOMAX personally appeared without the assistance of counsel. Defendants DAVID VITTETOE, M.D. and NIKKI TWEET appeared by and through attorneys Jack Hilmes and Jeffrey R. Kappelman. Defendant KAMAL ADERIBIGBE, M.D., appeared by and through attorneys Janice M. Thomas and Katherine E. Anderegg. Having considered the parties' respective motions, as well as the written and oral arguments, the Court makes the following ruling:

I. INTRODUCTION

On July 12, 2016, Plaintiff underwent a left total knee replacement surgery, which was performed by Defendant Vittetoe. He was assisted by Defendant Tweet. Following the surgery, Plaintiff reported difficulty with pain. According to Plaintiff, she felt significant pain in her left knee and left hip. Plaintiff's primary care physician, Dr. Ernesto Vasquez, referred her to Defendant Aderibigbe, who ordered magnetic resonance imaging (MRI) of Plaintiff's left hip.

As best as the Court can surmise, Plaintiff makes two claims: 1) because of her allergy to nickel, Defendant Vittetoe should have used titanium components during the knee replacement surgery; and 2) at some point, Defendant Vittetoe fractured Plaintiff's left hip.

Plaintiff filed this medical malpractice action against Defendants, alleging Defendants Vittetoe, Tweet, and Aderibigbe were negligent with respect to her care and treatment. Defendant Aderibigbe filed his Answer to Plaintiff's Amended Petition on

March 8, 2018. Defendants Vittetoe and Tweet filed their answer on March 2, 2018. All Defendants deny Plaintiff's allegations.

II. STANDARD OF REVIEW

The purpose of summary judgment is to enable the moving party to obtain a judgment promptly and without the expense of trial when no genuine issue of fact exists.[1] 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."[2] The Court views the summary judgment record in a light most favorable to the non-moving party and "indulge[s] in every legitimate inference that the evidence will bear in an effort to ascertain the existence" of a genuine issue of material fact.[3]

An inference is legitimate if it is rational, reasonable, and permissible under the governing substantive law. An inference is not legitimate if it is based upon speculation or conjecture. If reasonable minds could draw different inferences and reach different conclusions from the undisputed facts, the issues must be reserved for trial, and summary judgment is not appropriate.[4]

An issue of fact is "genuine" if the evidence would allow a reasonable jury to return a verdict for the non-moving party.[5] A fact is "material" if it will affect the outcome of the case given the applicable law.[6] The moving party carries the burden of establishing that the facts are indeed undisputed and they are entitled to judgment as a matter of law.[7] An issue becomes "a matter of law" when the sole determination is what legal consequences follow from otherwise undisputed facts.[8]

When a motion for summary judgment is made and properly supported, the non-

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[1] *Drainage District No. 119 v. Incorporated City of Spencer*, 268 N.W.2d 493, 499 (Iowa 1978).

[2] Iowa R. Civ. Pro. 1.981(3); *see also Parish v. Jumpking, Inc.*, 719 N.W.2d 540, 543 (Iowa 2006).

[3] *See Crippen v. City of Cedar Rapids*, 618 N.W.2d 562, 565 (Iowa 2000).

[4] *Smith v. Shagnasty's, Inc.*, 668 N.W.2d 67, 71 (Iowa 2004).

[5] *See Fees v. Mut. Fire & Auto. Ins. Co.*, 490 N.W.2d 55, 57 (Iowa 1992).

[6] *Parish*, 719 N.W.2d at 543.

[7] *See Estate of Harris v. Papa John's Pizza*, 679 N.W.2d 673, 677 (Iowa 2004).

