COURT OF APPEALS
DECISION
DATED AND FILED

February 4, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2373 **Cir. Ct. No. 01-CV-345**

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

DENISE SCHEBERLE AND STEVE SCHEBERLE,

PLAINTIFFS-APPELLANTS,

V.

BERTRAM MILSON, M.D. AND PHYSICIANS INSURANCE COMPANY OF WISCONSIN, INC.,

DEFENDANTS-RESPONDENTS,

WISCONSIN PATIENTS COMPENSATION FUND,

DEFENDANT,

PREVEA HEALTH INSURANCE PLAN, INC.,

SUBROGATED PARTY.

APPEAL from a judgment of the circuit court for Brown County: JOHN D. MCKAY, Judge. *Reversed and cause remanded with directions*.

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

¶1 HOOVER, P.J. Denise and Steve Scheberle appeal a summary judgment entered in favor of Dr. Bertram Milson dismissing their medical malpractice claim for Scheberle's[1] injuries. Specifically, they contend the circuit court failed to consider the possibility of a *res ipsa loquitur* instruction and that the court erred when it determined Milson had not breached his duty to obtain informed consent. Milson argues that the Scheberles have tried to confuse the issue with a sham affidavit. We reject Milson's argument and, because there are issues of material fact precluding summary judgment, we reverse and remand for proceedings consistent with this opinion.

Background

¶2 Milson performed a lymph node biopsy on Scheberle in July 1999. At the time she went in for surgery, she had no right arm or shoulder problems. During surgery, she reported that she experienced severe pain, although Milson's surgical notes state differently.[2] She experienced pain immediately after surgery, and she began to notice weakness in her right shoulder. She continually complained to her physicians, including Milson. Scheberle's problems apparently arise from an injury to her eleventh cranial nerve (also referred to as the spinal accessory nerve, or SAN).

[1] "Scheberle" refers to Denise only.

[2] The trial court, in its opinion, wrote that Scheberle began to experience pain some time after surgery. For our purposes, it is irrelevant when Scheberle began to experience pain, although it may become relevant in future proceedings. The trial court may not make factual findings from contested evidence on a summary judgment motion, and such a finding should not necessarily be adopted or accepted as fact on remand.

¶3 Scheberle's right shoulder muscle has "nearly faded from existence." Her trapezius muscle has atrophied, resulting in a pronounced droop of the shoulder. She has difficulty sleeping and raising her arm, back pain, rotator cuff tendonitis, numbness and pain in two fingers, an inability to exercise in the manner she would like, and an inability to comfortably perform her job as an associate professor at the University of Wisconsin—Green Bay.

¶4 Scheberle's expert, Dr. Robert Condon, testified in a deposition that during a lymph node biopsy the standard of care requires the surgeon to "protect the integrity of the spinal accessory nerve. Failure to do that is failure to meet the standard." Condon further testified that the surgeon may do whatever he or she thinks is necessary to protect the nerve, but the simple fact that this type of injury occurs means a surgeon has failed in the expected duty.[3]

¶5 Condon also addressed the informed consent issue. Scheberle testified that Milson never mentioned potential complications with her nerves but described the procedure as "a little more complicated than getting a mole removed." Condon testified at his deposition that he was unaware of the percentage chance of risk. In response to the summary judgment motion, Condon submitted an affidavit in which he stated that if he had been asked at the deposition, he would have testified that he routinely informs patients of the potential nerve injury. Milson's defense expert also testified that he makes such a disclosure.

[3] Condon also averred to mechanisms that could have caused the nerve injury. However, he opined that it was irrelevant which mechanism precisely caused the injury because they all constituted negligent acts.

¶6 Milson moved for summary judgment. The circuit court reasoned that because Scheberle failed to prove the specific mechanics that resulted in her injury, she had failed to prove a deviation from the applicable standard of care. Further, it concluded that "the facts of this case establish no violation of informed consent" and granted Milson summary judgment of dismissal.[4] Scheberle appeals.

