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

**April 24, 2007**

**David R. Schanker**
**Clerk of Court of Appeals**



**Appeal No. 2006AP1182** **Cir. Ct. No. 2004CV1348**

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

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**BRIAN CASPERSON,**

**PLAINTIFF-APPELLANT,**

**V.**

**N.E. WIS. CTR. FOR SURGERY & REHAB OF THE HAND, LTD. AND LARRY C. LIVENGOOD, M.D.,**

**DEFENDANTS-RESPONDENTS,**

**JEFFREY W. HANES, REMLEY & SENSENBRENNER AND NAVIGATORS INSURANCE COMPANY,**

**DEFENDANTS.**

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APPEAL from a judgment of the circuit court for Outagamie County: DENNIS C. LUEBKE, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Brian Casperson appeals a summary judgment in favor of Dr. Larry Livengood and Northeast Wisconsin Center for Surgery and Rehabilitation of the Hand, Ltd., (Northeast) holding that Casperson must provide expert testimony in order to proceed with his tort claim of medical abandonment. Casperson argues he does not need expert testimony to establish his claim, and to the extent that he does, he relies upon Livengood's testimony. We reject his arguments and affirm the summary judgment.

## BACKGROUND

¶2 In 2002, Casperson had surgery performed on his right wrist at the Northeast. After Casperson failed to pay his bill, Northeast retained attorney Jeffrey Hanes to file suit against Casperson to collect this unpaid debt. Hanes attached to the complaint a three-page Patient Registration Form, containing some of Casperson's personal health information.

¶3 In September 2003, Casperson returned to Northeast with a new injury to his right wrist and was seen by Livengood. Casperson began a course of conservative treatment, including therapy. On March 8, 2004, Casperson filed for Chapter 7 bankruptcy. On July 12, 2004, Casperson received a complete discharge of all debts, including the money he owed Northeast for the 2002 operation. Two days later, Casperson's attorney sent a letter to Northeast's attorneys notifying them that Casperson was pursuing an invasion of privacy claim against Northeast, stemming from attachment of the three-page Patient Registration Form to Northeast's complaint against Casperson. The letter also warned Northeast against having ex parte communications with Casperson. On July 16, 2004, Casperson scheduled a non-emergency, elective surgery of his right

wrist with Livengood at Northeast. This surgery was scheduled for August 12, 2004.

¶4 After receiving notice from their attorneys that Casperson was pursuing a legal action against Northeast for invasion of privacy, Livengood and his partners at Northeast met. They decided to end the physician/patient relationship and cancel the elective surgery.

¶5 On August 4, 2004, Livengood sent Casperson a letter explaining that he was withdrawing from Casperson's future care and the surgery was cancelled. Livengood explained continuing the physician/patient relationship was not in either party's best interests because they were to be adverse parties in an active lawsuit. Livengood provided Casperson with names and contact information for two qualified hand surgeons whom he recommended Casperson contact for care. Livengood also called one of the surgeons, Dr. Joseph Cullen, to discuss Casperson's case in order to ensure a smooth transition and continuity in Casperson's treatment. Initially, Casperson scheduled the surgery with Cullen for October 7, 2004. However, due to issues involving Casperson's insurance, Capserson underwent the surgery with Cullen on December 1, 2004.

¶6 On August 27, 2004, Casperson filed a lawsuit against Livengood, Northeast, Hanes, and Hane's firm Remley & Sensenbrenner, alleging numerous causes of action. The circuit court dismissed all of Casperson's claims, except for his breach of contract and tort claims, and he has not appealed the dismissed

causes of action.[1] Casperson initially named Cullen as his expert witness, but later removed him as a witness and expressly stated he would "have no expert witnesses for trial."

¶7 Livengood and Northeast moved for summary judgment on the basis that Casperson could not prove liability, causation, or damages without expert testimony. Livengood and Northeast argued Casperson would not be able to meet his burden of proof without an expert to testify as to the standard of care controlling a physician's duty to treat a patient, deviations from this standard, and ethical obligations of physicians. Casperson responded that he did not need an expert, and that to the extent he did, he would rely on Livengood's testimony. Casperson moved for summary judgment on the issue of liability, arguing Livengood and Northeast had, as a matter of law, breached their contract with Casperson and "fiduciary duty" owed to Casperson.

¶8 On January 5 and 17, 2006, the court heard both summary judgment motions. The court first granted summary judgment to Livengood and Northeast, dismissing Casperson's lawsuit. However, the court later reversed itself, holding that Casperson could proceed to trial with a breach of contract claim.

¶9 On March 7, 2006, the first day of trial, the court reaffirmed its previous ruling that Casperson could not proceed to trial on his tort claim without expert testimony. The court also ruled punitive damages and pain and suffering could not be recovered in a breach of contract claim. That same day, Casperson

[1] Livengood and Northeast disputed whether Casperson adequately pled a tort claim. The court however proceeded as if such a claim was adequately pled. Because of the dismissals, Hanes and Remley & Sensenbrenner were not parties to the present litigation, and they are not part of this appeal.

entered into a settlement agreement with Livengood and Northeast to dismiss with prejudice his contractual claim in exchange for Livengood and Northeast's agreement to waive taxable costs. The court's rulings and parties' stipulation were reduced to a judgment of dismissal, entered on April 5, 2006.

