IN THE IOWA DISTRICT COURT IN AND FOR SCOTT COUNTY

SHAWNA VANBLARICOM,	)	
	)	**Case No. LACE129597**
Plaintiff,	)	
	)	
v.	)	**RULING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**
	)	
LINDSAY GALL AND NELSON CHIROPRACTIC,	)	
	)	
Defendants.	)	

On February 21, 2019, the Defendants' Motion for Summary Judgment came before the Court for argument. The Plaintiff was represented by Attorney Eric S. Mail. The Defendants were represented by Attorney Abbey C. Furlong. After having considered the evidence presented, the written and oral arguments of counsel, and the applicable law, the Court enters the following ruling on the pending motion.

FACTUAL & PROCEDURAL BACKGROUND

On March 10, 2016, Plaintiff Shawna VanBlaricom sought treatment for back pain and suspected finger arthritis from Dr. Lindsay Gall of Nelson Chiropractic. On November 8, 2017, the Plaintiff filed this action alleging negligence against Dr. Gall and Nelson Chiropractic (Defendants)[1] and failure to obtain informed consent against Dr. Gall stemming from the treatment that she had previously received from the Defendants. On May 29, 2018, the Plaintiff filed her expert designation that identified her three treating physicians, Dr. Eduardo Marquez, Dr. Falguni Mehta, and Dr. Robert Knudsen, as expert witnesses. The Plaintiff did not include the expert witnesses' CVs, identify their respective qualifications, or establish the topics as to

[1] Since Dr. Gall is employed by Nelson Chiropractic and both parties have the same legal representation, the parties are referred to collectively as "Defendants" through parts of this Ruling. However, the parties are also referred to individually as appropriate throughout portions of this Ruling.

which each expert would testify. However, the Plaintiff did identify Dr. Marquez as her primary expert and indicated to the Defendants that Dr. Marquez's expert report was included in the Plaintiff's initial disclosures to the Defendants.

On June 27, 2018, the Defendants' attorneys identified the alleged deficiencies in Dr. Marquez's report, specifically that his opinions were not stated to a reasonable degree of medical certainty, so they requested that Plaintiff provide a supplemental report from Dr. Marquez within 30 days. (SUF ¶ 8, Defendants' Exhibit E). On September 25, 2018, the Defendants filed a motion to compel the Plaintiffs to provide the supplemental report because the Plaintiffs had not done so as of that date. On October 25, 2018, the Court issued an Order compelling the Plaintiff to provide all expert materials. On November 8, 2018, the Plaintiff provided Dr. Marquez's Amended Report to the Defendants. Part of Dr. Marquez's Amended Report states as follows:

> Due to the inherent risk of manual wrist manipulation it is my professional opinion beyond reasonable degree of medical certainty that the chiropractor she saw that day ***could have possibly*** caused this issue. ~~It is my professional opinion that the chiropractor~~, ***or could have*** aggravated this condition if a proper exam was not performed.

(SUF ¶ 14, Defendants' Exhibit H).

The Defendants now move for summary judgment on all counts. Defendants argue that Plaintiff's negligence claims against the Defendants fail as a matter of law because of her lack of expert testimony as to the applicable standard of care, breach of that standard, or causal relationship. Defendants assert that Dr. Marquez's Amended Report does not identify an applicable standard of care, breach of the applicable standard and causal relationship between Dr. Gall's breach of that standard and the Plaintiff's injuries. Defendants also argue that Plaintiff's informed consent claim fails because she has no expert testimony that establishes that Dr. Gall was required to disclose the material risks of the treatment.

ANALYSIS

I. Summary Judgment Standard

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." Iowa R. Civ. P. 1.981(3). The moving party carries the burden of proving the absence of an issue of material fact and affirmatively demonstrating that it is entitled to judgment as a matter of law. *Hallett Const. Co. v. Meister*, 713 N.W.2d 225, 229 (Iowa 2006) (citation omitted). "If reasonable minds may differ on the resolution of an issue, a genuine issue of material fact exists." *McIlravy v. N. River Ins. Co.*, 653 N.W.2d 323, 328 (Iowa 2002) (citations omitted). "An issue of fact is 'genuine' if the evidence is such that a reasonable finder of fact could return a verdict or decision for the nonmoving party." *Parish v. Jumpking, Inc.*, 719 N.W.2d 540, 543 (Iowa 2006). "A fact is material if it will affect the outcome of the suit, given the applicable law." *Id.* However, speculation and mere allegations are not material facts. *Hlubek v. Pelecky*, 701 N.W.2d 93, 95–96 (Iowa 2005) (citations omitted).

In ruling on a motion for summary judgment, the facts must be viewed in the light most favorable to the non-moving party. *Hlubek*, 701 N.W.2d at 95. Thus, the Court "consider[s] on behalf of the nonmoving party every legitimate inference that can be reasonably deduced from the record." *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 717–18 (Iowa 2001) (citations omitted). "An inference is legitimate if it is 'rational, reasonable, and otherwise permissible under the governing substantive law.'" *Id.* (quoting *Butler v. Hoover Nature Trail, Inc.*, 530 N.W.2d 85, 88 (Iowa Ct. App. 1994)). An inference cannot be based on mere speculation or conjecture. *Id.*

If the record establishes that the "resisting party has no evidence to factually support an outcome determinative element of that party's claim, the moving party will prevail on summary judgment." *Wilson v. Darr*, 553 N.W.2d 579, 582 (Iowa 1996). Even where factual disputes exist, summary judgment may nevertheless be appropriate if those in dispute are not material to the resolution of the case, and the uncontroverted facts establish that the moving party is entitled to judgment in its favor. *See Linn v. Montgomery*, 903 N.W.2d 337, 345–47 (Iowa 2017).

