COURT OF APPEALS
DECISION
DATED AND RELEASED

September 12, 1996

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

NOTICE

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No. 95-2440

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

VADIM KATZNELSON,

Plaintiff-Appellant,

v.

STUART HOFFMAN,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Milwaukee County: LAURENCE C. GRAM, JR., Judge. *Reversed and cause remanded with directions*.

Before Fine and Schudson, JJ., and Michael T. Sullivan, Reserve Judge.

SULLIVAN, J. Vadim Katznelson appeals from a judgment dismissing his action against dentist Stuart Hoffman. The trial court, *sua sponte*, granted the dismissal when, on the day of trial, Katznelson stated that he had no expert witness to testify on the issue of negligence. Katznelson argues that

the trial court erred in dismissing his action because none of his three causes of action required expert testimony. For the reasons discussed more fully below, we agree with Katznelson and reverse and remand for further proceedings consistent with this opinion.

I. BACKGROUND.

This suit arose out of Katznelson's visit to Hoffman to have color differences on two of his teeth removed. Katznelson alleged that instead of bleaching his teeth, Hoffman ground his teeth down, resulting in pain whenever his teeth came into contact with hot or cold substances. Katznelson's amended complaint set forth three causes of action: (1) negligent failure to obtain informed consent to treatment to correct discoloration of two upper incisors; (2) negligent performance of the treatment, resulting in removal of too much enamel from the incisors; and (3) battery, by failing to conduct the treatment in accordance with Katznelson's request.[1] Hoffman's answer joined issue and pleaded affirmative defenses. One of his defenses asserted that the complaint failed to state a claim upon which relief could be granted.

A pretrial conference was held on May 12, 1995. Katznelson stated that he would not call an expert to establish his negligence case. Hoffman asserts that Katznelson withdrew his negligence claim at the pretrial conference. Katznelson denies it. The record contains no transcript of the pretrial conference.[2]

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[1] The amended complaint alleges negligence and informed consent as a single cause of action. They are discrete causes of action based on common law negligence concepts. ***Johnson v. Kokemoor***, 199 Wis.2d 615, 629 n.16, 545 N.W.2d 495, 501 n.16 (1996). Further, § 448.30, STATS., prescribing a physician's duty to inform, is a codification of common law. ***Johnson***, 199 Wis.2d at 629-30, 545 N.W.2d at 501.

[2] On the day of trial, May 24, 1995, the pleadings consisted of an amended complaint and an answer. No motions pended before the trial court except Katznelson's motion to require Hoffman to deliver certain documents marked as exhibits at the defendant's deposition, and for leave to file an amended complaint. The deposition was not filed in the trial court. Katznelson filed a reply to interrogatories, although the interrogatories were not filed.

On July 28, the trial court entered a judgment that dismissed the action based on its conclusion that Katznelson would not be able to prove any of the claims because he did not have an expert witness. The trial court made no finding that Katznelson withdrew his negligence claim. Hoffman argued that Katznelson also withdrew his informed consent cause of action at the pretrial conference. The trial court did not address this in its verbal order of dismissal.

II. ANALYSIS.

Katznelson argues his suit should not have been dismissed by the trial court. We note that Katznelson and Hoffman both argued at the pretrial hearings that at issue was a motion to dismiss. Under these circumstances, we treat the trial court's *sua sponte* dismissal as a determination that the amended complaint failed to state a claim for which relief can be granted. *See* ***Olson v. Ratzel***, 89 Wis.2d 227, 235, 278 N.W.2d 238, 242 (Ct. App. 1979) (a motion for summary judgment submitted only on the pleadings was treated as a motion to dismiss for failure to state a claim for relief). A motion to dismiss presents an issue of law that we decide *de novo*. ***Northridge Co. v. W.R. Grace & Co***., 162 Wis.2d 918, 923-24, 471 N.W.2d 179, 180-81 (1991). Facts set forth in the amended complaint are taken as true and the complaint may be dismissed only if it appears certain that no relief can be granted under any set of facts that the plaintiff might prove to support the claim. ***Id***. Further, this court construes the facts and reasonable inferences favorably to the claim. ***Id***.

A. Withdrawal of negligence claim.

Katznelson first argues that, contrary to Hoffman's assertions, he did not withdraw his negligence claim at the pretrial conference on May 12. As noted above, the conference was not reported. The trial court made no finding of fact. We are not in a position to decide whether Katznelson withdrew the claim; therefore, we remand the issue of whether the negligence claim was withdrawn at the pretrial conference. On remand, we direct the trial court to hold further hearings and make appropriate findings on whether Katznelson withdrew his negligence claim.

In the event that the trial court finds that Katznelson's amended complaint was not withdrawn, we conclude that his amended complaint states grounds for relief in negligence. Katznelson's negligence suit alleged in part that Hoffman negligently treated Katznelson's teeth, thereby causing injury and remedial dental expenses.