## DISCUSSION

¶10 The grant or denial of a motion for summary judgment is a matter of law that this court reviews de novo. ***Torgerson v. Journal/Sentinel, Inc.***, 210 Wis. 2d 524, 536, 563 N.W.2d 472 (1997). We review summary judgment without deference to the circuit court, but benefiting from its analyses. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987).

¶11 Casperson raises a myriad of issues on appeal that are difficult to decipher. However, there is one dispositive issue. Livengood and Northeast challenge whether Casperson has a viable tort claim for medical abandonment. Even assuming Casperson has a viable medical abandonment claim, we conclude the circuit court appropriately granted summary judgment because Casperson needed expert testimony to establish this claim.[2]

[2] Livengood and Northeast argue, with some merit, that the medical abandonment claim is procedurally barred because Capserson did not comply with WIS. STAT. ch. 655. However, we do not need to reach this conclusion because this case can be resolved on other grounds. *See* ***Patrick Fur Farm, Inc. v. United Vaccines, Inc.***, 2005 WI App 190, ¶8 n.1, 286 Wis. 2d 774, 703 N.W.2d 707 (court of appeals decides cases on the narrowest possible grounds).

Conversely, Casperson argues, to the extent he needs any expert testimony, he will rely on Livengood's testimony. Casperson however confuses the procedural posture of this case. Casperson cannot survive a motion for summary judgment on the bald and speculative assertion that at trial he will rely on Livengood's testimony.

¶12 In Wisconsin, a "physician has the right to withdraw from a case, but if the case is such as to still require further medical or surgical attention, he must, before withdrawing from the case, give the patient sufficient notice so the patient can procure other medical attention if he desires." ***McManus v. Donlin***, 23 Wis. 2d 289, 300, 127 N.W.2d 22 (1964). In granting summary judgment, the circuit court held expert testimony was necessary to establish Livengood and Northeast failed to meet the standard of care in withdrawing from Casperson's case. Casperson argues expert testimony is not necessary because he established the breach of fiduciary duty not to abandon a patient, as a matter of law. We disagree with Casperson's argument because it ignores basic Wisconsin law regarding expert testimony.

¶13 "Expert testimony is mandatory only where the matter is 'not within the realm of ordinary experience and lay comprehension.'" ***Robinson v. City of West Allis***, 2000 WI 126, ¶29, 239 Wis. 2d 595, 619 N.W.2d 692. In ***Froh v. Milwaukee Medical Clinic, S.C.***, 85 Wis. 2d 308, 317, 270 N.W.2d 83 (Ct. App. 1978), we stated:

> In order to hold a physician liable, the burden is upon the plaintiff to show that the physician failed in the requisite degree of care and skill. That degree of care and skill can only be proved by the testimony of experts. Without such testimony the jury has no standard which enables it to determine whether the defendant failed to exercise the degree of care and skill required of him.

Furthermore, our supreme court has held that negligence can be inferred without expert testimony when "there is evidence that the event in question would not ordinarily occur unless there was negligence." ***Richards v. Mendivil***, 200 Wis. 2d 665, 674, 548 N.W.2d 85 (Ct. App. 1996).

¶14 Here, Casperson needed a medical expert to testify that either Livengood or Northeast fell below the standard of care when withdrawing from Casperson's case and canceling the elective surgery. Without this testimony, the jury would have been required to speculate as to whether Livengood and Northeast met the standard of care in deciding to discontinue treatment of a patient who was threatening to sue them. Casperson asserts that American Medical Association ethics opinions clearly that establish the standard of care was not met in this case. Casperson does not cite any authority that such opinions per se establish the standard of care required by doctors, which is precisely what an expert would testify to in this situation. The proper timing and method of terminating a physician/patient relationship involving an elective procedure yet to be performed is not within the everyday experience of most jurors. Furthermore, Casperson has not established that ending a physician/patient relationship for an elective procedure where the patient is threatening to sue would not ordinarily occur unless there was negligence.

¶15 Casperson also appears to argue that Livengood and Northeast violated federal laws and that violation is a relevant factor in establishing a breach of fiduciary duty that Livengood and Northeast conspired to violate Casperson's rights, and that he is entitled to damages. While Casperson agrees with Livengood and Northeast that federal laws do not provide a private right of action, he does not cite authority nor does he develop his arguments as to how these alleged violations establish either negligence or conspiracy. This court declines to consider arguments that are unexplained, underdeveloped, or unsupported by citation to authority. ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988). Therefore, we decline to address Casperson's additional arguments.

*By the Court.*—Judgment affirmed.

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