**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

May 1, 2001

**Cornelia G. Clark**
**Clerk, Court of Appeals**
**of Wisconsin**

## NOTICE

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**No. 99-2520**

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

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**JOHN D. MAY AND**
**CAROL R. MAY,**

**PLAINTIFFS-APPELLANTS,**

**V.**

**JOSEPH F. CUSICK, M.D. AND**
**MEDICAL COLLEGE OF WISCONSIN,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from a judgment of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 CURLEY, J. John D. and Carol R. May (the Mays) appeal the dismissal, following a jury trial, of their medical malpractice suit against Dr. Joseph Cusick, the Medical College of Wisconsin, Wisconsin Patients

Compensation Fund, and various insurers (Dr. Cusick). The Mays contend that the trial court erred in: (1) granting partial summary judgment to Dr. Cusick; (2) prohibiting the introduction at trial of a report by a defense expert witness whose name was withdrawn from the witness list prior to trial; (3) prohibiting the discovery of Dr. Cusick's hospital records and bills for hospitalizations occurring in 1989 and 1991; and (4) refusing to permit the admission of John May's (May) medical bills during the trial. Finally, the Mays submit that, because the real controversy has not been tried, they are entitled to a new trial pursuant to WIS. STAT. § 752.35.[1] We affirm.

## I. BACKGROUND.

¶2 May elected to undergo surgery to correct a small aneurysm in his brain. Dr. Cusick operated on him in July 1993, and placed a small wire clip on May's cerebral artery. Before the surgery, May requested that Dr. Cusick perform the operation rather than a resident. Dr. Cusick agreed. After the operation, but while May was still in the operating room, Dr. Cusick left to dictate the operative report and then went on to operate on another patient, leaving May in the hands of the resident. In the recovery room, the resident noticed May's right side showed no movement, suggesting a serious problem. Approximately thirty minutes later, Dr. Cusick came to the recovery room, examined May and returned to his other surgery. Dr. Cusick again interrupted this other operation to examine May's angiogram. Despite monitoring May's condition, Dr. Cusick testified that he did not know until several hours later that May suffered from a blocked blood vessel caused by the misplaced clip. Dr. Cusick also related that, once he realized that

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

May's symptoms suggested a blocked blood vessel, he decided against reentering May's brain to correct the problem, deciding, instead, to prescribe medication in the hopes of improving the situation. Unfortunately, the problem was not corrected, and May was rendered totally disabled as a result of the operation.

¶3 Following the operation, the Mays sued Dr. Cusick, his employer, the Medical College, the Wisconsin Patients Compensation Fund and various insurance companies, alleging that Dr. Cusick and the Medical College were negligent during May's operation. The Mays also sued Froedtert Hospital, claiming the hospital was negligent in renewing Dr. Cusick's credentials after he had two minor strokes because, as a result of the strokes, he "was or may have been impaired." The Mays also alleged, pursuant to the informed consent doctrine, *see* WIS. STAT. § 448.30, that Dr. Cusick should have told May about his two strokes. The Mays claimed Dr. Cusick's failure to tell May about his personal health history amounted to a lack of informed consent.

¶4 After answers were filed on behalf of the defendants, the parties engaged in numerous discovery disputes. The Mays filed interrogatories seeking Dr. Cusick's medical records and the internal records of the hospital pertaining to the granting of medical privileges to Dr. Cusick. Dr. Cusick, the Medical College, and the hospital sought and, at first, obtained a protective order prohibiting the Mays from obtaining any of these records. Ultimately, the Mays obtained the hospital's internal records. Shortly thereafter, the Mays voluntarily dismissed their suit against the hospital. The trial court, however, continued to prohibit the Mays from reviewing Dr. Cusick's medical records and medical bills because they failed to establish that the records were relevant. At trial, the trial court also prohibited the Mays from introducing any evidence concerning Dr. Cusick's health history.

¶5 Prior to trial, the trial court granted partial summary judgment to Dr. Cusick, dismissing the Mays' lack of informed consent claim pertaining to Dr. Cusick's failure to advise May of his strokes.[2] The trial court found, inasmuch as no evidence substantiated the Mays' contention that Dr. Cusick had any residual effects from the strokes, that Dr. Cusick's health history did not constitute a risk to May. Therefore, the trial court ruled that Dr. Cusick was not obligated to advise May of his history of two strokes and, consequently, Dr. Cusick did not violate WIS. STAT. § 448.30.

