COURT OF APPEALS
DECISION
DATED AND FILED

September 20, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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

Appeal No. 2006AP2440 **Cir. Ct. No. 2005CV691**

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

KATHLEEN PAULLIN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MARGARET LITTLE,

PLAINTIFF-APPELLANT,

MEDICARE PART A, C/O UNITED STATES GOVERNMENT SERVICES, LLC, MEDICARE PART A, C/O MEDICARE-ADMINISTAR FEDERAL, INC., MEDICARE PART B, C/O WISCONSIN PHYSICIANS SERVICES INSURANCE CORPORATION, TRICARE FOR LIFE, C/O HUMANA MILITARY HEALTHCARE SERVICES, TRICARE FOR LIFE, C/O WISCONSIN PHYSICIANS SERVICES INSURANCE CORPORATION, AND UNITED HEALTHCARE SERVICES, INC.,

INVOLUNTARY-PLAINTIFFS,

V.

OCONOMOWOC MEMORIAL HOSPITAL, INC. AND OHIC INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Waukesha County: JAMES R. KIEFFER, Judge. *Affirmed*.

Before Higginbotham, P.J., Lundsten and Bridge, JJ.

¶1 BRIDGE, J. The Estate of Margaret Little (the Estate) appeals an order granting summary judgment in favor of Oconomowoc Memorial Hospital (the Hospital) in which the circuit court held that expert testimony was necessary to establish: (1) causation between the Hospital's negligence and Little's fall from her hospital bed, and (2) causation between the injury Little incurred in the fall and her subsequent decline in health. We conclude that the second issue is not within the realm of common knowledge and therefore requires expert medical testimony. The Estate lacks the necessary expert testimony and we therefore conclude that the evidence is insufficient to support its claim. Because that issue is dispositive, we do not address the first issue. Accordingly, we affirm.

BACKGROUND

¶2 Margaret Little was admitted to Oconomowoc Memorial Hospital on March 16, 2002 following a visit to the Hospital emergency room. The notes prepared by the admitting physician state the following:

> REASON FOR ADMISSION:
> Weight loss and dysphagia.[1]
>
> HISTORY PRESENT ILLNESS:
> The patient is a 79-year-old Caucasian female admitted by Dr. Cleary for further evaluation of unexplained weight loss and dysphagia. Over the past year, the patient has lost weight from 162 to a current weight of 124 pounds. More

[1] Dysphagia means difficulty in swallowing. *See* ***Stedman's Medical Dictionary*** 554 (27th ed. 2000).

> recently, the patient complained of some difficulty swallowing. This was poorly described. The patient denied odynophagia.[2] She was recently diagnosed with herpes zoster and she has been treated with famciclovir and prednisone.[3] She had some pain where she has had shingles. She denies *any headaches, shortness of breath, chest pain, abdominal discomfort*, recently changing bowel habits, or urinary complaints. She has not been eating or drinking. She had "failure to thrive."

(Emphasis in original.)

¶3 Little was given medication that affected her balance and made her irritable. Railings were placed on her bed in order to prevent her from getting out of bed or falling. She still attempted to ambulate, and nursing staff placed an alarm underneath her bedding so that any movement by Little could be detected at the nursing station and the nurses could respond.

¶4 On March 19, members of Little's family came to visit her. Nursing staff lowered the bed railing during this time. Little's movements triggered the alarm on several occasions and a member of the nursing staff then removed the alarm to facilitate the family visit. As Little's family members were leaving the Hospital, they informed the nursing staff of their departure and indicated that Little was sleeping and that the bed rails and alarm should be put back in place.

¶5 Within an hour after returning home from the Hospital, Little's daughter received a call from a Hospital staff member informing her that Little had fallen from her bed. During that conversation, Little's daughter became aware

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[2] Odynophagia means pain in swallowing. *See* ***Stedman's Medical Dictionary*** 1254 (27th ed. 2000).

[3] Herpes zoster is commonly known as shingles. *See* ***Stedman's Medical Dictionary*** 815 (27th ed. 2000).

that the bed rails and the alarm were not put back into place after their visit. The Hospital staff member told Little's daughter that the Hospital would look into who was responsible for not replacing the rails.

¶6 As a result of the fall, Little required hip replacement surgery. Thereafter, Little received rehabilitation at Hartland Health from May 1, 2002, through May 31, 2002. She then resided in Willkerson Woods Assisted Living Center, where she suffered another fall. She was again conveyed to the Hospital complaining of wrist and pelvic pain but did not receive further treatment at that time. She was discharged to River Hills Nursing Home where her physical complaints continued. She was then transported to Beverly Terrace Nursing Center and from there to the Watertown Community Hospital where she was diagnosed with a pelvic fracture and broken arm. She was discharged from care to Beverly Terrace. Little died on August 15, 2005.[4]

¶7 Little's Estate brought suit against the Hospital, alleging that Hospital staff were negligent in failing to keep her bed rails in a raised position and in failing to replace the bed alarm.[5] The Estate named a single expert witness, nurse Denise Harden, who was not involved in Little's medical care but offered testimony based on her review of Little's medical records. When deposed, Harden stated that she could not opine to a reasonable degree of professional certainty that the alleged negligence of the Hospital staff was a cause of Little's fall or that Little's fall was a cause of her subsequent decline in health.

