COURT OF APPEALS
DECISION
DATED AND RELEASED

JULY 8, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

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No. 96-3591-FT

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

CONNIE M. METZLER,

PLAINTIFF-APPELLANT,

GREGORY E. METZLER,

PLAINTIFF,

V.

WILLIAM DICHRAFF, D.D.S.,

DEFENDANT-RESPONDENT,

CLAIM MANAGEMENT SERVICES, INC., AND UNKNOWN INSURANCE CARRIERS,

DEFENDANTS.

APPEAL from a judgment and an order of the circuit court for Brown County: JOHN D. MC KAY, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Cane, P.J., LaRocque and Myse, JJ.

La ROCQUE, J. Connie Metzler appeals a summary judgment granted to William Dichraff, DDS, dismissing her malpractice claims against him. We affirm that part of the summary judgment dismissing Metzler's negligence claim relating to a tooth extraction and her claim that Dichraff failed to advise her to seek post-extraction microsurgery to relieve discomfort caused by the extraction. We reverse that part of the judgment dismissing Metzler's claim that Dichraff failed to obtain her informed consent to perform the extraction surgery. We affirm in part and reverse in part.

Metzler sought treatment from Dichraff for an impacted third molar. After consultation, Dichraff extracted the tooth. The following day, Metzler called Dichraff's office complaining of numbness on the right side of her tongue.

Dichraff continued to treat Metzler for the next five weeks. Thereafter, Metzler consulted Dr. Mark Brodhagen about continuing pain and numbness in her tongue. After several referrals, Metzler was diagnosed as having a severed lingual nerve. Dr. Steven Sewell performed surgery to repair the nerve, but Metzler continues to complain of residual effects of the injury.

Metzler filed this malpractice action asserting that Dichraff was negligent in his removal of her tooth. She also asserted that there was a lack of informed consent regarding the procedure. Finally, she asserted that Dichraff failed to advise her to obtain microsurgery following the extraction. Metzler utilized Brodhagen as her liability expert. Dichraff moved for summary judgment based upon several depositions taken of Brodhagen. The trial court granted Dichraff's motion, dismissing the case with prejudice.

Summary judgment is used to determine whether there are any disputed facts that require a trial and, if not, whether a party is entitled to judgment as a matter of law. ***U.S. Oil Co. v. Midwest Auto Care Servs.***, 150 Wis.2d 80, 86, 440 N.W.2d 825, 827 (Ct. App. 1989); RULE 802.08(2), STATS. Our review of a trial court's grant of summary judgment is de novo, but is based on the summary judgment materials properly before the trial court. *See* ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). Summary judgment must be entered if this evidentiary material demonstrates "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." RULE 802.08(2), STATS. In resisting entry of summary judgment, "an adverse party may not rest upon the mere allegations or denials of the pleadings but ... must set forth specific facts showing that there is a genuine issue for trial." RULE 802.08(3), STATS. Moreover, the party with the burden of proof on an issue must establish that there is at least a genuine issue of fact on that issue by submitting evidentiary material "set[ting] forth specific facts," RULE 802.08(3), material to that issue. ***Transportation Ins. Co. v. Hunzinger Constr. Co.***, 179 Wis.2d 281, 290-92, 507 N.W.2d 136, 139-40 (Ct. App. 1993). As we noted in ***Hunzinger***, "once sufficient time for discovery has passed, it is the burden of the party asserting a claim on which it bears the burden of proof at trial 'to make a showing sufficient to establish the existence of an element essential to that party's case.'" ***Id.*** at 291-92, 507 N.W.2d at 140 (quoting ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322 (1986)).

Metzler first contends that a genuine issue of fact remains regarding whether Dichraff's treatment was negligent. We disagree. A physician is not an insurer or guarantor of his care and treatment, but must exercise proper care and skill. ***Ehlinger v. Sipes***, 155 Wis.2d 1, 14, 454 N.W.2d 754, 759 (1990).

Moreover, Wisconsin has rejected the "rarity of result" standard in medical malpractice cases. ***Hoven v. Kelble***, 79 Wis.2d 444, 461, 256 N.W.2d 379, 387 (1977). "Mere rarity of an untoward result does not permit an inference that the result was due to negligence; there must be evidence from which it may be inferred that the result does not normally occur in the absence of negligence." ***Id.***

We conclude that the evidence fails to create a genuine issue of material fact for trial. Metzler relies upon the deposition testimony of Brodhagen that Dichraff's care and treatment violated the standard of care for such procedures. That testimony, however, fails to identify any possible breach of the standard beyond the mere "bad result" of a severed lingual nerve.[1] Brodhagen testified as follows:

> Q. What I'm trying to do, to find out when you – when you think he first violated the standard of care.
>
> A. He first violated the standard of care when the nerve was severed.
>
> Q. Okay. And what standard of care did he violate?
>
> A. He severed the nerve.
>
> ….
>
> Q. Let me go back for a second. [Do] [y]ou believe that Dr. Dichraff violated any standard of care in performance of the surgery?
>
> A. In doing the actual technique of extracting the tooth and taking it out is what you're asking?

[1] We note that there is testimony in the record regarding Dichraff's failure to obtain a full X-ray of the tooth. However, Metzler does not argue on appeal that it was this act that constituted negligence. In fact, the record contains no testimony that the failure to obtain a full X-ray contributed to Metzler's injury in this case. We therefore do not address the significance of Dichraff's failure to obtain such an X-ray.