¶6 The Mays and Dr. Cusick engaged in another pretrial skirmish when the Mays attempted to name a defense expert witness as their witness. Dr. James Ausman was originally identified as a defense witness. Several weeks after he was named as a defense expert witness, the defendants notified the Mays' attorney that they were withdrawing Dr. Ausman as a witness. Thereafter, the Mays indicated their intent to call Dr. Ausman as their witness after obtaining a copy of Dr. Ausman's report, which was critical of one aspect of Dr. Cusick's treatment of May. When Dr. Ausman refused to testify for the plaintiffs, the Mays sought to admit Dr. Ausman's report into evidence. The trial court ruled that without Dr. Ausman's presence at trial, his report was hearsay and inadmissible.

¶7 During the trial, the Mays attempted to introduce May's hospital and medical bills amounting to $128,665. The trial court ruled that the bills could not be admitted into evidence because the bills had been paid by an insurance company which had subrogation rights, and the insurance company was not made

[2] Additionally, the Mays claimed Dr. Cusick violated the informed consent law by failing to adequately advise May of the risks of his surgical procedure. This claim was not dismissed.

a party to the Mays' litigation, contrary to WIS. STAT. § 803.03(2). Moreover, because the statute of limitations had now run on the insurance company's right to sue; the trial court determined that the bills could not be admitted into evidence.

¶8 After the close of testimony, the jury was asked to decide whether Dr. Cusick and the Medical College were negligent, whether Dr. Cusick had correctly informed May of the risks of the operation he underwent, and whether Dr. Cusick violated his agreement that he alone would perform the surgery. The jury returned a verdict finding that there was no negligence, no lack of informed consent, and no violation of the agreement between May and Dr. Cusick. Following the trial, the Mays brought a motion seeking a new trial, which the trial court denied.

## II. ANALYSIS.

### A. *Summary Judgment*

¶9 The Mays argue that the trial court erred in granting partial summary judgment to Dr. Cusick on their claim of lack of informed consent based upon Dr. Cusick's failure to disclose his health history to May. The Mays contend that, pursuant to WIS. STAT. § 448.30,[3] Dr. Cusick was obligated to disclose his health

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[3] WISCONSIN STAT. § 448.30 provides:

> **INFORMATION ON ALTERNATE MODES OF TREATMENT.** Any physician who treats a patient shall inform the patient about the availability of all alternate, viable medical modes of treatment and about the benefits and risks of these treatments. The physician's duty to inform the patient under this section does not require disclosure of:
>
> **(1)** Information beyond what a reasonably well-qualified physician in a similar medical classification would know.
>
> **(2)** Detailed technical information that in all probability a patient would not understand.
>
> **(3)** Risks apparent or known to the patient.

(continued)

history as it presented a risk to May. The trial court ruled that no evidence was presented that Dr. Cusick's health history was a risk to May and, therefore, no violation of § 448.30 occurred. As a result, the trial court granted summary judgment on this claim.

¶10 In an appeal from the entry of summary judgment, this court reviews the record *de novo*, applying the same standard and following the same methodology required of the trial court under WIS. STAT. § 802.08. ***Delta Group, Inc. v. DBI, Inc.***, 204 Wis. 2d 515, 520, 555 N.W.2d 162 (Ct. App. 1996). In ***Preloznik v. City of Madison***, 113 Wis. 2d 112, 334 N.W.2d 580 (Ct. App. 1983), we set out the methodology to be used in summary judgment.

> Under that methodology, the court, trial or appellate, first examines the pleadings to determine whether claims have been stated and a material factual issue is presented. If the complaint … states a claim and the pleadings show the existence of factual issues, the court examines the moving party's affidavits for evidentiary facts admissible in evidence or other proof to determine whether that party has made a prima facie case for summary judgment. To make a prima facie case for summary judgment, a moving defendant must show a defense which would defeat the claim. If the moving party has made a prima facie case for summary judgment, the court examines the affidavits submitted by the opposing party for evidentiary facts and other proof to determine whether a genuine issue exists as to any material fact, or reasonable conflicting inferences may be drawn from the undisputed facts, and, therefore a trial is necessary.