II. The Need for Expert Testimony on the Negligence Claims

To establish a prima facie case of medical negligence, a plaintiff must present evidence which establishes the applicable standard of care, demonstrates that the defendant breached that standard, and "develop[s] a causal relationship between the violation and the alleged harm" caused by the defendant. *Kennis v. Mercy Hosp. Med. Ctr.*, 491 N.W.2d 161, 165 (Iowa 1992) (citing *Daboll v. Hoden*, 222 N.W.2d 727, 734 (Iowa 1974)). "Most medical malpractice lawsuits are so highly technical they may not be submitted to a fact finder without medical expert testimony supporting the claim." *Bazel v. Mabee*, 576 N.W.2d 385, 387 (Iowa Ct. App. 1998). A physician's applicable standard of care can only be established by the testimony of experts. *Welte v. Bello*, 482 N.W.2d 437, 439 (Iowa 1992). However, medical expert testimony is not necessary when (1) the medical provider's lack of care is obvious to a lay person and "required only common knowledge and experience to understand" or (2) the medical provider injured a part of the Plaintiff's body that was not being treated. *Oswald v. LeGrand*, 453 N.W.2d 634, 636 (Iowa 1990).

The Defendants argue that Dr. Marquez's Amended Report does not establish an applicable standard of care or whether the Defendants breached that applicable standard of care. The Plaintiff argues that Dr. Marquez has stated an applicable standard of care through the

language "proper exam" in his Amended Report and the breach of that standard occurred when a proper exam was allegedly not performed. After reviewing Dr. Marquez's Amended Report, the Court finds that Dr. Marquez has not established an applicable standard of care for treating a patient with the Plaintiff's ailments. The words "proper exam" do not explain the applicable standard of care for the chiropractic treatment of an individual with back pain and suspected finger arthritis such as the Plaintiff. For the issue of whether Dr. Gall was negligent in treating the Plaintiff to be submitted to a jury of laypersons, the jury would need more details on the applicable standard of care than "proper exam."

The Court finds that the Plaintiff has failed to present expert testimony that establishes the applicable standard of care that Dr. Gall or Nelson Chiropractic should have applied in treating the Plaintiff. Therefore, the Plaintiff has also not established that the Defendants breached that applicable standard of care or whether a causal relationship exists between the Defendants' alleged breach and the Plaintiff's alleged injuries.

Therefore, the Court finds that summary judgment in favor of Dr. Gall on the issue of negligence should be granted. Furthermore, the Court finds that summary judgment in favor of Nelson Chiropractic on the issue of negligence should also be granted.

III. The Need for Expert Testimony on the Informed Consent Claim

"[A]bsent extenuating circumstances, a patient has the right to exercise control over his or her body by making an informed decision concerning whether to submit to a particular medical procedure." *Pauscher v. Iowa Methodist Med. Ctr.*, 408 N.W.2d 355, 358 (Iowa 1987) (citing *Cowman v. Hornaday*, 329 N.W.2d 422, 424–25 (Iowa 1983)). A medical provider'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…" *Kennis*, 491 N.W.2d at 166 (citing *Pauscher*, 408 N.W.2d at 359).

To demonstrate a lack of informed consent, a patient has to show that (1) the material risk was unknown to them; (2) the medical provider did not disclose the material risk; (3) "[d]isclosure 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) patient was injured as a result of the procedure or treatment. *Kennis*, 491 N.W.2d at 166 (citing *Pauscher*, 408 N.W.2d at 360). Unless the "knowledge of the nature, likelihood of occurrence, and materiality" of the risk are of a layperson's common knowledge, the Plaintiff is required to present expert evidence of the material risk. *Cox v. Jones*, 470 N.W.2d 23, 26 (Iowa 1991).

In the present case, the Plaintiff alleges that Dr. Gall failed to obtain her informed consent for the treatment that she received. The Defendants have moved for summary judgment on the assertion that the Plaintiff has provided no expert witness to identify (1) any material risk related to Dr. Gall's treatment that was not known by the Plaintiff; (2) whether Dr. Gall failed to disclose that material risk; (3) that disclosure of the information would have led a reasonable patient to decline Dr. Gall's treatment; or (4) that Dr. Gall's alleged failure to disclose any material risk caused the Plaintiff's injury.

The Court finds that expert evidence is necessary to identify any material risks of Dr. Gall's treatment because the material risks are not of a layperson's common knowledge. The Plaintiff has failed to designate any expert that would provide testimony as to the informed consent claim. The Plaintiff's primary expert, Dr. Marquez, does not identify the material risks of Dr. Gall's treatment, discuss whether the Plaintiff's informed consent would have been required for Dr. Gall's treatment, or address any other aspect of the informed consent claim. The

Plaintiff also has not resisted the Defendants moving for summary judgment on this issue. Furthermore, the record for this action clearly establishes that the Plaintiff as the resisting party has provided no evidence to factually support the informed consent claim. Therefore, the Court finds that summary judgment in favor of the Defendants on the issue of informed consent should be granted.

RULING

For all of the above-stated reasons, it is the ruling of the Court that the Defendants' Motion for Summary Judgment in its entirety should be and hereby is GRANTED.

IT IS THEREFORE ORDERED that costs are assessed to the Plaintiff.

State of Iowa Courts

Type: OTHER ORDER

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So Ordered

Mark D. Cleve, District Court Judge,
Seventh Judicial District of Iowa