

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 28, 2011

A. John Voelker
Acting 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. 2009AP3133

Cir. Ct. No. 2005CV4046

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

TY RUBEDOR AND TUCKER RUBEDOR,

PLAINTIFFS-APPELLANTS,

V.

DOUGLAS KOPP, M.D.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Affirmed.*

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 SHERMAN, J. Ty Rubedor appeals a judgment and order following a jury verdict finding in favor of Dr. Douglas Kopp on Rubedor's claim that Dr. Kopp failed to adequately obtain his informed consent prior to performing a medical procedure on his heart. Rubedor contends that the circuit court erred in

limiting the admission of evidence relating to his informed consent claim, in its instruction to the jury with respect to Dr. Kopp's ability to delegate to another physician the duty of obtaining a patient's informed consent, and in dismissing his claim that Dr. Kopp was negligent in failing to inform him of alternative forms of medical treatment. For the reasons discussed below, we affirm.

BACKGROUND

1. FACTUAL HISTORY

¶2 In November 2002, Rubedor was diagnosed with a type of chronic arrhythmia of the heart. Rubedor was referred to Dr. Kopp for a diagnostic study to confirm the diagnosis and for a potential ablation¹ to eliminate the arrhythmia. Dr. Kopp specializes in the treatment of heart rhythm disorders and is a member of the faculty of the University of Wisconsin School of Medicine and Public Health. It is undisputed by the parties that by virtue of his employment with the University of Wisconsin, Dr. Kopp is an employee of the State of Wisconsin.

¶3 Rubedor saw Dr. Kopp for the diagnostic study in December 2002. Following the study, Dr. Kopp performed an ablation and in the process, Rubedor's AV node was damaged, necessitating the insertion of a permanent pacemaker. Rubedor claimed that as a result, he now suffers from congestive heart failure.

¹ An ablation is a curative procedure which permanently disrupts the circuit that drives the arrhythmia.

2. PROCEDURAL HISTORY

¶4 On June 5, 2003, Rubedor served upon the attorney general a notice of claim² which provided as follows:

² The notice of claim statute at the time of Rubedor's alleged injury, WIS. STAT. § 893.82 (2001-02), provided in part:

(1) The purposes of this section are to:

(a) Provide the attorney general with adequate time to investigate claims which might result in judgments to be paid by the state.

(b) Provide the attorney general with an opportunity to effect a compromise without a civil action or civil proceeding.

(c) Place a limit on the amounts recoverable in civil actions or civil proceedings against any state officer, employee or agent.

....

(2m) No claimant may bring an action against a state officer, employee or agent unless the claimant complies strictly with the requirements of this section.

(3) Except as provided in sub. (5m), no civil action or civil proceeding may be brought against any state officer, employee or agent for or on account of any act growing out of or committed in the course of the discharge of the officer's, employee's or agent's duties ... unless within 120 days of the event causing the injury, damage or death giving rise to the civil action or civil proceeding, the claimant in the action or proceeding serves upon the attorney general written notice of a claim stating the time, date, location and the circumstances of the event giving rise to the claim for the injury, damage or death and the names of persons involved"

....

(continued)

1. On or about December 19, 2002 Ty Rubedor underwent an atrioventricular ablation conducted by Dr. Kopp.

2. During the course of the procedure, Mr. Rubedor's atrioventricular node was inadvertently ablated, resulting in complete heart block and the necessary insertion of a permanent pacemaker.

3. Upon information and belief, Dr. Kopp was negligent in failing to conduct sufficient tests prior to commencing Mr. Rubedor's atrioventricular ablation; in failing to recognize the danger of the procedure to Mr. Rubedor owing to the proximity of the area of intended ablation to Mr. Rubedor's atrioventricular conduction system; in failing to exercise the appropriate standard of care in performing the atrioventricular ablation on Mr. Rubedor[;] *in failing to follow proper policies, procedures, protocols and safeguards*; and in other respects not enumerated herein. (Emphasis added.)

¶5 Rubedor subsequently filed a complaint against Dr. Kopp³ wherein he alleged that Dr. Kopp caused him injuries and damages by:

(5m) With regard to a claim to recover damages for medical malpractice, the time periods under subs. (3) and (4) shall be 180 days after discovery of the injury or the date on which, in the exercise of reasonable diligence, the injury should have been discovered, rather than 120 days after the event causing the injury.

WISCONSIN. STAT. § 893.82 has undergone a number of amendments since 2002, including most recently in 2009. *See* 2009 Wis. Act 42. The most notable of the 2009 amendments is the change to subsection (5m), which was amended to provide:

With regard to a claim to recover damages for medical malpractice, the provisions of subs. (3), (3m), and (4) do not apply. The time periods for commencing an action under this section for damages for medical malpractice are the time periods under ss. 893.55(1m), (2), and (3) and 893.56.

Section 893.82(5m) (2009-10). All references to the Wisconsin Statutes in this case are to the 2001-02 version unless otherwise noted.