***Id.*** at 116. In other words,

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**(4)** Extremely remote possibilities that might falsely or detrimentally alarm the patient.

**(5)** Information in emergencies where failure to provide treatment would be more harmful to the patient than treatment.

**(6)** Information in cases where the patient is incapable of consenting.

> in the context of summary judgment, once the moving party demonstrates that 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," *the opposing party may avoid summary judgment only by "set[ting] forth specific facts showing that there is a genuine issue for trial.*"

***Transportation Ins. Co. v. Hunzinger Constr. Co.***, 179 Wis. 2d 281, 291, 507 N.W.2d 136 (Ct. App. 1993) (quoting WIS. STAT. § 802.08) (emphasis added).

¶11 At the time of the summary judgment motion, the discovery process was completed. Thus, it was incumbent on the Mays to present evidence that Dr. Cusick failed to adequately inform May of the risks of his surgery.

> [O]nce 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 292 (citation omitted).

¶12 Physicians, in complying with the directive of WIS. STAT. § 448.30, must discuss with a patient alternative treatments or diagnoses and the risks of the particular operation or treatment that is being contemplated. "Any physician who treats a patient shall inform the patient about the availability of all alternate, viable medical modes of treatment and about the benefits and risks of these treatments." WIS. STAT. § 448.30. In ***Johnson v. Kokemoor***, 199 Wis. 2d 615, 623, 545 N.W.2d 495 (1996), the supreme court expanded the risks which must be disclosed by physicians to include patient notification of the doctor's inexperience in performing a particular operation. ***Id.*** at 641. Further, in determining what must be disclosed to comply with the informed consent law, one is required to

view the information from the patient's viewpoint, and not the doctor's. ***Schreiber v. Physicians Ins. Co.***, 223 Wis. 2d 417, 434, 588 N.W.2d 26 (1999), *cert. denied*, 528 U.S. 869 (1999). However, the statute does not mandate that all "risks" be discussed – only material risks must be told to a patient. A risk is material if:

> "[A] reasonable person, in what the physician knows or should know to be the patient's position, would be likely to attach significance to the risk or cluster of risks in deciding whether or not to forego the proposed therapy."

***Kokemoor***, 199 Wis. 2d at 631 (citation omitted).

¶13 The Mays, noting that the test in Wisconsin for determining whether the statute mandating informed consent has been satisfied is an objective one, ***Schreiber***, 223 Wis. 2d at 434, assert that the question to be resolved was "what a reasonable person under the circumstances then existing would want to know," ***Martin v. Richards***, 192 Wis. 2d 156, 174, 531 N.W.2d 70 (1995). The Mays contend that a reasonable person contemplating brain surgery would want to know that the surgeon had suffered two slight strokes years earlier. The Mays insist that the very fact that Cusick suffered from two slight strokes several years prior to May's surgery was sufficient evidence to prove that May was not adequately informed. Further, the Mays argue, in any event, the trial court invaded the province of the jury by granting summary judgment to Cusick, because the issue of informed consent is a question for the jury. We are not persuaded by these arguments.

¶14 The basis for the Mays' argument that Dr. Cusick was obligated to inform May of his strokes under the informed consent law, WIS. STAT. § 448.30, is twofold. First, the Mays theorize that Dr. Cusick may have suffered effects from the strokes that affected his ability to operate on May and, thus, May should

have been alerted to Dr. Cusick's health background. Second, the Mays state that because Dr. Cusick could have had a third stroke while operating on May, May should have been informed of the strokes.

¶15 The trial court found that the Mays failed to meet their burden of proving that Dr. Cusick's strokes presented a risk to May. Despite numerous depositions of Dr. Cusick's wife, fellow physicians, co-workers and his immediate physician supervisor, who had consulted with Dr. Cusick's treating physician, not a single shred of evidence was produced that Dr. Cusick had any residual effects from the strokes. All the witnesses testified that they observed no indications that Dr. Cusick's mental or physical faculties had been impaired by his slight strokes. Dr. Cusick, who is, himself, an expert on the effects of strokes, testified that he saw no signs that his strokes affected his judgment or physically limited him. Thus, the trial court reasoned that, without some indication that Dr. Cusick's strokes posed a risk to May, Dr. Cusick did not have to disclose his health history to May. We agree.