Discussion

¶7 The review of a summary judgment motion is a question of law that we consider de novo. ***Jankee v. Clark County***, 2000 WI 64, ¶48, 235 Wis. 2d 700, 612 N.W.2d 297. In our review of a grant of a summary judgment, we apply the same methodology as the circuit court. ***Id.*** Summary judgment is appropriate when a court is satisfied that the pleadings, depositions, interrogatories, admissions, and affidavits show that no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. ***Id.*** An appellate court will reverse a summary judgment only if the record reveals the material facts are in dispute or if the circuit court misapplied the law. ***Id.***

The Propriety of *Res Ipsa Loquitur*

¶8 Scheberle challenges the circuit court's dismissal for inadequate evidence because she claims the circuit court failed to consider the possibility of a *res ipsa loquitur* instruction. The circuit court, in its written decision granting summary judgment to Milson, wrote:

[4] Scheberle had also alleged that Milson was negligent by failing to recognize and repair the nerve damage. The trial court found the claim unsupported by the evidence. Scheberle does not address this portion of her claim on appeal.

> Proof of a deviation from the standard of care is essential in a medical malpractice case. ... A physician's failure to meet the standard of care is "negligence." …
>
> Proof of deviation from the standard of care must be by expert testimony. Failure to provide such proof must result in dismissal of the claim. A violation of the standard of care cannot merely be a conclusion. There must be specifics which lead to that conclusion. …
>
> Res ipsa loquitur, raised first by the plaintiff in opposition to defendants' Motion for Summary Judgment, is not applicable to the facts of this case. It is an unsuccessful attempt to "boot-strap" an argument in support of the expert's conclusion which, as indicated, is not supported by specifics.

¶9 We note first that Condon testified there was a standard of care and that Milson deviated from that standard. In his deposition, he did not opine specifically how Milson failed to meet the standard. Rather, he stated that because there was an injury to Scheberle's SAN, Milson must not have met that standard. This is apparently what the circuit court found deficient.

¶10 Under the *res ipsa loquitur* doctrine, however, a plaintiff is not required to prove specific mechanisms of injury. In fact, "the doctrine of res ipsa loquitur should not be applied where the specifics of an event can be completely explained." ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 18, 496 N.W.2d 226 (Ct. App. 1993) (emphasis omitted). The procedural effect of *res ipsa loquitur* in Wisconsin is that of a permissible inference rather than a rebuttable presumption. ***Fehrman v. Smirl***, 20 Wis. 2d 1, 21, 121 N.W.2d 255 (1963). As a permissible inference, the effect of the *res ipsa loquitur* instruction is merely to permit the jury to draw a reasonable inference from circumstantial evidence. ***Id.*** These rules

directly conflict with what the circuit court concluded—that Scheberle needed to provide the court with specifics regarding her injury.[5]

¶11 Milson nevertheless maintains that *res ipsa loquitur* would be inapplicable. He argues that Scheberle did not prove the mechanism of her injury or prove that Milson had exclusive control of the operating field.

¶12 However, the mechanism of injury is irrelevant in a *res ipsa loquitur* case for two reasons. First, *res ipsa loquitur* should be applied when (1) the result normally does not occur absent negligence, (2) the agent or instrumentality of injury was within exclusive control of the defendant, and (3) the evidence sufficiently removes the causation question from the realm of conjecture but still fails to completely explain the event. *See* ***Lecander v. Billmeyer***, 171 Wis. 2d 593, 601-02, 492 N.W.2d 167 (Ct. App. 1992). Under this rubric, nowhere is a plaintiff required to prove specifically how an injury occurred to receive the benefit of a *res ipsa loquitur* instruction.

¶13 Second, as indicated above, an instruction on *res ipsa loquitur* is not appropriate where there is substantial proof of negligence; that is, where a mechanism of injury is shown. ***Fiumefreddo***, 174 Wis. 2d at 18. Thus, in proving the exact mechanism of her injury, Scheberle would completely explain the event and be unable to avail herself of the *res ipsa loquitur* instruction. *See* ***Turtenwald v. Aetna Cas. & Surety Co.***, 55 Wis. 2d 659, 668, 201 N.W.2d 1 (1972).