³ Rubedor also named as a defendant the University of Wisconsin Hospitals & Clinics Authority; however all claims against it were dismissed by stipulation of the parties.

failing to conduct sufficient tests prior to commencing surgery on Mr. Rubedor; in failing to recognize the danger of the procedure to Mr. Rubedor owing to the proximity of the area of intended ablation to Mr. Rubedor's atrioventricular conduction system; in failing to exercise the appropriate standard of care in performing surgery on Mr. Rubedor; in failing to adhere to proper policies, procedures, protocols and safeguards; and in other respects not enumerated.

¶6 Rubedor later amended his complaint to allege that Dr. Kopp was further negligent in, among other things: (1) failing to inform Rubedor about the availability of alternate viable medical modes of medical treatment; (2) "failing to ensure that adequate informed consent was obtained from [] Rubedor prior to the commencement" of the diagnostic study and ablation procedure; and (3) "failing to stop the procedure to have an [additional] informed consent discussion with [] Rubedor after discovering a substantial change in circumstances and substantial increased risk of permanent heart injury stemming from the procedure."

¶7 Rubedor ultimately dropped the allegations he raised against Dr. Kopp in his original complaint, leaving only claims against Dr. Kopp that were raised in the amended complaint. Dr. Kopp moved to dismiss those remaining claims on the basis that Rubedor failed to comply with the notice of claim statute, WIS. STAT. § 893.82, in that the notice of claim failed to adequately set forth the "circumstances of the event giving rise" to those claims. The court granted Dr. Kopp's motion with respect to Rubedor's alternative treatment claim, but denied the motion as to Rubedor's informed consent claims. However, in a separate ruling, the issue of informed consent was limited by the court, which granted a motion in limine to exclude from trial any evidence that Dr. Kopp should have halted the December 2002 procedure to conduct a second informed consent discussion with Rubedor after the extent of Rubedor's problems were ascertained but before the ablation was performed. Dr. Kopp had also sought in his motion

in limine to exclude from trial any evidence that he could not delegate to another doctor the responsibility for obtaining Rubedor's informed consent; however, the court declined to grant Dr. Kopp's motion on that issue.

¶8 The case proceeded to a jury trial solely on Rubedor's claim that Dr. Kopp failed to obtain his informed consent prior to the start of the procedure. Over Rubedor's objection, the court instructed the jury as follows:

You are instructed while the physician who will perform the procedure may delegate to another physician the informed consent process, the performing physician is ultimately responsible for verifying that the patient was provided with information necessary to enable the patient to make an informed consent about the procedure.

The jury returned a verdict in favor of Dr. Kopp. Rubedor appeals.

DISCUSSION

¶9 Rubedor challenges the circuit court's determination that evidence should not be presented to the jury that Dr. Kopp should have conducted a second informed consent discussion with him after the procedure began, but prior to performing the ablation, and the court's instruction to the jury that Dr. Kopp could delegate to another physician the duty of obtaining his informed consent. Rubedor also challenges on appeal the circuit court's dismissal of his claim that Dr. Kopp was negligent in failing to offer Rubedor alternative forms of medical treatment before proceeding with the diagnostic study and ablation. We address first the issues relating to Rubedor's informed consent claim and, second, Rubedor's alternative medical treatment claim.

1. INFORMED CONSENT CLAIM

¶10 Rubedor contends the circuit court erred: (1) in barring him from presenting evidence to the jury that Dr. Kopp negligently failed to hold an additional informed consent discussion with him before performing the ablation; and (2) in instructing the jury that Dr. Kopp was permitted to delegate to another physician the responsibility of obtaining his initial informed consent. Dr. Kopp maintains that the court acted correctly in both respects. Dr. Kopp further maintains that, with respect to these informed consent issues, we may affirm based on different reasoning than used by the circuit court. That is, we may affirm because the circuit court should have dismissed the informed consent claims for want of jurisdiction. *See State v. Williams*, 2005 WI App 122, ¶2 n.2, 284 Wis. 2d 488, 699 N.W.2d 249 (“[a] respondent need not file a cross-appeal ‘when the error complained of, if corrected, would sustain the judgment’”). More specifically, Dr. Kopp contends that Rubedor’s notice of claim did not adequately set forth the “circumstances of the event giving rise to [that] claim,” as is required by WIS. STAT. § 893.82(3). We agree with Dr. Kopp.⁴

¶11 Before a claimant may bring a medical malpractice action against a state employee, the claimant must serve upon the attorney general a notice of claim within “180 days after discovery of the injury or the date on which, in the exercise of reasonable diligence, the injury should have been discovered.” WIS. STAT. § 893.82(5m). Within that notice of claim, a claimant must state “the time, date, location and the circumstances of the event giving rise to the claim for the

⁴ Because we agree with Dr. Kopp that Rubedor failed to comply with the requirements for providing an adequate notice of claim concerning informed consent, we do not address the merits of Rubedor’s arguments.

injury.” Section 893.82(3). Strict compliance with the requirements of § 893.82 is required. Section 893.82(2m). If a notice of claim is inadequate in any respect, the claimant is barred from bringing the action. *See id.*

¶12 The question here is whether Rubedor’s statement of the “circumstances of the event giving rise to the claim for [] injury” in his notice of claim was sufficient to cover his claim that he was injured by Dr. Kopp’s failure to adequately obtain his informed consent. The adequacy of the notice of claim presents a question of law for this court. *See Sambs v. Nowak*, 47 Wis. 2d 158, 164, 177 N.W.2d 144 (1970). We review questions of law de novo. *See Pawlowski v. American Family Mut. Ins. Co.*, 2009 WI 105, ¶16, 322 Wis. 2d 21, 777 N.W.2d 67.