¶16 The only conclusion to be drawn from the evidence presented was that Dr. Cusick suffered no residual effects of any kind from the strokes. The testimony of numerous individuals who worked in close contact with Dr. Cusick overwhelmingly supported the conclusion that Dr. Cusick had made a complete recovery from his earlier strokes and had suffered no residual effects. Thus, the doctor's health history was not material because a reasonable person would not have attached any significance to it.

¶17 With regard to the Mays' argument that Dr. Cusick might have suffered another stroke while operating on May, it also fails because the possibility of a third stroke was not a material risk. Although an argument can be

made that Dr. Cusick's strokes were not technically "risks," because he suffered no after-effects from them, assuming that the potential of Dr. Cusick having a third stroke is a risk, it was not a risk that needed to be disclosed because, under the statute, it constituted an "extremely remote possibility." WISCONSIN STAT. § 448.30(4) instructs that "the physician's duty to inform the patient under this section does not require disclosure of: …Extremely remote possibilities that might falsely or detrimentally alarm the patient." Because the possibility of Dr. Cusick having another stroke fell into this category, Dr. Cusick was not obligated to disclose to May his health history.

¶18 Next, the Mays contend that the trial court applied the wrong test. The trial court found that Dr. Cusick's stroke did not pose a risk to May. The Mays posit that the correct question to be asked was not whether the doctor's past medical history was a risk, but, rather, whether a reasonable person would want to know about Dr. Cusick's health history. Thus, they urge us to find that the trial court erred. Unlike the Mays, we do not view these two tests as being conflicting. Under the statute, a physician need only advise a patient of material risks. Under the definition of a material risk, a doctor has a duty to advise a person of information that a reasonable person would attach significance to. Here, a reasonable person would not want to know that Dr. Cusick had two minor strokes from which he completely recovered because it was not significant information. Thus, we agree with the trial court's conclusion that Dr. Cusick's strokes did not pose a material risk to May.

¶19 Finally, the Mays argue that the trial court erred by improperly invading the province of the jury when it decided the informed consent question. The Mays cite to a quote from ***Kokemoor*** for support: "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." ***Kokemoor***, 199 Wis. 2d at 634 n.25.

¶20 We agree with the trial court that the question of whether Dr. Cusick violated the informed consent law by failing to reveal his strokes was not a proper question for the jury. While the question of whether a physician is negligent for failing to disclose risks under WIS. STAT. § 448.30(1) is a jury question, the issue can be taken from the jury if the evidence compels that result as matter of law. ***Kuklinski v. Rodriguez***, 203 Wis. 2d 324, 330, 552 N.W.2d 869 (Ct. App. 1996). Here, we are satisfied the trial court properly determined, as a matter of law, that the evidence required the grant of summary judgment. Case law does not compel juries to always decide informed consent issues — juries only decide these issues when there is evidence that a risk existed that needed to be divulged under the statute. Here, the Mays failed to submit any evidence that Dr. Cusick's history of strokes presented a risk to May. Further, even if one characterizes Dr. Cusick's strokes as presenting a risk to May, the risk was so remote as to fall outside the statute's directive because no reasonable person would believe it needed to be divulged. Consequently, we are satisfied that the trial court properly refused to submit the question to the jury.

B. *Dr. Ausman's Report*

¶21 As noted, Dr. Cusick originally identified Dr. Ausman as an expert witness who would be testifying at the trial. Several weeks later, Dr. Cusick notified the Mays that he no longer intended to call Dr. Ausman as a witness. After receiving a copy of Dr. Ausman's report, the Mays sought to transform Dr. Ausman into a plaintiff's expert witness. Dr. Cusick opposed this plan and

brought a motion *in limine*. The trial court ruled in favor of the Mays and found that they were free to call Dr. Ausman as a witness if the doctor was willing to be their witness. Later, Dr. Ausman indicated that he was unwilling to testify as a witness for either side. The Mays then sought to introduce Dr. Ausman's opinion, contained in a written report, concerning Dr. Cusick's treatment of May into evidence at trial. The trial court ruled that the report was inadmissible hearsay unless Dr. Ausman was going to be testifying.