A doctor's professional performance is held up to the litmus of whether it comports with the degree of skill and care exercised by the average doctor in that class of practitioners acting in the same or similar circumstances. ***Christianson v. Downs***, 90 Wis.2d 332, 338, 279 N.W.2d 918, 921 (1979). The same standard applies to dentists. ***Albert v. Waelti***, 133 Wis.2d 142, 145, 394 N.W.2d 752, 754 (Ct. App. 1986). To establish the standard of care required of a professional, expert evidence frequently is required. ***Id***. Case law, however, recognizes rare instances where the common knowledge of laypersons affords a basis to establish the required degree of care. ***Id***. We conclude that this may be one of the exceptional cases. Therefore, only after Katznelson presents his case and the extent of his tooth loss and its effect upon him can it be determined whether expert evidence is needed. Accordingly, the trial court erred when it granted dismissal based on this issue.

B. Informed consent.

Katznelson next argues that the trial court erred in granting summary judgment dismissal of his lack of informed consent claim. We agree that the trial court erred in concluding that Katznelson's proof of lack of informed consent required expert evidence. Informed consent postulates such disclosure to the patient as will enable the patient to exercise the right to consent to or refuse treatment. *See* WIS J I—CIVIL 1023.2. In ***Johnson v. Kokemoor***, 199 Wis.2d 615, 630, 545 N.W.2d 495, 501 (1996), our supreme court said: "The concept of informed consent is based on the tenet that in order to make a rational and informed decision about undertaking a particular treatment or undergoing a particular surgical procedure, a patient has the right to know about significant potential risks involved in the proposed treatment or surgery." The dentist must also advise the patient of alternative procedures approved by the dental profession. *See* § 448.30, STATS. To ensure that the patient can give an informed consent, the professional's duty is to provide such information as may be necessary under the circumstances then existing to assess the significant

potential risks confronting the patient. ***Johnson***, 199 Wis.2d at 631, 545 N.W.2d at 501.

To prove a cause of action for lack of informed consent, a plaintiff must establish: (1) the dentist's failure to disclose the risk information concerning the treatment; and (2) the patient's lack of knowledge of the risk and the onset of post-treatment ill effects. *See* ***Trogun v. Fruchtman***, 58 Wis.2d 569, 604, 207 N.W.2d 297, 315 (1973). Expert evidence is not required to establish the materiality of the risk to a patient's decision to undergo treatment. *See* ***id***. Once the patient makes a prima facie showing of failure to inform, the dentist must go forward and give a reason for failure to inform. *See* WIS J I—CIVIL 1023.2. Accordingly, we conclude that the trial court erred in dismissing this claim because Katznelson did not have an expert witness set to testify.

C. Battery claim.

Further, Katznelson argues that the trial court's dismissal of his battery claim was in error. Our review of the amended complaint leads us to conclude that it sufficiently alleges that Hoffman's treatment was administered without Katznelson's consent, and hence, constituted a battery. In ***Throne v. Wandell***, 176 Wis. 97, 101, 186 N.W. 146, 147 (1922), the dentist extracted six teeth without the patient's consent. The supreme court characterized the extractions as a "technical assault." In ***Suskey v. Davidoff***, 2 Wis.2d 503, 505, 87 N.W.2d 306, 308 (1958), a surgeon's removal of a gall bladder without consent or justification by way of emergency or necessity was deemed an assault. The elements of a civil battery are intentional bodily harm to the plaintiff without the plaintiff's consent. *See* WIS J I—CIVIL 2005. The amended complaint alleges that Hoffman performed a course of treatment upon the plaintiff without his consent. It alleged a valid cause of action and hence, survives the dismissal motion.[3]

[3] Our supreme court has noted that informed consent claims were traditionally based on the tort of battery; however, recently "the basis for liability informed consent cases changed to a negligence theory of liability." ***Martin by Scoptur v. Richards***, 192 Wis.2d 156, 170-73, 531 N.W.2d 70, 76-77 (1995). Nonetheless, we need not address this distinction at the summary judgment stage of this case. ***Throne v. Wandell***, 176 Wis. 97, 186 N.W. 146 (1922), and ***Suskey v. Davidoff***, 2

III. SUMMARY.

We conclude that, bare-bones as the amended complaint may be, it sets forth causes of action for negligence, failure to obtain informed consent, and battery. Therefore, we must reverse the judgment that dismissed Katznelson's claim. Nonetheless, we must also remand the matter to the trial court to determine whether Katznelson withdrew his negligence claim.

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

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(..continued)
Wis.2d 503, 87 N.W.2d 306 (1958), are still good law in Wisconsin. Accordingly, Katznelson has stated a valid claim for battery—that is, that the treatment was admiministered without Katznelson's consent, not that he wasn't given sufficient information to choose one form of treatment over another, which would be a lack-of-informed-consent claim.

SCHUDSON, J. (*concurring in part; dissenting in part*). Although I agree with the majority's conclusions in all other respects, I would affirm the trial court's dismissal of the battery claim under ***Martin by Scoptur v. Richards***, 192 Wis.2d 156, 170-173, 531 N.W.2d 70, 76-77 (1995).

In ***Martin***, the supreme court identified the "inherent difficulty ... in applying the tort of battery to informed consent" and explained:

> Accordingly, the basis for liability in informed consent cases changed to a negligence theory of liability: a physician's failure to obtain a patient's informed consent is a breach of a professionally-defined duty to treat a patient with due care.

Id. at 171, 531 N.W.2d at 77. Katznelson offers no reply to Hoffman's argument that, under ***Martin***, the trial court correctly dismissed the battery claim. I agree with Hoffman and the trial court. Therefore, on this issue I respectfully dissent.