[5] We also note that the trial court specifically mentioned that Scheberle did not raise an issue of *res ipsa loquitur* until she responded to the summary judgment motion. *Res ipsa loquitur*, however, is not a rule of pleading. ***American Family Mut. Ins. Co. v. Dobrzynski***, 88 Wis. 2d 617, 627, 277 N.W.2d 749 (1979).

¶14 The phrase "exclusive control" is not in all cases an accurate statement of the principle sought to be expressed. ***Richards v. Mendivil***, 200 Wis. 2d 665, 676, 548 N.W.2d 85 (Ct. App. 1996). All that is required is that the plaintiff present sufficient evidence that *probably* eliminates other causes. ***Id.*** Here, we know that Milson was the surgeon. Scheberle presented expert testimony that the injury does not occur unless the surgeon fails to protect the SAN. Milson has presented no evidence to rebut Scheberle's. Additionally, we have previously indicated that absent proof of some other actor or event a surgeon may be, as a matter of law, in exclusive control of the operating field. *See* ***Fehrman***, 20 Wis. 2d at 26 n.5. There are no summary judgment proofs suggesting Milson was not in control of the operation.

¶15 Whether the evidence sufficiently removes the causation question from conjecture but does not fully explain the event is partially a question for the jury, and the jury instruction so reflects. In the *res ipsa loquitur* instruction, the jury is informed that if the doctor has offered an explanation that fully explains the event *to the jury's satisfaction*, then *res ipsa loquitur* does not apply. WIS JI—CIVIL 1024. Milson offered at least two explanations not attributable to him—scar tissue and idiopathy—that could have explained Scheberle's nerve injury. He claims that a *res ipsa loquitur* instruction is inappropriate because Scheberle could not wholly discount these explanations. Whether these possibilities satisfactorily explain Scheberle's injuries, though, is ultimately a determination the jury must make after it considers and weighs all the evidence. This issue is not properly resolved on summary judgment.

¶16 Although Scheberle did not prove any "specifics" to the circuit court's satisfaction, she is not required to do so in order to receive the benefit of a *res ipsa loquitur* instruction at trial. There are adequate summary judgment proofs

that would support that theory. A summary judgment proceeding, however, is not a substitute for a trial. ***Lecus v. American Mut. Ins. Co.***, 81 Wis. 2d 183, 189, 260 N.W.2d 241 (1977). We are cognizant that the evidentiary picture may change during a trial. It would be the circuit court's role to determine at the close of testimony whether *res ipsa loquitur* is an appropriate jury instruction. *See* WIS. STAT. § 805.13(3). However, the record precludes summary judgment.

Informed Consent

¶17 The circuit court wrote:

> Wisconsin law requires a physician to disclose information which a "reasonable person in the patient's position would regard as significant when deciding to accept or reject a medical procedure." There is no dispute as to what this information must include. There is also no dispute that Wisconsin law recognizes that there are limits to this duty. WIS Ji Civil 1023.2 and Wis. Stats. §448.30[.] The facts of this case establish no violation of informed consent. To suggest so on the evidence presented is a reach to conclude again without specifics. A violation of informed consent, likewise, cannot be based on a mere conclusion which requires only the consideration of remote possibilities.

¶18 We cannot agree, however, with the circuit court that there was no dispute over what information or risk was to be disclosed. Based on the summary judgment submissions, we also conclude that the circuit court erred by effectively determining that the risk of an injury to the SAN during a lymph node biopsy was, as a matter of law, too remote to be discussed with a patient facing that procedure. *See* WIS. STAT. § 448.30(4).[6]

[6] WISCONSIN STAT. § 448.30 states in relevant part:

(continued)

¶19 The duty to disclose imposed by the statute is dependent upon the facts of each situation. ***Martin v. Richards***, 192 Wis. 2d 156, 175, 531 N.W.2d 70 (1995). The information reasonably necessary for a patient to make an informed decision will vary from case to case. ***Id.*** What a reasonable patient would have wanted to know is a factual issue properly left to the jury. ***Id.*** at 172-73.