¶22 The Mays argue that the trial court erred in finding that Dr. Ausman's medical report concerning Dr. Cusick was inadmissible hearsay. While ordinarily, in deciding this issue, we apply a deferential standard of review, as the trial court's determination to admit or exclude evidence is a discretionary decision that will not be upset on appeal absent an erroneous exercise of discretion, ***State v. Jenkins***, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992), here we decline to address this issue because the Mays raised no objection to the trial court's ruling below. We do not consider arguments raised, but never really argued, by the parties. ***Reiman Assocs. v. R/A Advertising***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981). At a hearing, the trial court ruled that the report without Dr. Ausman was inadmissible hearsay. The Mays did not object.[4]

> THE COURT: Yes. If he's gonna testify, that's one thing. If he's not gonna be here as a witness, I think that's another situation.
>
> [MAY'S ATTORNEY]: I still don't see any authority that says, that says we can't offer it into evidence. Its authenticity is not questioned.

[4] The Mays' brief states that this issue was taken up again just prior to the jury trial commencement, but they cite no record references and we could find nothing in the record to support their view.

> THE COURT: But he withdrew him as a witness, and my ruling, as I recall, was that you can – if he wants to testify, if he's willing to testify, then you can call him as your witness, and that was the purpose for the deposition.
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> [MAY'S ATTORNEY]: That's correct.
>
> THE COURT: But I don't think you can use a report that's hearsay, isn't it?
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> [MAY'S ATTORNEY]: Unfortunately, I don't have a lot of clout with the Medical College of Wisconsin to get the medical school in Chicago to modify its present position, but I haven't given up. And, if anything, this motion is premature.
>
> THE COURT: Well, he doesn't want to have to bring it after its [sic] brought to the attention of the jury and ask for a mistrial.
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> [MAY'S ATTORNEY]: Maybe we'll have to have a sidebar at the time.
>
> THE COURT: I'll rule that you're not to refer to it unless there is a ruling that you may. If there is some offer of proof or Dr. Ausman is gonna [sic] be here to testify or whatever.
>
> [MAY'S ATTORNEY]: Well, at least there will be an offer of proof.

Thus, we will not address the issue because no objection was raised in the trial court to the trial court's ruling. ***Vollmer v. Luety***, 156 Wis. 2d 1, 10, 456 N.W.2d 797 (1990) ("[I]n the absence of a specific objection which brings into focus the nature of the alleged error, a party has not preserved its objections for review.").

C. *Dr. Cusick's privileged health records.*

¶23 Prior to trial, the Mays unsuccessfully sought to discover Dr. Cusick's medical records and his medical bills pertaining to his two strokes. The trial court ruled that the patient-doctor privilege applied, and that the exception found in WIS. STAT. § 905.04(4)(c) releasing the privileged materials under certain conditions did not apply. The Mays argue that the trial court erred in refusing to permit them to discover Dr. Cusick's medical records and bills.

Although the Mays concede that the records were privileged medical information, they contend that their request fell within the exception found in § 905.04(4)(c).

¶24 WISCONSIN STAT. § 905.04(2) allows a patient to refuse to disclose his or her medical information and to prevent the disclosure of this medical information by anyone else.

> **(2)** GENERAL RULE OF PRIVILEGE. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment of the patient's physical, mental or emotional condition, among the patient, the patient's physician, the patient's registered nurse, the patient's chiropractor, the patient's psychologist, the patient's social worker, the patient's marriage and family therapist, the patient's professional counselor or persons, including members of the patient's family, who are participating in the diagnosis or treatment under the direction of the physician, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor.

Several exceptions to the general rule can be found in § 905.04, including § 905.04(4)(c):

> (c) *Condition an element of claim or defense.* There is no privilege under this section as to communications relevant to or within the scope of discovery examination of an issue of the physical, mental or emotional condition of a patient in any proceedings in which the patient relies upon the condition as an element of the patient's claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.