Q. Yes.

A. And leave it at that?

Q. Yes.

A. At this point in time, my only concerns are, and I can't make a decision on the standard of care of the severance of nerve, but that is an experience that normally does not happen, okay, in normal extractions of third molars.

….

Q. Are you of the opinion that Dr. Dichraff violated any standard of care in the surgical procedure?

A. Definitely initiated a complication of numbness and paresthesia, okay; and I feel that that is probably [a] violation of [the] standard of care, yes.

Q. Okay. And what specific standard of care did he violate?

A. The severance of the nerve.

Q. … First of all, do you know what Dr. Dichraff did during the performance of the surgery, what technique he did use?

A. No.

Q. Well, then how can you be of the opinion that he violated [the] standard of care if you don't even know what kind of technique he used?

A. The results.

….

Q. What standard of care did he violate?

A. He severed the nerve.

….

Q. Okay. At this point, would it be fair to say that you don't have any information that would lead you to believe

> that he did violate [the] standard of care in the performance of the surgery?
>
> A. I have no way to judge his technique, except the result.
>
> ….
>
> Q. Is the actual severing of the nerve, versus just impacting it, is that unusual or uncommon in a procedure like this?
>
> A. Yes.
>
> Q. And essentially, is that your basis for saying that the standard of care wasn't met in the surgery?
>
> A. Correct.
>
> Q. This is not what is the expected outcome; is that fair?
>
> A. Yes.

Even under questioning from his own attorney, Brodhagen admitted that his conclusion that Dichraff was negligent was based *solely* on the "bad result" that followed:

> Q. … Your opinion that Dr. Dichraff violated the standard of care during the course of the surgery is based solely on the fact that the nerve was severed, correct?
>
> A. Correct.

We conclude that this evidence fails to establish the breach of any standard of care beyond the mere "bad result" of the severed nerve. Such allegations are insufficient to raise an inference of negligence under ***Hoven***.

Metzler next argues that there was a lack of informed consent "concerning the experience of the defendant doing the surgery versus a specialist and the question as to whether the plaintiff was informed about when she should

be referred for attempted micro surgery to reattach the severed nerve." Although not entirely clear, we interpret this assertion to raise the following two issues: (1) whether Dichraff was obligated to advise Metzler that surgery could be obtained from a specialist and (2) whether Dichraff was obligated to advise Metzler to seek micro-surgery for her continuing discomfort after surgery. We conclude that summary judgment was inappropriate on the first issue.

When faced with an allegation that a health care provider breached a duty of informed consent, the pertinent inquiry concerns what information a reasonable person in the patient's position would have considered material to an exercise of intelligent and informed consent. ***Johnson v. Kokemoor***, 199 Wis.2d 615, 648, 545 N.W.2d 495, 508 (1996). The disclosures that would be made by doctors of good standing, under the same or similar circumstances, are certainly relevant and material to a patient's exercise of informed consent. ***Id.*** at 649-50, 545 N.W.2d at 509. A health care provider who conforms to the practices of other providers fulfills his duty of disclosure in most instances. ***Id.***

In this case, Brodhagen testified that it is his practice to inform patients of the possibility of obtaining surgery of this type from a specialist. He also testified that other dentists "do that as a general practice." He also testified as follows:

> Q. … In other words, the reason the patient should be advised about the oral surgeon as a choice is because they do them more frequently?
>
> A. Yes.
>
> Q. Because they are familiar with them and do them on a regular basis?
>
> A. Correct.

We conclude that this testimony raises the factual inference that a reasonable person in Metzler's position would consider the option of obtaining surgery from a specialist material to an exercise of intelligent and informed consent. Under Wisconsin's doctrine of informed consent, whenever the determination of what a reasonable person in the patient's position would want to know is open to debate by reasonable people, the issue of informed consent is a question for the jury. ***Id***. at 634-35 n.25, 545 N.W.2d at 503 n.25.

We conclude, however, that there is no dispute of material fact whether Dichraff was obligated to advise Metzler to seek micro-surgery for her continuing discomfort after surgery. Metzler argues that Dichraff should have referred her for micro-surgery sometime before his last appointment, five weeks after the surgery. However, all experts, including Brodhagen, agree that the standard practice in the profession is to wait up to three months before such a referral is required. A health care provider who conforms his or her disclosures to the industry standard fulfills his or her duty of disclosure in most instances. ***Id.*** at 649-50, 545 N.W.2d at 509. Because Metzler stopped receiving treatment from Dichraff a mere five weeks after the surgery was performed, his failure to refer her for micro-surgery by that date does not raise an inference that he violated any duty. Because Metzler fails to identify circumstances in her case that require referral *before* the three-month standard, we conclude that Dichraff's failure to refer her for micro-surgery does not raise an issue for trial with regard to either informed consent or negligence. *See* ***Hunzinger***, 179 Wis.2d at 291-92, 507 N.W.2d at 140 (it is the burden of the party asserting a claim on which it bears the burden of proof at trial to make a showing sufficient to establish the existence of an element essential to that party's case).

By the Court.—Judgment affirmed in part; reversed in part and cause remanded.

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