¶20 Here, Condon testified at his deposition that he was uncertain of the percentage risk of injury to the SAN. This does not necessarily mean that there was no risk or that there was an extremely remote risk. He also stated that because he was unaware of the risk, he did not fault Milson for not disclosing the risk. Condon then reviewed medical literature, and in his affidavit responding to the summary judgment motion he stated that the risk was more than 3%.

¶21 We note first that "the standard for informed consent cannot be defined by the medical profession." ***Id.*** at 174. Thus, whether Condon faulted Milson is irrelevant. Milson essentially claims that he need not have disclosed

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> 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:
>
> ….
>
> (4) Extremely remote possibilities that might falsely or detrimentally alarm the patient.

such a small risk,[7] and Scheberle claims she would have wanted to know the risk. Whether a reasonable person in Scheberle's position would have wanted to be apprised of the potential complications is a genuine issue of material fact for a jury. It should not have been resolved on summary judgment.

Sham Affidavit

¶22 Milson claims Condon's affidavit is a sham. Sham affidavits are impermissible because they attempt to create a genuine issue of material fact by contradicting the "better" evidence that comes from deposition testimony. *See* ***Yahnke v. Carson***, 2000 WI 74, ¶¶15-16, 236 Wis. 2d 257, 613 N.W.2d 102. Milson claims Condon testified that he could not offer an opinion on how Scheberle was injured, but then swore that the injury itself established there was negligence. Milson also claims Condon contradicted himself by testifying he did not know the potential risk for SAN injury and later stating the risk was 3%.

¶23 Condon's affidavit does not contradict his testimony. Condon maintained throughout his deposition that an injury to the nerve was indicative of a failure to meet the standard of care although he did not know specifically how the injury occurred. While the affidavit includes Condon's speculation on how the injury could have specifically occurred, he states he still does not know for certain

[7] It is possible that a 3% chance of injury is, as a matter of law, not too remote for WIS. STAT. § 448.30(4). *See* ***Martin v. Richards***, 192 Wis. 2d 156, 166-67, 531 N.W.2d 70 (1995) (1% to 3% risk not too remote). If this were so, and if the court granted summary judgment on that basis, we would have to reverse as a matter of law. We acknowledge, however, that the risk in ***Martin*** involved the possibility of brain damage and the patient became a partial spastic quadriplegic. The court's analysis considered the seriousness of the potential injury. Thus, the 1% to 3% chance of injury, considered in light of the possible consequences, is potentially distinguishable. Even if the remoteness of injury is not determinable as a matter of law, it is, as indicated, at least an issue of fact for the jury.

because he was not in the operating room when the injury occurred. Similarly, his statement in the affidavit that post-testimony research revealed the risk was approximately 3% does not contradict his testimony that he was uncertain of the risk. If a witness uses an affidavit to clarify ambiguous testimony, the affidavit may be used in the summary judgment equation. ***Id.*** at ¶18.

¶24 This is not a case where the witness testified in his deposition that the risk of SAN injury was approximately 0% and later averred that the risk was 3%. Rather, Condon maintained throughout his testimony that he did not know the real risk rate. His affidavit was based on a review of medical literature—which, we note, was submitted with the affidavit if the court felt verification was necessary—and apparently was designed to aid the court by removing his earlier ambiguity. There are no sham issues raised by Condon's affidavit.

Conclusion

¶25 The circuit court erred when it dismissed the Scheberles' case for failure to prove the "specifics" of Scheberle's injuries. The *res ipsa loquitur* doctrine is appropriately applied when specifics are unavailable. It appears from the decision that the circuit court did not adequately consider the possibility or propriety of applying the doctrine. The court also erred by dismissing the informed consent issue, because the ultimate question to be resolved is what a reasonable person in the patient's position would have wanted to know. This question is one of fact, left most appropriately to the jury, and unsuitable for summary judgment resolution.

By the Court.—Judgment reversed and cause remanded with directions.

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