¶25 The Mays submit that the trial court should have granted their request for this discovery material because their suit, alleging that Dr. Cusick was impaired when he operated on May, triggered the exception. Dr. Cusick counters

that to adopt the Mays argument is to permit the exception to swallow the privilege. As Dr. Cusick remarks in his brief, "According to the plaintiffs, the plaintiff only need allege that some health condition affected an outcome, a defendant reject[s] that contention and by doing so, the defendant waives his/her privilege or confidentiality of his/her medical records." We agree with Dr. Cusick.

¶26 After reviewing the trial court's evidentiary ruling under the erroneous exercise of discretion standard, we are satisfied that the trial court did not err. First, the Mays have not cited a single case to support their contention that, simply by suing Dr. Cusick and alleging he was medically disabled, they have opened the floodgates and are entitled to all his medical records. A common sense reading of the statute does not support their interpretation. To simply allege that Dr. Cusick was negligent and possibly impaired, and then be able to obtain his medical records would be contrary to the statute's intent and would significantly weaken the privilege which the statute protects. Further, the exception does not apply under these circumstances. The statute states an exception is created when "the physical, mental or emotional condition of a *patient* in any proceedings in which the *patient* relies upon the condition as an element of the *patient's* claim or defense." Unless these conditions were met, the Mays were not entitled to the medical records. Here, the patient, Dr. Cusick, has not relied upon a physical condition as an element of his defense to the Mays' suit for medical malpractice. On the contrary, his defense is that he had no physical condition that prevented

him from appropriately treating May. Thus, the Mays were not entitled to the information under that exception.[5]

D. *May's Hospital and Medical Expenses*

¶27 The Mays argue that the trial court erred in refusing to allow them to introduce into evidence May's hospital and medical expenses, totaling $128,665. The trial court ruled that because the Mays failed to name the insurance company as a party, and the statute of limitations had run on the insurer's bringing suit for reimbursement, the Mays were not entitled to recover these sums. The Mays contend that the collateral source rule allows them to be reimbursed for the hospital and medical expenses regardless of the fact that their insurer paid these bills. We decline to address this issue. Having determined that the trial court committed no error, the jury's verdict finding in favor of Dr. Cusick and the Medical College stands. Thus, our decisions concerning the earlier issues make it unnecessary for us to address this remaining argument. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issues need be addressed).

[5] The dissent's interpretation of the exception to the privilege enjoyed under the law of not having to reveal one's medical records is an unusual one. Further, the dissent criticizes the trial court for refusing to order Dr. Cusick to turn over his personal medical records, but the dissent overlooks the fact that the Mays engaged in extensive discovery of Dr. Cusick, his co-workers and supervisors, and his family regarding Dr. Cusick's physical and mental abilities, and not a shred of evidence was found that Dr. Cusick suffered any residual effects from his strokes. Following the reasoning of the dissent, doctors would automatically be required to turn over all their mental and physical health records whenever they are sued for medical malpractice and the patient alleges the doctor was physically or mentally impaired. This intrusion of privacy will occur without the plaintiff making any showing whatsoever that their allegations concerning the doctor's impaired physical and mental health are true.

E. *A New Trial*

¶28 The Mays argue that because the trial court: (1) denied them discovery on "a major factual issue"; (2) improperly granted partial summary judgment to Dr Cusick; and (3) made numerous evidentiary rulings, that they are entitled to a new trial in the interest of justice pursuant to WIS. STAT. § 752.35.[6] We disagree.

¶29 First, we have already concluded that the trial court committed no error prior or during this lengthy trial. Second, after reviewing the record, we find no support for the Mays' contention that the real controversy was not tried or that justice miscarried. Thus, we decline to exercise our discretionary power. Accordingly, the judgment is affirmed.

*By the Court*.—Judgment affirmed.

Not recommended for publication in the official reports.

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[6] WISCONSIN STAT. § 752.35 provides:

> **Discretionary reversal.** In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

¶30 SCHUDSON, J. (*concurring in part; dissenting in part*). According to the summary judgment submissions, Dr. Cusick, as co-director of the Stroke Center of Froedtert Memorial Lutheran Hospital, disseminated the *Consumer Guide To Stroke Prevention & Treatment*, which explained that stroke "can affect the senses, speech and the ability to understand speech, behavioral and thought patterns, and memory." Could Dr. Cusick's alleged negligence have been the result of any such impairment?