¶13 Rubedor’s notice of claim stated as follows:

1. On or about December 19, 2002 Ty Rubedor underwent an atrioventricular ablation conducted by Dr. Kopp.
2. During the course of the procedure, Mr. Rubedor’s atrioventricular node was inadvertently ablated, resulting in complete heart block and the necessary insertion of a permanent pacemaker.
3. Upon information and belief, Dr. Kopp was negligent in failing to conduct sufficient tests prior to commencing Mr. Rubedor’s atrioventricular ablation; in failing to recognize the danger of the procedure to Mr. Rubedor owing to the proximity of the area of intended ablation to Mr. Rubedor’s atrioventricular conduction system; in failing to exercise the appropriate standard of care in performing the atrioventricular ablation on Mr. Rubedor[;] *in failing to follow proper policies, procedures, protocols and safeguards*; and in other respects not enumerated herein. (Emphasis added.)

¶14 The State contends that Rubedor’s notice of claim is inadequate because it sets forth only the circumstances giving rise to Rubedor’s initial claim

for negligence against Dr. Kopp, not any circumstances giving rise to his informed consent claim. The State argues that “[a]n informed consent claim is different from a negligence claim” and that “[n]egligence in following procedures is different from failing to obtain a patient’s informed consent.”

¶15 Rubedor relies on the italicized portion of the notice of claim: his allegation that “Dr. Kopp was negligent ... in failing to follow proper policies, procedures, protocols and safeguards.” Rubedor claims that this general statement would have alerted the attorney general that Rubedor was claiming that Dr. Kopp failed to obtain his informed consent. We disagree.

¶16 WISCONSIN STAT. § 893.82(3) clearly requires that a claimant set forth the “time, date, location and the circumstances of the event” which gives rise to claimant’s claim for his or her injury. “Circumstance” is defined as the “background of an event.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 410 (1993). “Claim” is defined as “a demand for compensation, benefits, or payment.” *Id.* at 414. Under § 893.82, a claimant must, therefore, state the background of the event which gives rise to his or her demand for compensation for the particular injury he or she allegedly sustained.

¶17 Both “circumstance” and “background” describe statements of fact. Assuming without deciding that Rubedor is correct in his assertion that it is not necessary for a “plaintiff to state its separate legal claims for relief,” that does not excuse Rubedor’s failure to set forth sufficient *facts* to inform the attorney general of the nature of a claim.

¶18 The circumstances set forth in Rubedor’s notice of claim in this case focus on the event giving rise to Rubedor’s physical injuries—that event being Dr. Kopp’s performance of the ablation procedure. Rubedor’s notice set forth no facts

describing the circumstances relating to alleged errors on Dr. Kopp's part that are unrelated to that procedure. The notice did not set forth any facts describing the circumstances relating to the failure to provide information or adequately obtain Rubedor's informed consent. Simply put, the notice does not set forth any facts showing "the time, date, location and the circumstances of" either of Dr. Kopp's alleged failures to obtain informed consent. WIS. STAT. § 893.82(3).

¶19 Accordingly, we conclude that the notice of claim was insufficient with respect to Rubedor's informed consent claims and, therefore, those claims should have been dismissed by the circuit court.

2. FAILURE TO TREAT BY ALTERNATIVE MEANS CLAIM

¶20 Rubedor contends that the circuit court erred in dismissing his claim that Dr. Kopp was negligent in failing to offer or attempt alternative drug treatments before performing the diagnostic study and ablation procedure. The circuit court determined that this claim was not covered in Rubedor's notice of claim and that the claim was therefore barred.

¶21 Rubedor argues that the notice of claim adequately notified the State of his alternative treatment claim because informed consent discussions were among the hospital's protocols and implied in informed consent is apprising patients of alternate methods of treatment. As we discussed above, Rubedor's notice of claim did not sufficiently address Rubedor's informed consent claim. For the same reasons, Rubedor's notice of claim was insufficient with respect to his alternative treatment claim. Thus, dismissal of that claim by the circuit court was proper, as well.

CONCLUSION

¶22 For the reasons discussed above, we conclude that Rubedor's notice of claim was insufficient to cover his informed consent claims and that the circuit court erred in not dismissing those claims. We further conclude that Rubedor's claim that Dr. Kopp was negligent in failing to offer or attempt alternative treatment was also not covered by his notice of claim and that the circuit court did not err in dismissing that claim. Accordingly, we adopt Dr. Kopp's request that we affirm the circuit court.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