[4] The record does not make clear whether Little was residing at Beverly Terrace at the time of her death.

[5] Little's Estate was substituted as a plaintiff in this action following her death.

¶8 The Hospital moved for summary judgment, and, for purposes of its motion, conceded negligence. It argued that expert testimony was required to establish a causal link between the Hospital's negligence and Little's fall, and also to establish a causal link between Little's fall and her subsequent decline in health and damages. It asserted that the Estate lacked such evidence and therefore, as a matter of law, there was insufficient evidence to support the Estate's claim.

¶9 The circuit court ruled that the Estate's claim against the Hospital was not a claim for medical malpractice but rather a claim for the negligent failure to perform routine custodial care, and concluded that an expert witness was not required to prove whether the Hospital breached a standard of care. However, the court concluded that expert testimony was required to establish causation, both as to the link between the bed rails and alarm replacement and the fall, and also as to the link between Little's broken hip and subsequent decline in health. The court granted summary judgment to the Hospital after finding that the Estate did not have an expert witness to testify to a reasonable degree of professional certainty regarding these causal links. The Estate appeals.

DISCUSSION

¶10 We review summary judgment de novo, applying the same standards as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). A party is entitled to summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***Smaxwell v. Bayard,*** 2004 WI 101, ¶12, 274 Wis. 2d 278, 682 N.W.2d 923; WIS. STAT. § 802.08(2)

(2005-06).[6] We view summary judgment in the light most favorable to the nonmoving party. ***Smaxwell***, 274 Wis. 2d 278, ¶12.

¶11 We consider the necessity for expert testimony without deference to the circuit court's opinion. *See* ***Cramer v. Theda Clark Mem'l Hosp.***, 45 Wis. 2d 147, 150-53, 172 N.W.2d 427 (1969).

¶12 In Wisconsin, expert testimony is generally admissible if the person testifying is qualified and if the testimony will help the trier of fact to understand the evidence or to determine a fact in issue. WIS. STAT. § 907.02; ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 378, 541 N.W.2d 753 (1995). The supreme court has long recognized that certain kinds of evidence are difficult for jurors to evaluate without the benefit of expert testimony. When confronted with such a case, the trial court may decline to permit the case to go to the jury in the absence of expert testimony. ***Id.*** at 378-79 (citation omitted).

¶13 But the supreme court has also simultaneously emphasized that "requiring expert testimony rather than simply permitting it represents an extraordinary step, one to be taken only when 'unusually complex or esoteric issues are before the jury.'" ***Robinson v. City of West Allis***, 2000 WI 126, ¶29, 239 Wis. 2d 595, 619 N.W.2d 692. Expert testimony is mandatory only where the matter is "not within the realm of ordinary experience and lay comprehension." ***Id.*** (citation omitted). When expert testimony is required and is lacking, the evidence is insufficient to support a claim. ***Cramer***, 45 Wis. 2d at 152.

[6] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶14 The Hospital argues that it is entitled to summary judgment because, in view of the evidence admissible at trial and undisputed for purposes of summary judgment, the Estate's evidence of causation is insufficient to support a jury verdict. At trial, the burden will be on the Estate to prove that the failure to replace the bed rails and alarm caused Little's fall, and further that the injury she sustained in the fall caused her subsequent decline in health.[7] We begin with the latter of these issues.[8]

¶15 The Estate first argues that it may rely on Little's medical records to establish the causal link.[9] However, these records consist of two pages of notes prepared by the admitting physician when Little first entered the Hospital. The notes were prepared at the time of Little's admission, which was *before* the fall at the heart of this case. Thus, by definition, the doctor's notes do not address any causal link between the fall and Little's decline in health.

[7] The Estate's claim is not limited to seeking damages arising from Little's immediate treatment following her fall, i.e., her hip surgery and rehabilitative treatment. Instead, the Estate seeks compensation for what it describes as Little's "decline in health" over a period of two years, which it contends relates back to the fall at the Hospital. This decline in health included a subsequent fall while at a nursing facility which resulted in a fractured pelvis.

[8] Because resolution of the second issue is dispositive of the appeal, we do not reach the issue whether expert testimony is necessary to establish causation between the Hospital's negligence and Little's fall from her hospital bed. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) ("[when] sufficient ground for support of the judgment has been declared, there is no need to discuss the others urged.")

[9] The Estate apparently planned to offer the testimony of Little's treating physicians to explain the content of the medical records. However, it failed to timely file medical reports from these physicians as required by the circuit court's scheduling order. The circuit court granted the Estate an extension of time to identify any expert witnesses and file the necessary written reports on the issue of causation. When the Estate failed to name any expert or file a written report, the circuit court granted summary judgment.