¶31 Dr. Cusick and his witnesses answered, "No!" Thus, the trial court concluded that "nothing in Dr. Cusick's health history presented a risk at the time of Dr. Cusick's care and treatment of John May" and, therefore, it granted partial summary judgment to Dr. Cusick, "dismissing the plaintiffs' claim for informed consent as it relates to [Dr. Cusick's] alleged failure … to properly inform the plaintiffs regarding [his] health history." The trial court reached that conclusion, however, without affording the Mays the opportunity to review the very records that could have established whether Dr. Cusick and his witnesses were correct. Neither law nor logic supports such a truncated approach to summary judgment.

¶32 The Mays requested the opportunity to discover medical records that could reveal whether Dr. Cusick was impaired or, at the very least, whether Dr. Cusick or a reasonable person under the circumstances would have had reason to realize that his stroke history and resulting condition should have led him to disclose that history and condition. Dr. Cusick invoked the physician-patient privilege in order to prevent disclosure. The Mays correctly argue, however, that

the requested medical records fall within the WIS. STAT. § 905.04(4)(c) exception to the § 905.04(2) general rule of physician-patient privilege.

¶33 WISCONSIN STAT. § 905.04(4)(c) provides, in relevant part, that "[t]here is no privilege … as to communications relevant to or within the scope of discovery examination of an issue of the physical, mental or emotional condition of a patient in any proceedings in which the patient relies upon the condition as an element of the patient's … defense." That is exactly the circumstance presented in this case. Remarkably, however, the majority writes:

> Here, the patient, Dr. Cusick, has not relied upon a physical condition as an element of his defense to the Mays' suit for medical malpractice. On the contrary, his defense is that he had no physical condition that prevented him from appropriately treating May. Thus, the Mays were not entitled to the information under that exception.

Majority at ¶26 (footnote omitted). Needless to say, that reasoning is circular. To suggest otherwise is to lock the Mays into a *Catch-22* illogic from which one could never escape. After all, both Dr. Cusick's defense and his objection to discovery of his medical records are based on *his* opinion that *his condition* was fine. But the Mays were not required to accept *his* opinion or that of *his* witnesses. The Mays were entitled to review the medical records to determine whether Dr. Cusick's "physical, mental or emotional condition" could have presented a material risk to John May while he was receiving medical care from Dr. Cusick.

¶34 Unquestionably, therefore, the exception applies. Dr. Cusick did indeed "rel[y] upon [his] condition as an element of [his] … defense." *See* WIS. STAT. § 905.04(4)(c). Accordingly, the Mays were entitled to the discovery they requested. The trial court, in turn, was required to postpone its partial summary judgment determination of the Mays' informed-consent claim until the Mays had

the opportunity to review the records and offer any additional submissions based on what they discovered during that review.

¶35 Depending on what the records reveal, a new trial may be required. As the supreme court has explained:

> [W]hat a physician must disclose is contingent upon what, under the circumstances of a given case, a reasonable person in the patient's position would need to know in order to make an intelligent and informed decision. The question of whether certain information is material to a patient's decision and therefore requires disclosure is rooted in the facts and circumstances of the particular case in which it arises.

***Johnson v. Kokemoor***, 199 Wis. 2d 615, 639, 545 N.W.2d 495 (1996) (citations omitted). Moreover, "the evidentiary value of what physicians of good standing consider adequate disclosure is not dispositive, for ultimately 'the extent of the physician's disclosures is driven … by what a reasonable person under the circumstances then existing would want to know.'" ***Id.*** at 633.

¶36 If the medical records reveal no basis for any concern that Dr. Cusick's strokes left him impaired such that "a reasonable person in the patient's position would need to know [that information] in order to make an intelligent and informed decision," the result is unchanged. If, however, the records suggest otherwise, the issue would be for the jury.

¶37 Accordingly, I conclude that the trial court's partial summary judgment determination of the informed-consent claim was premature and, therefore, in part, I respectfully dissent.