[8] *See Emmet Cty. State Bank v. Reutter*, 439 N.W.2d 651, 653 (Iowa 1989).

moving party may not rest upon the mere allegations or denials of the pleadings.[9] Rather, the non-moving party must set forth specific material facts supported by competent evidence establishing the existence of a genuine issue for trial.[10] Where the non-moving party generates no evidence to support an outcome-determinative element of its claim, the moving party will prevail on summary judgment.[11]

III. ANALYSIS

One question before the court is whether Plaintiff is required to obtain an expert witness in order to establish a prima facie case of medical negligence against these Defendants. Plaintiff asserts the answer to that question is no. In support of that position, Plaintiff, during oral argument, cited to another one of her own medical negligence cases, *Hill v. McCartney*.[12]

In that case, Plaintiff brought action against her dentist, alleging negligent removal of a nickel bridge from her mouth and extraction of two teeth, and against an oral surgeon who completed the procedures. The District Court granted defendants' motion for summary judgment, after Plaintiff failed to procure an expert to establish a prima facie claim of medical negligence. As it is relevant to this case, the Court of Appeals reaffirmed that expert testimony is required to establish standard of care. However, the Court of Appeals reversed the District Court's grant of summary judgment after it found that the defendant/dentist's admissions were sufficient to stand as patient's expert testimony for trial. Plaintiff's reliance on *Hill* is misplaced.

Ostensibly, Plaintiff argues that *Hill* stands for the following proposition: because she, as the complaining witness, can discuss her ailments before and after the knee replacement surgery, expert testimony is unnecessary to establish a prima facie case of medical negligence. On this point, the Court of Appeals stated:

> Generally, when the ordinary care of a physician is an issue, only experts can testify and establish the standard of care and the skill required. ***If the standard of care of a physician, surgeon, or dentist is at issue, Iowa***

[9] *See* Iowa R. Civ. Pro. 1.981(5); *see also Bitner v. Ottumwa Cmty. Sch. Dist.*, 549 N.W.2d 295, 299 (Iowa 1996).

[10] *See id.*

[11] *Wilson v. Darr*, 533 N.W.2d 579, 582 (Iowa 1996); *see* Iowa R. Civ. Pro. 1.981(3).

[12] 590 N.W.2d 52 (IA Ct. App. 1998).

> ***law permits only testimony upon appropriate standard of care by an expert who has qualifications related directly to the medical problem at issue and type of treatment administered.*** There are two exceptions to the general rule that expert testimony is needed to establish negligence in a medical malpractice action. The first exception is when the lack of care is so obvious it is within comprehension of a lay person. The second exception, an extension of the first, is when the physician injured a part of the body not involved in the treatment.[13]

Defendant Vittetoe performed a total replacement of Plaintiff's left knee. There is no genuine issue of material fact regarding the complexity of that type of surgery. In other words, the surgery Defendant Vittetoe performed was technical in nature and not within the knowledge of a common lay person. Plaintiff argues that following the surgery, she could not breathe, developed pain in her groin area, numbness in her foot, and battled through bouts of vomiting. Plaintiff was ultimately diagnosed with pneumonia. Difficult as those reactions may be, they do not establish a prima facie case for medical malpractice. To establish a *prima facie* case of medical malpractice, Plaintiff was required to produce expert testimony that: 1) establishes the applicable standard of care; 2) demonstrates a violation of this standard; and 3) develops a causal relationship between the violation and the injury sustained. Plaintiff has failed to do so.

The reason Plaintiff survived summary judgment in *Hill* was because the defendant/dentist purportedly stated to Plaintiff, "I fucked you up" and "I did something freaky."[14] Based on those statements, in combination with the defendant/dentist's reference to medical malpractice insurance, the Court of Appeals concluded the jury could infer the defendant/dentist did not use the degree of care ordinarily exercised by other doctors in the community, and, as a result of the lack of care, Plaintiff was injured.[15] The Court concluded that the defendant/dentist's extrajudicial statements constituted direct expert testimony needed to show malpractice and, therefore, Plaintiff was not required to procure independent expert testimony.

Here, there are no statements from any of the defendants that "sufficiently admit

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[13] *Id.* at 56. (Emphasis added.)(Internal citations omitted.)

[14] *Id.*

[15] *Id.*