¶16 The Estate's only expert witness, Nurse Harden, could not testify as to the causal link between Little's fall and her subsequent decline in health to a reasonable degree of professional certainty.[10] The Estate asserts that even without Nurse Harden's testimony, it can prove causation through lay testimony by members of Little's family comparing Little's health before the fall with her health after the fall.[11] It contends that expert testimony has not been required in other similar cases. However, the cases upon which the Estate relies do not support its position.

¶17 In ***Ludwig v. Dulian,*** 217 Wis. 2d 782, 579 N.W.2d 795 (Ct. App. 1998)**,** we determined that, in the context of a back injury sustained in an altercation, it was not an erroneous exercise of discretion for the court to permit Ludwig to testify about health care treatment he received and physical complaints he suffered following the incident. ***Id.*** at 792. In that case Ludwig was competent to testify about his injury based on his own personal knowledge and experience. That is not the situation in the present case. Little is deceased and cannot testify on her own behalf and further, as we describe below, her medical history before and after the injury is significantly more complex than that described in ***Ludwig***.

[10] Nurse Harden was unable to offer her professional opinion on this issue because she had been provided with Little's medical records only for the period ending five days following Little's initial hospital stay. She had no information about Little's condition thereafter. Moreover, the Estate stated that it intended to offer Nurse Harden's testimony on the issue of causation between the lack of bed rails and alarm and Little's fall, not on the issue of causation between the fall and Little's subsequent decline in health.

[11] The Estate asserts that Little's daughter and granddaughter would testify that before her fall, Little lived in her own residence and lived a relatively normal life for a person her age, driving a vehicle, walking normally and engaging in a normal social life. They would testify further that after her fall, Little's "life situation deteriorated with various health problems, including a subsequent fall, a pelvic fracture, [and] admission to three different nursing home facilities," and that she was not able to live independently, drive a vehicle or walk without the aid of a walker thereafter.

¶18 In ***West Bend Co. v. LIRC***, 149 Wis. 2d 110, 438 N.W.2d 823 (1989), the supreme court determined that, in the context of a repetitive motion injury, a lay person was not allowed to make a diagnosis or a prognosis of the injured person's present or future condition when there were no outward manifestations of present or future disabilities that would be apparent in ordinary experience. ***Id.*** at 129. The Estate argues that the converse is also true, and a lay person *may* make a diagnosis or prognosis where outward manifestations of disability exist. However, it does not necessarily follow that a lay person is competent to make such a diagnosis or prognosis in every such case. "Whether expert testimony is required in a given situation must be answered on a case-by-case basis." ***Netzel v. State Sand & Gravel Co.***, 51 Wis. 2d 1, 6, 186 N.W.2d 258 (1971). While expert testimony is not necessary in all cases where the opinion is of a medical or quasi-medical nature, it requires an inquiry into whether the opinion testified to in each particular instance can reasonably be determined to be within the realm of ordinary experience. *See* ***id.*** at 6-7.

¶19 We agree that Little's family members may offer their observations regarding Little's general physical condition before and after her fall. *See, e.g.*, ***Freuen v. Brenner***, 16 Wis. 2d 445, 453, 114 N.W.2d 782 (1962) (lay witness may be allowed to testify regarding the physical condition of another person based on personal observation). However, we conclude that expert testimony is required to prove causation because expert knowledge is required to attribute Little's subsequent health problems to the Hospital fall.

¶20 Before the fall at the Hospital, Little had previously fallen at home and suffered a broken hip for which she underwent surgery.[12] She also previously had heart bypass surgery. In the year prior to her admission to the Hospital, she had experienced significant weight loss. At the time of her admission, Little was not eating or drinking. Following her fall at the Hospital, she fell again and fractured her pelvis while in an assisted living facility.

¶21 Any of these factors could potentially have a bearing on Little's declining health with or without the fall at the Hospital. While Little's family could testify regarding her general physical condition, an expert medical opinion is needed to assist the jury in understanding which of her health problems were caused or aggravated by the Hospital fall. For example, a person without expert knowledge would not know whether Little's later fall at the assisted living facility was attributable to her hip surgery. The level of complexity in this determination is not within the realm of ordinary experience and instead falls within the realm of medical practice. Per the reasoning in ***Robinson***, medical testimony is required.[13]

¶22 For the reasons discussed above, we conclude that expert medical testimony is required to establish the causal link between Little's fall at the Hospital and her subsequent decline in health. Because the Estate lacks the necessary expert testimony, the evidence is insufficient to support its claim.

[12] It is unclear from the record whether this was the same hip as Little broke in the fall at the Hospital.

[13] *See also* ***Globe Steel Tubes Co. v. Industrial Comm'n***, 251 Wis. 495, 497, 29 N.W.2d 510 (1947) (expert testimony is required as to whether a fall occurred because of a prior leg injury).

Accordingly, we affirm the circuit court's ruling granting summary judgment in favor of the Hospital.

By the Court.—Order affirmed.

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