COURT OF APPEALS
DECISION
DATED AND FILED

March 13, 2002

Cornelia G. Clark
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. 01-0832 Cir. Ct. No. 99-CV-873

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

CRISTY L. RASMUSSEN AND THE ESTATE OF SCOTT C. RASMUSSEN, BY ITS PERSONAL REPRESENTATIVE, CRISTY L. RASMUSSEN,

PLAINTIFFS-RESPONDENTS,

V.

DR. ANTHONY W. DEUSTER,

DEFENDANT-APPELLANT,

DR. DAVID FELDMAN, ST. LUKE'S HOSPITAL AND ST. MARY'S MEDICAL CENTER, WISCONSIN PATIENTS' COMPENSATION FUND, ABC INSURANCE COMPANIES, DEF INSURANCE COMPANIES, GHI INSURANCE COMPANIES, JKL INSURANCE COMPANIES, MNO INSURANCE COMPANIES, PHYSICIANS INSURANCE COMPANY OF WISCONSIN AND AMERICAN CONTINENTAL INSURANCE COMPANY,

DEFENDANTS,

MEDICAL PROTECTIVE COMPANY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: DENNIS J. BARRY, Judge. *Affirmed*.

Before Brown, Anderson and Snyder, JJ.

¶1 PER CURIAM. Anthony L. Deuster, M.D., and the Medical Protective Company appeal from the final judgment in this medical malpractice case. They argue on appeal that the circuit court erred when it refused to submit the issue of contributory negligence to the jury. We conclude that the issue of contributory negligence was properly kept from the jury. Therefore, we affirm.

¶2 Cristy L. Rasmussen brought this case after the death of her husband, Scott C. Rasmussen. On the day Scott died, he woke Cristy in the morning complaining of nausea, vomiting and severe abdominal pain. Cristy took Scott to the hospital where he was examined by Dr. Deuster, x-rayed, evaluated and eventually diagnosed with constipation. At the time he first saw Dr. Deuster, Scott told the doctor that his pain was ten on a scale of ten. Scott was given a narcotic pain-killer and enemas. Although Dr. Deuster reviewed the x-ray report, he did not review the x-ray taken of Scott.

¶3 Some time later, Scott's pain had reduced to five on a scale of ten. Scott was discharged from the hospital at about noon. He went home still in pain, and continued to vomit the rest of the day. He died later that evening. The cause of his death was a small bowel obstruction. The plaintiff's expert testified that Scott had all the classic symptoms of a small bowel obstruction when he arrived at the hospital, and that the obstruction was visible on the x-ray.

¶4 Dr. Deuster argues that the circuit court erred when it refused to include contributory negligence on the special verdict form. Issues involving the availability and nature of a defense of contributory negligence are questions of law which the reviewing court considers independently of the decision of the circuit court but benefiting from its analysis. ***Brown v. Dibbel***, 227 Wis. 2d 28, 42, 595 N.W.2d 358 (1999).

¶5 Dr. Deuster asserts that he was entitled to have the issue of contributory negligence presented to the jury because Scott told various people, including Dr. Deuster, that he was feeling better prior to discharge. Further, he argues that Scott was told in his discharge instructions that he was to return to the hospital if his condition worsened. He argues that under ***Brown***, he was entitled to have the jury consider contributory negligence.

¶6 In ***Brown***, the court held that contributory negligence could be considered in an informed consent case. ***Id.*** at 49. The court concluded that a patient had a duty to exercise ordinary care under certain circumstances to tell a doctor truthful and complete information about his or her family and medical history "to the extent possible in response to the doctor's requests for information when the requested information is material to a doctor's duty" under the informed consent statute. ***Id***. at 48-49.

¶7 The court acknowledged, however, that this duty was extremely limited. The court stated: "[T]he very patient-doctor relation assumes trust and confidence on the part of the patient and that it would require an unusual set of facts to render a patient guilty of contributory negligence when the patient relies on the doctor." ***Id.*** at 34. The court further noted: "A patient does not, except in a very extraordinary fact situation, fail to exercise ordinary care for her health or

well-being in an informed consent action when the patient chooses a viable medical mode of treatment presented by a doctor." ***Id.*** at 35.

¶8 We do not agree that this case is similar to ***Brown***, but rather this is a simple case of medical malpractice. First, this is not an informed consent case. Second, this is a case where the patient followed the mode of treatment prescribed by the doctor. Scott did only what the doctor told him—he went home. As a result of following his doctor's prescribed mode of treatment, he died. This is classic malpractice and contributory negligence is not an issue. The circuit court properly kept if off the verdict.

¶9 There is one other matter of concern to this court. In the appellants' brief, counsel states at pages 9-10:

> In the present case, there is substantial testimony regarding communications with Mr. Rasmussen. Prior to his discharge, Mr. Rasmussen spoke with Nurse Barrows, Physician Assistant Wrensch and Dr. Deuster. Mr. Rasmussen informed each of these individuals that he was feeling better and was ready to go home.

¶10 This quoted section of the brief does not contain any citations to the record. Further, we have not found testimony from either Wrensch or Barrows that prior to discharge, Scott told them he was feeling better and ready to go home.[1] WISCONSIN STAT. § 802.05(1) (1999-2000)[2] provides in relevant part:

[1] In the reply brief, counsel also states that Wrensch testified that Scott informed him "that he felt more comfortable." This statement includes a record cite. The actual testimony was as follows: "Q: How do you evaluate whether your treatment has been successful? A: Patient sharing with you that he's passed the stool, he's feeling more comfortable."

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

> The signature of an attorney or party constitutes a certificate that the attorney or party has read the pleading, motion or other paper; that to the best of the attorney's or party's knowledge, information and belief, formed after reasonable inquiry, the pleading, motion or other paper is well-grounded in fact and is warranted by existing law.

This statute is made applicable to the court of appeals by WIS. STAT. RULE 809.84.

¶11 By signing the brief, counsel certified that the argument was "well-grounded in fact." It was not. Counsel has a duty to the tribunal, opposing counsel and the system of justice not to do what was done here. We admonish counsel to be more careful in future filings in this court.

¶12 For the reasons stated, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.